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A First Amendment Exception to the “Collateral Bar” Rule: Protecting Freedom of Expression and the Legitimacy of Courts

Richard Labunski*

I. INTRODUCTION

When the United States Supreme Court dismissed the writ of certiorari it had granted in *United States v. Providence Journal Co.*,¹ the Court lost its only opportunity thus far to establish national standards for the “collateral bar” rule in First Amendment cases involving media organizations.² The Court could have used *Providence* to decide no less an issue than when First Amendment rights transcend the power of courts to punish criminally contemptuous behavior.³ To judges, the

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1. 485 U.S. 693 (1988). After the case was briefed and argued, the Court dismissed the writ upon learning that the special counsel appointed to prosecute the contempt charge against the newspaper and its editor failed to secure the proper authorization from the Solicitor General to allow him to represent the Federal government before the Supreme Court as required by 28 U.S.C. § 518(a). *Id.* at 699-700.

2. *Providence* would have been the first major Supreme Court decision on the collateral bar rule for First Amendment cases, involving either media or non-media defendants, in more than a quarter of a century. See *Walker v. City of Birmingham*, 388 U.S. 307, 315, 320 (1967) (holding that civil rights demonstrators who violated an order enjoining them from participating in a parade without a permit could not collaterally attack the original order while appealing the contempt conviction).

3. At common law, courts enjoyed an inherent power of contempt. See, e.g., *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911) (finding that courts have inherent contempt authority); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (recognizing the court's inherent power of contempt); *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 227 (1821) (stating that courts are vested with “power to impose silence, respect and decorum, in their presence, and submission to their lawful man-

collateral bar rule is essential if courts are to function as a viable third branch of government. To proponents of the First Amendment, the rule allows courts to use the awesome power of contempt to punish disobedience of orders that the judge knew or should have known were unconstitutional when issued.⁴

The collateral bar rule holds that a party who disobeys a judicial order may not "collaterally" challenge the validity of the original order when appealing a criminal contempt conviction.⁵ Under the rule, the

dates"); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that contempt is a power "necessary to the exercise of all others"). The contempt power of federal courts has been limited by statute. *See* 18 U.S.C. § 401 (1982). One judge observed that

contempt may well be the last vestige of the so-called 'common law crimes,' insofar as a determination that particular conduct should be punished as contempt depends not so much on specific prohibited acts having occurred as on the Judge's subjective determination that the conduct was culpable, blameworthy and deserving of punishment.

United States v. Dickinson, 465 F.2d 496, 513 (5th Cir. 1972).

4. Judges assert that orders that curtail First Amendment rights are issued in good faith, and that no litigant knows in advance whether such an order will survive on appeal. Judge West's comment in *United States v. Dickinson*, 349 F. Supp. 227 (M.D. La. 1972), to be discussed *infra*, represents the view that judges do not issue such orders frivolously: "Of course this Court was of the opinion that its order was a valid one. It would be difficult to conceive of a court issuing an order, knowing it to be invalid, and then having the audacity to cite a person for contempt for disobeying it." *Id.* at 229. In *Dickinson*, Judge West reinstated a contempt conviction against two newspaper reporters even after the Fifth Circuit Court of Appeals declared the underlying order to be unconstitutional. *Id.* at 228-29. The Fifth Circuit upheld Judge West's reimposition of the contempt punishment. *United States v. Dickinson*, 476 F.2d 373 (5th Cir. 1973). However, *Cooper v. Rockford Newspapers Inc.*, 365 N.E.2d 746 (Ill. App. Ct. 1977), undermines Judge West's statement since the trial judge first convicted the newspaper and its publisher of contempt *after* the appellate court had already determined that the underlying order was unconstitutional. *Id.* at 747.

5. For detailed discussion of the collateral bar rule in federal First Amendment cases, see *Walker*, 388 U.S. 307; *see also In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified en banc*, 820 F.2d 1354 (1st Cir. 1987); *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); Ronald F. Chase, J.D., Annotation, *Appealability of Contempt Adjudication or Conviction*, 33 A.L.R.3d 448 (1970); Edward L. Raymond, Jr., J.D., Annotation, *Media's Dissemination of Material in Violation of Injunction or Restraining Order as Contempt - Federal Cases*, 91 A.L.R. FED. 270 (1989). For major state cases, see *Ex parte Purvis*, 382 So.2d 512 (Ala. 1980); *Phoenix Newspapers, Inc. v. Superior Ct.*, 418 P.2d 594 (Ariz. 1966); *State v. Chavez*, 601 P.2d 301 (Ariz. Ct. App. 1979); *In re Berry*, 436 P.2d 273 (Cal. 1968); *Cooper v. Rockford Newspapers, Inc.*, 365 N.E.2d 746 (Ill. App. Ct. 1977); *Ex parte Tucci*, 859 S.W.2d 1 (Tex. 1993); *State v. Coe*, 679 P.2d 353 (Wash. 1984); *State ex. rel. Super. Ct. v. Sperry*, 483 P.2d 608 (Wash. 1971). The collateral bar rule generally applies only to criminal contempt, but there is no clear line between civil and criminal contempt. The same act in different situations may be regarded as either civil or criminal. In *International Union, United Mine Workers v.*

appeal of the contempt conviction is a separate cause of action, and once a party disobeys the original order, he or she forfeits the right to challenge its validity in any subsequent proceeding. The collateral bar rule has the effect of upholding punishment even though the original order was invalid or unconstitutional.⁶ Judges argue that their function would be merely advisory if parties could wantonly violate judicial orders, and then challenge the original order while appealing the contempt conviction.⁷

Several jurisdictions appear to impose the collateral bar rule in all First Amendment cases, including those involving "pure speech."⁸ Some states only apply the rule when there is "speech plus conduct," as in labor demonstrations,⁹ although one state permitted a collateral chal-

Bagwell, 114 S. Ct. 2552 (1994), the United States Supreme Court held that a \$52,000,000 fine was punishment for criminal and not civil contempt, as previously characterized by the Virginia Supreme Court. Therefore, the union was entitled to trial by jury and all criminal procedures before having to pay the fine. *Id.* at 2563.

6. The difference between disobeying an injunction later determined to be invalid, and a statute later deemed unconstitutional, is shown by comparing *Walker* and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). *Shuttlesworth* involved some of the defendants in *Walker* who were being prosecuted for violating the antiparade statute. *Id.* at 157. Justice Stewart, who also authored the *Walker* opinion, held in *Shuttlesworth* that the ordinance was clearly unconstitutional, and thus overturned the petitioners' convictions. *Id.* at 150-51. *Shuttlesworth* strongly suggested that the injunction in *Walker*, which was based on the ordinance struck down in *Shuttlesworth*, was also unconstitutional.

7. Collateral bar cases arising in contexts that only indirectly implicate First Amendment interests are briefly discussed for illustrative purposes, but are largely outside the scope of this Article. *See infra* note 15.

8. These jurisdictions include the Fifth Circuit Court of Appeals, and Alabama. *See supra* note 5. "Pure speech" usually refers to the publication or broadcast of information by a media organization, and involves a minimum of "conduct" such as picketing or demonstrating.

9. The Supreme Court strongly endorsed the rule in several cases involving labor disputes, including *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947), where the Court held that: "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal." *Id.* at 294. The Third Circuit Court of Appeals cited the rule with approval in *Latrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336 (3d Cir. 1976). "With regard to criminal contempt, the Supreme Court's opinion in *Walker v. Birmingham* and *United States v. United Mine Workers* clearly hold that a criminal contempt judgment does survive the voiding of any injunction." *Id.* at 1345 (footnotes omitted). *Compare Phoenix Newspapers, Inc. v. Superior Ct.*, 418 P.2d 594 (Ariz. 1966) (holding that an invalid order prohibiting news organizations from writing about a preliminary hearing held in open court cannot support a contempt conviction) *with State v. Chavez*, 601 P.2d 301 (Ariz. Ct. App. 1979) (holding that strikers could not collaterally challenge an injunction prohib-

lence in a case involving substantial conduct and potential for violence.¹⁰ Other courts have upheld the rule when the speech is unprotected, such as obscenity.¹¹ Some jurisdictions strongly reject the rule by holding that an invalid or unconstitutional order cannot support a contempt conviction,¹² while others will overturn the contempt conviction only if the original order had no "pretense to validity,"¹³ or was "transparently invalid."¹⁴

iting picketing which they had disobeyed).

10. *Ex Parte Tucci*, 859 S.W.2d 1 (Tex. 1993).

11. *People v. Sequoia Books, Inc.*, 527 N.E.2d 50 (Ill. App. Ct. 1988) (upholding contempt conviction even though part of the injunction was an unconstitutional prior restraint), *rev'd on other grounds*, 537 N.E.2d 302 (Ill. 1989). The same court that upheld the contempt conviction in *Sequoia* overturned a contempt conviction in *Cooper v. Rockford Newspapers, Inc.* 365 N.E.2d 746 (Ill. App. Ct. 1977) (concluding that an order compelling the newspaper not to publish information about a libel suit which it was defending was an unconstitutional prior restraint, and allowing collateral challenge of the order in contempt appeal).

12. *See generally In re Berry*, 436 P.2d 273 (Cal. 1968); *State ex rel. Superior Ct. v. Sperry*, 483 P.2d 608 (Wash. 1971). In *State v. Crenshaw*, 764 P.2d 1372 (Or. 1988), which was not a First Amendment case, the Oregon Supreme Court upheld a contempt conviction because it concluded the underlying order was valid, but stated that especially in direct criminal contempt, where no writ of mandamus is available unless the judge "as a matter of grace" allows a period of time to seek the writ, the court will not impose the collateral bar rule. *Id.* at 1376.

13. The principle that such orders do not have to be obeyed first emerged in *Walker*, where the Court stated: "And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Walker*, 388 U.S. at 315. In *Walker*, the Court upheld the criminal contempt convictions of civil rights demonstrators who violated an ex parte order prohibiting them from marching on Good Friday and Easter Sunday of 1963. *Id.* at 311, 321. The Supreme Court suggested that the underlying order was unconstitutional, but concluded that the demonstrators had an obligation to appeal the original order before disobeying it. *Id.* at 320. For a detailed examination of *Walker*, and criticism that the importance of the case is not recognized in law schools, see David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the 'Letter from Birmingham Jail'*, 26 U.C. DAVIS L. REV. 791 (1993).

14. *In re Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir. 1986), *modified en banc*, 820 F.2d 1354 (1st Cir. 1987). In *Providence*, the order was "transparently invalid" because it "constituted a presumptively unconstitutional prior restraint on pure speech by the press." *Id.* at 1353. The court did not clearly define at what point an order is sufficiently defective that it can be disobeyed and then challenged while appealing the contempt conviction. If, for example, a court issued an order against a party over whom it lacks subject matter or personal jurisdiction, it would be transparently invalid. Moreover, the *Providence* court held that if an order is ex parte, that would be a factor suggesting that the order was transparently invalid. Both the Supreme Court in *Walker*, and the First Circuit in *Providence*, stressed that an unconstitutional order is not automatically transparently invalid. To those courts, only a "void" order which is transparently invalid, as opposed to a "voidable" order which may be unconstitutional, can be ignored. *Id.* at 1347. Instead of characterizing orders as "transparently invalid," some courts have concluded that a court issuing the order

Collateral bar cases also arise in the context of defiance of court orders by attorneys. Some courts, including the Supreme Court, hold that if obeying the order requires the irretrievable surrender of constitutional rights, the attorney may advise a client to defy the order, then challenge it while appealing the contempt conviction.¹⁵ Some states nevertheless preclude lawyers from collaterally challenging the order when appealing a contempt conviction if they disregard an order¹⁶ or advise their client to defy an order that is not transparently invalid.¹⁷

Judges have substantial discretion to control proceedings before them. One federal court upheld a contempt conviction of a nonparty even though the trial court exceeded its inherent power to issue an order compelling attendance of the non-party at a settlement conference.¹⁸ Other states have strongly supported the collateral bar rule in

lacked jurisdiction to take such action, and disobeying a court order with jurisdictional defects is less threatening to judicial authority than defying an order that may be unconstitutional, but which a court had jurisdiction to issue.

15. *Maness v. Meyers*, 419 U.S. 449 (1975). *Maness* involved an order for the production of allegedly obscene materials which was challenged on self-incrimination grounds. *Id.* at 450-52. Although counsel advised his client to disobey the order, the Supreme Court overturned the contempt conviction of the attorney, concluding that "when a court during trial orders a witness to reveal information . . . compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error." *Id.* at 460. The Court added that although such an order can be resisted and challenged on appeal, if the original order is upheld, the contempt conviction stands. *Id. See, e.g., United States v. Ryan*, 402 U.S. 530, 532-33 (1971).

16. *In re Balter*, 468 N.E.2d 688, 689 (N.Y. 1984) (holding that attorney who believed that conflict of interest prevented ethical representation of client, and therefore, defied order to proceed to trial, was properly convicted of contempt even though underlying order was erroneous).

17. *In re Reeves*, 733 P.2d 795, 802 (Idaho Ct. App. 1987) (holding that lawyer who advised client to disobey order telling her not to "interfere" with husband's custody of child cannot collaterally challenge the order in the contempt appeal).

18. *In re Novak*, 932 F.2d 1397, 1409 (11th Cir. 1991). The non-party was an insurance executive in Illinois with authority to approve settlements, but the trial court issuing the order was in Georgia. *Id.* at 1399. The court of appeals held that the trial court had inherent authority to compel the parties in the case to produce those with settlement authority, but lacked inherent power to directly order a non-party from another state to appear. *Id.* at 1407-08. Nevertheless, the court of appeals decided that the non-party should have asked the court to modify its order, and should not have disobeyed it. *Id.* at 1409. It upheld the contempt conviction and \$500 fine. *Id.* at 1400. That courts take seriously their ability to punish disobedience of even invalid orders is demonstrated by the court in *Novak*: "Therefore, Novak suffers no unfair

principle, but in particular cases, found on narrow grounds that the contempt conviction must be reversed when the original order was held to be invalid.¹⁹ Other states have rejected the rule in non-First Amendment contexts.²⁰

When the power of courts to punish disobedience of their orders and the rights protected by the First Amendment clash, no easy solution emerges. The First Amendment has long enjoyed a "preferred position" under the federal constitution,²¹ and vigorous protection of speech and press is essential to a democratic society.²² On the other hand, courts could not function if their orders were routinely disobeyed.²³ Although the contempt power can be abused,²⁴ judges themselves frequently comment that it is to be used "sparingly."²⁵ In addition, if the contempt punishment is severe, courts require that those subject to such sanctions be afforded due process rights.²⁶

hardship by our application of the collateral bar rule in his case; it was his failure to properly challenge the district court's order and his subsequent disobedience of that order—not any failing of the judicial system—that resulted in his contempt conviction." *Id.* at 1402. *See also* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) (holding that "a nonparty witness can challenge the [trial] court's lack of subject-matter jurisdiction in defense of a civil contempt citation, notwithstanding the absence of a final judgment in the underlying action").

19. *Cologne v. Westfarms Assocs.*, 496 A.2d 476, 485 (Conn. 1985) (overturning contempt conviction because of lack of trial and showing of sufficient evidence, but strongly supporting collateral bar rule in principle).

20. *In re Wharton*, 290 S.E.2d 688, 693 (N.C. 1982) (holding that the court had no authority to issue an order requiring the county department of social services to establish a foster home for juveniles and overturning the contempt conviction); *see also Ex parte Olivares*, 662 S.W.2d 594, 595 (Tex. 1983) (reversing a contempt conviction because the court lacked jurisdiction to issue a written order after previously issuing an oral order of dismissal).

21. A footnote by Justice Stone is thought to be the origin of the "preferred position" theory. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

22. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (finding that presumption supporting legislation must be weighed against preference given to freedoms of the First Amendment); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (holding that it is irrelevant that an ordinance is nondiscriminatory because First Amendment rights stand in a preferred position and cannot be easily restricted); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) (stating that "neither liberty nor justice would exist" without freedom of thought and speech).

23. *See United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). Judge Brown noted that unlike defiance of an unconstitutional statute which does not interfere with the functioning of the legislature, refusal to obey a court order undermines judicial authority by requiring further action by the judiciary and, therefore, "directly affects the judiciary's ability to discharge its duties and responsibilities." *Id.* at 510.

24. *See infra* notes 88-138 and accompanying text.

25. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); *see also Yates v. United States*, 356 U.S. 363, 366-67 (1958); *Cammer v. United States*, 350 U.S. 399, 403 (1956); *In re Osborne*, 344 F.2d 611, 616 (9th Cir. 1965).

26. For "serious" criminal contempts involving imprisonment of more than six

The conflict is especially acute when judges issue orders in a free press/fair trial context. When judges are concerned about prejudicial publicity that interferes with the defendant's right to a fair trial, they may issue orders against either the trial participants, or news reporters covering the proceedings, or both.²⁷ Those orders frequently tell participants they may not discuss the case, and prohibit the news media from publishing or broadcasting information that would make impaneling an impartial jury more difficult, or if the trial has already begun, information that jurors would not hear in open court.²⁸ A defendant may be on trial for a serious offense, and judges believe that imposing restraining or "gag" orders against the press is necessary to protect the rights under the Sixth Amendment in some circumstances.²⁹

months, the protections include the right to jury trial. *Bloom v. Illinois*, 391 U.S. 194, 198-99 (1968). The requirement that a contempt defendant receive a jury trial if the sentence is potentially more than six months even includes direct criminal contempt, which takes place in the presence of the judge, and where appellate courts grant judges maximum discretion to summarily punish contemptuous behavior. On the other hand, "petty" contempt, like other petty criminal offenses, may be tried without a jury. *Taylor v. Hayes*, 418 U.S. 488, 495 (1974). The Supreme Court has not yet determined how large a fine constitutes a serious criminal sanction that requires trial by jury. In *Muniz v. Hoffman*, 422 U.S. 454 (1975), the Court held that a fine of \$10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to a jury trial. *Id.* at 477. In *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994), the Court found that a \$62,000,000 fine (later reduced to \$52,000,000) was "unquestionably a serious contempt sanction" which required a jury trial. *Id.* at 2562.

