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## Death Penalties - The Supreme Court's Obstacle Course

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## BOOK REVIEW

### DEATH PENALTIES—THE SUPREME COURT'S OBSTACLE COURSE BY RAOUL BERGER. CAMBRIDGE, MASSACHUSETTS: HARVARD UNIVERSITY PRESS, 1982. PP. 242. \$17.50.

David L. Gregory\*

*Death Penalties*, by Harvard Law School Professor Emeritus Raoul Berger, an eminent constitutional law scholar,<sup>1</sup> is an important, disturbing book.

Despite an incredible 852 footnotes,<sup>2</sup> relative to only 204 pages of primary text, the book certainly does not fall squarely within conventional legal academic scholarship. It is an advocate's brief more than it is a theoretical examination of the issue of capital punishment. *Death Penalties* is a narrow sequel to Berger's controversial study, *Government By Judiciary*.<sup>3</sup> Berger's overarching thesis is that the judiciary has unconstitutionally usurped the powers of the legislature, via unwarranted and illegitimate judicial distortion of the fourteenth amendment. "In short, the Court has engaged in rewriting the Constitution, exercising a power not granted to it, identifying its own predilections with constitutional imperatives."<sup>4</sup>

Berger critically analyzes unprincipled judicial interference with state administration of the death penalty. He argues that the Court's convoluted, activist decisions<sup>5</sup> have unconstitutionally compromised the fundamental tenth

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1. Berger has written numerous books and articles in the field of Constitutional law. See R. BERGER, CONGRESS V. THE SUPREME COURT (1969); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter cited as GOVERNMENT BY JUDICIARY]; R. BERGER, IMPEACHMENT, THE CONSTITUTIONAL PROBLEMS (1973); Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1 (1981); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Berger, *Ely's Theory of Judicial Review*, 42 OHIO ST. L.J. 87 (1981); Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801; Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311 (1979).

2. Similar to Professor Berger's admission in an earlier book, he has piled "proof on proof, even at the risk of tedium." GOVERNMENT BY JUDICIARY, *supra* note 1, at 8.

3. A representative sampling of critical reaction to Professor Berger's GOVERNMENT BY JUDICIARY, *supra* note 1, includes, but is certainly not limited to, the following reviews of the book: Bridwell, Book Review, DUKE L.J. 907 (1978); Clark, Book Review, 56 TEX. L. REV. 947 (1978); Murphy, Book Review, 87 YALE L.J. 1752 (1978); Perry, Book Review, 78 COLUM. L. REV. 685 (1978); Tao, Book Review, 55 U. DET. J. URB. LAW 497 (1978).

4. R. BERGER, DEATH PENALTIES—THE SUPREME COURT'S OBSTACLE COURSE 158 (1982) [hereinafter cited as DEATH PENALTIES].

5. Berger's analysis concentrates on two landmark capital punishment cases decided by

amendment right of the states to administer their criminal law with responsible autonomy.<sup>6</sup> Additionally, Berger maintains that the Court has unconstitutionally expanded the meaning of the cruel and unusual punishment clause of the eighth amendment far beyond the narrow intent of the Framers.<sup>7</sup> According to Berger:

The Court's revision of the "cruel and unusual punishments" clause is but one more arrogation of power under the aegis of the Fourteenth Amendment, but another chapter in the tale of judicial make-believe. . . . Control of death penalties and of the sentencing process, it may confidently be asserted, was left by the Constitution to the States.<sup>8</sup>

State legislatures have not been oblivious to federal judicial intrusion into the administration of criminal law. In a de facto repudiation of the *Furman v. Georgia*<sup>9</sup> decision, thirty five states immediately reenacted the death penalty.<sup>10</sup> Further, the states have struggled valiantly against judicial social engineering.<sup>11</sup> The people, through the state legislatures, and not the imperial federal courts, have the sole power to constitutionally abrogate capital punishment.

Unfortunately, Berger's important analysis suffers from disjointed, incohesive scholarship. Despite sophisticated research and intimate knowledge of the plethora of relevant literature, Berger hurries his theoretical inquiry. Dispassionate academic examination of the constitutionality of the death penalty is a remote, secondary concern to Berger. Having marshalled

the Supreme Court—*McGautha v. California*, 402 U.S. 183 (1971) and *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

In *McGautha*, the Court held that the jury has absolute discretion to decide whether the criminal defendant should live or die and that the absence of any standards to guide the jury is not violative of the Constitution. Fourteen months later, however, five members of the Court in *Furman* held that standards to guide the jury's discretion regarding the imposition of the death penalty are required by the cruel and unusual punishment clause of the eighth amendment. 408 U.S. at 256-57 (Douglas, J., concurring), *Id.* at 305-6 (Brennan, J., concurring), *Id.* at 310 (Stewart, J., concurring), *Id.* at 314 (White, J., concurring), *Id.* at 370 (Marshall, J., concurring).

