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Hugo Adam Bedau
Tufts University

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*Hugo Adam Bedau**

DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE. By *Raoul Berger*. Cambridge: Harvard University Press, 1982. Pp. x, 242. $17.50.

I

For opponents of the death penalty, 1982 was not a vintage year. In November, the people of Massachusetts voted by a three-to-two margin to amend the state constitution in order to permit enactment of a statutory death penalty,[1] thereby overturning the interpretation of the constitution by the state's Supreme Judicial Court, which had earlier ruled that any death penalty was unconstitutional under the state constitution.[2] Thus unleashed, the Great and General Court (as the legislature is called) promptly enacted a death penalty bill,[3] and it was as promptly signed into law by the departing Governor as the "legac[y]" to the Commonwealth of which, it was said, he was the "proudest."[4] Elsewhere in the nation last year, only two executions actually took place,[5] but each was the first in its jurisdiction in eighteen years[6] and the one in Texas was the first ever to be administered by lethal injection, the latest effort to "humanize" executions.[7] Christmas 1982 came and went with a record-breaking number — well over a thousand — men and women under sentence of death in thirty-two jurisdictions.[8] But bad as 1982 was, 1983 may be worse. A spokesman for the Department of Justice has predicted that in this year and the next, "The United States will witness a spate of executions . . . without parallel in this Nation since the

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* Professor of Philosophy, Tufts University. — Ed.

1. *See* Boston Globe, Nov. 4, 1982, at 28, col. 4 (Northeast ed.).

2. *See* Attorney for Suffolk County v. James Watson, 411 N.E.2d 1274, 1275 (Mass. 1980).

3. *See* Boston Globe, Dec. 15, 1982, at 1, col. 2 (Northeast ed.).

4. Boston Sunday Globe, Jan. 9, 1983, at 1, col. 2 (Northeast ed.).

5. In Virginia, on Aug. 10, 1982, and in Texas, on Dec. 7, 1982. *See* N.Y. Times, Aug. 11, 1982, at A1, col. 1; N.Y. Times, Dec. 8, 1982, at A28, col. 3.

6. The last previous executions in Virginia and in Texas were in 1964. *See* BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PUB. NO. 46, CAPITAL PUNISHMENT 1930-70, at 10-11 (1971).

7. *See A More "Palatable" Way of Killing*, TIME, Dec. 20, 1982, at 28-29; N.Y. Times, Dec. 8, 1982, at A28, col. 3.

8. NAACP Legal Defense and Educational Fund, Inc., DEATH ROW U.S.A., Dec. 20, 1982, at 1, reported 1,137 persons (including 13 women) under death sentence as of that date.

depression era [of the 1930s]."[9]

Adding to these woes is *Death Penalties*, by Raoul Berger, and published with the imprimatur of the Harvard University Press. Unlike most constitutional scholars, Berger has a ready-made general audience for his views, owing particularly to the timely publication a decade ago of his study of impeachment.[10] In this new book, carefully crafted and vigorously argued, he attempts to establish that the entire line of Supreme Court holdings aimed at reform or repeal of state capital statutes is totally misconceived, the result of an unconstitutional "arrogation of power" (p. 8) by the Court to itself, involving one interpretation of constitutional text after another based on nothing more than "wishful thinking" (p. 43), with bogus rulings brought about by "judicial mid-wifery" (p. 60) that "violates the basic principle of government by consent of the governed" (p. 66). Although there is little that is new in these conclusions or in the reasoning that leads to them — most can be found in the dissenting opinions in *Furman v. Georgia*,[11] and Berger's own hostility to "government by judiciary" has been spelled out at length elsewhere[12] — yet the detail and scope given in this book to that position will add intensity to the controversy. For those unfamiliar with it, a brief summary of how Berger unfolds his argument may be helpful.

Berger's principal thesis is that "[c]ontrol of death penalties and of the sentencing process . . . was left by the Constitution to the States" (p. 9). Hence, "the [Supreme] Court [since 1972] has been acting 'unconstitutionally' . . . with respect to death penalties" (p. 155). In the opening two chapters we get evidence for the proposition that the eighth amendment, with its prohibition against "cruel and unusual punishments," was originally understood in such a way that those incorporating this language into the Bill of Rights "did not contemplate interference with State control of death penalties" (p. 28). The history of the "cruel and unusual punishments" clause, in both English and American constitutional history, according to the next two chapters, has hitherto been misunderstood.[13] Properly viewed, it is clear that the intent of the Framers is fully consistent with the death penalty being inflicted today in many ways for any of several crimes. Berger then in effect restates in the present setting the burden of his previous book, *Government by Judiciary*, in which he argued that a very narrow

9. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, BULLETIN: DEATH ROW PRISONERS—1981, at 1 (1982).

10. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

11. 408 U.S. 238 (1972) (per curiam); 408 U.S. at 375-405 (Burger, C.J., dissenting); 408 U.S. at 414-65 (Powell, J., dissenting); 408 U.S. at 465-70 (Rehnquist, J., dissenting).

12. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

13. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969). Berger, p. 29, notes that this pioneering study of the eighth amendment was written by an author who, although no more than a "young [law school] graduate[,]" was erroneously described by Justice Marshall (in Furman v. Georgia, 408 U.S. at 319 n.14) as a "Professor." It is perhaps fair, therefore, to point out that *Death Penalties* was written not by a "retired Harvard Law Professor," *see* Goodman, *Ruling the Supreme Court Out of Order*, Boston Sunday Globe, Dec. 19, 1982, at A46, col. 2, but by the retired Charles Warren Senior Fellow in Legal History at Harvard Law School. Berger is presumably no more responsible for his implied promotion than was Granucci.

role for judicial review is the only one authorized by the written Constitution. This view he sharply contrasts with the increasingly common practice in which the Court disguises its "predilections" as "constitutional mandates" (p. 103), of which the line of death penalty cases is an especially illuminating and (to him) galling example. In contrast to constitutional "activists," who see in the Court a veritable "Mr. Fixit" (p. 89), Berger finds no warrant in the written Constitution for any such role and pours scorn on the whole idea. The sixth and longest chapter reviews the Court's eighth amendment death penalty cases, beginning with their background in *Weems v. United States*,[14] and taking the story down to *Lockett v. Ohio*[15] and *Bullinton v. Missouri*.[16] The rulings in these cases "represent a blatant perversion of the 'cruel and unusual punishments' clause that thwarts [the people's] indubitable will" (p. 180), which is to have and to use death penalties as a standard part of the criminal law (p. 58). Thus, these holdings constitute an "obstacle course,"[17] a "judicial gauntlet" (p. 152), through which the people and their elected legislatures cannot emerge unscathed. As a result, federalism, legislative supremacy, state sovereignty over state criminal law, and ultimately self-government have all taken a beating. In the penultimate chapter Berger reviews several remedies (in particular, constitutional amendment and impeachment of Justices)[18] and comes out in favor of a "contraction of judicial jurisdiction" (p. 153) by act of Congress. He ends with a parade to the gallows of all those judicial "activists" against whom the book is aimed,[19] their guns spiked, aces trumped, and ears boxed.

There is something of a problem, at least for this reviewer, in properly criticizing this book. It quickly becomes clear that the real subject under discussion is not what the book's title suggests, *viz.*, the death penalty in the United States in its full constitutional setting. Berger's attention to the thousand or so pages of opinions in the decided cases beginning with *Furman* is highly selective and scanty at best. He gives no evidence of having studied any of the briefs, much less all the commentators. He contents himself with little more than perfunctory reference to the great empirical and moral controversies that rage whenever the death penalty is under thorough review. Not for him excursions into the turbid waters of the deterrent effect of criminal penalties or the relative merits of a retributive versus a utilitarian theory of punishment. None of these has *any* relevance to his chosen theme, as he defines it. Rather, the true purpose of this book seems to be to let the death penalty issue serve as a threshing ground from which Berger can extract anew his theory of the Constitution, already well known

14. 217 U.S. 349 (1910).

15. 438 U.S. 586 (1978).

16. 451 U.S. 430 (1981).

17. See the book's subtitle.

18. He nowhere considers the merits of overruling *Furman*, presumably as much out of respect for *stare decisis* (although he never invokes this principle) as out of despair of the Supreme Court ever mending its "activist" ways.

19. "[Paul] Brest and his ilk" p. 194, are singled out for special disfavor. Rarely at issue, however, is the way that "activist" commentators have specifically defended the Supreme Court's attack on the death penalty. The most vigorous and comprehensive such discussion may now be found in D. PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY (1982); *see* Bedau, Book Review, — HARV. C.R.-C.L. L. REV — (forthcoming).

to the scholarly community, and argue, as before, that it is the only possible one. In which case, to quarrel with him over any substantive aspects of the death penalty is to verge constantly on the irrelevant, because doing so would misinterpret or misrepresent his true purpose.

I cannot undertake in this space, nor have I the competence to undertake elsewhere, a full-scale theory of judicial review and constitutional interpretation alternative to the one that Berger relies on and defends. Yet in the end nothing else will suffice to put his argument in the proper light for full and final evaluation. I admit to believing that his view of the Supreme Court and of the written Constitution in our nation is deeply wrong. I must trust to others, better equipped than I, who also share this view, to show why he is wrong and why it would be dangerous, even ruinous, if his views were to prevail. What I can and shall do is to draw attention to some of the features of his argument and to one central aspect of his basic theory, which are, in my view, deeply flawed, and which I regard as sufficient reason for caution in accepting other portions of his argument I have neither examined with equal care nor can judge with equal confidence. I shall begin with the less central matters.

