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Important Lessons from History

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IMPORTANT LESSONS FROM HISTORY

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REVIEWING:

CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM
BY *MARK CURRIDEN & LEROY PHILLIPS, JR.*
NEW YORK: FABER AND FABER. 1999.

> 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 the white woman shall die. The law maintains in every southern state, and is higher than any statutory law.[1]
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> "We're coming to get you, Negro. . .no damn Supreme Court will save you tonight."[2]
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> "To Justice Harlan. Come get your nigger now."[3]
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At the beginning of the twenty first century, many innocent men and women sit on death rows across America.[4] A disproportionate number are African American in the South.[5] The Anti-Terrorism and Effective

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1 MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM 230 (1999) [hereinafter CONTEMPT OF COURT].

2 *Id.* at 209.

3 *Id.* at 214. (quoting from the note pinned to the body of Ed Johnson).

4 As of January 1, 2002, 3711 men and women await execution in state and federal prisons. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW U.S.A. at 3. (Winter 2002). Despite the heightened public awareness of the imposition of the death penalty on the innocent, Congress has cut funding for death penalty resource centers that have helped vindicate numerous death row inmates. *Available at* http://www.deathpenaltyinfo.org.

5 While African Americans constitute about 12 percent of the nation's population, 43% of death row inmates are black. NAACP, DEATH ROW U.S.A. at 3. *See also,* U.S. CENSUS BUREAU STATISTICAL ABSTRACT OF THE UNITED STATES 233

Death Penalty Act of 1996[6] limits access to federal courts through the habeas corpus petitions making the execution of innocent people inevitable.[7] The current bench of the United States Supreme Court also hastens the process by frequently denying final review.[8]

Yet at the beginning of the twentieth century, the Supreme Court displayed a high level of courage and sensitivity to the plight of a twenty-four year old southern Black man, one generation out of slavery, named Ed Johnson. Johnson was convicted for the rape of Nevada Taylor, a young white woman. Johnson's attorneys won habeas corpus review in the United States Supreme Court after a clearly unconstitutional trial.[9] Ultimately, however, as were many Black men accused of sexually assaulting a white woman, Johnson was lynched, as routinely as women hung laundry in the hot southern breeze, before the Court could decide his petition. *Contempt of Court* chronicles the events leading up to *United States v. Shipp*[10], a now

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(1999) and SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 549 (1999). Of the numerous instances in which innocent people have been executed, researchers have documented several cases in the South of black men tried by all white juries and executed for the rape of a white woman. *See* H. Bedau & M. Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN. L. REV. 21, 65 (1987). In McCleskey v. Kemp, 482 U.S. 920 (1987), the defendant challenged the imposition of the death penalty on African Americans in Georgia as violative of the Fourteenth Amendment equal protection clause and the Eight Amendment prohibition against cruel and unusual punishment. The Court agreed that studies proved that black defendants convicted of murdering white victims in Georgia received the death penalty more often than white defendants or black defendants convicted of murdering black victims. *Id.* at 286-287. The Court concluded, however, that race did not impermissibly influence sentencing decisions. *Id.* at 297-298.

6 *See* Pub. L. No.104-132, 110 Stat. 1214 (1996)(AEDPA).

7 In Hohn v. United States, 524 U.S. 236 (1998), Justice Scalia wrote,

> The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal justice system, produced by various aspects of this Court's habeas corpus jurisprudence.

Id. at 265 (dissenting).

8 *See e.g.*, Barber v. Tennessee, 513 U.S. 1184 (Mem)(1995)(denying writ of certiorari); Lackey v. Texas, 514 U.S. 1045 (Mem)(1995)(denying writ of certiorari); Felker v. Turpin, 518 U.S. 651 (1996)(denying writ of habeas corpus).

9 *See infra* notes 32 through 40.

