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Case Comments

Constitutional Law: Capital Punishment for Rape Constitutes Cruel and Unusual Punishment When No Life Is Taken or Endangered

Petitioner was accused of arming himself with a tire iron, breaking into the victim's home, and committing forceable rape and sodomy after threatening the victim and her son with death if she refused to submit. Convicted of rape by a three judge court sitting without a jury, he was sentenced to death in 1961. The conviction was affirmed,¹ and certiorari was denied by the United States Supreme Court.² After four unsuccessful petitions for post-conviction relief in the state courts of Maryland³ and four unsuccessful habeas corpus petitions at the federal level,⁴ he again petitioned the federal district court, challenging the constitutionality of the death sentence. Petitioner appealed to the Fourth Circuit Court of Appeals from a denial of that petition. The Court, per Butzner, J., remanded, *holding* that the Eighth Amendment's prohibition against cruel and unusual punishment forbids the death penalty in rape cases in which the victim's life is not endangered. *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970).

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"⁵ and is applicable to the states through the Fourteenth Amendment.⁶ Exactly what consti-

1. *Ralph v. State*, 226 Md. 480, 174 A.2d 163 (1961).

2. *Ralph v. State*, 369 U.S. 813 (1962).

3. Misc. Pet. 2593, *aff'd*, *Ralph v. Warden*, 230 Md. 616, 185 A.2d 366 (1962); Misc. Pet. 3171; Misc. Pet. 3354, *aff'd*, *Ralph v. Warden*, 245 Md. 74, 224 A.2d 851 (1966); and Misc. Pet. 3869, *leave to appeal denied*, *Ralph v. Warden*, 250 Md. 672, 245 A.2d 592 (1968), *cert. denied*, 394 U.S. 1002 (1969).

4. *Ralph v. Pepersack*, 203 F. Supp. 752 (D.Md. 1962); *Ralph v. Pepersack*, 218 F. Supp. 932 (D.Md. 1963), *aff'd*, 335 F.2d 128 (4th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965); *Ralph v. Brough*, 248 F. Supp. 334 (D.Md. 1965); *Ralph v. Warden*, 264 F. Supp. 528 (D.Md.), *aff'd*, No. 11, 549 (4th Cir. 1967) (mem. dec.), *cert. denied*, 390 U.S. 922 (1968).

5. U.S. CONST. amend. VIII.

6. The early Supreme Court decisions refused to apply the "cruel and unusual" punishment clause to sentences imposed for state crimes. See *O'Neil v. Vermont*, 144 U.S. 323 (1892); *McElvaine v. Brush*, 142 U.S. 155 (1891); *In re Kemmler*, 136 U.S. 436 (1890). In 1947, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947), the Court first indicated that its view might be changing when it said, "[W]e shall

tutes "cruel and unusual" punishment, however, is unclear. The legislative history of the amendment is nearly barren, for the provision received little debate in Congress prior to approval for adoption by the states; the only major criticism was that the clause was too indefinite.⁷ In its first ruling on the amendment the Supreme Court echoed Congressional concern, stating that "[d]ifficulty would attend the effort to define with exactness the extent of the Constitutional provision."⁸ Eighty years later the Court again noted that "the words of the amendment are not precise" and that the "exact scope of the constitutional phrase has not been detailed by this court."⁹

While a few courts and commentators have considered the meaning of the word "unusual" and its relationship to "cruel" in discussing the constitutionality of a particular punishment,¹⁰ most courts ignore the term "unusual" in the clause and determine only whether the penalty is cruel. As the Supreme Court stated in *Trop v. Dulles*:¹¹

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. . . . These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to subtleties of meaning that might be latent in the word "unusual."¹²

examine the circumstances [of the case] under the assumption, but without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment." Finally, in *Robinson v. California*, 370 U.S. 660, 667 (1962), the court explicitly held that a person could be subjected to "cruel and unusual" punishment for a state crime under the due process clause of the Fourteenth Amendment.

7. See *Weems v. United States*, 217 U.S. 349, 368-69 (1910).

8. *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878).

9. *Trop v. Dulles*, 356 U.S. 86, 99, 100 (1958). See also *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D.Cal. 1966), in which the court restated the concession by the Supreme Court in *Weems v. United States*, 217 U.S. at 368, that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided." and then added, "This statement is as true today as it was in 1910." 257 F. Supp. at 679.

10. See *Trop v. Dulles*, 356 U.S. 86, 100-01 n.32 (1957); *Weems v. United States*, 217 U.S. 349, 401 (1910) (dissenting opinion); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1789-92 (1970); Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1345 (1968); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 849-50 (1961).

11. *Trop v. Dulles*, 356 U.S. 86 (1957).

12. *Id.* at 100 n.32.

Yet, even in determining whether a punishment is cruel, the courts have taken inconsistent stands in determining 1) whether the unconstitutional mode of punishment must be cruel per se or cruel in proportion to the crime; 2) the standard to be applied to determine cruelty; and 3) the application of that standard to the cases at bar.

1. *Mode or Proportionality of Punishment*

Most nineteenth and early twentieth century decisions interpreting "cruel and unusual punishment" clauses focused upon the mode of punishment without even considering the magnitude of the crime. In *Wilkerson v. Utah*¹³ and *In re Kemmler*,¹⁴ the Supreme Court looked only at the forms of punishment—death by shooting and electrocution respectively—and concluded that although punishment is cruel when torture or lingering death is involved, the mere extinction of life does not constitute "cruel and unusual" punishment.¹⁵ Moreover, most lower court decisions construing the Eighth Amendment or its counterparts in state constitutions concluded that the provisions restricted the judiciary to an examination of the mode of punishment exclusive of the crime for which it was imposed.¹⁶

Gradually courts began to examine the severity of the punishment in relation to the crime. In 1899, the Massachusetts supreme court, in *McDonald v. Commonwealth*,¹⁷ was the first to concede that long imprisonment might be so disproportionate to the offense as to constitute "a cruel and unusual punish-

13. 99 U.S. 130 (1878).

14. 136 U.S. 436 (1890).

