Supplementary Material

Chapter 4: The Early National Era—Individual Rights/Personal Freedom and Public Morality

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Barker v. People, 20 Johns. R. 457 (NY 1824)

Jacob Baker challenged David Rogers to a duel after both had exchanged insults over financial matters. Barker was subsequently indicted and found guilty of violating the New York ordinance against dueling. As part of the punishment for the offense, he was barred from holding any state office. Barker challenged his conviction and sentence. He insisted that the law against dueling violated the state constitution and that his punishment violated both the federal and state constitutions. The trial court rejected his claims as did an intermediate court. He appealed those decisions to the Supreme Court of New York.

The Supreme Court of New York sustained the trial court by an 18–1 vote. The justices held that the state power to define crimes and punishments enabled elected officials to forbid dueling and punish dueling by a ban on office holding. The Chancellor suggested that some constitutional limits exist on state legislative power to make certain actions crimes. What are those limits? Could the New York legislature after Barker v. People *pass a law prohibiting persons from eating red meat or playing cards?*

CHANCELLOR SANFORD, delivered the opinion of the Court.

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The provision in the constitution of the United States, that cruel and unusual punishments shall not be inflicted, is a restriction upon the government of the United States only; and not upon the government of any state.

The constitution of the United States provides, that cruel and unusual punishments shall not be inflicted. This provision is one of the amendments to that constitution which were adopted soon after the constitution itself had been ratified. Like other amendments adopted at the same time, it is a restriction upon the government of the United States, intended to deprive that government of a power, which it had or might claim, under the original constitution. In the language which accompanied these amendments, when they were proposed and adopted; "these farther declaratory and restrictive clauses were added to the constitution, in order to prevent misconstruction, or abuse of its powers." The solicitude of the people and of the states, then was, not to limit the power of the states, but to limit the power of the union, and by new provisions to give security to rights, which were supposed to be in danger from the new and untried system of national government. The danger apprehended, was by the parts from the new government of the whole; and not by any state from its own government. Each state was then at liberty, as it now is, to provide by its own constitution, that cruel and unusual punishments shall not be inflicted by its own government. Accordingly, several of the states, in their constitutions established since the adoption of this amendment to the constitution of the union, have provided, that cruel and unusual punishments shall not be inflicted. This provision is found in the constitution of Ohio, Tennessee, Indiana, and Maine. The constitution of Delaware, Kentucky, Mississippi, and Alabama, also established since the adoption of the amendment in question, provide, that cruel punishments shall not be inflicted. Other state constitutions are silent upon the subject of punishments, either cruel or unusual. It is most evident, that the states which have imposed these restraints upon their own governments, conceived, that they were at liberty to do so, or not; and that in their conception, the constitution of the union, contained no such restraints upon state governments, in the punishment of crimes against states. . . .

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The state legislature cannot establish arbitrary exclusions from office, or any general regulations, requiring qualifications which the state constitution has not required.

Eligibility to public trusts, is claimed as a constitutional right, which can not be abridged or impaired. The constitution establishes and defines the right of suffrage; and gives to the electors, and to various authorities, the power to confer public trusts. It declares, that ministers of religion, shall be ineligible to any office; it prescribes, in respect to certain offices, particular circumstances, without which, a person is not eligible to those stations; and it provides, that persons holding certain offices, shall hold no other public trust. Excepting particular exclusions thus established, the electors and the appointing authorities are, by the constitution, wholly free to confer public stations upon any person, according to their pleasure. The constitution giving the right of election and the right of appointment; these rights consisting essentially, in the freedom of choice; and the constitution also declaring, that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office, is not declared as a right or principle, by any express terms of the constitution; but it results, as a just deduction, from the express powers and provisions of the system. The basis of the principle, is the absolute liberty of the electors and the appointing authorities, to choose and to appoint, any person, who is not made ineligible by the constitution. Eligibility to office, therefore, belongs, not exclusively or specially to electors, enjoying the right of suffrage. It belongs equally, to all persons whomsoever, not excluded by the constitution. I therefore conceive it to be entirely clear, that the legislature can not establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the constitution has not required. If, for example, it should be enacted by law, that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts; or that all persons not possessing a certain amount of property, should be excluded; or that a member of the assembly must be a freeholder; any such regulation, would be an infringement of the constitution; and it would be so, because, should it prevail, it would be in effect, an alteration of the constitution itself. But the question before us, is not at all, of this character. The legislature have made no such general regulation. They have prescribed, that incapacity to hold public trusts, shall be the punishment of a particular crime; and the question here is, whether they have power to prescribe such an incapacity, as a punishment, or not.