10 214 U.S. 386 (1909).

obscure decision from the only criminal trial ever conducted before the nation's highest court.[11]

Most constitutional criminal procedure courses focus on cases such as *Powell v. Alabama*[12] and *Brown v. Mississippi*[13] to illustrate the expansion of federal court authority into state criminal proceedings on substantive due process grounds to protect the constitutional rights of black defendant before the civil rights revolution and the adoption of the doctrine of incorporation. The authors of *Contempt of Court* correctly imply in their subtitle that in *Shipp*, the Court significantly expanded the power of the federal courts to intervene in state affairs pursuant to the fourteenth amendment and the Habeas Corpus Act of 1867.[14] Mark Curriden[15] and Leroy Phillips, Jr.[16] have done the legal community, and the community at large, a great service by resurrecting this important lesson from history and reminding us how jealously we should guard the Bill of Rights in the criminal process. The authors use interviews, court transcripts, newspaper accounts and private papers to reconstruct the events surrounding the sexual assault of young Nevada and the sham trial of Johnson.

Contempt of Court begins in the United States Supreme Court and moves to a retrospective account of the crime and the events leading up to the Supreme Court contempt proceedings. The first six chapters detail the crime, the trial, historical background on the Chattanooga community, and the fervent determination of the crowd to lynch Johnson. The next six chapters explore the promising but futile attempts through the habeas corpus petition to spare Johnson from execution or lynching. The last four chapters focus on the Supreme Court contempt proceedings, which lead to a guilty verdict against Chattanooga's Sheriff Shipp, his deputies and numerous members of the mob that lynched Johnson.

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[11] *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 408 (Kermit L. Hall, ed., 1992).

[12] 287 U.S. 45 (1932). In Powell, often referred to as "the Scottsboro Boys" case, nine black teenagers were convicted of raping two white women and sentenced to death after a trial without effective assistance of counsel. The Court reversed the convictions and held that due process required that states provide defendants charged with a capital offense with adequate representation. *Id.* at 71.

[13] 297 U.S. 278 (1936). The Court reversed the conviction of a black defendant who was severely tortured to obtain a confession. The Court, again relying on the due process clause, held that confessions procured from helpless defendants were involuntary and inadmissible.

[14] *See* 14 Stat. 385 (1867).

[15] Mark Curriden is the legal affairs writer for the *Dallas Morning News.*

[16] Leroy Phillips, Jr. is a prominent trial attorney in Chattanooga, Tennessee.

While the account of the legal aspects of the story are rudimentary and often tedious, the authors have written an engaging story with detailed historical and antidotal accounts of the crime, the trials and, most important, the mood of the country at the time when states defiantly resisted federal intervention and people openly encouraged horrific lynchings such as that of Johnson.[17] This review recounts the crime, Johnson's trial, the significant constitutional and ethical issues raised, and the various legal proceedings leading to the contempt of court proceedings in the Supreme Court.

I.

The trial account and the cast of characters read like a John Grishom novel. The story begins in Chattanooga, Tennessee in 1906. The authors aptly describe the Ed Johnson case as "a fascinating and heartbreaking tale of an innocent man, a politically motivated Southern sheriff, two heroic African American lawyers, and a state-court system that refused to provide justice for all."[18] In the end, one black man is brutally murdered, the careers of his two black attorneys destroyed, the entire black community terrorized, but the law enforcement officers that conspired with the lynch mob are canonized. The Supreme Court redeems its honor and asserts its authority to prevent state action that violates constitutionally guaranteed rights and freedoms.

A. *Cast Of Characters*

The journalistic detail paid to the cast of characters in the story immediately captures the attention and imagination of the reader. The most engaging personality is Noah Walter Parden, the Black Chattanooga attorney and architect of Ed Johnson's appeal and habeas corpus petition to the Supreme Court.[19] Many of his writings provide primary source material for the book.[20]

Convinced of Johnson's innocence, Parden, a follower of Booker T. Washington, and his partner Styles Linton Hutchins, a proponent of William E.B. DuBois, seek to have his guilty verdict overturned. Lewis Sheppard, one of the three court-appointed white trial attorneys, joined Parden

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[17] Ed Johnson was one of 62 black Americans lynched in 1906. Between 1882 and 1944, 4,708 lynchings of African Americans took place. *See* CONTEMPT OF COURT, *supra* note 1, at 215-216, 353.

[18] CONTEMPT OF COURT, supra note 1, at xiv.

[19] *See id.* at 3.

