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BOOK REVIEW

CONTEMPT OF COURT, THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM

By Robert D. Peltz*

It often happens that only from the words of a good storyteller do we realize what we have done and what we have missed, and what we should have done and what we shouldn't have. It is perhaps in these stories, oral and written, that the true history of mankind can be found and that through them one can perhaps sense if not really know the meaning of that history

—Ivo Andrie¹

History is comprised of countless unrecorded events involving faceless individuals which nevertheless have profound importance upon our development as a society. Through their meticulous research and dramatic writing, Mark Curriden² and Leroy Phillips, Jr.³ have made a record and given faces to those involved in one of the previously overlooked unique events in this country's legal history. As Curriden observed:

The story of Ed Johnson brings to life a Supreme Court case that moves both the heart and the mind—to demonstrate that the liberties and prerogatives we so frequently take for granted were written in blood. Legal scholars say it signaled a change in the nation's entire criminal-justice system.⁴

*Contempt of Court*⁵ is the chilling story of the 1906 mob lynching of Ed Johnson, an African-American living in Chattanooga, Tennessee, following his conviction for the rape of a white woman in a trial that, at best, could only be called a shame to the American judicial system.

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1. JOHN P. BRADLEY ET AL., *THE INTERNATIONAL DICTIONARY OF THOUGHTS* 361 (1969).

2. Mark Curriden is the *Dallas Morning News* legal affairs writer.

3. Leroy Phillips, Jr. is a prominent trial attorney living and practicing in Chattanooga, Tennessee.

4. MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT, THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM*, at xiv (2001) [hereinafter *CONTEMPT OF COURT*].

5. *Id.*

Sadly, Johnson's fate can hardly be called unique as there were 3,385 documented mob lynchings of African-Americans in the United States between the years 1882 and 1935.⁶

What made Johnson's case unique, however, was that the lynching occurred directly in the face of a stay of execution granted by the United States Supreme Court after it had agreed to consider his precedent shattering petition for writ of habeas corpus. In this petition, Johnson's lawyers argued that the state of Tennessee had denied him numerous constitutional rights guaranteed by the Bill of Rights. At the time of the petition, the federal courts had uniformly held that the guarantees contained in the Bill of Rights only applied to the federal government, not to the states.⁷ Nevertheless, because the facts surrounding his trial were so egregious, Johnson's lawyers believed that this case could be the vehicle to dramatically change then existing constitutional law.

What followed was even more unique: the first contempt proceeding ever initiated by the United States Supreme Court.⁸ A legal spectacle watched by the entire country, in which the Attorney General of the United States prosecuted the sheriff of Hamilton County, Tennessee and a number of his deputies for virtually inviting (and in some cases assisting) the lynch mob to invade the jailhouse and remove Ed Johnson, despite the Supreme Court's direct order requiring his custody and safekeeping.

Ed Johnson's story not only has significant historical importance, but it is also a drama complete with heroes, innocent victims, and villains. Unfortunately, law schools do not teach of the heroic exploits of Noah Parden and Styles Hutchins, the two African-American attorneys who volunteered to represent Ed Johnson after his conviction. Despite the profound legal and personal obstacles, Parden and Hutchins argued that state criminal defendants were entitled to the same protections guaranteed under the Bill of Rights and convinced the Court to hear Johnson's case, despite the overwhelming precedent to the contrary. The public was so outraged that neither attorney felt safe to return to Chattanooga and practice law.

There was also an innocent victim sacrificed to satisfy an outraged city's blood lust. Despite his lack of formal education and economic stature, Ed Johnson displayed a determined dignity, accepting his fate

6. *Id.* at 354-55.

7. *See, e.g.*, *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *West v. Louisiana*, 194 U.S. 258 (1904); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Hurtado v. California*, 110 U.S. 516 (1884).

