The Death Penalty for Rape

By ARTHUR J. GOLDBERG*

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, necessarily be confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[1]

Introduction

In its recent opinion in *Coker v. State of Georgia*,[2] the Supreme Court held that a sentence of death for the rape of an adult woman is prohibited by the Eighth Amendment because it constitutes cruel and unusual punishment.[3] While serving consecutive life sentences for rape, murder, kidnapping and assault, Erlich Anthony Coker escaped from prison and, during his flight, entered an unlocked house, robbed the young couple inside, and raped and kidnapped the wife. He was tried and convicted under a Georgia statute[4] that allowed the imposition of the death penalty when a rape

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1. Weems v. United States, 217 U.S. 349, 373 (1910) (opinion by McKenna, J.) (citations omitted).

2. 97 S. Ct. 2861 (1977).

3. *Id.* at 2866.

4. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circum-

conviction was coupled with a conviction for another serious felony, in his case armed robbery. While *Coker* was the first case in which the Court held the death penalty to be cruel and unusual punishment for a crime other than murder,[5] to reach that result the Court applied standards that had been developed long before in *Weems v. United States*.[6] For the first time since the adoption of the Bill of Rights, the Court in that case held that a specific punishment as applied to a specific crime was violative of the Eighth Amendment's proscription against cruel and unusual punishments.[7]

I. Cruel and Unusual Punishment Under *Weems*

In *Weems*, an officer of the United States Government in the Philippine Islands was convicted of falsifying a public document and sentenced to fifteen years of *cadena temporal*.[8] Under this ominous sounding punishment of Spanish origin, a prisoner was condemned to hard and painful labor and forced to wear chains at his ankles and wrists. The penalty of *cadena temporal* could also include "civil interdiction," which subjected the convicted person to a denial of rights of "parental authority, guardianship of person or property, participation in the family counsel, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*."[9] Finally, after release from prison, the convict was placed

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stance is found and a recommendation of death is made, the court shall sentence the defendant to death. When a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

GA. CODE ANN. § 26-3102 (Supp. 1977).

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

. . . .

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

GA. CODE ANN. § 27-2534.1 (Supp. 1977).

5. 97 S. Ct. at 2866.

6. 217 U.S. 349 (1910).

7. *Id.* at 380-81. Cases before *Weems* include Wilkerson v. Utah, 99 U.S. 130 (1878), holding that death by firing squad was not cruel and unusual, and *In re* Kemmler, 136 U.S. 436 (1890), holding that death by electrocution, even though "unusual" in that it was a new and modern method, was still not "cruel" nor forbidden by the Eighth Amendment. *See also* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777-78 (1970).

8. 217 U.S. at 363-64.

9. *Id.* at 364.

under "surveillance" for the duration of his life.[10] After a careful analysis of the historical experience that formed the basis for the Eighth Amendment, the Court, in an opinion written by Justice McKenna, examined the penalty in question against the evil sought to be mitigated and concluded that the punishment was cruel and unusual.[11]

In so doing, the *Weems* Court developed three tests to determine the constitutionality of state imposed punishments: First, given the socially permissible objectives of punishment, whether deterrence, isolation or rehabilitation, a given punishment is cruel and unusual if a less severe one can as effectively achieve the permissible ends.[12] Second, a punishment is cruel and unusual if the evil it produces is disproportionately higher than the harm it seeks to prevent.[13] Third, regardless of its effectiveness in achieving the permissible ends of punishment, a specific punishment is cruel and unusual if it offends contemporary moral values.[14] This third test acts as a lens through which the Court must view the other tests for excessive punishment and disproportionate harm. Applying these tests, the Court found that viewed through evolving public opinion as "enlightened by a humane justice,"[15] fifteen years of hard labor in chains was disproportionate to the crime of falsification of documents by a minor government official and that a lesser punishment would equally serve the desired ends. The Court concluded that by means of punishment less severe than the death penalty, "[t]he purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."[16]

Since developing the cruel and unusual punishment tests in *Weems*, the Supreme Court has invoked the Eighth Amendment's proscription in *Trop v. Dulles*,[17] holding the imposition of loss of citizenship for a conviction of war time desertion to be a cruel and unusual punishment, [18] and in *Robinson v. California*,[19] holding that a California law making it a crime to be a drug

10. *Id.*

11. *Id.* at 380-81.

