THE CONSTITUTIONALITY OF THE DEATH PENALTY FOR NON-AGGRAVATED RAPE

Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970)

The appellant, armed with a tire iron, broke into the victim's home late at night. Threatening to kill her and her young son if she did not submit, he committed rape. A physician who examined the victim testified that she had suffered no physical or psychological harm from the appellant's assault. The appellant confessed to the crime, was convicted of rape, and sentenced to death by a three-judge court sitting without a jury.[1] He petitioned for a writ of habeas corpus contending that, in a rape case, when the victim's life is neither taken nor endangered, the imposition of the death penalty constitutes cruel and unusual punishment. The writ was denied.[2] On appeal, the United States Court of Appeals for the Fourth Circuit *held*: although the sentence imposed by the trial court was within Maryland's statutory prescription for rape, the eighth amendment's prohibition against cruel and unusual punishment prohibits the execution of a rapist whose victim's life was neither taken nor endangered.[3]

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1. MD. ANN. CODE art. 27, § 461 (Repl. Vol. 1967) provides:
Every person convicted of a crime of rape or as being an accessory thereto before the fact shall, at the discretion of the court, suffer death, or be sentenced to confinement in the penitentiary for the period of his natural life, or undergo a confinement in the penitentiary for not less than eighteen months nor more than twenty-one years. . . .

2. The record does not indicate that the eighth amendment issue was ever raised in the state courts. Nevertheless, the attorney for the state did not urge dismissal for lack of exhaustion of state remedies. The state courts of Maryland have repeatedly held that punishment is not cruel and unusual if it is within the statutory limits prescribed for the crime. *See* Robinson v. State, 238 A.2d 875 (1968). The appellate court found that the appellant had satisfied the exhaustion of state remedies requirement of federal law, since proceeding in the state court would have been ineffective. Ralph v. Warden, 438 F.2d 786, 788 n.1 (4th Cir. 1970), *cert. filed*, June 1, 1971.

3. Ralph v. Warden, 438 F.2d 786, 787 (4th Cir. 1970), *cert. filed*, June 1, 1971. This was exactly the same question before the Supreme Court in Rudolph v. State, 275 Ala. 115, 52 So. 2d 662 (1963), *cert. denied*, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan dissenting). In 1964 the Fourth Circuit had refused to rule on the same issue, stating that they had found no Supreme Court decision to support Ralph's eighth amendment contention and were not disposed to act favorably upon it. Ralph v. Pepersack, 335 F.2d 128, 141 (1964).

The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[4] Originally the courts interpreted the words "cruel and unusual" to mean the cruelty inherent in certain forms and methods of punishment.[5] The Supreme Court broadened this interpretation in *Weems v. United States*.[6] Weems, a government worker in the Philipines, was convicted of falsifying a minor government document. In accordance with the Spanish Penal Code then in effect, Weems was sentenced to fifteen years at hard labor with a life-long denial of civil rights.[7] The Court found the punishment disproportionate to the crime[8] and declared the entire statutory scheme unconstitutional.[9] This decision was justified not only on the historical ground that the drafters of the eighth amendment intended the clause to reach more

4. U.S. CONST. amend. VIII. Every state constitution, with the exception of Connecticut (where the provision is statutory) and Vermont (where it is considered to be part of the common law) has a similar provision. D. FELLMAN, THE DEFENDANT'S RIGHTS 203 (1958). For this reason there has been little debate whether cruel and unusual punishment is a state or federal constitutional issue. It is now settled, however, that the eighth amendment's prohibition of cruel and unusual punishment is applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962). *See* note 11 *infra*.

5. It was not until 1878 that the Supreme Court, in Wilkerson v. Utah, 99 U.S. 130 (1878), had occasion to discuss at length the constitutional prohibition against cruel and unusual punishment. In upholding shooting as a mode of execution, the court noted the difficulty in defining "the extent of the constitutional provision" but stated its applicability to "punishments of torture . . . and all others [involving] necessary cruelty." *Id.* at 136. *See In re* Kemmler, 136 U.S. 436, 447 (1890). "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word in the constitution. It implies something inhuman and barbarous, something more than the mere extinction of life." *Cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463-64 (1947).

