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Constitutional Law - Death Penalty as Cruel and Unusual Punishment for Rape. Ralph v. Warden. No. 13,757 (4th Cir., Dec. 11, 1970)

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Churches receive other tax exemptions, however, about which there are no definitive Supreme Court cases. These include exemptions from death and gift taxes at the state level,[29] exemption from income taxation at both the state[30] and federal[31] levels, and exemption from sales and other excise taxes.[32] On the basis of *Walz*, it appears that these areas of exemption would be upheld if they are ever considered by the Court.

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Constitutional Law—DEATH PENALTY AS CRUEL AND UNUSUAL PUNISHMENT FOR RAPE. *Ralph v. Warden*, No. 13,757 (4th Cir., Dec. 11, 1970).

On January 18, 1961, the petitioner was convicted of rape, and sentenced to death in the Circuit Court for Montgomery County, Maryland.[1] In appealing the dismissal of a habeas corpus petition, he contended that the death penalty, under the circumstances, constituted cruel and unusual punishment as proscribed by the Constitution.[2] Reversing the conviction, the United States Court of Appeals for the Fourth Circuit held that the eighth amendment's prohibition against cruel and unusual punishment forbids Ralph's execution for rape, since his victim's life was neither taken, nor endangered.[3]

29. Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUM. L. REV. 968, 974 (1949).

30. *Id.* at 979.

31. INT. REV. CODE of 1954, § 501(c)(3).

32. Note, *supra* note 29, at 981.

1. This unreported case was noted in Ralph v. State, 226 Md. 480, 481, 174 A.2d 163, 164 (1961), *cert. denied*, 369 U.S. 813 (1962). The state of Maryland authorizes capital punishment for a person convicted of the crime of rape. MD. ANN. CODE art. 27, § 461 (Repl. Vol. 1971) provides:

> Every person convicted of a crime of rape or as being 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; and penetration shall be evidence of rape, without proof of emission.

2. Ralph v. Warden, No. 13,757 (4th Cir., Dec. 11, 1970), *rehearing denied*, (4th Cir., Mar. 1, 1971). The issue of whether the imposition of the death penalty on a convicted rapist constitutes cruel and unusual punishment was raised by the same petitioner in this court in 1964. Ralph v. Pepersack, 335 F.2d 128, 141 (4th Cir. 1964). In that case the court found no Supreme Court decision to support such a contention, and refused to act favorably upon it.

3. Ralph v. Warden, No. 13,757 at 2 (4th Cir., Dec. 11, 1970).

The eighth amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [4] In attempting to interpret and apply this amendment, the Supreme Court has continuously recognized the indefinite limits and scope of the provision.[5] Initially, in capital cases, the Court looked to the manner of execution rather than the substance of the punishment itself to determine whether eighth amendment strictures had been violated.[6] In *Wilkerson v. Utah*,[7] the Court ruled that death by shooting was not cruel and unusual punishment, limiting that term to "atrocities".[8]

4. U.S. CONST. amend. VIII.

Prohibition of cruel and unusual punishment had its origins in the Magna Carta. *See* chapter 14 of the Magna Carta, printed as confirmed by King Edward I in 1297, 4 HALSBURY, STATUTES OF ENGLAND 24 (2d ed. 1948), which provides: "A freeman shall not be amerced for a small fault, but after the manner of the fault, and for a great fault, after the greatness thereof. . . ." The phrase itself first appeared in the English Bill of Rights of 1688, and it formed a part of the Virginia Declaration of Rights adopted in 1776. James Madison placed it in the constitutional amendments he drafted in 1789, and it was incorporated in the Constitution in 1791 as part of the eighth amendment. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846 (1961).

Since the adoption of the federal Constitution, cruel and unusual punishment provisions have been incorporated into the constitutions of forty-eight states. *Id.* at 847 n. 7.

5. Ralph v. Warden, No. 13,757 at 7 (4th Cir., Dec. 11, 1970). The imprecision of the amendment was first noted by Justice Clifford in Wilkerson v. Utah, 99 U.S. 130 (1878). In delivering the opinion of the Court, he said, "Difficulty would attend the effort to define with exactness the extent of the Constitutional provision which provides that cruel and unusual punishment shall not be inflicted. . . ." 99 U.S. at 135-36. The lack of precision was further noted by the Court in Trop v. Dulles, 356 U.S. 86 (1958). The Court stated that "the words of the [Eighth] Amendment are not precise, and that their scope is not static." 356 U.S. at 100-01.

6. In Re Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

Such an interpretation was consistent with the views of the framers of the Constitution. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 841-42 (1969). *See also* Weems v. United States, 217 U.S. 349, 393-98 (1909) (dissent).

7. 99 U.S. 130 (1878).

8. *Id.* at 135. Mr. Justice Clifford said:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

Id. at 135-36.

In a subsequent case, *In re* Kemmler, 136 U.S. 436, 447 (1889), the Court reiterated the holding of *Wilkerson* characterizing punishments as cruel "when they involve torture or a lingering death."

