AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided – Democratic Rights/Free Speech

**Landmark Communications v. Virginia, 435 U.S. 829** (1978)

*Landmark Communications Inc. owned a local newspaper in Norfolk, Virginia, the* Virginia Pilot*. The paper published an accurate article on a pending matter before the Virginia Judicial Inquiry and Review Commission, a disciplinary review board for the state judiciary. A grand jury indicted the newspaper for violating state law, which prohibited divulging the identity of a judge being investigated by the commission. Landmark was found guilty and fined $500 plus the court costs, and that conviction was upheld by the state supreme court. Nearly every state had some form of protection for the confidentiality of judicial disciplinary investigations (though criminal sanctions for the breach of confidentiality were uncommon), and the Virginia court concluded that the confidentiality of the judicial investigations was critical to maintaining public confidence in the judiciary.*

*Landmark appealed to the U.S. Supreme Court, arguing that applying the state statute to a newspaper was in conflict with the requirements of the First Amendment guarantee of freedom of press (Landmark conceded that the law could be potentially applied against a source who disclosed the information to a reporter). The U.S. Supreme Court unanimously reversed the state court and held that newspapers could not be held criminally liable for publishing true information.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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Landmark urges as the dispositive answer to the question presented that truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment. It points to the solicitude accorded even untruthful speech when public officials are its subjects and the extension of First Amendment protection to the dissemination of truthful commercial information to support its contention. We find it unnecessary to adopt this categorical approach to resolve the issue before us. We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom. See, e.g., *Buckley v. Valeo* (1976).

In *Mills v. Alabama* (1966), this Court observed: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." . . . The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media. The article published by Landmark provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Inquiry and Review Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect. See *New York Times v. Sullivan* (1964).

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It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants such as Landmark. The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.

. . . . Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free." The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales. . . .

The Supreme Court of Virginia relied on the clear-and-present-danger test in rejecting Landmark's claim. We question the relevance of that standard here; moreover we cannot accept the mechanical application of the test which led that court to its conclusion. . . . Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.

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In a series of cases raising the question of whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. *Bridges v. California* (1941). What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished, and that a "solidity of evidence," is necessary to make the requisite showing of imminence." The danger must not be remote or even probable; it must immediately imperil."

. . . . It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement. Moreover, much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings. . . .

*Reversed*.

JUSTICE BRENNAN and JUSTICE POWELL took no part in the consideration or decision of this case.