AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 7: The Republican Era – Individual Rights/Personal Freedom and Public Morality

**Ex parte Cannon, 94 Tex. Crim. 257 (TX 1923)**

*The town of Texarkana, Texas is located at a once prominent railroad juncture on the border of Texas and Arkansas. The town adopted an “emergency” ordinance entitled, “An Ordinance Prohibiting Male and Female Persons from Associating Together for Immoral Purposes, Defining and Stating What Shall Constitute Associating Together for Immoral Purposes, Prescribing Penalties, Repealing All Ordinances and Parts of Ordinances in Conflict Herewith and Declaring an Emergency.” The ordinance was part of a wave of city ordinances adopted in the late nineteenth and early twentieth century aimed at restricting prostitution. The Texarkana ordinance was wide-ranging in its effort to identify what might count as men and women associating together for immoral purposes, but included males and females who resided in a bawdyhouse found riding together in automobiles or buggies, walking the streets together or being in public together, or found together in a bawdyhouse unless falling within such outlined exceptions as a doctor making a call during sickness, a deliveryman running his errands, or a peace officer discharging his official duties, any man and woman not husband and wife who registered together for a hotel room, and any “white male person found at the place of residence of any negro woman,” unless they fell within a designated exception.*

*Maurice Cannon was arrested for violating a provision of the ordinance and convicted in city court. He filed a petition for a writ of habeas corpus with the state court of criminal appeals. The record does not detail the specific circumstances that led to Cannon’s arrest, but the court unanimously held that the ordinance had unconstitutionally exceeded the proper police powers of the state and intruded on individual liberties guaranteed by the due process clauses of the federal and state constitutions.*

Judge LATTIMORE.

It hardly seems necessary to analyze the various subdivisions of section 2 of this ordinance to demonstrate that it is violative of the fundamental guaranty of both the federal and state Constitutions to every citizen of life, liberty, and property. The courts have been careful, even when restrictive legislation is aimed only at those unfortunate classes whose occupations are deemed so obnoxious to society and to community welfare as to permit proper legislative safeguards, to not uphold such laws when their fair construction would include others than the class aimed at; and, in many cases when even those classes legitimately included in such laws have been limited beyond what would seem to be a fair exercise of police power, laws have been held unconstitutional. In *Milliken v. City Council* (TX 1881), our Supreme Court held unconstitutional an ordinance prohibiting renting homes to any prostitute or lewd woman, on the broad ground that, when such renting was not for the purpose of carrying on a vocation, it was not a proper exercise of the police power to forbid it, and that no matter how unfortunate or degraded, all human beings were entitled to the protection of the law and the right to hold and own property. In *Ex parte McCarver* (TX 1898), a curfew ordinance forbidding persons under 21 years of age from being on the streets of the city of Graham after the ringing of the curfew bell was held an unreasonable ordinance and an unwarranted invasion of the rights of the citizen, it not only including those who might be out on an evil bent, but also those who for reasons might be out on business, pleasure, or religious errands. . . . In *Ex parte Smith* (MO 1896), the Supreme Court of Missouri held unconstitutional an ordinance forbidding association with persons known to be thieves, pickpockets, etc. From that opinion we quote the following:

This ordinance is now attacked on the ground of its unconstitutionality, in that it invades the right of personal liberty by assuming to forbid that any person should knowingly associate with those who have the reputation of being thieves, etc. And certainly it stands to reason that, if the Legislature, either state or municipal, may forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of any one may be. But if the Legislature may dictate who our associates may be, then what becomes of the constitutional protection to personal liberty, which Blackstone says ‘consists in the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s inclination may direct, without imprisonment or restraint, unless by due course of law.’ Obviously, there is no difference in point of legal principle between a legislative or municipal act which forbids certain associations, and one which commands certain associations. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be.

. . . .

The obvious purpose of the ordinance is wholesome, but its terms are too broad, and many of its sections make penal acts and persons which and who by no construction could be held to be crimes or criminals. Many situations could be instanced where men might go to the house of ill fame with the best possible motives, or be temporarily thrown with fallen women with or without knowledge of their character and totally without evil purpose, and of men who from business, charitable, or religious purposes might be led to be at said places or with said people. We would seriously doubt the validity of any law a reasonable construction of whose terms would make criminal those persons and things against whose inclusion as such reason and common sense would revolt. Further argument would seem needless.

The ordinance in question being unconstitutional, it would follow that the arrest and conviction of relator was without authority of law, and his discharge will be ordered.