II

(1) Berger is selective in his use of primary sources. During the course of his argument, he naturally adverts frequently to *The Federalist Papers*, for they remain an unrivalled source for constitutional reflections among the "Framers and Ratifiers." One of the most relevant (and hence most cited) is Hamilton's 78th Federalist, in which we find this passage:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of irreconcilable difference between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute.[20]

The passage is interesting because it seems to stake out some room for appellate courts to probe the "meaning" of both constitutional and statutory language, so that if the two are "irreconcilable" the former may prevail over the latter. Could one not argue that this passage thus moves in the hated direction of judicial "activism," provided that a generous though not implausible reading is given to the crucial term "meaning," in this context? I offer this as a possible gloss for further reflection, and not as conclusive of Hamilton's "intention." For a scholar who boasts, as Berger does in another context, that (unlike his "activist" critics or this "indefatigable abolitionist" (p. 49)) he did "not start with a desired result, but sought out the historical facts, and unflinchingly followed where they dictated, whether or not they collided with [his] inclinations" (p. 185 n.15), it is curious that eight times[21] he has recourse to the source containing this passage but nowhere

20. *Quoted in* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 142 (12th ed.

21. *See* pp. 11, 49, 74, 79, 86, 123, 134, 164.

bothers to show that he has read and reflected on its possible relevance to his argument. But then, of course, even Homer nods.[22]

(2) Berger's use of historical evidence can be inaccurate or worse. Several pages (pp. 128-42) are ostensibly devoted to showing that "the relative roles of courts and juries" (p. 134) as viewed by the Founders is "antipodal" to that of Justice Brennan as expressed in his dissenting opinion in *McGautha v. California*[23] and in his concurring opinion in *Furman*.[24] The unstated thesis in context is whether discretionary jury *sentencing* in capital cases is properly subject to higher review under the Constitution (never mind on what grounds or theory). What do we get from Berger? A litany of encomia from the 1790s attesting to the sacred authority of jury *verdicts*. But not one of his two dozen or so citations refers to verdicts in *capital* cases. More to the point, not one of them refers to jury *sentencing*,[25] much less takes account of the shift in modern times of the characteristically judicial function of sentencing from the judges onto the jury's shoulders. Berger nevertheless ends his discussion with a triumphant shout: "History . . . establishes that discretion in sentencing within statutory prescriptions has been the inviolable jury domain" (p. 139). Perhaps it does. Certainly the evidence Berger assembled to establish this point does not. Instead, what we have is an attempt to spread onto the modern practice of discretionary sentencing by juries in capital cases the same luster the Founders saw in jury verdicts generally. Yet since jury sentencing discretion in capital cases was virtually unknown to them (a point Berger elsewhere finds it useful to stress (pp. 143-147)), what does his evidence in this instance establish as an exercise in historical argument? Little or nothing.

(3) Berger is not above waving the bloody flag. In the course of attacking the decision in *Roberts v. Louisiana*,[26] in which the Court invalidated a mandatory death penalty for murder of a police officer, Berger intones these sentiments: "As violence in the streets increasingly mounts, policemen who patrol crime-infested areas take their lives in their hands; more and more policemen are killed in the line of duty" (p. 146). Are they? Berger cites no evidence for this empirical assertion, yet his purpose for stating it in the context is to drive home the point that an arrogant Supreme Court exacts a high price in public security by its blatant anti-majoritarian rulings. The evidence on police killings available to him from the *Uniform Crime Reports* for the decade of the 1970s,[27] for example, shows *no increase* in the rate or number over this period. This is consistent with earlier re-

22. It should be noted, in fairness, that Berger does believe in the legitimacy of judicial review, but would limit it to unconstitutional usurpations of power by other branches. In GOVERNMENT BY JUDICIARY, he frequently refers to Federalist No. 78, emphasizing the institutional constraints that Hamilton thought limited the court to this narrower mission. *See* R. BERGER, *supra* note 12, at 261, 293, 304, 308, 316.

23. 402 U.S. 183 (1971).

24. It is actually only Brennan's opinion in *McGautha*, 402 U.S. at 257, 267, 274, 286, that comes in for explicit criticism.

25. I stress this because Berger is quick to raise his eyebrows when Brennan appealed to a line of *"civil"* cases in arguing for standards in *capital* trials. P. 132.

26. 431 U.S. 633 (1977).

27. FBI UNIFORM CRIME REPORTS 309 (1979), *reprinted in* THE DEATH PENALTY IN AMERICA 45-46 (H. Bedau ed. 3d ed. 1982).

search from the 1950s that looked in vain for evidence of an alleged special deterrent effect of the death penalty, yielding greater police safety in death penalty jurisdictions;[28] these results have also been confirmed by more recent research.[29] So, if *Roberts* denied to the police a protection they need (rather than merely one it is widely believed they need), Berger has given no evidence for it. Instead, he has obliquely bolstered his overall attack on the Supreme Court by the kind of off-the-cuff pronouncement more appropriate to a "Letters to the Editor" column than to the pages of a scholarly treatise.

(4) Berger is willfully indifferent to the relevance of the most obvious facts about the racial impact of the death penalty. More than any other aspect of this book, the author's abrupt and narrow disposal of everything surrounding the history of the administration of the death penalty in our society are revealed in his remarks on this issue, one of the few nontextual aspects of the constitutionality of the death penalty to which he adverts.