The power of the state legislature, in the punishment of crimes, is not a special grant or limited authority, but a part of the legislative or sovereign power of the state, to maintain social order, and to take life, liberty and all the rights of both, when the sacrifice is necessary.

The power of the legislature in the punishment of crimes, is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. It is a part of "the legislative power of this state," mentioned in the first sentence of the constitution. It is the sovereign power of a state, to maintain social order, by laws for the due punishment of crimes. It is a power to take life, and liberty, and all the rights of both, when the sacrifice is necessary to the peace, order, and safety of the community. This general authority is vested in the legislature, and as it is one of the most ample of their powers, its due exercise is among the highest of their duties. . . . The legislature have power to prescribe imprisonment or death, as the punishment of any offence. The rights of a citizen, are thus subject to the power of the state, in the punishment of crimes; and the restrictions of the constitution upon this, as upon all the general powers of the government, are, that no citizen shall be deprived of his rights, unless by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty or property, without due process of law.

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The power of the state over crimes, is thus committed to the legislature, without a definition of any crime, without a description of any punishment to be adopted, or to be rejected, and without any direction to the legislature concerning punishments. It is then, a power to produce the end by adequate means; a power to establish a criminal code, with competent sanctions; a power to define crimes and prescribe punishments by laws, in the discretion of the legislature.

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But though no crime is defined in the constitution, and no species of punishment is specially forbidden, to the legislature, yet there are numerous regulations of the constitution which must operate as restrictions upon this general power. The whole constitution must be supported; and all its powers and rules must be reconciled into concord. A law which should declare it a crime, to exercise any fundamental right of the constitution, as the right of suffrage, or the free exercise of religious worship, would infringe an express rule of the system; and would therefore, not be within the general power over crimes. Particular punishments would also encroach upon rules and rights established by the constitution. Though the legislature have an undoubted power to prescribe capital punishment, and other punishments which produce a disability to enjoy constitutional rights, yet a mere deprivation of rights, would, even as a punishment, be, in many cases, repugnant to rules and rights expressly established. Many rights are plainly expressed, and intended to be fundamental and inviolable, in all circumstances. A law enacting that a criminal should, as a punishment for his offence, forfeit the right of trial by jury, would contravene the constitution; and a deprivation of this right, could not be allowed, in the form of a punishment. Any other right thus secured, as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. These rights are secured to all; to criminals, as well as to others; and a punishment consisting solely, in the deprivation of such a right, would be an evident infringement of the constitution. Any punishment operating as an infringement of some rule thus expressly established, or some right thus expressly secured, would be unconstitutional; and all punishments which do not subvert such rules and rights of the constitution, are within the scope and choice of the legislative power.

Eligibility to office is not so secured.

But while many rights are consecrated, as universal and inviolable, the right of eligibility to office, is not so secured. It is not one of the express rules of the constitution, and is not declared as a right, or mentioned in terms as a principle, in any part of the instrument. Important as this right is, it stands, as the right to life itself stands, subject to the general power of the legislature, over crimes and punishments. As a right flowing from the constitution, it can not be taken away by any law declaring that classes of men, or even a single person not convicted of a public offence, shall be ineligible to public stations; but as a right not expressly secured by the constitution, it may be taken from convicted criminals when the legislature in their plenary power over crimes, deem such a deprivation, a necessary punishment. . . .

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It has been strongly urged, that the power to prescribe this species of punishment may be abused. That such a power may be abused, can not be denied; since all power entrusted to men, is subject to abuse. The power to declare crimes and prescribe punishments, is high, indefinite, and discretionary; and therefore affords ample room for abuse. Yet the legislature by their acts, instead of any tendency to severity, show a strong disposition to mildness, in the use of their power over crimes and punishments. . . . But whatever may be the danger of abuse, the punishment itself is not unconstitutional. The remedy for abuse of the legislative power, in enacting laws which may be unwise, while they are not unconstitutional, is not in the courts of justice. It is found in other parts of the system, in frequent elections and in the due course of the legislative power itself, which alike enacts and repeals laws, in pursuance of public opinion. That this punishment is little consonant to the genius of our institutions; that there is an ample choice of punishments for crimes, without adopting this; that the electors and the appointing powers should enjoy their free choice for public stations, without legal exclusions even for crimes, are reasons of great force; but they are reasons upon which the legislature must decide.

My opinion upon the whole case, is, that the punishment of incapacity to hold office, prescribed by the act to suppress dueling, is not inconsistent with the constitution; and that this cause has been rightly determined by the courts, through which it has passed.