See generally People v. Oppenheimer, 156 Cal. 733, 106 P. 74 (1909); State v. Burris,

Not until 1910, in the case of *Weems v. United States*,[9] did the Supreme Court go beyond the circumstances of the punishment, and indicate other standards which could be determinative of a punishment's constitutional status.[10] There the Court ruled that it was "a precept of justice that punishment for crime should be graduated, and proportioned to offense." [11] In determining a test by which to regard the eighth amendment, the Court stated that the cruel and unusual punishment clause is to be viewed as progressive; it "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." [12]

Weems has had little practical application in the courts.[13] One reason for this is that six years after the decision the Court rejected an eighth amendment claim on the basis of pre-*Weems* dictum, substantially reducing its effectiveness.[14] A more pervasive reason for the

194 Iowa 628, 190 N.W. 38 (1922); Dutton v. State, 123 Md. 373, 91 A. 417 (1914); State v. Gee Jon, 46 Nev. 418, 211 P. 676 (1923).

9. 217 U.S. 349 (1910).

10. The first case to apply a proportion test was State v. Driver, 78 N.C. 423 (1878). As early as 1892, in the case of O'Neill v. Vermont, 144 U.S. 323, 339-40 (1892), Justice Field in a dissenting opinion suggested that the eighth amendment forbids not only inherently cruel punishments such as torture and barbarism, but "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."

11. 217 U.S. at 367. The case involved a minor government official in the Philippines, who was convicted of falsifying a public document. The minimum punishment for the crime, as provided by statute: (1) twelve years and one day of *cadena temporal*—imprisonment at chains at hard labor; (2) certain excessory penalties, (a) civil interdiction, (b) permanent absolute disqualification (*i.e.* right to vote, hold public office, etc.), (c) subjection to official surveillance; (3) a fine of 1250 pesetas. Noting this, the Court declared the entire statutory penalty unconstitutionally disproportionate to so minor a crime.

12. 217 U.S. at 378. Refusing to restrain the scope of the amendment, the court said:

> Legislation, both statutory and Constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofor 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. . . . In the application of a Constitution, therefore, our contemplation cannot be only what has been but of what may be.

Id. at 373.

13. Appellate Courts rarely sustain appeals. *See, e.g.*, Jackson v. Dickson, 325 F.2d 573 (9th Cir. 1963); In Re Wells, 35 Cal. 2d 889, 221 P.2d 947 (1950), *cert. denied*, 340 U.S. 937 (1951); Sims v. Balkcom, 220 Ga. 7, 136 S.E.2d 766 (1964). *But see* Black v. United States, 269 F.2d 38, 43 (9th Cir.) (dictum), *cert. denied*, 361 U.S. 938 (1959); State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).

14. Badders v. United States, 240 U.S. 391 (1916). Holmes relies extensively on

courts' failure to implement *Weems* is that until 1947 the eighth amendment was not considered binding on the states.[15] In that year, the Supreme Court held that the violation of the principles of the eighth amendment "would be violative of the due process clause of the Fourteenth Amendment", and thus, "the Fourteenth would prohibit by its due process clause, execution by a state in a cruel manner." [16] A third reason is that several courts have regarded the cruel and unusual punishment clause as applying only to the legislature.[17] These courts have taken the position that punishment is not cruel if it is within the statutory limits prescribed for the crime.[18] It is now generally accepted, however, that the eighth amendment is a limitation on both legislative and judicial action.[19]

The Supreme Court again considered the scope of the amendment in *Trop v. Dulles*,[20] concluding that the punishment of expatriation was cruel and unusual and, therefore, violative of the eighth amendment. The case significantly expanded the cruelty test of *Weems* to encompass mental as well as physical cruelty.[21]

Howard v. Fleming, 191 U.S. 126, 136 (1903), in declaring the punishment constitutional. "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

15. As originally adopted, the eighth amendment like the rest of the Bill of Rights applied only to the national government. Pervear v. Commonwealth, 72 U.S. (5 Wall) 475 (1866). *See, e.g.*, Matter of Garner, 179 Cal. 409, 177 P. 162 (1918); State v. Taylor, 293 Mo. 210, 238 S.W. 489 (1922); State v. Griffin, 84 N.J.L. 429, 87 A. 138 (N.J. Sup. Ct. 1913), *aff'd*, 85 N.J.L. 613, 90 A. 259 (N.J. Ct. Err. & App. 1914).

16. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462 (1947). The case of Robinson v. California, 370 U.S. 660 (1962), relying on *Resweber* stated that the eighth amendment's prohibition of cruel and unusual punishment is applied to the states by the fourteenth amendment.

17. *E.g.*, Beckett v. United States, 84 F.2d 731 (6th Cir. 1936); Brown v. State, 152 Fla. 853, 13 So. 2d 458 (1943); Chavigney v. State, 112 So. 2d 910 (Fla. Dist. Ct. App. 1959), *cert. denied*, 362 U.S. 922 (1960). *Contra*, United States *ex rel.* Bongiorno v. Ragen, 54 F. Supp. 973 (N.D. Ill. 1944), *aff'd*, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945); Barber v. Gladden, 210 Ore. 46, 309 P.2d 192 (1957), *cert. denied*, 359 U.S. 948 (1959).