15. Although both *Wilkerson* and *Kemmler* involved punishments for murder such that it could be argued that the Court might have declared the death penalty unconstitutional for lesser offenses, no language in the opinion dictates such a result.

16. In *Commonwealth v. Hitchings*, 71 Mass. 482, 486 (1855), the Massachusetts court concluded that "[t]he question whether the punishment is too severe, and disproportionate to the offence [sic] is for the legislature to determine." The Virginia supreme court, in *Aldridge v. Commonwealth*, 4 Va. 447, 449-50 (1826), held that "[t]hat provision [prohibiting cruel and unusual punishments] was never designed to control the Legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment." The supreme court of Georgia in *Whitten v. State*, 47 Ga. 297, 301 (1872), decided that "[i]t would be an interference with matters left by the Constitution to the legislative department, for us to undertake to weigh the propriety of this or that penalty fixed by the Legislature for specific offenses."

17. 173 Mass. 322 (1899).

ment,"¹⁸ and Justice Field, dissenting in *O'Neil v. Vermont*¹⁹ in 1892, a case involving over 50 years for liquor violations, noted: "The inhibition [of the Eighth Amendment] is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."²⁰ In 1901 the New Mexico territorial court was the first to analyze the constitutionality of a punishment in terms of its relationship to the crime committed. In *Territory v. Ketchum*,²¹ a case involving an attempted train robbery for which appellant was sentenced to death, the territorial court assumed that the death penalty is not cruel within the prohibition of the Constitution,²² but went on to examine the gravity of the crime before concluding that it could not "say that we deem the death penalty in any degree excessive as compared with the gravity of the offense"²³

The *Ketchum* disproportionality doctrine was adopted by the United States Supreme Court nine years later in *Weems v. United States*,²⁴ a case in which a Phillipine coast guard officer convicted of falsifying an official document was sentenced to 15 years hard labor in chains, loss of the right to vote and hold office, and subjection to permanent surveillance. The Court declared the punishment unconstitutional even though such punishment for a more serious crime would have been upheld. After stating that few states or nations impose such sentences for similar offenses the Court concluded:

Such 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.²⁵

Despite *Weems*, courts were reluctant to adopt the proportionality test.²⁶ By the 1950's, however, the trend had changed,²⁷

18. *Id.* at 328.

19. 144 U.S. 323 (1892) (dissenting opinion).

20. *Id.* at 339.

21. 10 N.M. 718, 65 P. 169 (1901).

22. *Id.* at 719, 65 P. at 169.

23. *Id.* at 725, 65 P. at 171.

24. 217 U.S. 349 (1910).

25. *Id.* at 366-67.

26. *Hart v. Commonwealth*, 131 Va. 726, 744, 109 S.E. 582, 587 (1921). The court noted that while there was a difference of judicial opinion, "a large majority of the American courts" had held that the "cruel and unusual" punishment clause imposed only a limitation upon the legislative right to determine and prescribe the mode of punishments and not upon the quantum of punishment. See also *Badders v. United States*, 240 U.S. 391 (1916), and a discussion of that case and its relationship to

and in 1962 the Supreme Court for the first time since *Weems* explicitly upheld the "proportionality doctrine" in a case in which petitioner was convicted of a misdemeanor under a California statute making it criminal for a person to be addicted to narcotics.²⁸ Although the sentence was only 90 days, the court concluded it violated the Eighth and Fourteenth Amendments, ruling:

We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.²⁹

2. *Standard for Determining Cruelty*

The standard used by the courts to determine whether punishments are cruel per se or in proportion to the offenses has also undergone significant changes since the beginning of the twentieth century. While the new criterion is more rational than that used in the early cases, it is also more indefinite and therefore much more difficult to apply. For over a century subsequent to the ratification of the Eighth Amendment courts refused to declare punishments "cruel and unusual" unless they were so regarded under the English Bill of Rights in 1688³⁰ and by

Weems in Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 *Crim. L. Bull.* 145, 148 (1967) and Comment, *Cruel and Unusual Punishment*, 15 *WAYNE L. REV.* 882, 884 (1969).

27. In *State v. Evans*, 73 Idaho 50, 57-58, 245 P.2d 788, 792 (1952), the Idaho supreme court summarized the development:

Cruel and unusual punishments were originally regarded as referring to such barbarous impositions as pillory, burning at the stake, breaking on the wheel, drawing and quartering, and the like. But it is now generally recognized that imprisonment for such a length of time as to be out of all proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable men, is cruel and unusual within the meaning of the constitution.

28. *Robinson v. California*, 370 U.S. 660 (1962).

29. *Id.* at 667.

30. Justice Story, in commenting upon the amendment stated that it was "adopted as an admonition to all departments of the national government to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts," and indicated that was its sole purpose. 2 *J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, 610-11 (3rd ed. 1851).

colonial Americans.³¹ In *Weems v. United States*,³² however, while the Supreme Court extended the scope of the Eighth Amendment to disproportionately large punishments, it also altered the standard for determining whether such punishments were cruel or excessive. Realizing that imprisonment in chains for forgery would have been tolerated in colonial times, the Court nevertheless struck down the punishment, noting that a constitutional principle "to be vital must be capable of wider application than the principle which gave it birth."³³

In 1957 in *Trop v. Dulles*³⁴ the Supreme Court clearly rejected the colonial test. It noted that the "scope [of the Eighth Amendment] is not static," but that it draws its meaning from the evolving standards of society.³⁵ The lower courts have attempted to provide more structure for this standard, frequently stating that the test is whether today the act is considered so disproportionate to the offense committed as "to shock the moral sense of all reasonable men,"³⁶ "to be completely arbitrary and shocking to the sense of justice,"³⁷ or to shock "the conscience and sense of justice of the people of the United States."³⁸

3. *Application of the Standard*

The static standard of the Eighth Amendment contained little ambiguity and was easily applied. The courts that applied the cruel per se standard consistently upheld the death penalty, but consistently indicated they would strike it down if it involved a form of torture similar to those practiced in En-

31. The Georgia supreme court in *Whitten v. State*, 47 Ga. 297, 301 (1872), refused to declare unconstitutional a six month sentence for assault because it "doubt[ed] if it even entered into the minds of men of that day [the day the Eighth Amendment was adopted] that a crime such as this deserved a less penalty than the judge inflicted." Even as late as 1921, in *Hart v. Commonwealth*, 131 Va. 726, 741, 109 S.E. 582, 587 (1920), the Virginia supreme court upheld its predecessors' rule that the state's "cruel and unusual punishment" provision only prohibited "such punishments . . . as were regarded as cruel and unusual when such provision of the constitution was adopted in 1776."

