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Defining the "Transparently Invalid" Exception to the Collateral Bar Rule: In re Providence Journal Co.

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COMMENTS

DEFINING THE "TRANSPARENTLY INVALID" EXCEPTION TO THE COLLATERAL BAR RULE: *IN RE PROVIDENCE JOURNAL CO.*

It is axiomatic that compliance with judicial decrees is essential to the maintenance of orderly government.[1] To guard their au-

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[1] *See* 2 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 1416 (4th ed. 1905). "The granting of injunctions being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed." *Id.* at 1424. *See also* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 184 (1971) (every system of government requires enforcement mechanisms to preserve order); Rodgers, *The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings*, 49 B.U.L. REV. 251, 252 (1969) (foreclosing collateral attacks by contemnors promotes orderly and speedy resolution of disputes).

The extraordinary power associated with injunctions has its roots in the development of the Courts of Chancery under English common law. *See* 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 16-42 (4th ed. 1918). As receiver of the king's common law writs, the chancellor avoided the harshness of the *lex scripta* through grants of discretionary remedies, *see* 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 43, at 47 (14th ed. 1918), issued as similar writs, or writs *in consimili casu*, according to power granted under the Statute of Westminster II (1285), 13 Edw. I, ch. 1, § 24. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.2, at 29 (1973); 1 J. POMEROY, *supra*, § 24, at 31 n.1. This power was compounded by the chancellor's status as an official of the church and his ability to act *in personam*, with the accompanying power to levy fines or imprison disobedients. *See* D. DOBBS, *supra*, § 2.2, at 32; 1 J. POMEROY, *supra*, §§ 134, 135, at 162-64.

The merger of law and equity in the federal courts has not entirely robbed the injunction of its legacy as an extraordinary writ. *See* D. DOBBS, *supra*, § 2.6, at 66-67; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 67, at 436-38 (4th ed. 1983). *But cf.* O. FISS, THE CIVIL RIGHTS INJUNCTION 5-6 (1978) (arguing that treatment of injunction as extraordinary writ is illogical and unwarranted). Courts continue to use the contempt power as a unique tool to prevent subversion of the judicial process. See *In re* Debs, 158 U.S. 564 (1894). In *Debs*, the Court stated that "the power of a court to make an order carries with it the equal power to punish for disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court." *Id.* at 594. *See also* Z. CHAFEE, SOME PROBLEMS OF EQUITY 351 (1950).

In order to preserve doctrinal integrity, Professor Chafee advocated compliance with all judicial decrees; the sole exception being where the court lacked jurisdiction. *Id.* Professor

thority courts have applied a collateral bar rule, precluding parties who violate a court order from raising its constitutionality in subsequent contempt proceedings.[2] Of equal significance, however, is enforcement of the principle that the first amendment protects the press from prior restraints on publication.[3] When a party claims

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Chafee asserted that permitting disobedience on the grounds that an injunction was improperly granted would violate what he termed a "Bright Line Policy" and a "First Things First Policy." *Id.* at 348-49. Professor Chafee's "Bright Line Policy" espouses the notion that it is improvident to engage in extended investigations of a court's power to act. *Id.* at 350. It dictates that once a court has jurisdiction over the person and subject matter, its authority is established. *Id.* This definition provides a "bright line" boundary between valid judicial decrees and judicial nullities. *Id.* at 312. Professor Chafee's "First Things First Policy" holds that as long as a court has jurisdiction in the first instance, an injunction is valid and must be attacked directly. *Id.* at 316-21. For a further discussion of Professor Chafee's theories, see Rendleman, *More on Void Orders*, 7 GA. L. REV. 246, 249-51 (1973).

[2] *See* Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 86-87 (1948); Rendleman, *supra* note 1, at 249-71; Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 633-36 (1970). In Howat v. Kansas, 258 U.S. 181 (1922), the Supreme Court denied a collateral attack by striking coal miners on the Kansas Industrial Relations Act. In a classic exposition of the collateral bar rule, Chief Justice Taft affirmed that the constitutionality of the Act could not be reviewed by writ of error on the injunction. He stated:

> [A]n injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case.