27. The landmark Supreme Court case involving a "gag order" against the press was *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), in which the Court invalidated an order prohibiting the press from publishing information about a defendant in a mass murder case. *Id.* at 570. Attorneys may face criminal contempt charges for extrajudicial statements. *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720 (1991). In addition to imposing contempt punishment, some courts have barred reporters from further attendance at the trial after they violated a court order. See generally *Oliver v. Postel*, 282 N.E.2d 306 (N.Y. 1972); *Superior Ct. v. Sperry*, 483 P.2d 608, 611 (Wash. 1971).

28. In *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), a federal district court judge was concerned that publicity about the federal court hearing would make it difficult to impanel an impartial jury in the state prosecution. The Fifth Circuit invalidated the order as a violation of the First Amendment, although it recognized the efforts of the trial judge to secure a fair trial under the Sixth Amendment. *Id.* at 501.

29. *In re Farber*, 394 A.2d 330, 332 (N.J. 1978). *Farber* is a classic example of the clash between the Sixth and First Amendments. Dr. Mario Jascavevich was tried for the deaths of several patients in the New Jersey hospital where he worked. *Id.* Myron Farber, a New York Times reporter, refused to identify the names of confidential sources who provided information for a series of articles he wrote about the

The Supreme Court, however, has made it very unlikely that such an order against the press will be upheld on appeal. The Court has long recognized the First Amendment's intolerance for "prior restraint,"³⁰ and in the free press/fair trial context, the Court has established a three-part test that is extremely difficult for judges to meet.³¹ Journal-

deaths, although he testified at trial on other aspects of the case. *Id.* In rejecting Farber's argument that the New Jersey and Federal Constitutions, and the New Jersey Shield Law, provided a privilege to keep the names of sources confidential, the New Jersey courts upheld the civil contempt convictions of Farber and the newspaper, which paid several hundred thousand dollars in fines. *Id.* at 339. The case was somewhat unusual because the defense, rather than the prosecution, sought the information. It claimed that the defendant, who was later acquitted, could not receive a fair trial without it. *Id.* at 332. Farber spent 40 days in jail, and the New York Times paid \$286,000 in fines. Both Farber and the newspaper were later pardoned by Governor Byrne, and the fines were partially refunded. See Jonathan Friendly, *Times and Reporter Granted Byrne Pardon in 'Dr. X' Case*, N.Y. TIMES, Jan. 19, 1982, at A1. See generally M. FARBER, *SOMEbody IS LYING* (1982) (recounting Farber's experience with the "Dr. X" murder trial).

30. See *Near v. Minnesota*, 283 U.S. 697, 722-23 (1931) (concluding that the statute which authorized public officials to bring publishers of "malicious, scandalous, and defamatory" periodicals before a judge to prove the material is true and published in good faith was an unconstitutional restraint of freedom of expression); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (finding the government has a heavy burden to justify the restraint of speech); *New York Times v. United States*, 403 U.S. 713, 713 (1971) (per curiam) (finding that government did not carry the heavy burden required to support prior restraint on newspaper's publication of classified material regarding government's Vietnam policy). But see *United States v. Progressive*, 467 F. Supp. 990, 1000 (W.D. Wis. 1979) (issuing restraining order enjoining publication of restrictive data detailing a method for the construction of a hydrogen bomb because vital national security interests outweighed the constitutional doctrine against prior restraint). In an action that some view as the Supreme Court's approval of a prior restraint on pure speech, the Court, on November 18, 1990, by a 7-2 vote, refused to lift a Federal district judge's order that barred the Cable News Network (CNN) from broadcasting telephone conversations between General Manuel Noriega and his legal defense team. Linda Greenhouse, *Ban on Noriega Tape Telecast Continues*, N.Y. TIMES, Nov. 19, 1990, at A14.

31. The test established in *Nebraska Press Association* requires: 1) a finding of pervasive publicity affecting jurors; 2) a finding that there are no alternative methods available to the court other than issuance of a prior restraint on the press; and 3) a finding that the prior restraint will be effective. *Nebraska Press Ass'n*, 427 U.S. at 562-67. See James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STANFORD L. REV. 497 (1977) (arguing that if the substantial publicity surrounding the murders in Nebraska Press Association did not justify prior restraint order, it would be difficult to imagine a case that would). In *CBS v. Davis*, 114 S. Ct. 912 (1994) (application for stay), Justice Blackmun, as a circuit justice, overturned an injunction issued by a South Dakota state judge that would have prohibited the network from airing videotape taken at a beef processing plant. *Id.* at 915. Justice Blackmun issued the stay, citing traditional First Amendment rejection of prior restraint, on February 9, 1994, hours before the program aired. *Id.* at 912.

ists vigorously argue that because a prior restraint order is likely to be invalidated on appeal, one may violate the order and challenge its validity while appealing a contempt conviction.³² Judges assert that their orders are made in good faith, and no litigant knows in advance whether the order will be overturned. Moreover, they argue that the authority of the court is at stake, and no litigant should be a "judge in his own case."³³ They further argue that if there is conduct as well as pure speech involved, their orders, such as limiting picketing, will more likely be upheld on appeal.³⁴

Traditional First Amendment jurisprudence has focused on the rights of the speaker to communicate in a self-governing society.³⁵ Although efforts to protect the dissemination of information have been successful in most First Amendment contexts,³⁶ judges and commentators have observed that the First Amendment is just one provision of the Constitution, and that other rights must also be strongly enforced.³⁷ Courts

32. The collateral bar cases obviously arise because the underlying order was held to be unconstitutional. If it is valid, the court would uphold the contempt judgment and the journalists would not mount a collateral challenge. Although judges issuing the orders may strongly believe in their validity, appellate courts have sometimes characterized those orders as "constitutionally overbroad," "transparently invalid," and "patently frivolous."

33. In language repeated in many subsequent cases, Justice Stewart wrote: "[N]o man can be judge in his own case, however exalted his station, however righteous his motives." *Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967).

34. See *United States v. United Mine Workers*, 330 U.S. 258, 289 (1947) (holding that one who willfully disobeys a court order is subject to a criminal contempt order); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922) (holding that an order issuing out of a court with subject matter and personal jurisdiction over the parties must be obeyed even if later overturned).

35. See generally ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); LEONARD W. LEVY, *LEGACY OF SUPPRESSION* (1960); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (examining the sources and premises of the notion that freedom of expression has value partly because it has the function of checking the abuse of official power); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (examining neutral principles and their application to important and debated problems in the interpretation of the First Amendment).

36. The Supreme Court has long held that certainly narrowly defined classes of speech are not entitled to First Amendment protection. They include the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

37. For a critical view of *In re Providence Journal Co.* by one of the First

must be able to protect the rights of litigants and to vindicate challenges to their authority by punishing contemptuous behavior.

Those subject to an order later determined to be unconstitutional face limited options. If they comply with the order, then appeal, the news value of the information or timeliness of the expression may be lost during the months it takes for an appellate court to make a decision.³⁸ A delay may be the equivalent of forfeiting rights under the First Amendment to which the publisher or broadcaster was entitled.³⁹

The restrained party may attempt to have the issuing court modify the order or have the order overturned on appeal on an expedited basis.⁴⁰ If the decision does not come when the information is still timely, they can disobey the order and hope that the jurisdiction allows a collateral challenge to the underlying order.⁴¹ If, however, they disobey the order in a jurisdiction that upholds the collateral bar rule, they lose the right to challenge the validity of the original order and may be subject to serious contempt sanctions.⁴²

There are situations in which the collateral bar rule has been held inapplicable. First, if the issuing court lacks subject matter or personal

Amendment's most articulate proponents, see Anthony Lewis, *The Civilizing Hand*, N.Y. TIMES, Apr. 7, 1986, at A27.

38. The court in *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), recognized the importance of deadlines in news coverage: "[I]t is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish." *Id.* at 1351. Justice Brennan, dissenting in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), observed that the civil rights demonstrators needed to march on Good Friday and Easter Sunday to generate publicity for their cause. *Id.* at 349.

39. *In re Providence Journal Co.*, 820 F.2d at 1352 n.71.

40. Many jurisdictions do not have emergency appellate procedures that provide immediate review in First Amendment cases. In *Providence*, the newspaper argued that others were about to publish the information that the FBI had made available, and it, therefore, had to publish immediately. There may be emergency procedures to rescue attorneys jailed for direct criminal contempt by judges angry that they did not submit material in advance of publication for court approval. In *Goldblum v. National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1978), the attorney refused to make available to the judge an NBC documentary scheduled for national broadcast that evening. *Id.* at 906. The lawyer was in jail for about half a day before the Ninth Circuit granted emergency relief. *Id.*

41. The Supreme Court stated in *Walker* that it may have decided the case differently if the defendants had made any effort to appeal the injunction in the two days before the march. 388 U.S. at 318-19.

42. In *Providence*, 820 F.2d at 1354, the en banc court modified the three-judge panel decision by urging publishers to appeal orders before disobeying them whenever time permits. *Id.* at 1355. The Fifth Circuit observed in *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), that "newsmen are citizens, too They too may sometimes have to wait." *Id.* at 512.

jurisdiction, its order may be violated and challenged in the contempt appeal.⁴³ Second, the rule presumes that adequate remedies exist for orderly review of the challenged ruling. If there is no such opportunity for review, the contemnor may challenge the validity of the original order while appealing the contempt conviction.⁴⁴ Finally, court orders that are transparently invalid or patently frivolous need not be obeyed.⁴⁵

Traditional debate over the collateral bar rule centers on the rights of speakers versus the power of courts. Relatively recent and subtle First Amendment developments suggest, however, that not only the rights of the media or demonstrators are involved in freedom of speech and press cases, but also the right of readers, listeners and viewers to *receive* information.⁴⁶ Although tentatively embraced by the Supreme Court and lower courts, the principle that the "governors" in a democratic society enjoy First Amendment rights to receive relevant information potentially adds significant weight to the free expression side of the scales. If there is a right to receive information, then a judge who issues a restraining order not only interferes with the First Amendment rights of the speaker, but also interferes with the essential access that

43. See *In re Green*, 369 U.S. 689, 692 (1962) (holding that a court could not know whether it was within bounds for citing a person for contempt for violating the injunction without a hearing); *In re Hern Iron Works*, 881 F. 2d 722, 726-27 (9th Cir. 1989) ("In such a case, the original order is deemed a nullity, and the accused contemnor cannot be fairly punished for violating nothing at all."); *United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972) (holding that unconstitutional orders that must be obeyed presupposes subject matter and personal jurisdiction).

44. *Dickinson*, 465 F.2d at 511.

45. *Id.* at 509; see also *In re Providence Journal Co.*, 820 F.2d at 1347 (recognizing an exception to the collateral bar rule for transparently invalid orders).

46. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), which adopted Meiklejohn's "citizen as ruler" view of the First Amendment, the Court suggested a constitutional right to receive information. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263-65 (1961); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) ("[T]he expression of views on an issue of public importance is at the heart of First Amendment concerns."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (finding that recipients of information are entitled to bring First Amendment suits); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) (giving the FCC authority to mandate that all broadcasters operate in the public interest); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (holding that door to door distribution of religious material is constitutionally protected). See also Rene L. Todd, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171 (1990).

the public needs to monitor the activities of courts and other institutions of government.⁴⁷ If a right of access to information is added to traditional First Amendment jurisprudence that already provides substantial protection to the speaker, the argument that First Amendment rights transcend the ability of courts to enforce unconstitutional orders becomes more compelling. Those who disobey such orders still risk contempt conviction if the underlying order is later upheld. On the other hand, if the collateral bar rule is rejected, they cannot be punished for violating an unconstitutional order.

The complex issue of whether important First Amendment principles should be subject to state-by-state development must also be addressed. The Supreme Court created national standards in First Amendment cases from which it will allow little, if any, state deviation,⁴⁸ but has also recognized that states enjoy substantial autonomy to develop their own First Amendment standards, especially if based on free expression provisions of state constitutions.⁴⁹ Accepting that there should not be

47. No modern case has generated more pretrial publicity than the murder trial of former football star O.J. Simpson. From his arrest, covered live by helicopters hovering overhead beaming pictures to television sets all over the world, to the gavel-to-gavel coverage of the preliminary hearing, the public has learned much about the role of grand juries, the function of a preliminary hearing, the requirements under the Fourth Amendment, and other aspects of the judicial process. *See generally*, 95 *Million Watched the Chase*, N.Y. TIMES, June 22, 1994, at A12; Michiko Kakutani, *Why We Still Can't Stop Watching O.J. on TV*, N.Y. TIMES, July 3, 1994, at sec. 4, p. 10; Bill Carter, *Networks' Simpson Vigil: A Low-Cost Reply to CNN*, N.Y. TIMES, July 11, 1994, at D1. On October 20, 1994, Judge Lance Ito, the judge presiding at the Simpson trial, barred the media and the public from the courtroom while prospective jurors were questioned about the potential prejudicial effects of a newly-published book. Kenneth B. Noble, *Judge Restricts Simpson Coverage*, N.Y. TIMES, Oct. 21, 1994, at A1. The judge reversed the order the next day, allowing a pool of reporters and the public to attend the continued questioning of potential jurors. *Id.*

48. In *New York Times Co. v. Sullivan*, 376 U.S. at 285-86, the Court first nationalized defamation standards in media cases by holding that a public official must demonstrate "actual malice" with "convincing clarity" (as opposed to preponderance of the evidence) to win a judgment against a media defendant. The Court extended such protection to media discussion of public figures in *Curtis Publishing Co. v. Butts*, and *Associated Press v. Walker*, 388 U.S. 130, 132 (1967) (decided together). The Court insists that federal and state courts require that actual malice be demonstrated when the libel plaintiff is a public official or public figure. *New York Times*, 376 U.S. at 285-86. However, in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), the Court held that as long as the states do not allow liability without fault, they may decide for themselves the appropriate standard of liability in media cases involving private persons. *Id.* at 347. Although most states have chosen a negligence standard, *see generally* *Taskett v. King Broadcasting*, 546 P.2d 81 (Wash. 1976) (holding that private persons must demonstrate a lack of "reasonable care" on the part of the media defendant, but not actual malice), several states retain the actual malice standard for private person libel plaintiffs.

49. In *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), the Court held that

complete federal preemption in the First Amendment area, it is nevertheless difficult to justify the variable interpretation given free expression rights in different jurisdictions. The First Amendment clearly does not have the same meaning in Washington and Alabama, or in the First and Fifth Circuits.⁵⁰ National news organizations, which are subject to court jurisdiction anywhere they publish or broadcast,⁵¹ should not be exposed to widely varying punishments for disobeying unconstitutional orders. Where the order is issued largely determines whether the First Amendment rights to which journalists and others are entitled will be chilled, or even frozen, while they calculate the risks of violating a seemingly unconstitutional order.⁵²

Because of long-cherished principles of federalism, and the fact that many federal judges do not think it is their responsibility to tell state judges how to run their courtrooms and judicial systems,⁵³ national collateral bar rule standards in First Amendment cases will be resisted. Nevertheless, with so much at stake, it is important for the Supreme Court to establish minimum national standards to balance the power and legitimacy of courts with protections granted under the First Amendment.⁵⁴

states may provide through their own constitutions *more* First Amendment protection than is required by the United States Constitution. *Id.* at 81 (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

50. Washington, for example, largely rejected the collateral bar rule in *Sperry* and *Coe*, while Alabama applied it in *Purvis*. See *supra* note 5. The First and Fifth Circuits have come to opposite conclusions on the rule in First Amendment cases in *Providence* and *Dickinson*, respectively.

51. See generally *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (holding jurisdiction was proper where conduct took place and publication was distributed).

52. See, e.g., *In re Providence Journal*, 820 F.2d 1342, 1351-52 (1st Cir. 1986). Appellate courts in many states have not decided First Amendment collateral bar rule cases.

53. See, e.g., *Younger v. Harris*, 401 U.S. 37, 51-53 (1971) (finding that absent extraordinary circumstances, the federal courts will not enjoin pending state criminal prosecutions); see also *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (holding that when a state provides an opportunity for litigation, habeas corpus on Fourth Amendment grounds is not required).

54. The tension between the press and courts over how to deal with a potentially invalid order is aggravated by some journalists who proudly proclaim their defiance while publishing the information subject to the order. See *Dickinson*, 349 F. Supp. at 228-29; see also *Providence Journal*, 820 F.2d at 1345. The irony is that journalists ultimately depend on the judiciary for vigorous enforcement of their rights in the face of legislative and executive action that interfere with freedom of expression.

This Article argues that when the Court next has the chance to establish national standards, it should reaffirm the near-sacred protections granted under the First Amendment, and hold that the collateral bar rule should not apply in cases absent a showing of imminent violence,⁵⁵ or a substantial likelihood of severe interference with essential public services.⁵⁶ Issues that the Court should consider are discussed, and suggestions are made to resolve the conflict between the collateral bar rule and the First Amendment.

II. THE CONTEMPT POWER OF COURTS

A. *Civil and Criminal Contempt*

Because only criminal contempt survives the invalidation of the original order in jurisdictions that enforce the collateral bar rule, courts and parties must recognize the nature of the contemptuous behavior and the penalty.⁵⁷ It is often difficult, however, to determine whether the case involved civil or criminal contempt.⁵⁸ In general, civil contempt is intended to force compliance with a judge's order and protect the rights of one of the litigants. The penalty is indeterminate in nature, and it is often said that the contemnor "holds the key to his own jail cell."⁵⁹

55. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Yates v. United States*, 354 U.S. 298 (1957).