Consider how he evaluates *Coker v. Georgia*,[30] in which the Court ruled against the death penalty for rape. He dismisses it in one paragraph of middling length (pp. 148-149) and later describes it as "a decision that is without constitutional warrant" (p. 173). He pointedly fails to mention that the history of the death penalty for this crime in our nation (even if not in this case)[31] shows incontestably that it was used primarily for the punishment of black offenders who raped white victims.[32] He does not consider whether any case could be made for imputing just such an intention to the three post-*Furman* state legislatures that reintroduced (not a mandatory, but) a discretionary death penalty for this crime.[33] Berger is simply not

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28. *See* the research by Professor Thorsten Sellin and Donald R. Campion, S.J., undertaken in the early 1950's for the Canadian parliamentary committee on the death penalty, *reprinted in* THE DEATH PENALTY IN AMERICA 284-314 (H. Bedau ed. 1st ed. 1964).

29. *See* Cardarelli, *An Analysis of Police Killed by Criminal Action: 1961-1963*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 447 (1968); Bailey, *Capital Punishment and Lethal Assaults against Police*, 19 CRIMINOLOGY 608 (1982).

30. 433 U.S. 584 (1977).

31. The defendant in *Coker* was white. Brief for Petitioners at 56, Coker v. Georgia, 433 U.S. 584 (1977). Even so, the issue of race and rape was raised both by petitioners and by *amici*. Brief for Petitioner at 52-58; Brief *Amici Curiae* for American Civil Liberties Union, at 16-19.

32. *See* Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973). Even the Solicitor General, writing in support of the constitutionality of post-*Furman* discretionary death penalties, agreed that "[t]his is a careful and comprehensive study, and we do not question its conclusion . . . ." Brief for the United States as *Amicus Curiae* at 5a, Gregg v. Georgia, 428 U.S. 153 (1976). The same view is taken by the only scholarly research to cast doubt on the general adequacy of the evidence to establish racial discrimination in the administration of the death penalty. *See* Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 788-89 (1981).

33. This is a strong claim, and I cannot undertake here to support it adequately. The evidence of intent to discriminate against blacks in earlier decades is incontrovertible. *See* notes 31-32, *supra*. The haste with which legislatures, in the wake of *Furman*, reintroduced the death penalty for rape in itself suggests at least an insensitivity to the racially discriminatory results of the death penalty for rape in earlier decades. For a study of what would appear to be typical of such haste, see Ehrhardt & Levinson, *Florida's Legislative Response to* Furman: *An Exercise in Futility*, 64 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 10 (1973).

interested in any effect of the death penalty for rape; furthermore, he writes as though the reader should not be, either. Is this true? Must the Court take on the role of a ubiquitous "Mr. Fixit" before a racist practice of historic magnitude in state criminal justice can be ruled an unconstitutional violation of individual rights?[34] Is there no *law* in this nation that would prohibit a racist state legislature and criminal justice system from practicing and upholding racially-biased prosecutions, trials, and sentences for the crime of rape? Is there no *justice* under law for convicted offenders who would forfeit their lives rather than merely their liberty solely because of their race? Apparently not. Instead, black men are to be sentenced to death, as they were, and executed, as they would have been, during the 1950s, 1960s, and 1970s, under discretionary state capital statutes for rape because no popular majority existed in each of those states to elect legislatures that would overturn such statutes. Of course, there was always the clemency power that could have been exercised by (white) governors in these states to commute all such racially-motivated death sentences. Or the unfairness could have been rectified by having (white) trial juries sentence to death blacks guilty of raping blacks, and whites guilty of raping blacks, given suitable indictments by (white) prosecutors. Berger does not mention these theoretically possible remedies, since they raise no constitutionally interesting questions. Yet anyone who really thinks they were feasible remedies in, say, Georgia or Alabama prior to 1972 has a completely different view of the social and political realities from mine. As for Berger's apparently preferred remedy for the tyranny of majorities, recourse to the ballot box, this was (and perhaps still is) as absurd and unrealistic as the two "remedies" I mentioned above. It is beyond me how anyone could have lived in the United States for the past generation and still believe that the best theory of law and justice under our Constitution and Bill of Rights is one that would have *required* the Supreme Court and the lower federal judiciary to join state legislatures, state courts, and other branches of state and local government in ignoring the racist character of our society and our political and legal institutions that accounts for the salient vulnerability of black males to indictments, convictions, death sentences, and executions for rape. We are not, after all, talking about jobs, education, or pensions, important as they are; we are talking about using the authority of *law* to *kill* people.