6. DEATH PENALTIES, *supra* note 4, at 109. According to Berger, the tenth amendment raises a presumption that control over matters of local concern is reserved to the states and can be overcome only by clear language manifesting the states' intention to surrender such control.

7. DEATH PENALTIES, *supra* note 4, at 7 n.23. "An unbroken line of interpreters has held that it was the original understanding and intent of the framers of the Eighth Amendment . . . to proscribe as 'cruel and unusual' only such modes of execution as compound the simple infliction of death with added cruelties and indignities." *Id.*

8. *Id.* at 8-9.

9. 408 U.S. 238 (1972) (per curiam). For a brief discussion of the per curiam holding, see *supra* note 5. See also *infra* note 35.

10. DEATH PENALTIES at 7 n.23. "'According to a Gallup poll published in March [1981], two-thirds of all Americans, the highest percentage in 28 years, favor the death penalty for murder.' *New York Times*, June 14, 1981, p. 28. More significantly, the majority of the States speedily repudiated *Furman* by reenacting death penalties in what they thought would be acceptable terms."

11. DEATH PENALTIES, *supra* note 4, at 7 n.23.

voluminous data which purportedly supports his conclusions, Berger quickly proceeds to the primary purpose of his book—an indictment of the Supreme Court's illegitimate law-making, via its unconstitutional and egregious judicial distortion of the meaning of the fourteenth amendment.<sup>12</sup> Rather than fashion his academic analysis from an Archimedean position, Berger writes a vitriolic advocate's brief. There are frequent and scathing ad hominem attacks upon his activist critics.<sup>13</sup> Footnotes are used in an endless litany to bolster argument, rather than to elucidate legal analysis. Regrettably, this results in disconcerting reading. Apart from these negative stylistics, however, *Death Penalties* is a timely book on one of the most fundamental constitutional questions in American jurisprudence.<sup>14</sup>

Berger begins by debunking the activist theories that the fourteenth amendment incorporated the Bill of Rights either in whole or in part.<sup>15</sup> Rather, Berger posits that the Framers of both the Bill of Rights and the fourteenth amendment were firmly devoted to the principle of inviolate state sovereignty within the federal system. Explaining that the Framers never intended to surrender control of state administration of criminal law to the federal judiciary, Berger concludes that "the case of 'cruel and unusual punishment' did not contemplate interference with State control of death penalties."<sup>16</sup>

Examining the history of the eighth amendment, Berger asserts that the Supreme Court has interpreted the cruel and unusual punishment clause to prohibit cruel, as well as excessive punishment. In Berger's view, however, a punishment may be excessive without being cruel.<sup>17</sup> According to Berger, the Framers' choice of different terminology indicates a different purpose and in fact, "the Founders were accustomed to punishments that by our standards would be regarded as 'excessive,' and gave no inkling of an intention to bar them."<sup>18</sup> Furthermore, to violate the eighth amendment, a punishment must be both cruel (barbarous)<sup>19</sup> and unusual (a significant departure from the customary).<sup>20</sup> Thus, while capital punishment may inevitably be perceived as inherently cruel, it is not necessarily unusual.<sup>21</sup> For example, while crucifixion would be "unusual according to today's standards," death

12. See *supra* note 1 (listing a bibliography of Berger's continuing indictment of the Supreme Court's illegitimate law-making and judicial activism).

13. See *DEATH PENALTIES*, *supra* note 4, at 183-96.

14. Specifically, Berger addresses the law-making role of the Supreme Court and whether constitutional interpretation should be confined to the Framers' intent or whether it should be readjusted to meet current needs and ideals.

15. *DEATH PENALTIES*, *supra* note 4, at 15 n.24, 23-24 nn.68-70.

16. *Id.* at 28.

17. *Id.* at 30.

18. *Id.*

19. *Id.* at 39.

