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## Constitutional Law - Contempt Proceedings to Punish for Criticism of Judicial Decision

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# CONSTITUTIONAL LAW—CONTEMPT PROCEEDINGS TO PUNISH FOR CRITICISM OF JUDICIAL DECISION

On Sunday, May 18, 1952, Ross Allen Weston, pastor of the Arlington Unitarian Church, delivered a sermon in which he was highly critical of a recent decision of Hon. Walter T. McCarthy, judge of the Circuit Court of Arlington County. Judge McCarthy had held, in the case of *Rocco Paolicelli et al. v. Alan L. Dean et al.* that certain federal employees were disqualified to hold office on the County Board of Arlington County.<sup>1</sup> Weston's remarks, later published by a Washington newspaper and circulated in Arlington County, implied that the judge had been influenced in his decision by political affiliations, although he had no doubt of the judge's "intellectual integrity or his mental honesty". Summary contempt proceedings were brought against the pastor, and after considering the evidence the judge designate entered an order adjudging him guilty of contempt and fining him \$100 and costs. On appeal, *held*, reversed and dismissed on two grounds: (1) The Commonwealth did not show beyond a reasonable doubt that the language used by him was obscene, contemptuous, or insulting within the meaning of the Virginia statute,<sup>2</sup> and (2) the language used did not present a clear and present danger to the administration of justice. *Weston v. Commonwealth*, 195 Va. 175, 77 S.E.2d 405 (1953).

In this case the layman might consider the decision of the Circuit Court an impairment not only of his constitutional right of freedom of speech but also of his right to religious freedom. The fact is that the citizen's religious freedom is not the issue; nor is it involved in any way in this case. It might be said that Mr. Weston had gone beyond his usual "course of employment". However, if one were to argue that the decision of the Circuit Court and the dicta of the Supreme Court of Appeals had deprived the citizen of his freedom of speech, he would be concurring with a majority of the jurisdictions of this country. This would be true because by the statute<sup>3</sup> contempt proceedings may be brought

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1. *Affirmed*, 194 Va. 219, 72 S.E.2d 506 (1953).

2. Virginia Code of 1950, §18-255 ("The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

(3) Obscene, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding....").

3. *Ibid.*

against those who direct their contemptuous remarks toward the court concerning even *past-determined* decisions. A majority of the jurisdictions of the United States allow contempt proceedings only against persons who direct their criticism toward cases which are pending.<sup>4</sup> Herein lies the interesting point of the instant case, which raises some searching questions. Does the Constitution forbid attachments for contempt when the contemptuous words concern past-determined cases? Is there some distinction between past cases and pending cases which the courts should take into consideration because of the rights guaranteed in the Fourteenth Amendment to the Constitution of the United States? Should the Supreme Court of Appeals have declared Section 18-255 of the Code unconstitutional?

The basis for contempt proceedings at common law is expressed very well by Lord Hardwicke in *Roach v. Gervan*:<sup>5</sup>

There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their character.<sup>6</sup>

Because the courts could be scandalized by degrading remarks concerning past decisions as well as those concerning pending cases, there was no need to distinguish between the two. Thus, "that comments upon the court's action in a concluded case, where libelous or calculated to bring the court into disrepute, were freely punishable as contempt under the early common law, there can be no doubt. Distinctions between pending and concluded matters does not seem to have been made."<sup>7</sup> As an example of the extent to which this theory was carried out, in *Jeffes' Case*,<sup>8</sup> the defendant was found to be in contempt of court because of a publication critical of a decision handed down by a judge who was no longer on the bench. Wimot explains the underlying theory in this way:

The arraignment of the justice of the judges is arraigning the King's justice; It is an impeachment of his wisdom

4. 13 C.J., Contempt §44; 17 C.J.S., Contempt §30.

5. 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742).

6. *Id.* at 684.

7. 68 L.R.A. 251.

