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COMMENTARY

The Death Penalty Revisited

by ARTHUR J. GOLDBERG*

"Any man's Death diminishes Me" — John Donne

The number of persons sentenced to death boggles the mind. Two thousand one hundred fifty-one currently are on death row,¹ and their number increases almost daily. Moreover, in recent decisions the Supreme Court has sanctioned a rush to execution, brushing aside legal barriers.² The incontrovertible fact, however, is that there is no reasonable case for the death penalty.

The death penalty does not serve the permissible objectives of criminal punishment: it neither deters nor rehabilitates,³ and it punishes the least recidivist of all major crimes.

Capital punishment is nothing less than retaliation by society for the horrible crime of murder. It is a repugnant application of the archaic doctrine of *lex talionis*—an eye for an eye, a tooth for a tooth. Retaliation or retribution, however, is neither a permissible nor effective objective of criminal punishment.

In addition, the death penalty tends to sweep under the rug the known causes of murder and other capital offenses: drug addiction, lack of gun control, family disputes fueled by alcohol and pent-up grievances, and mental illness. Furthermore, there is the ever-present danger that innocents may be unjustly convicted and sentenced to death.⁴

The death penalty is also demonstrably disproportionately imposed

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1. N.Y. Times, Dec. 2, 1988, at B2, col. 1.

2. *Lowenfield v. Phelps*, 108 S. Ct. 546 (1988); *Tison v. Arizona*, 481 U.S. 137 (1987); *California v. Brown*, 479 U.S. 538 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976).

3. See, e.g., Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88 (1983); Baldus & Cole, *A Comparison of the Work of Thorston Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); see also H. BEDAU, DEATH IS DIFFERENT 33-44 (1987).

4. See Bedau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

on minorities.⁵ As proof, a recent research study establishes that over a period of several years in South Carolina the death penalty was requested by the prosecution in 49% of the cases of capital murder in which a black killed a white but in only 11% of the cases in which a black killed a black.⁶ This disparity in prosecutorial recommendation for sentencing is racial. There is no other explanation.

Further, the death penalty is uniformly imposed only on the poor,⁷ and the poor, unfortunately, are largely black and hispanic. Rich or establishment people also commit murder, but to my knowledge, no such persons wait in death cells. This disparity makes a mockery of the concept of Equal Justice for All, emblazoned on the edifice of the Supreme Court of the United States.

Virtually all of our Western NATO allies and many other countries have abolished the death penalty.⁸ Are we, alone, to be an outcast in the society of civilized nations? In a speech to the House of Commons on July 20, 1910, Sir Winston Churchill, then Home Secretary, said:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unflinching faith that there is a treasure, if you can only find it, in the heart of every man — these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.⁹

These humanitarian words and sentiments about the treatment of crime and criminals, in my view, apply to all who seriously transgress the law—common criminals as well as capital ones.

5. S. NATHANSON, *AN EYE FOR AN EYE?: THE MORALITY OF PUNISHING BY DEATH* 54-58 (1987); W. S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 113-39 (1987); W. Bowers and G. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 *CRIME & DELINQ.* 563 (1980).

6. Wall St. J., May 9, 1988, at 22, col. 4 (referring to a study by Raymond Paternoster, published in *J. CRIM. L. & CRIMINOLOGY* (Fall 1983)).

7. See generally BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, *PROFILE OF JAIL INMATES* (1980).

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

9. HANSARD, xix, 1354 (20 July, 1910); 2 R. JAMES, WINSTON S. CHURCHILL: *HIS COMPLETE SPEECHES 1897-1963*, at 1598 (1970).

During my tenure on the Supreme Court, it was my opinion that the death penalty violated the Eighth Amendment's proscription against cruel and unusual punishment.¹⁰ A majority of my colleagues did not agree.¹¹ Nor does a majority of the present Court.¹² I disagree respectfully.

I remain convinced, however, that whatever may be said of times past, the world-wide trend toward abolition of the death penalty establishes that such inhumane punishment transgresses "the evolving standards of decency that mark the progress of a maturing society."¹³ This concept of punishment, in my view, outlaws the death penalty, since the deliberate institutional taking of life by the state certainly offends evolving standards of decency.

The Supreme Court, as I have noted, does not now agree that capital punishment is unconstitutional.¹⁴ As Justice McKenna aptly remarked, however, in the landmark case of *Weems v. United States*,¹⁵ "Time works changes . . ." Indeed it does.

I am convinced that the Supreme Court cannot much longer continue to ignore the uncivilized nature of its present holdings. Ultimately the Supreme Court cannot long disregard the fact that the execution of the more than 2,000 persons—or a considerable number of them—now waiting in death cells would be nothing less than mass murder by government.

We proudly and justifiably proclaim that we are a decent society. We must, therefore, always be alert to continue to act like one. As

10. *Rudolph v. Alabama*, 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 889 (1963) (Goldberg, J., dissenting on the ground that the death penalty is cruel and unusual punishment within the meaning of the Eighth Amendment when there is no taking of human life); see Goldberg, J., *Memorandum to the Conference Re: Capital Punishment*, 1963, reprinted in 27 S. TEX. L. REV. 493 (1986).

11. During the 1963 Term the Court proceeded to deny certiorari in the six capital cases before it. *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).

12. *California v. Brown*, 479 U.S. 538 (1987); *Gregg v. Georgia*, 428 U.S. 153 (1976).

13. *Trop v. Dulles*, 356 U.S. 86, 101 (1957) (opinion of Warren, C.J., joined by Justices Black, Douglas, and Whittaker).

14. See *supra* notes 2, 12. See also B. NAKELL AND K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY*, 37-58 (1987).

15. 217 U.S. 349 (1910).

Americans, we neither can nor should tolerate even the prospect of such barbaric action.

