GAG ORDERS ON THE PRESS: A DUE PROCESS DEFENSE TO CONTEMPT CITATIONS

*By Richard Harris**

Introduction

This note discusses the dilemma faced by the news media when a judge enjoins publication of a news story. Should the press publish the news and face a contempt citation, or should it obey and appeal the order, running the risk that the enjoined story will lose its news value before the appellate courts decide the case?

The dilemma was posed in *United States v. Dickinson*,[1] a case arising out of the indictment of Frank Stewart, a VISTA volunteer and civil rights activist, on a charge of conspiring to murder the mayor of Baton Rouge, Louisiana. Alleging that the prosecution was groundless and intended solely to harass him and discourage his civil rights work, Stewart sought an injunction in federal court to prohibit the state prosecution. In order to avoid prejudice to either side in the pending criminal trial, the federal district judge enjoined the press from reporting on the open-court testimony at the November 1, 1971, injunction proceedings. Newspaper reporters Larry Dickinson and Gibbs Adams disregarded the gag order and the enjoined news item appeared the next day in Baton Rouge's two daily papers. Dickinson and Adams were cited for contempt of court. On appeal the injunction was held unconstitutional, but the appellate court held that the invalidity of the underlying injunction was no defense to the reporters' contempt citations: "[T]he well-established principle in proceedings for criminal contempt [is] 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."[2]

---

* Member, third year class, University of California, Boalt Hall School of Law.

1. 465 F.2d 496 (5th Cir. 1972).

2. *Id.* at 509 (emphasis in original). The court of appeals vacated and remanded the contempt convictions on the chance that, in view of the invalidity of the injunction, the district court judge might exercise his equitable discretion to decide that there had been no contempt. The district judge reaffirmed the contempt convictions, however, and these were upheld on appeal. United States v. Dickinson, 349 F. Supp. 227 (E.D. La. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

The rule prohibiting collateral attack upon the validity of the underlying injunction in defense to a contempt citation is known as the "collateral bar rule."[3] Invoked by the United States Supreme Court in cases involving antistrike[4] and antidemonstration[5] injunctions, the collateral bar rule has frequently been used by both state and federal appellate courts to uphold contempt convictions.[6] Although it has been applied only rarely in press gag order cases,[7] the collateral bar rule greatly troubles the advocates of press freedom:

> As the press views the situation now under *Dickinson*, any judge—no matter how misguided—may for virtually any reason at all without notice directly restrain any news publication from publishing virtually any information and the news media must abide by that unconstitutional order for as long as it takes to appeal, or go to jail.[8]

With increasing frequency in recent years, the press has been the target of court orders prohibiting publication of virtually every type of news story.[9] Appellate review of such orders takes time: in *Dickinson*, the Fifth Circuit Court of Appeals invalidated the gag order on August 22, 1972, more than nine months after it was issued. Yet many, if not most, news stories are ephemeral in nature: they are important news items for a few days and then become history. If publication of a news story is delayed for any period of time, sometimes even for a day or two, the news value of the story may be reduced or destroyed.[10] Thus, newsmen in Larry Dickinson's position are in a quandary: had he obeyed the injunction until it was reversed, Dickinson

---

3. *See* Rendleman, *Free Press-Fair Trial: Review of Silence Orders*, 52 N.C. L. REV. 127, 144-63 (1973) [hereinafter cited as Rendleman].

4. United States v. United Mine Workers, 330 U.S. 258 (1947); Howat v. Kansas, 258 U.S. 181 (1922).

5. Walker v. Birmingham, 388 U.S. 307 (1967).

6. See notes 80-81 and accompanying text *infra*.

7. Research has revealed only one press case other than *Dickinson* in which a contempt citation was issued or upheld *after* judicial determination that the underlying injunction was invalid. In Cooper v. Rockford Newspapers, Inc., 34 Ill. App. 3d 645, 339 N.E. 2d 477 (1975), an injunction against editorial commentary on a pending civil action was held invalid; the trial court later held the newspaper editor in contempt for having violated the order pending appeal. The contempt citation and the newspaper's appeal therefrom are reported in PRESS CENSORSHIP NEWSLETTER NO. IX, April-May 1976, at 18-19.

8. Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55, 58 (1976) [hereinafter cited as Landau]; *see* TWENTIETH CENTURY FUND TASK FORCE ON JUSTICE, PUBLICITY, AND THE FIRST AMENDMENT, RIGHTS IN CONFLICT 30, 84 (1976) [hereinafter cited as TWENTIETH CENTURY TASK FORCE].

9. See cases cited in notes 39, 43 *infra*.

10. The delays inherent in a system of legal decision making, of course, cause problems and temporary loss of rights for persons other than news reporters. For example, a person accused of a crime is under a legal cloud during the entire period of his trial and appeal. But the problem of delay is unique in cases of prior restraints on the press because: (1) news stories quickly lose their currency and relevance (see notes 40-41, 52-54 and accompanying text *infra*); and (2) the constitutional "heavy presumption" against the

would have lost the news value of his story; on the other hand, by printing the story while it was current, Dickinson subjected himself to criminal sanctions.

In a 1976 decision, *Nebraska Press Association v. Stuart*,[11] the Supreme Court invalidated a press gag order issued by a Nebraska criminal trial judge to prevent prejudicial pretrial publicity in the trial of a defendant charged with rape and murder.[12] The Court ruled that the injunction did not overcome the "heavy presumption" against prior restraints on the press and that insofar as it prohibited the reporting of matters adduced in open court, the gag order was "clearly invalid."[13] Although *Nebraska Press Association* has been hailed as a great victory for the press, the victory was only partial. The Court specifically refused to rule out the possibility that gag orders on the press might in some cases be constitutionally permissible[14] and the collateral bar rule problem was not discussed, leaving the law uncertain on this point.

Judges and commentators have proposed four solutions to the *Dickinson* problem: (1) absolute obedience—injunctions against press coverage must be obeyed until and unless they are reversed;[15] (2) injunctions should automatically be stayed, pending full appellate review;[16] (3) the collateral bar rule should never apply to cases involving gag orders on the press;[17] or (4) the press should be exempted from the collateral bar rule when

---

validity of press injunctions means that they are extremely unlikely to be upheld upon appeal (see notes 21-23 and accompanying text *infra*).

11. 427 U.S. 539 (1976).

12. Simants, the defendant in the pending criminal proceedings, was accused of killing a family of six in the course of a multiple sexual assault on October 18, 1975. The killings occurred in a small western Nebraska town and drew local, regional, and national press attention. A few days after the killings there were press reports that the prosecutor had announced Simants' confession. On October 22, the trial judge imposed a gag order on the press, prohibiting, among other things, publication of any testimony or evidence adduced at that day's pretrial hearing. The state's district and supreme courts subsequently modified the gag order to prohibit reporting of any confessions or other facts "strongly implicative" of the defendant. The gag order expired by its own terms on January 7, 1976, when the jury was impaneled in Simants' murder trial. *Id.* at 542-46.

13. *Id.* at 570.

14. *Id.* at 569-70.

15. Chief Justice Burger advocated this inflexible rule in an April 18, 1975, address to a convention of the American Society of Newspaper Editors in Washington, D.C. PRESS CENSORSHIP NEWSLETTER NO. VIII, Oct.-Nov. 1975, at 44-45 [hereinafter cited as PRESS CENSORSHIP NO. VIII].

16. Jack Landau, an attorney, newsman, and trustee of the Reporters Committee for Freedom of the Press, advocates this approach for gag orders on trial news reporting. *See* Landau, *supra* note 8, at 59.

17. *See* Rendleman, *supra* note 3, at 161; TWENTIETH CENTURY TASK FORCE, *supra* note 8, at 30.

it exhausts all appellate opportunities prior to its news deadlines.[18] This note advocates the fourth of these proposals as the only solution that fairly balances the needs of the press and of the legal system. Due process is the ground for this exception, and the exception should apply to all direct prior restraints on the press,[19] including injunctions issued on grounds of military security or national defense. In reaching this conclusion this note will: (1) review the current legal status of injunctions on news publication; (2) discuss the policies underlying the First Amendment's free press guarantee; (3) analyze the policies of the collateral bar rule and review the cases invoking or granting exceptions from the rule; and (4) detail the policies and the case authority supporting the proposed due process exception to the collateral bar rule.

---

18. *See* United States v. Schiavo, 504 F.2d 1, 9-11 (3d Cir.) (Adams, J., concurring), *cert. denied*, 419 U.S. 1096 (1974); Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 113 (1948) [hereinafter cited as Cox].

19. The scope of this note is strictly limited to direct orders to the news media enjoining publication of specified news matter. Not discussed in detail are two closely related issues that deserve a brief mention: (1) a court's standing orders prohibiting certain news gathering conduct or publication of certain information; and (2) "silence orders" on participants in a criminal trial, including defendants, witnesses, prosecution and defense attorneys, and law enforcement officers.

Standing orders. According to Landau, 80 of the 94 United States district courts have standing orders prohibiting certain news-gathering conduct or publication of certain information. Landau, *supra* note 8, at 56. The Seventh Circuit Court of Appeals, in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), held that such orders are an exercise of the courts' quasi-legislative function, and hence are subject to collateral attack in defense to a contempt conviction. *Cf. In re* Oliver, 452 F.2d 111 (7th Cir. 1971) (allowing collateral attack on disciplinary proceeding against attorney who had violated a court's "policy statement"); Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950) (allowing collateral attack in defense to citation of radio news program for contempt for violation of court's standing order). *But see* Seymour v. United States, 373 F.2d 629 (5th Cir. 1967).

