

PRESENTATION BY PROFESSOR WALTER DELLINGER*

It is an honor to debate Walter Berns, whose gentleness of manner and steeliness of mind have made him a scholar for whom I have the highest admiration. He has brought clarity, insight and wisdom to history, political theory, and law.

I will not try to persuade this audience that the death penalty is wrong or that it is, in the abstract, unconstitutional. What I will try to do is to make the case that a court proceeding with caution and restraint would not be precluded from holding that the death penalty, as it is now being administered, violates the Constitution. I will then try to show that such a ruling could be constitutionally sound and fully consistent with both the text of the Constitution and the intent of its Framers. I know that I face a challenge in making these arguments to this audience.

I agree with Walter Berns that a provision of the written Constitution can only mean what those who adopted it intended it to mean. Those who suggest that a text can mean something other than what the authors intended are arguing a proposition that seems to me to be simply contrary to basic common sense. The reason we consult the text of the Constitution is precisely because it embodies an understanding reached at a foundational moment by decision-makers at the Constitutional Convention, the First Congress, and in the legislatures of the ratifying states. Giving constitutional text a meaning other than that which was originally intended may be a wonderful exercise in creativity, but such interpretation deprives the text of its legitimating authority, which it received from its drafters and ratifiers.

Moreover, I agree that the penalty of death was not in principle unacceptable to those who proposed and ratified the cruel and unusual punishments clause of the eighth amendment. As Justice Powell wrote in his dissent in *Furman v. Georgia*,¹ "there cannot be the slightest doubt that [the Framers] intended no absolute bar on the Government's authority to impose the death penalty."²

Nonetheless, I would argue that the death penalty systems currently in force in this country might very well be contrary to the Constitution. You are entitled to ask: How so? First, from reading the records of the Constitutional Convention in Philadelphia in 1787 and the debates over the adoption of the Bill of Rights in the First Congress, I am convinced that the Framers did not intend to limit the application of the cruel and unusual punishments clause only to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights. What the Framers intended to place in the Constitution and what they finally did place in the Constitution was not a detailed list of unacceptable punishments, but rather a principle of restraint on the

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1. 408 U.S. 238 (1972).

2. *Id.* at 417 (Powell, J. dissenting).

power of government to punish. This principle was to be applied in good faith, according to the best judgment of subsequent constitutional decision makers.

I will digress with an example deliberately chosen because it moves us away from the beclouding emotion of capital punishment. Suppose your great-grandmother left you one thousand dollars with a note that said, "When you leave home and go off to school, use this money only to buy nutritious food." Let us assume that she wrote the note in 1949. You are now heading off, and are about to make your first purchase. You decide that you are going to abide by your great-grandmother's intention and buy nutritious food. You are not just going to take the thousand dollars and cheat. This decision is consistent with the views that Walter Berns and I share about our obligation of fidelity to a written Constitution.

How do you in good faith go about interpreting her instruction to "buy nutritious food"? Those who were involved in developing Attorney General Meese's articulation of original intent would treat this problem as an exercise in detective work. In their view, you would have to go back to your great-grandmother's house and find her old cookbooks and her diaries, and read through them. Under this approach, you would attempt to define "nutritious food" by looking to what your grandmother said specifically about nutrition, and at what her actual practices were. This approach would be similar to interpreting the meaning of equality under the fourteenth amendment by placing great reliance on the fact that the Congress that proposed the fourteenth amendment had racially segregated galleries. Under this approach, you would interpret her instruction to "buy nutritious food" to mean, "Buy those foods that I consider nutritious, and that I in fact eat myself."

But there is another approach you could legitimately take to interpreting your grandmother's command to "buy nutritious food." You could assume that what she wanted you to do was to conscientiously undertake to purchase those foods that you determine in good faith to be nutritious. It may well be that you are being faithful to her intent if you read her command to mean, "Buy those foods that you determine are nutritious." It is arguable that this is more faithful to her command to "buy nutritious food" than if you were to interpret her instruction to mean, "Buy only those foods that I would like have considered nutritious."

If you think about that example, you will see that there is a problem underlying the notion that you should go back and look at precisely what were great-grandmother's perceptions at the time of writing. The decisions that you can presently make are limited to the options available at your great-grandmother's time, and some of these options may be outmoded or even erroneous in the light of experience. Whereas, by focusing on her general requirement that the food be nutritious you allow yourself the opportunity to exercise judgment, consistent with her more general intention.

To return to our topic of the death penalty and original intent, my point is simply this: What the Framers intended to deny to the government was the use of those punishments that are cruel and unusual. If the death penalty, as

it is administered in late twentieth century America, meets that description, then the Framers intended it to be prohibited.

The real question, it seems to me, was put a generation ago by Professor Herbert Wechsler of Columbia University, who has said that the issue of capital punishment is no longer "whether it is fair or just that one who takes another person's life should lose his own. . . . [W]e do not and cannot act upon . . . [that proposition] generally in the administration of the penal law. The problem rather is whether a small and highly random sample of people who commit murder . . . ought to be dispatched, while most of those convicted of . . . [identical] crimes are dealt with by imprisonment."³ Many years later, that statement is still, I think, the central question facing the administration of the penalty of death.

