Book Reviews

States' Rights and Social Progress: A Review of *Contempt of Court: The Turn of the Century Lynching that Launched a Hundred Years of Federalism* by Mark Curriden & Leroy Phillips, Jr.

*By Josiah B. Brownell**

Contempt of Court: The Turn of the Century Lynching that Launched a Hundred Years of Federalism is a fascinating and important narrative on a topic that has been largely ignored in the literature. It is both a jurisprudential history of one of the seedlings of modern constitutional federalism, and a powerful human drama with obvious biblical parallels about innocence, fear, racism, vengeance and a grave injustice.

On the jacket of "Contempt of Court" the publisher states that the book is written "[i]n the tradition of *Gideon's Trumpet"* and so it is that this book takes on much the same form as that book and others in this genre. It is a well written and thoroughly researched narrative that examines a topic that had up to this point been buried within the yellowing pages of the *United States Reports*. The authors, a journalist and a trial attorney, tell with passion the story of the trial, appeal, and eventual lynching of a black man, Ed Johnson, accused of raping a white woman in turn-of-the-century Chattanooga, Tennessee.

Ed Johnson denied he attacked the woman and provided names of people who would corroborate his alibi. Nevertheless, he was arrested and charged with the rape on the basis of one unconvincing eye-witness sighting. The state court trial that followed was littered with what today would be obvious constitutional defects and Johnson was quickly convicted by the all-white jury and sentenced to death.

Johnson's lawyers, after their appeal was rejected by the Supreme Court of Tennessee, filed a petition for habeas corpus review in federal court on the bases of alleged violations of Johnson's federal constitutional rights. The lower federal court declined to rule, but stayed the execution until Johnson had the opportunity to submit an appeal to the Supreme Court of the United States. The Supreme Court agreed to hear the appeal and telegrammed the state officials informing them of the lengthened stay of execution pending appeal to the high court. The next night, as news of the stay spread around the community, a lynch mob formed outside the jail and with the acquiescence of the responsible state officials, entered the jail and lynched Ed Johnson. On Johnson's dead body a sign was hung reading: "To Justice Harlan. Come get your nigger now."[1]

The defiance infuriated the justices of the Court and in response, the Court held a hearing to decide if they had jurisdiction to charge members of the mob and certain state officials with contempt. The Court ruled that they had the requisite jurisdiction and began the unprecedented contempt trial of nine people, who included both members of the mob and the state officials responsible. This hearing still constitutes the only time the high court has ever heard a criminal trial. At the conclusion of this unorthodox trial, the Supreme Court found six people guilty of contempt of court and sentenced them to jail. This unique trial was also the only time the Supreme Court has ever enforced its own ruling.

The Contempt of Court title obviously refers to the charges the final six defendants were convicted of, and in addition, the title applies to the contempt that the residents of Chattanooga felt for the "meddling" of the Supreme Court into affairs they viewed as the exclusive prerogative of the state of Tennessee and the city of Chattanooga. It also applies to the federal government's, and the authors', contempt for the Chattanooga trial court that convicted Ed Johnson.

In the preface, the authors reveal the subtext of the book. The authors appear to view the Chattanooga court that convicted Ed Johnson in 1906 as rather indicative of how state courts operated, and perhaps still operate. There is a subtle condemnation of the dual federal system as something inherently flawed as evinced by this passage:

> The events in the book culminate in a unique and historical trial before the nation's highest tribunal. They represent a step in the long march of African-Americans seeking freedom, equality, and justice. The story provides unique insight into our dual criminal justice system, that of state and federal courts.

The inclusion of the last sentence in the context of the paragraph leads one to conclude that the "insight" provided in regards to the dual criminal justice system is that it is quite seriously flawed. The sentence is not in past tense and presumably must refer to the current dual system, which is impliedly still thwarting the advancement of "freedom, equality, and justice."

At the time of the appeal, the rights afforded individuals under the Bill of Rights were not binding upon state criminal courts. The Habeas Corpus Act of 1867 created a means for defendants to appeal state court convictions to federal courts to seek relief if they believed their imprisonment was in violation of their federal constitutional rights. These constitutional violations, however, were viewed very narrowly at the time and did not encompass much of what are considered violations today. The lynching obviously halted the Court from hearing the appeal and having to decide the case. The potential impact of the case if the court held that Johnson's federal constitutional rights were violated, would have been enormous. But as history would have it, that is mere conjecture.

