Supplementary Material

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

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Territory v. Ah Lim, 1 Wash. 156 (1890)

Ah Lim smoked opium on September 27, 1889, in the territory of Washington. Territorial law at the time declared that "[a]ny person or persons who shall smoke or inhale opium . . . shall be deemed guilty of a misdemeanor." When the territorial prosecutor sought to indict Ah Lim, Ah Lim claimed the state ban on opium violated the due process clause.

The Supreme Court of Washington sustained the statute. Justice Dunbar asserted that states could punish acts that both injured the general public and injured the actor. Why did he reach that conclusion? On what basis did the dissent disagree? What restrictions on opium use would the dissent accept? Suppose Washington required all citizens who were more than five pounds over their ideal weight to diet. Would Justice Dunbar find that law constitutional? Are elected officials or judges likely to better protect such rights?

JUSTICE DUNBAR

The duty of passing upon the constitutionality of a law should be approached by the court with the utmost caution, and demands the most solemn, thoughtful, and painstaking consideration, and in view of the consequences to society from the annulling of laws made by the representatives of the people, and presumed to have been enacted in response to the express desire of the people, it becomes the gravest question with which courts have to deal; and we believe it has been the uniform conviction of the courts that they ought not, and cannot, in justice to a coordinate department of the state government, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity. . . .

The organic act extends the power of the territorial legislature to all rightful subjects of legislation; and, when once we concede the rightfulness of the subject, the extent and character of the legislation on that subject cannot be called in question by the court. It has a right to take a comprehensive view in determining the necessity of the law, and the character of the purpose to be accomplished by it. This is the especial function of the legislature, and, in the investigation of legislative power, courts have nothing to do with questions of policy or expediency. . . . The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives according to the methods provided by the constitution. . . .

Whether or not the main current of decisions flows in the exact direction taken by the court in the New York cases, we are satisfied that the doctrine is well established that the power of the legislature cannot be restrained by the courts upon considerations of policy or supposed natural equity. Were this power, however, given to the courts, the law, instead of being administered and decided upon uniform principles, would be decided according to the particular bent or inclination of mind of the ruling judge. What would appeal to one judge as natural equity would not be so received by another; and the different views of what constitutes a natural equity would only be equaled in number by the number of judges on the bench, each judge following his own ideas of abstract right, not limited to any well-defined path of investigation, but controlled and impelled only by his personal ideas of what ought or ought not to be allowed in a particular case,—pointed in no definite direction, but drifting aimlessly, like mariners at sea under a clouded sky, with neither compass nor log. . . . The judiciary could not set aside a law, free from

conflict with the constitution, because it seemed unjust. It could only interfere by overstepping the limits of its sphere, by appropriating to itself a power beyond its province, and by setting an example which other organs of the government might not be slow to follow. It is its peculiar duty to keep the first lines of the constitution clear, and not to stretch its power in order to correct legislative or executive abuses. . . .

In the case at bar, no special constitutional limitation or inhibition is pointed out with which the law in question is in conflict; but it is contended by the defense that the right of liberty, and pursuit of happiness, is violated by the prohibition of any act which does not involve direct and immediate injury to another. . . . The state has an interest in the health of its citizens, and has a right to see to it that its citizens are self-supporting. It is burdened with taxation to build and maintain jails and penitentiaries for the safe-keeping of its criminals, and to protect its law-abiding subjects from their ravages. It is taxed to maintain insane asylums for the safe-keeping and care of those who become insane through vicious habits or otherwise. It is compelled to maintain hospitals for its sick, and poor-houses for the indigent and helpless; and surely it ought to have no small interest in, and no small control over, the moral, mental, and physical condition of its citizens. If the state concludes that a given habit is detrimental to either the moral, mental, or physical well-being of one of its citizens, to such an extent that it is liable to become a burden upon society, it has an undoubted right to restrain the citizen from the commission of that act; and fair and equitable consideration of the rights of other citizens make it not only its right, but its duty, to restrain him. If a man willfully cuts off his hand, or maims himself in such a way that he is liable to become a public charge, no one will doubt the right of the state to punish him; and if he smokes opium, thereby destroying his intellect, and shattering his nerves, it is difficult to see why a limitation of power should be imposed upon the state in such a case. But it is urged by the defense that a moderate use of opium, or that the moderate use of an opium pipe, is not deleterious, and consequently cannot be prohibited. We answer that this is a question of fact, which can only be inquired into by the legislature. Smoking opium is a recognized evil in this country. It is a matter of general information that it is an insidious and dangerous vice, a loathsome, disgusting, and degrading habit, that is becoming dangerously common with the youth of the country, and that its usual concomitants are imbecility, pauperism, and crime. It has been regarded as a proper subject of legislation in every western state; and it is admitted by counsel in defense, in the argument of this case, that the statute in relation to the suppression of joints kept for the purpose of smoking opium was constitutional and right.