Silence orders. Because the participants in a criminal trial are often news sources, their forced silence may effectively prevent publication of certain information. *See* Warren & Abell, *Free Press-Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51, 72-77 (1972). Although the effect of silence orders on news sources may often be to stifle the news, the Supreme Court has not applied the same "heavy presumption" against their validity as it applies to direct restraints on the press itself. *See* Sheppard v. Maxwell, 384 U.S. 333, 358-63 (1966); *cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 n.8 (1976). An incautious newsman can find himself directly affected by these "indirect" restraints. If he obtains information from an enjoined party, the reporter may be summoned by the court and ordered—on pain of contempt—to divulge his source. The Supreme Court has ruled that the reporter is not privileged to keep his source confidential. Branzburg v. Hayes, 408 U.S. 665 (1972). Even state newsmen's shield laws may not protect the reporter from the judge's questions. Rosato v. Superior Court, 51 Cal. App. 3d 190, 218-26, 124 Cal. Rptr. 427, 446-51 (1975), *cert. denied*, 96 S. Ct. 3200 (1976); Farr v. Superior Court, 22 Cal. App. 3d 60, 68-71, 99 Cal. Rptr. 342, 347-49 (1971), *cert. denied*, 409 U.S. 1011 (1972).

I. After Nebraska Press Association: The Current Status of Injunctions upon the Press

In *Nebraska Press Association* the Supreme Court characterized injunctions against speech and publication as "the most serious and the least tolerable infringement on First Amendment rights."[20] This is not a novel attitude. Over the past fifty years the Court has repeatedly declared that there is a "heavy presumption" against the validity of gag orders on the press.[21] This presumption is so heavy that the Court has invalidated every prior restraint on the press that it has considered.[22] Furthermore, it appears that no direct prior restraint on news publication has ever been upheld by the appellate courts.[23] Nevertheless, the Court in dicta has held open the possibility that in exceptional emergency circumstances the Constitution might permit injunctions on the press. Most recently, in *Nebraska Press Association*, the Court said: "This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. . . . We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances . . . ."[24] Such dicta stand as an open invitation to the lower courts, which have enjoined news stories on the grounds that publication would: (1) compromise the national security or imperil the national defense

20. 427 U.S. at 559.

21. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (the *Pentagon Papers* case); Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971) (handbills); Near v. Minnesota, 283 U.S. 697, 713-20 (1931); *cf.* Mills v. Alabama, 384 U.S. 214, 219-20 (1966). The strength of this "heavy presumption" can be seen in some of the concurring opinions in the *Pentagon Papers* case. There, the Supreme Court denied the federal government's attempt to enjoin publication of the contents of a classified Pentagon study of the history of American involvement in Vietnam. Although he believed that publication of the "Pentagon Papers" by the daily press would do "substantial damage to public interests," Justice White nevertheless agreed that the government had not satisfied "the very heavy burden that it must meet to warrant an injunction." 403 U.S. at 731 (White, J., concurring). Justice Douglas conceded that publication "may have a serious impact," but concluded that prior restraint was unconstitutional. *Id.* at 722-23 (Douglas, J., concurring). And Justice Stewart said that publication of some of the material would not be in the nation's best interest, yet he agreed that prior restraint was not justified. *Id.* at 730 (Stewart, J., concurring).

22. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); *cf.* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (handbills).

23. In researching this note the author discovered 26 reported cases of direct gag orders on the press, none of which was held valid upon appeal. See notes 39, 43 *infra*. A 1972 study by the Reporters Committee for Freedom of the Press likewise failed to discover a single case in which the appellate courts validated a gag order on the press. *See* Landau, *supra* note 8, at 59.

24. 427 U.S. at 570.

in wartime;[25] (2) prejudice criminal or civil litigation;[26] or (3) constitute defamation or invasion of privacy.[27] Additionally, Supreme Court and lower

25. The *Pentagon Papers* case is the only case in which the government has sought a prior restraint on publication on national security grounds, but the Court held that the government had not overcome the "heavy presumption" against the validity of prior restraints. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). Beyond this, it is impossible to ascertain the exact holding of the case because the six majority and three dissenting justices all submitted individual opinions to accompany the brief per curiam opinion. A close reading of the individual concurrences and dissents indicates that seven justices believed prior restraints on the press might be constitutionally valid under certain circumstances to preserve national security. Only Justices Black and Douglas argued that the Constitution never allows prior restraints on the press. *Id.* at 714-15 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring). The three dissenters obviously believed that prior restraints on national security grounds could be proper in time of undeclared war. Justice Brennan, however, believed this to be an open question and suggested that proof of a sufficiently grave danger to national security might conceivably justify prior restraints even in peacetime. *Id.* at 726 (Brennan, J., concurring). Justices White and Marshall suggested that if Congress provided for prior restraints on publication to protect national security, injunctions on the press might be constitutionally permissible. *Id.* at 732 (White, J., concurring); *id.* at 742 (Marshall, J., concurring). *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (dicta).

26. Chief Justice Burger's opinion for the Court in *Nebraska Press Ass'n* refused to "rule out the possibility of showing [in a future case] the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint." 427 U.S. at 569-70. *See also* Branzburg v. Hayes, 408 U.S. 665, 685 (1972) (suggesting in dicta that prior restraints on the press to secure a fair trial might sometimes be constitutionally valid); Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (instructing trial judges to protect criminal defendants from prejudicial pretrial publicity). Five justices joined in the *Nebraska Press Ass'n* opinion, but the status of the trial level news injunction appears unsettled. A head count of the justices in that decision suggests that the next time the issue comes up the Court might rule that injunctions on criminal trial news are never constitutionally valid. This was the position taken in Justice Brennan's concurrence. 427 U.S. at 572 (Brennan, J., concurring, joined by Stewart and Marshall, JJ.). Justice Stevens indicated his inclination to agree with Justice Brennan should the issue arise again. *Id.* at 617 (Stevens, J., concurring). And Justice White, who joined in the opinion of the Court, concurred separately: "[T]here is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. . . . If the recurring result . . . in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail." *Id.* at 570-71 (White, J., concurring).

27. In Near v. Minnesota, 283 U.S. 697 (1931), the Court specifically avoided discussion of prior restraints for this purpose. *Id.* at 716 (citing Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916)). In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), however, the Court invalidated an injunction on allegedly privacy-invading pamphleteering. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. . . . [R]espondent is . . . attempting to stop the flow of information

court opinions have suggested the possibility of gag orders to stop publication of: (1) obscenity;[28] (2) incitements to violence or to overthrow the government;[29] (3) confidential material, if the author has contracted not to divulge governmental secrets;[30] and (4) copyrighted material.[31]

By far the most common use of prior restraints on the press has been to stop publication of news that threatens to prejudice a criminal defendant's Sixth Amendment right to a fair trial.[32] The Supreme Court has clearly instructed trial judges to protect criminal defendants from prejudicial publicity[33] and has suggested, in dicta, that use of gag orders might be constitutionally proper for this purpose.[34] The Court has said that alternative measures—restrictions on public comment by parties, careful voir dire of the jury panel, change of venue, continuance, jury sequestration, and retrial[35]—are preferable to gag orders on the press. But the alternatives are

. . . to the public." *Id.* at 419-20. The opinion left open the question whether the Constitution permits the injunction of a publication that would invade a person's privacy or defame him in other than a business context. *Cf.* Oklahoma Publishing Co. v. District Court, 97 S. Ct. 1045 (1977) (reversing an injunction against publication of a juvenile's name revealed in open court).

28. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (dicta). This note will not discuss when, if ever, news might be enjoinable as obscene.

29. *See id.* This note will not discuss when, if ever, news might be enjoinable as incitement to riot or to overthrow the government.

30. *See* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) (book publication of classified CIA information enjoined on contract theory because author had signed a pledge not to divulge information). The question of when, if ever, this rationale could be used to enjoin publication by the news media is not discussed in this note. *See United States v. Marchetti and Alfred A. Knopf, Inc. v. Colby: Secrecy 2; First Amendment 0*, 3 HASTINGS CONST. L.Q. 1073 (1976).

31. The Copyright Act, 17 U.S.C. §§ 1-216 (1970), applies to newspaper publication (*id.* § 5(b)) and authorizes injunctions to prevent infringement (*id.* § 101(a)). *See* International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) (enjoining one wire service from using its competitor's stories); *cf.* L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919) (upholding judgment against newspaper for copyright infringement of advertising material). *See generally* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970).

32. This was the ground for news injunctions in 20 of the 26 reported cases discovered in research for this note. See notes 39, 43 *infra*.

33. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

34. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976); Branzburg v. Hayes, 408 U.S. 665, 685 (1972); Sheppard v. Maxwell, 384 U.S. 333, 358-63 (1966); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1307 (1974) (Powell, Circuit Justice).

35. These are the alternative measures for ensuring a fair trial recommended by the Court in Sheppard v. Maxwell, 384 U.S. 333, 358-63 (1966), and reiterated in Nebraska Press Ass'n v. Stuart, 427 U.S. at 563-64.

all more expensive, more time-consuming, and administratively more difficult than gag orders on the press. The continuing inclination of trial judges to gag the press is indicated by a recent Louisiana case, *Times-Picayune Publishing Corp. v. Marullo*.[36] There, barely one week after the Supreme Court held in *Nebraska Press Association* that an injunction on reporting of open-court proceedings was "clearly invalid,"[37] a Louisiana trial judge enjoined news coverage of an open-court narcotics trial.[38]

In view of the high probability that any given gag order ultimately will be held invalid, the press has been remarkably obedient. Of the twenty-six reported gag orders discovered in the author's research, the press obeyed eleven, or forty-two percent.[39] In six of these eleven cases obedience resulted in irrevocable loss of the enjoined news item. For example, in *Near v. Minnesota*,[40] the trial court enjoined publication of news stories alleging corruption in the Minneapolis police force and city government. Ultimately the Supreme Court held the gag order invalid, but the stories—and apparently publication of the newspaper—were halted for over three and one-half years, pending appeal.[41] In two other cases news coverage was delayed, but

36. 334 So. 2d 426 (La. 1976).

37. 427 U.S. at 570.

38. The injunction was vacated by the Louisiana Supreme Court at an emergency nighttime session on the same day it was issued. 334 So. 2d at 426.

39. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (pretrial publicity); Newspapers, Inc. v. Blackwell, 421 U.S. 997 (1975) (denying stay of an otherwise unreported Texas trial judge's injunction on publication of trial jurors' names) (*see* PRESS CENSORSHIP NO. VIII, *supra* note 15, at 44); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (Powell, Circuit Justice) (open-court testimony in pretrial hearing, defendant's criminal record, and editorial comment); New York Times Co. v. United States, 403 U.S. 713 (1971) (classified military history); Near v. Minnesota, 283 U.S. 697 (1931) (allegedly slanderous stories attacking corruption in city government); Schuster v. Bowen, 347 F. Supp. 319 (D. Nev. 1972), *vacated as moot*, 496 F.2d 881 (9th Cir. 1974) (jurors' names); Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973) (witnesses' photographs); State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 322 So. 2d 544 (Fla. 1975) (open-court events in civil trial taking place while jury out of courtroom); State *ex rel.* Miami Herald Publishing Co. v. Rose, 271 So. 2d 483 (Fla. App. 1972) (all trial-related information except that adduced in open court); State *ex rel.* Beacon Journal Publishing Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976) (all information about open-court proceedings); State *ex rel.* Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976) (all information about a closed pretrial suppression hearing).

40. 283 U.S. 697 (1931).

41. The other permanent news losses all occurred as the result of injunctions against press coverage of court proceedings: Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (news of crime silenced for two and one-half months, until after start of trial); Newspapers, Inc. v. Blackwell, 421 U.S. 997 (1975) (prohibited publication of jurors' names until case went to jury) (*see* PRESS CENSORSHIP NO. VIII, *supra* note 15, at 44); Schuster v. Bowen, 347 F. Supp. 319 (D. Nev. 1972), *vacated as moot*, 496 F.2d 881

a stay order or an expedited appellate decision lifted the gag order in time to allow publication while the story was still current.[42]

The courts' response to press disobedience of injunctions has been inconsistent. Among the twenty-six cases studied, the press violated the injunctions in fifteen;[43] of these, contempt citations were issued in ten cases.[44] Among these ten, only the contempt citation in *Dickinson* was

(9th Cir. 1974) (precluded publication for two years of murder trial jurors' names); Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973) (prevented publication of names and pictures of prison murder witnesses until more than two months after the trial); State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 322 So. 2d 544 (Fla. 1975) (precluded until after trial publication of information as to open-court proceedings taking place out of jury's presence).

42. New York Times Co. v. United States, 403 U.S. 713 (1971) (publication of the "Pentagon Papers" delayed 16 days while the injunction was being appealed); State *ex rel.* Beacon Journal Publishing Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976) (injunction caused a two day loss of press coverage of an open-court trial before the order was stayed).

43. Oklahoma Publishing Co. v. District Court, 97 S. Ct. 1045 (1977) (name and picture of juvenile homicide suspect); United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974) (publication of the fact that a perjury defendant was awaiting trial on murder and conspiracy charges); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) (see text accompanying notes 1-2 *supra*); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966) (open-court habeas corpus proceedings prior to petitioner's scheduled murder trial); Wood v. Goodson, 253 Ark. 196, 485 S.W.2d 213 (1972) (news of verdict in rape trial, pending jury deliberations in trial of alleged accomplice); Cooper v. Rockford Newspapers, Inc., 34 Ill. App. 3d 645, 339 N.E.2d 477 (1975) (editorials regarding a pending libel suit against the enjoined newspaper); Times-Picayune Publishing Corp. v. Marullo, 334 So. 2d 426 (La. 1976) (open-court criminal trial proceedings, pending jury selection in a related case); State *ex rel.* Liversey v. Judge, 34 La. Ann. 741 (1882) (unfavorable editorials and cartoons about a private citizen); Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (information regarding defendant's criminal record); New York Times Co. v. Starkey, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (1976) (defendant's criminal record); Ithaca Journal News, Inc. v. City Court, 58 Misc. 2d 73, 294 N.Y.S.2d 558 (1968) (names of juvenile court defendants); State v. Morrow, 57 Ohio App. 30, 11 N.E.2d 273 (1937) (information regarding a pending grand jury investigation); *Ex parte* McCormick, 129 Tex. Crim. 457, 88 S.W.2d 104 (1935) (open-court murder trial proceedings pending trial of alleged accomplice); *Ex parte* Foster, 44 Tex. Crim. 423, 71 S.W. 593 (1903) (open-court testimony in murder trial); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971) (open-court proceedings while jury out of courtroom).

44. No contempt citations have been reported in the following cases: Oklahoma Publishing Co. v. District Court, 97 S. Ct. 1045 (1977); United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974); Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); New York Times Co. v. Starkey, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (1976); Ithaca Journal News, Inc. v. City Court, 58 Misc. 2d 73, 294 N.Y.S.2d 558 (1968) (contempt proceedings halted by writ of prohibition before citation was issued).

sustained on appeal,[45] while an appeal from one other contempt citation is pending as of this writing.[46]

Thus, the state of the law today is confused. When the press is enjoined from publishing the news the editor can be certain of only one thing: the odds are overwhelming that the injunction is constitutionally invalid. From the case law, the editor will not be able to tell what the courts will do if he prints the enjoined story: he may or may not be cited for contempt, and if cited, he may or may not be allowed to challenge the validity of the injunction in defense to the contempt citation. *Dickinson* is the only case to date in which an appellate court has upheld a newsman's contempt conviction for violation of an admittedly invalid injunction. But there is no way to gauge the deterrent effect upon newsmen of the threat of prosecution and possible ultimate affirmance of a contempt conviction. The law must be clarified.

II. The Policy Behind Press Freedom: If People Are to Govern Themselves, They Must Be Informed

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.
>
> — James Madison[47]

The libertarians who framed the Constitution sought to establish a system in which the citizens would govern themselves. Indispensible to this system of self-government is a free press, which alone can keep the populace informed about society and government. Thus, Thomas Jefferson wrote:

> The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.[48]

---

45. See notes 1-2 and accompanying text *supra*.

46. Cooper v. Rockford Newspapers, Inc., 34 Ill. App. 3d 645, 339 N.E.2d 477 (1975); see note 7 *supra*. The remaining eight cases fall into two groups: the older cases, in which the majority opinions did not discuss the collateral bar rule, and the more recent cases, in which the rule was discussed but an exception was found. See note 96 and accompanying text *infra*.

47. THE COMPLETE MADISON 346 (Padover ed. 1953) (letter to W. T. Barry, Aug. 4, 1822).

48. 11 PAPERS OF THOMAS JEFFERSON 49 (Boyd ed. 1955) (letter to Edward Carrington, Jan. 16, 1787).

The framers clearly saw the dangers of an uncontrolled press but believed that, on balance, press freedom was indispensable:

> That [the freedom of the press] is often carried to excess, that it has sometimes been degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.[49]

According to Justice Stewart, the purpose of the free press guarantee in the First Amendment was to institutionalize the people's access to information:

> [T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution.
>
> . . . .
>
> The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches. . . .
>
> The relevant metaphor, I think, is the metaphor of the Fourth Estate. . . .
>
> . . . .
>
> It is this constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.[50]

In keeping with this view of the First Amendment, the Court has held on several occasions that freedom to circulate the news is a necessary element of press freedom:

> [S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[51]

---

49. AMERICAN STATE PAPERS, 2 FOREIGN RELATIONS 196 (1832) (letter from John Marshall, as an American envoy to France in 1798, to French Foreign Minister Tallyrand); *see* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971) (plurality opinion) (quoting the cited passage); Near v. Minnesota, 283 U.S. 697, 719-20 (1931).

50. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633-35 (1975) (excerpts from address to Yale Law School Sesquicentennial Convocation, New Haven, Conn., Nov. 2, 1974).

51. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (holding unconstitutional a special Louisiana state tax on large-circulation newspapers); *cf.* Martin v. Struthers, 319 U.S. 141, 143 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943); Jones v. Opelika, 319 U.S. 103 (1943); Lovell v. Griffin, 303 U.S. 444, 452 (1938) (these four cases all held unconstitutional local ordinances imposing a license tax on or prohibiting altogether door-to-door or streetcorner solicitation, as applied to distributors of religious leaflets).

In several decisions regarding speech and press, the Court has recognized that the First Amendment protects the timeliness as well as the content of expression. Commenting on the importance of timeliness to political speech, the Court said in *Carroll v. President and Commissioners of Princess Anne*:[52] "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. *A delay of even a day or two may be of crucial importance in some instances*."[53] In other words, the First Amendment protects the right of the press to print the news "while it's hot."[54]

Even in those rare situations where the First Amendment will allow publication to be punished after the fact, the Court has held that prior restraints are strongly disfavored. Thus, in *Near v. Minnesota*,[55] the Court invalidated a prepublication injunction of an allegedly libelous story, but noted that the newspaper might properly be held liable for defamation after publication:

> [I]t has been generally, if not universally, considered that it is the chief purpose of the [free press] guaranty to prevent previous restraints on publication. . . . The liberty deemed to be established was thus described by Blackstone: "The liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."[56]

Concurring in *Nebraska Press Association*, Justice Brennan explained the American hostility to prior restraints:

> A system of prior restraints is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government

---

52. 393 U.S. 175 (1968) (invalidating an injunction on a rally opposing school integration).

53. *Id.* at 182 (citing A Quantity of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting)) (emphasis added).

54. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); *accord*, Mills v. Alabama, 384 U.S. 214, 219 (1966); Bridges v. California, 314 U.S. 252, 268-69 (1941); *see* New York Times Co. v. United States, 403 U.S. 713 (1971), in which the Court's respect for the importance of timely news was demonstrated by its immediate response to the newspapers' appeals. In the *Pentagon Papers* case the Court adopted, in Justice Harlan's words, a "frenzied" briefing and hearing schedule (*id.* at 743 (Harlan, J., dissenting)) and rendered its opinion invalidating the gag order only five days after granting certiorari. The six majority justices thus showed their respect for the editors' judgment that the *Pentagon Papers* story was "hot" news, despite the dissenters' argument that the story was not a currently-breaking news event, but rather a three-year-old history. *Id.* at 761 (Blackmun, J., dissenting).

55. 283 U.S. 697 (1931).

56. *Id.* at 713-14; *see* cases cited at note 22 *supra*; *cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

> scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.[57]

The Court's abhorrence of prior restraints is in keeping with the framers' view of the press as the public's watchdog on government and society. Only the publisher is injured by subsequent punishment for illegal publication; by contrast, a prior restraint blocks the public's access to information.