8. Cro. Car. 175, 79 Eng. Rep. 753.

and goodness in the choice of his judges and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and dangerous obstruction to justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction what-ever, not for the sake of the judges as private individuals but because they are the channels by which the King's justice is conveyed to the people.<sup>9</sup>

Blackstone had this to say about this type of contempt proceeding:

...contempts may arise...by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity...and by anything in short that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.<sup>10</sup>

When the several colonial states found it necessary to break away from English rule, it was not contended by most men of the law profession that it was also necessary to disregard the common law. To do so, of course, would have resulted in unimaginable chaos. However, it was contended in those days of revolution and in the years that followed that certain phases of the English law should be done away with, particularly if they were in conflict with the basic principles which formed the basis of our new government. The big problem lay in deciding when these principles were in conflict with the common law. As our country grew, the legislatures and courts of most states felt that to hold a man in contempt of court for degrading criticism directed at past decisions was a violation of the individual's right to freedom of speech. In *State ex rel. Attorney General v. Circuit Court*,<sup>11</sup> the court said: "Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments..."<sup>12</sup>

9. *King v. Almon*, *Wilmot's Notes*, p. 253.

10. 4 Bl. Comm. \*285.

11. 97 Wis. 1, 72 N.W. 193 (1897).

12. 97 Wis. 1, —, 72 N.W. 193, 196 (1897). See, e.g., *Percival v. State* 45 Neb. 741, 64 N.W. 221 (1895); *Stare v. Edwards*, 15 S.D. 383, 89 N.W. 1011 (1902); *Cheadle v. State*, 110 Ind. 301, 11 N.E. 426 (1887); *Graham v. Jones*, 200 La. 137, 7 So.2d 688 (1942).

Most jurisdictions have gone so far as to hold that criticism concerning concluded cases is to be unrestricted, no matter how scandalous or degrading.<sup>13</sup> These same courts have seen fit to permit contempt proceedings if the criticism concerned a pending case. It seems they disregarded the first type of contempt mentioned by Lord Hardwicke, i.e., that of scandalizing the court, and retained the latter two. To permit unrestricted comment on cases which are pending would be prejudicial to the parties' right to a fair trial, since the public and the judge himself might be influenced by critical publications. The right to a fair trial is just as fundamental as the right to freedom of speech or of the press. The courts will not permit an abuse of the latter to deprive the individual of his right to the former.<sup>14</sup> In determining when such an abuse has taken place, the courts have imposed upon themselves a further limitation, which is applied in each case. In some jurisdictions it is called the "interference" with or "obstruction" of the administration of justice rule.<sup>15</sup> The Texas courts have preferred to call it the "reasonably calculated" rule.<sup>16</sup> Many courts have referred to it as the "clear and present danger to the administration of justice" doctrine.<sup>17</sup> In either case, before a man can be found in contempt of court for derogatory words concerning a pending case, it must first be shown that his remarks would tend to impair the orderly administration of justice.

While the law was developing along this trend in a majority of the jurisdictions throughout the country, there were a few courts which refused to disregard the common law.<sup>18</sup> The judges of these courts felt that punishment for the type of contempt which consisted of scandalizing the court, as explained by Blackstone, Hardwicke, and Wilmot, was just as necessary to the orderly administration of justice as proceedings for that contempt which tended to deprive a party litigant of a fair trial. In defending the common law

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13. See, e.g., *Cheadle v. State*, 110 Ind. 301, 11 N.E. 426 (1887); *People ex rel. Supreme Court v. Albertson*, 275 N.Y.S. 361, 242 App.Div. 450 (1934); *State ex rel. Pulitzer Publishing Co. v. Coleman*, 347 Mo. 1239, 152 S.W.2d 640 (1941); *State ex rel. Moser v. District Court*, 116 Mont. 305, 151 P.2d 1002 (1944).
  14. See, e.g., *Scorey v. People*, 79 Ill. 45, 22 Am. Rep. 158 (1875); *State ex rel. Pulitzer Publishing Co. v. Coleman*, 347 Mo. 1239, 152 S.W.2d 640 (1941).
  15. See *Nixon v. State*, 207 Ind. 426, 193 N.E. 591, 97 A.L.R. 894 (1935); *Ex parte Craig*, 193 S.W.2d 178 (1946); *State ex rel. Giblin v. Sullivan*, 26 So.2d 509 (1946).
  16. *Ex parte Craig*, 193 S.W.2d 178 (1946).
  17. The phrase "clear and present danger" has become one of the classic statements of Justice Holmes. It was made in *Schenck v. United States*, 249 U.S. 47, 39 Sup.Ct. 247, 63 L.Ed. 470 (1919), a case involving the Espionage Act rather than contempt.
  18. *Commonwealth v. Dandridge*, 2 Va. Cas. 408 (1824); *State v. Morrill*, 16 Ark. 384 (1855); *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 76 S.W. 79, 99 Am.St.Rep. 604 (1903).

