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RECENT DECISIONS

Cruel and Unusual Punishment—CONSTITUTIONALITY OF THE DEATH PENALTY FOR RAPE WHERE VICTIM'S LIFE NEITHER TAKEN NOR ENDANGERED—*Ralph v. Warden*

Throughout history societies have attempted to influence behavior and maintain order through the use of sanctions imposed by custom, tradition and law.¹ Various methods and degrees of punishment have been exacted for anti-social behavior;² each individual society fixing its own value upon the interest to be protected³ and its interest in punishing the offender.⁴ Some civilizations have utilized torture, maiming and, not infrequently, cruel and painful deaths as punishment for crimes.⁵

¹ See generally 4 W. BLACKSTONE, COMMENTARIES *1; J. Hall, *Readings in Jurisprudence* 857 (1938); Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

² The method and degree of punishment expresses society's disapproval of a given act. See, e.g., *State v. Borgstrom*, 69 Minn. 508, 520, 72 N.W. 799, 803 (1897) where the court recounted:

By the Roman law a parricide was punished by being sewed up in a leather sack with a live dog, a cock, a viper and an ape, and cast into the sea.

See also Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940).

³ Society seeks to preserve life by making murder a crime and therefore punishable. Likewise, property is protected by punishing acts of larceny, and property and persons are guarded by punishing for crimes such as robbery, burglary and arson. The value placed upon these interests varies with the time and with circumstances in a given society. For instance, the Roman civil law prescribed death for the crime of rape, while early Jewish law prescribed death only if the victim was betrothed to another. If the victim was not betrothed, Jewish law required the ravisher to pay fifty shekels to the girl's father and marry the victim. Saxon law also prescribed death for rape. Later English law exacted castration and blinding, and for a short period reduced the crime of rape to a mere misdemeanor, though it was later raised to a felony. See 4 W. BLACKSTONE, COMMENTARIES *210-13; Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940). See also *Robinson v. California*, 370 U.S. 660 (1962).

⁴ See, e.g., 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 451 (2d ed. 1968) (criminal punishment has at times been a great source of revenue as well as a means to inflict painful retribution upon offenders).

⁵ Barbarous practices were utilized under the guise of authoritarian control of society and were administered with passion, prejudice, ill will and other unworthy motives. Such methods as death by burning, crucifixion, disembowelling and drawing and quartering were used during the Middle Ages up to the time of the Magna Carta. See, e.g., *Robinson v. California*, 370 U.S. 660, 668 (1962) (Douglas, concurring) (cruel punishments for being insane); *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (drawing and quartering, torture on the rack and thumbscrew).

In response to this history of barbarous punishment the Eighth Amendment to the Constitution which prohibits the imposition of cruel and unusual punishments was adopted.⁶ However, what constitutes cruel and unusual punishments has not been explicitly defined by our courts.⁷ Subsequently, there is no all-encompassing definition of "cruel and unusual" though there have been attempts to define it. Some courts have interpreted the Eighth Amendment as proscribing only those punishments deemed cruel and unusual by the framers of the constitution⁸ while others have given it a more liberal and flexible interpretation.⁹

Generally, evolving concepts of decency and fairness within the limits of the standards of civilized society are considered with respect to the nature of the crime and the culpability of the defendant.¹⁰ It is consistently held that, to meet constitutional standards, the punishment must be proportionate to the crime.¹¹ Sentences that are excessive in length,¹² inherently

⁶ U.S. CONST. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The phrase "cruel and unusual" first arose legislatively in the English Bill of Rights although its origins are said to stem from the Magna Carta. 4 W. BLACKSTONE, COMMENTARIES *379. It was included in the Virginia Declaration of Rights of 1766, and James Madison incorporated it into his 1789 draft of the constitutional amendments. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 100 (1958); *Weems v. United States*, 217 U.S. 349 (1910); *Austin v. Harris*, 226 F. Supp. 304 (W.D. Mo. 1964). See generally Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. Rev. 846 (1961) [hereinafter cited as N.Y.U. Note].

⁷ See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (dissent); *Howard v. Fleming*, 191 U.S. 126 (1903); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (prison treatment).