Nevertheless, the Supreme Court has continued to hold open the possibility that in some extreme, yet to be encountered, circumstances, prior restraints on the press might be constitutionally valid.[58] This open possibility stands as an invitation to trial judges to enjoin the press despite the overwhelming odds that the gag order is unconstitutional. As reporter Larry Dickinson found out, such orders pose serious problems for the press. The remainder of this note seeks a solution to Dickinson's problem.

III. The Collateral Bar Rule: A Judicial Tool for Compelling Respect for Its Decision-Making Prerogative

A. Rationale and History of the Rule

Judges have long been jealous of their prerogative to declare the law. In *Marbury v. Madison*,[59] Chief Justice Marshall declared: "It is emphatically the province and duty of the judicial department to say what the law is."[60] The Supreme Court has held that the power to punish for contempt is inherent in the judicial power.[61]

---

57. 427 U.S. at 589-90 (Brennan, J., concurring) (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970)). *But see* Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1976). Murphy argues that subsequent punishment may as effectively discourage protected speech and publication as prior restraint and urges that the courts respond to the potential "inhibitive effects" of the sanction, rather than its form. *Id.* at 917.

58. See text accompanying notes 24-31 *supra*.

59. 5 U.S. (1 Cranch) 137 (1803) (establishing the principle of judicial review of legislation).

60. *Id.* at 177.

61. Shillitani v. United States, 384 U.S. 364, 370 (1966); Fisher v. Pace, 336 U.S. 155, 159 (1949); Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42, 65 (1924). A recent series of California cases held that a California "newsmen's shield" statute, designed to protect confidentiality of news sources, could not preclude judges from holding in contempt reporters who refused court orders to name their sources for court-related stories. Rosato v. Superior Court, 51 Cal. App. 3d 190, 218-26, 124

Without the contempt power, the Court has said, judges could not command obedience and respect for their rulings: "[T]he power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary. . . . For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded . . . ."[62] As a corollary to the decision-making prerogative, the Supreme Court has declared that the judiciary has inherent power to preserve in pending cases its ability to render meaningful and effective judgments. Thus, the general rule is that a court's orders must be obeyed even though they may be subject to serious question until such time as the order is stayed or is reversed on appeal. Even subsequent determination that an order was invalid will not excuse disobedience while it was in effect. This is the collateral bar rule, discussed above in connection with the *Dickinson* case.[63] The policy behind the rule is that when a controversy comes before the courts, it is exclusively the prerogative of the judiciary to declare the law and to implement a solution. The collateral bar rule deters parties from imposing their own solutions during the time period required for judicial decision making.[64]

The need for such a rule was clearly demonstrated in *United States v. Shipp*.[65] The Supreme Court, in an original action, cited Shipp, the sheriff of Chattanooga, Tennessee, for contempt for violating the Court's order to maintain custody of a convicted rapist pending the Court's decision on the prisoner's petition for a writ of habeas corpus. The contempt citation alleged that Shipp had conspired and complied with a lynch mob that killed the prisoner before the Supreme Court could rule on the petition.[66] Shipp de-

---

Cal. Rptr. 427, 446-51 (1975), *cert. denied*, 96 S. Ct. 3200 (1976); Farr v. Superior Court, 22 Cal. App. 3d 60, 68-71, 99 Cal. Rptr. 342, 347-49 (1971), *cert. denied*, 409 U.S. 1011 (1972); *cf.* Branzburg v. Hayes, 408 U.S. 665 (1972).

62. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). The contempt power includes authority to punish individuals for completed violations of past court orders (criminal contempt), and to compel a reluctant party to comply with an existing court order or to recompense a litigant for the damage caused by another party's contempt (civil contempts). *See* United States v. United Mine Workers, 330 U.S. 258, 302-04 (1947).

63. See notes 1-2 *supra*.

64. *See* Bickel, *Civil Disobedience and the Duty to Obey*, 8 GONZ. L. REV. 199, 212-13 (1973).

65. 203 U.S. 563 (1906).

66. The prisoner was Ed Johnson, a black man who had been convicted on February 11, 1906, by a Chattanooga jury of the rape of a white woman. While awaiting his death sentence, Johnson sought a writ of habeas corpus on the grounds, *inter alia*, that blacks had been systematically excluded from the grand and petit juries and that the threat of mob violence had deterred his counsel from appealing the case or seeking a change of venue or retrial. The writ was denied by the United States Circuit Court, but on March 19, the day before Johnson's scheduled execution, the Supreme Court granted an appeal

murred to the contempt citation, arguing that the Court had lacked jurisdiction to order the prisoner maintained in custody because it lacked jurisdiction to issue the writ. The Court acknowledged the question of its jurisdiction over the petition, but declared that it was the Court's place—not Shipp's—to determine the question. Pending this jurisdictional determination, the Court ruled, it had authority to make orders to preserve the status quo, and Shipp was bound to obey these orders:

> [T]his court alone . . . necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition . . . . There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed.[67]

Because his conspiracy deprived the Court of its chance meaningfully to decide the case, Shipp was cited for contempt.[68] The court punished the sheriff's disrespect for the system of legal decision making, not any mistake in his legal analysis.

The leading modern cases in which the Court has invoked the collateral bar rule to uphold contempt convictions are *United States v. United Mine Workers*[69] and *Walker v. Birmingham*.[70] In *United Mine Workers*, the Court upheld the criminal contempt convictions of the union and its president, John L. Lewis, after the union disobeyed a federal judge's injunction and struck government-operated coal mines. Lewis and the union argued that the injunction was void under section 4 of the Norris-La Guardia Act.[71] But a Court majority said that this was immaterial; by a complicated split vote the Court invoked the collateral bar rule *as a matter of federal law*,[72] and upheld the criminal contempt convictions: "Violations of an order are punishable as

---

and stayed the execution. That night a mob invaded the jail, overwhelmed the sole night watchman, and lynched Johnson. In citing Shipp for contempt, the Court pointed to the lack of precautions against the mob as indicative of Shipp's complicity in the lynching. Johnson's petition for habeas corpus was ultimately dismissed as moot in Johnson v. Tennessee, 214 U.S. 485 (1909).

67. 203 U.S. at 573 (citation omitted).

68. After reviewing the evidence, the Court held Shipp guilty of contempt in United States v. Shipp, 214 U.S. 386 (1909).

69. 330 U.S. 258 (1947).

70. 388 U.S. 307 (1967).

71. 29 U.S.C. § 104 (1970) (declaring that federal courts lack jurisdiction to enjoin strikes).

72. 330 U.S. at 292-95; *see* Maness v. Meyers, 419 U.S. 449, 459-60 (1975); Walker v. Birmingham, 388 U.S. 307, 314 & n.5 (1967). Both cases say in dicta that the collateral bar rule is the rule of law followed in the federal courts.

criminal contempt even though the order is set aside on appeal . . . ."[73] In *Walker*, the Court upheld the criminal contempt convictions of the Rev. Martin Luther King, Jr. and a group of Birmingham, Alabama, ministers who had led Good Friday and Easter Sunday civil rights marches in violation of an antidemonstration injunction. On appeal from their state court convictions, the ministers argued that the ex parte injunction was invalid under the First Amendment. Invoking the collateral bar rule, the Alabama Supreme Court upheld the contempt convictions without considering the validity of the underlying injunction. On certiorari, the Court acknowledged that there were serious constitutional questions about the validity of the injunction,[74] but the Court approved the collateral bar rule and upheld the convictions:

> [I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were free to ignore all the procedures of the law and carry their battle to the streets.[75]

---

73. 330 U.S. at 294. The Court was split with different combinations of five justices voting to uphold the civil and the criminal contempt convictions. Chief Justice Vinson's opinion for the Court, joined by Justices Reed, Burton, Black, and Douglas, held that the injunction was valid because the Norris-La Guardia Act did not apply to the government as an employer; hence, the citation for civil contempt was a proper method to coerce obedience to the order. *Id.* at 301-05. As an alternative ground for upholding the criminal contempt convictions, the opinion for the Court invoked the collateral bar rule. *Id.* at 289-94. Justices Black and Douglas dissented from this part of the opinion, arguing that criminal contempt, under the circumstances, was an excessive use of judicial force. *Id.* at 332 (Black and Douglas, JJ., concurring in part and dissenting in part). Justices Jackson and Frankfurter, in separate concurring opinions, argued that the injunction was prohibited by section 4 of the Norris-La Guardia Act, but they invoked the collateral bar rule as the sole ground for upholding the contempt convictions. *Id.* at 307 (Jackson, J., concurring); *id.* (Frankfurter, J., concurring). Justices Murphy and Rutledge dissented completely. *Id.* at 335 (Murphy, J., dissenting); *id.* at 342 (Rutledge, J., dissenting). For a thorough analysis of this complicated split vote, see Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409, 420-23, 436-37 (1947) [hereinafter cited as Watt].

74. 388 U.S. at 316-17. Indeed, in Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), a related case involving the same litigants, the Court held unconstitutional the municipal parade licensing statute upon which the injunction was based.

75. 388 U.S. at 320-21. The narrow holding of *Walker* is that a state court's invocation of the collateral bar rule is not unconstitutional. *Id.* at 315; *accord*, Howat v. Kansas, 258 U.S. 181, 189-90 (1922). *But see In re* Green, 369 U.S. 689, 692-93 (1962), which held that a state court's invocation of the collateral bar rule violated due process when the court issued the underlying strike injunction ex parte, without giving the defendant an opportunity to establish that the action was preempted by the National Labor Relations Board. The Court has held that the Constitution does not *require* the states to apply the collateral bar rule. In Donovan v. City of Dallas, 377 U.S. 408, 414 (1964), the Court held an injunction invalid and remanded the case to the state court for a decision whether to invoke the collateral bar rule. On remand, the Texas Court of Civil Appeals reversed the contempt conviction without discussing the collateral bar rule. Dallas v. Brown, 384 S.W.2d 724, 725 (Tex. Civ. App. 1964).