Elsewhere (pp. 55-58), Berger writes directly on the issue of racial discrimination in capital sentencing for murder. He argues that "[i]t is by no means obvious that [such] discrimination . . . amounts to a denial of equal protection" (p. 55), that is, in the constitutionally relevant sense of that phrase. His proof? The "racism . . . in the North in 1866" (p. 57) that undercuts any possibility of imputing to the authors of the fourteenth amendment such intentions as would have been required "to save an un-

34. Berger does not mention that the death penalty cases began with a dissent in a rape case, Rudolph v. Alabama, 375 U.S. 889 (1963) (three Justices dissenting from denial of certiorari), that the racial aspects of the death penalty for rape reached the Court in Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969), *revd.*, 408 U.S. 238 (1972), a companion case to *Furman*, and that these data had originally been expected to reach the Court even earlier in an Arkansas rape case which, however, was resolved elsewhere and on other grounds. *See* Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *vacated*, 398 U.S. 262 (1970) (per curiam) (vacated for defects in jury selection process).

doubtedly guilty black murderer from the death penalty because a jury had sentenced a white to life imprisonment . . ." (p. 57). End of discussion, except for this coda: "[W]ere the issue [to be] submitted to the people, they would not, I hazard, abandon the penalty because a black murderer, found guilty beyond a reasonable doubt after a fair trial, is sentenced to death, whereas from time to time a white murderer is not" (p. 58). Is this supposed to be testimony to the fair-mindedness of "the people," rather than the indictment it appears to be? On the contrary, I would "hazard" that black "people," were the issue put to them, would readily repudiate the death penalty under his hypothesized circumstances. The evidence is steady and of long standing that black Americans do not favor capital punishment.[35] As to those "fair" trials to which Berger alludes, he is skating on thin ice in his own pond. Even on the basis of my own first-hand experiences, admittedly very slender, I would find it impossible to use such words with the glibness that he does.[36] The evidence of empirical research, as I read it, favors my scepticism, not his complacency.[37]

The main issue, of course, is not what the evidence shows about current public attitudes toward the death penalty or whether capital trials, at long last, are fair enough (even if these issues ought to be of more concern to Berger than they are). The main issue is whether absence of evidence for imputation of (or evidence of the absence of) a certain intention in the "Framers and Ratifiers" to apply the provisions of "cruel and unusual punishments" and other key phrases in the Bill of Rights is *conclusive* for later judicial interpretation of these phrases. Berger is convinced it is. We turn now to this central theme in his argument.

III

Let us begin by looking at how Berger understands the single most famous comment squarely in point on "the original understanding" by the Framers and Ratifiers of what they meant by the "cruel and unusual punishments" clause. I refer to the oft-quoted remarks by William L. Smith and Samuel Livermore from the debates in the First Congress, in which Smith objected to the clause as "too indefinite" and Livermore complained "[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future to be prevented from inflicting these punishments because they are cruel?"[38] (pp. 45-46). According to the record, these remarks were greeted with silence. Yet Livermore's utterance strikes me as effective public notice for those who favored adoption of the clause that "in future" someone (the Supreme

35. Results from several different surveys on this issue are reported in Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974).

36. *See Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L.J. — (forthcoming 1983). *See also* Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 LAW & CONTEMP. PROBS. 137 (1980).

37. *See* Bowers & Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); RADELET, RACE AND PROSECUTORIAL DISCRETION IN HOMICIDE CASES (forthcoming).

38. 1 ANNALS OF CONG. 782-83 (1789), *cited in* Granucci, *supra* note 13, at 842.

Court? an informed public?) might conclude that corporal or capital punishments as such are "cruel and unusual" in the very sense of those terms then under debate. A more ambitious reading would suggest that Livermore's sensible comments also indicated that it should suffice to defeat an attack on a punishment as unconstitutionally "cruel and unusual" by showing that it was, as he said, a "necessary" punishment.

Berger offers exactly three relevant observations on these comments and the light they shed on the meaning of this clause. First, he characterizes the entire legislative history antecedent to the adoption of the clause, including the Smith-Livermore remarks, as "equivocal" (p. 47). This is a curious phrase in context, for the quoted remarks from Smith and Livermore are not in themselves "equivocal" at all, and supposedly there is little else in the record to be "equivocal." Second, he declares that the remarks of Smith and Livermore lack "any weight" because they came from persons who voted in opposition to adopting the clause, and "established canons" require us to discount entirely the views of opponents to a measure in any effort to divine what its proponents meant by it (p. 45). This "canon" is sensible enough, but its use here is a bit ham-handed, since to ignore the Smith-Livermore remarks is to ignore *everything* that was said in Congressional debate and thereby obscure the point above about public notice.

Third, and by far the most important, he insists that incorporation elsewhere in the Bill of Rights of references to penalties of death[39] and the enactment in 1790 of federal capital statutes[40] shows conclusively that the Founders "contemplated" the death penalty, acted on "the premise that one may be deprived of life," and believed that Congress had "the right to impose death penalties" (p. 46). No doubt all this is true, as far as it goes. But how far *does* it go?

Berger, as we have seen, thinks that the way to find out what "cruel and unusual punishments" means in the Constitution today is to establish what it must have meant to those who used the phrase when they first enshrined it there. Not only that, he holds that "cruel and unusual punishments" has a "fixed, known meaning and [is] therefore unalterable" (p. 100). Very well, but Berger seems not to realize that *he* nowhere states what that "known, unalterable" meaning is. Neither does he inspire any confidence in his ability to state it. Instead, he generally writes as if he thinks this phrase *means* a small number of particular and narrowly defined modes of punishment to which, historically, the phrase unquestionably did *refer*, viz., to such modes of carrying out the death penalty as "crucifixion or boiling in oil" (p. 41).[41] These punishments, as Berger notes, were undoubtedly cruel and unusual in any ordinary and legal-constitutional sense of these terms, even during the eighteenth century in England and America.[42] But to say

39. "No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment . . . nor shall any person . . . be twice put in jeopardy of life . . . nor . . . be deprived of life . . . without due process of law. . . ." U.S. CONST. Amend. V.

