Book Reviews

Berger Redux


Stephen Giller†

Despite its unexplained plural title, Death Penalties reiterates Raoul Berger's single theme, delivered now from the terrain of the Eighth Amendment's prohibition of "cruel and unusual punishments." Berger maintains that the framers' discoverable intent fixes the legal meaning of constitutional terms and that courts act unconstitutionally if they impose different meanings. More than half of Death Penalties reargues this position and responds to its critics. Only two of the book's seven chapters dwell on the Eighth Amendment or the death penalty. One comes away from Death Penalties wondering whether its purpose might in fact be to reargue principles of constitutional interpretation rather than to assess the Supreme Court's death penalty decisions, the history of capital punishment, or the meaning of the cruel and unusual punishments clause. A reader attracted by the book's name will find in it little new on these matters. This is not a criticism of Berger's reasoning or scholarship, but a caution that the book contains little scholarship on the death penalty itself. It would better have been called Berger Redux.

One explanation for the discrepancy between the book's title and content may be that Berger's constitutional stand on capital sentencing is so

† Professor of Law, New York University. I gratefully acknowledge the comments of Professors William E. Nelson and David Rudenstine and of David A. Kaplan, Esq., on an earlier draft of this Review.

2. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
far anterior to the locus of the present debate that he is unable to join this
debate wholeheartedly. Berger believes, based on his reading of the fram-
ers' intent, that the main concern of the Fourteenth Amendment was to
prohibit discrimination against blacks with respect to certain
rights; the Fourteenth Amendment's due process clause did not impose on the states
any of the provisions of the Bill of Rights; the Constitution does not for-
bid states to punish without "judicial trial" unless Congress requires such
trials; it is not obvious that racial discrimination in jury sentencing (in-
cluding death sentencing) amounts to a denial of equal protection, and
the cruel and unusual punishments clause forbids only punishments
deemed "barbarous" by its framers, who did not require proportionality
between crime and punishment, and that therefore death, ear cropping,
flogging, branding, mutilation, and disembowelment are constitutional even for minor offenses. With these views, Berger is not
likely to find it useful, perhaps not even possible, to pursue such narrow
current questions as whether death sentences may stand though based in
part on invalid and nonstatutory aggravating circumstances, or whether
a sentencing jury may properly be told that a life sentence includes the
possibility of parole. So perhaps it should come as no surprise that much of Death Penalties contains little of relevance to the current death penalty
debate.

At least three difficulties confront one who, claiming that "intent equals
meaning," argues that death for the theft of a loaf of bread or that mutila-
ton or disembowelment for any crime are constitutional penalties. He

7. P. 55.
11. P. 118 & n.29.
12. P. 113 n.6.
13. Pp. 113, 118 n.29.
14. Id.
15. P. 41.
16. See Barclay v. Florida, 103 S. Ct. 3418 (1983) (plurality opinion) (state judge's reliance, in
sentencing defendant to death, on aggravating factor that is not proper aggravating circumstance
under state law does not violate federal constitution); Zant v. Stephens, 103 S. Ct. 2735 (1983) (up-
holding death penalty where 1 of 3 aggravating circumstances was set aside as unconstitutional).
17. See California v. Ramos, 103 S. Ct. 3446 (1983) (requirement that sentencing judge inform
jury in capital case of governor's power to commute alternative sentence of life imprisonment without
possibility of parole to prison term with possibility of parole not unconstitutional). For a general
discussion of constitutional procedural issues in capital cases, see Gillers, Deciding Who Dies, 129 U.
18. P. 128.
19. Pp. 41, 113, 118 n.29. Since the Eighth Amendment, in Berger's view, does not require that
the punishment be proportional to the offense, see infra pp. 733-40, any punishment the framers did
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must first demonstrate that those responsible for the adoption of the language of the cruel and unusual punishments clause intended that these punishments survive the adoption of that clause. He must next convince us that the adopters intended that the meaning of the clause continue unaltered despite unforeseeable social changes or new learning. Finally, we might reasonably expect him to recognize that an equation of intent with meaning is not self-evident, but rather presupposes a theory of meaning that itself requires defense.

I.

In his effort to identify the intent of the framers, Berger reviews English and American constitutional history and then applies the lessons he draws to the Supreme Court’s capital punishment cases.

A. The English History

Virtually all of Berger’s discussion of the English antecedents to the cruel and unusual punishments clause centers on Anthony Granucci’s article tracing the origins of the clause. Granucci argued that the 1689 English Bill of Rights—part of which anticipates the Eighth Amendment—was intended to prohibit excessive punishments. Relying almost not intend to foreclose by the cruel and unusual punishments clause would be constitutionally permissible.

20. For a discussion of these burdens, see Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 213-17 (1980); Dworkin, The Forum of Principle, 56 N.Y.U. L. REV. 469, 482-97 (1981). By “adopters,” I mean those whose assent was necessary for the enactment of the Constitution or of an amendment, as opposed to the authors or framers of the Constitution or the amendment. Brest, supra, at 214-15; Dworkin, supra, at 482-83.


23. Compare Granucci, supra note 22, at 855 (citing 1689 Bill of Rights) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”) with U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

24. Granucci, supra note 22, at 844-47. A proportionality requirement was recognized in Weems v. United States, 217 U.S. 349 (1910). Proportionality is a well-established requirement in capital cases. See Enmund v. Florida, 102 S. Ct. 3368, 3376-77 (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (“sentence of death is grossly disproportionate and excessive punishment for rape”). Its force in noncapital cases, however, is less clear. Compare Solem v. Helm, 103 S. Ct. 3001, 3009 (1983) (“There is no basis for the State’s assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language suggests no exception for imprisonment.”) (footnote omitted) with Rummel v. Estelle, 445 U.S. 263, 274 (1980) (“For crimes concededly classified and classifiable as felonies . . . the length of imprisonment is purely a matter of legislative prerogative.”).
solely on the same sources as Granucci, Berger concludes that the English Bill of Rights prohibited a penalty only if, in 1689, it was both cruel and unusual (for example, "crucifixion" or "boiling in oil") and that excessiveness was irrelevant. Thus, Berger and Granucci differ on whether the eighteenth-century meaning of cruel and unusual punishments included a proportionality requirement.

A brief examination of the sources used by Granucci shows why Berger's scholarship is sloppy and misleading. First, Granucci's interpretation of the 1689 Bill of Rights relies on chapter twenty of the Magna Carta, which provides that

a free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise, in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

This language and the cases Granucci cites construing it recognize that there was a proportionality principle for "amercements." Since in Granucci's view an amercement is the equivalent of a modern day fine, and therefore penal in nature, he concludes that the Magna Carta introduced a proportionality principle into the penal law. By contrast, Berger states that "amercements were compensation for injuries, not penal fines levied by a court. . . . [They were] not, therefore, 'the equivalent of the modern fine' . . . ."

