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COMMENTARY

Death and the Supreme Court

By ARTHUR J. GOLDBERG*

In the summer of 1963, during my tenure on the Supreme Court, in reviewing the list of cases to be discussed when the Court reconvened for the 1963 Term in October, I found there were six capital cases seeking review by certiorari.¹ In studying these cases, I came to the conclusion that they presented the Court with an opportunity to address explicitly for the first time the constitutionality of capital punishment. I thereupon prepared a conference memorandum² on this subject which I circulated to the members of the Court for their consideration.

In this memorandum, I stated:

This Court has never explicitly considered whether, and under what circumstances, the Eighth and Fourteenth Amendments to the United States Constitution [proscribe] the imposition of the death penalty. The Court has, of course, implicitly decided (in every case affirming a capital conviction) that the death penalty is constitutional. But in light of the worldwide trend toward abolition, I think this Court should now request argument and explicitly consider this constantly recurring issue.³

In my memorandum, I marshalled the arguments and precedents against the death penalty. My conclusion was twofold: the death penalty constitutes cruel and unusual punishment proscribed by the Eighth⁴ and

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1. *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961), *cert. denied*, 375 U.S. 889 (1963) (rape of a minor); *Rudolph v. Alabama*, 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 889, *reh'g denied*, 375 U.S. 917 (1963) (rape); *Walker v. Nevada*, 78 Nev. 463, 376 P.2d 137 (1962), *cert. denied*, 375 U.S. 882 (1963) (felony murder); *Arnold v. North Carolina*, 258 N.C. 563, 129 S.E.2d 229, *cert. denied*, 375 U.S. 878, *rev'd on other grounds*, 376 U.S. 773 (1963) (murder); *Smith v. Bomar*, 212 Tenn. 149, 368 S.W.2d 748, *cert. denied*, 376 U.S. 915 (1963) (felony murder); *White v. Washington*, 60 Wash. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963) (murder).

2. Goldberg, J., Memorandum to the Conference, *Re: Capital Punishment*, October Term, 1963, reprinted in 27 S. TEX. L. REV. 493 (1986).

3. *Id.* at 499.

4. The Eighth Amendment provides: "Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Fourteenth⁵ Amendments to the United States Constitution. If a majority of the Court were unwilling to so hold, it should, in my view, rule that the death penalty could not constitutionally be imposed for an offense that did not involve the taking of human life.

When the Court reconvened on the first Monday in October, 1963, at its initial conference, a majority voted to reject the contentions and conclusions of my memorandum. The vote was six to three. Only Justices Douglas and Brennan joined in support of my views.

The Court then proceeded to deny certiorari in the six capital cases before it.⁶ In one of them, *Rudolph v. Alabama*,⁷ the petitioner was sentenced to death for rape, a horrendous offense which, however, did not involve the taking of human life. The Court denied the grant of certiorari. I dissented on the ground that the death penalty was cruel and unusual punishment within the meaning of the Eighth Amendment since there was no taking of human life.⁸ Only Justices Douglas and Brennan joined in this dissent.

Although my efforts to declare the death penalty unconstitutional were unsuccessful, an important consequence was to alert the Bar to challenge the constitutionality of capital sentencing laws, which had not been previously done, even in the six cases upon which we ruled. Thereafter, beginning in 1965, the constitutionality of the death penalty was raised by counsel in a wide variety of cases.⁹ Confronted squarely with the issue, the Court was forced to deal with both procedural and substantive challenges to the death penalty. This being the case, the Court, to consider these challenges, imposed a de facto moratorium on executions

5. Section 1 of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Although a restraint on federal conduct, the Cruel and Unusual Punishment Clause of the Eighth Amendment has been held applicable to states by its incorporation in the due process guaranty of the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947).

6. See *supra* note 1.

7. 275 Ala. 115, 152 So. 2d 662, cert. denied, 375 U.S. 889, reh'g denied, 375 U.S. 917 (1963).

8. 375 U.S. at 889-91.

9. The Court declined to hear cases raising eighth amendment challenges to the constitutionality of capital sentencing laws. See, e.g., *Alvarez v. Nebraska*, 393 U.S. 823 (1968) (denial of certiorari); *Craig v. Florida*, 383 U.S. 959 (1966) (denial of certiorari); *Swain v. Alabama*, 382 U.S. 944 (1965) (denial of certiorari).

