

MORRISON

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January 26, 1956
Opinion No. 56-31

REQUESTED BY: Honorable Dick Martin, Representative
Arizona State Legislature

OPINION BY: ROBERT MORRISON, The Attorney General

QUESTION: Is the proposed act prescribing the penalty of
castration for the commission of rape upon a
victim of less than twelve years of age con-
stitutional?

CONCLUSION: No.

The pertinent part of the proposed legislation considered in this
opinion reads as follows:

"B. Where the victim of a person convicted for the crime
of rape is less than twelve years of age the person so con-
victed shall after serving sixty days of his term in the state
prison be subjected to castration. Such penalty shall be
in addition to any other punishment prescribed by this sec-
tion."

The issue presented is whether this provision is repugnant to any constitu-
tional limitations placed upon the Legislature in prescribing punishment.

Generally, the Legislature may fix punishment for crimes as it
sees fit, subject to constitutional limitations, such as prohibiting cruel and
unusual punishments, ex post facto laws, imposition of double jeopardy,
equal protection of the laws, and due process of law. 15 Am. Jur. §507,
page 155. Article 8 of the Federal Constitution has no application to state
legislation. Article 2, §15, Constitution of Arizona, provides:

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

The underlined phrase has reference to the form or character of the punish-
ment rather than duration. The phrase, as used in the Constitution, means
such a punishment as would amount to torture or such as would shock the
conscience of every man possessed of common feeling. State v. Williams,
77 Mo. 310, 312; it was "doubtless intended to prohibit the barbarities of
quartering, hanging in chains, castration, etc". Whitten v. Georgia, 47 Ga.
297, 310 (1872).

Procreation of sex offenders by statute has been considered by two courts. In applying their respective constitutional limitations akin to the provision of the Arizona Constitution, each Court reached opposite conclusions.

In State v. Feilen, 70 Wash. 65, 126 Pac. 75, the Court reached the conclusion that a statute providing for a vasectomy of a rapist upon a child of tender age was not repugnant to Article 1, Section 14, of the Constitution, proscribing "cruel punishment".

On the other hand, in Mickle v. Henichs, 262 Fed. 687, (1918), the Court reached the conclusion that a state statute providing for vasectomy of sex offenders who committed sex offense or rape on children under ten (10) years (this act prohibited castration) violates Section 6, Article 1, Nevada Constitution, which provides:

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

The only distinction between the provision of the Arizona Constitution and the Nevada Constitution is that the latter provision uses the disjunctive word "or" and the former uses the conjunctive, "and". In my mind, this distinction is not one of major import. The Mickle case, while not on all fours with the problem before me, is closer than any other case diligent research can unearth. I think it advisable to quote at length from the opinion of this Court in support of my conclusion.

At page 688, this Court said of procreation as a punishment:

"It is a notorious fact that many judges do not regard mutilation as a wise or lawful method of punishment."

In answering the specific question before the Court as to whether the operation (vasectomy) is violative of constitutional injunction against cruel or unusual punishment, the Court said:

"Vasectomy in itself is not cruel; . . . but, when resorted to as punishment, it is ignominious and degrading, and in that sense is cruel. Certainly it would be unusual in Nevada. It may well be that it came in the minds of the men gathered in the constitutional convention of this state that there could be unwise punishment without the infliction of physical pain; that legislators, under the stress

of unusual conditions and peculiarly atrocious crime, might hastily adopt strange methods of repression, unknown to our criminal practice and harmful to the state.

"Reformation of the criminal is a wise and humane purpose of punishment, to be disregarded only when the death penalty is inflicted. It needs no argument to establish the proposition that degrading and humiliating punishment is not conducive to the resumption of upright and self-respecting life. When the penalty is paid, when the offender is free to resume his place in society, he should not be handicapped by the consciousness that he bears on his person, and will carry to his grave, a mutilation which, as punishment, is a brand of infamy. True, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed. . . ."

While this case does not deal directly with the problem of castration, the tenor and tone of the decision is that any form of mutilation as a form of punishment is contrary to constitutional proscription of cruel and unusual punishment.

Castration of criminal offenders is one of the forms of punishment which gave rise to the provision in the Federal Constitution as well as in the constitutions of the several states.

In Smith v. Command, 204 N. W. 140, (1925), Wiest, J., in his dissenting opinion, had occasion to review the term "cruel and unusual punishment". He said:

"In examining the subject of cruel and unusual punishments, I have been surprised at the dearth of adjudications. This fact, however, speaks well for American legislation. It must be assumed that the framers of the Bill of Rights had knowledge of former cruel and unusual punishments, whether adjudged under some law or imposed by despotic and arbitrary power. They knew of quartering, of slitting the nose and cropping the ears, of nailing the tongue to a post, of crucifixion, of flogging at the cart's tail, . . . of castration, . . . etc., and they emphatically said, 'Never again.'

"They looked at all past cruelties, and in a few comprehensive words prohibited a recurrence thereof, and

also kindred cruelties invented in the future. Old forms of cruelties were outlawed, and new forms prohibited. . .

"Emasculation was a penalty sometimes exacted for rape. The Laws of Alfred prescribed that a male theow (serf or bondman) who commits a rape upon a female theow shall be emasculated. Laws of Alfred, 2, 25, cited by Westermarck, Origin and Development of the Moral Ideas, Vol. 2, p. 521.

"In Bracton's De Legibus Et Consuetudinibus Angliae, Vol. 2, p. 481, it is stated:

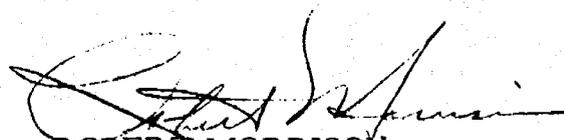
'There is amongst other appeals a certain appeal, which is called concerning the rape of virgins. . . .'

Castration was the punishment.

"Henry II made it treason for any person to bring over any mandate from the Pope or anyone in authority in church affairs. This he made punishable as to secular clergymen by the loss of their eyes and by castration. . . ."

In the opinion of Weems v. United States, (D. C.) 217 U. S. 349, in considering the interdict of the Federal Constitution of cruel and unusual punishment, the barbarity of castration was mentioned as prohibited.

I am in complete sympathy with the proponents for legislative action of a positive type to prevent repetition by rapists covered in your proposed bill. However, in compliance with a request for a legal opinion as to the constitutionality of a proposed bill, I must remove my personal feelings, as well as my emotions, and supplant them with both sober and considered legal conclusions. Therefore, it must be my opinion in this instance, based on the legal authority contained herein, that the proposed bill is unconstitutional.


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