56. In *Ex parte Purvis*, 382 So. 2d 512 (Ala. 1980), the trial court enjoined the continuation of a strike that it believed could disrupt the city's water service. *Id.* at 515. The union leader defied the order by not telling his members to return to their jobs. *Id.* at 514. The state supreme court held that he could not collaterally challenge the original order in the contempt appeal since the order was not transparently invalid or frivolous. *Id.*

57. In *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Supreme Court observed: "The right to remedial relief falls with an injunction which events prove was erroneously issued." *Id.* at 295.

58. The Supreme Court noted in *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994), that commentators and courts have often disagreed as to the distinguishing characteristics of civil and criminal contempt. *Id.* at 2557. See generally Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971); Earl C. Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025 (1993); Luis Kutner, *Contempt Power: The Black Robe - A Proposal for Due Process*, 39 TENN. L. REV. 1 (1971); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981).

59. Once it becomes clear that a jailed contemnor is not likely to comply, the punishment becomes punitive and not coercive, and must be vacated. *Catena v. Seidel*, 343 A.2d 744 (N.J. 1975) (holding that mob figure who was granted immunity, but who nevertheless refused to answer questions about mob activities, and who remained in jail for five years, must be released because of no substantial likelihood

Criminal contempt, on the other hand, primarily punishes disobedience of a judicial order and vindicates the court's authority.⁶⁰ However, in some instances, the same contemptuous behavior can be both civil and criminal.⁶¹

Determining the difference is necessary because if the punishment is criminal, the contemnor is entitled to procedural rights.⁶² The burden of proof is on the prosecution to prove its case beyond a reasonable doubt, and there is protection against self-incrimination.⁶³ The contemnor enjoys double jeopardy protection,⁶⁴ may be entitled to appointed counsel, and will have compulsory process for witnesses.⁶⁵ Similar to other crimes, intent is an essential element to be proven.⁶⁶ If the criminal sentence is serious, the contemnor will be entitled to a jury trial.⁶⁷ In some jurisdictions, contempt proceedings must begin with an indictment or information.⁶⁸ Civil contempt, on the other hand, is coercive in

of compliance). A federal witness who refuses to testify can be held no more than 18 months, even in coercive contempt and even if the testimony is still needed. 28 U.S.C. §1826 (1970). See *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983).

60. *LaTrobe Steel Co. v. United Steelworkers of Am.*, 545 F.2d 1336, 1345 (3d Cir. 1976); see also *supra* note 9 and accompanying text.

61. A court, after assessing a per diem fine, for example, can also punish by criminal contempt the same behavior that led to the civil contempt charge. For example, in *In re Farber*, 394 A.2d 330, 332 (N.J. 1978), Farber was incarcerated and the New York Times was fined on a daily basis for civil contempt. The civil contempt action was to force Farber to reveal the names of confidential sources. *Id.* The court also summarily held Farber in criminal contempt and sentenced him to six months in jail, to be served following the end of the civil contempt. *Id.* When the trial was over, however, the judge relented and dismissed the criminal contempt conviction. See *In re Timmons*, 607 F.2d 120, 123-24 (5th Cir. 1979) (holding that civil contempt may be lifted when the disobedience ends, but criminal contempt is punitive and lasts for a fixed period).

62. *Hicks v. Feiock*, 485 U.S. 624, 632 (1988).

63. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911).

64. *In re Bradley*, 318 U.S. 50 (1943).

65. *Cooke v. United States*, 267 U.S. 517 (1925).

66. *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947). "Willfulness" is an essential element of criminal contempt. *Id.*

67. *Bloom v. Illinois*, 391 U.S. 194, 199 (1968); *Taylor v. Hayes*, 418 U.S. 488, 495 (1974).

68. In the Noriega tapes case involving CNN, a special federal prosecutor proceeded by information. By agreement of both sides the case was tried by a judge, not a jury. Larry Rohter, *CNN Charged Over Tapes of Noriega*, N.Y. TIMES, Mar. 31, 1994, at A16.

After CNN was convicted of criminal contempt, the news organization agreed to broadcast an apology for defying the judge's order, in return for not having to pay a

nature and can be avoided by obeying a court order.⁶⁹ Punishment for civil contempt can be imposed in an ordinary civil proceeding upon notice and opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.⁷⁰

The nature of the penalty determines whether it is civil or criminal contempt. If the punishment is coercive in nature, and imposes either an indefinite jail sentence or per diem fines, it is clearly civil. Civil contempts are prosecuted by a complainant rather than the state or a special prosecutor appointed by the court, and generally any fines are paid to the complainant.⁷¹ But if the sentence is not intended to force compliance with a judge's order, and instead seeks to vindicate the authority of the court by punishing the contemnor, it is criminal, and the fines are paid to the state.⁷² Once a criminal contempt proceeding is under way, it is controlled by the court and the state. If the parties decide to settle the original dispute that led to the civil contempt charge, it is up to the court, not the parties, to determine whether criminal contempt proceedings go forward.⁷³

The line between civil and criminal contempt blurs when courts have both remedial and punitive goals in mind when applying a single punishment. When imposing criminal contempt fines and punishment, the court is not only vindicating its legal authority to enter the initial order, it is also attempting to put into effect the law's purpose of modifying the contemnor's behavior to comply with the original order.⁷⁴ The contempt citation may punish a prior offense and seek to pressure the contemnor to refrain from future disobedience.⁷⁵ In determining whether the contempt is civil or criminal, the Supreme Court will look not at

substantial fine. CNN agreed to run the apology, written by the judge, and to pay the federal government \$85,000 for its legal fees. *CNN is Sentenced for Tapes and Makes Public Apology*, N.Y. TIMES, Dec. 20, 1994, at A8.

69. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2556 (1994).

70. *Id.* In the federal system, the burden of proof in civil contempt cases is by "clear and convincing" evidence. *Oriel v. Russell*, 278 U.S. 358, 362 (1928); *In re Irving*, 600 F.2d 1027, 1037 (2d Cir.), *cert. denied*, 444 U.S. 866 (1979).

71. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911).

72. *Id.* One difficulty in federal cases is that once the court releases the criminal contempt fine to the federal treasury, it takes an act of Congress for the money to be returned to the contemnor if the conviction is overturned.

73. *Board of Junior College Dist. No. 508 v. Cook County College Teachers Union, Local 1600*, 262 N.E.2d 125 (1970) (holding that a court does not need to depend on either a party to the litigation or the county prosecutor to pursue contempt, and that a court can appoint special counsel), *cert. denied*, 402 U.S. 998 (1971).

74. *Hicks v. Feiock*, 485 U.S. 624 (1988).

75. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2557 (1994).

the "subjective intent of a State's laws and its courts," but at an "examination of the character of the relief itself."⁷⁶

B. Direct and Indirect Contempt

It is not enough to establish whether a contempt penalty is civil or criminal. Criminal contempt can be either direct or indirect, and the procedural rights enjoyed by the defendant can vary depending on the physical location of the contemptuous behavior.⁷⁷ Direct criminal contempt is often inappropriate conduct that occurs within the courtroom or the judge's presence.⁷⁸ Indirect criminal contempt, which raises the most serious First Amendment problems, involves disobedience of a judge's order while away from the court, as when a reporter publishes a

76. *Id.* There are several subcategories of civil contempt. It can be described as compensatory (retrospective) or coercive (prospective). If the judgment is compensatory, the court acknowledges that it cannot secure the conduct sought by the plaintiff, and is awarding money damages as compensation. Considering that the equitable powers of the court were exercised in the first place because money damages were not adequate, this form of contempt has certain ironies. Coercive contempt is prospective because it seeks to compel future conduct from the defendant. Compensatory contempt, on the other hand, is ancillary to the injunction suit, and, therefore, there is no jury trial in most jurisdictions. About ten states reject compensatory contempt partly for that reason. See Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L. REV. 971, 982-83 n.49. Historically, there has also been a distinction between mandatory ("refusing to do an act commanded"), and prohibitory ("doing an act forbidden") injunctions. *Bagwell*, 114 S. Ct. at 2561. The Court noted in *Bagwell* that the distinction is easily applied where the contempt sanctions are used to enforce orders compelling or forbidding a "single, discrete act." *Id.* But the distinction between "coercion of affirmative acts and punishment of prohibited conduct" is difficult to apply when "conduct that can recur" is involved, or when "an injunction contains both mandatory and prohibitory provisions." *Id.*

77. The states and Congress have long been concerned that allowing judges to punish contempt by publication, which takes place outside the presence of the judge, is susceptible to abuse. In response, Congress enacted the Federal Contempt Act of 1831 to prevent courts from summarily punishing misbehavior that takes place outside the presence of the court, unless it is "so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401 (1986). The Act, though, did not stop trial court judges or the Supreme Court from interpreting § 401 as granting themselves broad powers.

78. For many years, judges disregarded the language of § 401 by holding that it was not a geographical limitation on their power to summarily punish criminal contempt. The Supreme Court, in an opinion which was discredited and directly overruled, briefly upheld that view. *Toledo Newspaper Co. v. United States*, 247 U.S. 401 (1918), *overruled by Nye v. United States*, 313 U.S. 33 (1941).

story in violation of a "gag" order.⁷⁹

Judges have almost unrestricted power to summarily punish petty direct criminal contempts.⁸⁰ It is assumed that because the judge witnessed the contemptuous behavior, there is limited need for extensive fact-finding. Moreover, appellate courts want judges to have maximum control of court proceedings. Thus, petty direct contempts in the presence of the court traditionally have been subject to summary adjudication to "maintain order in the courtroom and the integrity of the trial process in the face of an 'actual obstruction of justice.'"⁸¹

Indirect criminal contempts, on the other hand, do not usually interfere with court proceedings, and thus the judge's power to summarily punish such contempts is significantly reduced.⁸² Generally, summary adjudication of indirect contempts is prohibited, although for a period of time, the Supreme Court had to remind trial judges that they may not impose such punishment in First Amendment cases absent compelling reasons.⁸³ Judges generally provide notice and the opportunity to

79. See, e.g., *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972).

80. *Bloom v. Illinois*, 391 U.S. 194, 195 (1968). Petty in this context means less than six months in jail, but there may well be a substantial fine.

81. By finding someone in direct criminal contempt, a judge is combining the roles of grand jury, prosecutor, jury and judge. For a general discussion of the power of courts to punish contempt summarily, see *Wilson v. United States*, 421 U.S. 309, 315-16 (1975); *Codispoti v. Pennsylvania*, 418 U.S. 506, 513 (1974); *Harris v. United States*, 382 U.S. 162, 164 (1965). The Supreme Court held in *Bagwell* that if the contemptuous behavior does not constitute a direct contempt, and the court waits until the completion of the trial before imposing punishment, there are weaker grounds for allowing summary punishment. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2560 (1994). The Court also held that the fact that the union was warned in advance that continued strike activity would be punished by contempt does not make it civil contempt. *Id.* at 2562. "Due process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed." *Id.*

82. There are situations when behavior outside the courtroom clearly could interfere with the administration of justice. If, for example, a news organization disseminates information about a key piece of evidence not admitted at trial with a non-sequestered jury, a mistrial may result. However, the urgent need to take immediate action in direct contempt is not usually present in cases involving indirect disobedience.

83. *Cooke v. United States*, 267 U.S. 517, 534 (1925) (reversing a 30-day jail sentence of an attorney who sent a letter to a judge in chambers criticizing a decision and requesting that the judge disqualify himself). The Supreme Court has provided substantial protection to media defendants in cases involving indirect criminal contempt. See *Craig v. Harney*, 331 U.S. 367 (1947) (finding that newspaper editor's contempt conviction for unfairly reporting events of pending state trial violates constitutional right of freedom of expression because judiciary has no special power to suppress or censor reports of pending litigation); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (stating that criticism of a judge's inclinations or actions neither presents clear

explain why the defendant should be not be held in contempt.⁸⁴ However, often the facts are known to the court, and there is nothing the contemnor can say at the "show cause" hearing to prevent punishment from being imposed.

An injunction or order must comply with 65(d) of the Federal Rules of Civil Procedure.⁸⁵ The order must lay out specific obligations and may not do so by reference to other documents.⁸⁶ The rule does not require "unwieldy" specificity, but only that the injunction "be framed so that those enjoined will know what conduct the court has prohibited."⁸⁷

and present danger to justice nor warrants punishment for contempt); *Bridges v. California*, 314 U.S. 252 (1941) (finding that judicial punishment for contempt must be scrutinized, particularly when it affects freedom of expression); *Nye v. United States*, 313 U.S. 33 (1941) (discussing court's power to use criminal contempt as punishment for out-of-court publication about pending case).

84. A judge cannot prosecute an indirect criminal contempt, but must rely on either one of the party's counsel, appointed counsel, or the state or local prosecutor to do so. If, however, a judge goes to great lengths to secure a special prosecutor to pursue the contempt charge, the appearance of unfairness or bias may arise when that judge eventually presides over the contempt proceeding.

85. FED. R. CIV. P. 65(d). The rule states:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

28 U.S.C. § 65(d) (1988). See *United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1971) (holding that Rule 65(d) was a "codification rather than a limitation of courts' common-law powers," and therefore "cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment"). In *Hall*, the court upheld contempt convictions in a desegregation case against a person who was not an original party to the case, and was not acting in concert with the parties. *Id.* at 263-64.

86. *H.K. Porter Co. v. Nat'l Friction Prods.*, 568 F.2d 24 (7th Cir. 1977). The court held that an order adopting a "settlement agreement," but specifying no obligations of the agreement, was inadequate support for a contempt order because the settlement order "did not use language which turned a contractual duty into an obligation to obey an operative command." *Id.* at 27.

87. *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981) (finding an injunction prohibiting employer from "engaging in . . . unlawful employment practice" sufficiently specific because it "recited that defendant violated Title VII by constructively discharging plaintiff when she was pregnant"). See also *Professional Assoc. of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273 (5th Cir. 1984) (holding that injunction prohibiting retaliation of discrimination by

C. Abuse of Contempt

The contempt power of judges is as awesome as it is indispensable.⁸⁸ Judges, themselves, recognize that it should be used “sparingly,” and probably few courts would issue orders they know to be invalid, then hold someone in contempt for violating that order.⁸⁹ Where such orders interfere with the exercise of First Amendment rights, however, those subject to them may not have the time or resources to pursue an appeal or modification of the order before a deadline to publish or broadcast. Under those circumstances, they must disseminate the information, then challenge the original order while appealing the contempt conviction.

That the contempt power can be abused is illustrated in several cases that show some judges not only lack judicial “temperament,” but cannot always be trusted to exercise responsibly the arsenal of powers available in a court’s equity jurisdiction, especially when First Amendment interests are at stake.

In *Goldblum v. National Broadcasting Corp.*,⁹⁰ a California district court action sought to enjoin NBC from broadcasting “Billion Dollar Bubble,” a report about securities and insurance fraud. The former CEO of a company criticized in the program sought an injunction to stop NBC from airing it, and the court agreed to view the program prior to its broadcast.⁹¹ The judge ordered counsel for NBC to produce the documentary so he could view it for “inaccuracies,” the implication being that if such inaccuracies were found, the judge would enjoin its broadcast. When counsel declined to produce the documentary, he was immediately incarcerated.⁹²

the District against employees was sufficiently specific); *Hall v. Wood*, 443 So.2d 834, 841-42 (Miss. 1983) (holding that as long as the court clearly explains the *ends* to be accomplished, it need not be as detailed in laying out the *means* by which to attain those goals).

88. Judges obviously need the power of contempt to force compliance with and punish defiance of their orders. But judges enjoy absolute immunity from liability for judicial acts, and punishment for issuing unconstitutional orders and holding in contempt those who violate such orders, might be nothing more than a mild rebuke in an appellate opinion. See generally *Stump v. Sparkman*, 435 U.S. 349 (1978) (finding judge who approved a petition for sterilization of a minor immune from liability even if his approval was in error).

89. See *supra* note 4 and accompanying text.

90. 584 F.2d 904 (9th Cir. 1978).

91. The CEO was serving a federal prison sentence for his part in the fraud when he filed the action. He claimed the program would present a false and inaccurate portrayal of his and his company’s role in the fraud, and that it would jeopardize his release on parole and future litigation against him. *Id.* at 905-06.

92. *Id.* at 906.

Any judge who had read *Nebraska Press Association*,⁹³ or who had an elementary understanding of the major prior restraint cases,⁹⁴ would know that such an order was unconstitutional.⁹⁵ Because the Ninth Circuit declared the order "void," it had no trouble holding that the order need not have been obeyed.⁹⁶ Presumably, if such an order were entered in a jurisdiction that applies the collateral bar rule, a court would uphold punishment of NBC's counsel for criminal contempt.⁹⁷

NBC's counsel in *Goldblum* was not alone in finding that judges may abuse the powers of their office. *Zarcone v. Perry*,⁹⁸ which involved a remarkable display of judicial arrogance, would be amusing if it did not demonstrate how awesome the powers of a judge can be. Judge William Perry of the District Court of Suffolk County, Long Island, saw a food vending truck outside the courthouse as he sat in chambers during a break from the evening session of traffic court. He asked a deputy sheriff to get him some coffee. Both Perry and the deputy thought the coffee tasted "putrid," and the judge ordered the deputy to bring the coffee vendor "in front of me in cuffs."⁹⁹

93. 427 U.S. 539 (1976).