6. 217 U.S. 349 (1910). The Court was interpreting the Phillipine bill of rights prohibiting the infliction of cruel and unusual punishment. The language of this provision was identical to the eighth amendment, and the Court found that Congress, in drafting the Phillipine provision, intended to give the words their constitutional significance. *Id.* at 383 (dissenting opinion).

7. *Id.* at 357-58.

8. "[I]t is a precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Id.* at 367. The basis for this interpretation of the eighth amendment had been laid in O'Neil v. Vermont, 144 U.S. 323, 337 (1892), by Mr. Justice Field, dissenting. He said the eighth amendment was "directed . . . against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." *Id.* at 339-40.

9. The court declared that the punishment would have been unconstitutionally disproportionate even if Weems had been given the minimum sentence of twelve years at hard labor. Weems v. United States, 217 U.S. 349, 365 (1910).

than methods of punishment,[10] but also by the judgment that the amendment should be interpreted in light of the changing times.[11]

The *Weems* doctrine of proportionality has seldom been used to invalidate harsh sentences because the majority of courts interpret the eighth amendment and similar state provisions as directed only to legislative action. Under that view a sentence imposed within the limits of a valid statute cannot be cruel and unusual.[12] In these jurisdictions a statutory punishment may be constitutionally attacked only on the grounds that it is so severe it would be cruel and unusual under any circumstances. This judicial deference to legislative judgment may be explained by the lack of definite guidelines to determine what is cruel and unusual.[13] A minority of courts have, however, ruled sentences imposed within valid statutes unconstitutional,[14] finding the eighth amendment a limitation on judicial as well as legislative action. Recognizing that fixing penalties is unquestionably a legislative func-

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

11. *Id.* at 378. "The clause of the Constitution . . . is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." The Court further broadened its interpretation of the eighth amendment in Robinson v. California, 370 U.S. 660 (1962), invalidating punishment of imprisonment imposed for narcotics addiction. Analogizing narcotics addiction to mental illness and leprosy, the Court concluded that "in light of contemporary human knowledge, a law which made a criminal offense of such disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 666.

12. *See, e.g.*, United States v. MacLeod, 436 F.2d 947, 951 (8th Cir. 1971), *cert. denied*, — U.S. — (1971); Guerro v. Fitzpatrick, 436 F.2d 378, 380 (1st Cir. 1971); United States v. Dawson, 400 F.2d 194, 200 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); Overstreet v. United States, 367 F.2d 83 (5th Cir. 1966); Lindsay v. United States, 332 F.2d 688, 692 (9th Cir. 1964); Beckett v. United States, 84 F.2d 731, 733 (6th Cir. 1936); Schultz v. Zerbst, 73 F.2d 668, 670 (10th Cir. 1934); Crossin v. State, 244 So. 2d 142, 144 (Fla. Dist. Ct. App. 1971); People v. Sinclair, 30 Mich. App. 473, 477, 186 N.W.2d 767, 771 (1971); State v. Grimm, 461 S.W.2d 746, 759 (Mo. 1971).

13. *Cf.* Goldberg, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777 (1970) [hereinafter cited as Goldberg]; Note, *Revival of the Eighth Amendment: Development of Cruel—Unusual Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

14. *See, e.g.*, Hedrick v. United States, 357 F.2d 121, 124 (10th Cir. 1966) (dictum); Rudolph v. Alabama, 275 Ala. 115, 52 So. 2d 662 (1963), *cert. denied*, 375 U.S. 889 (1963) (Goldberg, Douglas and Brennan dissenting); United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952); United States *ex rel.* Bongioro v. Ragen, 54 F. Supp. 973, 980 (N.D. Ill. 1945), *aff'd*, 146 F.2d 349 (7th Cir. 1945), *cert. denied*, 325 U.S. 865 (1945); Faulkner v. State, 445 P.2d 815 (Alas. 1968); Stephens v. State, 73 Okla. Crim. 349, 354, 121 P.2d 326, 328 (1942); Calhoun v. State, 85 Tex. Crim. 496, 504, 214 S.W. 335, 338 (1919).

tion, these courts have suggested that under some circumstances a sentence may be disproportionate to the crime. Implicit in these decisions is the belief that the appellate court is the final guardian of the rights of the individual.