I have not seen a wholly persuasive argument that the penalty of death is, in the abstract, unconstitutional. In that sense, I agree with Walter Berns' suggestion that it is unpersuasive to argue that the death penalty is contrary to "evolving standards of decency." In this respect, I acknowledge the force of Justice Scalia's observation that the risk of assessing evolving standards is that it is all too easy to believe that such an evolution has culminated in one's own present views.⁴

But, as Charles Black⁵ has reminded us, the penalty of death is not administered in the abstract. If the death penalty is presently administered in such a capricious, episodic and discriminatory manner that it cannot seriously be thought to advance any significant public purpose, then it fails to meet the most fundamental test of American constitutionalism: the requirement that the most basic liberties may be infringed only by actions that clearly advance important governmental objectives.

Suppose that a state were to adopt a punishment called a "capital lottery," in which one out of every one thousand persons convicted of homicide would be randomly selected for execution. I think we would recognize that such a system would have been unknown to the Framers and would offend the most basic values they embodied in the Constitution. To execute such a small number of people at random would hardly advance any serious purpose of deterrence and would not serve any meaningful moral principle of retribution.

I ask you whether a system of death by lottery might be more constitutionally defensible than the system we now have, which is, I believe, considerably worse than random. The current system establishes no meaningful basis for choosing between those who will die and those who will go to prison. In addi-

3. H. Wechsler, Remarks, *quoted in* Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 352 (H. Bedau ed. 1982).

4. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2714-15 (1988) (Scalia, J., dissenting).

5. See Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1 (1976) (arguing that administration of death penalty is inherently defective because it is too arbitrarily applied); see also Black, *Reflections on Opposing the Penalty of Death*, 10 ST. MARY'S L.J. 1, 7 (1978) (arguing that due process test should be abolished because it is arbitrarily applied and prone to mistake); Black, *The Death Penalty Now*, 51 TUL. L. REV. 429, 445 (1977) (noting that death penalty is applied in "a real world, a real legal system, real cases").

tion, it selects those who will die on the basis of capricious and illegitimate factors, such as race or economic status. There is substantial evidence that one is far more likely to receive the death penalty if one's victim is white, or if one is poor, ill-educated, mentally retarded, or able to retain representation by only marginal counsel. It has been said that under our current system, the ability of the defendant's lawyer to generate a twenty thousand page transcript at the death sentencing hearing is by far the best indicator of whether the defendant will be given a term of imprisonment rather than the death penalty.

In 1972, the Supreme Court, by a five to four vote, decided the *Furman* case, holding all then-existing death penalty statutes to be unconstitutional.⁶ Although there were nine separate opinions in *Furman* and although those opinions are something of a cacophony, I think the Court got it about right. From the strands of *Furman*, one can put together a jurisprudence of capital punishment. In essence, what the Court held was that the death sentencing statutes then in force did not provide enough guidance to the judge or jury in their decision whether or not to impose a death sentence. As a result, out of a large number of defendants eligible for the death penalty only a few were selected for actual execution, essentially at random. A majority of the Court found this arbitrary sentencing to be cruel and unusual and a violation of the eighth amendment.

Following *Furman*, thirty-five states quickly enacted new statutes setting guidelines for the imposition of the death penalty. In 1976, the Court held in *Gregg v. Georgia*⁷ that those statutes were likely to cure the defects in the capital punishment system that the Court had previously identified.⁸ Since *Gregg*, the Court has been on a course, to use Robert Weisberg's chilling phrase of "deregulating" death.⁹

I think those revised statutes have papered over the essential *Furman* problem of arbitrariness. This problem is unlikely to be corrected by statutory tinkering. The difficulty, I think, is that the death penalty, as Frank Zimering and Gordon Hawkins have put it in a recent book,¹⁰ is a "punishment in search of a crime."¹¹ Society has determined that the death penalty should be imposed only in the rarest and most extraordinary situations. Given this decision, it is impossible for a legislature to frame a statute that could identify the exact circumstances in a person's crime that would warrant a death sentence. The statutes currently in force make distinctions in crimes that determine

6. *Furman v. Georgia*, 408 U.S. at 239-40 (per curiam). Justices Douglas, Stewart, White, Brennan and Marshall formed the majority. Justices Rehnquist, Powell, Blackmun and Chief Justice Burger dissented.

7. 428 U.S. 153 (1976) (plurality opinion).

8. *Id.* at 169.

9. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (1984). See generally W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1988) (overview of modern United States death penalty jurisprudence).

10. G. HAWKINS & F. ZIMERING, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 77-92 (1986).

11. *Id.*

whether the defendant shall live or die. These distinctions, however, very often do not reflect the defendant's actual culpability.