94. See *supra* note 30.

95. The Ninth Circuit wrote in *Goldblum*:

We find no authority which is even a remote justification for issuance of a prior restraint on a theory that parole officials would somehow become inflamed by the contents of a communication or on a theory that a wholly speculative criminal prosecution might commence at some future date The order to produce the film in aid of a frivolous application for a prior restraint suffers the constitutional deficiencies of the application for an injunction. The order not only created a reasonable apprehension of an impending prior restraint, it was also a threatened interference with the editorial process. The district court's order was therefore void.

584 F.2d at 906-07.

96. The court further stated:

A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt.

Id. at 907.

97. In *Goldblum*, the incarceration was apparently civil in nature, and was thus intended to force the attorney to comply with the judge's order. If the collateral bar rule were strictly applied, the invalidity of the original order would have been irrelevant, and *Goldblum's* conviction would have been upheld.

98. 572 F.2d 52 (2d Cir. 1978).

99. *Id.* at 53.

Two plainclothes officers accompanied the uniformed deputy as they handcuffed Zarcone, the hapless coffee vendor, and then paraded him through the courthouse hallway in full view of dozens of people.¹⁰⁰ Zarcone was taken, still handcuffed, to the judge's chambers where a "pseudo-official" inquisition began.¹⁰¹ With a court reporter present, the judge told Zarcone that he was keeping the coffee for evidence, and then screamed at Zarcone for twenty minutes, "threatening him and his 'livelihood'."¹⁰² Before Zarcone was allowed to leave, the judge ordered the deputy to note his vehicle and vending license numbers and told Zarcone, "Mister, you are going to be sorrier before I get through with you."¹⁰³

Zarcone then resumed his mobile truck route and returned to his spot outside the courthouse about forty-five minutes later.¹⁰⁴ Perry again ordered the deputy to bring Zarcone to him.¹⁰⁵ He told Zarcone he was going to have the coffee analyzed, and only if Zarcone would admit that he did something wrong would Perry drop the matter.¹⁰⁶ Zarcone consistently denied that anything was wrong with the coffee, and no charges were filed against him. The court of appeals said the abuse of power in this case was "intolerable."¹⁰⁷

If one concludes from *Zarcone* that serving coffee to a judge may be risky, honking your car horn at a judge on a highway may create even more problems. In *Malina v. Gonzales*,¹⁰⁸ the plaintiff honked his horn

100. *Id.* Zarcone later recalled that one bystander observed they were locking up the "frankfurter man." *Id.*

101. *Id.*

102. *Id.* Because Zarcone was successful in his 42 U.S.C. § 1983 action against the judge—one of the few cases where judicial immunity was defeated—the court of appeals assumed that the jury believed Zarcone's version of the events. *Id.* The jury awarded plaintiff \$80,000 in compensatory damages against Perry and the sheriff's deputy, \$60,000 in punitive damages against Perry, and \$1000 in punitive damages against the sheriff. *Id.* Only Perry appealed. *Id.*

103. *Id.*

104. *Id.* at 54.

105. *Id.* The deputy said that Zarcone did not have to be handcuffed. *Id.* As a result of his encounter with Judge Perry, Zarcone testified "that he was very upset by the incident, that he could not sleep, and that he started to stutter and get headaches." *Id.* Judge Perry was removed from office because of his treatment of Zarcone, and for testifying falsely at his disciplinary hearing. *Id.*

106. *Id.*

107. *Id.* at 57. In upholding the judgments, the court of appeals held that §1983 permitted punitive damages in these circumstances, and concluded that the damages were not excessive considering the judge's "outrageous" conduct. *Id.* at 56-57. Because judges normally enjoy absolute immunity for actions taken pursuant to their judicial duties, the court of appeals must have concluded that Judge Perry's actions were outside his judicial duties. *See, e.g.,* *Stump v. Sparkman*, 435 U.S. 349 (1978).

108. 994 F.2d 1121 (5th Cir. 1993).

and motioned for a driver, a state court judge, to move out of the fast lane where he was apparently going too slowly.¹⁰⁹ Judge Gonzales put a flashing red light on his car, and pulled Malina's car over.¹¹⁰

Three hours later a police officer arrived at Malina's house and told him to report to Judge Gonzales' chambers the next day.¹¹¹ After informing Malina of his violations, in the courtroom, Judge Gonzales sentenced him to five hours in jail.¹¹² Malina was handcuffed and taken through the courthouse lobby, across the street, and into the Baton Rouge jail. There he was fingerprinted, photographed and imprisoned.¹¹³ The court of appeals held that Judge Gonzales enjoyed "absolute immunity" from suit for actions related to the contempt citation; however, the court found that pulling Malina over was not within his judicial duties. Therefore, no immunity applied to that action.¹¹⁴

Another person found himself thrown into jail after a Florida judge overheard a conversation between the plaintiff and the judge's secretary.¹¹⁵ Jack Harper wanted to leave his child support check with the judge's secretary because his ex-wife, who worked for a different judge in the same courthouse, was away from the office. Judge Merckle, who overheard the conversation from his chambers, told his secretary to get Harper's divorce file.¹¹⁶ As he waited, the judge saw that only a post office box was listed on Harper's child support check.¹¹⁷ He demanded

109. *Id.* at 1123.

110. *Id.* Malina, fearing that the unmarked car with a red light that could be purchased by anyone posed a threat, did not pull over right away. He apparently had to be nearly forced to the side of the road. *Id.* at 1123. Gonzales told Malina that as a judge, he had the powers of a police officer and had authority to arrest him, although he did not do so. *Id.*

111. *Id.*

112. The courtroom was empty except for court personnel and closed to the public. No record was made of the proceedings. The violations included "fleeing to allude," "resisting an officer," "public endangerment," "disobeying an officer," "reckless driving," and "leaving the scene." *Id.*

113. *Id.*

114. *Id.* at 1124. The court of appeals noted that although Judge Gonzales' act of pulling Malina over and ordering him to appear before the court were "illegitimate," nevertheless, the judge had subject matter jurisdiction in the case. *Id.* at 1125. However, the court also concluded that Gonzales did not have the authority to stop Malina, and that he is no different from anyone who purchases a red light and stops people on the interstate. *Id.* at 1126.

115. Harper v. Merckle, 638 F.2d 848 (5th Cir.), cert. denied, 454 U.S. 816 (1981).

116. *Id.* The judge claimed that he had heard around the courthouse that there was an outstanding contempt violation against the plaintiff. *Id.* at 851.

117. *Id.*

that Harper provide his complete address, and he complied.¹¹⁸ At that point the judge instructed Harper to “raise his right hand to be sworn in,” presumably so that his responses to the judge’s questions would be under oath.¹¹⁹

After Harper left the secretary’s office, the judge ordered court bailiffs to go find him.¹²⁰ Harper tried to elude the pursuing bailiffs by seeking refuge in a friend’s office.¹²¹ The bailiffs trapped and apprehended Harper and returned him to the judge’s chambers.¹²² Judge Merckle then began a “contempt proceeding.”¹²³ At the conclusion of the proceeding he found the plaintiff in contempt and ordered him to jail.¹²⁴ On Monday morning jail officials chained Harper to about a dozen prisoners, loaded him into a van, and then paraded him in shackles past his former wife, through the halls, and into Judge Merckle’s courtroom.¹²⁵ He was released, and ordered to return a week later to the judge’s courtroom, whereupon he was sentenced to three days in jail.¹²⁶ His contempt conviction was overturned by the Florida Court of Appeal because the controversy did not involve a case pending before the judge, and because the visit to the judge’s office was unrelated to the judge’s official capacity.¹²⁷ The Fifth Circuit concluded that the judge’s acts were not “judicial acts,” and thus rejected his argument for absolute immunity.¹²⁸

Some judges use contempt to enforce dress codes. In *In re De Carlo*,¹²⁹ the judge decided that a female attorney who wore a sweater and slacks was not wearing attire that was “proper and respectful,” and convicted her of contempt.¹³⁰ In *Friedman v. District Court*,¹³¹ the of-

118. *Id.*

119. *Id.* Harper did not swear under oath; he testified that he promptly walked out of the chamber. The judge claimed that Harper used profane language and bolted away from the court. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 852.

124. Harper spent the weekend at the county jail in a six-by-eight foot, roach infested, dark, stifling cell in which the smell of vomit and human waste permeated. *Id.* at 853-54.

125. *Id.* at 854.

126. He was given credit for the three days he already spent in jail and was released. *Id.*

127. *Id.* at 859.

128. *Id.* at 858-59.

129. 357 A.2d 273 (N.J. 1976).

130. She was fined \$50. *Id.* at 274. The appellate court concluded that her conduct was not contemptuous. *Id.* at 275.

131. 611 P.2d 77 (Alaska 1980) (holding that an attorney can be held in contempt for failing to comply with a reasonable dress code if there was proof of a court

fending clothing was the lack of a coat and traditional tie. In *Purpura v. Purpura*,¹³² the judge convicted the attorney of contempt because the attorney unbuttoned his shirt collar and loosened his tie.¹³³

Although perhaps extreme, these examples nevertheless demonstrate that judges make mistakes, lose their temper, and issue bad decisions. Unfortunately, the collateral bar rule requires attorneys or third parties to obey the judge's order even if the order clearly violates First Amendment rights. It must be obeyed unless the court lacks subject matter or personal jurisdiction, or unless the order fits the narrow description of "transparently invalid" in some other respect. The judge may hold in contempt those who defy such rulings, even after an appellate court determines the underlying order to be unconstitutional. In addition, those who defy such rulings cannot seek damages against the judge for harm caused by the contempt judgment and penalties.

Congress recognized long ago that judges can abuse their authority. In 1830, Congress tried U.S. District Court Judge James Peck on Articles of Impeachment after Judge Peck imprisoned someone who published criticism of one of his opinions.¹³⁴ As a result of the entire incident, Congress curtailed a judge's power to summarily punish contempt by publication.¹³⁵ Under 18 U.S.C. § 401(1), the contemptuous behavior

order establishing the dress code and proof that the attorney was familiar with the code).

132. 847 P.2d 314 (N.M. Ct. App. 1993).

133. *Id.* at 315. The court of appeals upheld the conviction. *Id.* at 317. The same lawyer was also fined \$50 for direct criminal contempt for wearing a "bandanna" instead of a conventional tie, and for not wearing a jacket in court. *State v. Cherryhomes*, 840 P.2d 1261, 1262 (N.M. Ct. App. 1992).

134. The Senate eventually acquitted Judge Peck. For a history of the Judge Peck incident, see Walter Nelles & Carol W. King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401 (1928); see also *Nye v. United States*, 313 U.S. 33, 45-46, (1941) (discussing the Judge Peck incident).

135. The statute, codified as 18 U.S.C. § 401, authorizes summary punishment for direct contempt:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1982). There is some overlap between 18 U.S.C. § 401 and § 1503. Although § 401 is confined to courtroom misconduct, some conduct covered by § 1503, which requires indictment and trial, may occur in the presence of the court. See 18

must take place either in the courtroom or close by.¹³⁶ In effect, the statute applies a geographical limitation on the contempt power of federal courts.¹³⁷ Nevertheless, § 401 allows courts to impose significant punishments.¹³⁸

III. THE FIRST AMENDMENT AND THE COLLATERAL BAR RULE IN FEDERAL COURTS

A. Walker v. Birmingham

The Supreme Court provided the first clear statement that court orders must be obeyed, even when they appear to be unconstitutional, in *Howat v. Kansas*.¹³⁹ The principle that a contempt conviction will sur-

U.S.C. § 1503 (1982) (providing for a fine or imprisonment of anyone who corruptly influences or injures a court officer or juror); see also *In re Bradley*, 318 U.S. 50 (1943) (holding that a contempt sentence "could only be a fine or imprisonment," but not both); *United States v. Howard*, 569 F.2d 1331 (5th Cir. 1978) (finding a § 401 and a § 1503 violation when defendants attempted to sell secret grand jury testimony transcripts), *cert. denied*, 439 U.S. 834 (1978).

136. See *Higgins v. United States*, 160 F.2d 223 (D.C. Cir. 1946) (offense that "occurred in the corridor of the court, about thirty feet from the entrance to the courtroom" was within "presence" of the court), *cert. denied*, 331 U.S. 840 (1947).

137. *United States v. Wilson*, 421 U.S. 309, 315 n.6 (1975) ("[T]he phrase 'in its presence or so near thereto' was intended to apply a geographical limitation on the power.") (quoting *Nye v. United States*, 313 U.S. 33, 50 (1941)).

138. See *United States v. Gabay*, 923 F.2d 1536 (11th Cir. 1991) (upholding five-year sentence for fleeing shortly before trial); *United States v. Di Paolo*, 804 F.2d 225 (2d Cir. 1987) (upholding a 10 year sentence for contacting member of witness's family in violation of court order); *United States v. Papadakis*, 802 F.2d 618 (2d Cir. 1986) (upholding a five-year sentence for refusing to testify before a grand jury despite a grant of immunity), *cert. denied*, 479 U.S. 1092 (1987); *United States v. Ray*, 683 F.2d 1116 (7th Cir. 1982) (upholding three-year sentence for failing to provide handwriting samples pursuant to a motion to compel); *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976) (upholding four-year sentence for refusing to answer question at criminal trial despite grant of immunity).

139. 258 U.S. 181 (1922) (holding that workers cannot disobey antistrike injunction issued by state court on the grounds that it was invalid under the Federal Constitution). The Court wrote:

An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Id. 189-90.

vive the invalidation of the underlying order was reinforced in *Walker v. Birmingham*,¹⁴⁰ although the Court did not specifically conclude that the injunction prohibiting the civil rights activists from parading without a permit was unconstitutional.¹⁴¹

In *Walker*, the trial court issued an ex parte order forbidding civil rights activists from parading on the streets without a permit.¹⁴² At the contempt hearing the judge rejected the petitioners' claim that the injunction was "vague and overbroad, and restrained free speech."¹⁴³ In issuing the order, the judge incorporated the language of the permit ordinance,¹⁴⁴ which the Supreme Court declared unconstitutional in *Shuttlesworth v. City of Birmingham*.¹⁴⁵

The Court clearly illustrated the difference between an "unconstitutional" injunction and an unconstitutional statute. Based on the same actions—demonstrating on Good Friday and Easter Sunday—the trial court convicted the petitioners in *Walker* of contempt for violating the ex parte order and for violating the permit law. The Supreme Court overturned the convictions for violating the ordinance but the contempt convictions were upheld.¹⁴⁶

The *Shuttlesworth* Court had little problem striking down the ordinance, noting that its past decisions "have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."¹⁴⁷ Nevertheless, the *Walker* Court would not allow defiance of a judicial order even if based on the unconstitutional statute unless the order was "transparently invalid or had only a frivolous pretense to validity."¹⁴⁸ The Court expressed

140. See *supra* note 14 and accompanying text.

141. The Court in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), wrote: "The breadth and vagueness of the injunction itself would also unquestionably be subject to constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved." *Id.* at 317.

142. When the activists sought a permit from the Commissioner of Public Safety, Eugene "Bull" Connor, he said, "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail." *Id.* at 317 n.9.

143. *Id.* at 311.

144. *Id.* at 321-22.

145. 394 U.S. 147 (1969).

146. Four years after the demonstrations, Dr. King and his colleagues returned to Alabama to serve their five days in jail. They were also fined \$50.00 each.

147. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

148. *Walker*, 388 U.S. at 315.

sympathy for the petitioners' "impatient commitment to their cause," but held that "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."¹⁴⁹

Justice Brennan sharply criticized this conclusion in his dissent in *Walker*.¹⁵⁰ He stated that the petitioners had no realistic expectation that an appellate court would overturn the ex parte order in an emergency appeal before the march, scheduled for two days later.¹⁵¹ Brennan sharply criticized the view that if an ex parte order merely recites the words of an invalid statute, such an order must be obeyed.¹⁵²

The Supreme Court has not decided a collateral bar rule case involving the First Amendment on the merits since *Walker*.¹⁵³ In the absence of national collateral bar rule standards, lower courts have applied or rejected the rule, depending on whether the First Amendment cases in which they developed collateral bar rule standards involved pure speech or speech plus conduct. Additionally, lower courts have considered how much reverence those decisions give to First Amendment principles.

B. *United States v. Dickinson*

Nowhere has the collateral bar rule been embraced with more enthusiasm than in *United States v. Dickinson*.¹⁵⁴ Although recognizing that the case presented a "civil libertarians' nightmare," with a "classic confrontation between 'two of the most cherished policies of our civilization'—freedom of the press . . . [and] the right of the accused to

149. *Id.* at 321.

150. *Id.* at 338. Justice Brennan wrote:

[T]he Court empties the Supremacy Clause of its primacy by elevating a state rule of judicial administration above the right of free expression guaranteed by the Federal Constitution. And the Court does so by letting loose a devastatingly destructive weapon for suppression of cherished freedoms heretofore believed indispensable to maintenance of our free society. I cannot believe that this distortion of the hierarchy of values upon which our society has been and must be ordered can have any significance beyond its function as a vehicle to affirm these contempt convictions.

Id. at 338. Chief Justice Warren and Justices Douglas and Fortas joined the dissent. The Chief Justice and Justice Douglas also wrote separate dissenting opinions.

151. *Id.* at 348-49. See also, *Oppenheimer*, *supra*, note 13.

152. *Walker*, 388 U.S. at 346-47.

153. *Providence Journal Co.* provided that opportunity. See *supra* note 2 and accompanying text.