[20] *See id.* at xvi.

and Hutchins.[21] Sheppard, a seasoned criminal defense attorney and former judge, was the most prominent member of the local Chattanooga bar.[22] After the appeals in state court failed, Emmanuel Molyneaux Hewlett, a prominent black attorney in Washington, sponsored Parden's admission to the Supreme Court. Parden argued before Justice John Marshall Harlan, author of the dissent in *Plessy v. Ferguson,*[23] for a stay of Johnson's execution pending a full review of the case.[24]

Hamilton County Sheriff Joseph Shipp, his Chief Deputy Fred Frawley, Criminal Court Judge Samuel D. McReynolds, and District Attorney General Matt Whitaker conspired from beginning to end to assure a politically satisfactory outcome in the Ed Johnson case. They certainly had no idea that their local plot to secure their political positions would garner the national spotlight and jail time.

When the United States Justice Department filed criminal contempt charges against Shipp, citizens created a legal defense fund for him and the other defendants. Dozens of lawyers offered to represent him without charge. His political popularity increased with the announcement of the contempt charges. Shipp's response to the contempt charges was to blame the Supreme Court for precipitating Johnson's lynching by interfering with the actions of state authorities.[25] Despite his conviction, Sheriff Shipp became a hero.

B. The Crime, The Trial and Chattanooga

The authors describe Chattanooga as "progressive" until the adoption of the Black Codes in Tennessee in the 1890s.[26] Black owned busi-

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[21] *See id.* at 141.

[22] *See id.* at 60-62.

[23] 163 U.S. 537 (1896).

[24] *See* CONTEMPT OF COURT, supra note 1, at 13-14.

[25] *See id.* at 257-258.

[26] "Black Codes" were adopted throughout the South as early as 1865 to undermine the Emancipation Proclamation and the Thirteenth Amendment. *See* Aremona G. Bennett, *Freedom: Personal Liberty and Private Law: Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambition Following Emancipation, 1065-1910,* 70 CHI.-KENT L. REV. 439, 453-454 (1994) (demonstrating the use of Black Codes to maintain the indicia of slavery to secure the economic and social subjugation of new black citizens); *see also* Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions,* 107 YALE L.J. 2249, 2258-2259 (1998) (using vagrancy provisions in Black Codes to retain control of black labor population).

nesses thrived and the city boasted an unusually high number of black professionals.[27] But when young Nevada Taylor was raped and robbed in 1903 on her way home from work, the city was in the mist of a "Negro crime problem" blamed on "Negro thugs."[28]

Taylor was unable to provide a description of her attacker and there was no corroborating evidence. She could only identify her attacker's voice.[29] But Sheriff Shipp was under pressure to end the crime wave in order to win reelection.[30] Someone black had to pay.

The arrest of Ed Johnson came after inflammatory newspaper reports called for the "Negro fiend" perpetrator to be lynched.[31] The first attempt to lynch Johnson came shortly after his arrest. The jail was destroyed, but no arrests were made. Johnson was taken to Nashville to avert the lynching.[32]

During the three-day trial, the newspapers focused a great deal of attention on Johnson's physical features to further inflame the community. Articles characterized Johnson as "a Negro with a peculiar method of walking" and a "strange" and "noticeable" voice. The news article continued, "His noise is sharp and his skin is very dark. His eyes are bloodshot. His nose seems to spring suddenly to its position making an extraordinarily sharp angle with his forehead. The lower part of his nose and mouth, including the front portion of his checks, protrude from his face in a curious fashion."[33] The prosecutor characterized Black witnesses for Johnson as "black men who were alcoholic gamblers" and a "Negro of a fun-making variety."[34] On the other hand, defense and prosecution described a Black witness for Johnson as "an old time Negro. . .given much respect" in both communities. But despite being a respected "old time Negro" four white witnesses were called to vouch for his character for truthfulness.[35]

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[27] *See* CONTEMPT OF COURT, supra note 1, at 24.

[28] *Id.* at 30.

[29] *See id.* at 93.

[30] *See id.* at 35.

[31] *Id.* at 26.

[32] *See id.* at 41-50.

[33] *Id.* at 93.

[34] *Id.* at 100, 102.

