

CHAPTER TWO: CONSTITUTIONAL LIMITATIONS

INTRODUCTION

New York State has its own constitution called the [Constitution of the State of New York](#). Like the United States Constitution, it has a Bill of Rights which provides basic guarantees for all individuals. The New York Constitution does not codify the same rights as the Federal Constitution, but New York is nevertheless required to uphold the same rights guaranteed to everyone by the United States Constitution. Fundamentally, the New York State Constitution provides that “no person shall be deprived of life, liberty, or property without due process of law.”

This chapter provides a brief overview of some of the rights an individual has when charged with a crime or when he or she is otherwise affected by the criminal justice system in New York. This chapter will discuss *ex post facto*, equal protection, and the right to freedom of speech with corresponding cases to illustrate how these concepts are applied in New York. Other protections that New York provides, which the reader may want to explore, are double jeopardy, trial by jury, the prohibition against excessive bail, the right to peaceful assembly, etc.

EX POST FACTO

Ex post facto is not explicitly defined in the New York Constitution. Trial judges in New York, however, have been faced with *ex post facto* concerns. Issues of *ex post facto* may arise when the New York Legislature amends, creates, or removes a statute. The concurring opinion in *People v. Hudy*¹ provides the rationale and application of the *Ex Post Facto* Clause in the United States Constitution. According to the New York Court of Appeals, the *Ex Post Facto* Clause serves three purposes. First, the clause is intended to curb arbitrary and oppressive abuses by the government. In other words, the government cannot change the law and apply the current law against a defendant who committed the proscribed act before the law was changed, especially when the change presents a disadvantage to the defendant. Second, the clause ensures that the law gives fair warning regarding the behavior that is prohibited and the punishment for committing it. Third, the clause upholds the separation of powers by “confining the legislature to penal decisions...and the judiciary and executive to applications of existing penal law.” Furthermore, “the critical elements necessary to establishing that a...penal law is *ex post facto* are its retrospectivity and its detrimental effect on the accused.”

Previous federal case law has described four types of laws as being *ex post facto*.² The first type, with perhaps the widest application, are those laws that make an action which was completed before the passing of the law criminal and punish accordingly. Second are those laws that aggravate a crime, i.e., make punishment for the act more serious than when the act was committed. Third are laws that change or increase the punishment for a crime committed when the punishment was less or different. And fourth are those laws that alter legal rules of evidence.

The following case, *Hobbs v. County of Westchester and Mr. Montalto*,³ argued in front of the U.S. Court of Appeals, concerns the third type of *ex post facto*. The plaintiff, appealing from a judgment in U.S. District Court, argued that a county executive order denying him a solicitation permit for a child-oriented performance unduly inflicts greater punishment than was applicable to the crime when committed. Thus, the central question that the Court of Appeals considered was whether the aim of an executive order banning appellant’s activities from a county-owned park was to punish him for his past sex offense convictions, or whether the restriction arose out of “a relevant incident to a regulation of a present situation.”

In this case, appellant Hobbs applied for a permit to perform tricks and games for children at Playland Park in Rye, New York, which is owned by Westchester County. The defendant, Montalto, who was Director of Playland, denied his permit on the basis that appellant’s interest in soliciting tips from his

audience is restricted activity in the park. The appellant filed a complaint against defendants in the U.S. District Court by alleging that the county violated his First Amendment rights. The District Court agreed that the county's restrictions on First Amendment activity in public areas, such as the park, pier, boardwalk, and pathways, could not be used to exclude persons from "communicating with their fellow citizens." During the course of this action, however, the defendant learned that appellant was a repeat sex offender against minors. After appellant again applied for a permit in 2001, defendant Montalto again denied the permit, stating that appellant's convictions for sex offenses against minors rendered him ineligible. As additional court hearings were going on to resolve defendants' contention that they could bar solicitation in public areas, the County Executive issued Order No. 3-2003 in March 2003, which stated, in section VI, paragraph 2 that "no individual known to have been convicted of a sexual offense against a minor shall be permitted to obtain a permit if the solicitation performance, demonstration or other similar activity would entice a child to congregate around that person since the granting of such a permit would involve an unreasonable risk to the safety and welfare of children."