Berger's conclusion rests primarily on one secondary source, William McKechnie's Magna Carta. McKechnie's view on the status of amercements, however, is at odds with Berger's; nevertheless, Berger neither points out this difference nor explains what evidence leads him to disagree

25. See pp. 29-43; Granucci, supra note 22, at 844-47.
27. In Solem v. Helm, 103 S. Ct. 3001 (1983), the Supreme Court concluded that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." Id. at 3006.
29. Id.
30. Id. at 845-46.
32. Pp. 30 n.6, 31 nn.7-9, 12, 13.
33. W. McKECHNIE, MAGNA CARTA (1905). There is also a second, revised edition. See W. McKECHNIE, MAGNA CARTA (2d ed. 1914). Granucci cites to the second edition. Granucci, supra note 22, at 845 n.27. Berger cites to the first edition. P. 30 n.6. Although the second edition contains an abbreviated discussion of chapter 20, there is no substantive difference between the two editions. Subsequent references to McKechnie will be to the first edition except where quoted language is different in or absent from the second edition.
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with McKechnie.

In *Magna Carta*, McKechnie describes "[t]he efforts made in medieval England to devise machinery for suppressing crime . . . ." 34 The first was the "bloodfeud," followed by "money in lieu of vengeance," and then "amercements." 35 The second gave way to the third because the money payments "demanded from a wrong-doer" by the victim's family, various lords, the church, and the king became too high. The Crown stepped in and allowed the wrongdoer to set his property "unreservedly at the king's disposal" and receive "not only a free pardon, but also the restoration of the balance of his effects, after the king had helped himself to a share." 36 That share became an amercement:

Strictly speaking, the man's life and limbs and all that he had were at the king's mercy. The Crown, however, found that it might defeat its own interests by excessive greed; and generally contented itself with exacting moderate sums. . . . The amounts taken in each case were regulated partly by the wealth of the offender, and partly by the gravity of the offence. Further, it became a recognized rule that the amount should be assessed by what was practically a jury of the culprit's neighbors; and attempts were also made to fix a maximum. 37

McKechnie distinguishes amercements from medieval fines:

In the thirteenth century these terms were sharply contrasted. "Amercement" was applied to such sums only as were imposed in punishment of misdeeds, the law-breaker amending his fault in this way. He had no option of refusing, and no voice in fixing the amount assessed upon him. "Fine," on the contrary, was used for voluntary offerings made to the king with the object of procuring some concession in return—to obtain some favour or to escape some punishment previously decreed. Here the initiative rested with the individual, who suggested the amount to be paid, and was, indeed, under no legal obligation to make an offer at all. 38

McKechnie viewed amercements as a "punishment" for wrongdoing, not, as Berger argues, as "compensation for injuries." The "penal" character of amercements seems compelling given that they went to the king,

34. W. McKECHNIE, MAGNA CARTA 334 (1905).
35. Id. at 334-35.
36. Id. at 336. This language does not appear in the second edition.
37. Id. at 336-37 (footnote omitted). The second edition has the same language with a few changes, most notably the substitution of the words "with moderate forfeits" for the first edition's phrase "with exacting moderate sums." W. McKECHNIE, MAGNA CARTA 286 (2d. ed. 1914).
not the victim; that there were efforts to establish a maximum; and that their size varied with the offender's wealth and the nature of the offense, not with the victim's loss. In fact, Berger appears to confuse an amercement with its predecessor, "money in lieu of vengeance."

A second historical source on which Granucci relies is the 1613 case of Hodges v. Humkin. Hodges had been imprisoned for making "very unseemly speeches" about the Mayor of Liskerret; he sought release on habeas corpus. According to Granucci, the King's Bench found that "[i]mprisonment ought always to be according to the quality of the offense, and so is the Statute of Magna Charta cap. [20] and of Marhbridge, cap. 1 secundum magnitudiem, et qualitatem delicti the punishment ought to be, and correspondent to the same, the which is not here in this Case. . . ." This language recognizes a proportionality principle for the penal sanction of imprisonment. Further, its reference to the Magna Carta supports Granucci's interpretation of chapter twenty. Berger resists Granucci's conclusion: "This was not a holding by King's Bench but a quotation from one of three opinions, that of Justice Croke. Justices Haughton and Dodderidge did not invoke Chapter 20, possibly because it prohibited excessive amercements, not imprisonment." Berger appears to be wrong. He omits to tell us that Justice Dodderidge, who opined prior to Justice Croke, is quoted again, immediately following Justice Croke's opinion: "Dodderidge Justice agreed herein: and if a constable do arrest one and put him in the stocks . . . he ought not to keep him there by the space of a week; no more might the major keep him here in prison so long as he hath done." Dodderidge's "agreed herein" suggests a concurrence in Croke's opinion, making it the majority view. Berger may want to argue against this construction, despite what Dodderidge adds, but as a scholar, he has the duty to present the evidence.

Furthermore, Justice Haughton, the third member of the bench, said that Humkin "ought not to imprison [Hodges] for ever," and Justice Dodderidge, as quoted above, thought the maximum imprisonment "the space of a week." Faced with this language and with Croke's opinion and its reference to the Magna Carta, Berger is willing to concede only that

39. Holt also considers amercements payments imposed for an "offence" or a "crime" and traces the "principle that amercements should fit the crime [to] the Charter of Henry I." J. Holt, Magna Carta 230 (1965); see also 1 J. Stephen, A History of the Criminal Law of England 490 (1883) (chapter 20 of Magna Carta and 1689 Bill of Rights govern "amounts of the fines and the length of the imprisonment which the court may impose").
42. P. 33.
44. Id. (Haughton, J.).
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“at most Hodges v. Humkin stands for the proposition that a mayor is not authorized to imprison one for disrespectful words spoken out of court for an overlong term imposed months after the speech.”45 In other words, Berger says the case may recognize a proportionality limitation, but one that applies to the sentence for a particular crime imposed “months after” the crime is committed. Berger makes no effort to support this strikingly narrow interpretation.

Granucci also cites the case of Titus Oates, who was tried and convicted of perjury before the King’s Bench in 1685.46 Oates was sentenced to life imprisonment, a fine, whipping, pillorying, and defrocking.47 In 1688, he petitioned both houses of Parliament for “a release from the judgment, calling it ‘inhumane and unparalleled.’”48 Parliament had issued a Declaration of Rights on February 12, 1689; its text was enacted, with some changes, as the Bill of Rights on December 16, 1689.49 On May 31, 1689, a majority of the House of Lords rejected Oates’ petition without opinion.50 Fourteen Lords dissented and gave the following reason, among others:

Because [the majority’s decision] is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled, and by their declaration engrossed in parchment, and enrolled among the records of parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.51

45. P. 34.
46. Granucci, supra note 22, at 856-60. Granucci’s other sources predate the adoption of the English Bill of Rights by centuries, and he cites them for the historical light they shed on that document’s cruel and unusual punishments clause. The Oates trial, however, differs from the other sources in that it occurred contemporaneously with the adoption of the English Bill of Rights.
47. Id. at 858.
48. Id.
49. P. 36; Granucci, supra note 22, at 855. Both Granucci and Berger fail to distinguish between the Declaration of Rights and the Bill of Rights. After James II threw the Great Seal into the Thames on December 11, 1688, there was no legal government in England. James’ Parliament had been dissolved in July, 1688. William of Orange, who landed in England on November 5 and marched unopposed to London, caused the calling of a Convention Parliament, which resolved that James II had abdicated and that the throne was “thereby vacant.” On February 12, 1689, Parliament agreed to the Declaration of Rights. The throne was offered to William and Mary subject to their acceptance of the Declaration of Rights. Eventually, Parliament “turned its Declaration into a regular act of the legislature enacted as a statute in 1689. Hence, the name Bill of Rights itself is the result of the fact that the original Declaration was introduced as a bill . . . in the new Parliament.” 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41 (1971); see R. PERRY, SOURCES OF OUR LIBERTIES 222-23 (1959).
51. Id.
Granucci cites the Oates case to show contemporary understanding of the term “cruel and unusual punishments.” Since none of the punishments imposed on Oates were considered cruel or unusual “methods” of punishment at the time, Granucci argues, the dissent’s reference to the recent Declaration of Rights makes sense only if that document is read to require proportionality.