8. CONTEMPT OF COURT, *supra* note 4, at 255, 270.

with his head unbowed. Since no pictures exist, all that is left to memorialize him is a granite tombstone with a barely legible inscription:

GOD BLESS YOU ALL. I AM A
INNOCENT MAN
ED JOHNSON
BORN 1882
DIED MARCH 19, 1906
FAREWELL UNTIL WE MEET AGAIN IN THE
SWEET BY AND BY⁹

THE TRIAL

Although there were many troubling aspects to Ed Johnson's trial, there were certain injustices that cried out among all the rest. Immediately following the rape, the victim told the sheriff that she did not get a sufficient look at her attacker to determine whether he was black or white.¹⁰ In the ensuing days while the sheriff unsuccessfully attempted to solve the crime, tensions in the community began to mount to the drumbeat of inflammatory news accounts from the local newspapers, typified by the following article from the *Chattanooga News*:

The fiendish and unspeakable crime committed in St. Elmo last night by a Negro brute, the victim being a modest, pretty, industrious and popular girl, is a sample of the crimes which heat southern blood to the boiling point and prompt law abiding men to take the law into their own hands and mete out swift and horrible punishment.

No crime has so shocked the community within the memory of its oldest citizens.¹¹

Not to be outdone, the competing *Chattanooga Times* carried an article on the following day entitled, "*Feeling at High Pitch: Black Brute Managed to Cover Up Tracks Well*," which read in part:

Feeling continues to run high, not only in St. Elmo and vicinity, but all over Hamilton County because of the terrible outrage committed Tuesday night

It was acknowledged by everybody, including officers of the law, that no power could save the criminal from summary vengeance in case he should be caught. . . .

Neither is there any likelihood of any dying out public sentiment along these lines

Many citizens who were never before heard to use any intemperate expressions on account of crime were open yesterday in their vile desire to aid in meting out punishment to this Negro whenever

9. *Id.* at xiii.

10. *Id.* at 31.

11. *Id.* at 33.

caught. It was a frequently expressed desire to help pulling the rope or wielding the weapon that would send such a brute into eternity at the earliest possible moment.¹²

The fact that the sheriff, a former confederate army officer, was locked in a close re-election campaign compounded the public pressure to find the perpetrator. Several days later, after a reward was offered, an extremely dubious eyewitness surfaced. Although he identified Johnson as being in the area of the crime, his testimony was subsequently discredited.¹³

Before the start of the trial, *which began less than two weeks after the crime*, large, gun wielding mobs attacked the jail house on three separate occasions in an effort to hang Johnson, only to be foiled by his transfer to Nashville.¹⁴ Each unsuccessful attack only heightened the city's hysteria, as evidenced by the following article in the *Chattanooga News*:

Many citizens have been heard to express the sentiment that they were willing to wait until Wednesday for the Negro to be brought to Chattanooga for trial, but were unwilling to wait longer, regarding the "law's delay" in this matter as explicable.

There have been expressions of concern that the Negro was enjoying too long a lease of life after his crime. There exists a determination to see that the Negro Johnson shall pay the extreme penalty for his terrible crime.¹⁵

With this backdrop, the presiding judge, along with the prosecutor and sheriff, met with Johnson's court-appointed attorneys several days before the start of the trial. In this meeting, the judge advised them to not even consider moving for a continuance of the trial or a change of venue because community outrage was so high that it would incite a mob lynching and possibly an attack on the lawyers and their families. Intimidated by these threats, Johnson's lawyers remained silent and the trial began under circumstances that guaranteed the impossibility of a fair proceeding.¹⁶

Although one-third of Hamilton County's population was African-American, there were no blacks on the venire panel. In fact, for decades, jury commissioners had systematically excluded African-Americans from jury service.¹⁷ As a result, the deputy clerk in charge of summoning jurors testified in one of the subsequent proceedings that he

12. *Id.* at 34-35.

13. *Id.* at 13.

14. *Id.* at 14.

15. *Id.* at 72-73.

16. *Id.* at 16, 162.