The collateral bar rule might be most needed precisely in those cases involving parties in exalted stations and with righteous motives. Labor and civil rights leaders, public servants, and indeed news reporters, tend to be self-righteous and self-confident in pursuit of their social goals. In general they are confident that their views will prevail. In deciding whether or not to obey a court injunction, if the only compulsion were the threat of punishment if they did not prevail upon appeal, such persons might be inclined to disobey and take their chances on appeal. Such disregard of a court's order can mean, as it did in *Shipp*, that the courts lose their ability effectively to decide the case. For example, when the press publishes an enjoined story pending appeal, the cat is let out of the bag; a subsequent appellate decision that the injunction was valid cannot recall the effects of publication. The function of the collateral bar rule is to discourage disobedience: the violator can expect punishment whether or not the injunction itself is held valid.

But the costs of the collateral bar rule are obviously high: if the injunction is held invalid upon appeal, the party who violated the order is punished for doing something that he had a right to do. In both *United Mine Workers* and *Walker*, the collateral bar rule was invoked by bare five-vote majorities, and strong dissents in both decisions pointed to the dangers of the rule. Dissenting in *Walker*, Justice Brennan called the rule "a devastatingly destructive weapon for infringement of freedoms."[76] And in *United Mine Workers*, Justice Rutledge foresaw the rule's potential for irrevocable destruction of constitutionally-protected rights:

> The force of such a rule, making the party act on pain of certain punishment regardless of the validity of the order violated or the court's jurisdiction to enter it as determined finally upon review, would be not only to compel submission. It would be also in practical effect for many cases to terminate the litigation, foreclosing the substantive rights involved without any possibility for their effective appellate review and determination.
>
> This would be true, for instance, wherever the substantive rights asserted or the opportunity for exercising them would vanish with obedience to the challenged order. The First Amendment liberties especially would be vulnerable to nullification by such control.[77]

This specter of permanent loss of rights is the mirror image of the *Shipp* problem. In *Shipp*, the sheriff's disobedience pending appeal foreclosed the possibility of a meaningful judicial decision. The collateral bar rule places the entire burden of the judicial time delay problem on the party whose perishable rights are at stake: in *Dickinson*, the newsmen's obedience pending appeal would have foreclosed the possibility of a meaningful appeal. In several reported cases of gag orders on the press, obedience pending appeal has caused permanent loss of the right to report timely news.[78]

---

76. 388 U.S. at 349 (Brennan, J., dissenting).
77. 330 U.S. at 351-52 (Rutledge, J., dissenting) (citation omitted).
78. See notes 40-42 and accompanying text *supra*.

The commentators have generally criticized the collateral bar rule; one critic has called it a judicial assertion of "divine right."[79] But the state and the lower federal courts appear in general to follow the rule. Several courts have upheld contempt convictions despite the invalidity of the underlying injunctions;[80] more commonly, the appellate courts have simply refused to consider collateral attacks on the injunctions.[81] The California Supreme Court has explicitly rejected the collateral bar rule,[82] but no other state or federal court has followed California's lead. There are exceptions to the rule, but they have not been consistently applied; consequently, the law in this area is in a state of disarray.

B. The Exceptions to the Collateral Bar Rule: A Tangled Legal Thicket

1. Lack of Jurisdiction

The traditional exception to the collateral bar rule is that if the enjoining court lacked jurisdiction, an enjoined party is free to disregard the order. If the appellate courts accept the jurisdictional objection, the contempt conviction will not stand.[83] The problem here is that the courts have not consis-

79. Watt, *supra* note 73, at 448; *see* Comment, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970). *But see* Tefft, *Neither Above the Law Nor Below It*, 1967 SUP. CT. REV. 181, 190-92 (advocating a need for the rule).

80. *See, e.g.*, Mays v. Harris, 523 F.2d 1258, 1259 (4th Cir. 1975) (injunction against driving without driver's license); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) (see notes 1-2 and accompanying text *supra*); Rambo v. Fraczkowski, 350 A.2d 774 (Del. Super. 1975) (antistrike injunction); Hayes v. Towles, 95 Idaho 208, 506 P.2d 105 (1973) (temporary restraining order prohibiting wasting of assets); County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970), *cert. denied*, 402 U.S. 929 (1971) (antistrike injunction); Marsh v. Maryland, 22 Md. App. 173, 322 A.2d 247 (1974) (order that appellant submit to psychiatric examination); Mead School Dist. v. Mead Educ. Ass'n, 85 Wash. 2d 278, 534 P.2d 561 (1975) (antistrike injunction).

81. *See, e.g.*, United States v. Partin, 524 F.2d 992, 999 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976) (antistrike injunction); Fields v. City of Fairfield, 273 Ala. 588, 143 So. 2d 177 (1962) (injunction against political rally); Sandstrom v. State, 309 So. 2d 17, 20-21 (Fla. App. 1975) (attorney ordered to wear tie while in court); Hawaii Pub. Employment Relations Bd. v. Hawaii State Teachers Ass'n, 55 Hawaii 386, 520 P.2d 422 (1974) (antistrike injunction); Houston v. Hennessey, 534 S.W.2d 52, 56 (Mo. App. 1975) (injunction on showing of movie "Deep Throat"); State *in re* Frankel, 119 N.J. Super. 579, 293 A.2d 196 (1972), *cert. denied*, 409 U.S. 1125 (1973) (attorney ordered to serve as pro bono counsel to an indigent); Eastern Associated Coal Corp. v. Doe, 220 S.E.2d 672 (W.Va. 1975) (antistrike injunction).

82. *In re* Berry, 68 Cal. 2d 137, 147, 436 P.2d 273, 280, 65 Cal. Rptr. 273, 280 (1968) (*United Mine Workers* doctrine "is not the law in California").

83. *In re* Burrus, 136 U.S. 586 (1890) (reversing contempt conviction because federal district court lacked subject matter jurisdiction over child custody suit); *In re* Ayers, 123 U.S. 443, 507-08 (1887) (reversing contempt conviction because the federal district court, under the Eleventh Amendment, lacked subject matter jurisdiction over action by English citizens against the State of Virginia); United States v. Thompson, 319 F.2d 665

tently defined jurisdiction.[84]

In a handful of old cases, the Supreme Court defined jurisdiction to include the power, or legal authority, to issue an injunction. For example, in *Ex parte Fisk*,[85] the Court held that although the trial judge had both subject matter and personal jurisdiction, he lacked the "power" to order a party to submit to a pretrial deposition because the law of the day made deposition testimony inadmissible in federal court proceedings. The contemnor in *Fisk* therefore was released by the Court on a writ of habeas corpus.[86] The Court in *In re Sawyer*[87] granted a writ of habeas corpus to the city councilmen of Lincoln, Nebraska, who had been held in contempt for violating a federal judge's order not to conduct proceedings to remove a local police court magistrate from office. The Supreme Court held that removal from office was an action "at law" and that consequently the federal judge lacked "equity jurisdiction" to issue the order.[88] A similarly broad definition of lack of jurisdiction—interpreted to include lack of precedent for an injunction—was the basis for appellate reversals of newsmen's contempt convictions in several old press injunction cases as well as a recent one.[89]

But in *United Mine Workers* the Supreme Court apparently narrowed its definition of "jurisdiction" to include only subject matter and in personam jurisdiction:

(2nd Cir. 1965) (reversing contempt conviction because court lacked jurisdiction to issue grand jury summons to foreign resident). In criminal trials, it is open to debate whether a court has in personam jurisdiction to enjoin publication by a news organization, not a party to the criminal action, if the publication does not voluntarily submit to jurisdiction. The Supreme Court discussed but did not resolve this issue in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 566 nn.9-10 (1976). *See* Rendleman, *supra* note 3, at 149-55.

84. *See* Cox, *supra* note 18; Annot., 12 A.L.R.2d 1059, 1107-15 (1950).

85. 113 U.S. 713 (1885).

86. *Accord*, *Ex parte* Rowland, 104 U.S. 604, 616-18 (1882), where on writ of habeas corpus the Court released county commissioners who had been held in contempt for disobeying a trial court's order to cause taxes to be collected on the ground that the trial court lacked "jurisdiction"—legal precedent—to order an officeholder to perform a task beyond the bounds of his office.

87. 124 U.S. 200 (1888).

88. *Id.* at 212, 221-22; *cf.* Commonwealth v. Ryan, 459 Pa. 148, 157, 327 A.2d 351, 355-56 (1974) (contempt conviction reversed on ground that the trial court lacked "equity jurisdiction" to enjoin a teachers' strike not yet in progress when the order was issued).

89. Wood v. Goodson, 253 Ark. 196, 203, 485 S.W.2d 213, 217 (1972); State *ex rel.* Liversey v. Judge, 34 La. Ann. 741 (1882); State v. Morrow, 57 Ohio App. 30, 11 N.E.2d 273 (1937); *Ex parte* McCormick, 129 Tex. Crim. 457, 88 S.W.2d 104 (1935); *Ex parte* Foster, 44 Tex. Crim. 423, 71 S.W. 593 (1903); *cf.* Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950) (court's standing orders). The only discussion in these cases of the collateral bar rule was in *Liversey*, in which a dissenting judge argued that the contempt conviction should be upheld despite the invalidity of the injunction. 34 La. Ann. at 747-50 (Bermudez, C.J., dissenting).

> [A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. . . . Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, or though the basic action has become moot.[90]

Furthermore, when a court's subject matter jurisdiction is in dispute, as it was in *United Mine Workers*, a court has jurisdiction to determine its own jurisdiction. During this period of "bootstrap jurisdiction," the judge can issue injunctions to preserve the status quo.[91]

2. *"Transparent" Invalidity*

While cutting back on its definition of jurisdiction in *United Mine Workers* and *Walker*, the Court in dicta in those cases suggested a second exception to the collateral bar rule: an injunction may be disregarded and its validity collaterally attacked if the order is "transparently invalid"[92] or "frivolous and not substantial."[93]

---

90. 330 U.S. at 293-94 (citations omitted); *accord*, Maness v. Meyers, 419 U.S. 449, 459 (1975) (dicta); Walker v. Birmingham, 388 U.S. 307, 314-15 (1967); Howat v. Kansas, 258 U.S. 181, 189-90 (1922). *But see In re* Berry, 68 Cal. 2d 137, 147, 436 P.2d 273, 280, 65 Cal. Rptr. 273, 280 (1968) (continuing to define lack of jurisdiction broadly to include any acts in excess of "the defined power of a court in any instance"). Authority is virtually unanimous, however, that civil contempt convictions cannot stand when the underlying injunction is invalid. This is because the purpose of civil contempt is not to vindicate the court's authority, but rather to compel obedience or to recompense other parties for damages. *See, e.g.*, United States v. United Mine Workers, 330 U.S. 258, 294-95 (1947); United States Steel Corp. v. United Mine Workers, 519 F.2d 1236, 1249 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 3221 (1976); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. Ry., 420 F.2d 72 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1024 (1970). *But see* Hawaii Pub. Employment Relations Bd. v. Hawaii State Teachers Ass'n, 55 Hawaii 386, 520 P.2d 422 (1974).