Berger contests Granucci’s reference by citing other reasons advanced in the dissent. But the fact that there were other reasons—for example, that a temporal court lacked power to defrock Oates—does not negate that the dissent also relied on the Declaration of Rights. Berger does not address this reliance. He says only that “the Lords in effect decided that whipping, pillorying and excessive imprisonment were not within the clause.” This is inaccurate. The majority did not decide that “excessive imprisonment” is not within the clause. The majority said nothing. By using the word “excessive,” Berger assumes the question and then uses the majority’s unexplained affirmance to answer it in his way. We do not know the majority’s reasons. It may have viewed the Declaration of Rights as prohibiting excessive imprisonment but not have considered Oates’ punishment excessive. Berger’s conclusion as to what the Lords decided is guesswork.

Finally, on the Oates case, Berger writes: “Granucci concluded that ‘In the context of the Oates case, “cruel and unusual” seems to have meant a mere punishment unauthorized by statute and not within the jurisdiction of the court to impose.’” This is not what Granucci concluded. He did not say “a mere punishment.” He said “a severe punishment.” This error drains Granucci’s conclusion of his reason for citing the Oates case in the first place.

Another source Granucci relies on is a fourteenth-century document, a purported copy of the Laws of Edward the Confessor, which, he argues, extended the proportionality requirement of amercements to cover physi-
cal punishments: "We do forbid that a person shall be condemned to death for a trifling offense. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offense." Berger, citing Barrington, completely dismisses the document as a forgery, but Berger then chooses not to cite or quote Barrington's further conclusion that:

The fact that the chronicle is spurious, must be accepted, however regretfully. But even with that fact before us, it would not be advisable to totally cast aside the whole of the chronicle as useless and valueless, for there is much in it that is true and a help to the study of the trying times of which it speaks. It was written near to the time which it purports to describe, and the facts therein contained may in some measure have been in the possession of the writer; at least it might have been so in the case of these laws, for as to them, there could have been little gain in forging.

Berger argues that "the crowded catalog of statutes decreeing death for trivial offenses explodes the so-called common law 'doctrine' that punishment must fit the crime." Although it may seem extreme—and inappropriate—to our sensibility, the existence of execution for particular offenses is not necessarily inconsistent with the proportionality doctrine. Berger's argument does exactly what he condemns the Court itself for doing—"reading our sentiments back into the minds of the framers." Because today we consider execution disproportionate for the offenses now deemed "trivial," Berger infers that the same offenses were always considered trivial.

Moreover, the mere existence of the death penalty, even for "trivial" offenses, is not itself inconsistent with a proportionality principle. We need to know when and against whom the penalty was actually used. Here, there was place for discussion of royal pardons, jury nullification, prosecutorial discretion, and benefit of clergy. English law relied on each to avoid harsh punishments. Berger writes only: "To be sure, any one who could read was insulated from [the death penalty] by 'benefit of clergy'; and in time death sentences were commuted to transportation to and imprisonment in the colonies. But commutation of a statutory sentence does not nullify the statute." True enough, but surely it is the

59. Granucci, supra note 22, at 846.
60. P. 32.
62. P. 35.
63. P. 57; see pp. 103, 107.
64. Pp. 34-35; see, e.g., 1 J. STEPHEN, supra note 39, at 457-72 (availability of the benefit of
pattern of use and not the mere presence of a statutory punishment that is the best evidence of a society's toleration of extreme penalties. If today we wished to identify society's view of the gravity of particular crimes, we would not rely solely on the maximum permissible prison term for each crime, but would also examine sentencing, prosecutorial discretion, and parole records to identify actual punishments.

As Berger wrote in response to earlier criticism, "One who undertakes to tear down the scholarship of another is under a duty of unimpeachable accuracy." But his criticism of Granucci's scholarship is far from accurate. Similarly, his contention that the terms of our supreme law are for all time defined in the dictionary of history requires that he construct that dictionary with the utmost care. There is no care evident in his treatment of English precedent. He has conducted virtually no historical survey of English sources beyond those cited in Granucci's article. Even if Berger had successfully distinguished Granucci's sources, he would not thereby have established his own position, but simply that Granucci's proposition remained unproven.

B. The American History

Berger moves on to discuss the American adoption of the "cruel and unusual punishments" language. He spends eight pages demonstrating two propositions that are not seriously disputed. The first is that the framers of the Eighth Amendment and their contemporaries did not regard the death penalty as cruel and unusual. The best evidence for this conclusion, of course, is the Constitution's own reference to execution and the fact that the same Congress that adopted the Eighth Amendment authorized execution for several crimes. Berger's second, uncontested proposition is that even if the Fourteenth Amendment "absorbed" the Eighth Amendment, its adoption was not intended to invalidate capital punishment. Largely unexplored, however, are the more important questions of the framers' views on proportionality and whether these were

66. Pp. 43-50; see Granucci, supra note 22, at 839-44.
67. P. 46; U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .")
68. P. 47.
different from those held by English courts. In the final few pages of his chapter on the cruel and unusual punishments clause, Berger addresses the prospect that "activist counsel are likely further to press the view that [execution] violates 'equal protection'" because it discriminates against "racial defendants." He asserts that racial discrimination in jury sentencing might not amount to a denial of equal protection:

The common law prized the discretion of the jury and shielded its verdicts from judicial inquiry. As an "attribute" of "trial by jury," these perquisites have constitutional stature. It should take more than the "indeterminate," "vague and ambiguous" words "equal protection" to persuade that the framers meant thereby to abandon so important and valued an attribute.

Berger argues that even after adoption of the Fourteenth Amendment, it was assumed that the states would be free to exclude blacks from jury service. Given the rejection of this "best possible safeguard against discrimination," Berger concludes that it is difficult to assume that the framers provided for even more far-reaching intervention in the States' sentencing processes, particularly when in many States the Negro presence was negligible. Then too, the notion that the States would be required to abolish the death penalty if their juries did not evenhandedly sentence blacks runs counter to the framers' narrowly ameliorative aims. They sought to ensure access to the Courts, to a fair trial, so that an innocent black would not be railroaded to death. But to assume that they also meant to save an undoubtedly guilty black murderer from the death penalty because a jury had sentenced a white to life imprisonment is to ignore the racism that ran deep in the North in 1866.

