Opinion No. 33-557

January 28, 1933

BY: E. K. NEUMANN, Attorney General

TO: Miss Nancy Lane, House of Representatives, Santa Fe, New Mexico.

*{*26}* Yesterday morning you requested me to examine several laws, with reference to constitutional provisions, which might allow the legislature to provide public whipping as a punishment for certain crimes.

Section 13 of Article 2 of our Constitution, under which the question would arise, is as follows:

"All persons shall be bailable by sufficient sureties, except for *{*27}* capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and** unusual punishments inflicted."

In Maryland we find the following constitutional provisions:

"Article 25. That excessive bail ought not be required, nor excessive fines imposed, **nor cruel or unusual punishment inflicted** by the Courts of Law."

"Article 16. xxx; **and no law to inflict cruel and unusual pains and penalties ought to** be made in any case or at any time hereafter."

In nearly all constitutions is found the same or similar provisions and many courts have construed same. Although most of the cases are early cases, I find that most courts uphold whipping, within reasonable bounds, as sentences not within the constitutional prohibitions set forth.

As late as 1882, the Supreme Court in State vs. Foote, 59 Ind. 266, upheld the constitutionality of Section 15, Article 27 Maryland Code (so designated at this time) which provided for whipping in cases of wife beating.

It might be interesting to have more time and make a more thorough research, for the modern trend has been to abandon such methods of punishment, though I am inclined to believe that this is one of policy rather than a belief that such laws are unconstitutional.

New Mexico has one case upon the subject, prior to Statehood, in 1869, which is interesting. I might say here that all of these cases seem to disregard any possible prohibition under the Federal Constitution, for as late as the eighties several federal penal statutes provided whipping as a punishment.

Coming back to the New Mexico case, Garcia vs. Territory, 1 N.M. 415, we find our Territorial Supreme Court upholding a New Mexico Statute, which provided that for stealing mules, etc., the offender should be punished by not less than 30 nor more than 60 lashes. The Court used this significant language:

"xxx All punishment is more or less cruel, and the kind of punishment to be inflicted upon criminals to induce reformation and repress and deter the thief from repetition of his larcenies has generally been left to the sound discretion of the law making power."

"xx The word cruel, as used in the amendatory Article of the Constitution, was no doubt intended to prohibit a resort to the process of torture. It was never intended to abridge or limit the selection by the law making power of such kind of punishment and suppression of crime."

The same court further says, "However averse the court may be to this mode of punishment, it cannot authorize the court in disregarding and annulling the law providing for the punishment of this crime, and, until repealed, it is the duty of the court to enforce it."

I believe that this attitude might be adopted today by our courts, though it might be that general public opinion would force a different view. After all public opinion is a great factor in all things, especially so in guiding courts in construing the meaning of words as used in statutes. There is a tendency to define words as they are defined by popular conception.

The only way you can test this theory, is, if you believe it to be an effective deterrent of crime, to draw some acts providing for the punishment of the crimes mentioned to be public whipping within reasonable bounds, so that our courts may have the opportunity to pass upon the constitutionality of such acts.