40. *See* Act of Apr. 30, 1790, Ch. 9, § 14, 1 Stat. 112, 115 (1790).

41. Berger seems not to realize that he fails to give even a very ample list of the punishments understood in the eighteenth century to be "cruel and unusual." Nor does he tell us what would be required to draw up such a list.

42. One curious consequence of Berger's argument can be illustrated with the example of death by disembowelment. He insists that this could not have been prohibited in England

this is not yet to state what "cruel and unusual punishments" *means*.

First of all, no general term, in or out of the Constitution, in 1789 or today, ever *means* the things to which it *refers*. For a century at least, philosophers have been explaining this lesson to all who will listen and think.[43] *A fortiori*, the constitutional phrase "cruel and unusual punishments" does not mean those particular punishments (whatever they all were) to which it was initially used to *refer* — or, for that matter, those to which you or I might use it to refer today. What the term does mean, to be sure, is related to certain (authentic or putative) properties of the class of things to which it refers. What are those properties? More precisely, what were they in 1789? Until we know this clearly and indisputably, we cannot claim to know what the term *means*. Berger may think he has told us what these properties are when he speaks of the prohibited punishments, using the language of the eighteenth century, as "barbarous" (p. 44) or "barbarous, torturous" (p. 131). This is an error. Either these terms are no better than synonyms for the clause itself, in which case we have made no helpful advance, or they do not really allude to the properties of the prohibited punishments because they serve primarily to express horror and disapprobation of punishments deemed to be "cruel and unusual." Berger also argues at some length in order to discard a plausible and helpful idea, *viz.*, that whatever else "cruel and unusual punishments" are, they are "disproportional" punishments (pp. 32-35, 114-15). His objection is that there is no warrant for supposing that disproportionality was a concept implicit in the original understanding of any punishments judged to be "cruel and unusual" (p. 115). And that is all he really has to say about what the term, "cruel and unusual punishments," means. Thus he has not stated what this clause meant to those who

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during the eighteenth century as a "cruel and unusual punishment," as that phrase was understood in the English Bill of Rights of 1689, since Parliament did not see fit to abolish this mode of inflicting the death penalty until 1814. P. 41. Berger does not even mention the possibility that between 1689 and 1814, Parliament had embraced a tacit contradiction, or that Parliament presumably thought such a contradiction could be avoided by implicit appeal to the "necessity" or "proportionality" of what Berger (speaking only for himself? admits is a "horrible" punishment. P. 41. Now, suppose, *horribile dictu*, that Congress in 1800 had enacted a federal death penalty of disembowelment for the crime of treason. Would that have been consistent with the eighth amendment so recently adopted? One would think not, given the cruelty of such a punishment as well as the lack of precedent (hence its "unusualness") in American law. But Berger claims otherwise: In regard to *any* criminal penalty that was or might have been enacted by statute in the United States, he says, "If it did not violate the 1689 clause, it did not violate the eighth amendment." P. 40 n.52.

43. The classic source is the 1892 essay by Frege, *On Sense and Reference*, in TRANSLATION FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56-78 (Geach & Black eds. 1952). As a general argument for distinguishing meaning (Frege's *Sinn*, or sense) from reference, consider this: "trilateral closed plane figure" and "triangular closed plane figure" have the same reference, viz., the same class of geometrical entities; but the meaning of these terms is not the same. Likewise, "square circle" and "triangular tetrahedron" are terms with the same reference, viz., the null class, but they obviously do not mean the same thing. An elementary and representative recent discussion of these matters may be found in M. BLACK, THE LABYRINTH OF LANGUAGE 150-68 (1968). Frege's platonistic theory of meanings as abstract entities is not by any means required by Berger's historicist theory of constitutional interpretation, but it is one way to understand his semantic assumptions and to place them within a recognizable and traditional theory. Such platonism is not, however, the sole or even the dominant contemporary outlook; for a representative strong anti-platonistic view, see L. COHEN, THE DIVERSITY OF MEANING 1-23 (1962).

used it in 1789, and, therefore, according to his own principles, has not stated what it means to us today.

Second, in keeping with the fact that "cruel and unusual punishments" is a general term, not a proper name or an abbreviation for a handful of definite descriptions of specific punishments, neither Berger nor anyone else can cash it in favor of an exhaustive list of all and only those punishments that in 1789 were judged by the Framers to meet this description. The "Framers and Ratifiers" chose to formulate their prohibition in general and (*pace* Smith) "indefinite" terms, and they must be presumed to have intended the semantic consequences of this act.