In sum, because the right to trial by jury (with an implicitly shielded

70. In addressing this issue in Solem v. Helm, 103 S. Ct. 3001 (1983), the Supreme Court stated: "When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality." Id. at 3007.
71. P. 55.
73. P. 56 (footnotes omitted).
74. Pp. 56-57. Berger also comments on a recent empirical study in which Hans Zeisel concluded that death sentencing in Florida is racially discriminatory. Pp. 53-54; see Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L. REV. 456 (1981); see also Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 MICH. L. REV. 1, 82 (1982) (concluding that prosecutors in the Florida district studied "systematically (and effectively) exercised their peremptory challenges to exclude death-scrupled jurors from capital juries [with] . . . devastating consequences for the adjudication of capital cases").
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discretion) is in the Constitution, while another allegedly inconsistent right (against racially biased jury death sentencing) must be inferred from the words "equal protection," Berger concludes that the second right does not exist. The concrete prevails over the general. In addition, the absence of the "best possible safeguard" (blacks sitting on juries) negatives the presence of a supposedly lesser safeguard. In Berger's view, the Fourteenth Amendment has little effect on the scope of permissible punishments or on racially motivated sentences.

The problem with these arguments, from Berger's own perspective, is that they are only arguments. The right to trial by a jury with shielded discretion is not necessarily inconsistent with a prohibition against discriminatory capital sentencing, and it is possible to reject the purportedly "best possible safeguard" and still mean to outlaw racial bias in capital sentencing. It does not matter which interpretation is correct, however, because for Berger the ambiguity should itself be troublesome. Berger relies on the proposition that constitutional terms are "fixed" and that history will convey their meaning. But history proves incomplete in *Death Penalties*; Berger must add a traditional lawyer's inference to the historical evidence he adduces. If he is free to do that, he has enlarged the route for finding meaning. He should then allow others to travel the same route and to draw different inferences.

C. "The Cases"

Berger describes his chapter called "The Cases" as a "compressed summary of the clashing views expressed in the several decisions [that] barely scratches the surface of the voluminous plurality, concurring, and dissenting opinions in each case . . . ." Berger is correct. The chapter is little more than a compilation. Much of its discussion consists of juxtaposed quotations from majority or plurality opinions, from dissents, and from commentators critical of the Court's death penalty decisions or of the Court generally.

As one might expect, Berger rejects the holding in *Weems v. United States*, which recognizes a proportionality principle in the Eighth Amendment; the plurality view in *Trop v. Dulles* that the Eighth Amendment must draw its meaning from society's "evolving standards of decency"; and all of the Supreme Court's restrictive capital punishment opinions. In this chapter, too, Berger misconstrues the record. In one critical paragraph, Berger writes:

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75. See, e.g., pp. 71, 78-79.
76. P. 152.
77. 217 U.S. 349 (1910); pp. 113-15.
78. 356 U.S. 86 (1958) (plurality opinion); see pp. 116-22.
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Although the Gregg plurality—Justices Stewart, Powell, and Stevens—quote Chief Justice Burger’s statement that legislatures, not courts, must respond to the will and moral values of the people, and recognize that the “specification of punishment” is “peculiarly” a question “of legislative policy,” they conclude that “the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the amendment.” Whence does it draw this “basic concept”? From “the evolving standards of decency that mark the progress of a maturing society,” that is, “cruel and unusual punishments” may “acquire meaning as public opinion becomes enlightened by a humane justice.” Thus, the desires of “contemporary society” must yield to a “basic concept” that is drawn from “public opinion”—a pretty example of circular reasoning.79

The circle Berger charges the plurality with creating is really his own. He has misread the case. Berger correctly quotes the Gregg plurality as requiring that a punishment comport “with the basic concept of human dignity.”80 But the plurality did not define the “basic concept of human dignity” in terms of “public opinion.” Although it stated that “an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment,” it then immediately added:

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with the “dignity of man,” which is the “basic concept underlying the Eighth Amendment.” This means at least that the punishment not be “excessive.” When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into “excessiveness” has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second the punishment must not be grossly out of proportion to the severity of the crime.81

The “basic concept of human dignity” is explicitly said not to be controlled by “public perceptions of standards of decency.” If the Court were to find that a punishment involved “the unnecessary and wanton infliction

80. Id. at 182.
81. Id. at 173 (citation omitted).
of pain” or was “grossly out of proportion to the severity of the crime,” the punishment would fail, even though it met society’s “evolving standards of decency.” Berger ignores this holding. He creates the circle for which he criticizes the Court.

II.

Berger maintains that the framers intended to prohibit only “barbarous” punishments, and, in their minds, death penalties were not “barbarous.” The Court has not held the death penalty itself unconstitutional, but it has invalidated capital punishment for rape of an adult woman, for some felony-murders, and for kidnapping, and it has concluded that because “death is different” from every other penalty, the Eighth Amendment mandates due process protections in capital cases that are not required in any other criminal case. We can agree with Berger that the framers had none of this in mind when they proposed the Eighth Amendment and that members of Congress and of the various state legislatures likewise had none of this in mind when they ratified it. We can make similar assumptions about the Fourteenth Amendment.

This does not make Berger’s case, however. Even if we concede that intent equals meaning, the question Berger does not adequately answer in Death Penalties is this: Assuming everyone who participated in the adoption of the Eighth and Fourteenth Amendments viewed the death penalty and extant procedures for deciding who would suffer it as not “cruel and unusual,” did they also intend to freeze the constitutional meaning of the phrase for succeeding generations regardless of changes or new learning? Berger says they did. He argues that while constitutional principles can be applied to new facts, the principles themselves should remain fixed:

*Weems v. United States*, the bible of death penalty abolitionists, argued that “Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be of wider application than the mischief that gave it birth.” *This confuses application of a principle to new facts with the Court’s replacement of a constitutional principle by its own.* Of course the Fourth Amend-

82. The plurality reiterates this distinction later in the opinion. *Id.* at 182-83. Subsequent cases have reworked Gregg’s classifications, but have continued to stress the Court’s constitutional obligation to make a determination informed by, but independent of, popular opinion. Enmund v. Florida, 102 S. Ct. 3368, 3376-77 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977).
83. P. 44.

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ment "search and seizure" principle, for example, goes beyond physical searches to comprehend current wiretaps and electronic surveillance. They are analogous to what was prohibited and illustrate the application of a principle to similar facts. Very different is the abolitionist reading of the cruel and unusual punishments clause—that clause did not prohibit death penalties either in England or the colonies. Nor was a ban on disproportionate penalties a part of the common law. Consequently, Weems was not giving a "wider application" to an accepted principle but replacing the principle with its own opposite.88

Berger thus draws a sharp distinction between the application of a principle to new facts and the creation of a new principle. That he can create these neat categories in language, however, does not mean that he can as crisply impose them on historical events.

For example, how does Berger know that the Fourth Amendment’s "search and seizure" principle goes beyond physical searches to include current wiretaps and electronic surveillance? A contrary argument can be made that the framers of the Fourth Amendment were offended by physical trespass and the seizure of real objects, and that if they had foreseen the advent of nontrespassory electronic "seizures" of conversations, they would have allowed these without constitutional controls.89 For a long time, indeed, the Court rested its decisions on such a "physical invasion" distinction,90 a distinction that was finally rejected in Katz v. United States.91 Since, under Berger’s theory, the meaning of constitutional language never changes, Katz can only be justified by arguing that the pre-Katz opinions failed to see that the Court was merely being asked to apply an established principle to "similar facts," not to create a new principle based on later predilections. The pre-Katz courts must have been wrong because, and only because, they did not recognize the nature of the request. How is a court to know which task it is being asked to perform?