20. *Id.* at 41. Chief Justice Warren recognized: "If the word 'unusual' is to have any meaning apart from the word 'cruel' . . . the meaning should be the ordinary one, signifying something different than that which is ordinarily done." *Id.*

21. *Id.* But according to Berger, if a punishment is no longer customary, then it is both cruel and unusual. *Id.*

by injection would not. Therefore, only the former mode of capital punishment would be unconstitutional on its face today.

Consonant with English precedent, the Framers did not intend to make the death penalty unconstitutional *per se*. Indeed, coterminous with the enactment and ratification of the Constitution, capital punishment applied to a wide range of non-capital felonies which today are not considered to constitute capital crimes. According to Berger:

The continued vitality of death penalties is further attested by the Act of April 30, 1790, enacted by the selfsame First Congress, the best interpreter of what it meant by the "cruel and unusual" clause it adopted. That Act made murder, forgery of public securities, robbery, and rape punishable by death, incontrovertible evidence that the Framers did not intend "cruel and unusual" to exclude death penalties.<sup>22</sup>

Berger is not a proponent of capital punishment *per se*; he opines it has no intrinsic merit in the abstract. However, from a constitutional perspective, he makes an important and legitimate argument. Should the people now wish to abolish capital punishment, they may do so constitutionally by statute or formal amendment. Berger maintains that the critical and fundamental point is that the Constitution vests the power of abrogation or reaffirmation of capital punishment exclusively with the people, and *not* with the judiciary.<sup>23</sup> Thus, although it may be socially and morally commendable to abolish capital punishment, that decision rests with the people: "by Article V that power of amendment is reserved to the people, not given to the Courts to exercise under the guise of 'interpretation'. . . . Nothing in the Constitution, in my judgment, authorizes the Court to abolish the death penalty."<sup>24</sup>

Undoubtedly, there is firm historical precedent for the gradual prohibition of certain forms of punishment through legislative action which properly reflects the collective will of the citizenry.<sup>25</sup>

[P]unishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislatures responded to this sentiment. At issue is not whether a man may be hanged for stealing a loaf

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22. *Id.* at 47.

23. *Id.* at 48-49. "As concerns the states, in particular, the Constitution leaves them large freedom to do what they like—and what the Justices may not like—subject only to the *clearest and narrowest limitation.*" *Id.* at 49-50 (emphasis in original). Therefore, as Berger argues, it is clear that "the Framers did *not* intend to limit State control of death penalties." *Id.* at 50, 67 (emphasis in original).

24. *Id.* at 58.

25. *See id.* at 41 (the punishment for treason, disembowelment while alive, survived until it was abolished by Parliament); *id.* at 48 (Justice Brennan commented that concepts of justice change, as exemplified by society's virtually total rejection of the death penalty); *id.* at 128 (punishments which were once commonplace, such as "cutting off of ears" became offensive to the people, therefore, the legislature responded by abolishing the punishment).

of bread, but whether the Court is authorized to take that decision away from the legislature and the people.<sup>26</sup>

Therefore, Berger argues, the gross imposition of the judges' personal mores, via the arrogance of unprincipled judicial fiat, is blatantly unconstitutional.

Echoing the central thesis of his earlier book, *Government By Judiciary*,<sup>27</sup> Berger is unalterably opposed to judicial activism. Utmost restraint is the only constitutionally legitimate federal judicial perspective regarding state administration of capital punishment. Berger states that "at the root of the Court's transformation of the 'cruel and unusual punishment' clause lies the assumption that the Court is empowered to revise the Constitution, discreetly expressed as 'adaption' to changing conditions. Such claims are garbled in jewels of obfuscation."<sup>28</sup>

Berger acknowledges former Chief Justice Marshall's famous characterization of " 'a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs,' "<sup>29</sup> and declares that it is incontrovertible that ours is a "living" Constitution. Berger concludes, however, that the Constitution must be modified and given vitality by the people and the legislature, via the constitutional amendment mechanism of Article V, and not by the Court's dangerous expansion of the fourteenth amendment.<sup>30</sup>

Berger terms Chief Justice Warren's remark that the eighth amendment " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society' "<sup>31</sup> as "a euphemism for judicial soothsaying."<sup>32</sup> In summary, Berger dismisses judicial activism as "double talk for amending the Constitution without consulting the people. . . . Simply put, amendment is confined to the people under Article V."<sup>33</sup>

Analyzing the controversial *McGautha v. California*<sup>34</sup> and *Furman v. Georgia*<sup>35</sup> decisions, Berger maintains that these decisions were wholly in-

26. *Id.* at 128.