17. *Id.* at 158-63.

could only remember one time in which an African-American had ever even been called for a jury, and that man was "almost white."¹⁸

Under these circumstances it was hardly surprising that Ed Johnson was convicted by an all white jury, despite a dozen alibi witnesses who established his presence elsewhere, the original lack of a positive identification by the victim, and the discrediting of the sole "eyewitness." The manner in which the trial was conducted also led to an increase in tensions as the jury was allowed to directly question the victim. The degree of hatred for Ed Johnson reached such extremes that during the jury's questioning of the victim, one of the jurors pointed to Johnson and screamed out, "If I could get at him, I'd tear his heart out right now."¹⁹ The court did not discharge the juror, nor did the defense counsel move for a mistrial; rather, this outburst only led to the prosecutor apologizing to the victim for having to endure such an "embarrassing procedure."²⁰

Following the preordained conviction, the judge, prosecutor, and sheriff again met with Johnson's attorneys and talked them into waiving his right to appeal. They convinced the attorneys that this course of action was necessary to avoid a lynch mob storming the jail again, possibly killing the other African-American prisoners as well.²¹ Accordingly, Johnson's execution date was set for thirty days after the conviction.

THE WRIT OF HABEAS CORPUS

Hours after Ed Johnson was sentenced to death, his father came to the office of Noah Parden, who at age forty-one, was Chattanooga's premier African-American attorney. Although Parden originally declined to serve on Johnson's court-appointed defense team, during the course of the trial he became convinced of Johnson's innocence. Accordingly, he and his partner, Styles Hutchins, the first black man ever to be admitted to the Georgia Bar and a former state legislator, took on his appeal.

Johnson's attorneys' initial efforts at an appeal to the Tennessee Supreme Court were thwarted by the trial judge's deliberate trickery in refusing to accept their petition until after the appeal time had run. Accordingly, Parden and Hutchins decided to file a petition under the Habeas Corpus Act of 1867. Although on its face the Act allowed federal review of state criminal cases where the defendant had been denied constitutional rights, most lawyers of the day were of the view that such petitions were a waste of time since United States Supreme Court prece-

18. *Id.* at 163.

19. *Id.* at 109.

20. *Id.*

21. *Id.* at 158-63.

dent uniformly declared that the guarantees of the Bill of Rights did not apply to the states.

Following an evidentiary hearing, the district court judge expressed grave doubts over the validity of Ed Johnson's trial, but felt constrained to deny the petition because of the prevailing view on the inapplicability of the Bill of Rights to the states.²² Nevertheless, he granted Johnson a ten day stay to prepare a writ to the United States Supreme Court. As the lawyers prepared the writ, tensions continued to boil in Chattanooga, leading to attacks on Parden's home and family. After sending his family to live with neighbors, Parden boarded the train for the long and lonely trip to Washington, D.C., in order to present Johnson's petition to the United States Supreme Court.

While in Washington, the legendary Justice John Marshall Harlan, the emergency Justice for the Sixth U.S. Circuit and an avowed foe of racism, gave Parden the rare opportunity to present argument in support of his petition.²³ Following the *ex parte* argument, Justice Harlan left without giving any indication as to his thoughts. Accordingly, it was not until he stepped off the train after the fifteen hour ride back to Chattanooga that Parden learned that Justice Harlan, with the help of Justice Oliver Wendall Holmes, had convinced the Court, during a rare Sunday meeting, to issue a stay of execution and advance the case to the top of its docket.

THE LYNCHING

As Justice Harlan's order directing the Sheriff to keep Johnson safe pending the appeal was being read in Chattanooga, the local newspapers stoked passions even higher with continued attacks of the Court and calls for outright vigilantism:

22. *Id.* at 167-68.

23. In his often quoted dissent in the infamous decision of *Plessy v. Ferguson*, Justice Harlan proclaimed, "Our Constitution is color-blind." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). He went on to observe:

What can more certainly arouse race hate, what can more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation. . . .

. . . .
The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

. . . The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

Id. at 560, 562 (Harlan, J., dissenting).

The gallows in the Hamilton County Jail has again been disappointed in the case of Ed Johnson, convicted by the state courts of rape and sentenced to death.