In endorsing Katz, Berger necessarily chooses between (at least) two levels of abstraction for the Fourth Amendment. At the lower, more concrete level, the provision was intended to limit trespassory searches (of "persons," "houses") for real objects ("papers," "effects"), searches and seizures the framers surely contemplated. To apply the Fourth Amendment to nontrespassory electronic surveillance of conversations, Berger must recognize in it a "principle" that protects against the "violat[ion of]
privacy upon which [a person has] justifiably relied." Berger is willing to recognize this principle, though to do so requires that "persons, houses, papers, and effects" be abstracted to include wires, radio signals and conversations. But Berger cannot then deny that he is glazing the constitutional language with his "twentieth century predilections." Since we have no way of knowing if the eighteenth-century framers would have agreed with Berger, the choice, even if dressed up in references about their intent, must ultimately be his. The fact that in 1928, in Olmstead v. United States, the Supreme Court saw a different principle in the Fourth Amendment is some evidence that the framers might have disagreed with Berger. After all, the predilections of the Olmstead Court come from the late nineteenth and early twentieth centuries, closer than Berger's to the time of the framers.

Or perhaps Berger is not pretending to know what the framers would have done had they foreseen modern technology and instead is acting on his own to abstract a principle from the Fourth Amendment after first satisfying himself that at least the framers did not specifically intend to exclude his result. If so, Berger must be basing his interpretation of the language of the Fourth Amendment on his own twentieth-century predilections about privacy. But more than that, to be true to himself Berger must also be saying that the framers intended the Supreme Court to have this freedom, or at least that they did not intend to deny it.

This freedom, furthermore, cannot logically be limited to technological discoveries. Would not social science learning also have to qualify as a development the Court could permissibly weigh in ascertaining the implications of a principle fairly abstracted from the constitutional language? For example, advances in the psychology of perception have engendered rules governing the use of eyewitness identification in criminal cases. More generally, it would seem that the justifying development need not be a science, social science, or other kind of discovery at all. New patterns of demographic or economic activity, such as those that influence the scope of the commerce power or the breadth of a state's extraterritorial assertion of personal jurisdiction, would also suffice.

If Katz is a valid exercise of Supreme Court power because the framers intended to allow future generations freedom to apply consistent but un-

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92. Id. at 353.
93. P. 117.
94. 277 U.S. 438 (1928).
Death Penalty

contemplated Fourth Amendment “principles” to “new facts,” then there might be a basis for distinguishing death penalty cases from electronic surveillance cases. For (to come back to Berger’s often-repeated argument) the framers and adopters of the Eighth and Fourteenth Amendments did not intend these provisions to apply to capital punishment. Consequently, the argument continues, the Supreme Court may not frustrate the power of the federal or state governments to execute (or, indeed, to brand, mutilate, disembowel, or flog) for any criminal act. Furthermore, this conclusion remains valid even if developments extinguish the conditions that gave rise to the particular framer intent and even if the constitutional language fairly yields a principle which, when applied to the new conditions, counsels a result inconsistent with framer intent. In short, regardless of discoveries or changed circumstances, the Court in this view may not notice facts arising after the date of a provision’s adoption if to do so defeats original intent. Consequently, the Court may not take notice of studies showing the psychological effect of racially segregated schools on minority children or of changing patterns in the use of (or failure to use) capital punishment.

This seems quite a strange distinction to attribute to the framers, but one that Berger must accept if he is going to endorse *Katz v. United States* and condemn *Brown v. Board of Education* and *Furman v. Georgia.* Yet if any distinction were intended, it would intuitively seem to be the opposite one. By prohibiting “cruel and unusual punishments”—words Madison thought “too vague to have been of any consequence, since they admit of no clear and precise signification”—the framers passed up the opportunity to definitively exclude death penalties. With regard to unforeseeable issues, such as authority to conduct nontrespassory electronic seizures of conversations, however, there was no such opportunity. A knowing refusal to include limiting language can be construed as authority to ignore limits within the author’s power to impose, whereas no similar inference is fair with regard to matters that are largely unforeseeable.

98. See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 & n.11 (1954) (relying on psychological evidence to conclude that “separate educational facilities are inherently unequal”).
99. See *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (White, J., concurring) (“[P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury . . . may refuse to impose the death penalty no matter what the circumstances of the crime.”).
100. 347 U.S. 483 (1954); see R. BERGER, supra note 3, at 243-45.
101. 408 U.S. 238 (1972) (per curiam).
102. 1 B. SCHWARTZ, supra note 49, at 453.
III.

Berger is free to search the historical record and uncover the intent of those who were instrumental in drafting and adopting the Eighth and Fourteenth Amendments. Such discoveries here are of value not only to those who believe that intent and meaning are equivalent, but also to those who believe that intent bears on meaning. Berger ceases to be an historian, however, and becomes instead a political, legal, or moral philosopher when he contends that the meaning of constitutional language is the intent of the framers. A theory of constitutional meaning necessarily presupposes a philosophical position. Meaning is a construction we place on events, not a fact that can be discovered through historical detection.\textsuperscript{103} Berger seems not to recognize this. He certainly does not acknowledge it. He seems equally unaware that his unarticulated theory of meaning is not inescapable and that competing and respectable theories of constitutional meaning yield conclusions rather unlike his.

We may gain some perspective about contemporary attitudes toward constitutional meaning if instead of looking back on the centuries about which Berger writes, we treat our own age as history and consider how Berger’s view of constitutional meaning fares when applied to events of the last third of the twentieth century. In the past decade, the nation nearly adopted a new amendment, which said in part: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”\textsuperscript{104} Yet the words “equality of rights under the law” sound very much like the phrases Berger tells us the Court has so abused in the past. Did those who voted for the amendment believe that the Supreme Court would be forever bound by the meaning each voter intended, as revealed in legislative and public debate? If not, how is it that so many people were willing, and are still willing, once again to give the Court final authority to construe a phrase like “equality of rights under the law,” knowing (as members of Congress and state legislators surely do) of the Court’s interpretive history? If an amendment with this kind of language is someday adopted, would Berger presume to be able to tell us its meaning for all time? Would we expect or want to know?

It may be that the great mission of Raoul Berger is not so much to save us from the Supreme Court as to free us from ourselves.

\textsuperscript{103} See Dworkin, supra note 20, at 496-97. For discussion of Berger’s failure to recognize this principle in \textit{Death Penalties}, see Richards, Book Review, 71 CALIF. L. REV. 1372 (1983).

Judicial Relief and Public Tort Law


Cass R. Sunstein†

The last few years have seen a resurgence of academic interest in what might be called structural questions—those of procedure and remedy. While the 1960's and early 1970's produced an outpouring of writing on substantive problems, most prominently free speech and equal protection, more recent writers have shifted the focus. The interest in structural questions is evident in essays on hearings for those deprived of government benefits,1 on separation of powers,2 on equitable relief,3 and on judicial remedies for misconduct by administrative agencies.4

One might attribute this renewed interest in remedial problems to the notion that substantive problems present questions of politics or taste, on which little remains to be said. But at a deeper level, I think, the emphasis on structural questions reflects an interest in three problems that turn out to be substantive after all.