[35] *Id.* at 102-104. The credibility of black witnesses is still an issue today. *See* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility,* 1 MICH. J. RACE & L. 261 (1996) (looking at current and historical race-based assessments of credibility); *see also* Withers v. United States, 602 F. 2d 124 (6th Cir. 1979) (reversing conviction based on prosecution closing statement "not one white witness has been produced in this case" to contradict the testimony of the govern-

The use of stereotypical racial features and character traits to justify the subordination of people of color was a common practice during this era.[36] These stereotypes were often justified by allegedly "scientific" theories that established the notion of hierarchy among racial categories.[37] While much of this science has been rejected, some scholars persist in perpetuating such theories.[38] In *Jinro America, Inc. v. Secure Investments, Inc.*,[39] the court excluded so-called expert testimony that Korean businesses use corrupt practices as unduly prejudicial as tinged with "ethnic bias and stereotyping."[40] In the legal profession, the intractable problem of racial bias and stereotyping continues to hinder the fair administration of justice.[41]

Seventeen days after the attack on Nevada Taylor, Johnson was convicted and sentenced to death by an all white male jury.[42] Fifty-three days after his arrest, a mob of citizens, in complicity with Sheriff Shipp and accompanied by local news reporters, dragged Ed Johnson from his cell and brutally lynched, then shot him.[43]

II.

Johnson was arrested and tried absent the procedural protections we have become accustomed to as a result of the incorporation of the Bill of Rights into the Fourteenth Amendment during the Civil Rights era. Readers familiar with the criminal process will cringe at what today would be flagrant violations of rights, the strategic errors by the defense, and the unethi-

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ment's white witness) and Commonwealth v. Sowers, 388 Mass. 207 (1983) (questioning jurors on their ability to fairly weight the credibility of white witnesses against the credibility of black witnesses).

[36] The relevance of racial appearance in turn of the century cases has been well documented. *See* IAN F. HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (detailing the use of physical appearance by courts and agencies to determine "whiteness" for the purpose of naturalization).

[37] *Id.* at 4-9, 92-102.

[38] *See e.g.*, CHARLES MURRAY & RICHARD HERRNSTEIN, THE BELL CURVE (1994).

[39] 266 F.3d 993 (2001).

[40] *Id.* at 1006.

[41] *See e.g.* GEORGIA SUPREME COURT COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURT SYSTEM, LET JUSTICE BE DONE: EQUALITY, FAIRNESS AND IMPARTIALITY (August 1995); *see also* CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMISSION ON RACE AND ETHNIC BIAS IN THE COURTS, FAIRNESS IN THE CALIFORNIA STATE COURTS: A SURVEY OF THE PUBLIC, ATTORNEYS AND COURT PERSONNEL (July 1993).

[42] *See* CONTEMPT OF COURT, supra note 1, at 129.

[43] *See id.* at 214.

cal consorting of Judge McReynolds with the District Attorney. Before and during the trial, the state violated numerous rights now recognized as extending to state suspects and defendants under the Fourth, Fifth and Sixth Amendments.

Before the trial, the Sheriff ordered the search of the home of Johnson's sister without a warrant or sufficient probable cause. The search failed to produce any evidence linking Johnson to the crime.[44] Despite the lack of evidence, however, the Sheriff arrested Johnson and questioned him without an attorney present or without advising him of his right against self-incrimination under the Fifth Amendment.[45] The Sheriff continued to trammel Johnson's right against self-incrimination and his right to counsel by using another inmate as an informant in hopes of getting Johnson to confess without the benefit of counsel.[46]

In 1906, the Tennessee Constitution was one of the few that guaranteed the right to counsel to any person facing the death penalty.[47] However, with very little procedural safeguards to insure the impartiality of the jury[48] Johnson was tried by an all white jury. During the trial, the jury, troubled by Nevada Taylor's inability to give a positive identification of her assailant, requested that she be recalled and that Johnson don the type of hat her perpetrator was alleged to have been wearing and stand in front of her. Despite the objections of his attorneys, Judge McReynolds allowed the

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[44] *See id.* at 37-38.

[45] *See id.* at 39. *See also* Miranda v. Arizona, 384 U.S 436 (1966), which was decided 60 years later and held that criminal suspects were entitled to have counsel present during custodial interrogations to protect their right against self-incrimination; Dickerson v. United States, 530 U.S.428 (2000) (affirming the holding in *Miranda* as an immutable constitutional rule).