32. 217 U.S. 349 (1910).

33. *Id.* at 373.

34. 356 U.S. 86 (1957).

35. *Id.* at 100-01.

36. *State v. Teague*, 215 Ore. 609, 611, 336 P.2d 338, 340 (1959), *quoting* *Sustar v. County Court*, 101 Ore. 657, 665, 201 P. 445, 448 (1921).

37. *Kasper v. Brittain*, 245 F.2d 92, 96 (6th Cir. 1957).

38. *United States v. Rosenberg*, 195 F.2d 583, 608 (2nd Cir.), *cert. denied*, 344 U.S. 838 (1952), *quoting* *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).

gland during the reign of the Stuarts.³⁹ Even those courts that applied the proportionality standard did not hesitate to uphold the death penalty in all cases except those involving minor offenses since the death penalty was commonly used in colonial America for larceny, burglary and even forgery.⁴⁰

The courts have encountered more difficulties in applying the doctrine that punishments so disproportionate as to shock the *evolving* conscience are unconstitutional. In making this assessment the Supreme Court has generally considered in detail the effect of the crime upon society,⁴¹ the effect of the punishment on the criminal,⁴² the punishment generally imposed for more serious crimes and the number of states and nations imposing such penalties. Such a broad review enables courts to consider both their own views of cruelty and those of state, federal and foreign legislatures as representatives of their citizenry.⁴³ Most lower courts, however, consider only whether the punishment shocks the populace⁴⁴ and the number of other jurisdictions that impose the same penalty, without including their own assessment of whether the punishment is excessive based on the gravity of the crime and the effect of the punishment upon the offender.⁴⁵

39. *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878); *Garcia v. Territory*, 1 N.M. 415 (1869).

40. *Whitten v. State*, 47 Ga. 297, 301 (1872).

41. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

42. *Trop v. Dulles*, 356 U.S. 86, 101-02 (1957).

43. *Trop v. Dulles*, 356 U.S. 86, 103 (1957); *Weems v. United States*, 217 U.S. 349, 377 (1910).

44. *United States v. Rosenberg*, 195 F.2d 583, 608 (2nd Cir.), *cert. denied*, 344 U.S. 838 (1952); *State v. Cannon*, 55 Del. 487, 493, 190 A.2d 514, 517 (1963). *But see Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968), and *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D.Cal. 1966), in which it was suggested that one factor in determining the constitutionality of the sentence should be whether it is necessary to rehabilitate the offender, and *Sims v. Balkcom*, 220 Ga. 7, 11, 136 S.E.2d 766, 769 (1964), in which the court declared: "[W]e would question the judicial right of any American judge to construe the American Constitution contrary to its apparent meaning, the American history of the clause, and its construction by American courts, simply because the numerous nations and States have abandoned capital punishment for rape."

45. In fact in *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), the author of the majority opinion, upholding a 199-year sentence in a felony murder case in which the petitioner participated in the robbery but did not kill the victim, conceded:

The writer of this memorandum must admit that to him a sentence of a court which determines that a person who is adjudged not to deserve death must serve a term of imprisonment in a penitentiary, from which he cannot reasonably hope to be relieved so long as he lives, is cruel. The writer regretfully states that he believes his view on the subject is that of the

Largely because of the requirement imposed by most lower courts⁴⁶ that a punishment cannot shock the conscience if a number of jurisdictions enforce it and a significant percentage of the public support it, few punishments have been declared unconstitutional even under the "proportionality test" as determined by "evolving standards," and on numerous occasions the death penalty has been upheld.⁴⁷ Even in non-homicide cases the death penalty is generally not regarded as unconstitutionally disproportionate. Offenses for which the death penalty has been upheld include armed robbery,⁴⁸ kidnapping,⁴⁹ treason,⁵⁰ rape,⁵¹ and attempted rape.⁵² In recent years, however, there has been some indication that courts would declare death an unconstitutionally disproportionate punishment for rape and attempted rape in certain situations,⁵³ although until the *Ralph* decision, no

minority. It follows that, in spite of the personal opinion of the writer regarding the cruelty of the sentence, the court cannot say that the 199-year sentence, imposed as a punishment for murder in the case at bar, is cruel and unusual punishment under the Fourteenth and Eighth Amendments to the Constitution of the United States.

46. Another reason, of course, is the expressed reluctance of courts to question the legislatures' apportionment of punishment for criminal offenses. See *Coon v. United States*, 360 F.2d 550, 555 (8th Cir. 1966); *State v. Cannon*, 55 Del. 587, 593-94, 190 A.2d 514, 517 (1963). The result of these two factors led one commentator to observe, "Few constitutional guarantees of individual liberty have so often been relied upon to so little avail, as has the eighth amendment." Note, *supra* note 10, at 846.

47. See, e.g., *Bell v. Patterson*, 279 F. Supp. 760, 765 (D.Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968); *Rivers v. State*, 226 So.2d 337, 338 (Fla. 1969); *Furman v. State*, 225 Ga. 253, 167 S.E.2d 628 (1969). All of these cases were decided subsequent to the United States Supreme Court's most recent pronouncement that the death penalty per se is not "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 99 (1957) (dictum). Since *Trop*, the Supreme Court has avoided the issue by deciding cases involving that problem on procedural grounds without reference to the punishment's constitutionality. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Goldberg and Dershowitz*, *supra* note 10, at 1798-1802.

48. *Ellis v. State*, 19 P.2d 972 (Okla. Crim. App. 1933); *Territory v. Ketchum*, 10 N.M. 718, 65 P. 169 (1901).

49. *Coon v. United States*, 360 F.2d 550, 554-55 (8th Cir. 1966).