Id. at 189-90. *See also* Walker v. City of Birmingham, 388 U.S. 307, 325 (1967) (civil rights activists disobeying injunction against street demonstrations collaterally barred from attacking constitutionality of permit statute); United States v. United Mine Workers of America, 330 U.S. 258, 306-07 (1947) (striking coal miners collaterally barred from challenging courts jurisdiction to issue injunction); United States v. Dickinson, 465 F.2d 496, 513 (5th Cir. 1972) (reporters cannot raise constitutionality of gag order in contempt hearing for its violation), *cert. denied*, 414 U.S. 979 (1972).

[3] U.S. CONST. amend. I. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." For approximately 130 years after its adoption, the first amendment was virtually ignored by the Court. *See* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 652 (1955). Not until the landmark case of Near v. Minnesota, 283 U.S. 697 (1931), did its free press protections receive significant judicial attention. In *Near*, the Supreme Court held a Minnesota nuisance statute calling for suppression of defamatory publications to be violative of the free press guarantees applicable to the states through the fourteenth amendment. *Id.* at 707. The constitutional protection of liberty of the press was interpreted to provide "principally, although not exclusively, immunity from previous restraints or censorship." *Id.* at 716. This principle was grounded in the concept that while subsequent punishment for violation of a speech-restrictive statute may have a "chilling" effect upon free expression, prior restraints "freeze" speech, thus stifling the robust exchange of ideas which is at the core of first amendment jurisprudence. *See* A. BICKEL, THE MORALITY OF CONSENT 61 (1975).

Although the doctrine of prior restraint has become a widely accepted tenet in American constitutional law, *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-31 to 12-33 (1978), the premise of *Near* was the subject of vigorous contemporary debate. *See, e.g.*,

the protection of the first amendment as justification for noncom-

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Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 544 (1951) (subsequent punishment/prior restraint dichotomy criticized); Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?*, 49 COLUM. L. REV. 1001, 1006 (1949) (prior restraint doctrine is an anachronism); Note, *Previous Restraints Upon Freedom of Speech*, 31 COLUM. L. REV. 1148, 1155 (1931) (*Near* is a "resurgence of eighteenth century doctrine" creating an illusory distinction between previous restraints and subsequent punishment). For an interesting discussion of the somewhat tawdry factual background of the *Near* case, see F. FRIENDLY, MINNESOTA RAG 145-47, 156-57 (1981).

Cases subsequent to *Near* have broadened the interpretations of the first amendment's free press protections. In New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) [hereinafter *Pentagon Papers*], the Supreme Court drastically narrowed the scope of a government interest sufficient to warrant prepublication restraints by refusing to uphold an injunction against disclosure of the Pentagon Papers, despite a potential threat to national security. *Id.* at 730 (Stewart, J., concurring). In his concurrence to the Court's *per curiam* order, Justice Brennan relied on dicta in *Near* to state that mere conclusory allegations as to consequences of speech will not support a prior restraint. Rather, "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726-27 (Brennan, J., concurring) (citing *Near*, 283 U.S. at 716).

That the *Pentagon Papers* standard has proved virtually insurmountable is best observed by the scarcity of prior restraint cases received by the federal courts. Moreover, those coming to litigation have met with infrequent success. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (gag order on investigation of state judge before judicial commission struck down as invalid prior restraint); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam) (pretrial order enjoining publication of identity of juvenile charged with second degree murder held invalid prior restraint); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraint invalid method of protecting sixth amendment right to fair trial). *But cf.* Seattle Times Co. v. Rhinehardt, 467 U.S. 20 (1984) (newspaper has no first amendment right to publish information received through pretrial discovery); Snepp v. United States, 444 U.S. 507 (1980) (proper remedy for C.I.A. to enforce prepublication agreement with employee was to apply for injunction); United States v. Progressive, Inc., 486 F. Supp. 5 (W.D. Wis. 1979) (publication of article on "how to" construct hydrogen bomb may be suppressed on national security grounds).