⁸ See, e.g., *Sims v. Eyman*, 405 F.2d 439 (9th Cir. 1969) where the court stated that the Constitution makes it plain in the grand jury clause, the double jeopardy clause, and the due process clause of the Fifth Amendment that the framers deemed the death penalty valid. See also *Hart v. Commonwealth*, 131 Va. 726, 109 S.E. 582 (1921).

⁹ Most courts recognize that it is a flexible concept that, by its very nature, must continue to change. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349, 373 (1910) (the meaning must be "wider . . . than the mischief which gave it birth."). See generally N.Y.U. Note, *supra* note 6, at 850 n.27.

¹⁰ See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910); *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970); *Faulkner v. State*, 445 P.2d 815 (Alaska 1968); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968). See also *Collins v. Johnston*, 237 U.S. 502 (1915).

¹¹ See, e.g., *Weems v. United States*, 217 U.S. 349 (1910); *Faulkner v. State*, 445 P.2d 815 (Alaska 1968); *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952); *State v. Driver*, 78 N.C. 423 (1878); *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948).

cruel,¹³ or dehumanizing¹⁴ in effect may fall within this prohibition. The basic concept governing the application of the Eighth Amendment is the dignity of man.¹⁵

Statutes authorizing wide ranges of penalties without standards by which they are to be administered are particularly susceptible to abuses of discretion that may result in sentences so inordinately excessive or unusual that they violate the Eighth Amendment.¹⁶ This principle has recently been applied to the states by incorporation of the Eighth Amendment into the Fourteenth.¹⁷

The most prevalent penalties today are in the nature of fines, imprisonment and death.¹⁸ Of these the death penalty is attacked the most vehemently. Abolitionists contend that it is contrary to modern standards of morality and criminal justice and an affront to the personal value and dignity of man.¹⁹ The deterrent effect of the death penalty is questioned,

¹² See, e.g., *O'Neil v. Vermont*, 144 U.S. 323 (1892) (Field, J., dissenting) (19,914 days in jail if fine not paid); *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970) (5 year sentence for refusal to be inducted into the armed forces). *But see* *Badders v. United States*, 240 U.S. 391 (1916); *United States ex rel. Bongiorno v. Ragen*, 54 F. Supp. 973 (N.D. Ill. 1944) (199 year sentence held valid). *See generally* Annot., 33 A.L.R.3d 335 (1970).

¹³ See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947).

¹⁴ The concept of dehumanizing punishment was explained in *Trop* where the court held that denationalization for the crime of desertion from the armed forces was cruel and unusual because it stripped a man of his citizenship and placed him at the mercy of the world. *Trop v. Dulles*, 356 U.S. 86 (1958). *See also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

¹⁵ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

¹⁶ It has been a matter of conjecture whether there is any individual significance in the words "cruel" and "unusual." The most reasonable conclusion is that the phrase is conceptual, and that the technical definitions of the words, their order, or whether they are to be used conjunctively or disjunctively are matters of academic concern only.

It has been said that the term "cruel and unusual" is latently ambiguous. *Gottlieb, Testing the Death Penalty*, 34 S. CAL. L. REV. 268, 281 (1961).

¹⁷ See, e.g., *Robinson v. California*, 370 U.S. 660 (1962); *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo. 1968).

¹⁸ The crimes for which the death penalty is still exacted has decreased. *See McCafferty, Major Trends in the Use of Capital Punishment*, XXV FED. PROB. 15 (Sept. 1961).

Some states do retain remnants of earlier forms of corporal punishment. *See, e.g., State v. Cannon*, 190 A.2d 514 (Del. 1963).

¹⁹ The arguments for and against the death penalty may be classed into two general categories—those that are dogmatic and those that are empirical. It has been suggested, however, that the scientific approach may be actually only a disguise for

and it is contended that if any deterrent effect is in fact realized, it could be achieved as effectively through less severe means.²⁰ Abolitionists feel that the certainty of being punished is a greater deterrent than the severity of the punishment.²¹ It is also argued that modern objectives of penology are rehabilitation and reformation and that by executing the convict society loses the opportunity to realize these objectives.²²

Retentionists, on the other hand, argue that a deep-rooted objective of criminal justice requires severe penalties to deter the commission of heinous crimes.²³ As evidence of the death penalty's deterrent effect proponents

irrational feeling. See Sellin, *The Death Penalty*, ALL MODEL PENAL CODE (Tent. draft no. 9, 1959) [hereinafter cited as Sellin, MODEL PENAL CODE].

