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Criminal Contempt—Preliminary Injunction not Broad Enough to Include Forty-Five Faculty Members Charged With Criminal Contempt

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RECENT CASES

CRIMINAL CONTEMPT—PRELIMINARY INJUNCTION NOT BROAD ENOUGH TO INCLUDE FORTY-FIVE FACULTY MEMBERS CHARGED WITH CRIMINAL CONTEMPT

On many college campuses, the 1969-70 school year was one marked with violent demonstrations which frequently resulted in physical confrontation between police and students. For the State University of New York at Buffalo, the period of confrontation began during the last week in February and extended until the school recessed for spring vacation, a period of over three weeks. What started as a sit-in on the basketball court during a game soon escalated to the point where police from the City of Buffalo were billeted in the gymnasium. The University was turned into a battlefield with broken windows, paint-scarred buildings and riot police patrolling the campus. In an effort to restore order, pressured administrators obtained a preliminary injunction from the Supreme Court of Erie County which barred thirteen named students and John and Richard Doe from perpetrating any unlawful activities on campus.[1] While the injunction was intended to aid in restoring order, it, coupled with the presence of riot police patrolling the campus, seemingly served to force students further away from a peaceful settlement of their grievances with the University administration. Feeling that such "shows of force" were serving only to pull the University apart, the Faculty Senate passed a resolution calling for the immediate removal of the police from the campus, and a lifting of the preliminary injunction. Four days later, on Sunday, March 15, 1970, forty-five faculty members entered the office of the University President and refused to leave until they had presented him personally

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1. The preliminary injunction ordered:

[F]or a period of 30 days from the granting and entry of this order or pending trial of this action whichever occurs first, the defendants and all other persons receiving notice of this preliminary injunction, whether acting individually or in concert, be, and they hereby are restrained and enjoined:

1) From acting within or adjacent to any of the plaintiff's academic or administrative buildings, dormitories, recreation rooms or athletic facilities or in any corridors, stairways, doorways, and entrances thereto, in such unlawful manner as to disrupt or interfere with the lawful and normal operations of State University of New York at Buffalo, conducted by plaintiff in such places or to unlawfully block, hinder, impede or interfere with lawful ingress to, or lawful egress from any of such properties by plaintiffs' faculty, administrators, students, employees or guests or otherwise disrupt the lawful educational functions of the said university;

2) From employing unlawful force or violence or the unlawful threat of force and violence, against persons or property. . . .

Brief for Appellant at 6, State University of New York v. Denton, 35 App. Div. 2d 176, 316 N.Y.S.2d 297 (4th Dep't 1970).

with their petition.[2] They remained in the office for an hour and fifteen minutes before they were taken into custody and charged with criminal contempt of court for violating the preliminary injunction. The faculty members were found guilty of criminal contempt and sentenced to thirty days in the Erie County Penitentiary.[3] The defendants appealed to the Appellate Division, Fourth Department. *Held,* a preliminary injunction which enjoins named students, and John and Richard Doe, cannot be read to include members of the University faculty, unless it can be shown that they acted in direct concert with those who were enjoined. *State University of New York* v. *Denton,* 35 App. Div. 2d 176, 316 N.Y.S.2d 297 (4th Dep't 1970).[4]

Contempt proceedings, like any other type of judicial action, are distinguished by the civil–criminal dichotomy. When an action is viewed as a personal affront to the integrity of the court, it is classified as a criminal contempt;[5] when an action violating a court order results in specific damage to the party protected by the court, it is termed a civil contempt.[6] A criminal contempt is a " 'wilful' disobedience,"[7] while a civil contempt is a "mere disobedience by which the right of a party to an action is defeated or hindered."[8] The two causes of action are not necessarily distinct and mutually exclusive; a contempt may be both criminal in its disobedience, and civil in the damage to the plaintiff, and the plaintiff may proceed

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2. Their petition read:

> Peter Regan [University President] and his administration have defied the will of the faculty senate expressed Wednesday, March 11, for the *immediate* removal of police from campus, thereby making themselves responsible for Thursday's events. Hence, we members of the faculty will occupy these premises until 1) the police are removed from campus and 2) the injunction is lifted. We are in sympathy with the general principles of the strike and will be formulating new structures of University goverance [*sic*]—to follow Regan's resignation—for the consideration of the University community.