154. 465 F.2d 496 (5th Cir. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

a fair and impartial trial,"¹⁵⁵ the court held that even unconstitutional orders must be obeyed.¹⁵⁶

In *Dickinson*, two newspaper reporters were convicted of contempt and each fined \$300 by the United States District Court for the Eastern District of Louisiana for violating an order not to report the details of a pretrial hearing.¹⁵⁷ The court held a *Younger v. Harris*¹⁵⁸ hearing, focusing on whether the state had legitimate grounds for pursuing a murder conspiracy prosecution against Frank Stewart, a VISTA volunteer active in the civil rights movement.¹⁵⁹ The state accused him of plotting the murder of the mayor of Baton Rouge.¹⁶⁰ Stewart alleged that the state prosecution was groundless and was intended solely to harass him and suppress his First Amendment rights.¹⁶¹

On remand, at the second evidentiary hearing, the trial judge issued an order prohibiting news organizations from reporting the details of the hearing because of concern that publishing the testimony could interfere with the state court in selecting an impartial jury.¹⁶² The judge allowed the press to report that a hearing had been held, but he would not permit the "reporting of the details of the evidence" taken

155. *Id.* at 499 (quoting *Bridges v. California*, 314 U.S. 252, 260 (1941)).

156. *Id.* at 509-10.

157. *Id.* at 500.

158. 401 U.S. 37 (1971) (a hearing to determine if a prosecution was brought in bad faith).

159. *Dickinson*, 465 F.2d at 500. The district court originally declined to restrain the state court from further prosecuting Stewart. *Stewart v. Dameron*, 321 F. Supp. 886 (E.D. La. 1971). However, the court of appeals "vacated that order and remanded the case for a new evidentiary hearing, since 'Stewart had not been allowed to put on any evidence concerning his allegations of bad faith prosecution and harassment' at the original proceeding." *Dickinson*, 465 F.2d at 500 (quoting *Stewart v. Dameron*, 448 F.2d 396, 397 (5th Cir. 1971)).

160. *Id.* at 499.

161. *Id.*

162. *Id.* at 500. The court stated that:

It is ordered that no, no [sic] report of the testimony taken in this case today shall be made in any newspaper or by radio or television, or by any other news media. This case will, in all probability, be the subject of further prosecution; at least there is the possibility that it may. In order to avoid undue publicity which could in any way interfere with the rights of the litigants in connection with any further proceedings that might be had in this or other courts, there shall be no reporting of the details of any evidence taken during the course of this hearing today.

Id.

during the hearing.¹⁶³ Two reporters, who admitted that their actions violated the court order, wrote articles for their newspapers summarizing the testimony.¹⁶⁴ A show cause order was issued and following a hearing, the court found the reporters guilty of criminal contempt for knowingly violating the order, and fined them \$300 each.¹⁶⁵

After reviewing the historical clash between First Amendment and Sixth Amendment rights, the court of appeals concluded that the judge's order was an unconstitutional prior restraint.¹⁶⁶ The court then turned to the validity of the contempt citation and the question of whether "a person may with impunity knowingly violate an order which turns out to be invalid."¹⁶⁷

The court began its analysis of the contempt issue with the "well-established principle" in proceedings for criminal contempt that "an injunction duly issuing out of a court having subject matter and personal jurisdiction must be obeyed, irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt."¹⁶⁸ The court not-

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 509. The court cited six reasons for its decision. First, the court held that for First Amendment freedoms to be abridged, the "substantive evil must be extremely serious and the degree of imminence extremely high." *Id.* at 507 (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)); accord *Craig v. Harney*, 331 U.S. 367, 376 (1947) (requiring that the expression "immediately imperil" the administration of justice before the First Amendment right is abridged); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (stating that "freedom of public comment should weigh heavily against a possible tendency to influence" trials when protecting First Amendment rights).

Second, because the publicity surrounding the present trial was neither unfair nor excessive, the judge could not sanction the press to prevent disruption. *Dickinson*, 465 F.2d at 508. *But see Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (holding that a trial court can impose sanctions on the press to "protect their processes from prejudicial outside influences").

Third, "the public's right to know the facts was particularly compelling here, since the issue being litigated was the accusation that elected state officials had trumped up charges against an individual solely because of his race and political civil rights activities." *Dickinson*, 465 F.2d at 508.

Fourth, the district court's order was "not directed at any named party or court official, . . . but rather it sought to control activities of non-parties to the lawsuit—namely, two reporters—in matters not going to the merits of the substantive issues of the ongoing trial." *Id.*

Fifth, the appellate court held that while the district court's effort to protect the accused was "laudable," it put the federal judge in the role of "policing the climate of the community to insure a sterile trial in the State Court." *Id.* Finally, the appeals court held that there are "alternative cures for prejudicial publicity far less disruptive of constitutional freedoms than an absolute ban on publication." *Id.*

167. *Id.* at 509.

168. *Id.* (citing *Walker v. City of Birmingham*, 388 U.S. 307 (1967)); *see generally*

ed that "[p]eople simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it Court orders have to be obeyed until they are reversed or set aside in an orderly fashion."¹⁶⁹ The court, in following the principles of *Walker*, held that "[a]bsent a showing of 'transparent invalidity' or patent frivolity surrounding the order, it must be obeyed until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality or lack thereof."¹⁷⁰

The court acknowledged that the "inviolability" of judicial orders is "unique among governmental commands."¹⁷¹ When legislators or executive agencies exceed constitutional limits, their mandates need not be obeyed.¹⁷² Those who violate laws or executive orders run the risk of criminal sanctions if they are wrong about the ultimate validity, but "if the directive is invalid, it may be disregarded with impunity."¹⁷³ The court recognized that in some situations intentional disobedience may be the only way to test the constitutionality of such directives.¹⁷⁴

The appeals court stated that the elevated status of judicial orders is "not the product of self-protection or arrogance of judges," but is required by the nature of judicial power.¹⁷⁵ Disobedience to legislative decisions does not interfere with the legislature's ability to continue to pass laws.¹⁷⁶ The judiciary pursues the dispute while the legislature continues to function unencumbered by the disregard for its direc-

United States v. United Mine Workers, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922); and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

169. *Id.* at 509 (quoting *Southern Ry. v. Lanham*, 408 F.2d 348, 350 (5th Cir. 1969) (Brown, C.J., dissenting)).

170. *Id.* at 509-10.

171. *Id.* at 510.

172. *Id.*

173. *Id.* at 500 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1968)); see also *Wright v. Georgia*, 373 U.S. 284, 291-94 (1963) (ruling that failure to obey unconstitutional order of a police officer is not punishable); *Watkins v. United States*, 354 U.S. 178, 197-200 (1957) (invalidating contempt citation for refusal to testify before congressional subcommittee which failed to define scope of investigation and which was not justified by overwhelming need); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (reversing Thornhill's loitering and picketing conviction because the conviction was based on a state statute later held unconstitutional).

174. *Dickinson*, 465 F.2d at 510 (citing *Boyle v. Landry*, 401 U.S. 77 (1971)).

175. *Id.*

176. *Id.*

tives.¹⁷⁷ Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional command of a police officer.¹⁷⁸ On the other hand, such disobedience affects courts differently: "The deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities."¹⁷⁹

The court acknowledged that special problems arise when the statements enjoined from publication are newsworthy, noting that "[t]imeliness of publication is the hallmark of 'news' and the difference between 'news' and 'history' is merely a matter of hours."¹⁸⁰ Immediate access to orderly review is a factor that will affect the "incontestable inviolability" of the order, but unless the appellate process was "deliberately stalled," news organizations may not violate an order with impunity.¹⁸¹ The court noted that both the district court and the court of appeals were available to afford "speedy and effective review" quickly enough to protect the right to publish while the information was still "news."¹⁸²

Having found that the order enjoining publication should have been obeyed, the Fifth Circuit nevertheless vacated the contempt conviction and remanded to the district court to determine whether it should stand based on the finding that the order was unconstitutional.¹⁸³ The court of appeals wanted to give the district court judge the opportunity to correct a "mistake of law" because the judge erroneously believed the order was authorized by local free press/fair trial court rules.¹⁸⁴

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 512.

181. *Id.*

182. *Id.* The court added:

Of course the nature of the expression sought to be exercised is a factor to be considered in determining whether First Amendment rights can be effectively protected by orderly review so as to render disobedience to otherwise unconstitutional mandates nevertheless contemptuous. But newsmen are citizens, too. They too may sometimes have to wait. They are not yet wrapped in an immunity or given the absolute right to decide with impunity whether a Judge's order is to be obeyed or whether an appellate court is acting promptly enough.

Id.

183. *Id.* at 514.

184. *Id.* The court of appeals cited *Donovan v. City of Dallas*, 377 U.S. 408 (1964), where the Supreme Court remanded to the Texas courts to determine if the contempt conviction should still stand once the Court invalidated a writ of prohibition that prevented federal court plaintiffs from pursuing their claims in the Fifth Circuit

On remand, Judge West reacted angrily to the suggestion that his order was based on a mistake of law.¹⁸⁵ He maintained that the original order, struck down by the court of appeals, was valid and issued in good faith.¹⁸⁶ He reinstated the penalties and criticized the reporters for their "public display" of contempt.¹⁸⁷ Judge West concluded that allowing the defendants to escape contempt punishment after they violated his order would undermine judicial authority.¹⁸⁸ In a per curiam opinion before a different three-judge panel, the court of appeals upheld Judge West's reimposition of the contempt citations.¹⁸⁹

C. United States v. CBS

The Fifth Circuit's strong endorsement of the collateral bar rule in *Dickinson* suggested that any news organization appealing a contempt conviction for disobeying an order would see the conviction sustained even if the underlying order was later invalidated. Yet in *United States v. CBS*,¹⁹⁰ the court not only held that the order was an unconstitu-

Court of Appeals. On remand, the Texas Court of Civil Appeals determined that the contempt judgments were inappropriate in view of the Supreme Court's decision that the restraining orders were unlawful. The Tenth Circuit adopted a similar approach in *Dunn v. United States*, 388 F.2d 511, 513 (10th Cir. 1968).

185. *United States v. Dickinson*, 349 F. Supp. 227 (M.D. La. 1972).

186. *Id.* at 228-29. See *supra* note 4 and accompanying text.

187. *Dickinson*, 349 F. Supp. at 228. The court noted that the defendants, rather than seeking judicial review,

decided instead to announce to Court personnel that they were going to violate the order and then, after violating the order, contemptuously announced to the public, at the end of their published articles, that they had published this story despite an order of the Court ordering them not to do so. It was primarily this public display of utter contempt for this Court's order that prompted the contempt citation It was the intentional, willful, flagrant and contemptuous disregard of the Court's order before in any way attempting to have the order, which was obviously issued in good faith, judicially reviewed. It was upon this action, rather than a mistake of law, that the contempt citation was bottomed.

Id. at 228-29.

188. The judge stated, in colorful language, that it was "inappropriate in this case for me to try to imitate the proverbial catfish who could talk out of both sides of his mouth and whistle all at the same time." *Id.* at 228.

189. 476 F.2d 373 (5th Cir. 1973), *cert. denied*, 414 U.S. 979 (1973).

190. The court separated the issues arising from one factual scenario into two different opinions. The first opinion dealt with the constitutionality of the district court's orders prohibiting the publication of sketches depicting the courtroom or its participants. *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974) [hereinafter *CBS Order*].

tional prior restraint, it also reversed the contempt conviction because of procedural defects in the issuance of the order.¹⁹¹ Although the court of appeals expressed no view as to whether the lower court should pursue the contempt conviction, no subsequent trial was held.¹⁹²

The case involved the highly publicized trial of individuals known as the "Gainesville Eight," who were accused of conspiring to disrupt the 1972 Republican National Convention in Miami, Florida.¹⁹³ At a pretrial hearing, the judge issued a verbal order that "no sketches in the courtroom would be permitted to be made for publication."¹⁹⁴

Following these orders, a CBS News sketch artist instead watched the proceedings for several hours, and then went into the hall to sketch what she had seen. After discovering what the sketch artist had done, the judge confiscated the sketches, and issued another verbal order prohibiting sketches. No court reporter was present during this meeting, but the judge later stated that it was clear that he would permit no sketches no matter where they were made.¹⁹⁵

The artist did not return to the courthouse, but later sketched the trial participants from memory, and four sketches were televised on the CBS Morning News.¹⁹⁶ A few weeks later, CBS was adjudged guilty of contempt for defying the judge's order.¹⁹⁷

The Fifth Circuit recognized that "strong measures" are sometimes needed to protect the rights of the accused, but concluded that the judge's order prohibiting the broadcast of sketches was an unconstitutional prior restraint.¹⁹⁸ The appellate court held that before a prior restraint may be imposed by a judge, there must be "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."¹⁹⁹ The appellate court could not find a case where a state or federal court had

The companion case, decided the same day, reversed the contempt convictions which were based on these unconstitutional orders. *United States v. CBS*, 497 F.2d 107 (5th Cir. 1974) [hereinafter *CBS Contempt*].

191. *CBS Contempt*, 479 F.2d at 110.

192. *Id.*

193. *CBS Order*, 497 F.2d at 103.

194. *Id.*

195. *Id.* The judge's orders were not reduced to writing until he issued the show-cause order some time later. *Id.* at n.1.

196. *Id.* at 103.

197. CBS was fined \$500.00. *CBS Contempt*, 479 F.2d at 109.

198. *CBS Order*, 497 F.2d at 104-05.

199. *Id.* at 104 (quoting *United States v. Dickinson*, 465 F.2d at 496 (5th Cir. 1972); see also *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941).

prohibited the publication of sketches, and stated that even if such an order were permitted, it would have to be very narrowly tailored.²⁰⁰ The court further held that the ban on sketching in the courtroom was also invalid where there had been no showing that "sketching was in any way obtrusive or disruptive."²⁰¹

The court then turned to the issue of contempt and overturned the conviction in a separate opinion.²⁰² The appellate court was especially concerned that because the orders were verbal in nature, it was necessary to prove their content by the testimony of those individuals who had witnessed the conversation between the judge and the CBS employees.²⁰³ The court of appeals expressed grave misgivings about the appearance of unfairness when a judge tries a case in which he was a principal actor in the factual issues to be determined. Because CBS was entitled to a "totally fair and impartial" tribunal, and because of the "strange milieu of a judge passing on the clarity of his own orders," the court reversed the contempt conviction and remanded the case for trial before a different judge.²⁰⁴

The court's action in *CBS* was not a rejection of the collateral bar rule which had been strongly endorsed by the same court in *Dickinson*. The appellate opinion left open for consideration by the lower court the "advisability of pursuing the contempt action" as it had in *Dickinson*.²⁰⁵ It would not, however, uphold a contempt conviction where there was any "hint or appearance of bias."²⁰⁶

200. *CBS Order*, 497 U.S. at 106. The court concluded that "the total ban on the publication of sketches is too remotely related to the danger sought to be avoided, and is, moreover, too broadly drawn to withstand constitutional scrutiny." *Id.*

201. *Id.* at 106-07.

202. *CBS Contempt*, 479 F.2d at 108.

203. The witnesses at the contempt proceeding were the judge's secretary, his law clerk, and a local newspaper reporter. In all significant respects, the witnesses' testimony was consistent. *Id.* The second meeting, at which the judge told the artist that no sketches could be made and used on the air, even if made from memory, was recounted by the newspaper reporter. The judge stated that "absolutely no sketches were to be broadcast, regardless of where they were made." *Id.*

204. *Id.* at 109.

205. It will be recalled that in *Dickinson*, the trial judge reimposed the contempt conviction. *See supra* note 4.

206. *CBS Contempt*, 479 F.2d at 109. *See also* *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

D. United States v. Providence Journal

The Fifth Circuit's eloquent defense of the collateral bar rule in *Dickinson* not only failed to persuade a number of state courts,²⁰⁷ it was directly contradicted and criticized by the First Circuit Court of Appeals in *In re Providence Journal Co.*²⁰⁸ The newspaper and its executive editor were found guilty of criminal contempt by a federal district court after the newspaper published an article about the late Raymond L.S. Patriarca, a reputed organized crime figure.²⁰⁹ His son had filed a complaint asserting that the FBI wrongfully released the logs and memoranda to the news media, and seeking a motion for temporary injunctive relief, which the court granted.²¹⁰

The district court issued the order on November 13, 1985, and scheduled a hearing for two days later at which time it would decide whether or not to vacate the order.²¹¹ On November 14th, one day after the court issued the order and one day before the hearing, the newspaper published the article about the senior Patriarca.²¹² Initially, the son filed a motion for contempt, but when he declined to pursue it, the district court appointed a special prosecutor.²¹³ Following a hearing, the district court found the editor and newspaper guilty of criminal contempt,²¹⁴ and later imposed a suspended 18-month jail term on the executive editor, ordered him to perform 200 hours of community service, and fined the newspaper \$100,000.²¹⁵

207. See *supra* note 5 and accompanying text.

208. 820 F.2d 1342 (1st Cir. 1986).

209. The FBI had conducted electronic surveillance of Patriarca in violation of his Fourth Amendment rights. The FBI later destroyed the tapes, but retained the logs and memoranda compiled from the recordings. When the Journal requested the materials under the Federal Freedom of Information Act, 5 U.S.C. § 552, the FBI denied the request on the grounds that disclosure would be an unwarranted invasion of privacy. After Patriarca died, the newspaper renewed the request and the FBI provided the materials not only to the Journal, but also to other news organizations. *Id.* at 1344.

210. *Id.* at 1345.

211. *Id.* Upon reflection, the judge determined that the order violated the First Amendment and vacated it at the November 15th hearing.

212. *Id.*

213. *Id.*

214. *Patriarca v. F.B.I.*, 630 F. Supp. 993 (D.R.I. 1986).