The first is the problem of promoting the participation of those affected by administrative and judicial decisions. In particular, the structural injunction appears to furnish a mechanism by which a variety of affected persons may participate, or at least be represented,5 when basic social

† Assistant Professor of Law, University of Chicago. I would like to thank Douglas G. Baird, Frank H. Easterbrook, Richard A. Epstein, Richard A. Posner, Richard B. Stewart, Geoffrey R. Stone, and James Boyd White for helpful comments on a previous draft.


choices are made. In this respect, the structural injunction may operate as a kind of surrogate for the legislative process.6

The second is the strain put on conventional doctrines by efforts to protect the wide range of statutory benefits provided by modern government. Traditional judicial remedies allow for the protection of common law liberty and property—rights against governmental intrusion into the realm of private autonomy.7 By contrast, structural remedies are designed to protect the new rights created by the administrative state: rights to welfare benefits, to freedom from discrimination, to government employment. Purely negative decrees—the sort of remedy commonly associated with the courts—inadequately implement those positive guarantees. Considerable creativity seems necessary to devise and perfect judicial tools to enforce regulatory programs.

The third factor relates to recent attacks on the notion that adjudication generates outcomes that are in some sense objective and distinct from the power struggle of politics.8 In the face of those attacks, there has been a renewed effort to see whether structure or process may discipline social decisions.9 Process has, in this sense, been treated once again both as an important legitimating device and as an end in itself.

Peter Schuck's *Suing Government*10 is an ambitious effort to set forth a general theory of judicial remedies for official wrongs. Schuck attempts to discuss together two remedies typically treated separately in the literature: liability for damages and injunctive relief. There is much that is valuable and illuminating in the analysis, and the book is, I think, an important contribution to the current debate. At the same time, it is incomplete, for it fails to treat adequately the three sources of the renewed interest in remedial problems. Before elaborating these criticisms, however, it is useful to explore Schuck's argument in some detail.

I.

There are three parts to that argument. The first sets forth a conceptual framework for analyzing remedial questions, the second proposes an over-

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haul of the current system of damage remedies, and the third deals with the problem of injunctive relief.

A.

The conceptual framework arises out of Schuck's analysis of the different reasons for governmental illegality, the various remedial tools available to the courts for remediing such illegality, and the purposes judicial remedies might serve. Schuck begins by observing that a government official may violate the law for a number of reasons.11 Officials may not know what the law requires. They may be unable, because of a lack of resources, to comply with the law. They may have improper motivations. Or they may be merely careless. The reasons for official illegality may in turn have an important bearing on the usefulness of a particular remedy.

The courts have at their disposal a number of tools to remedy official illegality: declaratory judgment; damages; and various forms of injunctive relief, including the structural injunction. These tools vary substantially in terms of their intrusiveness and the demands they place on courts. A declaratory judgment, for example, requires only a conclusion of law; it does not by its own force require any change in the defendant's conduct. A structural injunction, by contrast, enables the court to seize control of another institution and to monitor its functions through continuing supervision.

These remedies, Schuck suggests, might promote one or more of the goals of the public law. Following the conventional catalogue, Schuck lists six such goals: deterrence, promotion of vigorous decisionmaking, compensation of victims, exemplification of moral norms, achievement of institutional competence and legitimacy, and systemic efficiency through the integration of the primary goals.12

B.

This conceptual framework serves as background for the second part of the book, an attack on the reliance of the current remedial system on damage remedies against government officials. According to Schuck, that system not only fails to promote any of the six remedial goals but also creates perverse incentives for government officials.

In general, public officials, unlike their counterparts in the private sector, do not retain any of the benefits that flow from their decisions.13 Although the status and income of government employees may be improved by successfully taking chances, "the returns for accepting risk are far more intangible and remote than the potential returns that motivate private

risk-taking." The predominant remedial tool of damages makes officials personally liable for violations of the law; indemnification from the governmental employer is "neither certain nor universal." As a result, when the prospect of damage liability is added to the official's calculus, decision-making is skewed toward risk aversion. Action has significant personal costs without corresponding personal benefits; inaction may have few benefits—personal or social—but little cost as well. The possibility of personal liability for unlawful action tends to generate inaction, delay, or an unproductive formalism that produces little but documents to defend officials in lawsuits.

Schuck thus suggests that the official decisionmaker, trapped by the fear of personal liability, is inclined to avoid courses of action that might turn out to be beneficial. At the same time, Schuck rejects one obvious remedy—to reestablish the balance by allowing damages for unlawful inaction as well—on the ground that it would have unpredictable effects on official recruitment, vigorous decisionmaking, and civil service morale.

Because of the skewing effect of damages liability, Schuck argues, the courts have developed immunity doctrines to shield officials and thereby promote more vigorous decisionmaking. Such doctrines, however, have disadvantages of their own, for they undermine deterrence and defeat compensation. In addition, the need to ascertain "good faith," a conventional basis for immunity, produces enormous administrative costs. The current system emerges as a kind of crazy-quilt: damages remedies that skew incentives in an undesirable fashion and immunity doctrines that, in a crude effort to counteract those incentives, undermine the goals of public tort law.

Schuck's proposed remedy is simple—transfer liability from individual officials to the government as a whole. Such a system, he contends, would avoid nearly all the hazards associated with official liability. First, it would strengthen deterrence. Except in the atypical cases of intentional wrongdoing, placing liability on the official may not deter at all. The agency, by contrast, is "well equipped to deter," since at the agency level a number of crucial ingredients converge: a comprehension of the full range of social values affected by the misconduct and by efforts to control it; an understanding of the technology of how particular

14. P. 68.
15. P. 85.
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misconduct can be deterred; the incentive to optimize not only deter-
rence but also competing values, notably vigorous decisionmaking;
and the resources to ensure that this knowledge and incentive is used
at street level. 18

At the same time, government liability would, in Schuck’s view, promote
compensation, since he would make the government liable for every tor-
tious act or omission committed by its agents within the scope of their
employment. 19 The other purposes of the public tort law would also be
promoted. There would be no adverse effect on vigorous decisionmaking,
and moral norms exemplified in statutory and constitutional provisions
would be realized more readily. 20

C.

The third part of the book discusses the problem of injunctive relief.
Schuck believes that the problem is worth addressing because government
liability will sometimes fail to vindicate the various goals of public tort
law. 21 First, when social valuations of the costs and benefits of legality
diverge from the government’s valuations, monetary damages that allow
the government to choose between legality and compensated illegality will
inadequately deter government officials. Furthermore, some of the costs of
official illegality—such as those resulting from unlawful school segrega-
tion—are not easily monetizable. And in some cases—especially those in-
volving judicial or prosecutorial behavior—it may be worthwhile to pre-
serve governmental immunity while fashioning an injunctive remedy to
guard against unlawful conduct. Finally, damages relief may not provide
an effective “signal” to the bureaucracy; its effects may be felt too slowly,
and low-level bureaucrats may ultimately not comply.

When any of these factors is present, the cornerstone of Schuck’s sys-
tem—governmental liability—may be insufficient to deter illegal official
conduct. Schuck suggests that some form of injunctive relief may be ap-
propriate in such circumstances. 22 He acknowledges that such relief has
considerable costs and that it taxes the institutional capacity of judges by
forcing them to assume managerial and supervisory roles for which they
are ill-suited. But he argues that a structural decree can sometimes be
“legitimated” through a particular conception of its function.