50. *United States v. Rosenberg*, 195 F.2d 583 (2nd Cir.), *cert. denied*, 344 U.S. 838 (1952).

51. *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966); *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965); *Rudolph v. State*, 152 So.2d 662 (Ala.), *cert. denied*, 375 U.S. 889 (1963).

52. *Hart v. Commonwealth*, 131 Va. 726, 109 S.E. 582 (1921).

53. In *Rudolph v. Alabama*, 375 U.S. 889 (1963), the Supreme Court denied certiorari to a petitioner sentenced to death for rape. Justices Goldberg, Douglas and Brennan dissented, saying they "would grant

such punishment for rape had actually been struck down.⁵⁴

To determine whether the punishment imposed in *Ralph* was disproportionate, the court did not look to the effect of the offense on society or to its own views concerning the punishment's excessiveness.⁵⁵ It simply examined the number of states and foreign nations that permit the death penalty in rape cases,⁵⁶ the extent to which juries or judges actually sentenced offenders to death under these statutes⁵⁷ and the extent to which rapists had actually been executed after receiving death

certiorari in this case . . . 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." They suggested that they considered capital punishment in such a case unconstitutional. Subsequent lower federal court decisions also indicated that the death penalty in rape cases like those suggested in the dissent in *Rudolph* might be unconstitutional. The Fourth Circuit Court stated in *Snider v. Peyton*, 356 F.2d 626 (4th Cir. 1966):

There is extreme variation in the degree of culpability of rapists. If one were sentenced to death upon conviction of rape of an adult under circumstances lacking great aggravation, the Supreme Court might well find it an appropriate case to consider the constitutional question tendered to us. Even an inferior court such as ours might find the question foreclosed to it if the actual and potential harm to the victim was relatively slight.

Id. at 627. In three rape cases, the Eighth Circuit recognized (without approving or rejecting) the dissent's position in *Rudolph* but concluded that in any case, the victims' lives had been endangered. *Harris v. Stephens*, 361 F.2d 888, 894-95 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); *Mitchell v. Stephens*, 353 F.2d 129, 135 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966); *Maxwell v. Stephens*, 348 F.2d 325, 332 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965).

54. In *Calhoun v. State*, 85 Tex. Crim. 496, 214 S.W. 335 (1919), the state court did declare the death penalty for rape to be "cruel and unusual" punishment. However, the decision seems to be based upon the court's reluctance to believe that the defendant was actually guilty of rape rather than upon the grounds that the death penalty for an admitted rapist was unconstitutional. The court noted that the alleged victim was of questionable moral character, that she said nothing about resisting, that her appearance after the alleged offense did not reveal that she had been raped, that the incident occurred within calling distance of her home although she didn't cry out and that she had told conflicting stories concerning whether the rape attempt had been successful. The court concluded, "[W]e do believe under the facts and circumstances in this case that this verdict is excessive." 85 Tex. Crim. at 504, 214 S.W. at 338.

55. In fact, the court explicitly stated: "The constitutionality of *Ralph's* punishment cannot rest on the subjective opinions of the judges who imposed the sentence or of the judges who must review the case. On the contrary, his punishment must be tested objectively." *Id.* at 789.

56. *Id.* at 791-93.

57. *Id.* at 792-93.

sentences.⁵⁸ It found that only sixteen states and four nations permitted capital punishment in rape cases,⁵⁹ that only a small percentage of convicted rapists received the death penalty even in those states⁶⁰ and that no one had been executed for rape in the United States since 1964.⁶¹ Concluding that these figures suggested the popular rejection of the death penalty in rape cases,⁶² it ruled that capital punishment in such cases constituted a violation of the Eighth Amendment where—as in *Ralph*—life was neither taken nor endangered.⁶³

Although the court in *Ralph* followed tests for determining the constitutionality of sentences that had been used for over half a century, its decision wrought a major change in the fields of criminal and constitutional law. No previous federal court had been willing to invalidate capital punishment for any crime as serious as rape. In fact, many lower federal courts had been unwilling even to consider the constitutionality of such punishments until the Supreme Court ruled on the issue.⁶⁴ Yet despite the willingness of the Fourth Circuit to consider this case and despite the apparently proper result in light of the *Weems* criteria, there are two basic problems inherent in the *Ralph* opinion which will confuse future courts and which could bring unfortunate results that neither the adopters of the Eighth Amendment nor the Supreme Court intended. The first is the difficulty and the undesirability of having to determine whether life has been endangered by the rapist in determining the con-

58. *Id.*

59. *Id.* at 791-92.

60. *Id.* at 792-93.

61. *Id.* at 792.

62. *Id.* at 790-93.

63. *Id.* at 793. Although the figures compiled in *Ralph v. Warden* indicated a public rejection of capital punishment in all rape cases including those in which life has been endangered, the court refused to expand its ruling to cover rape in general, explicitly stating, "Lest our opinion be given a breadth greater than is necessary for the decision of this case, we do not hold . . . that death is an unconstitutional punishment for all rapes." *Id.*

64. For example, Justice Blackmun, then on the Eighth Circuit, concluded in *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965), a case similar to *Ralph*:

Despite whatever personal attitudes lower federal court judges as individuals might have toward capital punishment for rape, any judicial determination that a state's (in this case, Arkansas') long existent death-for-rape statute . . . imposes punishment which is cruel and unusual, within the language of the Eighth Amendment and, by referenced inclusion, violative of the Fourteenth Amendment, must be for the Supreme Court in the first instance and not for us.

Id. at 332.

stitutionality of the punishment. The second is the danger of permitting the populace to determine what punishment is "cruel and unusual."