215. *Providence*, 820 F.2d at 1345. Federal District Court Judge Boyle was quoted as saying that the newspaper "had chosen to violate an appropriate court order and boldly communicate that defiance to hundreds of thousands of residents in this area." *Newspaper Fined by Federal Judge*, N.Y. TIMES, Apr. 3, 1986, at A11. The \$100,000 fine was determined by multiplying the newspaper's average daily circulation of 200,000 by 50 cents. The judge derived that figure, according to the Associated Press, by adding 15 cents per copy of estimated advertising revenues to the 35 cents per copy price. *Judge Fines Rhode Island Paper \$100,000 for Contempt*, THE SEATTLE

Although the district court vacated the restraining order, the court of appeals first considered whether the order was an unconstitutional prior restraint. It observed that the case presented a conflict between two fundamental principles, "the hallowed First Amendment principle that the press shall not be subject to prior restraints," and the "sine qua non of orderly government, that, until modified or vacated, a court order must be obeyed."²¹⁶ It concluded that it was "patently clear" that the November 13th order failed the *Nebraska Press Association* test.²¹⁷ The court of appeals expressed much understanding of the role of daily newspapers, and stated that the district court did not preserve the "status quo" because newspapers have a right to publish information when the editors decide to publish.²¹⁸

The court distinguished *Walker* by holding that the order in *Providence* was "transparently invalid," one of the exceptions to the collateral bar rule noted in *Walker*.²¹⁹ Recognizing an exception to the rule for such orders, the *Providence* court held that requiring a party to obey, upon penalty of contempt a transparently invalid order would "give the courts powers far in excess of any authorized by the Constitution or Congress."²²⁰ The court explained that "although a court order—even an arguably incorrect court order—demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority."²²¹

Even while rejecting the collateral bar rule, the court of appeals noted that the "line between a transparently invalid order and one that is merely invalid is, of course, not always distinct," and that there should

TIMES, Apr. 3, 1986, at A7. The next day the judge granted an indefinite stay of the fine and suspended sentence so that the newspaper could appeal. *Judge Delays Fine to Let Newspaper File Appeal*, N.Y. TIMES, Apr. 4, 1986, at A8.

216. *Providence*, 820 F.2d at 1344.

217. *Id.* at 1349. The First Circuit held that a party seeking a prior restraint against the press must show not only that publication "will result in damage to a near-sacred right, but also that the restraint will be effective and that no less extreme measures are available." *Id.* at 1351. The court noted that the district court had failed to make a finding on either of these issues, "an omission that made the invalidity of the order even more transparent." *Id.*

218. The court added: "A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history." *Id.*

219. *Providence*, 820 F.2d at 1346-47.

220. *Id.*

221. *Id.* at 1347.

be a "heavy presumption" in favor of validity of an order.²²²

Several factors led the court to the conclusion that the order was transparently invalid. First, the district court failed to make a finding of the conditions required under *Nebraska Press Association*.²²³ Second, the court issued a prior restraint order without holding a "full and fair hearing" with procedural protections.²²⁴ Finally, the court held that the other grounds asserted by Patriarca could not support injunctive relief against a media organization in these circumstances.²²⁵

In an unusual development, the First Circuit granted a petition for rehearing en banc and issued a per curiam opinion that modified, but did not overrule, the three-judge panel's opinion.²²⁶ As did the original panel, the en banc court recognized that requiring publishers to pursue the normal appeal process sometimes posed great difficulties.²²⁷ Nevertheless, the court felt compelled to urge publishers to attempt to appeal such orders before disobeying them.²²⁸ The en banc court characterized its modification as "technically dictum," but believed that asking publishers to seek orderly review of orders they consider unconstitutional may avoid future tensions between the courts and journalists.²²⁹

222. *Id.* at 1347-48.

223. *Id.* at 1351; *see also* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

224. *Providence*, 820 F.2d at 1351. The matter came before the district court on an emergency basis because Patriarca's son had apparently learned that news organizations were preparing to publish articles about his father. Counsel for the newspaper received the papers less than 24 hours before they made their arguments to the district court. The judge had to make an immediate decision without the "opportunity for cool reflection." *Id.*

225. *Id.* at 1350. Patriarca argued that his privacy interests permitted the court to issue the order. *Id.* The court of appeals rejected the assertion that privacy interests permitted a prior restraint order against a media organization. He also based his complaint on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, the Freedom of Information Act, 5 U.S.C. § 552 (hereinafter FOIA), and the Fourth Amendment. Title III, which provides an action for damages to individuals injured as a result of illegal interception or disclosure of private communications does not provide for injunctive relief. *Id.* at 1349; *see* 18 U.S.C. § 2520 (Supp. 1994). The Supreme Court has concluded that FOIA does not authorize an injunction prohibiting a federal agency from disclosing information and that the Fourth Amendment protects citizens from abuses of government, not private citizens. *Providence*, 820 F.2d at 1349-50. *See also* *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (holding that FOIA does not authorize an injunction prohibiting a federal agency from disclosing information); *United States v. Calandra*, 414 U.S. 338 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects.").

226. *Providence*, 820 F.2d at 1354.

227. *Id.* at 1354-55.

228. *Id.* at 1355.

229. The court wrote:

It is not asking much, beyond some additional expense and time, to require a

The en banc court also noted that very little time elapsed between the order and the deadline for publication. It urged publishers to make a good faith effort to appeal, but realized that the procedures they announced cannot always be followed.²³⁰

IV. THE FIRST AMENDMENT AND THE COLLATERAL BAR RULE IN STATE COURTS²³¹

Relatively few states have decided collateral bar rule cases involving the First Amendment. Of the states that have, Washington, California and Texas have made the strongest commitment to rejecting the rule in cases involving free expression.²³² Other states have rejected the rule in some First Amendment cases, but have accepted it in others.²³³ Still other states have approved the collateral bar rule in principle, while finding some grounds for overturning the contempt conviction in particular cases.²³⁴

A. *Washington*

The Washington Supreme Court has a long history of protecting First Amendment interests.²³⁵ But despite a strong commitment to free ex-

publisher, even when it thinks it is the subject of a transparently unconstitutional order of prior restraint, to make a good faith effort to seek emergency relief from the appellate court. If timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceedings. In such event whatever added expense and time are involved, such a price does not seem disproportionate to the respect owing court processes; and there is no prolongation of any prior restraint. On the other hand, should the appellate court grant the requested relief, the conflict between principles has been resolved and the expense and time involved have vastly been offset by aborting any contempt proceedings.

Id.

230. *Id.*

231. Several states have decided collateral bar cases in non-First Amendment contexts. See *supra* notes 12, 17-20 and accompanying text.

232. See *supra* note 5 and accompanying text.

233. See *supra* note 9 and accompanying text.

234. See *supra* note 19 and accompanying text.

235. For example, it provides substantial protection to journalists to keep the names of sources confidential, authority for which the court found in common law as well as the federal and state constitutions. See *State v. Rinaldo*, 689 P.2d 392 (Wash. 1984) (stating that journalists have a qualified common law privilege to withhold confiden-

pression and rejection of the collateral bar rule in two major cases, the court nevertheless upheld a contempt conviction in a labor dispute even while holding that the trial court lacked jurisdiction to issue the underlying order.²³⁶ Washington's efforts to establish standards that balance the power of courts and the rights protected by the First Amendment demonstrate how difficult it is for even those states with progressive records on freedom of speech and press issues to consistently apply the collateral bar rule. The experience of Washington and other states argue for national collateral bar rule standards in First Amendment cases.

A year before *Dickinson*, in *State ex rel. Superior Court v. Sperry*,²³⁷ the Washington Supreme Court strongly rejected the collateral bar rule by holding that an unconstitutional order cannot support a contempt conviction.²³⁸ In *Sperry*, the trial court anticipated extensive press coverage in a first-degree murder trial.²³⁹ The judge entered an order prohibiting news organizations from reporting on any proceedings that took place outside the presence of the judge, jury, and interested parties.²⁴⁰ Shortly after the trial began, a motion to admit certain evidence was made and an evidentiary hearing was held in open court without a jury.²⁴¹

The morning after the hearing, the *Seattle Times* published a story that included testimony from the hearing.²⁴² Upon learning of the newspaper's actions, the trial judge summoned the reporters before him, barred them from attending the remainder of the trial, and ordered

tial information from a criminal defendant); *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (holding that there is a common law qualified reporters' privilege in civil cases and that the privilege extends to both working reporters and their employees).

236. *See Mead School District v. Mead Educ. Ass'n*, 530 P.2d 302 (Wash. 1975) (hereinafter Mead I); *Mead School District v. Mead Educ. Ass'n*, 534 P.2d 561 (Wash. 1975) (hereinafter Mead II).

237. 483 P.2d 608 (Wash. 1971), *cert. denied*, 404 U.S. 939 (1971).

238. *Id.* at 613.

239. *Id.* at 609.

240. The court order provided:

No Court proceedings shall be reported upon or disseminated to the public by any form of news media, including, but not limited to newspaper, magazine, radio and television coverage, except those proceedings occurring in open Court in the presence of the Judge, jury, court reporter, defendants, and counsel for all parties. No report shall be made by such news media in any event of matters of testimony ruled inadmissible or stricken by the trial judge at the time of the offer of the matter or testimony.

Id.

241. *Id.* at 610.

242. *Id.* at 609-10.

them to show cause why they should not be held in contempt for violating the court's order.²⁴³

The state argued, citing *Walker v. City of Birmingham*,²⁴⁴ that the newspaper should have challenged the order directly on appeal, by motion to set aside, or by other immediate review.²⁴⁵ The Washington Supreme Court rejected the state's argument and distinguished *Walker*.²⁴⁶ First, the court found that the order was "transparently invalid," while the order challenged in *Walker* was not void on its face.²⁴⁷ Second, the court noted that injunctions are frequently issued immediately before the planned activity, leaving the enjoined party no opportunity to directly attack the injunction.²⁴⁸ Finally, the court struck down the order as an unconstitutional prior restraint.²⁴⁹

The court then addressed the contempt citation. In a brief statement the court concluded that the trial court's order was void and, therefore, it could not support a contempt conviction.²⁵⁰ Additionally, the court stated that sustaining the contempt judgment would have implied that the "mere possibility of prejudicial matter reaching a juror outside the courtroom is more important" than the constitutional guarantee of freedom of expression.²⁵¹

Sperry was undermined in a subsequent case, and the rule now may

243. *Id.* at 611.

244. 388 U.S. 307, 320 (1967) (Petitioners violated an injunction prohibiting the encouragement of or participation in mass parades. The Court held that petitioners could not attack the constitutionality of the injunction when appealing the contempt order because they had not directly challenged the injunction).

245. *Sperry*, 483 P.2d at 611.

246. *Id.*

247. *Id.* The court noted that "[w]e have held in a number of cases that a void order or decree, as distinguished from one that is merely erroneous, may be attacked in a collateral proceeding. The violation of an order patently in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt." *Id.* (citations omitted).

248. *Id.* The court added: "The practical result then is that the enjoined party has no adequate remedy at law and cannot engage in a lawful activity because of an unconstitutional order. To us it seems unlikely that allowing collateral attack would significantly reduce citizen compliance with lawful decrees . . . the citizen still faces a substantial risk of criminal penalties if proved wrong in collateral, rather than direct, attack on the decree's validity." *Id.*

249. *Id.* at 611-12. The court observed that if jurors failed to follow admonition instructions telling them to consider only the evidence heard in court, and not to discuss the case with anyone, the proper remedy would be a new trial. *Id.* at 613.

250. *Id.*

251. *Id.*

be interpreted to mean that only orders affecting pure speech can be collaterally challenged, while a contempt conviction may be upheld in cases involving conduct, such as a labor dispute.²⁵²

The Mead School District brought an action to enjoin a strike by its employees, members of the Mead Education Association.²⁵³ The teachers responded with a motion to dismiss on the grounds that the action was improperly authorized at a school board meeting held in violation of the state's Open Public Meetings Act.²⁵⁴ The court dismissed the association's motion and later issued a temporary restraining order.²⁵⁵ The association subsequently violated the order and was cited for contempt.²⁵⁶

In *Mead I*, the supreme court found the temporary injunction to be unauthorized because the school board met illegally and its actions in seeking the injunction were void. As a result, the court had no authority to issue the order.²⁵⁷ In *Mead II*, it considered whether the association could be held in contempt for violating an order later determined to be invalid.²⁵⁸ The court found that once the injunction underlying a contempt citation is held invalid, the status of the contempt citation is determined by looking at whether the trial court had jurisdiction to issue the erroneous injunction.²⁵⁹

The court in *Mead II* recognized that if it applied traditional jurisdictional standards,²⁶⁰ the contempt conviction would be reversed because the trial court technically lacked jurisdiction to issue the order.²⁶¹ The court noted, however, that few cases have suffered from a similar jurisdictional defect. The jurisdictional flaw rested in the

252. *See supra* note 9.

253. *Mead I*, 530 P.2d 302, 302-03 (Wash. 1975).

254. *Id.* at 304. The Act required the school board to give 24 hours notice before it held a meeting.

255. *Id.*

256. The association was originally fined \$1,000 which was later reduced on appeal to \$100. *Mead II*, 534 P.2d 561, 567 (Wash. 1975).

257. *Mead I*, 530 P.2d at 205.

258. *Mead II*, 534 P.2d at 561.

259. *Id.* at 563.

260. The court found two bases for jurisdiction. First, when the court has jurisdiction over the parties and subject matter of the dispute and the court has legal authority to issue the order. *Dike v. Dike*, 448 P.2d 490, 495 (Wash. 1968); *see also* *State v. Olsen*, 340 P.2d 171, 172 (Wash. 1959) (holding that test of court's jurisdiction is whether it had power to inquire, not whether the outcome is right or wrong). Second, a court has jurisdiction to determine jurisdiction. *United States v. United Mine Workers*, 330 U.S. 258, 292 (1947). Under this theory, a court has jurisdiction because the most logical forum to decide jurisdiction is the trial court hearing the case. *United States v. Shipp*, 203 U.S. 563, 573 (1906).

261. *Mead II*, 534 P.2d at 563.

plaintiff's lack of authority to sue, and not with the trial court.²⁶² Despite the fact that there was no properly authorized case or controversy before the trial court, the supreme court held that it had valid jurisdiction over the parties and subject matter, and that "talismanic invocation of the phrase 'lack of jurisdiction' . . . is not enough to vitiate a contempt conviction."²⁶³ The state supreme court reversed the convictions against the individual association officers on self-incrimination grounds, but upheld the contempt conviction against the union. The court based its decision on the principle that the contempt citation was not designed to benefit the plaintiff in the case, but was intended to vindicate the court's power and to bolster respect for future court orders.²⁶⁴

The state's highest court reaffirmed *Sperry's* rejection of the collateral bar rule in pure speech cases in *State v. Coe*,²⁶⁵ holding that an order "void on its face" cannot support a contempt conviction.²⁶⁶ The trial court found a co-owned radio and television station in contempt for broadcasting accurate and lawfully obtained copies of tape recordings that had been played in open court.²⁶⁷ The tapes contained conversations between the defendant and an undercover police officer. Coe was accused of attempting to hire the officer to murder the prosecutor and judge who previously tried and convicted her son.²⁶⁸ After the station had legally obtained the tapes from the prosecutor, the trial judge issued an order prohibiting the broadcast of the tapes because the defense attorneys had presented evidence that their client's mental state would be harmed by public dissemination of the conversations.²⁶⁹ Three days after the judge's order, the station broadcast portions of the tapes during its newscast. The judge held the station in contempt and fined it \$2,000.²⁷⁰

262. *Id.* at 565. In some respects this is similar to the "jurisdictional" defect in *United States v. Providence Journal* in which the United States Supreme Court dismissed the writ of certiorari after it learned that the special prosecutor failed to obtain written authorization from the attorney general. See *supra* note 1.

263. *Id.*

264. *Id.* at 567.

265. 679 P.2d 353 (Wash. 1984).

266. *Id.* at 358.

267. *Id.* at 356.

268. *Id.* at 355.

269. *Id.* at 355-56. The prosecutor agreed to provide the tapes to the station on the condition that they not be aired until they were played in open court. The station complied with this condition. *Id.* at 355.

270. *Id.* at 357. The judge observed that the "order was and is of honestly debatable constitutionality," but nevertheless held the station in contempt. *Id.*

The supreme court concluded that the trial court order violated free speech provisions of both the Federal and state constitutions,²⁷¹ and therefore, the court lacked jurisdiction to issue the order.²⁷² When a court was not authorized to issue the order, it can be collaterally challenged in a contempt proceeding.²⁷³ The contempt citation must be reversed, the court stated, because it cannot be based on an invalid order.²⁷⁴ The court noted that the contrary approach taken in *Walker* and *Dickinson* represented federal law concerning the rule,²⁷⁵ and had previously been discredited in *Sperry*.²⁷⁶

Distinguishing *Mead II* presented a challenge. The court described *Mead II* as providing a "jurisdiction" test which measures whether a court, in issuing an order or holding in contempt those who defy it, "was performing the sort of function for which judicial power was vested in it. If, but only if, it was not, its process is not entitled to the re-

271. The court held that the state constitution protected the fundamental rights of its citizens and therefore, free speech rights are first to be tested under the state rather than federal constitution. *Id.* at 359; see WASH. CONST. art. I, § 5, (providing that: "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right"). The court added:

The language of the Washington Constitution absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech under the facts of this (Coe) case, since the information sought to be restrained was lawfully obtained, true, and a matter of public record by virtue of having been previously admitted into evidence and presented in open court.

Coe, 679 P.2d at 360. The court also reviewed the federal cases related to prior restraint in free press/fair trial contexts, and concluded that they support its holding that the order was an unconstitutional prior restraint. *Id.* at 361-62. See *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308 (1977) (explaining that the First Amendment does not permit state court to prohibit publication of widely disseminated information obtained at open court proceedings, even though involving juvenile a charged with a serious crime); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (holding that family of rape and murder victim may not maintain privacy action against television station for broadcasting name of the victim in violation of state law when legally obtained from court records and accurately reported).