Schuck discusses three possible legitimating conceptions. The first, the

18. P. 104.
19. P. 111.
22. P. 150.
"pure rights" conception, focuses on the courts' role in identifying individual rights and downplays or ignores implementation problems. Schuck rejects this conception because it is unrealistic and naive. The second conception, which Schuck attributes to Owen Fiss, is called "judicial interpretivism." That approach recognizes that structural remedies are not logical deductions from substantive rights, but nonetheless treats the courts as the best institutions for identifying public values to guide the remedial enterprise. According to Schuck, this understanding is "juridocentric" because it disregards the process by which values are "actualized . . . and absorbed into the life and practice of the society."

Schuck prefers an "institutional competition" conception that recognizes the important role of nonjudicial institutions in the remedial process. Under this approach, "conflicting goals, limited resources, political and ideological struggle, and human and institutional imperfections transform partial meanings into social reality." The distinguishing feature of this conception is its emphasis on the fact that governmental actors other than the courts play a substantial role in implementing constitutional or statutory rights, especially when implementation involves managerial or allocational decisions whose consequences are not easily grasped by the courts. Schuck believes that this conclusion does not deprecate the rule of law, but instead removes an unwarranted emphasis on the judiciary.

Schuck concludes by sketching "a remedial system for the future." Such a system would expand governmental liability for damages as the basic element of public tort law, thereby displacing the current patchwork of official liability and immunity. Injunctive relief would be available only in those rare cases in which damage liability would not do the job. In such cases, courts should be sensitive to their own limitations and their dependence on other branches of government. When injunctive relief is required, courts should always fashion the least restrictive remedy. The most intrusive remedies would be available only as a last resort and upon a showing of recalcitrance. In sum, courts should adopt a graduated response to social problems demanding injunctive relief. Schuck concludes with a suggestion that other branches of government ought to assume a greater role in the remedial process.

25. P. 176.
27. P. 178.
29. Pp. 197-98. In the same vein, Professor Mashaw has recently suggested that a focus on judicial remedies may deflect attention from the more important mechanisms for transforming administrative performance. See J. MASHAW, BUREAUCRATIC JUSTICE 6 (1983). For recent efforts to exercise executive and legislative control, see Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (guidelines
II.

Two characteristics of *Suing Government* are especially impressive. The first is the effort to distinguish considerations usually mixed together in discussions of remedial problems. Schuck neatly sorts out the purposes of remedial doctrines, identifies the various reasons for judicial inability to afford effective structural relief, catalogues the reasons for government illegality, and analyzes the several factors that may make damage remedies inadequate.

The second impressive feature of the book is its examination of the weaknesses of the current system of personal liability and of the advantages of governmental liability. The point is not new, but it is made exceptionally well. Schuck argues that the current scheme, with its patchwork of official liability and immunity rules, could be substantially improved, at least in some contexts, by a system of governmental liability. The basic proposal has much to recommend it.

A.

The book, however, is incomplete. The effort to set forth a conceptual framework is, I think, only partly successful. Schuck provides a useful catalogue of relevant factors: the reasons for official illegality, the various remedial tools, and the purposes of the public tort law. Like most such catalogues, however, his list is of limited usefulness. One needs a method for relating the three to one another and a way to develop some hierarchy of reasons, tools, and purposes. What does one do when compensation conflicts with deterrence? How does one know what the role of “exemplification of moral goals” should be? When does negligence rather than lack of resources account for official illegality? What difference does it make if one knows? Precisely when should a damage remedy be found inadequate? On such questions, Schuck provides little help.

There are, moreover, weaknesses in Schuck’s argument for a system of governmental liability. Take, for example, the discussion of the subversive effects of official liability. Schuck contends that liability inclines officials toward delay, inaction, and needless formality. That claim, however plausible, is highly speculative. We do not really know whether and to what

to increase agency accountability for regulatory actions); S. 1080, 97th Cong., 2d Sess., 128 CONG. REG. S2713 (daily ed. Mar. 24, 1982) (Regulatory Reform Act to facilitate judicial and congressional review of regulatory actions).

extent the specter of liability interferes with the judgment of lower-level officials in state and federal hierarchies. In view of the enormous costs—psychological and monetary—of instituting litigation, the assumption that the interference is substantial requires a considerable leap of faith. Indeed, the assumption is to some degree undermined by Schuck's own claim that the current system provides significant disincentives for victims seeking redress. If the existing system in fact discourages lawsuits, one might think that official liability is necessary to achieve optimal deterrence.  

Moreover, I am not entirely persuaded by Schuck's effort to distinguish between public and private employees in terms of the incentive for risk-taking. The distinction has been made before, and undoubtedly there is something to it. But surely there are low-level employees in private industry who do not capture the benefits of aggressive action, and surely there are bureaucrats in government whose willingness to assume risks is rewarded. Moreover, in a bureaucratized and heavily unionized private sector, it is hard to believe that good or bad performance is automatically reflected in the salary of the individual employee. The difference between the public and private sectors is one of degree rather than of kind.

Schuck's use of economic analysis fails, moreover, to recognize or answer a standard economic argument. If officials risk personal liability, and if that risk skews incentives or discourages federal employment, presumably the government will increase salaries to provide ex ante compensation for the risk. I do not mean to suggest that it does not matter whether liability is placed on the government or on the official. But Schuck's failure to deal squarely with the economic argument is unfortunate.

Finally, Schuck does not adequately take account of the taxing power and the resulting danger that a system of governmental liability will have little deterrent effect on official misconduct. Because it has the power to tax, the government is fundamentally different from the private enterprises on which Schuck bases his proposal. To be sure, private industry can pass on to consumers the costs of tort liability; the market, however, furnishes at least some check on price increases. The government faces much weaker constraints. It can hardly be said that the taxpayers' lobby is sufficiently powerful to resist the likely minimal increases that might be required by governmental tort liability of the sort Schuck proposes.

Schuck does recognize the related problem of locating liability at some point between the treasury as a whole and the particular work detail

32. See Cass, Damage Suits Against Public Officers, 129 U. PA. L. REV. 1110, 1164 (1981) (governmental enterprises less likely than private institutions to respond appropriately when their employees are subject to overdeterrent liability constraint).
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whose unlawful conduct is at issue. Moreover, it should be possible to structure a liability scheme so that the fear that damages might cut into an agency’s budget would affect the extent of illegal conduct. But in view of the taxing power, there are severe practical difficulties in promoting the goal of deterrence with a system of governmental liability.

B.

All of these are relatively minor objections to what is, on the whole, a lucid and persuasive presentation. My more fundamental concern is with that part of the book that deals with the problem of injunctive relief, a problem that has received considerable attention in recent years. As I have suggested, this interest stems from the potential of the injunction to promote participation in the remedial process, to ensure direct and immediate enforcement of the positive guarantees of the regulatory state, and to help legitimate social choices.

Schuck’s principal purpose is to undermine the “pure rights” and “judicial interpretivist” approaches on the ground that they are insufficiently sensitive to the role institutions other than the courts play in translating rights into remedies. To some extent, Schuck is attacking a straw man. I doubt that anyone denies the courts’ ultimate dependence on other institutions of government. Moreover, Schuck’s own “institutional competition” model is itself indeterminate. It is of course true that courts depend on other institutions and that regulatory provisions and the Constitution permit or require some flexibility in the implementation process. In the end, however, recognition of those points does little other than to suggest the familiar point that institutional reform litigation often entails a bifurcation of right and remedy.