Brief for Appellant at 8, State University of New York v. Denton, 35 App. Div. 2d 176, 316 N.Y.S.2d 297 (4th Dep't 1970). Throughout the rest of this paper, it is important to note that the professors announced themselves "in sympathy with the general principles of the strike," thereby making themselves something more than casual observers. But as will become evident later, this bond was not sufficient to make them parties to the injunction.

3. State University of New York v. Denton, Index No. D39406 (Sup. Ct. N.Y., Apr. 24, 1970).

4. Hereinafter referred to as the instant case.

5. N.Y. JUDICIARY LAW § 750 (McKinney 1968). *See, e.g.,* People *ex rel.* Stearns v. Marr, 88 App. Div. 422, 84 N.Y.S. 965 (4th Dep't 1903), *modified,* 181 N.Y. 463, 471, 74 N.E. 431, 434 (1905).

6. N.Y. JUDICIARY LAW § 753 (McKinney 1968).

7. People *ex rel.* Negus v. Dwyer, 27 Hun 548, 63 How. Pr. 115 (2d Dep't), *aff'd,* 90 N. Y. 402, 406 (1882)

8. *Id.*

on both theories.[9] In *In re N.Y.S.L.R.B.* v. *George B. Wheeler, Inc.*,[10] the defendant was charged with violating a court order, which forced the defendant to bargain collectively with his employees and to reinstate those employees who were fired because of their activity in organizing the corporation's labor force. Wheeler was found guilty of both criminal and civil contempt. The court concluded that he wilfully disobeyed the court order and fined him $250.[11] They also awarded the plaintiffs damages to cover their lost wages which resulted from Wheeler's failure to rehire them as per the original court order.[12] The rationale then dictates that if a criminal contempt can be proven, all that is necessary for a civil contempt to lie, is the proof of damages.

Historically, in New York, there has been a limit to the scope of a preliminary injunction: one can have an injunction "against the defendants only, not the whole world."[13] Courts have allowed the use of injunctions, and its threat of contempt proceedings, against recognizable organizations such as labor unions to bar illegal strikes,[14] but have refused to uphold contempt proceedings which sought to replace the responsibility for disjointed mob action on a select few.[15] New York courts have always upheld strict service of process and jurisdictional standards. However, it was not until very recently, that the individual in a criminal contempt proceeding was given other due process rights, such as the right to a jury trial, inherent in the normal criminal action.[16] Recognizing the restrictions on indi-

9. *See, e.g.*, Eastern Concrete Steel Co. v. Bricklayers' Union, 200 App. Div. 714, 715, 193 N.Y.S. 368, 369 (4th Dep't 1922). "Frequently an order in a criminal contempt proceeding in a civil action contains the recital appropriate to an order in a civil contempt proceeding, and orders in civil contempt proceedings often contain recitals only applicable in criminal contempt proceedings."

10. 177 Misc. 945, 946, 31 N.Y.S.2d 785, 787 (Sup. Ct. 1941).

11. *Id.* at 954, 31 N.Y.S.2d at 793.

12. *Id.* at 953, 31 N.Y.S.2d at 793.

13. Rigas v. Livingston, 86 App. Div. 626, 83 N.Y.S. 1116 (1st Dep't 1903), *rev'd*, 178 N.Y. 20, 24, 70 N.E. 107, 108 (1904).

14. *See, e.g.*, Rankin v. Shanker, 30 App. Div. 2d 956, 294 N.Y.S.2d 680 (1st Dep't), *aff'd*, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968). In this case the Court of Appeals ruled that those public employees charged with criminal contempt for conducting an illegal strike in violation of the Taylor Law (N.Y. CIV. SERV. LAW art. 14, § 200-12 (McKinney Supp. 1968)) did not have a constitutional right to a jury trial. The case turned on the special nature of a civil service employee as opposed to someone employed by the private sector. 23 N.Y.2d at 116, 242 N.E.2d at 805, 295 N.Y.S.2d at 629. *See also* Note, 33 ALBANY L. REV. 610 (1969).

15. *See* Garrigan v. United States, 163 F. 16 (7th Cir.), *cert. denied*, 214 U.S. 514 (1908).

