DEDICATION

A Tribute to Justice Arthur J. Goldberg

By JUSTICE STANLEY MOSK*

It can be said without successful contradiction that we have been blessed with no more versatile and useful American in the past half century than Arthur J. Goldberg. He has excelled as a successful lawyer, arbitrator, law professor, cabinet officer, Supreme Court Justice, ambassador, diplomat—and most of all, as a concerned defender of human rights everywhere.

Arthur Goldberg's service on the Supreme Court—as it is perpetuated in published volumes—is the most readily available aspect of his work open to scrutiny. In my opinion, while his tenure on the Court may have been brief in terms of chronological years, it was timeless in the context of major contributions to constitutional law.

No jurist, before or since, has so persuasively called our attention to the Ninth Amendment as did Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*.[1] With the pen of a historical scholar, he traced the anatomy of that little noted amendment from the conception of James Madison, through Justice Story, to its application to the right of marital privacy.

More significantly, he maintained that "the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[2]

That observation has proved to be perceptive and helpful in achieving justice in innumerable areas. For example, the Constitution does not guarantee a defendant a "fair trial," but only, in the Sixth

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1. 381 U.S. 479, 486 (1965).

2. *Id.* at 492.

Amendment, "the right to a speedy and public trial"[3] and in the Fifth Amendment the right to "due process of law."[4] Nevertheless, courts have consistently required that, as a fundamental though unexpressed right, every accused must receive a fair trial; it is unthinkable for it to be otherwise.

In determining what rights are fundamental, judges cannot rely on their personal whims or predilections. Rather, Justice Goldberg wrote in *Griswold*, "they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' "[5] "The [judicial] inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . .' "[6]

I find *Griswold* particularly significant also because Justice Goldberg applied the Ninth Amendment and its implied guarantees of fundamental rights not only to the federal government, but to the states as well. Indeed, it was a state law of Connecticut that was invalidated in that case.[7] While agreeing with the Brandeis thesis that states may act as social laboratories, he does " 'not believe that this includes the power to experiment with the fundamental liberties of citizens . . . .' "[8]

Justice Goldberg struck a major blow for the protection of a criminal accused's constitutional rights in the famous *Escobedo* case.[9] Writing for a five-judge majority, he indicated a belief that prosecutions begin long before a defendant is haled into court, indeed often at the police station. Thus, while taking pains not to interfere with genuine police investigation of crime, he declared that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer."[10]

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3. U.S. CONST. amend. VI.

4. U.S. CONST. amend. V.

5. 381 U.S. at 493 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

6. *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

7. *Id.* at 480 (construing CONN. GEN. STAT. §§ 53-32, 54-196 (1958)).

8. *Id.* at 496 (quoting Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring)).

9. Escobedo v. Illinois, 378 U.S. 478 (1964).

10. *Id.* at 492.

He cited at length Dean Wigmore's suspicion of any system of administration that habitually depends upon compulsory self-disclosure as a source of proof,[11] and then declared:

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[12]

In *Escobedo*, Justice Goldberg referred to the duty of police to effectively advise a defendant of his right to remain silent.[13] This duty was later broadened by Chief Justice Warren to include the *Miranda* admonitions and the exclusionary rule as a means of deterring improper police conduct.[14]

In *Aguilar v. Texas*,[15] Justice Goldberg wrote the opinion for the Court that explained the requirements for issuance of a search warrant by state authorities. The issuing magistrate, he declared, must "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police."[16] While some hearsay may be permitted in affidavits for warrants, the instruments must contain affirmative allegations based not on mere suspicion or belief, but on personal knowledge—in short, the underlying circumstances from which the magistrate may make his independent determination of whether to issue the warrant. *Aguilar* retains vitality and is frequently cited in current cases.[17] By contrast, he held an affidavit, if "read in a commonsense way," to be sufficient in *United States v. Ventresca*.[18]

The right to travel, even for a native-born communist, was upheld by the Court in an opinion written by Justice Goldberg,[19] and such