The issue was extensively briefed and argued before the Court in *Boykin v. Alabama*, 395 U.S. 238 (1969). See Brief for Petitioner at 8-24. However, the Court reversed the conviction on procedural grounds without referring to the constitutionality of the death penalty.

which lasted from 1968 to 1976.¹⁰

In 1972, the Supreme Court decided in *Furman v. Georgia*¹¹ that the sentencing authority, judge or jury, cannot exercise untrammelled discretion to pronounce life or death in capital cases, but that rational standards must be used to make this determination. The sentencing authority was required to weigh various mitigating and aggravating factors in deciding whether an individual should be put to death.¹² In other words, as the Court later made clear, mandatory capital sentencing laws were unconstitutional.¹³

Since most states had mandatory sentencing laws, and these were unconstitutional, the convictions of more than 600 inmates of death cells were reversed.¹⁴ They were not set free, however, but resentenced. Virtually all of them were then given life imprisonment.¹⁵ Litigation, however, continued with respect to other aspects of the death penalty, thus keeping the moratorium in effect while states proceeded to amend their laws to conform to the Court's decision in *Furman*.

In 1976, in *Gregg v. Georgia*,¹⁶ the Court for the first time squarely held that "the punishment of death does not invariably violate [the Cruel and Unusual Punishment Clause of] the Constitution."¹⁷ It did so by a divided vote.¹⁸ This was a deplorable step backward. It legitimated the imposition of this ultimate sanction.

Opponents of the death penalty continued to litigate, raising other issues. In 1977, in *Coker v. Georgia*,¹⁹ the Court held that imposing the death penalty on a convicted rapist who did not take the life of the victim

10. See UNITED STATES DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1981, A NATIONAL PRISONER STATISTICS REPORT Table 1, at 14 (1982).

11. 408 U.S. 238 (1972) (plurality opinion).

12. The plurality opinion turned on the separate concurrences of Justices Stewart and White. Both declined to rule that the death penalty was unconstitutional in all applications, but held that its arbitrary imposition constituted cruel and unusual punishment. In rejecting Georgia's capital sentencing law, Justice White explained that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313.

13. See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

14. See *N.Y. Times*, June 30, 1972, at 1, col. 8.

15. Bruck, *Decisions of Death*, THE NEW REPUBLIC, Dec. 12, 1983, at 18-19.

16. 428 U.S. 153 (1976) (plurality opinion).

17. *Id.* at 169.

18. Justice Stewart, joined by Justices Powell and Stevens, announced the opinion of the Court, *id.* at 158; Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment, *id.* at 207; Justice Blackmun concurred without an opinion, *id.* at 227; and Justices Brennan and Marshall dissented separately, *id.* at 227, 231.

19. 433 U.S. 584 (1977).

was unconstitutional under the Eighth Amendment.²⁰ In *Coker*, the Court adopted my dissenting opinion in *Rudolph v. Alabama*.²¹ This led to the resentencing of persons convicted of such crimes. My only comment is that in the Supreme Court, as in life in general, time works changes.

The moratorium imposed by the Court on the death penalty, however, was not lifted until 1977.²² This was because the Court, in a number of cases, had to pass on state sentencing laws that had been re-drafted to meet the *Gregg* test. The Court sustained these statutes²³ and made it clear by decisions and denials of certiorari that states were free to proceed with executions in capital cases, as they regrettably now are doing. Since 1977, nearly ninety persons convicted of capital offenses, under statutes conforming to *Gregg*, have been executed.²⁴

Opponents of the death penalty, notwithstanding, have continued their challenge on other grounds. In *McCleskey v. Kemp*,²⁵ the death penalty was attacked on the ground, supported by substantial evidence, that it was disproportionately imposed on blacks and other racial minority groups. The Court rejected this contention.

More recently, on July 29, 1987, the Court denied a stay of execution in *Brogdon v. Butler*,²⁶ which involved the question of whether a mentally defective person with a chronological age of twenty-four but the mentality of a ten-year-old could be executed. Regrettably, the Court, in denying this stay, reached out and touched Brogdon fatally by telephone, a practice which I have deplored.²⁷ In this case, as in previous ones, the Justices, being on vacation, were scattered here and abroad. They were polled by telephone, and this poll resulted in a denial of the stay. Indeed, it is unlikely that, with the exception of the Chief Justice who was in Washington, D.C., any of the Justices had the benefit of study and review of the stay application.

Why the rush to execution? This case could have been referred to the first conference when the Court reconvened in October. The defend-

20. *Id.* at 592.

21. *See supra* note 7 and accompanying text.

22. Gary Gilmore was executed on Jan. 17, 1977. *See* N.Y. Times, Jan. 18, 1977, at 1, col. 4.

23. *See* *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding death penalty statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (same); *but see* *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating death penalty statute).

24. *See* N.Y. Times, Aug. 9, 1987, at 1, col. 2 (reporting 86 executions as of Aug. 9, 1987).