The moral objections to the death penalty are based on religious and philosophical ideals. Society and the whole of mankind suffer by the removal of even one man, thus upsetting the equilibrium of nature. Even if mankind generally is not harmed, the value of life itself is diluted and the dignity of man is discounted by the imposition of the death penalty.

Concepts of fairness are also violated when one considers the possibility that innocent persons may be wrongfully executed. See Hockhammer, *The Capital Punishment Controversy*, 60 J. CRIM. L.C. & P.S. 360 (1969).

²⁰ Abolitionists argue that people abstain from anti-social behavior because of a feeling of obligation to behave lawfully. See Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. 141, 142 (1969).

It is also argued that the death penalty may even increase the instance of certain crimes. Once a criminal has committed a capital offense he may feel that he has nothing to lose by killing hostages or police. See also *People v. Cash*, 52 Cal. 2d 841, 345 P.2d 462 (1959) where the defendant, after unsuccessful attempts to commit suicide, committed a capital crime so that the state would execute him.

²¹ The last execution in this country was in June 1967. If, however, the death penalty is to have any deterrent effect at all there must be certainty that it will be carried out. See Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Leisse, *The Supreme Court and Cruel and Unusual Punishment from Wilkerson to Witherspoon and Beyond*, 14 ST. LOUIS L.J. 463 (1970); Sellin, MODEL PENAL CODE, *supra* note 19, at 20; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268 (1968).

²² Belief in a scientific approach to the understanding of the motive forces of human conduct, which is the result of the growth of the behavioral sciences in the nineteenth and twentieth centuries, has brought about great changes in the discussion about the aims of criminal justice. See generally Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959); Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. 141, 147 n.11 (1969).

²³ See, e.g., *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) (dissent); Murdy, *A Moderate View of Capital Punishment*, XXV FED. PROB. 11 (Sept. 1961).

Another aim allegedly achieved by the imposition of the death penalty is eugenic exclusion of abnormal human strains by making impossible the future procreation of criminal offenders. The efficacy of this proposal is questionable, and the same objective could be achieved as well by sterilization. See Sellin, *Capital Punishment*, XXV FED. PROB. 3 (Sept. 1961). See generally Note, *In Defense of Capital Punishment*, 54 KY. L.J. 742 (1966).

point to the number of people who do not commit capital offenses.²⁴ They also argue that the death penalty insures that dangerous criminals will not be paroled to repeat their crimes.²⁵ Society demands protection. Indeed, it is sometimes argued, an outraged community might resort to lynch law if the death penalty were removed for certain crimes.²⁶

The debate over the policy behind the death penalty has continued for centuries²⁷ and though pressure for its abolition is widespread, it is still utilized in most states for various types of crime.²⁸ Attacks upon its constitutionality on the theory that it is cruel and unusual, either as to method of execution or severity of the penalty itself have, to date, proved unsuccessful.²⁹ The United States Supreme Court has had several opportunities recently to decide the constitutionality of the death penalty but has either refused certiorari³⁰ or has decided the cases on other grounds.³¹

²⁴ See, e.g., ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964), where the author recognizes the argument and states:

It must surely be apparent that the criminal law has a general preventative function to perform in the interests of public order and of security of life, limb, and possessions. Indeed, there is reason to assert that the influence of criminal sanctions on the millions who never engage in serious criminality is of greater social importance than their impact on the hundreds of thousands who do. *Id.* at 31.

²⁵ Some feel that in our modern penal system there is no actual permanent isolation of offenders and that parole or pardon will return the criminal to society to commit another crime. See, e.g., Note, *In Defense of Capital Punishment*, 54 KY. L.J. 742 (1966).