view as defined by Lord Hardwicke, the court in *State ex inf. Crow v. Shepherd*<sup>19</sup> had this to say:

It will be observed that the first kind of contempt spoken of, to wit, scandalizing the court itself, is a matter wherein the state, the people, and the court are vitally interested. It is therefore a public matter, and hence is a criminal contempt. The two other kinds of contempt spoken of are such as directly affect a party litigant . . . This distinction has been overlooked in some of the adjudicated cases, and hence the error they have fallen into of saying that the contempt must relate to a cause that is still pending, and, if the cause is disposed of, that will be no contempt which would have been a contempt if it had occurred while the cause was pending . . . They do not cover the whole field, for there is still the first kind of contempt, to wit, scandalizing the court itself. . . .<sup>20</sup>

The above opinion typifies the reasoning of the minority jurisdictions in refusing to distinguish between pending and past-determined cases. The position which Virginia has taken is fully realized when one considers that the *Shepherd* case, in which the court adhered so strictly to the common law, has been overruled.<sup>21</sup> Even more alarming is the fact that in one of the leading Virginia cases on the subject, *Burdett v. Commonwealth*,<sup>22</sup> the court relied heavily on *State v. Morrill*,<sup>23</sup> an early Arkansas case which is expressive of the common law view but is of doubtful present applicability in that state.<sup>24</sup> It would seem that *Virginia stands alone* on this point of law. However, before condemning the Virginia view too severely, it would be wise to examine it more closely.

It must be remembered that contempt proceedings are not brought against those who indulge in honest criticism of a court decision. If this were true, the jails would be filled with law professors, attorneys, and even judges. The contempt action is reserved for those who express a belief that the judge is dishonest or motivated by base principles—those who make defamatory statements concerning the courts. This is obvious to most, but it was not so obvious to a California judge who held that even a *favorable* comment on a pending case was contempt of court because it might

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19. 177 Mo. 205, 76 S.W. 79, 99 Am.St.Rep. 624 (1903).  
20. 177 Mo. 205, —, 76 S.W. 79, 86, 99 Am.St.Rep. 624, 642.  
21. *Ex parte Creasy*, 243 Mo. 679, 148 S.W. 914 (1912).  
22. 103 Va. 838, 48 S.E. 878, 68 L.R.A. 251 (1904).  
23. 16 Ark. 384 (1855).  
24. *See Bares v. State*, 197 S.W.2d 45 (1947).

tend to influence the court. On appeal this decision was reversed,<sup>25</sup> but it does show the confusion which can result from putting the *whole* emphasis on preventing the influencing of the judge's decision.

The Constitution of Virginia provides: "The General Assembly may *regulate*" [Emphasis added] the exercise by courts of the right to punish for contempt."<sup>27</sup> The words "or published of" in Section 18-255 of the Code<sup>28</sup> were added in the Code of 1919.<sup>29</sup> Before the addition, the Supreme Court of Appeals expressly adopted the common law view in the *Burdett* case, *supra*. In that case the defendant, having been convicted of the illegal sale of intoxicating liquor, published a letter in which he said that the judge had been "actuated by vicious and corrupt motives". The court held that such a statement was a "gross and insulting libel" and "degrades the administration of justice by bringing the courts into disrepute". No other test was applied. This case is an expression of the Virginia law today in only one respect; there may still be contempt proceedings for contemptuous statements concerning past-determined cases. Since the *Burdett* case, the test has changed.

The court said in *Boorde v. Commonwealth*,<sup>30</sup> "Considerable latitude is permissible in the criticism of judicial decisions already rendered, but when such criticism necessarily involves the future actions of the courts in pending causes a stricter rule, for obvious reasons, must be applied."<sup>31</sup> This view tends toward consistency with the majority of the jurisdictions, i.e., whether or not a statement will tend to influence a judge's decision is a very material factor in contempt cases. However, the court saw no reason to distinguish between past and pending cases, except that in the former there should be more leniency; it felt that it was as unjust to allow a remark concerning a past case which might influence a judge in a future case as it would be to permit such remarks concerning a pending case. The position which the court took is understandable in view of the situation which existed at the time the decision was made. It was 1922, during the days of prohibition, and *Boorde*, a

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25. *Times-Mirror Co. v. Superior Court of California*, 314 U.S. 252, 62 Sup.Ct. 190, 86 L.Ed. 192 (1941).