Now we get to the really central question: Could capital punishment, or any other mode of punishment, undeniably not deemed among the "cruel and unusual punishments" by those who deliberately chose this phrase to express what they wished to prohibit, nevertheless at a later time in history be included within the reference of that phrase *because* of the very meaning, "the original understanding," of that phrase? Berger seems to think this is simply inconceivable, or at least, inconceivable given that a *written* Constitution is being interpreted. To put it in another way, he writes as if a prohibition against the death penalty, general or specific, is not permitted by the *intension* (meaning or sense) of "cruel and unusual punishments" because such a prohibition it was demonstrably not part of the original *intention* of the "Framers and Ratifiers." But this is another error. To help see this issue in a neutral light, consider a very different example. Prior to the discovery of Australia, no European had seen a black swan; hence "swan" was used always and only to refer to a certain class of white water fowl. The intention of anyone using "swan" was unquestionably to refer to fowl of such color only. Then black swans were sighted. Clearly, the *reference* of the term, "swan," no longer remained the same, for the class of things now to be regarded as swans included both black and white fowl. But must the *meaning* of the term have changed also? Far from it. So long as ornithologists were prepared to treat the property of color as incidental (as they obviously did) so they could retain other, structural properties as essential, they widened the original reference class without changing the term's meaning. Thus, even if in 1750, when every Englishman used the term "swan" *intending* to refer only to white fowl, and even if anyone had been asked he would no doubt have denied that anything so called could be other than white, nevertheless a century later this very same term, thanks to its *intension*, is understood (and properly so) to refer to black creatures as well as to white. So intention does not determine intension. There is no reason in principle why death penalties as a class today must be any different from black swans in 1850, so long as our constitutional taxonomists seize on the correct, structural properties (whatever they are) even if that requires them to dismiss a hitherto salient property and treat it instead as incidental. No perverse "activism" or opinionated judicial "predelictions" are needed to account for an increase in the reference class for "cruel and unusual punishments," any more than they are part of the story of what has happened to the term "swan" in ornithology texts.

Let us apply this same line of analysis directly to the remarks of Samuel Livermore. The following is the sort of thing that a sensible proponent of

the eighth amendment language might have said or thought after being provoked to do so by Livermore's comment and question:

> Yet, in some distant future it may well be that the best reading, fully supported by the right sort of reasons, will indeed convince any dispassionate and informed person that the death penalty is a "cruel and unusual punishment," and is therefore to be prohibited by virtue of the constitutional language we now propose. To be sure, we do not use this language today in the belief that it rules out recourse to capital punishment; nor do we adopt this clause with the intention that at some later date it be so interpreted by our successors. But we do choose not to try to prevent such an interpretation, though we could if we were to formulate the prohibition as nothing more than a certain few specific punishments (*e.g.*, boiling in oil). For all we know today, it may in the future show a better understanding of what the death penalty is in itself to prohibit it altogether, rather than to permit, as we do, some modes of its infliction (*e.g.*, hanging for murder). In any case, we do now intend to prohibit punishments that are barbarous and torturous, examples of which abound, and we will use the time-honored language of "cruel and unusual punishments" to characterize, however, indefinitely, what it is about these punishments that we find requires their prohibition. We cannot do better than use these words to express what the common properties are of such punishments in virtue of which they are to be forbidden, even if popular majorities or duly elected legislatures declare otherwise. Nothing in our choice of language today renders it contrary to our intention for our successors to decide that what this language means provides a sufficient reason for them to bar modes of punishment that we, today, find not impermissible under that very language.

What this imaginary response contemplates and Berger completely overlooks is that it need not be the *words* "cruel and unusual punishments" that have changed their *meaning* between 1789 and 1972. It can be, rather, that the *thing* in question, capital punishment, has changed its *nature*.[44] Indeed, as a punitive practice woven into the fabric of modern social and political institutions and attitudes, this is exactly what has happened. For example, it would be impossible today to argue that the death penalty is "necessary," although one certainly could have argued this, as Livermore implied, in 1789. This "necessity" is a crucial fact about the nature of this punishment as a social institution. (As for the race- and class-sensitivity of the death penalty, they may have been traits of long standing although effectively undetectable by the perceptions of an earlier day, despite their visibility to us.) Perhaps it will help to think of it this way. It is as though astronomers, familiar for centuries with a certain celestial object, suddenly

44. The doctrine that the death penalty is categorically unconstitutional, adopted by only two current Justices, *see* Furman v. Georgia, 408 U.S. at 305 (Brennan, J., concurring); 408 U.S. at 370 (Marshall, J., concurring), is generally expressed somewhat misleadingly in terms of "*per se* unconstitutionality." Admittedly, this does make it sound as if anyone committed to this doctrine must hold that what makes the death penalty unconstitutional is something about it *in or through itself* (*i.e.*, *per se*), and thus in isolation from its social context, much as the medievals said of Christian doctrine and the Church that they were *semper et ubique et ab omnibus*. However, the concept of *per se* unconstitutionality need not be understood in this manner. It can be understood to mean only that as customs, institutions, and attitudes currently stand in this (or in a) society, the death penalty for any crime under such conditions is unconstitutional.

and for the first time see its true nature as revealed to them through new techniques of investigation (*e.g.*, Galileo's telescope). The object under scrutiny may not have changed, but astronomers' knowledge of its properties has and so has their account of its nature. The analogy is imperfect, of course, because legal and social practices do not have a nature unaffected by the history and circumstances of those who engage in them, whereas we fancy that the proper objects of astronomical research do. But Berger is one of those who will not look through the telescope.