272. *Coe*, 679 P.2d. at 358. The court strongly suggested that prior restraint of protected speech is always unconstitutional. In cases involving unprotected speech, such as obscenity, the court specifically stated that there is no absolute bar to prior restraints. *Id.* at 359-60. It also indicated that there are adequate and constitutionally permissible methods available to trial courts to protect the Sixth Amendment rights of defendants. *Id.* at 364. In *Coe*, however, the issue was not her right to a fair trial, but the harm the broadcast of the tapes would cause her mental health.

273. *Id.* at 357-58.

274. *Id.* at 358.

275. *Coe* was decided before *In re Providence Journal Co.*, after which it can be argued that federal law is divided over whether to apply the collateral bar rule in First Amendment cases.

276. *Id.* at 358 n.3.

spect due that of a lawful judicial body."²⁷⁷ The *Coe* court did not, however, explain why the issuance of a void order meant a lack jurisdiction to have issued it when the *Mead* court held that even when no case was technically before the trial court, it had "jurisdiction" to decide jurisdiction, and the contempt penalty against the teachers association was thus upheld.²⁷⁸ The court largely ignored *Mead* and credited *Sperry* as establishing the law in collateral bar rule cases involving the First Amendment.²⁷⁹

B. Illinois

Support for the collateral bar rule assumes that judges issue orders in good faith, and if they punish defiance of those orders by contempt, they must believe in the validity of the orders. That argument is undermined by *Cooper v. Rockford Newspapers, Inc.*,²⁸⁰ where an Illinois appellate court reversed a contempt conviction imposed by a trial court after the appellate court had already determined the order to be unconstitutional.

The trial judge had ordered the publisher of the *Rockford Register-Star* not to publish editorials related to a libel suit against the newspaper.²⁸¹ The newspaper published editorials in direct violation of the order.²⁸² The state appellate court subsequently held that the trial court's restraining order was unconstitutionally overbroad and an unjust curtailment of free speech.²⁸³ Following the appellate court's ruling that the original order was unconstitutional, the trial court imposed the contempt citation on the newspaper.²⁸⁴

The Illinois appellate court noted that generally, an injunction must be obeyed if the court issuing the order had personal and subject matter jurisdiction. The court concluded that the trial court had jurisdiction to issue the injunction.²⁸⁵ The newspaper argued that the general rule

277. *Id.* at 357.

278. See *supra* note 264 and accompanying text.

279. *Coe*, 679 P.2d at 357-58.

280. 365 N.E.2d 746 (Ill. Ct. App. 1977).

281. 339 N.E.2d 477 (Ill. Ct. App. 1975). The trial court's dismissal of the libel action was upheld. *Rockford Newspapers*, 365 N.E.2d at 746.

282. *Rockford Newspapers*, 365 N.E.2d at 749.

283. 339 N.E.2d at 482.

284. *Rockford Newspapers*, 365 N.E.2d at 747. The trial judge fined the newspaper \$2000 and the publisher \$1000.

285. *Id.* at 748.

did not apply in this case because the trial court lacked authority to issue a transparently invalid order that amounted to an unconstitutional prior restraint.²⁸⁶ The newspaper further claimed that because the trial court lacked authority to issue the order, the validity of the original order could be collaterally challenged in the contempt appeal.²⁸⁷

The appellate court concluded that the order was not transparently invalid under *Nebraska Press Association* because the Supreme Court in that case did not hold that all prior restraint orders are forbidden under the First Amendment.²⁸⁸ It recognized that some states had permitted collateral attack if the original order was issued in "excess of jurisdiction," but concluded that the Illinois cases did not support a similar defense.²⁸⁹

The first part of the opinion states classic collateral bar rule arguments that one who disobeys a court order should not be permitted to later challenge its validity. Nevertheless, the appellate court considered the harm to the newspaper to be "irreparable," and implied that because the constitutional right involved is one with "ancient roots," the violation may not be punishable by contempt if the order is proved invalid.²⁹⁰ The court was convinced that *Maness v. Meyers*,²⁹¹ where the Supreme Court concluded that a lawyer could not be held in contempt for advising his client to assert his Fifth-Amendment privilege because the damage could not be undone, required reversal of the contempt conviction in *Cooper*.

The court of appeals decided that there was no actual or imminent interference with the administration of justice. The trial judge entered the temporary injunction to prevent influencing potential jurors,²⁹² but the appellate court concluded that there was no threat to the administration of justice when the original order was wrongly issued, and thus, there was no threat when the editorials were subsequently published.²⁹³ It also observed that timeliness is essential to news organizations which must be able to publish information about current events.²⁹⁴ The court distinguished *Walker* as not applying to "pure speech" where greater First Amendment protection applies, and noted that to the extent that *Dickinson* "does not recognize the strong presumption against the validity of prior restraints on pure speech and the

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 749.

291. 419 U.S. 449, 460 (1975).

292. *Rockford Newspapers*, 365 N.E.2d at 750.

293. *Id.*

294. *Id.*

irremedial nature of the injury inflicted by such an order . . . we are not persuaded by it."²⁹⁵

In an unusual twist that departed from the view expressed by some courts, the Illinois appellate court permitted the newspaper greater flexibility because it was *not* subject to an ex parte order. The Illinois court noted that in *Walker*, the defendants disobeyed the order without recourse to the courts. But in *Cooper*, the defendant newspaper "respectfully argued to the trial court the constitutional issues which we [the appellate court] found compelling on appeal before the alleged disobedience."²⁹⁶ Some courts would argue that greater deference to First Amendment interests should be given in those cases where there was no opportunity to oppose the restraining order. Where, as here, the news organization participated in a full hearing on the merits prior to the issuance of the order, the courts should not allow a collateral attack once that order has been defied.²⁹⁷ Such a result, it could be argued, encourages the losing party in an adversary proceeding to defy the order and bring a collateral challenge.

The same Illinois appellate court that was so solicitous of First Amendment interests in *Cooper* was much less tolerant in *People v. Sequoia Books*.²⁹⁸ Although the court partially invalidated an injunction against a seller of sexually-explicit materials as an unconstitutional prior restraint, it nevertheless upheld a jury contempt conviction and \$10,000 fine for violating the order.²⁹⁹

The court distinguished *Cooper* as applying to speech protected by the First Amendment, whereas in *Sequoia*, the injunction prohibited the "distribution of obscenity, and obscenity is not within the area of constitutionally protected speech or press."³⁰⁰ The court, whose panel consisted of none of the judges participating in *Cooper*, stated that respect for court orders requires that *Cooper* and *Providence Journal* be "very narrowly applied such that if a portion of an injunction is constitutionally valid and it is that portion which is violated a contempt finding should stand."³⁰¹ *Sequoia* suggests that "low value" expression, such as sexually-explicit material, will not enjoy the same First Amendment

295. *Id.* at 751.

296. *Id.*

297. *See supra* note 224 and accompanying text.

298. 527 N.E.2d 50 (Ill. Ct. App. 1988).

299. *Id.* at 58.

300. *Id.* at 55 (citing *Roth v. United States*, 354 U.S. 476 (1957)).

301. *Id.* at 57.

protection against the collateral bar rule as communication more closely related to core First Amendment values.

C. Arizona

Two rulings demonstrate the difference conduct makes in collateral bar cases. In *Phoenix Newspapers v. Superior Court*,³⁰² the Arizona Supreme Court held that an invalid order against news organizations seeking to limit coverage of a pretrial hearing in a murder case could not support a contempt conviction.³⁰³ After the newspaper published a factual account of a habeas corpus hearing held the day before the jury was impaneled, the court directed the reporters to appear to show cause why they should not be held in contempt for violating the order.³⁰⁴

The state supreme court overturned the order. The court observed that it "strikes at the very foundation of freedom of the press by subjecting it to censorship by the judiciary." And it further noted that "[w]hat transpires in the courtroom is public property."³⁰⁵ The court concluded that an order restraining the press from publishing accurate and truthful information obtained in open court was void and cannot support a contempt conviction.³⁰⁶

Phoenix Newspapers, involving pure speech, did not protect labor demonstrators in *State v. Chavez*.³⁰⁷ The Arizona Court of Appeals held that the defendants, who were members of the United Farm Workers Union, could not collaterally attack an injunction prohibiting them

302. 418 P.2d 594 (Ariz. 1966).

303. *Id.* at 595-96.

304. The judge's order, issued orally, noted that the defendant was going to be tried for homicide and the county attorney was seeking the death penalty. With jury selection to begin shortly, the judge did not want any coverage of the habeas corpus hearing. The judge further stated that "if it is published that I found probable cause . . . it would be tantamount to everybody reading the paper to believe that he is already guilty." *Id.* at 595.

305. *Id.* at 596.

306. *Id.* The Arkansas Supreme Court relied on *Phoenix Newspapers* in allowing a newspaper editor to collaterally challenge a prior restraint order in *Wood v. Goodson*, 485 S.W.2d 213 (Ark. 1972). A state judge had ordered the newspaper not to publish a verdict delivered in open court in a criminal trial while a related trial was pending. After disobeying the court order, the editor was fined \$250 and sentenced to 60 days in jail, both of which were suspended pending appeal. *Id.* at 214. Quoting extensively from *Phoenix Newspapers* about the public nature of trials, the Arkansas Supreme Court concluded that "no court has the power to prohibit the news media from publishing what transpires in open court," and, therefore, "the order not to publish was void and subject to collateral attack." *Id.* at 217.

307. 601 P.2d 301 (Ariz. Ct. App. 1979).

from demonstrating once they disobeyed the court order.³⁰⁸ Unlike other collateral bar cases where an appellate court first determines the validity of the underlying order, the Arizona Court of Appeals refused to consider the constitutionality of the order prohibiting the union from demonstrating.³⁰⁹ The court rejected the argument that just because the First Amendment is involved, one can disobey a court order.³¹⁰ When there have been acts of violence, a court may well enjoin further picketing. The court stated that the "basic liberties of the First Amendment cannot be enhanced by denying to our courts the power to deal with such violence."³¹¹

D. California

Two years after *Phoenix Newspapers* and a year after *Walker*, the California Supreme Court held in *In re Berry*³¹² that public employees could collaterally challenge an injunction seeking to prevent them from picketing and encouraging non-union employees to participate in a strike.³¹³ The petitioners disobeyed the court order, then sought release from a contempt proceeding by filing a habeas corpus petition.³¹⁴

The state supreme court rejected the argument that the employees were precluded from challenging the original order while appealing the contempt conviction, noting that "it is clearly the law that the violation of an order in excess of jurisdiction of the issuing court cannot produce a valid judgment of contempt."³¹⁵ The California Supreme Court quickly dismissed *Walker* by concluding that the Supreme Court only held that the collateral bar rule as applied in that case did not violate the Constitution, and that states could still enact broader standards in this

308. *Id.* at 302.

309. *Id.*

310. The court concluded that the "concept that any person, lay or professional, may determine whether a court order is 'void on its face' and thus susceptible to being ignored as unconstitutional can find no justification in the law. The application of such a principle would stand the judicial system in this country on its head." *Id.* at 306.

311. *Id.* The Arizona court criticized California for permitting a collateral challenge in a labor picketing case, *In re Berry*, 436 P.2d 273 (Cal. 1968), and suggested that the Washington Supreme Court should have followed *Walker* in its *Sperry* decision. *Id.* at 302, 305.

312. 436 P.2d 273 (Cal. 1968).

313. *Id.* at 279.

314. *Id.*

315. *Id.* at 280 (citing *Fortenbury v. Superior Ct.*, 106 P.2d 411, 412 (Cal. 1940)).

area.³¹⁶ The court held that its rule was “considerably more consistent with the exercise of First Amendment freedoms than that adopted in Alabama, and it is therefore difficult to perceive how the *Walker* decision is of relevance.”³¹⁷ The court assumed that punishment of the alleged contemnor who miscalculates the validity of the underlying order sufficiently protects judicial authority.³¹⁸

E. Texas

In *Ex parte Tucci*,³¹⁹ the Texas Supreme Court found that under its own constitution, anti-abortion demonstrators convicted of civil contempt for violating a temporary restraining order may collaterally challenge the validity of the original order.³²⁰ The court recognized that “speech delayed often translates into speech denied,”³²¹ and it strongly rejected the federal collateral bar rule in *Walker* as controlling.³²²

The court sharply criticized the dissenting justices’ refusal to review the constitutionality of the underlying order because the case involved civil contempt, and it further held that the “exceptions” stated in *Providence* and other cases that “transparently invalid” orders can be disobeyed are only a “mirage.”³²³

316. *Id.* at 282.

317. *Id.*

318. *Id.* at 281. The court added that the contemnor

may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril . . . such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is . . . determined that the order was issued without or in excess of jurisdiction, his violation of such a void order constitutes no punishable wrong.

Id. at 281; see also *Glen v. Hongisto*, 438 F. Supp. 10, 18 (N.D. Cal. 1977) (finding a federal habeas corpus proceeding that prohibited activity protected by the First Amendment unconstitutional and the “contempt judgment based on petitioners’ supposed violation of the injunction [as] impermissible”).

319. 859 S.W.2d 1 (Tex. 1993).

320. *Id.* at 2. Anti-abortion demonstrators protested outside a family planning clinic, violating a temporary restraining order which created a 100-foot zone around the clinic to protect clients’ access. *Id.* at 3. Although the restraining order sought to prevent abusive and harassing behavior, as well as other activities, the protesters were held in contempt only for demonstrating within 100 feet of the clinic. *Id.* at 4.

321. *Id.* at 2.

322. *Id.* Petitioners brought an original habeas corpus proceeding under art. 1, sec. 8 of the Texas Constitution which states in part: “Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.” *Id.* at 5 n.8.

323. *Id.* Applying strict scrutiny, the court found that the order was not the “least

The dissent suggested that a collateral challenge may be appropriate when "an appeal of an order restricting expression cannot be timely prosecuted."³²⁴ But the court majority concluded that judges should not be "elevated to censors required to examine the content of speech to determine whether or not the message could wait a week, two weeks, a month or years until an appeal is prosecuted."³²⁵ The majority's strong endorsement of First Amendment interests suggested that even expressive conduct, which may include the blocking of access to planning clinics as well as intimidation of those seeking clinic services, enjoys the same protection against the harsh effects of the collateral bar rule as pure speech.³²⁶

F. *Massachusetts*

In *Fitchburg v. 707 Main Corp.*,³²⁷ the Supreme Judicial Court of Massachusetts reversed the conviction of a movie theater owner that was based on his violation of a licensing law later declared invalid on appeal.³²⁸ The appellate court ruled that the ordinance requiring movie theaters to be licensed was arbitrarily and capriciously applied, lacked objective standards, and was unconstitutionally vague.³²⁹

The court found that the type of contempt under which petitioner was convicted was ambiguous, stating that the facts in the record "could have provided a basis for either a criminal contempt proceeding or a civil contempt proceeding."³³⁰ Despite the confusion, it found no

restrictive means" of protecting access to family planning clinics and violated the Texas Constitution's guarantee of free speech. *Id.* at 7.

324. *Id.* at 3.

325. *Id.*

326. *Id.* at 8. The court concluded:

Today our court continues to favor the growth and enhancement of freedom not its constraint. The fact that vigorous debate of public issues in our society may produce speech considered obnoxious or offensive by some is a necessary cost of that freedom. Our Constitution calls on this court to maintain a commitment to expression that is strong and uncompromising for friend and foe alike.

Id.

327. 343 N.E.2d 149 (1976).

328. *Id.* at 151. The trial court had fined the defendant \$500 a day for a period of two weeks, sentenced him to six months in jail, then fined him an additional \$15,000. *Id.* at 152.

329. *Id.* at 153-54.

330. *Id.* at 154.

prejudice resulting from the ambiguity and chose not to remand to the trial court the issue of whether criminal contempt punishment is still appropriate which would "vindicate the court's authority."³³¹ It concluded that although the order was not transparently invalid, the contempt conviction must be reversed.³³²

G. Alabama

Considering that *Walker* emerged from Alabama courts, it is not surprising that the state's highest court upheld the collateral bar rule. In *Ex parte Purvis*,³³³ the defendant, a union leader, was jailed for contempt after violating a temporary restraining order enjoining a strike against the Birmingham water department.³³⁴ The court held that the defendant could not challenge the constitutional validity of the trial court's order because he made no effort to have the order modified or dissolved before violating it.³³⁵

In rejecting the defendant's contention that the order interfered with his First Amendment rights and was therefore void on its face, the state supreme court justified the order by noting that violence had erupted during the union strike causing a threat to the city's continuation of water service.³³⁶ The trial court's order was not, therefore, transparently invalid or frivolous.³³⁷ The court also observed that the trial judge had scheduled a hearing within five days after issuance of the order, at which time the defendant could have sought modification or dissolution of the order.³³⁸ The court concluded that it need not consider the validity of the underlying order because the "[s]ole basis for our decision in this case is the need to maintain the integrity of court orders."³³⁹

331. *Id.*

332. *Id.*

333. 382 So. 2d 512 (Ala. 1980).

334. *Id.* at 514.

335. *Id.* at 515. The trial court sentenced the defendant to 15 days in jail, and he served eight days before the state supreme court stayed the sentence pending appeal. *Id.* at 513.

336. *Id.* at 515.

337. *Id.*

338. *Id.* The court differentiated between cases in which orders are issued against the press in criminal trials and those in which the state has a compelling interest in regulating the use of streets and other public places. *Id.* at 514-15.