12. *Id.* at 381. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Id.*

13. *Id.* at 366-67. "Such [severe] penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*

14. *Id.* at 378. "[The Eighth Amendment] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*

15. *Id.*

16. *Id.* at 381.

17. 356 U.S. 86 (1958).

18. *Id.* at 99-103.

19. 370 U.S. 660 (1962).

addict constitutes cruel and unusual punishment.[20] In *Trop*, Chief Justice Warren relied upon the *Weems* tests in weighing the punishment against the "enormity of the crime"[21] in the context of "evolving standards of decency that mark the progress of a maturing society."[22] In *Robinson*, Justice Stewart, delivering the opinion of the Court, noted that a punishment must be tested against the crime for which it is inflicted, since the excessiveness of a punishment is what makes it constitutionally impermissible.[23] In a concurring opinion, Justice Douglas applied the *Weems* "lesser punishment" test: "A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, *where a civil commitment would do as well*."[24] Thus, the *Weems* tests were applied in these two cases shortly before I joined the Court in 1963.

II. Arguments for Applying *Weems* to the Death Penalty

As early as the October Term of 1963, I had circulated a memorandum to the other justices on the Court supporting the idea that the death penalty is proscribed by the Eighth and Fourteenth Amendments to the United States Constitution. My concern about the death penalty arose from a study of capital punishment during my years as a practicing attorney and was accentuated during my service on the Court by the number of cases on the conference list seeking review by certiorari of death penalty sentences. In the memorandum, I reviewed the history of the death penalty in our country and made certain observations about its constitutionality.

Research had disclosed that many nations of the western world had abolished the death penalty,[25] and that even where it was not abolished, it was not generally practiced.[26] Those nations that had abolished the death penalty rarely, if ever, restored it; the worldwide trend was unmistakably in the direction of abolition.[27] Moreover, even in this country, several states had abolished the death penalty.[28] Public opinion polls did not show strong feelings in favor of retaining the death penalty, but there was a close division among the public on the subject.[29]

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20. *Id.* at 667.
21. 356 U.S. at 100.
22. *Id.* at 101.
23. 370 U.S. at 667.
24. *Id.* at 677 (Douglas, J., dissenting) (emphasis added).
25. DEPARTMENT OF SOCIAL & ECONOMIC AFFAIRS, UNITED NATIONS REPORT ON CAPITAL PUNISHMENT 8 (1962). Twenty-nine nations were listed as having abolished capital punishment completely.
26. Australia, New South Wales and Nicaragua are included within this group. *Id.* at 8-9.
27. *Id.* at 7-9.
28. Pennsylvania v. Nelson, 350 U.S. 497 (1956).
29. G. GALLUP, III THE GALLUP POLL: PUBLIC OPINION, 1935-1971, at 1659 (1972); Roper Polls on Capital Punishment (Aug. 1957 & Feb. 1960).

In certain matters, especially those relating to fair procedures in criminal trials, the Supreme Court has led rather than followed public opinion in the process of articulating and establishing progressively civilized standards of decency. If only punishments that are overwhelmingly condemned by public opinion come within the cruel and unusual punishment proscription, I argued, the Eighth Amendment would be a hollow protection. Such punishments would presumably be abolished by the legislature or suffer desuetude. The Eighth Amendment, however, like the other nine in the Bill of Rights, was intended as a countermajoritarian limitation on government action; it is to be applied to nurture rather than to retard our "evolving standards of decency." As the Court recognized in *Weems*, "our contemplation cannot be only of what has been but of what may be."[30]