Appellant complained again in District Court that the Executive Order violated the First Amendment of the Constitution because it was "not narrowly tailored to the compelling state interest of protecting children from sexual predators." The District Court disagreed and found in favor of the defendants.

Appellant then appealed to the U.S. Court of Appeals by stating that the Executive Order, among other things, amounts to further criminal punishment of previously convicted sex offenders in violation of the *Ex Post Facto* Clause of the U.S. Constitution. According to the Court of Appeals, the *ex post facto* bar, "is applicable only to 'criminal punishments,' and does not 'include retrospective laws of a different character.'" As such the prohibition provision in the Executive Order did not pose a criminal penalty. Rather, "nothing...suggests that the legislation sought to create anything other than a civil...scheme designed to protect the public from harm...The Court concludes that...the provision clearly is civil and regulatory, rather than criminal." The prohibition does not impose a criminal penalty, is not a restraint that is designed to be punitive, and is not intended to serve the traditional purposes of punishment, i.e., retribution, rehabilitation, prevention, and deterrence. The judgment of the District Court was affirmed.

EQUAL PROTECTION

Section 11 of Article I of the New York Constitution contains the equal protection clause which states:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Equal protection issues permeate all areas of law, such as laws regulating same sex marriage, landlord-tenant matters, health insurance benefits, access to public places, and local government procedures. Equal protection civil lawsuits have been brought against governmental entities in cases originating from criminal violations or offenses.

In *Schnapp, et al. v. Lefkowitz, et al.*⁴, the plaintiffs argued that the law requiring all dog owners in cities with a population in excess of 400,000 to pick up after their pets in public places (§1310 of the Public Health Law) denied plaintiffs equal protection of the laws. The law makes it a violation punishable by not more than \$100. The lawsuit asked that the law be declared unconstitutional since it places such great burdens on dog ownership that it makes it virtually impossible for city dwellers to continue to own

dogs. The New York Supreme Court resoundingly disagreed and declared the lawsuit “frivolous.” According to the court, “It is elementary that a statute designed to foster the safety, health, and welfare of the people of the State is a reasonable and proper exercise of the police power... We all recognize that the city is different

from the country, and that the intense concentration of population in the city makes it necessary to prohibit, limit, or regulate certain practices which could be tolerated in the countryside... The fact that the law applies only to cities with a population in excess of 400,000, i.e., New York and Buffalo, hardly constitutes a denial of the equal protection of the laws to the residents of those cities. Density of population creates distinct and unique problems.” The court declared the statute to be constitutional and dismissed the complaint.³

In another case, the defendant was ticketed for speeding in violation of the Vehicle and Traffic Law. The prosecutor in the case had previously dismissed several others because the speed limit sign was partially hidden by foliage. However, in this case, the prosecutor reasoned that he decided to prosecute this case because “he was entitled to change his mind.” The Village Court dismissed the case in part for violation of equal protection. The court reasoned that “it is both arbitrary and capricious for the prosecutor to not afford this defendant the same treatment that he extended to several other defendants in similar circumstances... [and] that it would be a gross violation of the 14th Amendment of the United States Constitution and article I, §11 of the New York State Constitution to not afford this defendant the ‘equal protection of the laws.’” The court in this case found no “extenuating circumstances” to treat this case differently.⁴