25. 107 S. Ct. 1756, *reh'g denied*, 107 S. Ct. 3199 (1987).

26. 824 F.2d 338 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 13 (1987).

27. Goldberg, *The Supreme Court Reaches Out and Touches Someone—Fatally*, 10 HASTINGS CONST. L.Q. 7 (1982).

ant, after all, was confined to a death cell, and there is no good reason why this customary practice was not followed, affording all Justices access to the record and briefs and an adequate collegiate discussion of the issues raised.

In view of the present membership of the Court, there is no likelihood that the Court will overrule its holding in *Gregg* in the foreseeable future. Watchman, what of the night? Or, to put it in other terms, where other than the Court, can opponents of the death penalty turn for relief?

The answer is Congress and state legislatures, courts, and governors. I am not optimistic that, with few exceptions, they will abolish the death penalty. Public opinion polls show that a majority of the public now favors the death penalty.²⁸ The bodies I have mentioned are more than likely to follow these "election returns." Nevertheless, public opinion on this grave matter has changed in the past and, hopefully, it may change again in the not too distant future.

Further, there is a widespread and mistaken notion, not only in the public's mind but among these governing bodies, that once the Supreme Court has spoken, this is the final word. Not so! There is nothing in the Constitution that precludes Congress, state legislatures, state courts, or governors from abolishing or not imposing the death penalty, despite the Supreme Court's unwillingness to do so. These bodies may go beyond the Court in protecting individual freedoms, including the safeguard against cruel and unusual punishment. What they may not do is restrict or cut back on Supreme Court decisions.²⁹ In other words, they may not invoke the discredited doctrines of interposition and nullification³⁰ which were designed to limit constitutional safeguards mandated by the Supreme Court.

In addition, Congress, under section 5 of the Fourteenth Amend-

28. For example, a recent Gallup opinion poll found that 71% of Americans favor the death penalty for persons convicted of murder; 23% were opposed and 5% did not know. Gallup, *The Gallup Report*, Report Nos. 232/233 (Jan.-Feb. 1985), reprinted in U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1986 Table 2.23, at 100-01 (1987).

29. See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (upholding free speech rights under California Constitution).

30. These doctrines held that a state, in the exercise of its sovereignty, may reject the jurisdiction of federal courts when the state deemed it to be unconstitutional or to exceed the powers delegated to the federal government. This position was rejected in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (invalidating state law under federal Constitution). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

ment, may declare that capital punishment violates due process.³¹ Thus, with one blow, Congress has the authority to abolish capital punishment throughout the United States.

Also, state legislatures and courts may interpret the language of their own constitutions as prohibiting the death penalty, notwithstanding that the language of most state constitutions is the same or similar to the Eighth Amendment.³² The right of states to do so is an established principle of federalism and not subject to review by the Supreme Court. Finally, state governors may commute death sentences, both on constitutional and moral grounds.

So, the ball is in the court of Congress and the legislatures, courts, and governors of the several states. These bodies cannot escape the reality that 1900 persons are now incarcerated in death cells³³ and that more will follow. They cannot escape the reality that the executions of such persons will be nothing more than governmental mass murder. And they cannot ignore the fact that all reliable studies show that there is no probative evidence that the death penalty effectively deters capital offenses.³⁴ Deterrence, after all, is the ultimate rationale for capital punishment.

More than twenty-five years ago, French author Albert Camus wrote that "the great civilizing step" is to abolish the death penalty.³⁵ Virtually all Western countries have done so and many neutral and nonaligned countries as well.³⁶ The ultimate question is: shall our nation continue to live under the archaic doctrine of *lex talionis*—an eye for an eye; a tooth for a tooth?

31. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. For the due process guaranty, see *supra* note 5.

32. See, e.g., *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (holding death penalty barred by state constitutional prohibition of "cruel or unusual" punishments). The *Anderson* decision was eventually reversed by a constitutional initiative.

33. See Applebome, *Executions on the Rise as Legal Barriers Fall*, N.Y. Times, Aug. 9, 1987, at 22, col. 1.

34. See, e.g., Lampert, *The Effect of Executions on Homicides: A New Look on an Old Light*, 29 CRIME & DELINQ. 88 (1973); Baldus & Cole, *A Comparison of the Work of Thorston Sellin and Isaac Ehrlich on the Deterrent Effect of the Death Penalty*, 85 YALE L.J. 170 (1985); see also H. BEDAU, *DEATH IS DIFFERENT* 33-44 (1987).

35. A. CAMUS, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION AND DEATH* 232 (1961).

36. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, *THE DEATH PENALTY* app. 12 (1987).