27. According to Berger in *GOVERNMENT BY JUDICIARY*, *supra* note 1, at 300-11, 351-62, the Supreme Court was not designed to act as a continuing constitutional convention and, consequently, its continuing revision of the Constitution under the guise of interpretation far exceeds the original intention of the Framers. Berger maintains that the Framers merely intended the Court to police the boundaries drawn by the Constitution. Furthermore, he argues that the original intention of the Framers should be binding on the present generation and that the role of the Court is not to reinterpret the Constitution in light of current exigencies or changed ideals.

28. *DEATH PENALTIES*, *supra* note 4, at 59.

29. *Id.* at 67.

30. *Id.* at 72.

31. *Id.* at 122.

32. *Id.*

33. *Id.* at 123.

34. 402 U.S. 183 (1971).

35. 408 U.S. 238 (1972) (*per curiam*). The decision in *McGautha*, that unlimited discretion in capital sentencing by juries was constitutionally permissible, is not necessarily inconsistent

imical to basic constitutional precepts. He argues that jury discretion regarding the death penalty is, and must be, constitutionally immune from judicially imposed constraints:

The historical evidence demonstrates that the Constitution left the States free to enact death penalties unencumbered by any measure of proportionality. . . .

The Court's attempt to impose and police 'standards' to curb jury discretion in sentencing has even less constitutional footing and already has resulted in a quagmire of contradictions. . . . Early on the Founders expressed their attachment to the common law mode of trial by jury, whereunder juries could not be called upon to explain their verdicts nor were judges empowered to review verdicts. The jury, in fact, was far closer to the hearts of the Founders than was the judiciary; for protection they looked to the jury rather than the judge.

. . . If the Court is free to substitute its own meaning for the established common law content of the constitutional terms, it obliterates those limits and revises the Constitution for the imposition of its own predilections on a people who, in the case of death penalties, lost no time in repudiating the Court's reading of prevailing standards of 'human decency.' In turning its back on the practice that obtained at the adoption of the Constitution and persisted for 181 years thereafter, the Court assumed power to alter and amend the Constitution, a power exclusively reserved to the people themselves, a power usurped by the Court disguised in soothing double-talk.<sup>36</sup>

By the abolitionists' own admission,<sup>37</sup> the post-*Furman* standards purportedly governing the imposition of capital punishment, severely restrained jury discretion, and were an exercise in sheer futility. Apart from lacking solid majorities,<sup>38</sup> the landmark *McGautha* and *Furman* decisions were over

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with the finding that a jury's decision to impose the death penalty was arbitrary and, hence, unconstitutional. Because of the *Furman* Court's unwillingness to overrule *McGautha*, it distinguished the two cases on the basis of the input to and the output from the jury. The question of the permissibility of jury sentencing standards was answered in *McGautha* to the extent that it is constitutional not to impose standards. This determination, however, does not preclude the future input of some sentencing standards to guide the jury. Thus, at the present, the input to the jury is free of all constraints. In *Furman*, the Court found that juries randomly were handing out death sentences and, therefore, struck down the death penalty in cases where the results of the unguided jury were arbitrary. The effect of jury sentencing was thus circumvented at the output stage in order to protect the rights of those being sentenced, without disturbing the nature of the jury procedure. Although the Court in *Furman* did not explicitly overrule *McGautha*, Berger states that "[t]his abrupt about-face exemplifies the very 'government by whim' against which Justice Brennan inveighed in *McGautha* on the ground that ours is a 'government of laws, not of men.'" DEATH PENALTIES, *supra* note 4, at 129.

36. DEATH PENALTIES, *supra* note 4, at 173, 174-75.

37. *Id.* at 176-77. Justice Marshall is foremost among the abolitionist justices and like most abolitionists, prefers imprisonment to capital punishment. *Id.* at 177 n.10. According to Berger, abolitionist reliance on the "cruel and unusual punishment" clause assumes that the Constitution endowed the Court with power to make selected portions of the Bill of Rights applicable to the states. Furthermore, he claims that abolitionists assume that the Court may substitute its present-day reading of the clause for the meaning the Framers intended. *Id.* at 173-74.

38. In *McGautha*, Justice Harlan delivered the opinion of the Court. Justice Black wrote

360 pages in length and involved over fourteen separate opinions: the quintessence of judicial convolution and obfuscation. It was evident in each of these decisions that the justices were unable to convince either the nation or one another of the legitimacy of their respective positions.