[46] In Massiah v. Unites States, 377 U.S. 201(1964), the Court held that the Constitution is violated when the government solicits an informant to intentionally elicit incriminating information from a person against whom judicial proceedings have commenced without having counsel present.

[47] The right to counsel in a capital case was first guaranteed under the due process clause of the federal constitution in Powell v. Alabama, 287 U.S. 45 (1932). The Sixth Amendment right to counsel in a felony case was established in Gideon v. Wainwright, 372 U.S.25 (1963).

[48] In numerous rulings, the Court has made clear that parties cannot systematically exclude women or other distinct groups in the population from the jury or the jury pool. *See e.g.* Taylor v. Louisiana, 419 U.S. 522 (1975); Batson v. Kentucky, 476 U.S. 79 (1986); *see also* Georgia v. McCollum, 505 U.S. 42 (1992); J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127 (1994).

demonstration, ignoring the clear violation of Johnson's Fifth Amendment right against self-incrimination.[49]

In closing, defense counsel accused the judge of bias and concluded,

> This case wasn't about justice. This case wasn't about finding the truth. This case wasn't about preserving the rule of law. Justice and truth and the rule of law have been trampled on in this very case.[50]

Despite this impassioned plea, the jury convicted Johnson. The defense counsel made the strategic errors of waiving their client's right to request a new trial, thus foreclosing an appeal.[51] The threat of another lynch mob deterred Johnson's white lawyers from requesting a new trial to preserve the right of appeal, even with their concern of jury tampering.[52]

This catalogue of violations would have invalidated the arrest, prosecution and conviction of Ed Johnson today. Compounding the problem was the unethical conduct of the judge and prosecutor. For instance, shortly before Johnson's trial, the prosecutor intentionally played "the race card" in another case against black defendants with members of the local press present to insure that potential jurors in the Johnson case would have race on their minds.[53] But even in light of the racially charged atmosphere created by the Sheriff and the District Attorney who would prosecute Johnson, the court denied the defense motions to delay the trial and to change venue.[54]

The most troubling ethical breaches were the continuous ex parte meetings between the Judge, the District Attorney and the Sheriff. During the first meeting, Sheriff Shipp advised the Judge and prosecutor, before Johnson's arrest, that Johnson was guilty.[55] They next met after Johnson's arrest to plan the trial and trial strategy.[56] Again the Judge conspired with the District Attorney on how to prevent an appeal and assure Johnson's execution after Noah Parden submitted a post-trial motion for a new trial.[57] The Judge also meets once ex parte with defense counsel to suggest that

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49 *See* CONTEMPT OF COURT, supra note 1, at 108.

50 *Id.* at 112.

51 *See id.* at 127.

52 *See id.*

53 *Id.* at 78-79.

54 *See id.* at 82.

55 *See id.* at 40.

56 *See id.* at 59.

57 *See id.* at 142-143.

they not spend much time on a pro bono case.[58] Although there was no extensive Code of Professional Responsibility in 1906, the intent of these meetings was clearly to insure a political victory at the expense of justice. This was unethical even without a Code.[59]

III.

After Judge McReynolds rejected Parden's motion for a new trial, the authors focus on the appeal, the habeas corpus proceedings and the contempt proceedings precipitated by the lynching of Ed Johnson while in federal custody under a Supreme Court ordered stay of execution.

A. Appeal and Habeas Corpus

Much like today, in 1906 habeas corpus was viewed as a disfavored tactic to delay punishment.[60] White and black citizens of Chattanooga criticized Noah Parden and his partner Styles Hutchins for attempting to overturn the verdict.[61] Parden's office was set on fire,[62] but he and his partner persevered despite the strong opposition.[63] Eventually, Lewis Sheppard agreed to help.[64]

Parden based his post-trial strategy on the growing disenchantment of the bench and bar with the lack of professionalism in state courts, which resulted in lack of adequate legal protection and due process for black and poor white criminal defendants.[65] Although federal courts had aggressively expanded the federal government's role in the regulation of commerce, the Supreme Court displayed no similar willingness to expand individual rights and liberties under the federal constitution.[66]

Parden sought a writ of error in the Tennessee Supreme Court. He argued that the evidence in the case did not warrant a conviction; the evi-

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[58] *See id.* at 62-63.