The first problem was raised in the dissent from the denial of rehearing in *Ralph*, where it was contended that a rule prohibiting the imposition of the death sentence in rape cases unless life is taken or endangered is an extremely imprecise instruction.⁶⁵ This contention is well-founded, since as one commentator noted:

There is a sense in which life is always endangered by sexual attack, just as there is a sense in which it is always endangered by robbery, or by burglary of a dwelling or by any physical assault. The threat of violence is not the less a threat by being conditional, and violence always carries the possibility of a fatal outcome.⁶⁶

Evidently, the court in *Ralph* did not use the word "endangered" in this sense; but it is not clear how it was used. Although in *Ralph* the rapist broke into the victim's house at night, picked up a tire iron, approached the small, frail victim and told her that an outcry would result in death to her and her young son asleep in the next room, the court ruled no life had been endangered. This difficulty is compounded by the fact that in *Rudolph v. State*⁶⁷ and *Snider v. Smith*⁶⁸ rape involved similar aggravating circumstances, and yet in these cases Justice Goldberg dissented on the grounds that capital punishment for rape in which life is not endangered may be unconstitutional; whereas in two cases in the Eighth Circuit in which life was found to be

65. *Ralph v. Warden*, 438 F.2d 786, 794-98 (4th Cir. 1971). The dissenters' other argument is that the standard used to establish the disproportionateness of the punishment to the crime was the popular rejection of the death penalty in 1970, when the Fourth Circuit heard the case, rather than the public attitude in 1961, when the crime was committed. Such an argument seems fallacious. If a person commits a crime during an era in which drawing and quartering is tolerated and a court is called upon to judge the constitutionality of the sentence in an era in which such punishment shocks the conscience, it seems unconscionable to impose the punishment merely because the crime was committed during a more barbarous period.

66. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1077 (1964).

67. 152 So. 2d 662 (Ala.), cert. denied, 375 U.S. 889 (1963) (assailant threatened to kill victim and told her she could look at him but that she wouldn't live to tell about it).

68. 187 F. Supp. 299 (E.D.Va. 1960), aff'd sub nom, *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961), cert. denied, 375 U.S. 889 (1963) (victim was nine-year old girl who was raped several times and who subsequently required hospitalization).

endangered,⁶⁹ the facts leaning toward that conclusion were no stronger than those in *Ralph*, *Snider* and *Rudolph*.

In light of the difficulty in establishing a line separating those cases in which capital punishment for rape is valid and those in which it is not, it seems unnecessary to require such a division. The arguments the court used in *Ralph* in reaching its decision argue against the death penalty in any rape case, since the statistics the court used did not differentiate between the public attitude toward cases in which life was endangered and those in which it was not.⁷⁰ Moreover, since no statute authorizes capital punishment for attempted murder, even if the victim is injured and his life endangered, it is inconsistent to allow execution of rapists who endanger their victims' lives, even though an attempted murder with no other consequence is clearly distinguishable from a threat to life accompanied by a rape.⁷¹ It would therefore have been desirable for the court in *Ralph* to have extended its ruling to invalidate capital punishment for rape in all cases in which the victim was not killed.

The second and more serious danger results both from the reasoning in *Ralph* and from that in most other lower federal and state court decisions. These courts refuse to consider their own consciences in assessing the cruelty of the punishment, choosing instead to determine constitutionality by reference to the "conscience of men today"⁷² as reflected in public opinion or statutes passed by the elected representatives of the citizenry. Such a criterion is disturbing for two reasons. First, it is difficult, if not impossible, to discover the public's opinion. Secondly, even if that opinion could be computed, the practice of allowing the people to determine the application of a constitutional doctrine gravely endangers the nation's minorities by subjecting them to majority rule without regard to constitutional mandates.

It has generally been conceded that the public's opinion is unascertainable. As Judge Hand stated while attempting to

69. *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966) (aged woman raped at knife point and robbed); *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965) (victim bruised, apparently by an unarmed rapist, and threatened with death).

70. See text accompanying notes 55-60 *supra*.

71. *Ralph v. Warden*, 438 F.2d 786, 794 (4th Cir. 1971) (concurrence in the denial of the rehearing).

72. *Turkington*, *supra* note 26, at 161. See also text accompanying notes 36-38, 44-45 *supra*.

discover the public's sentiments: "It would not be practicable . . . to conduct an inquiry as to what is the common conscience"73 Yet, even if the attitude of a community is known or the statutory authorizations of a state legislature are considered to reflect the public's opinion in that state, the question becomes which community is of importance in determining "community opinion." For an offense committed in the United States, should the public sentiment in foreign nations be relevant? And for state offenses, should the opinion of other state legislatures and of the public of those states be considered? Although the latter question would seemingly be answered in the affirmative in the interest of national uniformity, the court in *United States ex rel. Borgiono v. Ragen*⁷⁴ ruled that even though "one must conclude from the evidence that 199-year sentences are unusual in all parts of the United States, other than Illinois, and perhaps Cook County,"⁷⁵ they "do not shock the sense of justice of the people of Illinois" and therefore do not constitute "cruel and unusual" punishment.⁷⁶

In addition to the difficulty of application, use of community attitudes rather than a judge's opinion poses a danger to our constitutional system.⁷⁷ The Constitution and especially the Bill

73. *Schmidt v. United States*, 177 F.2d 450, 451 (2nd Cir. 1949). Similarly, in *United States v. Rosenberg*, 195 F.2d 583, 608 (2nd Cir.), cert. denied, 344 U.S. 838 (1952), Judge Frank was forced to determine whether the imposition of the death penalty for treason shocked "the conscience and sense of justice of the people of the United States" so as to constitute "cruel and unusual punishment." He noted:

[S]uch a standard—the community's attitude—is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately what the community, or a majority, actually feels. Even a carefully-taken "public opinion poll" would be inconclusive in a case like this.

Id.

74. 54 F. Supp. 973 (N.D.Ill. 1944), *aff'd*, 146 F.2d 349 (7th Cir.), cert. denied, 325 U.S. 865 (1945).

75. *Id.* at 981-82.

76. *Id.* at 981.