91. United States v. United Mine Workers, 330 U.S. 258, 290 (1947); United States v. Shipp, 203 U.S. 563, 573 (1906). *See generally* C. WRIGHT, FEDERAL COURTS § 16, at 59-62 (3d ed. 1976); Boskey and Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940); Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003 (1967).

92. Walker v. Birmingham, 388 U.S. 307, 315 (1967).

93. United States v. United Mine Workers, 330 U.S. 258, 293 (1947). Justice Frankfurter phrased the exception in yet another way: "Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. . . . To be sure, an obvious limitation upon a court cannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld." *Id.* at 309-10 (Frankfurter, J., concurring). An antistrike injunction issued in a dispute involving private parties would be an example of a "frivolous" order according to Justice Frankfurter. *Id.* at 310.

Assuming that "transparent invalidity" was intended as more than makeweight,[94] the problem remains that the exception provides little guidance to trial courts or to litigants. The Court has not yet explained how to distinguish a "transparently" invalid injunction from a garden variety invalid injunction.[95] It is impossible in any given case to predict what the appellate courts will find to be "transparently" invalid. The supreme courts of Arizona and Washington appear to have followed this exception in prohibiting contempt proceedings and reversing convictions of reporters who violated injunctions on publication of news gathered in open court.[96] And in *Nebraska Press Association*, the United States Supreme Court ruled that all injunctions on publication of open-court news are "clearly invalid."[97] But citing many of the same precedents that were cited by the Supreme Court and by the Washington and Arizona courts, the Fifth Circuit Court of Appeals in *Dickinson* did not find a gag order on open-court news to have been "transparently invalid."[98]

Three concurring justices in *Nebraska Press Association* would completely ban all injunctions on publication of news of the courts: "Settled

94. The exception was announced as a negative in both *Walker* and *United Mine Workers*: the Court said that the injunctions in those cases were not "frivolous" or "transparently invalid," and hence had to be obeyed pending appeal. Since *Walker*, the Court has said nothing directly about this exception. There is an opaque hint in *Nebraska Press Ass'n*, however, that the Court acknowledges the exception. See note 97 and accompanying text *infra*. This exception may represent simply a partial revival of the *Fisk* principle that lack of power to issue an order is equivalent to lack of jurisdiction (see notes 85-86 and accompanying text *supra*), although the principle is narrowed to apply only when the order is blatantly illegal.

95. The Court in *United Mine Workers* indicated that apparent constitutional defect does not make for "transparent" invalidity. 330 U.S. at 293-94; see text accompanying note 90 *supra*. In his opinion for the Court in *United Mine Workers*, Chief Justice Vinson said that the injunction was not "frivolous" because there was no clear, recent legal precedent on the question and because the legislative history was unclear. *Id.* at 293. This suggests that if there *is* clear and recent precedent, or if the legislative history is clear, a contrary injunction can be considered "transparently invalid." The Court in *Nebraska Press Ass'n* said that an injunction upon publication of information gathered in open court was "clearly invalid" (427 U.S. at 570), but because a contempt citation was not involved, it is not certain what this means with regard to the collateral bar rule.

96. Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966) ("too plain for equivocation"); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 74, 483 P.2d 608, 611, *cert. denied*, 404 U.S. 939 (1971) ("patently invalid").

97. The opinion for the Court said: "To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it *plainly violated settled principles*: 'there is nothing that proscribes the press from reporting events that transpire in the courtroom.' . . . [T]o the extent that this order restrained publication of such material, it is *clearly invalid*." 427 U.S. at 568-70 (citations omitted) (emphasis added); *accord*, Oklahoma Publishing Co. v. District Court, 97 S. Ct. 1045 (1977).

98. 465 F.2d at 509.

case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system . . . .''[99] But even if the Supreme Court were to announce at its next opportunity that all injunctions on the news of the courts are ''transparently invalid,'' the press would still be subject to uncertainty over injunctions against other types of news stories. In sum, the ''transparently invalid'' exception is unsatisfactory because of its uncertainty; an injunction cannot safely be treated as ''transparently invalid'' until the Supreme Court says it is.

3. Judicial Discretion

Mindful of the harshness of the collateral bar rule, a few courts have exercised their equitable discretion in failing to hold parties in contempt for violating invalid injunctions. This is apparently what happened in five reported cases in which reporters who violated invalid gag orders were not cited for contempt.[100] Additionally, two federal courts of appeals have overturned contempt convictions and remanded the cases for reconsideration by the district courts after invalidating the underlying injunctions.[101] In both cases, the appellate courts acknowledged the collateral bar rule as federal law, but said that the trial judges nevertheless had equitable discretion to decide that, in view of the invalidity of the injunctions, there had been no contempt.[102]

But this means of avoiding the collateral bar rule is unsatisfactory—like the lack of jurisdiction and ''transparently invalid'' exceptions—because it has absolutely no predictive value. In all three instances, the litigants are at the mercy of judicial discretion and arbitrary, after the fact definitions of vague concepts.

---

99. 427 U.S. at 588 (Brennan, J., concurring); see note 26 *supra*.

100. See note 44 *supra*.

101. United States v. Dickinson, 465 F.2d 496, 513-14 (5th Cir. 1972); Dunn v. United States, 388 F.2d 511, 513 (10th Cir. 1968). The courts in both *Dickinson* and *Dunn* cited Donovan v. City of Dallas, 377 U.S. 408, 414 (1964), for the proposition that the subsequent holding of invalidity ''tainted'' the contempt conviction and that the issuing judge ought to have the opportunity to reconsider the citation. *Dickinson* and *Dunn* are the only cases ever to cite *Donovan* for this proposition, and the latter case is best understood as a declaration that the Constitution does not require the states to adopt the collateral bar rule as state law. See note 75 *supra*.

102. On remand, the trial judge in *Dickinson* invoked the collateral bar rule and reinstated the contempt convictions, and these were upheld on appeal. See note 2 *supra*. On remand in *Dunn* the district court judge, in an unreported decision, dismissed the contempt citation. *See* Hyde Constr. Co. v. Koehring Co., 387 F. Supp. 702, 710 (S.D. Miss. 1974).

C. The "Delay or Frustration" Exception

A due process-like exception to the collateral bar rule was suggested in dicta by the Court in *Walker*:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with *delay or frustration* of their constitutional claims.[103]

The injunction in *Walker* had been served on the petitioners only a day before their scheduled Good Friday demonstration. The Court emphasized that the petitioners did not attempt to appeal before marching. In contrast, the Court pointed to *In re Green*,[104] a strike injunction case in which the Court nullified a contempt conviction: "The petitioner in *Green*, unlike the petitioners here, had attempted to challenge the validity of the injunction *before* violating it by promptly applying to the issuing court for an order vacating the injunction."[105] Although it has never expressly invoked this "delay or frustration" exception to the collateral bar rule, the Court has explained that the exception applies when the enjoined party has no opportunity for appeal before he must act: "Our holding that the claims . . . sought to be asserted [in *Walker*] were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage."[106]

---

103. 388 U.S. at 318 (emphasis added). Like the "transparently invalid" exception, the "delay or frustration" exception appeared as a negative: the *Walker* petitioners had not met delay in appeal (because they had not appealed), so they were bound to obey the order. The dictum suggests that the prospect of either delay *or* frustration of a right may exempt a party from the collateral bar rule, but the Court distinguished the terms without defining them. Without reference to the *Walker* dictum, an entirely separate line of cases suggests that "frustration" means irrevocable loss of a right. See text accompanying notes 108-10 *infra*. "Delay," then, must designate something less drastic than irrevocable loss, but more serious than the normal time lag inherent in all judicial decision making. Given the context of *Walker*, "delay" must mean delay that without regard to the number of days or weeks, *seriously impairs the exercise of a protected right*: for example, delay tantamount to the forced postponement of a planned holiday political demonstration. Had the petitioners in *Walker* obeyed the injunction and as a consequence missed their planned Easter weekend demonstrations, they would have been able to march later—but the later demonstration would have lacked the special significance and impact of the holiday demonstrations. Because the function of the press is to inform the public of *current* events, even the slightest delay in publishing the news can amount to the kind of delay contemplated by the *Walker* dictum. See notes 52-54 and accompanying text *supra*.

104. 369 U.S. 689 (1962).

105. 388 U.S. at 315 n.6. This is a gloss on *Green*, not the reason stated for the holding in *Green* itself. See note 75 *supra*.

106. United States v. Ryan, 402 U.S. 530, 532 n.4 (1971). The Court held that a trial court's denial of a motion to quash a subpoena to produce documents was not an appealable order because the party could refuse to obey and then raise the invalidity of the subpoena in defense to a contempt citation. See cases cited at notes 108-10 and accompanying text *infra*.

The policy behind this "delay or frustration" exception seems clear: the law should not force a citizen to choose between irrevocable forfeiture of a constitutional right on the one hand and a certain contempt conviction on the other. That is to say, a citizen should not have to buy his freedom by giving up his right to constitutional protection. The "delay or frustration" exception tacitly recognizes that there may be certain basic rights that citizens will choose to defend, even on pain of certain punishment. In such cases the threat of a contempt citation does not serve the collateral bar rule's purpose of compelling obedience. It is true that a judge's basic job is to decide cases, and it is also true that the collateral bar rule is designed to preserve cases so that the courts can make meaningful decisions;[107] but in a larger sense, the duty of the judiciary is to dispense justice. In the "delay or frustration" dictum in *Walker* the Court seems to recognize that when important perishable rights are at stake and the courts cannot act quickly enough, justice is best served by allowing parties to act at their own risk—subject to punishment if they are wrong—rather than by forcing them irrevocably to forfeit their claims.