18. *See, e.g.*, Jones v. State, 247 Md. 530, 233 A.2d 791 (1967); Dutton v. State, 123 Md. 373, 91 A. 417 (1914).

19. Robinson v. California, 370 U.S. 660 (1962); United States v. McKinney, 427 F.2d 449, 455 (6th Cir. 1970).

20. 356 U.S. 86 (1958).

21. "The uncertainty, and the consequent psychological hurt, which must accompany one who has become an outcast in his own land must be reckoned a substantial factor in the ultimate judgment." *Id.* at 111.

In speaking for the Court, Chief Justice Warren reemphasized the basic concept embodied in the eighth amendment as "nothing less than the dignity of man." 356 U.S. at 100.

The *Trop* case marked an expansion of *Weems*, but did nothing to revitalize it. Not until 1963 was there an effort to redefine the limits of the eighth amendment. In *Rudolph v. Alabama*,[22] a convicted rapist who had been sentenced to death was denied certiorari. In his dissenting opinion Justice Goldberg formulated a basis for measuring the limits of the eighth amendment.[23] The opinion is significant in two respects: it reasserted the legitimacy of a broad comparative law approach in determining whether a punishment is cruelly excessive; and secondly, it suggested a less vague standard for determining whether a sentence passes permissible limits of society.[24]

Accepting the test reemphasized in *Trop*,[25] and applying the standards suggested by Justice Goldberg in *Rudolph*,[26] the court in *Ralph v. Warden* determined "that two factors coalesce to establish that the death sentence is so disproportionate to the crime of rape when the victim's life is neither taken nor endangered that it violates the Eighth Amendment. First, in most jurisdictions death is now considered an excessive penalty for rape. . . . Second, when a rapist does not take or endanger the life of his victim, the selection of the death penalty from the range of punishment authorized by statute is anomalous when compared to the large number of rapists who are sentenced to prisons." [27]

The decision is significant in that for the first time the death penalty

22. 375 U.S. 889 (1963) (dissent to denial of cert.).

23. The specific issues raised by the dissent were:

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 proscriptions against "punishments which by their excessive . . . severity are greatly disproportioned to the offense 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"?

Id. at 889-91.

24. *Id.*

25. The eighth amendment should be viewed from a vantage point that discloses the "evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101.

26. Other cases had rejected the logic of the dissenting opinion in *Rudolph*. *E.g.*, Maxwell v. Stephens, 229 F. Supp. 205, 217 (E.D. Ark. 1964); Sims v. Balkcom, 220 Ga. 7, 136 S.E.2d 766, 769 (1964); Gordon v. State, 160 So. 2d 73, 76-7 (Miss. 1964).

27. No. 13,757 at 19 (4th Cir., Dec., 11, 1970).

in a rape case was found to be cruel and unusual punishment within the scope of the eighth amendment. By applying a test which encompasses "contemporary human knowledge," the court suggests a widening of the scope of the amendment, and provides a clear constitutional basis upon which similar cases can be determined.[28]

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Constitutional Law—PRIVILEGED COMMUNICATIONS—EFFECT OF FREEDOM OF THE PRESS UPON GRAND JURY INVESTIGATIONS. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

Earl Caldwell, a *New York Times* reporter who specializes in reporting the activities of the Black Panthers, was subpoenaed by a grand jury to testify about his confidential interviews with Panther leaders.[1] Claiming that compliance with the subpoena would infringe upon the right of freedom of the press, Caldwell moved alternatively to quash the subpoena and to limit the scope of the investigation.[2]

The district court, although refusing to quash the subpoena, became the first court to hold that the first amendment protects a newsman from disclosing confidential information unless a compelling and overriding need for the information is clearly established.[3] Caldwell, however, claimed that the ruling did not adequately protect his first amendment right to gather news because his tenuous relationship with the Panthers would be destroyed merely by requiring him to appear at the investigation. Accordingly, he refused to appear and was held in contempt.[4] On appeal of the contempt citation, the Court of Appeals for the Ninth Circuit expanded upon the district court's decision by holding that Caldwell is not required to appear at the investigation until the party seeking disclosure establishes a compelling need for his presence.[5]

Whenever a court orders a newsman to disclose confidential informa-

28. For a discussion of possible applications of such a test see Goldberg, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

1. Application of Caldwell, 311 F. Supp. 358, 359 (N.D. Cal. 1970).

2. *Id.* at 360. The rationale underlying these motions was that Caldwell's constitutional right to gather and disseminate news would be violated by requiring his presence or by requiring him to disclose confidential information at the investigation because either requirement would destroy the sensitive relationship between Caldwell and the Panthers. *Id.* at 361.

3. *Id.* at 360, 362.

4. Caldwell v. United States, 431 F.2d 1081, 1082-83 (9th Cir. 1970).

5. *Id.* at 1089.