[59] The Canons of Judicial Ethics prohibit a judge from initiating, permitting or considering ex parte communications with limited exceptions. Canon 3B(7). None of the current exceptions would have excused the conduct of Judge McReynolds.

[60] *See id.* at 151.

[61] *See id.* at 146.

[62] *See id.* at 178.

[63] For a detailed discussion of the struggle of black lawyers at the turn of the century, *see* J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944 (1993).

[64] *See* CONTEMPT OF COURT, supra note 1, at 147.

[65] *See id.* at 175-176.

[66] *See id.* at 182.

dence during the trial actually demonstrated the defendant's innocence; a lynch-mob mentality permeated the entire trial and placed undue pressure on the jury to convict the defendant; the attempt to lynch Johnson before the trial violated the state constitutional guarantee to a fair trial and due process; and the jury demonstrated bias against the defendant when they threatening to kill him during the trial in open court.[67] The court granted the motion for a writ of error, but refused to stay the execution.[68]

Parden had already anticipated defeat and immediately filed a petition for a writ of habeas corpus in the federal district court. Parden argued before Judge Charles Dickens Clark that Johnson had been denied due process and equal protection.[69] Parden filed the "writ of habeas corpus" a week before the execution date under the Habeas Corpus Act of 1867.[70]

The 1867 Act expanded the reach of the federal courts, granted federal courts the power to intervene in state judicial proceedings and issue a writ of habeas corpus for a person held in violation of federal law. This represented a significant change from the 1789 Act, which had been interpreted by the Chief Justice John Marshall's Court to limit federal habeas corpus exclusively to federal prisoners.[71] Following the Civil War, concern over the illegal detention of former slaves prompted the introduction of legislation that eventually formed the basis of the expanded 1867 Act.[72] Although the Supreme Court never reviewed Johnson's habeas petition, Noah Parden was on target in seeking a reversal of his conviction under the 1867 Act. Subsequent cases filed in similar scenarios of racially charged trials resulted in the ultimate expansion of habeas relief.[73]

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[67] *See id.* at 147-148.

[68] *See id.* at 149.

[69] *See id.* at 150.

[70] The Habeas Corpus Act of 1867, 14 Stat. 385 (1867).

[71] *See* Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789,* 51 ALA. L. REV. 531, 536 (2000).

[72] *See* Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus,* 26 SETON HALL L. REV. 1493, 1507-1510 (1996).

[73] *See* Frank v. Magnum, 237 U.S. 309 (1915) (anti-Semitic mobs adversely impacted the outcome of the trial in Georgia); *see also* Moore v. Dempsey, 261 U.S. 86 (1923) (exclusion of blacks from the jury and ineffective assistance of counsel in trial of blacks accused of killing a white assailant in Arkansas); Brown v. Allen, 344 U.S. 443 (1953) (coerced confession and race discrimination in jury selections grounds for granting habeas review by district court).

Although the catalogue of violations discussed in Part II would qualify as due process violations today, the Court in 1906 narrowly construed the meaning of "due process" and limited violations to cases where the charges were not based on existing law, the state procedural rules were violated, or the defendant was denied the opportunity to be heard during the trial.[74] Law-enforcement tactics such as beating a confession from a witness or defendant,[75] or suppressing evidence pointing to the innocence of the defendant[76] were not considered violations of a state criminal defendant's rights in 1906. So weak and ineffective was the due-process clause that Parden could not find a single case over the previous forty years in which the US Supreme Court or the federal courts had reversed a state-court conviction on the basis of it.[77]

Since most of the allegations in the writ of error focused on jury bias, the writ of habeas corpus relied on the Supreme Court decision of *Strauder v. West Virginia.*[78] *Strauder* held that the equal protection clause is violated when states and counties intentionally and systematically exclude blacks from the jury. This was the only case since the Civil War in which the Supreme Court had reversed a state court criminal conviction on equal protection grounds.[79] Parden also proffered an equal protection violation claim based on the fact that black men in Chattanooga accused of raping white women were always convicted, whereas men accused of raping black women rarely if at all punished.[80]

Judge Clark ruled that the Sixth Amendment right to a fair trial did not apply to state court trials, but issued a stay of execution to give the defendant an opportunity to seek an appeal of his ruling to the United States Supreme Court.[81]

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[74] *See* CONTEMPT OF COURT, supra note 1, at 151.