77. Even if public opinion is only used by a judge to interpret a statute, rather than to determine its constitutionality or the constitutionality of an act or decision, the judicial process is harmed in two respects. First, the judge avoids personal responsibility for his decision merely by relying upon the indefinite standard of the community. As Edmond N. Cahn noted, "[w]e have . . . cause to fear the making of decisions by a judge who deems himself the mouthpiece of an unidentifiable, amorphous, and irresponsible mass." Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 850 (1951). Moreover it seems more advantageous to incorporate the moral values of a judge (what shocks his conscience) into the law than the values of the masses as conceived by the same judge. As Cahn explained in speaking of Judge Hand's frequent deference to the standards of the community in cases in which stat-

of Rights were intended to protect individuals against federal and state government and against the majority of the public;⁷⁸ yet, by allowing the majority through public opinion polls and the decisions of its elected officials in the state legislatures to determine the constitutionality of punishment, the Eighth Amendment protection is drastically curtailed. As former Justice Goldberg stated:

[C]onstitutional protection [should not] depend upon virtually unanimous condemnation of the penalty at issue. Were wide acceptance—measured by statutory authorization or public opinion polls—enough to authorize a punishment, the clause would indeed be “drained of any independent integrity as a governing normative principle.” Like no other constitutional provision, its only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom. It would forbid only extremely aberrant penalties. The framers cannot have intended so narrow a role for the basic guaranty of human rights.⁷⁹

Moreover, if the “public conscience” concept is interpreted to mean the sentiments of the people of the forum state as reflected by the statutes passed by their elected officials, even the “extremely aberrant penalties” escape the prohibition of the Eighth Amendment.⁸⁰

Much of the time, of course, the consciences of justices as interpreters of the Constitution and the public conscience coin-

utes referred to “crimes involving the moral turpitude”:

But by subordinating his own moral principles to those of the market place, Judge Hand seriously distorted the function of the court He distorted the court's function because instead of exercising such influence as he could to raise the morals of the marketplace [sic] to a level approaching his own, he expressed an attitude of resignation

Id. at 844.

78. S. KRISLOV, *THE SUPREME COURT IN THE POLITICAL PROCESS*, 109-10 (1965); Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1351 (1968).

79. Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970).

80. For instance in *State v. Cannon*, 55 Del. 587, 190 A.2d 514 (1963), whipping was upheld by Delaware's Supreme Court as constitutionally permissible:

Today, however, there has been no legal and effective expression of people speaking through the General Assembly [of Delaware] that whipping is a cruel punishment in the constitutional sense. Indeed, we think we may judicially notice the fact that there is undoubtedly a decided difference in view on the part of the people. What the weight of public opinion pro or con is, we have no way of knowing. Certain it is, however, that as yet the only constitutionally sound way of expressing the public sentiment, by act of Assembly, has not condemned the imposition of lashes as a cruel punishment.

Id. at 595, 190 A.2d at 518. Such an interpretation leaves the Eighth Amendment devoid of meaning.

cide. During these periods the test used by the lower courts will not have harmful results. In generations not as tolerant as the present, however, absolute deference to public opinion polls and state statutes can be disastrous. It is in these generations that the Constitutional protection becomes most vital and must be given significance independent of the public conscience. As one commentator noted:

It would follow that wide acceptance is no reason to hold a penalty consistent with the eighth amendment. Just as the first amendment's protection is especially important for unpopular speech and critical for hated expression, so is the eighth amendment's prohibition of retribution essential precisely when a majority is outraged by criminal behavior.⁸¹

The potential for abuse of such a standard in such an era of excitement was painfully evident in *United States v. Rosenberg*,⁸² in which the Rosenbergs were sentenced to death for communicating secret information to Russia. In 1951 Judge Frank upheld the sentence, concluding, "Assuming the applicability of the community-attitude test . . . , it is impossible to say that the community is shocked and outraged by such sentences resting on such facts."⁸³ Perhaps the decision would have been the same in the 1940's or 1960's or 1970's; yet, it cannot be said that the attitude of the public in 1951 during the midst of the red scare was a rational one on which a Constitutional decision should have been based.⁸⁴

In applying other Constitutional Amendments, the courts have realized the dangers of deferring to public sentiment and

81. Comment, *supra* note 78, at 1351. Even if *Aldridge v. Commonwealth*, 4 Va. 447 (1826), one of the first cases in the United States to interpret a "cruel and unusual punishment" clause, the court noted:

[T]his section in the [Virginia] Bill of Rights, was framed effectually to exclude these [punishments], so that no future Legislature, in a moment perhaps of great general excitement, should be tempted to disgrace our Code by the introduction of any of these odious modes of punishment.

Id. at 450.

82. 195 F.2d 583 (2nd Cir.), *cert. denied*, 344 U.S. 838 (1952).

83. *Id.* at 609.

84. In *Dennis v. United States*, 341 U.S. 494 (1951), the Supreme Court upheld the conviction of petitioners for conspiring to advocate the overthrow of the United States government and to organize the communist party. In dissent, Justice Black stated:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

Id. at 581 (dissenting opinion).

have rejected previous "community standards" tests.⁸⁵ Unfortunately, however, the courts have ignored the identical dangers of using public opinion polls and state laws reflecting public opinion to determine the constitutionality of punishments. Today, 20 years after *Rosenberg*, the dangers inherent in the reasoning of that case have not convinced the state and lower federal courts in cases such as *Ralph* to include their personal evaluations of the gravity of the crimes for which the punishments are imposed and the effect of the punishments upon the offenders. Until that change is made, the Eighth Amendment will continue to be subject to the will of a sometimes irrational and sometimes panic-stricken people, a danger against which the Bill of Rights was designed to protect.

85. For instance, in *Wolf v. Colorado*, 338 U.S. 25 (1949), decided two years prior to *United States v. Rosenberg*, the Supreme Court refused to extend the *Weeks* doctrine, excluding evidence secured in violation of the Fourth Amendment from admission in federal courts, to the states. After examining the law of other states and nations, it concluded:

When we find that in fact most of the English-speaking world does not regard as vital to such protection [against arbitrary intrusion by the police] the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right [of due process]. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which we have given the problem in light of the *Weeks* decision.

Id. at 29. In dissent, Justice Murphy declared, "I cannot believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions . . ." *Id.* at 46 (dissenting opinion). The Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), agreed, reversing the *Wolf* decision. It first stated, "While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based." *Id.* at 651. After noting that more states had accepted the *Weeks* doctrine since the time of the *Wolf* decision, it concluded:

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling. *Id.* at 653.