To be sure, courts should be sensitive to the sometimes loose relationship between right and remedy and to the need for deference to implementation strategies designed by the executive. Although it suggests a “mood,” however, such sensitivity does not solve the fundamental problems. In a hard case, should structural relief be granted? How does a court promote compliance? How does a court inform itself of the consequences of alternative remedies for persons not before the court? What should a court do when the defendant is unable or unwilling to comply?


34. In the sense used by the Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (legislative history of the Labor Relations Act expresses Congressional mood with regard to standards for judicial review of Labor Board decisions).

In my view, the increasing availability of structural remedies signals a more dramatic development than Schuck acknowledges. The development is, in brief, a shift from private to public law. Schuck tries to derive public law from private law; the latter is seen as the paradigm, and the effort is to build public law upon the best of private law. That posture has a lengthy and honorable tradition in American administrative and constitutional law. Most of our public law—both substantive and procedural—grows quite directly out of private law and corresponding efforts to treat the government as a defendant in a private lawsuit. But that model is breaking down. And it is the breakdown of that model that accounts for the special appeal of structural remedies.

American administrative law was originally founded on a notion that governmental intrusions into common law liberty and property interests were presumptively illegitimate; rights to a hearing and judicial review were available to test the question of authorization of what would otherwise be a common law wrong. That simple notion explains much of administrative law until the last quarter century. But in that period, common law interests have been supplemented, sometimes supplanted, by a wide range of opportunities—the right to welfare benefits, to government employment, even to redress of harms inflicted by third parties, like discrimination and pollution. Such opportunities are frequently given out by agencies and officials who enjoy broad discretion. Many observers—including courts and agencies themselves—have thought it critical to promote participation by regulatory beneficiaries as that discretion is exercised. The challenge of a genuinely public tort law is to accommodate these interests—the protection of new rights and the promotion of participation—in a regulatory era.

Schuck’s discussion is largely insensitive to this challenge. Hence the preference for monetary damages, the inconclusive catalogue of the goals of public tort law, the useful but indeterminate discussion of competing conceptions of the role of the court in structural reform litigation. I want here to sketch the elements of a truly public, public tort law and to suggest some of the implications for lawsuits against the government.

The first step is to abandon the idea that private tort law, with its emphasis on protection of private autonomy, is a useful model on which to

36. See Stewart, supra note 7, at 1717-18.
37. See J. Vining, supra note 7, at 22-27 (discussing breakdown in context of standing to review administrative action); see also Sunstein, Deregulation and the Hard-Look Doctrine, 1983 SUP. CT. REV. (forthcoming) (discussing breakdown in administrative law generally).
base public tort law. Many of the actions of which we are speaking cannot be properly understood as efforts to promote private autonomy. Attempts to reform mental institutions, to eliminate the effects of racial discrimination, or to require administrative agencies to enforce regulatory statutes resemble conventional private law tort suits only vaguely, if at all. Their aim is not to carve out a realm for private autonomy, but to enlist the government in implementing public values embodied in regulatory statutes or constitutional provisions. Most important, both the courts and the regulations tend not to take existing private preferences and social norms for granted, but treat them as subject to public scrutiny and review. The rejection of the autonomy of private preferences—the hallmark of a public rather than private tort law—has a number of consequences for the general problem of judicial remedies for official wrongs.

1. The Inadequacy of a Rights-Based Approach to Regulatory Problems

One consequence of rejecting the autonomy of private preferences is that an entitlement-based conception of law becomes ill-suited to many, perhaps most regulatory programs. As Professor Jaffe emphasized long ago, regulatory programs are frequently couched in terms of relevant factors rather than of rights and duties. A person may have an interest that an administrator must consider; it is rare, however, for a regulatory scheme to grant an entitlement of the common law form to a particular person or group of persons.

Moreover, regulatory programs frequently involve benefits that are collective in character. The right to clean air is an example. In light of differing individual preferences for benefits that are inescapably joint, it is difficult to speak the language of private rights. Finally, regulatory policies must often shift with rapidly changing economic conditions. In such circumstances, statutory benefits are not easily understood as static entitlements.

2. The Open-Ended Character of Public Law Norms

The private law of tort is built on reasonably determinate standards of conduct. By contrast, public law torts frequently involve standards that


41. See Stewart & Sunstein, supra note 38, at 1271-75.

42. L. Jaffe, Judicial Control of Administrative Action 508 (1965).
are abstract and open-ended. In constitutional litigation and in many cases involving regulatory provisions, it is often hard to speak in terms of the rule of law at all. The courts' role is not to apply rules laid down in advance, but to give content to public norms.

3. The Need to Promote Participation

Under private tort law, litigation is treated as bipolar, and third-party effects are discounted or ignored. As a result, the problem of participation is usually ignored. By contrast, in public tort law—especially in cases involving the structural injunction—participation often operates as a kind of surrogate for the rule of law. The decree will necessarily affect large numbers of persons. Because their interests may conflict, it is important to ensure that they are represented as the decision is framed. In short, as governing norms become increasingly open-ended, decisions are disciplined (or so it is hoped) by allowing those affected to receive a hearing.

4. The Preference for Injunctive Relief

Damages remedies, the traditional form of relief in private law, are most appropriate when it is desirable to base decisions on the traditional economic criterion of "willingness to pay." In regulatory programs, however, this criterion becomes much less coherent. Such programs often amount to a deliberate rejection of the willingness-to-pay criterion as a basis for social choice. They do not take the existing distribution of income and the existing set of entitlements for granted, but subject them to public scrutiny and review. Indeed, such programs sometimes depend on the notion that it is irrelevant whether the purported beneficiaries would choose the right at issue or how much they would be willing to pay for it. A person's right to freedom from desegregation or from unlawful treatment in a mental institution is not to be measured by seeing how much that person is willing to pay for the benefit. In such circumstances, it is hardly surprising that courts have rejected the traditional preference for damages relief.

43. The nature and extent of the differences between common law courts deciding damage actions under standards of reasonableness and regulatory agencies and courts filling in open-ended regulatory provisions is a difficult subject that I cannot discuss here.

44. It is of course unclear to what extent it was ever plausible to attempt to understand adjudication in terms of rule-application. See Kennedy, supra note 8.


46. This premise is central to political pluralism. See T. Lowi, The End of Liberalism: The Second Republic of the United States 52-84 (1975); J. Mansbridge, Beyond Adversary Democracy 15-18, 237-40 (1980).
5. *The Advantages of Continuing Supervision*

Finally, structural decrees may be favored precisely because of what is regarded as a cost under an entitlement approach: The parties and the courts will continuously monitor and control the conduct of the governmental defendant by means of the structural injunction. The aim, in short, is to ensure that decisions are subject to public scrutiny and review. It is in this sense that the structural injunction can act as a surrogate for legislative control.

III.

These factors point to the need for a new conception of the remedial process—for an evaluation of the underlying premises of structural remedies and for a comparison of these premises with those of private tort law. It should come as no surprise if such a comparison tends to show that private tort law depends on a distinctive if familiar conception of the function of law—one that sees governmental activity as primarily facilitative, that treats preferences as private and exogenous, and that regards judicial supervision as at best a necessary evil. The competing conception tends to treat judicial supervision not as a cost, but as an indispensable element in self-government. Whether this conception will ultimately prove coherent or workable is a large and difficult question. In the end, however, an approach that attempts to derive public law remedies from the private law model may miss an important point and thus provide an incomplete perspective on the problems raised by suits against the government.