16. Bloom v. Illinois, 391 U.S. 194 (1968).

In a case decided on the same day, Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court held that the right to a jury trial in a serious criminal case was a fundamental legal right which the states could not abridge. With this case in mind, the Court, in *Bloom*, held that the Constitution guarantees the right to a jury trial in a criminal contempt proceeding punishable by a twenty-four month prison term. When

vidual freedom which accompany a guilty verdict in a criminal contempt proceeding, the Supreme Court in *Bloom v. Illinois*[17] stated: "convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same."[18] It necessarily follows then, that a court must afford the same constitutional safeguards to one charged with criminal contempt as it does to those charged with an ordinary criminal offense.[19]

The court in the instant case chose to follow the rather substantial precedent in the area. Initially dealing with the question of whether the defendants were parties to the injunction,[20] the court relied heavily on *Rigas v. Livingston*.[21] In that decision, the Court of Appeals stated that unless it could be shown that the "persons mentioned in the injunction" acted "either as the agents or servants of the defendants or in combination or collusion with them or in assertion of their rights or claims,"[22] the term "all persons having knowledge of this injunctive order"[23] would not be sufficient to bind them to the injunction. Unless the University could prove that the faculty members acted in direct concert with those students

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the rationale of *Bloom* is taken with its companion case, it seems certain that the Supreme Court viewed the charge of criminal contempt as a crime in the ordinary sense.

To trace the developments of the decisions which led to *Bloom*, see Note, 1967 DUKE L.J. 632. *See also* Gompers v. United States, 233 U.S. 604 (1914). This early case held that the statute of limitations shall be allowed as a defense in a criminal contempt proceeding.

17. 391 U.S. 194 (1968).

18. *Id.* at 201.

19. *Id.* at 198. Speaking on this point, Justice White stated: "Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for jury trial."

There is an indication that this area of constitutional development is still expanding. In the past, a criminal contempt proceeding was handled summarily as long as the act of contempt was committed within the sight of the judge. The New York Court of Appeals annunciated this point in *In re* Douglas v. Adel, 244 App. Div. 818, 280 N.Y.S. 1005 (2d Dep't), *rev'd*, 269 N.Y. 144, 146-47, 199 N.E. 35, 362-37 (1935), when they said:

> [A] criminal contempt in the 'immediate view and presence' of the court may be punished summarily if the acts constituting such contempt are seen or heard by the presiding judge so that he can assert of his own knowledge the facts constituting the contempt in the mandate of commitment. In that case, no proof need be given.

However, in Mayberry v. Pennsylvania, 39 U.S.L.W. 4133 (U.S. Jan. 20, 1971), the Supreme Court held that when a court waits until the end of the trial to find an individual guilty of criminal contempt for actions which occurred during the trial, it must allow him a separate hearing on the charges before a different judge.

20. 35 App. Div. 2d at 178, 316 N.Y.S.2d at 299-300.

21. 86 App. Div. 626, 83 N.Y.S. 1116 (1st Dep't 1903), *rev'd*, 178 N.Y. 20, 70 N.E. 107 (1904).

22. 178 N.Y. at 24-25, 70 N.E. at 108.

23 *Id.* at 22, 70 N.E. at 107.

made parties to the injunction, they would not be bound by its edict.[24] Following this reasoning the court stated: "[K]nowledge of a majority alone is not sufficient without proof of agency or collusion with the named defendants to impose liability for a violation."[25]

Not satisfied with merely dismissing the case, the court went on to bring those criminal contempts which arise out of a civil action, such as a civil law suit, or as in the instant case, a civil injunction, within the *Bloom* perspective.[26] These types of contempt actions have always been termed civil special proceedings in New York because they are an ancilliary action to the main civil action.[27] The court pierced this distinction to note the criminal "characteristics" of this action,[28] namely the thirty-day prison sentence which faced the professors for their conviction. Because the civil special proceeding is criminal in nature, the court acknowledged the defendants' right to confront witnesses;[29] a right which had been denied them in the lower court.

While the instant case does not espouse any new legal doctrine, it is significant in that it rules out the use of a preliminary injunction to help cool campus tension. Traditionally the injunction has been used as a prompt, efficient means of returning the status quo to an otherwise disruptive situation. It has been particularly effective in the labor field, and because of this success, many officials, academic and otherwise, have championed its use as the answer to a volatile campus situation.[30] However, because of the recent annexation of procedural guarantees to the injunctive process, and the lack of organizational unity inherent in the campus, the injunction may not be adaptable to the college crisis.[31] While the effort to protect constitutional guarantees may have slowed down the privilege

24. *See, e.g., In re* Lennon, 166 U.S. 548 (1897); U.S. Playing-Card Co. v. Spalding, 92 F. 368 (C.C.S.D.N.Y. 1899); People *ex rel.* Stearns v. Marr, 88 App. Div. 422, 84 N.Y.S. 965 (4th Dep't 1903), *modified*, 181 N.Y. 463, 74 N.E. 431 (1905).