339. *Id.* at 515. See *Eastern Assoc. Coal Corp. v. Doe*, 220 S.E.2d 672, 682 (W. Va. 1975) (upholding criminal contempt convictions of union leaders violating a restraining order against picketing). In *Doe*, the court allowed a limited exception to the collateral bar rule when someone can prove "that the injunction was not issued in good faith and that the legal process was being used as a vehicle for intimidation." *Id.* at 680.

V. ESTABLISHING NATIONAL COLLATERAL BAR RULE STANDARDS IN
FIRST AMENDMENT CASESA. *State-by-State Adjudication*

How much protection those exercising First Amendment rights enjoy from the effects of the collateral bar rule varies from jurisdiction to jurisdiction. Because a number of states have held that an unconstitutional order cannot support a contempt conviction, and few jurisdictions have directly upheld the rule in First Amendment cases, it is tempting for those supportive of free expression rights to allow state-by-state development to continue. It could be argued that in the future, if too many states fail to provide sufficient deference to the First Amendment by prohibiting collateral challenges to unconstitutional orders, the Supreme Court may react by establishing protective national standards.

Leaving the states to develop their own standards, and assuming that the Supreme Court will step in if those standards are insufficiently protective of the First Amendment, is risky for a number of reasons. First, the Supreme Court may grant certiorari in a case with an unrepresentative set of circumstances in which First Amendment interests are difficult to uphold.³³⁷ Second, it may reaffirm *Walker* and either require or strongly encourage federal courts not to permit collateral challenges when no effort to appeal or modify the order was made.

Third, it may lay down specific rules for federal courts while permitting states flexibility to allow collateral challenges if they choose. But if states know that extending First Amendment protection is not required by the Supreme Court, they may be less likely to do so especially if it means curtailing judicial authority. Moreover, if the Supreme Court

337. A classic example of an unrepresentative case going to the Supreme Court to test an important First Amendment principle was *Branzburg v. Hayes*, 408 U.S. 665 (1972), where the Supreme Court held that reporters do not enjoy a privilege to keep confidential the names of sources when they have actually witnessed a crime and have been called before a grand jury. *Id.* at 667. Most of the time reporters do not witness crimes but relay events told to them by others. That made *Branzburg* a poor case for deciding the privilege, which the Supreme Court rejected in a five to four decision. *Id.* at 665. However, because of Justice Powell's concurrence that suggested such a privilege should exist under appropriate circumstances, some courts have adopted the three-part test included in Justice Stewart's dissent which makes forced disclosure of confidential sources extremely difficult. See *Kaker v. F & F Inv.*, 470 F.2d 778, 785 (2d Cir. 1972) (affirming decision not to require a reporter to disclose his journalistic sources).

established standards protective of judicial authority for the federal courts, many state courts would find those standards difficult to resist. The result would be the adoption of principles less protective of the First Amendment than would have been the case if the Supreme Court had remained silent on the issue.

Fourth, the Supreme Court could attempt to distinguish "pure speech" from "speech plus conduct" and permit the collateral bar rule in the latter but not the former. As the "flag burning" and other cases have demonstrated, however, this is a difficult road to travel and the Court has often been unsuccessful in separating speech and conduct elements.³³⁸

Furthermore, state-by-state development does not necessarily further First Amendment interests in an era of national news dissemination. Major news organizations, which can be sued in almost any jurisdiction where their news product is distributed, are subjected to widely varying First Amendment standards.³³⁹ Plaintiffs, although not always successful, frequently forum shop for the most hostile First Amendment environment, and juries and appellate courts are more than willing to reward those efforts with substantial damage awards.³⁴⁰

The best approach is for the Supreme Court to establish minimum

338. *United States v. Eichman*, 496 U.S. 310, 319 (1990) (holding the Flag Protection Act of 1989 unconstitutional); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag burning is expressive conduct and, therefore, protected by the First Amendment); see *O'Brien v. United States*, 391 U.S. 367 (1968), in which the Court developed a "mid-level" scrutiny test for statutes that purport to regulate conduct, but which have an incidental or direct effect on speech.

339. There are certain states, for example, where juries award huge libel damages against media defendants, and appellate courts, largely ignoring Supreme Court-mandated protections such as actual malice in public official and public figure cases, uphold those judgments. Pennsylvania, for example, is one of the most hostile environments for media defendants in defamation suits. See Albert Scardino, *Newspaper Pays Big Libel Award*, N.Y. TIMES, July 12, 1989, at A13 (awarding a former judge \$2.8 million who was defamed in a newspaper article). A jury in Waco, Texas awarded a huge sum to a former district attorney in his libel suit against a Dallas TV station. *\$58 Million Awarded in Biggest Libel Verdict*, N.Y. TIMES, Apr. 21, 1991, at 19. The television station settled for a reported \$20 million. Kim Cobb, *Attorney Considered by Turner Gains Prestige in Libel Lawsuits*, HOUS. CHRON., Feb. 10, 1992, at A11. See also James A. Hemphill, Note, *Libel-Proof Plaintiffs and the Question of Injury*, 71 TEX. L. REV. 401 (1992) (arguing that libel-proof plaintiff doctrine is well established in basic tort law principles).

340. In *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), the Court held that the plaintiff, a resident of New York, could sue the magazine, an Ohio corporation, in New Hampshire federal court because, "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens." *Id.* at 776. Keeton chose New Hampshire because of its six-year statute of limitations on defamation actions. It had expired everywhere else. *Id.* at 773.

standards which the lower courts must meet, while granting them the flexibility to extend First Amendment protection beyond those standards.³⁴¹ This is the approach the Court has taken in defamation cases and other areas of the law.³⁴² It would preserve the autonomy that courts need to enforce their orders, and at the same time, provide national standards in First Amendment cases that all courts must meet.

The First Amendment's special role in a democratic society requires that state and federal courts be permitted to extend the minimum standards only in the direction of providing more protection for free expression, and not less. Those states that adopt standards that are more protective of speech than the Supreme Court's approach would have two choices. First, they can base the holding on their own state constitutions, thus largely insulating the decisions from later federal court review.³⁴³ Second, they can choose to rest their holdings on First Amendment grounds, and assert that they are extending those holdings to more favorably accommodate free expression interests.³⁴⁴

B. *Minimum Procedural Standards*

The U.S. Supreme Court must eventually establish procedural and substantive standards for collateral bar cases involving the First Amendment. On the procedural side, the Court should require that if the trial court's order is issued *ex parte*, the news organization or other speaker must be allowed to disobey the order and collaterally challenge it in the contempt appeal.³⁴⁵ It is unfair for those subject to an order issued at

341. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (holding that states may adopt more expansive First Amendment protection under their own constitutions even though the Supreme Court would not make such a ruling under the Federal Constitution).

342. See *Gertz v. Welch*, 418 U.S. 323, 347 (1974) (holding that as long as states do not allow liability without fault, they may choose for themselves the standard of liability in private person defamation suits). Under *Gertz*, states may require more press-protective standards in defamation cases. *Id.* at 350. New York, for example, chose "gross negligence"—a standard between mere negligence and actual malice—in cases involving private persons involved in matters of legitimate public concern. *Chapadeau v. Utica Observer-Dispatch*, 341 N.E.2d 569, 571 (N.Y. 1975).

343. For a list of the freedom of expression provisions of all state constitutions, see *Ex parte Tucci*, 859 S.W.2d 1, 37-38 (Tex. 1993).

344. *Id.*

345. In *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the order was issued *ex parte*. *Id.* at 309. A year later, the Supreme Court limited *ex parte* injunctions restraining a planned demonstration to those circumstances in which it is virtually im-

a hearing in which they were not heard to be required to obey the order or face contempt.³⁴⁶ The First Amendment requires that at a minimum, those who are to be enjoined be represented before the order is issued.³⁴⁷

In its capacity as the administrative head of the federal system, the Supreme Court could require appellate courts to provide emergency procedures for cases dealing with First Amendment interests. Too often in prior restraint cases, many months elapsed between the time of the order and the appellate decision. By the time the appellate ruling was handed down, the news value of the event had long passed, and the appellate decision did not provide relief to the media organization.

The Supreme Court must also end the special reverence it grants to court orders that do little more than incorporate unconstitutional statutes, but which must nevertheless be obeyed. When a void statute is transformed into a void court order, the petitioners must be able to disobey the order and challenge it in a contempt proceeding.³⁴⁸

The Supreme Court should continue to clarify the difference between civil and criminal contempt. In *Bagwell*, the Court found that lower courts still characterize serious criminal contempt penalties as civil either because they are misinformed, or they do not want to provide criminal procedures to those held in contempt.³⁴⁹ The Supreme Court's historical treatment of civil and criminal contempt has provided rela-

possible to have notified petitioners and provide them an opportunity to be heard. *Carroll v. President of Princess Anne*, 393 U.S. 175, 185 (1968). The Court stated:

There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Id. at 180.

346. See *CBS Order*, 497 U.S. at 102. The Supreme Court should also require that any restraining order against First Amendment interests be in writing so that there will not be factual disputes as to the content of the order when an appeal is taken. See *id.*

347. It is possible that once a judge has determined that there is the potential of irreparable harm and the "status quo" must be preserved while a hearing is scheduled, nothing that the media organization's attorney will say before the trial judge will convince the court not to issue the order. Nevertheless, counsel for demonstrators or media organizations may be successful in limiting the scope or duration of the temporary restraining order, and may establish a more complete record for emergency appeal.

348. See *supra* note 6.

349. *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994); see also Edward L. Raymond, Jr., Annotation, *Media's Dissemination of Material in Violation of Injunction or Restraining Order As Contempt - Federal Cases*, 91 A.L.R. FED 270 (1989).

tively clear rules that lower courts should have followed. The presumption should be to provide procedural rights before imposing contempt penalties even if there are both civil and criminal elements involved. This is especially true when First Amendment interests are at stake.

The Supreme Court should also discourage lower courts from using "jurisdictional defects" to justify rejection of the collateral bar rule unless there is a genuine issue as to subject matter or personal jurisdiction.³⁵⁰ It is confusing when an appellate court determines an order was void because the trial court lacked "jurisdiction" to issue it when the lower court clearly had jurisdiction over the subject matter and the parties. Appellate courts apparently are comfortable with the fiction that a lower court's order may be disobeyed if that court lacked jurisdiction to order it. The fiction suggests that because the lower court lacked jurisdiction, there was no actual order, and therefore, there was no defiance of the court's authority that must be vindicated in a criminal contempt proceeding. The Supreme Court should require that lower courts abandon this fiction and candidly admit that they allow defiance of seemingly void or unconstitutional orders if First Amendment interests are involved.

In those cases where an appellate court has concluded that a trial court order is unconstitutional *before* a contempt citation has been imposed, or when an appellate court vacates a contempt judgment because of the invalidity of the lower court order and remands for further action,³⁵¹ the Supreme Court should not permit a contempt conviction. The argument that court orders must be obeyed because no one knows in advance whether it will be upheld on appeal is undermined when an appellate court has already overturned the order. Under those circumstances, allowing the trial court to reimpose a contempt citation is an abuse of judicial power.

C. *Minimum Substantive Standards*

The Supreme Court must bring contempt into the modern judicial era. The power of trial courts to summarily impose serious contempt penalties, such as those which carry a sentence of up to six months in jail and a potentially large fine,³⁵² places too much power in the hands of an individual judge. Judges must be able to control proceedings be-

350. See *supra* note 260 and accompanying text.

351. See *supra* note 4.

352. See *supra* note 26.

fore them by dealing with contemptuous behavior that disrupts courtroom decorum. Once the trial is over, however, there is little reason for not providing a hearing before a different judge and when appropriate, a jury.

The historical justification for allowing summary judgment is that no fact-finding is required because the judge witnessed the contemptuous conduct, and appellate courts should not restrict the authority of trial judges to deal swiftly and aggressively with misbehavior in their presence. As noted by the Fifth Circuit in *Dickinson*, direct criminal contempt is perhaps the last vestige of "common-law crimes" in this country.³⁵³ To allow the judge who may be the target of the contemptuous behavior to sit as grand jury, prosecutor, witness, trial jury, and sentencing judge, sometimes within a matter of minutes, raises serious questions of unfairness or bias.³⁵⁴ It makes little sense to require procedural protections in the prosecution of indirect criminal contempt while allowing few procedural rights beyond a "show cause" hearing in cases of direct criminal contempt.

VI. A FIRST AMENDMENT LIMIT TO THE COLLATERAL BAR RULE

Despite some notable exceptions, the Supreme Court has traditionally provided substantial protection to free expression interests.³⁵⁵ The Court permits prior restraint orders in extremely limited circumstances;³⁵⁶ it grants media defendants an arsenal of weapons in defamation cases involving public officials and public figures, and considerable protection in cases involving private persons;³⁵⁷ certain invasion of privacy suits against media defendants are hard to win because the Court extended the "actual malice" standard from defamation to false-light invasion of privacy plaintiffs;³⁵⁸ it generally allows states to extend, but not restrict, First Amendment rights based on their own constitutions;³⁵⁹ it has established a test for obscene materials that is extremely difficult to meet;³⁶⁰ it requires that advocacy of radical ideas be closely linked to violence before such speech can be punished.³⁶¹ In

353. See *supra* note 3.

354. See *supra* note 83 and accompanying text.

355. See *supra* note 30-31 and accompanying text.

356. See *supra* note 30.

357. See *supra* note 48 and accompanying text. Even private persons must prove actual malice before they can collect punitive damages in a defamation suit. See *Gertz v. Welch*, 418 U.S. 323 (1974).

358. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time Inc. v. Hill*, 385 U.S. 374 (1967).

359. See *supra* note 49.

360. See *Miller v. California*, 413 U.S. 15 (1973).

361. See *supra* note 55 and accompanying text.

short, the Court has mostly preserved the "preferred position" of the First Amendment.

The essential role that the First Amendment plays in a democratic society provides ample justification for special treatment in collateral bar rule cases. Except under limited circumstances, courts should not impose the rule in cases related to central principles of the First Amendment. Providing this protection does not undermine the legitimacy of courts. If the order is ultimately upheld on appeal, the contempt citation stands and the court's authority is vindicated. Whether challenge to the order comes from direct or collateral appeal does not make a substantial difference in the ability of courts to function, yet it may determine whether First Amendment rights are unfairly forfeited, especially when there is little time before a deadline for the expressive activity.

Deviations from this special treatment should be limited to those rare circumstances when a temporary restraining order or injunction is required to prevent imminent violence, significant destruction of property, or interference with essential public services. That would exclude from the exceptions all cases of "pure speech," and would permit collateral challenges involving news organizations and others who disseminate information by print or broadcast. In cases where there is speech and conduct, and the conduct must be enjoined to prevent dire consequences, such orders should be obeyed if the courts have subject matter and personal jurisdiction, and direct, not collateral, appeal should be sought.

The consequences of violent or destructive behavior cannot be "reversed" when an appellate court eventually decides the validity of the original order. Unlike a prior restraint order which a judge should know is likely to be reversed under *Nebraska Press Association*,³⁶² a judge may not know whether activities by demonstrators or picketers will result in violence.

This "violence" exception must be narrowly applied, and would not have covered the demonstrations in *Walker*. The threshold showing of potential serious violence must be extremely high. In *Walker*, the court appended a clearly unconstitutional ordinance to an ex parte order enjoining peaceful demonstrations.³⁶³ Such an order is entitled to no respect.

362. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

363. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967).

Where ongoing violent demonstrations are enjoined, the courts should enforce the collateral bar rule. If the court has already seen a pattern of violent behavior by those exercising First Amendment rights or by those viewing the demonstrations, it should enjoin further violence, and the court's order should be obeyed and challenged on direct appeal. The court should not attempt to weigh how much of the activity is speech and how much is conduct, providing First Amendment protection to the former and limited protection to the latter. It should look at whether violence has already taken place, or whether the evidence of potential violence is clear and convincing.

Disruptions of essential public services are unlikely to directly implicate First Amendment interests. If police officers or fire fighters are about to strike, or a city's water system is threatened by a work stoppage or walkout,³⁶⁴ a court order enjoining such activities should be obeyed and not collaterally challenged. Picketing and other labor-related activities clearly implicate First Amendment rights, and the enjoining of such activities have been abused by the courts.³⁶⁵ Nevertheless, the harm that would result from the disobedience of such orders requires that courts be able to impose contempt penalties even if the order is later invalidated.

Imposing the collateral bar rule in First Amendment cases forces those who may lack sufficient resources to pursue what could be a long and prohibitively expensive appellate process. Those who do not have the money of a large media organization would find the safer course to be compliance with the judicial order no matter how likely it is to be overturned. Such orders may never be tested if there is compliance and no appeal.

The harm resulting from such interference with legitimate First Amendment rights is magnified when the rights of readers, viewers and listeners are considered. Traditional First Amendment jurisprudence has focused on the speaker. Nevertheless, the right to receive information has enjoyed increasing attention by the courts.³⁶⁶ When those subject to invalid orders are prevented from disseminating information, the public is also deprived of information it may need to make political, economic, and other important decisions. When courts issue orders telling a news organization not to publish or broadcast information, they are also telling the readers, listeners and viewers that they are not entitled to receive it.

Those subject to an order limiting their First Amendment rights

364. See, e.g., *Ex parte Purvis*, 382 So. 2d 512 (Ala. 1980).

365. See *supra* notes 9-10 and accompanying text.

366. See *supra* note 46.

should make a reasonable effort to have it modified or vacated on appeal before disobeying it. The legitimacy of courts as a co-equal branch of government requires such deference. But if an invalid order interferes with free expression rights, and the appeal cannot be made or be heard before circumstances require public dissemination, those subject to the order must be able to challenge it while appealing the contempt conviction. Such a collateral challenge is essential if First Amendment rights are to be preserved, and it shows no more disrespect for the law than does an invalid court order restricting freedom of speech and press.