26. *But see Carter v. Commonwealth*, 96 Va. 791, 32 S.E. 780 (1899), in which it was held that a statute providing for juries in contempt cases was unconstitutional since the power of the court to proceed against those in contempt is inherent.

27. Va. Const., §63.

28. See note 2, *supra*.

29. Virginia Code of 1919, §4521.

30. 134 Va. 625, 114 S.E. 731 (1922).

31. *Id.* at 639, 114 S.E. 731, 735.

preacher, had accused a judge of being a "wet judge". The court held that this statement implied that the judge had been biased and dishonest in his decisions concerning "bootleggers", and, since there were many cases pertaining to the same problem, such statements might endanger objectivity in similar future trials. The test which seems to emerge from the *Boorde* case is not merely whether the court has been derogated but whether the right to a fair trial will be prejudiced. In *Weston v. Commonwealth, supra*, the court has further expanded this doctrine; there must be a clear and present danger to the administration of justice before there can be an attachment for contempt. This danger might be the deprivation of an individual's right to a fair trial, or it might be the disrupting of the judicial system.

It does not seem that the citizens of this state are being deprived of their constitutional rights. The court has set up a very rigid test in order to guard the right of freedom of speech and of publication. It was held in the *Weston* case that the courts are restricted by the Fourteenth Amendment to the Constitution of the United States as well as by the Constitution of Virginia.<sup>32</sup> In the first place the contempt proceedings under consideration are of a criminal nature<sup>33</sup> and must be proved beyond a reasonable doubt. Also, orders adjudging defendants guilty of contempt are final judgments, to which a writ of error will lie.<sup>34</sup> The leniency with which the court regards comments on past-determined cases is apparent from the treatment accorded Mr. Weston's statements, made in protest against the judge's decision in the *Dean* case, *supra*:

Finally, and most important of all, we must be alert to the encroachments on the freedom of persons. The stealth, the intrigue, and the wicked designs of the illiberal are a constant menace. . . .

. . . . .

Sometimes these forces are clothed in the gown of justices of the law. I refer, of course, to Judge McCarthy and his recent decision in the *Dean* case. . . .

. . . . .

32. Va. Const., §12.

33. See Local 333B, United Marine Division of International Longshoremen's Assn. v. Commonwealth, 193 Va. 773, 779, 71 S.E.2d 159, 163 (1952); 4 M.J., Contempt 834 (1949).

34. Virginia Code of 1950, §19-256.

He has segregated a group of our citizens—our federal employees. He has taken away their civil rights, and he has made them into second-class citizens. . . .

. . . . .

I do not know Judge McCarthy . . . Yet, I have no doubt about his intellectual integrity or his mental honesty . . . But I do know that Judge McCarthy holds his present office by virtue of appointment by a state legislature which is under the domination of Senator Byrd . . . Thus, I am forced to the conclusion that Judge McCarthy's decision coincides with the interests of the Byrd "organization". It is true, isn't it? "No man can serve two masters."<sup>35</sup>

At first glance, it would seem that a criticism which accused a judge of using stealth and intrigue, having wicked designs, purposely depriving citizens of their rights, and being influenced by a political organization would certainly be a contempt of court which could not be mitigated by a statement that the judge's "intellectual integrity" or "mental honesty" was not doubted. Yet, the court found no contempt.

Whether or not a statement is libelous is no longer the sole test as it was in the *Burdett* case, *supra*. The court has made this clear in the *Weston* case by saying, ". . . false and libelous utterances as to a judge's conduct of an ended case may or may not be punishable contempt, depending upon whether such utterances present a clear and present danger to the administration of justice."<sup>36</sup>

The law in Virginia seems quite liberal when viewed as it is and not as it appears, because the contempt must be proved beyond a reasonable doubt and appeal is permitted from any order of contempt. Also, it must be shown, when the criticism concerns a past case, that the statement presents a "clear and present danger to the administration of justice". There are situations in which the individual's right to a fair trial may be prejudiced as much because of comments on a past case as by comments on the pending case. The Supreme Court of Appeals has refused to ignore this and will not close the door on its power to prevent it.