In New York, certain sex offenses were written, even in the revised Penal Law, to be applied only to instances where a male perpetrated a crime against a female victim. The idea behind this was to protect the chastity of women and prevent unwanted pregnancies. Thus, female perpetrators were exempt from the law as well as male victims. However, in 1984, the Court of Appeals ruled in *PEOPLE v. LIBERTA*⁵ (discussed in Chapter 10) that the rape and sodomy statutes both violate equal protection because they are “underinclusive classifications” which burden males who victimize females, but not female victimizers or males who victimize males. The court found that this statute no longer achieves an important governmental objective, i.e., protecting chastity and preventing pregnancy. In *People v. Dieudonne, Dieudonne, Bernagene and Strackman*, the Supreme Court relied upon *Liberta* to find that the sexual misconduct statutes also violate equal protection, again since no important governmental objective was demonstrated by the prosecution.⁶

The following case, which originated in New York, was appealed to, and decided by, the United States Supreme Court. The decision, delivered by Chief Justice William Rehnquist, had wide-ranging implications not only for New York but also for the United States regarding the laws on assisted suicide. In this case, the Supreme Court considered the balance of refusing medical treatment against the intentional aiding of another person to commit suicide.

Vacco, et al. v. Quill, et al.
95-1858
Supreme Court of the United States (1995)

Opinion By: Rehnquist, C.J.

The issue presented in this case is whether New York’s prohibition on assisting a suicide violates the Equal Protection Clause of the Fourteenth Amendment.

New York State law states that: (1) certain criminal statutes provide that a person who

intentionally causes or aids another person to attempt or commit suicide is guilty of a felony; but (2) under other statutes, a competent person could refuse lifesaving medical treatment.

This action was brought in 1994 against New York State's Attorney General to the United States District Court in Southern New York by plaintiffs who were, among others, three physicians who practiced in New York. The plaintiffs asserted that the prohibition on assisted suicide statutes violated the equal protection clause of the Federal Constitution's Fourteenth Amendment when applied to physicians who assisted mentally competent but terminally ill adults who chose to hasten death. The District Court, however, recognized that New York's assisted-suicide statutes have been in existence since 1965, when the Penal Law was revised. Since then, New York has continually recognized the line between "killing"

and "letting die." The District Court granted judgment in favor of the New York Attorney General and dismissed the suit by ruling that New York could recognize a difference between allowing nature to take its course and intentionally using an artificial death-producing device.

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit which reversed the order of the District Court. The Court of Appeals expressed the view that (1) the ending of life by the withdrawal of life-support systems was nothing more nor less than assisted suicide; and (2) to the extent that the criminal statutes prohibited a physician from prescribing medications to be self-administered by a mentally competent, terminally ill person in the final stages of terminal illness, such statutes were not rationally related to any legitimate state interest and violated the Equal Protection Clause.

The United States Supreme Court granted certiorari and reversed the Court of Appeals. The Supreme Court held that the New York criminal statutes did not violate the equal protection clause because: (1) the criminal statutes did not infringe fundamental rights; (2) on their faces, neither the statutes banning assisted suicide nor the statutes permitting the refusal of medical treatment treated anyone differently than anyone else or drew on any distinctions between persons; (3) the distinction between assisting suicide and refusing lifesaving medical treatment was important, logical, and rational; and (4) New York's reasons for recognizing and acting on the distinction between assisting suicide and refusing lifesaving medical treatment were valid and important public interests.

If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end' ...New York's statutes outlawing assisting suicide affect and address matters of profound significance to all New Yorkers alike. Under the current law, "[e]veryone, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide. Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause [of the United States]."

The Court further stated, "The distinction [between refusing medical treatment and assisted suicide] comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication...Furthermore, a physician who withdraws, or honors, a patient's refusal to begin life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and 'to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them'...A doctor who assists a suicide, however, 'must, necessarily and indubitably, intend primarily that the patient be made dead.' Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not."

New York State criminal statutes providing that a person who intentionally causes another's attempt or commission of suicide is guilty of a felony, does not violate the Fourteenth Amendment's Equal Protection Clause.

The judgment of the Court of Appeals was reversed.