²⁶ If the public felt that the law was not protecting it or was not dispensing justice then the public might feel the need to resort to extra-legal means to do so. For some statistics and comments on this point see Sellin, *MODEL PENAL CODE*, *supra* note 19, at 16.

²⁷ Organized attack on the death penalty dates from 1764 when C. Beccaria published his essays on crimes and punishments, which proposed individualized punishment based on the character of the offender. See D'Esposito, *Sentencing Disparity: Causes and Cures*, 60 J. CRIM. L.C. & P.S. 182 (1969).

The chief arguments for and against the death penalty have remained relatively unchanged though the meaning of the arguments has changed along with concepts of justice and morality. Today society has abolished torture as a means of executing the death penalty and more humane methods are constantly being sought. Indeed, some of the deterrent effect may have been lost by hiding the executions from the public. See Sellin, *MODEL PENAL CODE*, *supra* note 19, at 18.

²⁸ Since 1930, 98% of the executions in the United States have been for murder and rape. Bedau, *The Courts, The Constitution, and Capital Punishment*, 12 UTAH L. REV. 201, 204 (1968).

²⁹ See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878); *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo. 1968). *But cf.* *United States v. Jackson*, 390 U.S. 70 (1968); *Ralph v. Warden*, — F.2d — (4th Cir. 1970), *reh. denied*, — F.2d — (4th Cir. 1971); *Calhoun v. State*, 85 Tex. Crim. 496, 214 S.W. 335 (1919).

³⁰ See, e.g., *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961), *cert. denied*, 375

The Fourth Circuit Court of Appeals recently ventured into this area of unbounded complexity and in *Ralph v. Warden*³² held that the death penalty is an unconstitutional sentence for the crime of rape where the victim's life is neither taken nor endangered. The defendant had threatened the lives of the victim and her son and then raped her. Although the victim was genuinely in fear for her life, a medical examination revealed no outward physical injury or psychological trauma. The court explained that under these circumstances the sentence of death was so disproportionate to the defendant's culpability and excessive in view of present standards of decency that it violated the Eighth Amendment.³³ The court also reasoned that in view of the great number of rapes in this country and the small number of convicted rapists who receive the death penalty, the selection of the death penalty in a case where there is less than the greatest aggravation evidences arbitrariness.³⁴

The court's approach in *Ralph* responds to the questions posed by Justice

U.S. 889 (1963); *Rudolph v. State*, 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 899 (1963); *Swain v. State*, 275 Ala. 508, 156 So. 2d 368 (1963), *cert. denied*, 382 U.S. 944 (1965); *Craig v. State*, 179 So. 2d 202 (Fla. 1965), *cert. denied*, 383 U.S. 959 (1966); *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746 (1967), *cert. denied*, 393 U.S. 823 (1968); *Williams v. State*, 427 S.W.2d 868 (Tex. Crim. App. 1967), *cert. denied*, 391 U.S. 926 (1968).

³¹ See, e.g., *Maxwell v. Bishop*, 398 U.S. 262 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

³² — F.2d — (4th Cir. 1970), *reh. denied*, — F.2d — (4th Cir. 1971).

³³ The Maryland Statute provided for penalties ranging from eighteen months to death. MD. CODE ANN. art. 27, § 461 (Repl. Vol. 1971).

The dissent in the denial for rehearing argued that Ralph's culpability was indeed great, however. Ralph had premeditatedly broken into the victim's home in the late nighttime, pulled the light box, and threatened the victim and her son with death. He then raped her and committed sodomy. There was also evidence that Ralph had confessed to other rapes.

Chief Judge Haynesworth explained in concurring in the denial of the rehearing that there is a "qualitative difference between life and death which cannot be readily disregarded." To justify the death penalty for the crime of rape there must be not only the endangering of life but lasting injury. See *Ralph v. Warden*, — F.2d — (4th Cir. 1970), *reh. denied*, — F.2d — (4th Cir. 1971).

³⁴ The death penalty is a discretionary alternative under the Maryland statute. Ralph argued, as have others, that he received the death penalty because he is a Negro and the victim was a white woman. The court noted this argument but did not address itself to it, concluding that there were too many variables involved that could affect the sentence. See, e.g., Brief for NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent as Amicus Curiae, *Ralph v. Warden*, — F.2d — (4th Cir. 1970). See also, Note, 22 WASH. & LEE L. REV. 43 (1965).