Three factors influenced my 1963 memorandum to the Court: The finality of death, its failure as a deterrent, and the arbitrary fashion in which the death penalty was being imposed.[31] The finality of the death penalty was the foremost factor contributing to my opinion. Whenever capital punishment is imposed, there is always the possibility of mistakenly and irredeemably executing an "innocent" person. *Weems* recognized that even giving full weight to reasonable legislative findings, a punishment is nevertheless cruel and unusual if one less severe can as effectively achieve the permissible ends of justice.[32] Commentators agreed that deterrence is a principal end result. The critical question, therefore, was whether capital punishment had any greater deterrent effect upon potential criminals than did a less severe punishment, such as life imprisonment. If a less severe punishment would as effectively deter, it would follow that the death penalty is unconstitutional under the first *Weems* test.[33]

Voluminous research has been conducted in an effort to learn whether capital punishment is a unique deterrent to capital crime. The most that can be said, however, is that "there is no clear evidence in any of the figures . . . that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[34] Whatever standards are generally applicable to weighing legislative findings based on conflicting evidence, under prevailing judicial doctrine the state must show an overriding necessity before it can take human life.[35] I concluded in the

30. 217 U.S. at 373.

31. There was disturbing evidence that the imposition of the death penalty had been arbitrary, haphazard, capricious and discriminatory. For example, the impact of the death penalty had been demonstrably greatest among disadvantaged minorities.

32. *See* note 12 and accompanying text *supra*.

33. *Id.*

34. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT, at 23 (1953).

35. *Cf.* Schneider v. State, 308 U.S. 147, 161 (1939).

memorandum that because there was no persuasive evidence that capital punishment uniquely deters capital crime, and because doubts should be resolved against the death penalty, this penalty runs afoul of the constitutional principles articulated in *Weems* and is, therefore, unconstitutional *per se*.

The Court, however, did not agree that capital punishment, as such, was unconstitutional. So I submitted for its consideration an alternative proposition that the infliction of death for *certain crimes* and in the case of certain offenders was violative of the Eighth and Fourteenth Amendments. I questioned specifically the constitutionality of death as a penalty for crimes that do not endanger life. This question, which I derived from the second *Weems* test, was posed: May human life constitutionally be taken by the state to protect a value other than human life? According to *Weems*, a punishment can create no greater evil than the harm that is sought to be deterred.[36] Therefore, if the crime did not involve the taking of a human life, I argued, the punishment cannot be death.

It is apparent from the Court's record that this alternative proposal also did not prevail. Attesting to this fact is the Court's denial of certiorari in *Rudolph v. Alabama*,[37] from which I, joined by Justices Douglas and Brennan, dissented on the ground that the Court should have reviewed the constitutionality of a death sentence for a conviction of rape:

> I would grant certiorari in this case and in . . . *Snider v. Cunningham*[38] . . . to consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.
>
> The following questions, *inter alia*, seem relevant and worthy of argument and consideration:
>
> (1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate . . . "standards of decency more or less universally accepted"?
>
> (2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged"?
>
> (3) Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (*e.g.*, by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?[39]

36. *See* note 13 *supra.*

37. 375 U.S. 889, *rehearing denied*, 375 U.S. 917 (1963).

38. 375 U.S. 889 (1963).

39. *Id.* at 889-91 (footnotes omitted).

Not until the most recent decision, *Coker v. Georgia*,[40] did the Court confront the issues raised in *Rudolph*.

III. Recent Applications of *Weems*

A. *Furman v. Georgia*

In 1972, the Supreme Court decided *Furman v. Georgia*,[41] in which three death penalty cases were consolidated on appeal. One petitioner had been sentenced to death for murder; the other two had been sentenced to death for rape.[42] After much consideration and by a five to four vote, the Court held that the imposition of the death penalty in each of the three cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[43]

Furman is a unique decision, not only on its merits, but also in its form. Although there was a brief *per curiam* opinion announcing the decision, there was no opinion of the Court. Instead, each of the nine justices expressed his view in a separate opinion. Among the justices of the majority, Justices Brennan and Marshall concluded that capital punishment was unconstitutional *per se* under the Eighth Amendment.[44] Justice Douglas based his vote in support of the unconstitutionality of the death penalty on the ground that capital punishment, as practiced in recent times, has discriminated against minorities and, in effect, has violated the concept of equal protection that he found implicit in the cruel and unusual punishment clause.[45]

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.[46]

Justices Stewart and White based their conclusions on the arbitrariness and infrequency with which the death penalty is actually imposed in relation to those sentenced for capital crimes.[47] As Justice Stewart stated:

40. 97 S. Ct. 2861 (1977).