FREEDOM OF SPEECH

Section 8 of Article I contains the freedom of speech clause which states:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

A case in which the public's right to attend a criminal court proceeding was considered against a court's right to protect a defendant against prejudice occurred in *In the Matter of Poughkeepsie Newspapers, Inc. v. Rosenblatt, et al.*⁷ In this case, defendant Lemuel Smith strangled and sexually

molested a correction officer who had been on the job for about a month. The insidious nature of the crime made it a high profile case in the media.

The petitioner, Poughkeepsie Newspapers, Inc., challenged an order of the respondent, Justice Rosenblatt, that excluded the public from a hearing conducted to determine the admissibility of certain evidence in the trial of defendant Lemuel Smith. The issues raised required the Supreme Court of New York to strike a balance between the First Amendment's guarantee of freedom of the press as it pertains to public access to criminal proceedings and a defendant's right to a fair trial.

Defendant was on trial for murder in the first degree. In the highly publicized mutilation slaying of Correction Officer Donna Payant at Green Haven Prison, the respondent Justice, who was presiding at the trial, granted the application for a hearing and ordered that the public be excluded. The New York Court of Appeals heard this case because of the importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus evade review. "Accordingly, we address the merits of the petitioner's contention that the public was improperly excluded from the hearing at bar."

According to the Court, "It is now firmly established that the press and the general public have a constitutional right of access to criminal trials founded upon the guarantees of the First Amendment. Nevertheless, 'although the right of access to criminal trials is of constitutional stature, it is not absolute. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one...[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'"

In this case, the justice did not exclude the public from the trial, but only a hearing to determine the admissibility of certain evidence. Further, "In view of the intensive publicity surrounding the trial, press access to the hearing would undoubtedly raise a significant danger that information concerning the substance of the challenged evidence will reach sitting jurors...That danger would require additional interrogation of the jurors, needlessly and significantly prolonging this already lengthy trial and...causing additional prejudice...The evidence proffered by the prosecution was extremely damaging to the defendant...Weighing these circumstances against the legitimate rights of the press...we hold that the respondent Justice properly closed the hearing to the public pending a determination of the admissibility of the challenged evidence."

REVIEW QUESTIONS

1. If a right, recognized in the U.S. Constitution, is not explicitly recognized in the New York State

Constitution, the New York courts:

- A. can ignore that right.
 - B. must nevertheless recognize the right
 - C. must write the right in the State Constitution
 - D. must let the defendant know about the right.
2. One reason behind imposing constitutional limits on the law is to:
- A. create needless difficulties for the government.
 - B. provide challenges to the government so that only the most capable can interpret the law.
 - C. prevent arbitrary and capricious application of the law.
 - D. encourage lawyers to get jobs in corporate law firms.
3. New York State prohibits assisted suicides, but competent but terminally ill patients are permitted to:
- A. take death inducing medication.
 - B. refuse medication.
 - C. commit suicide.
 - D. take medical marijuana.
4. Which of the following is **not** an example of an *ex post facto* law?
- A. An offender sentenced to a prison term that's twice as long as the term was when the offense was committed
 - B. An offender who is charged with an offense that did not exist as an offense at the time of his act
 - C. An offender who is charged with an aggravated offense which had no aggravating factor at the time of the act
 - D. An offender who is convicted of an offense that was an offense at the time he committed the act
5. Under which of the following conditions may a judge preclude the presence of the press in a court proceeding?
- A. Never
 - B. When she wants it
 - C. When it would be highly prejudicial to a defendant's right to a fair trial
 - D. When the prosecutor requests it

REFERENCES

¹ 73 N.Y.2d 40 (1988)

²Calder v. Bull (3 U.S. 386 (1798))

³ 546 U.S. 815 (2005)

⁴ 422 N.Y.S.2d 798 (1979)

⁵ 64 N.Y.2d 152 (1984)

⁶ 544 N.Y.S. 2d 405 (1989)

⁷ 61 N.Y.2d 1005 (1984)

ANSWERS

1. B; 2. C; 3. B; 4. D; 5. C