[75] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[76] *See* Brady v. Maryland, 373 U.S. 83 (1963) (imposing constitutional duty under the due process clause on the prosecutor to disclose exculpatory evidence to the defense).

[77] *See id.*

[78] 100 U.S. 303 (1880).

[79] *See* CONTEMPT OF COURT, supra note 1, at 14, 151. *Compare* Batson v. Kentucky, 476 U.S. 79 (1986) (giving defense counsel the right to object to the use of preemptory challenges by the prosecutor to exclude blacks from the jury).

[80] *See* CONTEMPT OF COURT, supra note 1, at 166.

[81] *See id.* at 168.

B. The Path to the Supreme Court Contempt Proceedings

It is hard to grasp the degree of and depth to which the average citizen and state law enforcement person despised the idea of federal interference into state affairs in 1906. The *Chattanooga Times* captured this sentiment writing, "It was the appeal to the federal courts that revived the mob spirit and resulted in the lynching. . .The Supreme Court of the United States ought in its wisdom to take cognizance of this fact."[82] Judge McReynolds was personally offended by the federal court intervention in cases within the state court's jurisdiction.[83] The historical record notes that, "Both Shipp and McReynolds were unsure as to whether an order issued by a federal judge superseded an order from a state court judge in a state-court criminal case."[84] Even Judge Clark conceded that his authority was in question and deferred to the governor to grant a reprieve in lieu of the judge's stay.[85]

The subtitle, "The Turn-of-the-Century Trial That Launched 100 Years of Federalism," attests to the significance of *United States v. Shipp* in American politics and jurisprudence. Johnson's lynching in defiance of the Supreme Court ordered stay launched the federalism era that ultimately culminated in the incorporation of most of the Bill of Rights into the fourteenth amendment.[86] The Supreme Court granted Johnson's appeal of the habeas corpus petition. This was the first time the Justices had agreed to hear a state criminal case on federal constitutional issues involving the right to a fair and impartial trial.[87] The Court issued a stay of execution, notified Judge Clark, Judge McReyolds and Sheriff Shipp and docketed the appeal for expedited review.[88]

The defiance of its order to stay Johnson's execution certainly was enough to trigger the wrath of the Court.[89] The Court concludes and history confirms that Judge McReynolds (although not a named defendant) and Sheriff Shipp set up the lynching in complicity with various private citizens

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[82] *Id.* at 219.

[83] *See id.* at 170.

[84] *Id.* at 171.

[85] *See id.* at 172.

[86] Justice Harlan and the federal prosecutor in Shipp, Terry Stanford, who later became a federal judge and a Supreme Court Justice, advocated the doctrine of incorporation. *See* CONTEMPT OF COURT, supra note 1, at 341-343.

[87] *See id.* at 175, 192.

[88] *See id.* at 193-194.

[89] *See id.* at 230.

and in defiance of the Supreme Court's order. In the majority opinion authored by Chief Justice Melvin Fuller, the Court found,

> The assertions that mob violence was not expected, and that there was no occasion for providing more than the usual guard of one man for the jail in Chattanooga, are quite unreasonable and inconsistent with statements made by Sheriff Shipp and his deputies that they were looking for a mob the next day. . . Only one conclusion can be drawn from these facts, all of which are clearly established by the evidence,—Shipp not only made the work of the mob easy, but in effect aided and abetted.[90]

The Court's conclusion rested on the fact that the Sheriff made sure that no extra guards or deputies would be on duty to protect Johnson, who was alone on the third floor. The mob had been given the prison floor plan and there was no phone available to the lone elderly guard at the jail.[91]

In response to the allegation that in the south Black citizens were systematically kept off of juries, the editor of the *Chattanooga News* wrote:

> That allegation is a fact. The South long ago decided this to be a white man's government. . .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 the white woman shall die. The law maintains in every southern state, and is higher than any statutory law.
>
> And once it is made certain that the guilty man has been captured there is not enough power in the Unites States Army to save him. . .the worthless, shiftless, criminal black brute who outrages a white woman has no more rights under the law than a serpent.[92]

After reading this, it was obvious to several members of the Court "that the lynching had arisen out of contempt for the Court and its ruling."[93]

Attorney General William Moody sent Secret Service agents undercover in Chattanooga to investigate and determine what if any federal charges could be brought against the sheriff, and others who conspired to

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90 United States v. Shipp, 214 U. S. 386, 416-417, 423 (1909).