My argument throughout has *not* been designed to show that the death penalty today *is* a "cruel and unusual punishment," but rather only to try to show how one can correctly reason that it is and not be committed in the course of such reasoning to any distortion or falsification of "the original understanding" or "the intention of the Framers and Ratifiers."

IV

In the course of defending his jurisdictional limitation remedy for what he regards as the unauthorized power of the federal judiciary, Berger pauses to dissociate himself from some of his more obvious political allies (he mentions those who enlist in "the Helms-Falwell causes" (p. 154)). In a later aside, he readily admits that the willingness of state legislatures to require prayer in public schools "grate[s] on [his] sensibilities" (p. 158). Am I alone in finding it curious and unacceptable that an author who can demonstrably wear his heart on his sleeve when he wants to nowhere takes the reader similarly into his confidence to share with him his "predelictions" on the main issue under discussion? Berger, of course, implies throughout his book that since the issue is not the merits of the death penalty, he need not declare his own opinion for or against it. Certainly no one can fault him for evasiveness or reticence on what he *says* "the real issue" is, *viz.*, "nothing less than the right of the people to govern themselves" (p. 8).[45] On this "issue" he makes his own convictions abundantly clear. However, to take this line as a sufficient reason for silence on the issue that gives the title to his book is to misconceive why readers of books care, or should care, about what the Supreme Court and the Constitution say about the death penalty. Nor is it sensible or well-advised for a scholarly writer, in addressing himself to such a controversial contemporary issue of public policy, to keep to himself his own views. Berger, after all, is no mere advocate for a point of view from which no important general policy issues emerge, much less a hireling assigned to a personally distasteful but dutifully performed task. If a scholar has only one client, the truth, then where public policy issues are under discussion that requires a willingness in an author to be candid about his own convictions.

Since Berger has left us free to speculate, let us do so. Perhaps he writes as a closet abolitionist, who finds it his painful duty to unravel what "a small band of dedicated abolitionists, led by a few top flight lawyers" (pp. 4-5)[46] has woven with the help of "activist" majorities on the Court. Possi-

45. *See* p. 128: "At issue is not whether a man may be hanged for stealing a loaf of bread, but whether the Court is authorized to take that decision away from the legislature and the people."

46. Berger consistently, pp. 4, 6, refers to these "lawyers" as affiliated with the "NAACP";

ble but unlikely. Conspicuously absent throughout the book is any pathos, or even any evidence of concern over the nation's plight as it faces the unprecedented and really unbelievable prospect of a *thousand* lawful executions. If I am wrong about where his sympathies lie, Berger would have done better to confess his "predilictions" and get on with his argument. After all, if Justices of the Supreme Court can do so in their opinions in death penalty cases without thereby destroying their credibility, as Justice Blackmun did in his dissenting opinion in *Furman*,[47] so can any responsible and serious scholar.

Somewhat more likely, I think, is that Berger writes out of no real interest in the merits of the death penalty controversy, one way or the other.[48] Perhaps he has not yet made up his own mind, or perhaps he has thought about it enough to decide he really does not care whether the nation continues to employ death penalties. If such reasons explain his silence, then his whole enterprise is trivialized. Is it, therefore, possible that Berger really approves of death penalties but has decided to conceal that truth from his readers, thereby deliberately refusing to share the true angle of his vision? I do not know, but I think it most likely.

I explore this theme not in order to advance an *argumentum ad hominem*. Whatever Berger's stance may be on the death penalty, none of his arguments or the truth of any of his assertions in this book is thereby put in jeopardy. In any case, I tip my hat to him for having delivered himself of an uncompromising argument that will surely help state courts, state legislatures, and others to bring about "a spate of executions . . . without parallel in this Nation since the depression era."[49] With considerable reluctance, I suppose I have to hope that is what he wants.

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this is incorrect. They are affiliated with the LDF, *i.e.*, the NAACP Legal Defense and Educational Fund, Inc. For a discussion of the role of the LDF in developing the litigational strategy against the death penalty, see M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973), a book Berger does not cite. On the historic origin of the LDF out of the NAACP, see R. KLUGER, SIMPLE JUSTICE 221-74 (1976), a book Berger cites several times.

47. Justice Blackmun showed that he stood personally opposed to the death penalty, and used the strongest possible language to say so ("I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . ."; Furman v. Georgia, 408 U.S. at 405, yet he voted to uphold its constitutionality, 408 U.S. at 410-14. As a result, his discomfort, such as it was, is to be sharply contrasted with Berger's evasiveness.

48. Berger has been quoted in an interview as saying, " 'I'm not interested in whether death penalties are moral or immoral or horrifying. I don't go into that argument.' " CHRON. HIGHER ED., Oct. 20, 1982, at 21, col.2.

49. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 9.