AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era—Criminal Justice/Punishments/Sterilization

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Mickle v. Henrichs, 262 F. 687 (D.C.Nev. 1918)

Pearley C. Mickle was convicted of rape and sentenced to at least five years in prison. Nevada law at that time gave the sentencing judge the option of ordering that persons convicted of rape be sterilized. The law declared, "Whenever any person shall be adjudged guilty of . . . rape, . . . the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation." The judge in Mickle's case ordered that a vasectomy be performed. Mickle filed a lawsuit against Rufus Henrichs, the warden of the Nevada State Penitentiary. He claimed that the sterilization order violated the "cruel or unusual punishment" clause of the Nevada State Constitution.

The federal district court in Nevada declared the sterilization order unconstitutional. Judge Farrington insisted that the Nevada Constitution, which forbade "cruel ***or*** *unusual punishment," required a different result than state constitutions that forbade "cruel and unusual punishments." What reason did Judge Farrington give for this conclusion? How was this opinion different from the judicial opinion in* State v. Feilen *(WA 1912)?*

DISTRICT JUDGE FARRINGTON

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. . . There is no attempt by defendants to support the judgment on the ground that vasectomy is calculated to promote general welfare. It is conceded that cruel or unusual punishments are prohibited, regardless of any and all theories of race culture. Whether the operation performed as punishment is violative of the constitutional injunction against cruel or unusual punishment is the question.

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The decisions are not altogether harmonious. Some hold that, as used in the earlier Constitutions, including that of the United States, the restriction applies only to those ancient punishments which seem so shocking in this more enlightened age.

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In other and more recent cases there are strong expressions to the effect that imprisonment, though not in itself cruel or unusual, may become so if the term of confinement is grossly disproportionate to the offense. . . . In [*Weems v. United States* (1910)] the Supreme Court of the United States seems to have committed itself to the more humane and liberal doctrine that the Eighth Amendment is a regulation of sufficient vitality and adaptability to restrain cruel innovations in the way of punishment.

The Nevada Constitution was not adopted until 1864, a comparatively recent date. Neither then nor at any other time within the history of this state, prior to the date of the act in question, had mutilation of the person been a recognized mode of punishment. It is to be noted that the Nevada Constitution forbids punishments either 'cruel or unusual.' The terms are used disjunctively, and if accorded their usual significance it is evident the purpose was to forbid newly devised as well as cruel punishments.

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In *State v. Feilen* (WA 1912), the Supreme Court of Washington came to the conclusion that a statute authorizing vasectomy was not unconstitutional. This decision was rendered under a Constitution which prohibited cruel punishment only. In this it differs from the Nevada Constitution, which prohibits cruel or unusual punishment. I am not inclined to adopt the view that the two provisions mean substantially the same thing.

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Vasectomy in itself is not cruel; it is no more cruel than branding, the amputation of a finger, the slitting of a tongue, or the cutting off of an ear; 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. It will not do to argue that, inasmuch as the death penalty may be inflicted for this crime, vasectomy, or any other similar mutilation of the body, cannot be regarded as cruel, because the greater includes the less. The fact that the extreme penalty is not exacted is evidence that the criminal is considered worthy to live, and to attempt reformation. For him, and for society, a fair opportunity to retrieve his fall is quite as important as the eugenic possibilities of vasectomy.

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