. . . .

It will be at least thirty or sixty days before Johnson can be legally executed.

All of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty and that he ought to suffer the penalty of the law as speedily as possible.

If by legal technicality the case is prolonged and the culprit finally escapes, there will be no use to plead with a mob here if another such crime is committed. Such delays are largely responsible for mob violence all over the country.²⁴

Later that evening, the sheriff not only ignored his chief deputy's suggestion to post extra men at the jail, but incredulously gave all of his deputies the night off, with the exception of a single, elderly jailer. Shortly thereafter an armed mob broke into the jail. "Their talk was loud and angry. None of them seemed surprised when they found no law enforcement officers in their initial search of the first floor" ²⁵

As the mob reached the third floor, where the cell holding Johnson was located, they were stymied by a steel-plated door. After unsuccessfully pounding on the lock with sledgehammers and axes, they located the elderly jailer and took his keys, only to discover that their earlier pounding had rendered the lock incapable of being opened.²⁶

While the attack inside the jail continued, the crowd outside quickly swelled into the hundreds, stoked by racist speeches that were intermittently interrupted by play-by-play progress reports from inside the jail. Over three hours after the initial onslaught had begun, the noisy mob finally broke through the last doorway and forced Ed Johnson out of his cell.

Subsequent testimony established that while the screaming mob was breaking into the jail, the trial judge and prosecutor monitored their progress from the courthouse across the courtyard.²⁷ Not only was no effort made to alert the nearby National Guard, but the judge subsequently locked out a minister who wanted to ring the alarm bells located on the roof to alert the National Guard.²⁸ Not to be outdone, the sheriff eventually responded to the jail house in the midst of the assault. He made no effort to stop the mob or even identify the citizens involved.

24. CONTEMPT OF COURT, *supra* note 4, at 196-97.

25. *Id.* at 201.

26. *Id.* at 201-04.

27. *Id.* at 252.

28. *Id.*

Despite being on the scene for over an hour, the sheriff subsequently testified that he could not identify one person present.²⁹

Not content to merely beat and hang Ed Johnson, the mob began to shoot at him when he did not die quickly enough to suit them. After being shot over fifty times, one stray bullet severed the rope, causing his body to fall to the ground, prompting a second fusillade of bullets. "In a final act of desecration, one leader of the mob stepped forward and pinned a large note to the victims body. It read, 'To Justice Harlan. Come get your nigger now.'"³⁰

Despite the massive public involvement, not one arrest was ever made for Ed Johnson's murder. Not even a police report was filed. According to the official records of Hamilton County, the "incident" never happened.³¹

PUBLIC REACTION

Not surprisingly, public sentiment in Chattanooga blamed the Supreme Court for the crime:

The lynching is a direct result of the ill-advised effort to save the Negro from the just penalty of the laws of Tennessee. Had not that effort been made, the Negro would have been legally executed today at the county jail. There was not a scintilla of doubt in the minds of the jury that he was guilty.

The [Chattanooga] News deems it timely to mention that this community was content to let the law take its course provided there was no unnecessary delay. It was the appeal to the federal courts that revived the mob spirit and resulted in the lynching. This fact should be a lesson in the future.

There is no community south or north which will submit to delay in punishment for this particular crime. The Supreme Court of the United States ought in its wisdom to take cognizance of this fact.³²

The comments of the *Chattanooga News's* editor, published in a *Washington Post* article, were even more to the point:

That allegation [that blacks were intentionally excluded from juries] is a fact. The South long ago decided this to be a white man's government, and there is no appeal in Hamilton County from that

29. *Id.* at 207, 315.

30. *Id.* at 214.

31. *Id.* at 217. This, unfortunately, was hardly unusual. In the sixty-five lynchings which occurred during 1906, a total of only three people were arrested, none of which were even charged with murder.

32. *Id.* at 219.

decision. If that is treason, our critics are invited to make the most of it.