If you look at modern Western experience with the death penalty, Zimering and Hawkins note the pattern that emerges is "so simple it is stunning."¹² Every Western industrial nation has stopped executing criminals, except the United States. The list of actively executing countries is not the kind of list we want to be on: Iran, Iraq, Uganda, South Africa, the Soviet Union and its satellites.¹³ As they note, except for the United States the list of actively executing countries is just about the same as the list of politically repressive countries.¹⁴

In the United States, executions are and have been infrequent throughout this century. Let me disabuse you of any notion that this infrequency was the result of judicial moratorium. About twenty thousand homicides occur each year in this country, and that terrible and tragic figure has remained stable over time. In 1935, we had the highest number of executions in a single year in American history: 199. By 1952, the number of annual executions dropped below one hundred. By 1958, there were fewer than fifty executions in the United States; in 1963, twenty-one; in 1964, fifteen; and in 1965, seven. There was one execution in 1966 and two in 1967. Since the Court reopened the possibility of inflicting the death penalty in *Gregg* and its companion cases, we have had, as Judge Higginbotham noted, about one hundred executions. This number averages out to about eight executions a year, that is eight executions in years where there have been twenty thousand homicides.¹⁵

Walter Berns has made a powerful argument that retribution is morally justifiable. I am not persuaded that retribution is an impermissible goal for a legislature to seek. Walter says that moral indignation, anger and a desire for retribution affirm our humanity and the humanity of the victims and that this anger is fundamentally connected with justice. I do not disagree that a legislature could reach the conclusion that execution is simply the morally appropriate punishment for a person who intentionally kills another.

But this is the critical point: no modern American jurisdiction has come close to adopting a system of capital punishment that in fact reflects a judgment that it is morally proper to execute those who intentionally kill. Walter Berns offers a powerful defense for capital punishment by citing the Book of

12. *Id.* at 90-91.

13. *Id.* at 30 (Table 2.2).

14. *Id.* at 6-10.

15. Weisberg, *supra* note 9, at 305. Weisberg argues that in four cases heard in the 1982 term—*Zant v. Stephens*, 462 U.S. 862 (1983), *Ramos v. California*, 463 U.S. 992 (1983), *Barefoot v. Estelle*, 463 U.S. 880 (1983), and *Barclay v. Florida*, 453 U.S. 939 (1983)—the Court substantially loosened the constitutional restrictions placed on the penalty trial portion of a capital trial. In Weisberg's view these decisions "reduced the law of the penalty trial to almost a bare aesthetic exhortation that the state just do something . . . to give the trial a legal appearance." Weisberg, *supra* note 9, at 306. Robert Burt has observed that the Court, in recent years, has turned away from scrutinizing the death sentence and the procedures that govern its administration. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1788-89 (1987).

Exodus and the Law of Alfred. At common law and under the early penal statutes, death was the automatic penalty for felonious homicide. This is no longer the case, and it has not been the case for the past hundred years. The notion that execution is the morally appropriate punishment for murder has not been followed in this century.

If the system could select out those few who were most deserving of execution then we might find its retributive aspect to be a defensible constitutional goal. But this it does not do. Instead, the system arbitrarily designates a few defendants to die, while sparing the vast majority of defendants. Justice White, joining in the opinion invalidating the death penalty in *Furman*, wrote that after ten years of looking at records, he could see no meaningful basis for the decision of which few should be chosen to die and which should live.¹⁶

The critical constitutional issue is whether this randomness and arbitrariness deprives the death penalty as presently administered of any legitimating governmental purpose. Even if Walter Berns is correct, and he may well be, that retribution can be defended as morally appropriate, the death penalty system in this country in this century simply has not been a system that in fact treats death as the morally appropriate retribution for the intentional taking of human life. Executing one person in a thousand cannot be defended by the proposition that execution is always morally appropriate for those who murder.

Choosing one murderer in one thousand for execution also disparages the victims of all those whose killers do not get the death penalty. How do you explain the case of the young officer to whom President Reagan so movingly referred in his presentation? In most states, unless there is a special statute concerning the murder of law enforcement officers, it is not likely that the murderer would receive the death penalty for that offense. How do you explain that to the family?

I think that any attempt to select for execution a small subgroup from among those who have committed homicide seems doomed to failure. In 1986, the Court decided *McCleskey v. Kemp*.¹⁷ In that case, Justices Stevens and Blackmun suggested that the Baldus study, which examined racial discrimination in Georgia's death sentencing, contained within it findings that there is a very small number of definable homicides for which prosecutors invariably seek, and juries invariably return, the death penalty.¹⁸ They argued that if Georgia could narrow its statute to execute only that group, it could survive constitutional muster.

There is no such statute presently on the books anywhere. I am skeptical, to be candid, of the capacity to define that small group. If, however, it could be defined then, intellectually, then I could be persuaded that the imposition of the death penalty in that defined class of cases would be constitutional.

16. *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring).

17. 481 U.S. 279 (1986).

18. *Id.* at 367 (Stevens, J., dissenting, joined by Blackmun, J.).

The public desires, and the Constitution permits, the penalty of death; but the public also expects, and the Constitution requires, that any penalty that severe be administered fairly, without racial and economic bias, and without pervasive caprice and mistake. If the Court comes to the conclusion that we cannot have both the death penalty and have its administration fairly, surely the only proper conclusion has to be that we cannot, under those circumstances, administer it at all.

Thank you very much.