41. 408 U.S. 238 (1972).

42. Furman v. Georgia, 225 Ga. 253, 167 S.E.2d 628 (1969); Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969); Branch v. Texas, 447 S.W.2d 932 (1969).

43. 408 U.S. at 239-40.

44. Justices Brennan and Marshall relied upon the *Weems* tests to arrive at their conclusions. 408 U.S. at 305-06 (Brennan, J., concurring); *id.* at 330-32 (Marshall, J., concurring).

45. *Id.* at 255 (Douglas, J., concurring).

46. *Id.* at 256 (footnote omitted).

47. *Id.* at 309 (Stewart, J., concurring); *id.* at 311-13 (White, J., concurring).

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[48]

The four dissenters, on the other hand, Chief Justice Burger, and Justices Blackmen, Powell and Rehnquist, expressed the view that the death penalty was constitutional and that its abolition should be left to the legislatures and not to the courts.[49]

The *Weems* tests were applied in three of the separate opinions.[50] Justice Douglas, in defining cruel and unusual punishment under the Eighth Amendment, applied the third *Weems* test of contemporary moral standards, as articulated in *Trop v. Dulles*.[51] Changing social values compelled him to conclude that the unequal application of punishment is cruel and unusual.[52] Justice Brennan relied upon the first and third *Weems* tests in formulating a "cumulative" test for the unconstitutionality of a punishment:

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then [its] continued infliction . . . violates the command [of the Eighth and Fourteenth Amendments].[53]

Likewise, Justice Marshall invoked the first *Weems* test of excessive punishment [54] and discussed a test similar to the third *Weems* test of contemporary moral standards.[55] Thus, although *Furman* was a plurality opinion based on the discretionary element of the death penalty statutes in question,[56] the principles in *Weems*, nonetheless, played a definitive role in shaping the opinions of a majority of the members of the Court.

The Court's decision in *Furman* invalidated some thirty-nine state statutes, the District of Columbia's death penalty legislation and various provisions of the United States Criminal Code and the Uniform Code of Military Justice[57] because of the discretionary, arbitrary, infrequent and

48. *Id.* at 309-10 (Stewart, J., concurring) (footnotes omitted).

49. *Id.* at 375-405 (Burger, C.J., dissenting); *id.* at 405-14 (Blackmun, J., dissenting); *id.* at 414-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting).

50. *Id.* at 241-42 (Douglas, J., concurring); *id.* at 305-06 (Brennan, J., concurring); *id.* at 330-32 (Marshall, J., concurring).

51. 356 U.S. 86 (1958).

52. 408 U.S. at 256-57 (Douglas, J., concurring).

53. *Id.* at 282 (Brennan, J., concurring).

54. *Id.* at 331, 343 (Marshall, J., concurring).

55. *Id.* at 362.

56. GA. CODE ANN. §§ 26-1005, -1302 (Supp. 1971) (effective prior to July 1, 1969); TEXAS PEN. CODE, art. 1189 (1961).

57. *See* 408 U.S. at 417-18 (Powell, J., dissenting).

discriminatory basis upon which guilty offenders could be sentenced under those laws. Since *Furman*, Congress and thirty-five states, including Georgia, have enacted death penalty legislation in conformity with that opinion. By specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, and by making the death penalty mandatory for certain crimes, the new statutes avoid the discretionary, and thus unconstitutional, element of the statute struck down in *Furman*.

B. *Gregg v. Georgia*

In July of 1976, the revised Georgia death penalty statute[58] was scrutinized by the Court in the case of *Gregg v. Georgia*.[59] The decision of the Court was announced in an opinion by Justices Stewart, Powell and Stevens, holding that punishment of death for the crime of murder under a statutory scheme that required the sentencing jury to make specific findings as to the circumstances of the crime or the character of the defendant and that required the state supreme court to compare each sentence rendered by a jury to that imposed upon other similarly-situated criminal defendants[60] did not violate the Eighth Amendment.[61] Chief Justice Burger and Justices Rehnquist, White and Blackmun concurred,[62] while Justices Brennan[63] and Marshall[64] wrote separate dissenting opinions.