91 *See* CONTEMPT OF COURT, supra note 1, at 200.

92 *Id.* at 230.

93 *Id.*

kill Johnson.[94] The Justice Department considered bringing charges against the mob (that remained unidentified even though news reporters knew who they were) and local authorities under the criminal provisions of the 1871 Civil Rights Act. Ultimately, the Attorney General and Justices of the Court agreed that the Justice Dept. would bring "criminal contempt of the Supreme Court" charges against the people involved in the lynching.[95]

Sheriff Shipp, his deputies and several private citizens were charged. The Information filed with the Court alleged that they

> Did willfully, unlawfully and wrongfully combine, conspire, confederate, and agree to break and enter the county jail. . .for the purpose of taking therefrom the person of Ed Johnson to lynch and murder him, with the intent to show their contempt and disregard for the orders of this Honorable Court. . .and for the purpose of preventing this Honorable Court from hearing the appeal of Ed Johnson. . .and for the purpose of preventing Ed Johnson from exercising and enjoying a right secured to him by the Constitution and laws of the United States.[96]

Defendants responded to the charges alleging that the Court lacked jurisdiction over the claim.[97] Writing for a unanimous Court Justice Oliver Wendell Holmes concluded, "A state officer having prisoners committed to his custody by a court of the United States is an officer of the United States."[98]

The last two chapters recount the contempt trial held in Chattanooga before a court-appointed Commissioner in the United States Customs House.[99] Closing oral arguments were made in Washington before the Supreme Court. After five days of deliberation, the Court announced its opinion.[100]

> In our opinion it does not admit of question on this record that this lamentable riot was the direct result of opposition to the administration of the law by this court. It was not only in defiance of our mandate, but was understood to be such. The Supreme Court of the United States was called

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94 *See id.* at 237.

95 *Id.* at 252.

96 *Id.* at 254.

97 *See id.* at 262.

98 *Id.* at 283.

99 *See id.* at 287, 289, 292.

100 *See id.* at 327, 330-334.

> upon to abdicate its functions and decline to enter such orders as the occasion, in its judgment, demanded, because of the danger of defeat by an outbreak of lawless violence. It is plain that what created this mob and led to this lynching was the unwillingness of its members to submit to the delay required for the appeal. The intent to prevent that delay by defeating the hearing of the appeal necessarily follows from the defendants' acts, and, if the life of anyone in custody of the law is at the mercy of the mob, the administration of justice becomes a mockery. When this court granted a stay of execution on Johnson's application it became its duty to protect him until this case shall be disposed of. And when its mandate, issued for his protection, was defied, punishment of those guilty of such attempt must be awarded.[101]

The Court found Shipp and five others guilty. After five months of debate, the guilty were sentenced to 90 days in federal jail.[102]

CONCLUSION

> The white men of the South claim that the Negro is the only criminal. Yet in this case, the Negro fought on the higher plain, while the white man depended on his brutality. . .Never before in the history of this country has lynching been brought so plainly within the power of the federal government to punish the perpetrators. It is now up to the federal government to deal out justice.[103]

These were Noah Parden's parting words as he left Chattanooga and the practice of law. No one was ever tried for the murder or the violation of Ed Johnson's civil rights. Nevada Taylor's rapist was never brought to justice. She died in 1907 at the age of 23.[104] The legal victory in the Supreme Court could not undo the human tragedy that precipitated such protracted legal proceedings. *Contempt of Court* stands as a reminder of how vigilant we must be in protecting our rights and freedoms against encroachment by private and public acts motivated by racial animus.

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[101] U.S. v. Shipp, 214 U. S. at 425.

[102] *See* CONTEMPT OF COURT, supra note 1, at 335.

[103] *Id.* at 234-235.

[104] *See id.* at 340.