Granted that this is a proper subject for legislative enactment and control, no limit can be placed on the legislative discretion. It is for the legislature to place on foot the inquiry as to just in what degree the use is injurious, to collate all the information, and to make all the needful and necessary calculations. These are questions of fact, with which the court cannot deal. The constitutionality of laws is not thus to be determined.

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Our conclusion is that the law in question involves no inalienable right. It may be radical, injudicious, and wrong; but, as we have before indicated, these are questions solely for legislative investigation and discretion. . . .

CHIEF JUSTICE ANDERS and JUSTICE HOYT concur.

JUSTICE SCOTT dissenting

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The offense charged in this case cannot be held to be a nuisance, for it relates purely to the private action or conduct of the individual, and must not be confounded with those acts which directly affect the public. It is thought that the act in question is *sui generis;* that there is none other of a similar nature in force in this country, or one that has ever been sustained by the courts since we became an independent nation, although there may be occasional instances somewhat closely allied to it. Legislation, however, has ordinarily been confined to those cases where the act of the person directly and clearly affected the public in some manner. But here a single inhalation of opium, even by a person in the seclusion of his own house, away from the sight, and without the knowledge of any other person, constitutes a criminal

offense under this statute; and this regardless of the actual effect of the particular act upon the individual, whether beneficial or injurious. It is urged that there could be no conviction in such a case, for the want of proof. But the difficulty or impossibility of conviction could not affect the criminality of the act; also, the evidence might sometimes be furnished by the admission or confession of the guilty party, if in no other way. It is admitted that this law can only be sustained upon some one or more of the following grounds, viz.: That smoking or inhaling opium injures the health of the individual, and in this way weakens the state; that it tends to the increase of pauperism; that it destroys the moral sentiment, and leads to the commission of crime. In other words, that it has an injurious effect upon the individual, and consequently results indirectly in an injury to the community. And it is claimed that we must presume that the legislature had some one or more of these objects in view in enacting the law, although there is nothing upon the face of the act to indicate the legislative intention. This is going to a very great and dangerous extent to sustain legislation in this most important branch of our social structure.

. . . There is no good reason why the legislature should not fairly declare the object or purpose of all such laws limiting the personal conduct of the citizen, at least where the direct or primary effect is upon himself only; and there are many good reasons why it should be required. Unless the legislature has, as it is claimed it does have, the absolute, uncontrolled right to determine that the effect of any personal act it chooses to prohibit is injurious to the particular citizen,—and this is untenable,—then the authority cited, stating that it is not necessary to declare the purpose of the act upon its face, . . . is not applicable here, as an entirely different case is presented. Limiting the scope of the act to cases where injury results would not merely be declaring its purpose, but would be so framing the act as to keep within the legislative province; for, clearly, where there is no resulting injury, there is no right to restrain, if laws restraining the personal conduct can be sustained at all where the act forbidden does not affect the public except through injury to the particular individual, and thereby, possibly, injuring the community in some one of the ways specified. . . . However, if the act in question declared that no man should willfully injure himself by smoking or inhaling opium, thereby limiting its scope to such cases where injury resulted, there would be strong, and I think valid, reasons for sustaining it, upon some one or more of the grounds mentioned. Every act of the individual which has a direct tendency to render him unfit to perform the duties he owes to society is a rightful subject of legislation. The principle is a just and legal one. A man has no right to do that which will render himself an imbecile or a pauper. Society has an interest in the promotion and preservation of the bodily, mental, and moral health of each individual citizen; and laws tending to such results should be upheld in all reasonable ways. But because it is true that personal acts are rightful subjects of legislation to the extent where they clearly interfere with the reciprocal rights of others, and their control is generally recognized as being within the police powers of the state, or because they may be a rightful subject of legislation to that further extent, where they merely result in injury to the individual, and thus less directly to the state, which, however, has not as yet been very generally, if at all, recognized heretofore in this nation, it cannot be that every self-regarding act of the person which the legislature may choose to prohibit upon the ground that it is injurious to the individual, and thereby to the state, must be allowed to stand unquestioned through the courts, or that the courts have no duty to perform in the premises, as to determining whether the legislature has exceeded the limit of its legitimate powers under the constitution, unless a particular, specific constitutional provision can be shown which has been violated.