It has been an unwritten law in the South, since the memory of man runneth not to the contrary that the black man who assaults a white woman shall die. This law maintains in every southern state, and is higher than any statutory law.

And when once it is made certain that the guilty man has been captured there is not power enough in the United States Army to save him. I hold that the worthless, shiftless, criminal black brute who outrages a white woman has no more rights under the law than a serpent.³³

The Supreme Court's reaction was aptly expressed in another article published in the *New York Times*:

The open defiance of the Supreme Court of the United States of the mob that lynched the Negro, Ed Johnson, last night, has no parallel in the history of the Court. The event has shocked the members of the Court beyond anything that has ever happened in their experience on the bench. They have met in twos and threes today and discussed the matter, and the course to be taken to vindicate the power and authority of the Court.³⁴

While the Court and President Theodore Roosevelt considered the proper response, Sheriff Shipp was re-elected by the largest margin ever recorded up to that time. The local feeling was expressed in another *Chattanooga News* editorial:

Sheriff Shipp ought to be re-elected by the white voters of the county. When we remember that the issue against him is his course in the Johnson case, there ought to be enough Anglo Saxon manhood in the county to elect him. He should be given one of the largest majorities in the history of the politics of the county. His defeat would be entirely too much encouragement to the defenders of such fiends as Johnson was. We repeat that we do not understand how a white man can withhold support from Sheriff Shipp under all the circumstances.³⁵

Such feelings were not limited just to Chattanooga, as evidenced by the *Atlanta News's* comments on the events:

When a brute, white or black, attacks and kills or ruins the life of a white woman, we believe that speedy justice should be meted out to him. If the courts permit indefinite delay and fail to protect defenseless women of the south against such outrageous crimes, there

33. *Id.* at 230.

34. *Id.* at 221-22.

35. *Id.* at 232.

is nothing left for white men to do except to handle the guilty devils as they did in Chattanooga.

The idea of the Supreme Court of the United States interfering in a case infamous as that at Chattanooga seems to us to be an outrage against justice, and puts the courts beyond consideration in such cases. We do not believe in lynching or anarchy, but we do believe in the white men of the south protecting at any cost the white women, when the courts fail to do so.

In the case at Chattanooga the crime was especially brutal and inhumane. The people of that city were justified in punishing the guilty Negro when they saw he might try to escape justice by the unwarranted delay And technicalities of the courts.³⁶

Other papers throughout the South took-up the banner of anti-federalism and criticized the Court for "interfering" with state affairs.³⁷ It quickly became apparent that the ramifications went beyond Ed Johnson's lynching and the affront to the Supreme Court, but to the very heart of the relationship between the states and the federal government.

THE CONTEMPT PROCEEDING

Accordingly, the Justice Department moved cautiously, first sending in Secret Service agents to investigate and take witness statements. Because any criminal charges would necessarily have to be brought and tried in Tennessee, where a conviction was doubtful, the decision was made to instead bring contempt charges against the sheriff and the mob members who could be identified, who would then be tried before the U.S. Supreme Court itself.

Even after the charges were brought, the defendants remained defendant, as noted in an interview given by Sheriff Shipp to the *Birmingham News*:

[I]n my judgment, the Supreme Court of the United States was responsible for this lynching. I had given that Negro every protection I could. Nevertheless, I must be frank in saying that I did not attempt to hurt any of the mob and would not have made such an attempt if I could.

Had not the Supreme Court of the United States interfered, we would have been able to set an example for the maintenance of law and order and a speedy trial in cases of this kind that would have been of great value throughout this country.

I regard it as very unfortunate that this case had not been left to the state authorities where it originated.³⁸

36. *Id.* at 236.

37. *Id.* at 237.

38. *Id.* at 257.

Because this was the first direct contempt proceeding ever tried before the United States Supreme Court, there were no established rules or procedures. Following two full days of preliminary oral arguments, the Supreme Court unanimously refused to dismiss the charges and eventually decided that testimony would be taken before a special master as part of a trial, which would conclude with final arguments before the Court itself. In this preliminary argument, Justice Harlan repeatedly questioned the defense counsel concerning the Supreme Court's ability to apply the Bill of Rights' protections to the states by incorporation through the Fourteenth Amendment's Due Process Clause.