Goldberg in his dissent to denial of certiorari in *Rudolph v. Alabama*.³⁵ Both opinions draw from the precept of justice propounded in *Weems v. United States*³⁶ that punishment must be graduated or proportioned to the offense. More recently, *Trop v. Dulles*³⁷ added to this concept by stating that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁸ The Fourth Circuit decided that the legislative trend to abolish the death penalty for rape and the fact that no one has been executed for rape³⁹ since 1964 evidences sufficient evolution of the moral standard to limit the death penalty to the most aggravated instances.⁴⁰

³⁵ 375 U.S. 889 (1963) (Goldberg, Brennan & Douglas, JJ., dissenting) (footnotes omitted):

(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 "evolving standards of decency that mark the progress of our maturing society," or "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"?

The court in *Ralph* did not go so far as to hold that the penalty is unconstitutional per se, but it did adhere to the idea that only the protection of life itself justifies the use of the death penalty.

For comment and analysis see D'Esposito, *Sentencing Disparity: Causes and Cures*, 60 J. CRIM. L.C. & P.S. 182 (1969); Leisse, *The Supreme Court and Cruel and Unusual Punishment From Wilkerson to Witherspoon and Beyond*, 14 ST. LOUIS L.J. 463 (1970); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964) [hereinafter cited as Packer].

³⁶ 217 U.S. 349 (1910).

³⁷ 356 U.S. 86 (1958).

³⁸ *Id.* at 101.

³⁹ The court noted that only four countries and sixteen states still use the death penalty for rape. It follows, the court reasoned, that countries and states that have abolished it consider it excessive. Such use of comparative law is considered a valid measure of standards of decency. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 103 n.38 (1958); *Solesbee v. Balkcom*, 339 U.S. 9, 21 (1950) (Frankfurter, J., dissenting); *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968). But see Packer, *supra* note 35, at 1073-74.

⁴⁰ The legislative trend away from the death penalty for rape may eventually prompt a court to hold that the death penalty for rape is unconstitutional. *Ralph* was only concerned with the disproportionality in this case, however. The best evidence before the court on the issue of the mood of the community was the fact that there is a moratorium on the execution of these convicts. If society questions the validity of the penalty itself, then surely if it is to be used at all it should be used only in the extreme case.

The nature of the crime of rape and the interest to be guarded are important in interpreting the *Ralph* holding. The interests to be guarded are the dignity of womanhood and her physical and psychological integrity.⁴¹ The hazards involved in rape are the chance of unwanted pregnancy, the chance of contracting venereal disease and the mental and physical injuries to the person. All of these interests are violated to some degree by the act of sexual intercourse by force against the will of the victim without other aggravating circumstances.⁴² The *Ralph* decision does not discount these interests nor does it question the legislature's wisdom in providing for the death penalty as a maximum punishment. It does recognize, as did the Maryland legislature in providing for a wide range of punishments, that there is a wide range in the culpability of rapists and that the highest penalty should be reserved for those most culpable. The death penalty is still valid in cases where the victim's life is taken or endangered. No problem arises in applying this standard in a case where life is actually taken, but determining when life has been endangered promises to present grave difficulties.⁴³

The court recognized that life is endangered in many felony situations

It is still difficult to be certain that the imposition of the death penalty would shock the conscience of the community when it is not possible to ascertain what the community feels. See *United States v. Rosenberg*, 195 F.2d 583, 608 (1952). But see *Cahn, Authority and Responsibility*, 51 COLUM. L. REV. 838 (1951).

⁴¹ "Rape is one of the highest crimes against civilized society. . . ." *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523, 531 (1963). However, the emotional impact of rape on society also makes the crime susceptible to use as a tool of pure vengeance. Even the definition of the interest to be guarded is stated in emotional terms. See, e.g., *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766, 769 (1964).