An analogy to the "delay or frustration" exception appears in a group of cases in which witnesses cited for contempt for refusing to testify or produce evidence successfully challenged their convictions on the grounds that the orders violated their First, Fourth, or Fifth Amendment rights.[108] In *Maness v. Meyers*,[109] the Court reversed a contempt conviction, explaining:

> Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. . . . When a court during trial orders a witness to reveal information, however, a different situation may be presented. *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.*[110]

---

107. See notes 63-68 and accompanying text *supra*.

108. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958) (order to produce organization's membership lists held to violate First Amendment freedom of association); Hoffman v. United States, 341 U.S. 479, 485-87 (1951) (holding petitioner had Fifth Amendment right to disobey court's order to testify); Cobbledick v. United States, 309 U.S. 323, 327 (1940) (subpoena duces tecum ordering grand jury appearance held to be an unappealable interlocutory order whose constitutionality could be challenged in defense to a contempt citation); Alexander v. United States, 201 U.S. 117, 121 (1906) (court order directing appearance before a special examiner held to be an unappealable order whose unconstitutionality could be asserted in defense to contempt citation); *cf.* Gelbard v. United States, 408 U.S. 41 (1972) (order to testify before grand jury held invalid under 18 U.S.C. § 2515 (1970)).

109. 419 U.S. 449 (1975).

110. *Id.* at 458-61 (emphasis added). The injunction in *Maness* was mandatory, whereas press injunctions are prohibitory, designed to maintain the status quo. The Court's language, however, does not distinguish between mandatory and prohibitory court orders; rather, it indicates that whenever obedience to an injunction risks permanent loss

Thus, without using due process language, the Court in *Maness* and in the *Walker* "delay or frustration" dictum has effectively recognized a due process-like exception to the collateral bar rule: when judicial procedures do not or cannot provide opportunity for appeal before the enjoined party must either disobey or surrender his claimed right, the contemnor must be allowed to attack collaterally the validity of the injunction.[111]

This due process exception to the collateral bar rule should be far less arbitrary than the exceptions for lack of jurisdiction, transparent invalidity, and judicial discretion. The only questions are: (1) if the injunction is appealable, did the contemnor make a good faith effort to appeal without receiving a final appellate answer before he acted; and (2) did he need to act when he did in order to avoid loss of his right?[112] If the answer to both questions is yes, the collateral bar rule should not apply.

IV. Application of the "Delay or Frustration" Exception to Cases of Direct Injunctions on the Press

Freedom of the press is a perishable right; timing is crucial to its meaningful exercise.[113] Unlike the Fifth Amendment privilege cases in which "appellate courts cannot always '*unring* the bell' once the information has been released,"[114] in news injunction cases the appellate courts are unable retroactively to *ring* the bell once the news has been suppressed.

In his opinion for the Court in *Nebraska Press Association*, Chief Justice Burger acknowledged that an injunction on the press may cause irrevocable and permanent loss: "A prior restraint . . . by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."[115] In those cases where appellate review cannot be completed before an enjoined news story loses its news value, press freedom

of important constitutional rights, the enjoined party may violate the order at his own risk and may defend a contempt citation by challenging the validity of the order.

111. In a separate class of cases the courts have reversed contempt convictions because the contempt proceedings themselves lacked notice, hearing, or other due process requisites. *See* Peabody Coal Co. v. Locals 1734, 1508, & 1548, UMW, 484 F.2d 78 (6th Cir. 1973) (union's counsel not given sufficient time to prepare for contempt hearing); Emery Air Freight Corp. v. Teamsters Local 295, 449 F.2d 586 (2nd Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972) (ambiguous procedural setting and inadequate record); Coolbeth v. Berberian, 354 A.2d 120 (R.I. 1976) (lack of notice to defendant).

112. The burden of proof should be upon the judge who issued the injunction to prove beyond a reasonable doubt that the news value of the enjoined story would not have been impaired or lost if the press had delayed publication pending appeal. See notes 135-36 and accompanying text *infra*.

113. See cases cited at notes 52-54 and accompanying text *supra*.

114. Maness.v. Meyers, 419 U.S. 449, 460 (1975) (emphasis added).

115. 427 U.S. at 559.

will be permanently "frozen" if the story is not published. In this situation *Maness* and the *Walker* "delay or frustration" dictum require an exception to the collateral bar rule for the press.[116]

A completely separate line of precedent also compels a due process exception for the press. The Supreme Court mandated in *Freedman v. Maryland*[117] that prior restraints may be imposed only under "procedural safeguards designed to obviate the dangers of a censorship system."[118] These safeguards must include certain provisions:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a *prompt final judicial determination* must be assured.[119]

These procedural safeguards have been required by the Court in cases involving movie censorship,[120] mail censorship,[121] issuance of use permits for municipal facilities,[122] customs seizures,[123] and injunctions against political demonstrations.[124] A principal purpose of these judicial safeguards, accord-

116. A major flaw in *Dickinson* was the failure of the Fifth Circuit Court of Appeals to recognize that freedom of the press can be lost or frustrated if not exercised at the appropriate time. *See* 465 F.2d at 511-12.

117. 380 U.S. 51 (1965) (holding that Maryland's movie censorship system imposed unconstitutional prior restraints on speech).

118. *Id.* at 58; *accord*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-61 (1975) (holding that the procedure for issuing permits to use a municipal auditorium violated due process because there was no provision for prompt judicial review, and the burden of seeking judicial review was upon the enjoined party); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180 U (1968) (holding that an ex parte injunction of a political rally was invalid, the judge having made no showing that prior notice and hearing were impossible). *See generally* Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518 (1970) [hereinafter cited as Monaghan]. Professor Monaghan points out that the Court has not invoked concepts of Fifth or Fourteenth Amendment due process but has looked instead to the First Amendment itself as the source of the procedural requirements for prior restraints. The inquiry in each case is: "does the procedure show 'the necessary sensitivity to freedom of expression?' " *Id.* at 519 (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

119. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975) (partial emphasis added); *accord*, Freedman v. Maryland, 380 U.S. 51, 58 (1965). Thus, even when temporary prior restraints may be imposed prior to judicial review, there must be "prompt" final review. The import of *Walker*'s "delay or frustration" dictum is that judicial review cannot be considered "prompt" when it comes only after fundamental rights have been damaged or forfeited.

120. Teitel Film Corp. v. Cusak, 390 U.S. 139 (1968); Freedman v. Maryland, 380 U.S. 51 (1965).

121. Blount v. Rizzi, 400 U.S. 410 (1971).

122. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

123. United States v. Thirty-seven Photographs, 402 U.S. 363 (1971).

124. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968).

ing to the Court, is to "insure that a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship."[125] For example, in *Freedman*, a movie censorship case, the Court noted the danger that final judicial determination might not come until after "the most propitious opportunity for exhibition" has passed.[126] As discussed above, in cases of injunctions on news publication the danger is great that delay pending appellate review will have the effect of censorship.[127] And it is clear that press freedom needs and warrants at least as much procedural protection from censorship as the rights, for example, to exhibit sexy movies or to conduct political demonstrations.[128]

Appellate review of an injunction on news publication cannot be termed "prompt," under *Freedman*, if review does not come before the enjoined story loses its news value. The *Walker* "delay or frustration" dictum recognized this fact in the case of a political demonstration, and the reasoning applies at least equally to gag orders on the press. The "final judicial determination" required by *Freedman* must mean, at least in gag order cases, an ultimate decision by the United States Supreme Court—either an opinion or a denial of certiorari.[129]

125. United States v. Thirty-seven Photographs, 402 U.S. 363, 367 (1971).

126. 380 U.S. at 61.

127. See notes 40-42 and accompanying text *supra*.

128. *See* Monaghan, *supra* note 118, at 519, 524. The American Bar Association has recommended procedural requirements for injunctions on news reports about the courts and the judiciary. *See* Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 60, 63-64 (1976). The recommended procedures, including a strong recommendation that judges not directly enjoin news publication (*id.* at 64), were adopted by the ABA House of Delegates at its August 1976 annual meeting. Comment, *Applying Due Process to Gag Rules and Orders*, 55 NEB. L. REV. 427 (1976). Additionally, at least two appellate courts have imposed due process requirements upon prior restraints on the press. In United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974), the court invalidated an orally issued injunction against the press. By its supervisory authority over the third circuit courts, the circuit court of appeals imposed requirements of notice, hearing, and written orders upon all future injunctions on the press. In New York Times Co. v. Starkey, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (1976), the court held that the First Amendment requires procedures for prior restraints similar to those recommended by the ABA Advisory Committee.

129. The need for full appellate review is at least as great in cases of gag orders on the press as in political demonstration or strike injunctions. News publication is a "pure" First Amendment right, whereas strikes and demonstrations have elements of unprotected conduct. *Cf.* United States v. O'Brien, 391 U.S. 367, 376 (1968) (upholding conviction for draft card burning). Perhaps more importantly, there is a greater chance in press injunction cases than in strike and demonstration cases that the injunction will be held invalid upon appeal. The Supreme Court on occasion has upheld the validity of prior restraints on specific parades and political demonstrations. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding convictions of student demonstrators for violating an "anti-noise" ordinance that placed reasonable time, place, and manner restrictions upon expressive activity). The Court has also upheld the constitutionality of anti-

In applying this "delay or frustration" exception, a critical question is how the courts should determine whether the enjoined news item had to be published immediately in order to preserve its news value. The need to maintain respect for judicial decision-making authority is so great that the courts should not be bound by an editor's judgment that the story had to be reported without waiting for appeal.[130] Obviously, the press in every case will claim that the news cannot wait; without some sort of subsequent judicial review of this claim, the press would effectively be free from the collateral bar rule.[131] Notwithstanding the Supreme Court's repeated warnings that news judgments are to be made by editors rather than judges or legislators,[132] the Court in libel cases has been willing to second-guess editorial judgment;[133] and the interest in maintaining respect for judicial authority is at least as important as the interest in protecting citizens from

strike injunctions. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) (upholding Norris-La Guardia Act, 29 U.S.C. § 104 (1970), inapplicable when collective bargaining agreement has no-strike and binding grievance arbitration clauses); United States v. United Mine Workers, 330 U.S. 258 (1947) (see note 73 *supra*). By comparison, no direct news injunction on the press has ever been held valid either by the Supreme Court or by the appellate courts. See notes 22, 23 and accompanying text *supra*; *cf.* Goldberg v. Kelly, 397 U.S. 254, 264 n.12 (1970) (emphasizing the special need for judicial review of administrative decisions when courts had frequently overruled past administrative decisions).