Thirty-four states do not punish rape by death under any circumstances.[15] In the other sixteen states, death is an alternative but not mandatory punishment for rape.[16] The Maryland legislature has enacted penalties for rape ranging from eighteen months imprisonment to death.[17] Finding the eighth amendment a limitation on judicial as well as legislative action,[18] the court in *Ralph v. Warden* was faced with the constitutionality of the trial court's selection of the death penalty from among the statutory alternatives. It did not attempt to decide whether capital punishment *per se* violates the eight amendment, but decided the narrower question whether capital punishment for rape when the victim's life had neither been taken nor endangered is so disproportionate to the crime as to be cruel and unusual. Relying on language in *Weems*[19] and *Trop v. Dulles*,[20] the court concluded

15. ALAS. STAT. §11.15.130 (1970); ARIZ. REV. STAT. ANN. §13-614 (1971); CAL. PENAL CODE § 264 (Deering 1971); COLO. REV. STAT. ANN. § 40-2-28 (1963); DEL. CODE ANN. tit. 11, § 781 (1970); HAWAII REV. LAWS § 768-61 (1968); IDAHO CODE ANN. ch. 61 § 18-6104 (1947); ILL. REV. STAT. ch. 38, § 11-1 (1963); IND. ANN. STAT. § 10-4201 (1956); IOWA CODE ANN. § 698.1 (1946); KAN. STAT. ANN. § 21-3502 (1971); ME. REV. STAT. ANN. tit. 17, § 3151 (1964); MASS. ANN. LAWS ch. 265, § 22 (1968); MICH. STAT. ANN. § 28.355 (1962); MINN. STAT. ANN. § 617.01 (1964); MONT. REV. CODE ANN. § 94-4104 (1969); NEB. REV. STAT. § 28-408 (1965); N.H. REV. STAT. ANN. § 585-16 (1955); N.J. STAT. ANN. § 2A:164-3 (1968); N.M. STAT. ANN. § 40A-1-7; § 40A-9-2 (1964); N.Y. PENAL LAW art. 130 § 25, 30, 35 (McKinney 1967); N.D. CENT. CODE § 12-30-05 (1960); OHIO REV. CODE ANN. § 2901.24 (Page 1954); ORE. REV. STAT. § 163.210 (1969); PA. STAT. tit. 18, § 4721 (1963); R.I. GEN. LAWS ANN. § 11-37-1 (1970); S.D. CRIM. CODE § 22-22-5 (1967); UTAH CODE ANN. § 76-53-18 (1953); VT. STAT. ANN. tit. 13, § 3201 (1958); WASH. REV. CODE ANN. § 9.79.020 (1961); W. VA. CODE ANN. § 61-2-15 (1966); WIS. STAT. ANN. § 944.01 (1958); WYO. STAT. ANN. § 6-63 (1959).

16. ALA. CODE tit. 14, § 395 (1959); ARK. STAT. ANN. § 41-3403 (1964); FLA. STAT. ANN. § 794.01 (1965); GA. CODE ANN. § 26-2001 (1969); KY. REV. STAT. ANN. § 435.090 (1971); LA. CIVIL CODE art. 14.42 (West 1951); MD. ANN. CODE art. 27, § 461 (1971); MISS. CODE ANN. § 2358 (1957); MO. ANN. STAT. § 559.260 (1953); NEV. REV. STAT. § 200.363 (1968); N.C. GEN. STAT. § 14-21 (1969); OKLA. STAT. ANN. tit. 21, § 1115 (1970); S.C. CODE ANN. § 16-72 (1962); TENN. CODE ANN. § 39-3702 (1955); TEX. PEN. CODE ANN. art. 1189 (1961); VA. CODE ANN. § 18.1-44 (1960).