25. 35 App. Div. 2d at 179, 316 N.Y.S.2d at 301.

26. *Id.* at 181, 316 N.Y.S.2d at 302.

27. *In re* Douglas v. Adel, 244 App. Div. 818, 280 N.Y.S. 1005 (2d Dep't), *rev'd*, 269 N.Y. 144, 146, 199 N.E. 35, 36 (1935).

28. 35 App. Div. 2d at 181, 316 N.Y.S.2d at 302.

29. *Id.*

30. *See, e.g.*, Mitchell, *Violence in America and the Right to Dissent*, 37 TENN. L. REV. 129, 137 (1969). There, the U.S. Attorney General stated:

> Fourth, if all else fails and a major disturbance does occur, university officials should consider applying immediately to a court for an injunction. . . . The civil injunction appears to have several advantages. [One of these is that] [i]t carries the judicial authority of the courts rather than the administrative authority of the police.

31. It seems especially important, in a situation such as this, when the very framework of society is being tested, that the court avoid the trap which stymied the lower court in the instant case. By forcing the injunctive process to fit the campus crisis, one cannot help but wonder how many students and faculty saw the basic tenet of our judicial system, due process of law, as just another empty phrase.

of immediate, effective, contempt action which the injunction previously enjoyed, the real problem may well lie within the older rule. It may be virtually impossible to enjoin the diverse groups of students, faculty, staff, and street people who may have a part in the campus disorder. Without being able to show a strong bond between those charged with contempt and those actually mentioned in the injunction itself, it is doubtful whether a court could allow them to be brought as defendants into a criminal court action. The university then, may have to handle the campus riot as they would any other criminal act. They may bring the violators to trial in criminal courts, or in the alternative, develop an effective campus judiciary whose final punishment may be suspension or expulsion from the university community.

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CRIMINAL LAW—EXCLUSIONARY RULE HELD NOT APPLICABLE TO IDENTIFICATION TESTIMONY OF KNOWN WITNESS MADE POSSIBLE BY LEAD RESULTING FROM ILLEGAL SEARCH IN INVESTIGATION OF UNRELATED CRIME.

In October, 1967, the Los Angeles Police Department in the course of investigating a series of burglaries obtained a search warrant to enter petitioners' apartment. Among other articles found in the house, a gun was seized.[1] The warrant was thereafter held to be legally insufficient[2] and all items confiscated as a result of the search were deemed inadmissible as evidence against petitioners.[3] The gun's serial number, however, was traced, and it led the police to a robbery victims' report at the Lennox Sheriff's station. The robbery was on the "inactive"[4] file and had not been actively investigated for over two years. The police contacted the robbery victims and showed them photographs of the petitioners whom they identified.

See Katzenbach, *Protest, Politics and the First Amendment*, 44 TUL. L. REV. 439, 440, 449, (1970). Speaking on "governmental" reaction to violent demonstrations for social change, the former United States Attorney General stated:

> What is being tested is the capacity of our political institutions to maintain that essential public confidence which lies at the heart of our democracy, while at the same time coping with the stresses and strains of a very rapidly changing society.

And in conclusion, Mr. Katzenbach suggests:

> . . . [I]f the objective of government is—as it should be—to maintain confidence in its processes, it may often have to go well beyond what is constitutionally required to prove its point.

1. Lockridge v. Superior Court, 3 Cal. 3d 166, 168, 474 P.2d 683, 684, 89 Cal. Rptr. 731, 732 (1970) [hereinafter cited as instant case].

2. *See* Lockridge v. Superior Court, 275 Cal. App. 2d 612, 80 Cal. Rptr. 223 (Ct. App., 2d Dist. 1969).

3. Instant case at 168, 474 P.2d at 684, 89 Cal. Rptr. at 732.

4. A case is "inactive" when all pertinent points have been investigated. Instant case at 168 n.1, 474 P.2d at 685 n.1, 89 Cal. Rptr. at 733 n.1.