Almost all of the alleged rights that were violated in the Johnson case have later been held to be binding on the states. This case, though stopped prematurely, proved to be a seedling of modern constitutional criminal procedure. Afterwards, the federal courts began to intervene more vigorously in

state court matters, although most authorities would argue that the causation between this case, in which the actual legal precedent set was limited, and the subsequent rise in federal power is somewhat attenuated[2]. The subtitle of the book suggests that the incidents that took place in the book "Launched a Hundred Years of Federalism", but the authors do not make a convincing argument that they did. The authors seem mostly to rely on the falacious reasoning of *post hoc ergo propter hoc*— after this, therefore because of this. The model set forth in the contempt case, while it delivered a strong public message, was never again followed. The lynching was important more because of the increased awareness it raised of the injustices of mob law, rather than its establishment of any legal groundwork for federal intervention. This, of course, does not discount the effect this increased awareness had on subsequent events, and in that way, the outrage over the lynching, more than the actual legal case, seems to have been the seed that was planted that led to the dramatic increase in federal involvement in state criminal trials.

But to praise the planting of a seed does not, however, prevent one from supporting the pruning and trimming of that tree once it becomes overgrown. The inroads made by the federal government into the sphere of state affairs have increased manifold since (and at least partially because of) the Johnson lynching. This state of affairs has in many ways been beneficial to the realization of the rights of the downtrodden, but it is not the unqualified success the authors make it out to be. The habeas corpus petition filed by Johnson's lawyers was a rarity at the time and a legal long-shot, but today such petitions have become a matter of course. In fact, there is probably a valid cause for a malpractice or an ineffective assistance of counsel claim if *not* filed in a state capital case. The flood of habeas corpus petitions over the years in part prompted the passage of the Antiterrorism and Effective Death Penalty Act of 1996, that attempted to stem the tide. Because of the constant flow of habeas corpus petitions, it now seems to be the case that even state supreme courts have been reduced to the status of the lower courts of the United States, a situation that makes a mockery of our federal system.

States' rights arguments have unfortunately been viewed by many as merely a transparent justification for the oppression of minorities. Upon a superficial historical survey, the factual backgrounds of the great federal-state power struggles that have dominated so much of our history seem to bear this out. This view of history, which the authors of this book seem to share, is overstated as it seems to teleologically point to the gradual growth of the federal government and the concomitant withering away of the anachronistic sovereignty of the states. This is viewed by proponents as an unqualified victory of progress over regress, of enlightened inclusiveness over racism, and of the common good over parochial self-interest. As a result, the persistent march of the federal government in our history is viewed by many as a triumph of not only a more efficient form of government, but a system that is morally superior to the federal system of dual sovereignty originally put in place by our founders. This is perhaps one of the "insight[s]" into the dual system that readers are supposed to come away from this book with. These sentiments, however, are too simplistic and discount the deeper political and theoretical issues involved in these struggles.

The dual system of government was originally viewed as a buffer for the protection of individuals from undue central government interference. In the minds of the Founders, and in the minds of many today, the states play an important role in defending the people against an overbearing federal government. Contrary to widespread belief, the states are not always and inherently more reactionary than the federal government. A obvious example of this can be shown through the recent controversy over same-sex marriages, where following a Hawaiian court ruling allowing the practice, the United States Congress immediately stepped in and limited the impact of the state ruling through federal legislation. This is perhaps only the most glaring example. Federal courts have interpreted the thresholds of federal constitutional rights as a basement, not a ceiling. Consequently, many state constitutions provide much greater protections than those required under the federal constitution. There are many structural advantages to the dual federal system that was wisely put in place by the Founders that are too often overlooked and disregarded for reasons of political expediency and short-sightedness.

The federal intervention into the Johnson case was wise and it was moral, as were many of the other interventions since then. However, the unfettered growth of federal power since the Johnson lynching is not an unqualified positive, but instead the "Hundred Years of Federalism," celebrated in the book's title as an almost utopian period in America's legal history, has in many ways threatened the very nature of our federal system.

Despite its subtitle, "Contempt of Court," does not delve as deeply into the political ramifications of the evolving federal-state relationship following the Johnson lynching as perhaps it should. Nonetheless, the book is important because it draws attention to a dramatic and tragic story and uncovers a long forgotten origin of modern criminal procedure. It is a compelling daguerreotype of race relations, the justice system, and society as a whole in the South around the turn of the century and it deserves a choice spot on the bookshelf not only of legal scholars, historians, and sociologists, but anyone interested in the history of our country.

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Footnotes

[1] The trial and death of Ed Johnson in many ways paralleled Jesus Christ's trial and execution as described in the New Testament. In addition to many other similarities, such as the bloodthirsty mobs, the politically savvy government officials who signed off on both their deaths, and the remarkable serenity of both victims when facing death, the sign that was stuck into Ed Johnson upon his death reads in the same mocking style and was intended to deliver the same message as the sign that was hung above Jesus Christ's crucifix during his execution that read : *Iesus Nazarenus, Rex Iudaeorum* (I.N.R.I.) - "Jesus Christ, King of the Jews."

[2] This point is made in great detail by Daniel Hoffman professor in the Department of Social Sciences, Johnson C. Smith University, in his review of the same book for the Law & Politics Book Review. http://www.polsci.wvu.edu/lpbr/subpages/reviews/curriden.html.