17. *See* note 1 *supra.*

18. Ralph v. Warden, 438 F.2d 786, 789-91 (4th Cir. 1970).

19. *See* note 11 *supra.*

20. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958).

that current public opinion provided the appropriate standard to determine whether the death sentence for appellant's crime was cruel and unusual punishment.[21] For objective indicia of public opinion the court looked to legislative schemes in other states and nations, and the general decline in executions for rape.[22] Neither basis for this determination is a scientifically reliable indication of public sentiment.

The *Ralph* court found that the absence of the death penalty in thirty-four states was a strong indication of public sentiment.[23] In *Weems,* the Supreme Court had used a comparative law approach, but no American jurisdiction had a punishment for a comparable crime even approaching the severity of Weem's sentence. When, as in *Ralph,* almost one-third of the jurisdictions have similar statutory provisions, the contrast may show no more than different exercises of legislative judgment, and not strong sentiment against the death sentence. The court was also on uncertain ground in concluding that the legislative schemes reveal current trends. In 1919, only seventeen states provided the death penalty for rape compared to sixteen today.[24] The court was apparently impressed by recent but unsuccessful attempts to abolish the death penalty for rape.[25] Indeed, the infrequency with which the death penalty has been imposed in rape cases may have diminished public awareness of this issue and placed a damper on any movement for statutory change.[26]

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21. Ralph v. Warden, 438 F.2d 786, 789-90 (4th Cir. 1970). For other Supreme Court cases supporting this conclusion, *see* Robinson v. California, 370 U.S. 660, 666 (1962); Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947).

22. Ralph v. Warden, 438 F.2d 786, 791-93 (4th Cir. 1970).

23. *Id. See* note 18 *supra.*

24. In 1919 seventeen states provided the death penalty for rape. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 11-12 (1919); Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1073 (1964).

25. Ralph v. Warden, 438 F.2d 786, 791 (4th Cir. 1970). The court reasoned that the elimination of the death penalty for rape in the District of Columbia, D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91, 358, § 20, 84 Stat. 473, 600, *amending* D.C. CODE ANN. § 22-2801 (1970), was symbolic of the total movement. Also, the recommendations of the National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, §§ 1641 and 3201 (1971), and the N.J. MODEL PENAL CODE, §§ 213.1 and 6.06 (Proposed Official Draft, 1962) carried considerable weight. Such activity, although from highly respected sources, is hardly indicative of any large-scale trend.

26. Ralph v. Warden, 438 F.2d 786, 792 (4th Cir. 1970). For example, only once in the last forty years has the Federal Government executed anyone for rape. United States Dep't of Justice, Bureau of Prisons, *National Prisoner Statistics, No. 45, Capital Punishment 1930-1968,* at 29 (1969). *See* note 35 *infra.*

The actual decline in the number of executions for rape does not, of course, necessarily reflect current public opinion. Although no one has been executed for any crime in the United States since 1967[27] and no one for rape since 1964,[28] the number of persons sentenced to death has steadily increased.[29] Unless there has been a wide divergence beween the judges and juries who impose the sentence and the public as a whole,[30] there has been no popular rejection of the death penalty.[31] If one believes that juries are cross-sections of the community and reflect current attitudes, then the increase in the number of defendants sentenced to death warrants a conclusion opposite to that reached by the *Ralph* court. The probable reason for the temporary cessation of executions in the United States is the recent attack on the constitutionality of the death penalty *per se*.[32] To conclude that public sentiment is against the death sentence for rape, the test suggested for constitutionality, ignores the reason behind the cessation of execution.

The court also found the three-judge court's choice of the death penalty in this case was anomalous when compared to the large number of rapists sentenced to prison.[33] It argued that the death sentence

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27. The last execution in the United States took place June 3, 1967.