Berger concludes by proposing a legislative solution for judicial interference with the states' constitutional power to administer capital punishment. Congress should remedy this judicial intrusion by appropriately curtailing the jurisdiction of the federal courts over the administration of criminal law.<sup>39</sup> Berger fails, however, to enunciate the scheme for congressional action. He simply suggests a draconian solution,<sup>40</sup> with little consideration of either the implementation or ramifications of his proposal.

Following this brief discussion of his proposed solution, Berger launches into a diatribe against his academic critics, particularly Stanford Law School Professor Paul Brest.<sup>41</sup> He argues that "[t]hose who do not share Paul Brest's belief that the Court is not bound by the Constitution, who consider that its revision was confined to the people, not the Court, should welcome the exercise of congressional power to restore the democratic system of self-government."<sup>42</sup>

The academic furor regarding the constitutionality of capital punishment rages among abolitionists/activists, strict interpretivists, and satellite theorists. *Death Penalties* presents Berger's strict interpretivist plea for judicial restraint. Unfortunately, the book is one part scholarship, two parts advocate's brief, and two parts castigation of real and perceived critics.

Berger makes a facially impressive argument. Nonetheless, the stridency of his personal diatribe detracts from the cogency of his thesis. Neither Berger nor his critics have an absolute monopoly on the constitutional "truth." Continual reinterpretation (read: manipulation) of the intent of the Framers, though often critically necessary, is nevertheless extremely wearisome. Before an immediate rejoinder to Professor Berger, perhaps the legal field would be best served by a period of academic reflection.

a separate opinion, and Justice Douglas wrote the dissenting opinion, joined by Justices Brennan and Marshall. Justice Brennan also wrote a dissenting opinion joined by Justices Douglas and Marshall. In *Furman*, Justices Douglas, Brennan, Stewart, White, and Marshall each wrote a concurring opinion. Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, wrote the dissenting opinion. Justices Blackmun, Powell, and Rehnquist also each wrote a dissent.

39. *DEATH PENALTIES*, *supra* note 4, at 154.

40. *Id.* at 171-72.

41. *Id.* at 183-96. Referring critically to Professor Brest's scholarship, Berger rejoins: "His critique of my views is therefore merely mud-slinging, the more since he patently has been influenced by them." *Id.* at 187 n.26. Berger further asserts that "it is dispiriting to find that my prior refutation of his criticism has not deterred him from repeating his misrepresentations of my position. That goes beyond the issue of his credibility. Given academe's current infatuation with judicial activism, he [Brest] owes a duty both to scholarship and to the people to state an opponent's view honestly and fairly. Instead he flails away at strawmen of his own devising." *Id.* at 187-88.

42. *Id.* at 172.



At the conclusion of the book, one realizes that Berger, in this latest re-examination of the "true" intent of the Framers of the eighth and fourteenth amendments, has discounted his earlier valuable advice: "We must be wary of reading our sentiments back into the minds of the framers."<sup>43</sup>

Both Berger and his activist critics are virulent advocates of their respective positions regarding the constitutionality of the death penalty. Berger responds "Hallelujah" to Professor Brest's acknowledgment that "'most of our writings [concerning judicial review] are not political theory but advocacy scholarship-amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good.'"<sup>44</sup>

Regardless of one's personal assessment of Berger's position, clearly the minority view in recent years,<sup>45</sup> he continues to make a persuasive case for restoring criminal law administration of capital punishment to the states.

Despite Berger's fulminations, his central thesis is scholarly, and his conclusion merits serious reflection. Indeed, Berger's countervailing position to judicial activism deserves thoughtful attention by everyone interested in criminal law administration of capital punishment.

We are therefore entitled to look behind every decision contrary to majoritarian wishes in order to be satisfied that the Constitution, rather than the Justices, bars the way. That emphatically is not the case with the "cruel and unusual punishments" clause, which the Court once again uses as a vehicle to impose its own morals on the people.<sup>46</sup>

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43. DEATH PENALTIES, *supra* note 4, at 57.

44. *Id.* at 196.

45. *Id.* at 122. The abolitionists/activists represent the major trend today in constitutional interpretation. In Chief Justice Warren's words, the Constitution "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 122 n.42. Berger rejects this evolving interpretation of the Constitution, maintaining that such judicial activism has distorted its original and limited meaning. For a discussion of Berger's position on the role of the Supreme Court, see generally GOVERNMENT BY JUDICIARY, *supra* note 1.

46. DEATH PENALTIES, *supra* note 4, at 103.