The majority opinion in *Gregg* dealt with each of the three *Weems* tests in reaching the conclusion that the Georgia statute was not a cruel and unusual punishment. With regard to the disproportionate harm of the penalty vis-à-vis the crime, the Court held that a penalty of death for the crime of murder was not disproportionate.[65] The Court, however, specifically declined to confront the issue not presented by the facts before it, namely, whether a penalty of death for a crime other than murder would be disproportionate.[66] In considering contemporary moral standards, the Court decided that the legislative changes subsequent to *Furman*,[67] the recent jury verdicts under the new statutes,[68] and the California death penalty referen-

58. GA. CODE ANN. § 26-1101 (1972); GA. CODE ANN. § 27-2534.1(b) (Supp. 1975).

59. 428 U.S. 153, *rehearing denied*, 429 U.S. 875 (1976). There were four companion cases to *Gregg*: Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

60. 428 U.S. at 164-66. *See* note 58 *supra.*

61. *Id.* at 187-93.

62. There was a separate opinion by Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurring in the judgment. Justice Blackmun concurred in the judgment based upon his dissent in *Furman. Id.* at 227.

63. *Id.* at 227.

64. *Id.* at 231.

65. *Id.* at 187 (plurality opinion).

66. *Id.* at 187 n.35.

67. *Id.* at 179-80.

68. *Id.* at 182.

dum[69] all indicated that public sentiment was in favor of retaining the death penalty. With these considerations in mind, the Court refused to apply the first *Weems* test of excessive punishment on the ground that "[c]onsiderations of federalism as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."[70]

The two dissenting opinions, by Justices Brennan and Marshall, focused on the third *Weems* test. Justice Brennan suggested that the majority opinion in analyzing "evolving standards of decency" looked to the state procedures for applying the penalty rather than the death penalty itself, in that the majority had arrived at constitutionality not by testing the penalty but by testing only the sentencing procedures.[71] Justice Marshall based his dissent upon the excessiveness[72] of the death penalty and upon an interpretation of the contemporary moral standards test that would look only to a fully informed citizenry.[73] Relying in part upon a study that indicated that public opinion seemingly in support of the death penalty altered significantly when only the opinions of those knowledgeable about the effects and consequences of the penalty were considered, Justice Marshall concluded that "the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable."[74]

The *Gregg* decision upheld the constitutionality of capital punishment for deliberate murder under state statutes that allowed juries and judges to determine, under prescribed guidelines, whether a defendant should be sentenced to death. The constitutionality of the statutes depended upon the fact that those guidelines permitted admission of evidence demonstrating aggravating or mitigating circumstances prior to the discretionary determination. On the same day *Gregg* was decided, the Court struck down mandatory death sentences for murder in *Roberts v. Louisiana*.[75] As a result of *Gregg*, approximately 300 prisoners in death cells in a number of states became subject to execution because their sentences were in conformity with the statutes upheld by the Court. Several have since been executed. About 300 other prisoners were affected by the ruling in *Roberts* and have

69. *Id.* at 181. The referendum effectively negated a prior ruling by the Supreme Court of California in People v. Anderson, 6 Cal. 3d 628, 493 P. 2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

70. 428 U.S. at 186-87.

71. *Id.* at 227 (Brennan, J., dissenting).

72. *Id.* at 231 (Marshall, J., dissenting).

73. *Id.* at 232.

74. *Id.*

75. 428 U.S. 325 (1976). *See also* Woodson v. North Carolina, 428 U.S. 280 (1976).

since been re-sentenced to life imprisonment or to death under revised sentencing procedures.