130. See notes 65-68 and accompanying text *supra*.

131. *But see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481 (1970). Professor Blasi argues that the courts should not be able to second-guess a contempt defendant's own determination that his First Amendment right of free speech would have been irrevocably lost had he not taken part in a political demonstration, rather than waiting for appellate review of the injunction. *Id.* at 1571.

132. In *Nebraska Press Ass'n*, the Court said: "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." 427 U.S. at 560-61 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring)); *see* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973) (holding that broadcaster could not be forced to accept editorial advertising); Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (holding unconstitutional a state law forbidding election-day political editorials).

133. New York Times Co. v. Sullivan, 376 U.S. 254, 279-83 (1964), and Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 164 (1967) (Warren, C.J., concurring) together established a conditional privilege for the press in libel cases: a "public official" (*Sullivan*) or "public figure" (*Butts*) must prove "actual malice" in order to recover for libel by publication. Subsequent decisions confirmed what was implicit in these cases: the courts have the final say about who is a "public official" or "public figure." Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (rejecting the news magazine's characterization of prominent socialite as a "public figure" and vacating and remanding case to state courts for determination of whether magazine had been negligent in its news gathering);

defamation. By analogy, in the *Maness* line of Fifth Amendment privilege cases, the courts make their own determination of whether the testimony withheld by the witness would have tended to incriminate him.[134]

This is not to leave the press at the mercy of judicial fiat. In determining whether or not an enjoined story had to be published immediately the courts will not be left to their own discretion. Rather, due process places the burden of proof upon the judge issuing the injunction to prove beyond a reasonable doubt that delay pending review would not have impaired the news value of the story. This allocation of the burden of proof is required by Supreme Court decisions holding: (1) that when First Amendment rights are involved "the State bear[s] the burden of persuasion to show that the appellants engaged in criminal speech";[135] and (2) that in all criminal prosecutions, including those for contempt, the state must prove all elements of the crime beyond a reasonable doubt.[136] It is theoretically possible for a judge issuing an injunction to meet this heavy burden of proof, but because news judgment is so highly subjective, there will be room for reasonable doubt about

---

Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974) (rejecting magazine's characterization of attorney as a "public figure" and remanding case for determination whether magazine was "at fault"). In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), Justice Brennan's opinion announcing the decision of the Court held that the *New York Times* "actual malice" standard should apply even to private plaintiffs who were written about in connection with "matters of public or general concern." *Id.* at 44-45. Justice Brennan would have left it to the courts to determine what matters were of "public or general concern." *Id.* at 44 n.12. The four-justice plurality in *Gertz* criticized *Rosenbloom* for inviting judicial second-guessing of editorial judgments. 418 U.S. at 346. The same four-justice plurality, however, saw no problem with judicial second-guessing of editorial judgments about which persons are "public figures." *Id.* at 351-52.

134. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951).

135. Speiser v. Randall, 357 U.S. 513, 526 (1958). In *Speiser*, the Court held that a special California veterans' property tax exemption violated due process because the veterans, not the state, had the burden of proving that they did not advocate forceful overthrow of government. Placement of the burden of proof on the state is particularly needed when the distinction between protected and unprotected speech is subjective and unclear: "[W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position." *Id.* (citation omitted). The determination of precisely when a story's news value is lost or damaged is the sort of close, highly subjective question for which *Speiser* requires the state to carry the burden of proof. *See* Healy v. James, 408 U.S. 169, 184 (1972) (holding that in certification procedure for student organizations the burden of proof is upon university administration to show unfitness, not upon the students to show fitness); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 162-63 (1972) (dicta); *cf.* Freedman v. Maryland, 380 U.S. 51, 58 (1965) (in prior restraint cases censor has the burden of proof to show that particular speech is unprotected).

136. *See In re* Winship, 397 U.S. 358, 361-64 (1970).

virtually all news judgments. This burden of proof will be made yet more onerous by the fact that expert testimony about news value will have to come largely from newsmen, who will likely be unsympathetic toward the injunction.

Objection might be heard that this "delay or frustration" exception will swallow the collateral bar rule in press injunction cases, and that without the collateral bar rule effective prior restraints on the press will be impossible. In response, it must be emphasized that the exception will swallow the rule only when the press exhausts its appellate opportunities before publishing, and when delay pending appeal would impair or destroy the news value of a story.[137] Because most books and magazine articles lack the urgency of daily news there will usually be sufficient time before deadline for full appeal of injunctions on magazine and book publishers. Thus, injunctions on the daily press will be virtually the only cases in which the "delay or frustration" exception could swallow the collateral bar rule. Even here, editors cannot act irresponsibly because the courts will have the final say about whether immediate publication was necessary to save the news value of the enjoined story.

Conclusion

Much uncertainty today accompanies gag orders on the press. While editors can be reasonably certain that any given gag order will be held

137. Rendleman, *supra* note 3, at 161, argues to the contrary—that the press should not have to appeal an injunction before violating it because the daily deadline makes it impossible for the courts to act quickly enough and because appeal is a hollow formality. Rendleman's argument does not take into account that the courts can act almost immediately in an emergency. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Times-Picayune Publishing Co. v. Marullo, 334 So. 2d 426 (La. 1976) (Louisiana Supreme Court invalidated a press injunction on the same day it was issued); State *ex rel.* Beacon Journal Publishing Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976) (Ohio Supreme Court, meeting in emergency session on a state holiday, stayed a press injunction five days after it was issued and before it resulted in any delay in news coverage). Even when the courts do not or cannot respond immediately, the appeal is important as an indication of respect for the judicial process. See United States v. Schiavo, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974), for an example of the kind of news story and the kind of effort to obtain prior judicial review that will exempt the press from the collateral bar rule. In *Schiavo*, a Philadelphia newspaper was enjoined at 2 p.m. on a Friday from reporting that a perjury defendant then standing trial was also under indictment for murder. The paper immediately moved to vacte the order; this motion was denied two hours later, whereupon the paper immediately filed notice of appeal and moved for a stay in the United States District Court and the Third Circuit Court of Appeals. The district court denied the stay motion on that same Friday afternoon, and the paper printed the enjoined news item in its weekend editions. The circuit court granted a stay on the following Wednesday, and on that same day, the perjury jury returned its verdict. Almost ten months later, the court of appeals held that the injunction was invalid because it had been issued orally. The plurality opinion did not discuss the collateral bar rule, and the trial court apparently did not cite the reporters for contempt.

invalid upon appeal, they do not know, if they disobey an injunction pending appeal, whether they will be cited for contempt and, if so, whether the contempt citation will be sustained. Much of this uncertainty would be eliminated by the "delay or frustration" exception to the collateral bar rule. Although the courts will continue to have the final word on the law, this due process exception does not give the courts the broad discretion involved in the other exceptions to the collateral bar rule. As a result, the "chilling effect" resulting from uncertainty is virtually eliminated.

The "delay or frustration" exception is required by due process and is consistent with the policies underlying both the contempt power of the judiciary and the free press guarantee of the First Amendment. It is the only solution to the *Dickinson* problem that fairly balances the needs of both the press and the judiciary.[138] This exception to the collateral bar rule does not set the press above the law. Although the circumstances are rare—and as yet entirely theoretical—a news publisher might be subjected to prior restraints upon publication. If he violates a constitutionally valid prior restraint, he can properly be held in contempt of court. It is therefore not inconsistent with the First Amendment to require an enjoined editor or publisher to seek judicial review before he is free from the effects of the collateral bar rule.

Neither is it inconsistent with the policies underlying the judiciary's contempt power and the collateral bar rule to find no contempt if a publisher violates an injunction only after being frustrated in his efforts to obtain timely and complete judicial review. In *Walker*, the Supreme Court declared the purpose of the contempt power and the collateral bar rule to be preservation of respect for "the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[139] The Court in *Walker* and in *United Mine Workers* invoked the collateral bar rule to uphold the contempt convictions of defendants who disobeyed court orders without first making any effort to appeal. Such behavior is truly contempt of court because it denies the appellate courts any opportunity to decide the case. No disdain for legal processes is shown, however, by a publisher who makes every effort to

138. Chief Justice Burger's inflexible position requiring obedience until appellate reversal (note 15 *supra*) is inconsistent with due process. See notes 113-28 and accompanying text *supra*. The suggestion that injunctions against the press automatically be stayed pending appeal (note 16 *supra*) is unsatisfactory because it merely transfers the entire burden of the judicial delay problem from the press to the judiciary. If all news injunctions were automatically stayed pending appeal, the press would never be held in contempt for violations pending appeal, even if the injunction were upheld by the appellate courts. The third suggestion, that the collateral bar rule should never apply to press gag orders (note 17 *supra*) is unsatisfactory because it would not encourage the press to make an effort to appeal the injunction before violating it when appellate opportunities are available. This solution would needlessly deny the judiciary an opportunity to decide cases.

139. 388 U.S. at 321.

appeal an injunction before his deadline and who publishes in order to save the news value of a story.[140]

It is only fitting that a heavy procedural and legal burden be imposed upon the courts before they may censor the news. The framers of the Constitution believed that popular self-government was possible only if the press were kept free. Without the requirement for full prior judicial review of restraints on the press, the constitutional machinery is out of balance. The extra procedural burden required by the *Walker* "delay or frustration" dictum would establish an equilibrium between the judiciary and the press. When a lone judge, acting without review, can irrevocably deny the right of the press to print the news and the right of the public to know the workings of government, "the civilizing hand of law" has been replaced by the despot's iron fist.

---

140. See note 137 *supra*.