It seems that most of the arguments against the Virginia view are in reality not arguments against contempt actions for criticism of past cases alone but against all summary contempt proceedings.

35. 195 Va. 175, 178, 77 S.E.2d 405, 407 (1953).  
36. *Id.* at 184, 77 S.E.2d 405, 409.

In either case the court action is designed to accomplish the same end, i.e., the protection of the right to a just trial. This fundamental right can be prejudiced by comments on either past or pending cases. If the reason for the rule fails in one case, it must fail in the other. The theory that permits contempt actions for comments on pending cases but not on past cases is founded on a presumption that a judge will be honest and capable on the one hand but dishonest or incapable on the other. A judge's discretion may be abused in either case, and in the final analysis the only true safeguard lies in the conscience and intelligence of our judges. When the General Assembly determines that summary proceedings are a threat to the citizen's rights, then it can abolish such proceedings entirely. Until then, it would be well to remember the words of Justice Holmes: ". . . if it is a bad rule that is no reason for making a bad exception to it."<sup>37</sup>

G. Duane Holloway

[Editor's note: *In view of the general interest shown in the Weston case and a difference of opinion among professors and students of the Marshall-Wythe School of Law, the editor takes the liberty to present the following statement by the Dean of the Law School.*]

The court unfortunately states, "We are not impressed with the argument that because of the constitutional guaranty of freedom of speech and press the State is without power to punish in a contempt proceeding unwarranted and improper criticism of judicial conduct in litigation *which has been terminated* [Emphasis added], but must resort to a criminal libel proceeding for that purpose."<sup>38</sup>

But who is to determine what criticism of judicial conduct is unwarranted and improper? Is it to vary with the sensibilities of

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37. *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84, —, 34 N.E. 177, 178. (1893).  
38. 195 Va. 175, 184, 77 S.E.2d 405, 409 (1953).

the individual called upon to determine the matter? This very case illustrates the difficulty. Judge McCarthy evidently thought the language used by Mr. Weston was improper, or he would not have cited him for contempt. Judge Taylor must have thought the language improper or he would not have convicted him. Surely Judges McCarthy and Taylor are men of better than average intelligence and judgment, or they would not hold the offices they do. But yet the Justices of our Supreme Court of Appeals unanimously thought that the language used was permissible criticism. Thus the author of any criticism of a court for a past decision must act at his peril as to whether or not someone in authority may think it proper or improper. Courts have the power to decide, and the power to decide includes the power to decide wrongly. Surely then the power to criticize includes the power to criticize improperly, subject only to the law of defamation, both civil and criminal. To publish only what those in authority think is fair or proper is not freedom of speech but freedom to praise.

The court also states, "While such an attack may not affect the particular litigation which has been terminated, it may very well affect the course of justice in future litigation and impair, if not destroy, the judicial efficiency of the court or judge subjected to attack."<sup>39</sup> It is submitted that this statement is itself a gross libel on our judiciary. Surely judges are made of sterner stuff than that. Can it be that judges who decide the most important questions of our time do not have the fortitude and integrity of professional baseball umpires! And yet the court speaks of the respect the judiciary must command. Surely a public confession of inability to resist pressure is no way to instill that respect. And ill-advised rules that only proper and fair criticism will be tolerated lead to contempt of the judiciary even though because of such rules the contempt may be inward rather than outward. And an inward unexpressed contempt is far more dangerous to our free institutions than an expressed contempt. The very fact that one can express his contempt acts as a safety valve, and when the expressions are obviously unfair and improper, as is very often the case, the person expressing such sentiments is in reality defaming himself rather than the object of his vilification.

The language and the philosophy of the statute for religious freedom (" . . . that to suffer the civil magistrate to intrude his

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39. 195 Va. 175, 184, 77 S.E.2d 405, 409 (1953).

powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy . . . because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them . . ."<sup>40</sup>) are much more noble than those of the statute on contmpt and of the court in the instant case.<sup>41</sup>

D. W. Woodbridge

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40. Virginia Code of 1950, §57-1.

41. For further comment on this case see 39 Va.L.Rev. 1011 (1953).