Constitutional Law: Free Exercise of Religion vs. Compulsory Education

Defendants, members of the Old Order Amish religion, were convicted of violating the Wisconsin compulsory education law¹ requiring parents to send their children to school through the age of 16. Defendants asserted that the right to practice religion as protected by the free exercise clause of the First Amendment² made enforcement of the education law against them unconstitutional. The trial court held that although the law interfered with the freedom of the defendants to follow their religious beliefs, the statute was a constitutional exercise of state power. The circuit court affirmed. On appeal, the Wisconsin supreme court reversed, *holding* that the state interest in compulsory education did not justify infringing upon defendants' rights to free exercise of their religion. *State v. Yoder*, 49 Wis. 2d 430, 182 N.W.2d 539 (1971).³

This comment will examine the case in the light of two issues: (1) whether the Amish proscription against attending school past the eighth grade, a matter of religious belief, is within the scope of protection of the free exercise clause; and (2) whether the parents' right to free exercise of their religion outweighs the need of the state to protect the children's right to choose their own life style.

1. Protection Under the Free Exercise Clause

The Old Order Amish belief that their children should not attend school beyond the eighth grade is based on a biblical command that they should live apart from contemporary society, sequestered in a culture of their own.⁴ The earliest case in this

1. WIS. STAT. ANN. § 118.15(1) (1967) requires that any person with a child between the ages of seven and 16 under his control must have the child attend either a public or private school.

2. U.S. CONST. amend. I provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." The First Amendment has been made applicable to the states through the Fourteenth Amendment. *Hughes v. California*, 339 U.S. 460 (1950); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Gitlow v. New York*, 268 U.S. 652 (1925).

3. *Cert. granted*, *Wisconsin v. Yoder*, 39 U.S.L.W. 3520 (May 18, 1971).

4. See generally Note, *The Right Not to Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967).

area, *Pennsylvania v. Beiler*,⁵ recognized the life style of the Amish as a religious belief. In *Ohio v. Hershberger*,⁶ however, the court did not find a conflict between compulsory education and Amish beliefs. In that case the court distinguished between religious belief and religious conduct and held that the requirement that the Amish educate their children did not abridge the right to worship. This implicit distinction between religious belief and conduct was articulated by the United States Supreme Court in *Cantwell v. Connecticut*,⁷ which forbade any government interference with religious beliefs, but distinguished conduct from beliefs. The court ruled in effect that a person is free to believe what he wishes, but his conduct—affirmative acts or omissions—may be regulated for the attainment of permissible state goals.⁸

This traditional dichotomy between belief and conduct was subsequently narrowed by the United States Supreme Court in *Sherbert v. Verner*.⁹ In that case a Seventh Day Adventist was denied unemployment compensation for refusing to accept a job that required work on Saturday, the Sabbath for Adventists. In holding that this regulation was an unconstitutional infringement of the free exercise clause the Court broadened the provision to include the refusal to act. The *Sherbert* case does not, however, compel the decision in *Yoder*. For example, in the only post-*Sherbert* case dealing with the Amish, the Kansas supreme court in *Kansas v. Garber*¹⁰ found the Amish beliefs on education not within the constitutional protection of the free exercise clause. Using an analysis similar to *Beiler*, the court separated religious belief and religious conduct, holding that even in light of *Sher-*

5. 168 Pa. Super. 462, 79 A.2d 134 (1951).

6. 103 Ohio App. 188, 144 N.E.2d 693 (1955).

7. 310 U.S. 296 (1940).

8. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court considered the other side of the free exercise question. Orthodox Jews who closed their businesses on Saturdays challenged the application of a Sunday closing law to them, asserting impairment of their ability to earn a livelihood. A majority of the Court disagreed, distinguishing between laws regulating religious acts and laws regulating a secular activity that makes the holding of religious beliefs more expensive. In *Braunfeld* the additional cost of holding Orthodox Jewish beliefs was closing shop for two days of the week rather than the state-compelled one day. The Court found that any law which impedes the observance of a religion or of all religions or which discriminates invidiously between religions is unconstitutional. However, if the law regulates only secular activity (e.g., days of business), the law's indirect effect on religious beliefs does not make the law constitutionally invalid.

9. 374 U.S. 398 (1963).

10. 197 Kan. 567, 419 P.2d 896, cert. denied, 389 U.S. 51 (1967).

bert, the refusal to educate children constituted unprotected conduct. This reasoning, however, was rejected by the court in the instant case. The court began its analysis by noting that the essence of the Old Order Amish religion is not the traditional religious service, but their life style.¹¹ In ruling that the life style of the Amish is their religion, the court found *Garber* to be a "mechanical separation" of conduct and belief and rejected the argument that constitutional protection extends only to direct infringement of the act of worship.¹²

The holding in *Yoder* that Amish beliefs on education are within the free exercise clause takes cognizance of the delicate nature of the free exercise right. The structure of the Amish religion presents difficulties because it does not fit within either of the traditional categories of conduct or belief. Although the free exercise clause is most easily claimed as a protection for the conventional aspects of a religion, the nature of the protection should be no less applicable to those religions which do not consist of conventional religious services, but which, as in the case of the Amish, consist of a life style. Since the free exercise clause is designed to prevent state-imposed restrictions on religions, a court's attempt to separate a defendant's religion into beliefs and conduct is an invasion of the protected area of the free exercise clause,¹³ and was rightly rejected by the court in *Yoder*.

2. *Balancing the State's and the Parents' Interests*

The second issue raised by *Yoder* is whether the state's interest in compulsory education outweighs the parents' right to free exercise of their religion. *Pennsylvania v. Beiler*¹⁴ was the only

11. 49 Wis. 2d at 435, 182 N.W.2d at 541.

12. *Garber* was subsequently undercut by a legislatively provided exemption for the Amish. KAN. STAT. ANN. § 72-1111 (Supp. 1969).