28. Ralph v. Warden, 438 F.2d 786, 792 (4th Cir. 1970).

29. In 1965, 298 prisoners were under sentence of death, United States Department of Justice, Bureau of Prisons, *National Prisoner Statistics No. 45, Capital Punishment 1930-1968*, at 12 (1969). This number increased to 479 in 1966; sixty of these persons were under sentence of death for rape. *Id.* at 2. As of October 14, 1971, 654 prisoners were under sentence of death. *Citizens Against Legalized Murder, Inc.* Newsletter, vol. V No. 2, (Nov. 1971).

30. Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968):

> [O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

31. *Cf.* Brief by American Friends Service Committee *et al.* as amicus curiae at 6, Witherspoon v. Illinois, 391 U.S. 510 (1968); Witherspoon v. Illinois, 391 U.S. 510, 521 n.19 (1968). *But see* Goldberg at 1784.

32. The Supreme Court has granted *certiorari* in four cases which raise on appeal the question whether the death penalty is cruel and unusual punishment prohibited by the eighth amendment. Aikens v. California, 70 Cal. 2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969), *cert. granted*, 403 U.S. 952 (1971); Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969), *cert. granted*, 403 U.S. 952 (1971); Furman v. Georgia, 225 Ga. 253, 167 S.E.2d 628 (1969), *cert. granted*, 403 U.S. 952 (1971); Branch v. Texas, 447 S.W.2d 932 (Tex. Civ. App. 1969), *cert. granted*, 403 U.S. 952 (1971).

33. The court pointed out that in 1960, the year Ralph committed the rape, 15,560 rape cases were reported in the United States. Between 1960 and 1968, 190,790

was so anomalous as to be disproportionate in this case because, on the record, the appellant's crime was not marked with the aggravating circumstances which often accompany rape.[34] Varying penalties for an offense do not by themselves, however, violate the eighth amendment, because the eighth amendment does not require perfect equality in the punishment of crimes. "Undue leniency in one case does not transfer a reasonable punishment in another case to a cruel one."[35] Infrequency of imposition may mean the sentence is "unusual" but not necessarily in the constitutional sense,[36] nor does it mean the sentence is cruel, and the eighth amendment seems to require at least a finding of cruelty before it will condemn a punishment.[37]

When a court decides to examine whether a particular punishment

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rapes were reported. Compared to the number of reported cases the imposition of the death penalty was rare. 1961, the year Ralph was convicted, saw only 21 convicted rapists sentenced to death and the total 1960-68 period saw only 101 receive the sentence. Only 28 convicted rapists were executed during this same period. Ralph v. Warden, 438 F.2d 786, 792-3 (4th Cir. 1970). *See also* FBI, Uniform Crime Reports, *Crime in the United States* (1970).

34. Evidence in the case indicates, contrary to the majority's finding, that the victim's life was endangered.

> Armed with a tire iron, Ralph broke into the victim's home late at night. Threatening her and her young son, who was asleep in another room, with death if she did not submit, he forcibly committed rape and sodomy. Ralph v. Warden, 438 F.2d 786, 788 (4th Cir. 1970).

Is the majority of the court limiting the circumstances under which the death penalty could be imposed to situations in which there is actual harm to the victim, or is the decision limited to the actual circumstances of the crime involved? These questions are left unanswered because of the failure of the majority to define the term "endangered". As a result, the majority's holding may be extremely difficult to apply in future cases. Without a definition of "endangered" the question appears to be the subjective judgment of the appellate courts versus the subjective judgment of the trial court. *See* Ralph v. Warden, 438 F.2d 786, 794-98 (4th Cir. 1970) (Boreman, J., dissenting opinion); *cf.* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1077 (1964).

35. Howard v. Fleming, 191 U.S. 126, 136 (1903), *relied upon* in Badders v. United States, 240 U.S. 391, 394 (1916).

36. Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958).