11. *Id.* at 489 (citing 8 WIGMORE, EVIDENCE 309 (3d ed. 1940)).
12. 378 U.S. at 490.
13. *Id.* at 491.
14. *See* Miranda v. Arizona, 384 U.S. 486 (1966).
15. 378 U.S. 108 (1964).
16. *Id.* at 111.
17. *See, e.g.,* Michigan v. Summers, 452 U.S. 692, 698 n.8 (1981); *In re* De Monte, 674 F.2d 1169, 1173 (7th Cir. 1982); United States v. McEachin, 670 F.2d 1139, 1142 (D.C. Cir. 1981); People v. Fleming, 29 Cal. 3d 698, 708, 631 P.2d 38, 45, 175 Cal. Rptr. 604, 611 (1981); People v. Kurland, 28 Cal. 3d 376, 383, 618 P.2d 213, 217, 168 Cal. Rptr. 667, 671 (1980) (Newman, J., opinion of Court); *id.* at 399, 618 P.2d at 227, 168 Cal. Rptr. at 681 (Bird, C.J. dissenting).
18. 380 U.S. 102, 109 (1964).
19. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

right cannot be denied in the absence of due process. Indeed, he declared that "freedom of travel is a constitutional liberty closely related to rights of free speech and association."[20]

Of course, Justice Goldberg's significant contributions to jurisprudence were not limited to majority opinions. I particularly like this paragraph in his dissenting opinion in the maritime case of *Gillespie v. United States Steel Corp.*:

> *Stare decisis* does not mean blind adherence to irrational doctrine. The very point of *stare decisis* is to produce a sense of security in the working of the legal system by requiring the satisfaction of reasonable expectations. I should think that by allowing a remedy where one is needed, by eliminating differences not based on reason, while still leaving the underlying scheme of duties unchanged, this sense of security will not be weakened but strengthened.[21]

I believe my favorite Goldberg opinion is his dissent in *Swain v. Alabama*,[22] in which Chief Justice Warren and Justice Douglas joined. He deplored the use of peremptory challenges for the purposes of selecting an all-white jury. He wrote, "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."[23]

While his view did not prevail, thirteen years later I had the satisfaction of writing *People v. Wheeler*.[24] In that case, we expressly declined to follow the *Swain* majority, and held that under the California Constitution no litigant may exercise peremptory challenges in a racially discriminatory manner.[25]

The purpose of this brief article is not to serve as a compendium of Goldberg opinions. That would not be possible in the space allotted to me. He wrote numerous challenging dissents, many with literary and legal gems hidden within them. In the 1962 term he dissented nine times, in the 1963 term seventeen times, in the 1964 term twelve times. He was obviously most comfortable in the company of Chief Justice Warren and Justice Brennan,[26] though he also dissented on occasion

20. *Id.* at 517.

21. 379 U.S. 148, 166 (1964) (Goldberg, J., dissenting in part).

22. 380 U.S. 202, 228 (1965) (Goldberg, Douglas, JJ., & Warren, C.J., dissenting).

23. *Id.* at 244.

24. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

25. *Id.* at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910.

26. *See, e.g.,* Commissioner v. Brown, 380 U.S. 563, 581 (1965) (Goldberg, Black, JJ., & Warren, C.J., dissenting); American Ship Bldg. v. Labor Bd., 380 U.S. 300, 327 (1965)

with Justices Black, Douglas, Stewart, and Harlan.[27]

My desire here is to pay tribute to Arthur J. Goldberg, a discerning legal mind, a distinguished American, but more importantly, a warm, compassionate human being. It has been my pleasure to have known him vicariously since World War II—he and my brother served together, at times in some dangerous missions. It has been my good fortune to have known him personally and intimately since the days of the Kennedy administration. He has been a good friend, a delight to dine with, to talk to, to listen to, and even occasionally to argue with.

Arthur Goldberg has contributed much to the well-being of our country. And he is continuing to do so.

(Goldberg, J., & Warren, C.J., concurring in the result); Bouie v. Columbia, 378 U.S. 347, 363 (1964) (Goldberg, J., & Warren, C.J., joining opinion of Brennan, J., and holding of the Court); Simpson v. Union Oil Co., 377 U.S. 13, 25 (1964) (Goldberg & Brennan, JJ., mem.).

27. *See, e.g.,* Paragon Coal Co. v. Commissioner, 380 U.S. 624, 639 (1965) (Goldberg & Black, JJ., dissenting); Swain v. Alabama, 380 U.S. 202, 228 (1965) (Warren, C.J., Goldberg & Douglas, JJ., dissenting); Crider v. Zurich Ins. Co., 380 U.S. 39, 43 (1965) (Goldberg, Harlan & Stewart, JJ., dissenting).