13. 49 Wis. 2d at 436-37, 182 N.W.2d at 542. The opposite argument is that where a religious group is exempted from sanctions imposed on others for prohibited conduct, such a rule is a preferential establishment prohibited by the establishment clause of the First Amendment. See generally Donnici, *Governmental Encouragement of Religious Ideology: A Study of the Current Conscientious Objector Exemption from Military Service*, 13 J. PUB. L. 16, 43 (1964). This assertion ignores the delicate balancing of religious freedom and police power which is especially important in a society comprised of as many diverse religious groups as is the United States. Acceptance of the argument that a religiously oriented exemption violates the establishment clause requires a choice between education and religious freedom in the instant case, making impossible the legislative or judicial compromises that help fulfill the requirements of both education and religious freedom.

14. 168 Pa. Super. 462, 79 A.2d 134 (1951).

previous case to recognize the Amish proscription against higher education as protected by the free exercise clause, and thus the only other case that balanced the state's and the parents' rights. In balancing these interests the *Beiler* court found an "absolute right to believe but only a limited right to act."¹⁵ The United States Supreme Court reached a similar result in *Prince v. Massachusetts*,¹⁶ where it upheld the conviction of a Jehovah's Witness who permitted a nine year old child to sell religious publications in violation of a child labor statute. The Court found the conduct to be within the ambit of the free exercise clause, but in balancing the interests of the state and the interests of the woman and child the Court found state interest overriding.¹⁷

The court in *Yoder* weighed the burden of forced attendance against the state interest in compulsory education and found the burden to be a heavy one since the compulsory attendance law required affirmative acts in violation of Amish religious beliefs.¹⁸ The court viewed the parent's choice as "to either obey its [the law's] commands and risk the loss of his salvation or to disobey the law and invite criminal sanctions."¹⁹ The court defined "compelling" as the need to apply regulations without exception in order to attain a legislative purpose and did not find the state interest in compulsory education compelling.²⁰ Analyzing the state interest in compulsory education in terms of performance of public responsibilities, good citizenship and helping the child to adjust to cultural values and prepare for further professional training, the court accepted the Amish claim that their program of parentally supervised farm work trained children for society as well as two additional years of high school.

15. *Id.* at 468, 79 A.2d at 137.

16. 321 U.S. 158 (1944).

17. While parents have a strong natural interest in the upbringing of their children, the state's interest in the child's welfare as *parens patriae* is overriding where the child's welfare in such vital areas as health care is concerned. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967); *Snyder v. Mason*, 328 Mich. 277, 43 N.W.2d 849 (1950); *In re Clark*, 21 Ohio App. 2d 86, 185 N.E.2d 128 (1962). *See also* Annot., 30 A.L.R.2d 1138 (1953), and note 20 *supra*.

18. The belief-conduct dichotomy had its origin in *Reynolds v. United States*, 98 U.S. 145 (1878), where the court upheld a polygamy conviction notwithstanding the requirement of the defendant's faith that he practice polygamy.

19. 49 Wis. 2d at 437, 182 N.W.2d at 542.

20. The *Yoder* dissent disagrees strongly, citing the importance of education from the time of the Northwest Ordinance and the United States Supreme Court's statement in *Brown v. Board of Ed.*, 347 U.S. 483,

The state in *Yoder* also argued that under the doctrine of *parens patriae*²¹ the judgment of the parents should be overruled and the state's protection of the child substituted. The court, however, ruled that a parent's right to bring up his children in his religion outweighed any harm that might be done to a child by the loss of two years of high school. The court premised this conclusion on the rationale that a child could decide for himself at a later age whether or not to retain the Amish life style, but until that time the state should not be permitted to force education on him which might influence that choice. The court also found that the subjugation of all Amish children to an education they did not want or need for the sake of those few who might wish to leave was not a compelling interest.²²

In holding that the defendant Amish fathers are protected under the free exercise clause,²³ the *Yoder* court failed to adequately consider the interests of the children themselves. If only the parents and the state had been affected by this case, it would be far easier to find the state interest unconvincing since, as the court noted, compulsory education would not have been severely disrupted. However, the children involved also have a right to choose which religion to follow and what life style they wish to adopt. The court did not consider the peculiar nature of the Amish religion, in which religion and life style are synonymous. This aspect of the religion locks the children into the Amish sect by making it very difficult for them to choose another way of life because of their limited employability. This failure was implicitly recognized by the court when it cited the testimony of one child that she did not wish to continue her education as support for its reasoning that the possibility that some

491 (1954), that "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." 49 Wis. 2d at 449, 182 N.W.2d at 548 (dissenting opinion). *Braunfeld v. Brown*, 366 U.S. 499 (1961), discussed in note 8 *supra*, is not *contra* to the majority's definition of compelling interest. In order to make the uniform day of rest effective it must be total, otherwise commercial activities would continue all week.

21. Constitutional considerations limit the application of the state's right to step in and protect the interests of the child under the doctrine of *parens patriae*. It is only where there is a definite overriding interest that requires a child's protection that the state may step in. See note 17 *supra*.

22. 49 Wis. 2d at 438-39, 182 N.W.2d at 542-43. See also note 20 *supra*, and accompanying text.

23. 49 Wis. 2d at 437-38, 182 N.W.2d at 542. See text accompanying note 13 *supra*.

children might wish to leave the Amish religion or want further education was not a compelling interest.²⁴

Yoder is the first case giving judicial relief to Amish defendants who refused to send their children to school after the eighth grade; but by doing so the decision completely ignores the rights of Amish children. Because of this one-sided consideration of a complex question, *Yoder* is not likely to be followed in its entirety by other courts faced with the same difficult issues. The *Yoder* case does appreciate the complex questions involved in the consideration of whether a particular act or omission falls under the free exercise clause, but fails to follow its analysis through to the other side of the issue. As the dissent in *Yoder* points out, finding that the compulsory education law unconstitutionally infringes upon the free exercise of Amish religion does not compel a holding that it cannot apply at all.²⁵

24. 49 Wis. 2d at 438, 182 N.W.2d at 542.

25. *Id.* at 453, 182 N.W.2d at 550. The *Yoder* dissent posits one method of accomplishing a compromise in order to balance the conflict between the state and parents by affirming the sentence but staying execution to give the Amish time to establish a vocational school. After the school is established, the judgment would be vacated and the complaint dismissed. *Id.* at 455, 182 N.W.2d at 551.