Though the emotional impact should be recognized, it should not be forgotten that rape is a serious crime, and that it poses a grave threat to the safety of women. See, e.g., *State v. Chaney*, 477 P.2d 441 (Alaska 1970) (defendant and an accomplice raped a girl several times and beat her, but the defendant received only a one year sentence). See also *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968); *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1896); *Calhoun v. State*, 85 Tex. Crim. 496, 214 S.W. 335 (1919).

⁴² Many factors could combine to aggravate the crime of rape. See, e.g., *Butler v. State*, 285 Ala. 387, 232 So. 2d 631 (1970) (four Negroes held a young boy at gun point while they raped his date); *Snider v. Peyton*, 356 F.2d 626 (4th Cir. 1966) (nine year old girl raped and hospitalized).

⁴³ Life can be endangered by so many acts that as a standard the concept of endangering life is not certain enough to be of value. Bodily injury appears to be the real standard that is required under *Ralph*, however.

Some states make a distinction based on bodily injury for punishment purposes. See *NEV. REV. STAT. § 200.363* (1968); *Schwartz, The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 59 J. CRIM. L.C. & P.S. 509 (1968).

and that, absent physical evidence that life was endangered, it is a difficult fact to determine. The *Ralph* court implied that actual physical or psychological injury of a permanent nature must accompany the act to justify the imposition of the death penalty for rape.⁴⁴

Traditionally trial court sentences have not been susceptible to review except where there has been gross abuse of discretion.⁴⁵ Any sentence delivered under a constitutionally valid statute has been accepted as valid.⁴⁶ The *Ralph* case transcends the problem of review of sentence and imposes a constitutional standard upon the court's discretion for sentencing in rape cases.

Many courts, when faced with determining a community or society standard, have viewed it as a policy matter for the legislature and have refused to venture into that territory. However, the *Ralph* court invalidated the sentence, not the statute and, therefore, did not invade the legislature's domain.⁴⁷

This decision demonstrates the pressing necessity for viable standards for juries and courts to use in sentencing persons convicted of crimes.⁴⁸ Though the case is technically limited to a narrow factual situation other courts may well be induced to follow *Ralph* in limiting the imposition of the death penalty for other capital crimes.⁴⁹

E.D.B., C.J.S., Jr.

⁴⁴ The court stated that "there are rational gradations of culpability that can be made on the basis of injury to the victim." Certainly this is true, and physical injury does provide a more concrete standard. See also *Ralph v. Warden*, — F.2d — (4th Cir. 1970), *reh. denied*, — F.2d — (4th Cir. 1971). In the denial for rehearing Chief Justice Haynesworth compared the difference in sentences for the crime of murder and attempted murder, noting that the only difference was the death of the victim which is immaterial to the defendant's culpability.

⁴⁵ See, e.g., *United States v. Weiner*, 418 F.2d 849 (5th Cir. 1969); *United States v. Godel*, 361 F.2d 21 (4th Cir.), *cert. denied*, 385 U.S. 838 (1966); *Faulkner v. State*, 445 P.2d 815 (Alaska 1968).

⁴⁶ See, e.g., *Stephens v. Warden*, 382 F.2d 429 (4th Cir. 1967); *Overstreet v. United States*, 367 F.2d 83 (5th Cir. 1966); *Schultz v. Zerbst*, 73 F.2d 668 (10th Cir. 1934). *But see* *Faulkner v. State*, 445 P.2d 815 (Alaska 1968).

⁴⁷ *But see* *Ralph v. Warden*, — F.2d — (4th Cir. 1970), *reh. denied*, — F.2d — (4th Cir. 1971) (Boreman, J., dissenting), where Judge Boreman in dissenting to the denial for rehearing argues that the decision actually legislates in that it amends the Maryland statute to apply in a particular factual situation.

⁴⁸ Several states have adopted procedures for reviewing sentences. See, e.g., ALASKA CONST., art. 1, § 2. See also *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review* (Approved Draft, 1968).

⁴⁹ See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969) (robbery); *Craig v. State*, 179 So. 2d 202 (Fla. 1965), *cert. denied*, 383 U.S. 959 (1966) (rape where the defendant threatened the victim with a screwdriver).