Because of the proceeding's historic nature, the Supreme Court set aside two full days for final arguments. The prosecution's argument was presented by the Attorney General himself, Charles Bonaparte. The arguments focused on the facts surrounding the lynching, rather than the Court's legal authority, as in the earlier phase. In the ensuing months while the Court was deliberating, another event occurred that shook the nation.

Even as the Court debated the issues and facts, a telegram arrived from Oxford, Mississippi, detailing how U.S. Senator W.V. Sullivan had led a lynch mob to kill a black man accused of cutting a white woman's throat. "I led the mob which lynched Nelse Patton and I'm proud of it," Sullivan told newspaper reporters.

I directed every movement of the mob. I wanted him lynched. I saw his body dangling from a tree this morning and I am glad of it. I aroused the mob and directed them to storm the jail. I had my revolver but did not use it. I gave it to a deputy sheriff and told him to shoot Patton and shoot to kill. I supposed the bullets from my gun were some of those that killed the Negro.

The article went on to state that no charges were being brought against any person who had participated in the lynching.³⁹

Eventually, after five full days of deliberations, a divided Court reached its verdict, finding the sheriff, one of his deputies, and four other participants guilty of contempt. Although the sentences only ranged from sixty to ninety days, the opinion was seen as sending a significant message. As subsequently commented by Noah Parden in an interview to the *Atlanta Independent* in November, 1909:

The very rule of law upon which this country was founded and on which the future of this nation rests has been enforced with the might of our highest tribunal.

We are at a time when many of our people have abandoned the respect for the rule of law due to the racial hatred [sic] deep in their

39. *Id.* at 329.

hearts and souls, and nothing less than our civilized society is at stake.⁴⁰

In 1909, the year that Sheriff Shipp was sentenced, lynchings significantly decreased from ninety-seven in the preceding year to eighty-two. This downward trend continued over the following years. Likewise, the number of people saved from lynchings by law enforcement officers correspondingly began to grow.⁴¹

Although we will never know whether Ed Johnson's Supreme Court case would have produced the changes in constitutional law that his attorneys had hoped, these changes were gradually adopted in subsequent years. The arguments in his case touched on many critical constitutional issues that were continuously debated throughout the twentieth century, such as the application of Bill of Rights protections to state court proceedings, the parameters of a fair and impartial trial, the definition of effective assistance of counsel, and the right to a trial free from community prejudice.

LOOKING BACK

Contempt of Court is more than just an interesting story of a time long past in this nation's development, with little relevance to today's much different world. It has been said that, "History is a voice forever sounding across the centuries the laws of right and wrong. Opinions alter, manners change, creeds rise and fall, but the moral law is written on the tablets of eternity."⁴²

Although most of the constitutional arguments raised by Noah Parden and Stiles Hutchins were eventually adopted by the Supreme Court in ensuing decades, even today there are those who would seek to turn back the hands of time and wipe out the progress that has been made. As noted by the authors in their epilogue:

[T]he Johnson case was an important "seed of federalism" that grew over the next sixty years. It marks the first glimpse of the federal-courts system's exercising its power to protect an individual's rights from wayward state authorities. Now, nearly a century later, there are efforts to curtail these rights. Congress is trying to limit the federal court's authority in overseeing how states treat or mistreat their prisoners. Some politicians want to make it easier to get rid of federal judges who make rulings that are not politically popular. And even the U.S. Supreme Court itself has taken steps to limit the federal court's authority over state-court criminal cases. The story of Ed

40. *Id.* at 336.

41. *Id.* at 339.

42. BRADLEY ET AL., *supra* note 1, at 362.

Johnson and Sheriff Shipp reminds us why this federal intervention was needed and established in the beginning.⁴³

43. CONTEMPT OF COURT, *supra* note 4, at 347.