It is the one great principle of our form of government, expressed throughout that soul-inspiring document, our national constitution, that the individual right of self-control is not to be limited, only to that extent which is necessary to promote the general welfare; and these are not only questions of natural right but of constitutional right as well. It is none the less a constitutional guaranty because general in its nature, or implied in the bill of rights, or because each particular act wherein the will of the citizen should not be interfered with is not pointedly and specifically guarantied. Such particularity would be impossible. When one becomes a member of society, he necessarily parts with some rights or privileges which as an individual, not affected by his relations to others, he might retain. A body politic is a social compact by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. This does not confer power upon the whole people to control rights which are purely and exclusively private; but it does authorize the

establishing of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government. . . .

It is contended here that the legislature, being the sole and absolute judge of the effect upon the individual of the act forbidden, has decided every act of smoking or inhaling opium to be injurious to the person so doing, no matter how long or how short the duration, or how great or how small the quantity, or under what conditions or circumstances the same might have been used, and that there is no right of appeal to the courts in this particular. Such a construction of the law makes the legislature the sole judge of the constitutionality of its own acts of this character. There must be a right of review or control, to some extent, in the courts. Each citizen is entitled to the protection of all the branches of the government. A declaration by the legislature as to what the law shall be is not necessarily a conclusion reached by the state. The legislature is not the state, although a very important or essential part of it. The power to protect the rights of the citizen from the wrongful effect of such legislation is peculiarly adapted to, and within the province of, the judicial branch of the government, and can be exercised in one of two ways. Either the scope of such legislation should be limited to those instances where injury results as a matter of fact, and resorting to a trial in court to prove that fact in each individual instance; or if this would render an enforcement of the law impracticable, and a few must suffer for the public good by being prevented from regulating their own personal conduct in some matters beneficial or not harmful to them, in order that another class may be prevented from like actions, which to such persons would be harmful, then by recognizing a discretionary power in the legislature to prohibit such acts entirely, and at the same time recognizing the duty of the courts to correct abuses thereof when the act prohibited should have no real relation or tendency to produce any of the results sought to be avoided. To declare any private act or omission of the citizen to be crime, which does not result in any injury to the person, and could not possibly affect society under any other possible view except the last one, would be an unwarranted infringement of individual rights, and therefore unconstitutional. Individual desires are too sacred to be ruthlessly violated where only acts are involved which purely appertain to the person, and which do not clearly result in an injury to society, unless, possibly, thus rendered necessary in order to prevent others from like actions, which to them are injurious.

A great principle is involved in this character of legislation. Suppose the legislature had forbidden the use of opium in any manner. If the unqualified right to prohibit its use in one way exists, this carries with it the right to prohibit its use entirely. Substitute any other substance, whether commonly used as medicine, food, or drink, and still such a statute must be upheld, if the courts have no right of review. It is no answer to say that the legislature would do nothing unreasonable. No man knows as to this. The question is, has it the arbitrary power and right? Neither is it a sufficient answer to say that an appeal may be had to a subsequent legislature for redress; that where such laws are wrongfully passed the remedy must be sought in this way; and that until another legislature is convened, the citizen must tamely submit to, and obey, the restrictions and commands of every conceivable law relating to his personal conduct that, through some possible legislative caprice or inadvertence, might find its way upon the statute-books, before the question could be again submitted to another legislature, and its constitutionality again be tried by it, as that is virtually what the question would be. If it tended to promote the public welfare in any of the ways specified, it would be constitutional; and, if it did not do so, it would then be unconstitutional and void. And under such a view the legislature must decide this.

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Whichever view is taken of the duty of the courts in the premises—whether to hold such laws must be limited to instances where injury results to the particular person, or otherwise—the act in question should be held void. It is altogether too sweeping in its terms. I make no question but that the habit of smoking opium may be repulsive and degrading; that its effect would be to shatter the nerves, and destroy the intellect; and that it may tend to the increase of pauperism and crime. But there is a vast difference between the commission of a single act and a confirmed habit. There is a distinction to be recognized between the use and abuse of any article or substance. It is also a well-known fact that opium, in its different forms, is frequently administered as a medicine, and with beneficial results; and, while it may not be customary to administer it by way of inhalation, yet the legislature should not arbitrarily prevent its use in such a manner. If this act must be held valid, it is hard to conceive of any legislative

action affecting the personal conduct or privileges of the individual citizen that must not be upheld. We have been cited to no law, which has been sustained, that goes to the extent that this one does. It has no reference to the manufacture or sale of the substance. It is not based upon any pernicious example that the commission of the act might be to others. The prohibited act cannot affect the public in any way except through the primary personal injury to the individual, if it occasions him any injury. It looks like a new and extreme step, under our government, in the field of legislation, if it really was passed for any of the purposes upon which that character of legislation can be sustained, if at all. . . .

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JUSTICE STILES concurs with JUSTICE SCOTT