C. *Coker v. Georgia*

On June 29, 1977, the Court in *Coker v. Georgia*,[76] dealt specifically with the question left open in *Gregg*—the constitutionality of the death penalty as punishment for a crime other than murder. The Court held that a sentence of death for rape of an adult women constitutes cruel and unusual punishment and is therefore prohibited by the Eighth Amendment.[77] Once again, there was no opinion for the Court. Justice White wrote the plurality opinion in which Justices Stewart, Blackmun and Stevens joined.[78] Justices Brennan and Marshall each concurred separately in the judgment, adhering to the view that the death penalty is in *all* circumstances a cruel and unusual punishment.[79] The Chief Justice, joined by Justice Rehnquist, dissented.[80] Justice Powell concurred in part and dissented in part, his dissent being from that section of the opinion holding that rape, with or without aggravated circumstances, cannot constitutionally be punished by death.[81] In his view, capital punishment for rape would be constitutional in situations in which legislatures have allowed this ultimate penalty for outrageous rape resulting in serious and lasting harm to the victim.[82] Since Coker was not convicted of such an "outrageous rape," but rather of rape coupled with another felony, armed robbery, the death penalty was cruel and unusual as applied to him.[83]

In his plurality opinion, Justice White relied upon all three *Weems* tests. The Court referred to the *Gregg* opinion for a clarification of the first two tests:

> Under *Gregg*, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.[84]

With respect to the rape of an adult woman, the Court concluded that the death penalty is a cruel and unusual punishment because it is excessive and disproportionate to the crime of rape.[85] In addition, the Court in examining contemporary moral standards found that prevailing public sentiment was

76. 97 S. Ct. 2861 (1977).
77. *Id.* at 2866.
78. *Id.* at 2863-70.
79. *Id.* at 2870.
80. *Id.* at 2872.
81. *Id.* at 2870.
82. *Id.* at 2871-72.
83. *Id.* at 2870.
84. *Id.* at 2865 (plurality opinion).
85. *Id.* at 2866.

not in favor of the death penalty for rape; subsequent to *Furman*, only three state legislatures included the crime of rape of an adult woman in their amended death penalty statutes.[86] Furthermore, as Justice White noted, "[a]t no time in the last 50 years has a majority of the States authorized death as a punishment for rape."[87]

In ruling that the death penalty for rape in connection with a felony was too severe a punishment, Justice White did not overlook the seriousness of the crime:

> We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." . . . Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage.[88]

Thus, Justice White, relying upon the tests devised in *Weems*, concluded that although rape is deserving of serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for a convicted rapist.[89]

Conclusion

Coker, in part, echoes the same arguments that I expressed in the 1963 *Rudolph* dissent. I would be less than honest in failing to admit a great personal gratification in the Court's holding. Joining with Justices Brennan and Marshall in the belief that the death penalty is unconstitutional in all circumstances,[90] I regard *Coker* as a giant step forward after the deplorable step backward in *Gregg*. This result is to be welcomed and is worthy of commendation. To paraphrase Justice McKenna's pertinent observation in *Weems*: Time does indeed work changes.[91] In 1963, I was confident that the views expressed in the *Rudolph* dissent would ultimately prevail, and now with equal confidence I voice the belief that *Gregg* will be ultimately

86. *Id.* at 2867. Those states were Georgia, North Carolina and Louisiana. The North Carolina statute was invalidated by Woodson v. North Carolina, 428 U.S. 280 (1976). Louisiana's statute was invalidated by Roberts v. Louisiana, 428 U.S. 325 (1976). Also, Florida, Mississippi and Tennessee permitted the death penalty for rape of a child by an adult. 97 S. Ct. at 2867 & n.9.

87. *Id.* at 2866.

88. *Id.* at 2868 (footnotes omitted) (citing LAW ENFORCEMENT ASSISTANCE ADMINISTRATION REPORT, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 338 (1973); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 922-23 (1973)).

89. *Id.* at 2869.

90. *Id.* at 2870. *See* Justice Brennan's and Justice Marshall's dissents in *Gregg*, and their concurring opinions in *Furman*.

91. Weems v. United States, 217 U.S. 349, 373 (1910).

overruled and the Court will take what Camus called the great civilizing step of putting an end to the death penalty.[92] At the time that *Rudolph* came before the Court, I believed that the death penalty was unconstitutional *per se* under the Eighth Amendment. I have not departed from that conviction.

92. *See* A. CAMUS, REFLECTIONS ON THE GUILLOTINE (R. Howard trans. 1959).