37. *In re* Kemmler, 136 U.S. 436, 447 (1890); GOLDBERG at 1789-90. If the death penalty is administered arbitrarily or discriminatorily the court might find this a form of "unusual" punishment proscribed by the eighth amendment without also requiring a showing of cruelty. Former Supreme Court Justice Goldberg has suggested this approach, GOLDBERG at 1790. This interpretation, however, appears unnecessary as discriminatory administration would be prohibited by the equal

is cruel and unusual, appropriate standards must be established. Many courts have avoided the problem by applying no standard.[38] Other courts have looked to whether the "punishment contradicts prevailing standards of decency,"[39] or is "shocking to the sense of justice."[40] This approach forces courts to evaluate public sentiment regarding the severity of the punishment. While according to recent public opinion polls, the *Ralph* court may have been correct in determining the current state of the public conscience,[41] it reached this conclusion on less than convincing empirical data. Objective indicia of societal attitudes is lacking.[42] The *Ralph* court realized this difficulty. All data relied

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protection clause of the fourteenth amendment. *Cf.* Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded on other grounds,* 398 U.S. 262 (1970); Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1082 (1964). The problem remains the lack of statistics to prove discrimination. While strong probability of discrimination can be shown by statistics, there remain too many variables for a court conclusively to decide there has been discrimination. *See* Ralph v. Warden, 438 F.2d 786, 793 n.24 (4th Cir. 1970); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968). For examples showing the probability of a pattern of discrimination, see United States Dep't of Justice, Bureau of Prisons, *National Prisoner Statistic No. 45, Capital Punishment* 1930-1968 at 10 (1969); Sellin, *The Death Penalty* 7, in MODEL PENAL CODE (Tent. Draft No. 9, 1959). The *Ralph* court was unable to conclude from statistics showing a high correlation of race to death sentences in rape cases that *Ralph* received the death penalty because he is black. Ralph v. Warden, 438 F.2d 786, 793 n.24 (4th Cir. 1970).

38. *See, e.g.,* Hedrick v. State, 357 F.2d 121 (10th Cir. 1966); Stephens v. State, 73 Okla. Crim. 349, 121 P.2d 326 (1942); Calhoun v. State, 85 Tex. Crim. 496, 214 S.W. 335 (1919).

39. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958); *cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 469 (1947). Both were cited by Mr. Justice Goldberg in his dissent in Rudolph v. Alabama, 375 U.S. 889 nn. 2 & 3 (1963).

40. *See, e.g.,* United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952); United States *ex rel.* Bongiorno v. Ragen, 54 F. Supp. 973, 981 (1944); Faulkner v. State, 445 P.2d 815 (Alas. 1968); State v. Teague, 215 Ore. 609, 611, 336 P.2d 338, 339 (1959) (per curiam).

41. In Gallup poll conducted in 1969, 51% of those asked were in favor of retaining the death penalty for those convicted of murder. Forty percent were opposed and 9% had no opinion. Gallup Opinion Index, Report No. 45, p. 15, 16 (March 1969). It is logical to conclude that fewer persons are in favor of the death penalty for crimes other than murder. *Cf.* GOLDBERG at 1781 n.39 stating that a recent Gallup poll showed less than 6% of those interviewed favored death as an appropriate penalty for air-plane hijackers, bombers, and inciters of riots. Unless there is a historical carryover of death as an appropriate penalty for rape the percent may be quite low. *But see* Brief from respondent at 56, Aikens v. California, 403 U.S. 952 (1971) for a poll showing 64.3% in favor of the death penalty for murder.

42. There has been extreme difficulty in ascertaining a national standard of decency in obscenity cases. It would appear to be no less a problem with regard to criminal punishments. *See, e.g.,* Scuncio v. Columbus Theatre, Inc., 277 A.2d 924,

on dealt with the death penalty for rape without distinguishing whether the victim's life was taken or endangered. The court, on the basis of that data, could just as reasonably have declared the death penalty unconstitutional punishment for all rapes. It expressly refused to do so.[43]

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927 (R.I. 1971); Court v. State, 51 Wis. 2d 683, 188 N.W.2d 475 (1971); Seaton, *Obscenity: The Search for a Standard*, 13 U. KAN. L. REV. 117 (1964).

43. Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970).