However, the practical and theoretical aspects of the prior restraint doctrine continue to be the subject of much comment by legal scholars. For commentary especially relevant to the collateral bar rule, see Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 93 (1984) (prior restraints not *per se* more restrictive than subsequent punishment). *See also* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 85-86 (1981) (arguing that use of collateral bar rule is main factor in making prior restraints more speech-restrictive than subsequent punishment); Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 295 (1982) (subsequent punishment more speech-protective than prior restraint given judiciary's inconsistent protection of first amendment rights); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 429 (1983) (arguing that specific commands of injunction less threatening to free expression than criminal statutes); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 281 (1982) (questioning subsequent punishment as a viable alternative to prior restraint).

pliance with a judicial order, a court is faced with a paradigmatic conflict between the rightful assertion of its powers of enforcement and its unique role in the protection of individual rights. Recently, in *In re Providence Journal Co.*,[4] the United States Court of Appeals for the First Circuit held that a temporary restraining order issued against a daily newspaper, seeking publication of lawfully obtained information, constituted a "transparently invalid" prior restraint on pure speech thereby forming an exception to the collateral bar rule.[5]

In *Providence Journal*, the plaintiff's father, Raymond L.S. Patriarca,[6] a reputed leader in organized crime, had been the object of an illegal wiretap by the Federal Bureau of Investigation ("F.B.I.").[7] In preparation for an upcoming exposé, the *Providence Journal* (the "*Journal*") petitioned the F.B.I. under the Freedom of Information Act ("FOIA")[8] for release of logs and memoranda compiled during the surveillance. The F.B.I. refused disclosure under exemption 7(c) of the FOIA in order to protect Patriarca's statutory right to privacy.[9] The First Circuit held this decision to be within the discretion of the F.B.I.[10]

Upon the death of Patriarca Sr. in 1985, the *Journal* renewed its FOIA request. This time the F.B.I. released portions of the materials to the *Journal*, WJAR television and others in the New England news media.[11] On November 8, 1985, Raymond J. Patriarca filed suit against the F.B.I., the *Journal*, and WJAR, claim-

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[4] 809 F.2d 63 (1st Cir. 1986), *withdrawn, modified on reh'g*, 14 Media L. Rep. (BNA) 1029 (1st Cir. 1987).

[5] *Id.* at 66 (citing Walker v. City of Birmingham, 388 U.S. 307, 315 (1967)).

[6] Suit was brought by Raymond J. Patriarca, son of Raymond L.S. Patriarca. The former was a party to several of the conversations monitored by the F.B.I. *Providence Journal*, 809 F.2d at 65, n.6.

[7] The wiretap was conducted between 1962 and 1965. Patriarca brought suit against several other agencies who were not relevant to the contempt proceeding. *Id.* at 65, n.5.

[8] Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. § 552 (1982)). The petition was served in 1976. *Providence Journal*, 809 F.2d at 65.

[9] *See Providence Journal*, 809 F.2d at 70; 5 U.S.C. § 552(b)(7)(C). Subsection 7 states that the requirements of the FOIA do not apply to: "investigatory records compiled for law enforcement purposes, . . . but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy. . . ." 5 U.S.C. § 552(b)(7)(C).

[10] Providence Journal Co. v. F.B.I., 602 F.2d 1010, 1015 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

[11] *In re* Providence Journal Co., 809 F.2d 63, 65 (1st Cir. 1986), *withdrawn, modified on reh'g*, 14 Media L. Rep. (BNA) 1029 (1st Cir. 1987).

ing violations of his right to privacy under the FOIA, Title III of the Omnibus Crime Control and Safe Streets Act of 1968[12] and the fourth amendment.[13] The United States District Court for the District of Rhode Island issued a temporary restraining order against publication of information obtained pursuant to the FOIA request.[14] The District Court then set a hearing for November 15 to consider vacating the order.[15]

The day before preliminary injunctive relief was denied and while the temporary restraining order was still in effect, the *Journal* published an article containing the prohibited materials.[16] In a hearing to show cause why the *Journal* should not be held in contempt, the district court barred the *Journal* from collaterally attacking the constitutionality of its temporary restraining order.[17] Stripped of this defense, the *Journal* and its editor were held in criminal contempt.[18] The Court of Appeals for the First Circuit unanimously reversed the contempt conviction holding that the district court had erred in its application of the collateral bar rule.[19]

Writing for the court, Judge Wisdom[20] stated that the clear import of prior Supreme Court decisions had forbidden courts from imposing restraints on publication of the news in all but the most dire circumstances.[21] The court surmised that the only interest being protected by the temporary restraining order was Patriarca's common law right to privacy,[22] a right not warranting

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[12] Pub. L. No. 90-351, title III, § 802, 82 Stat. 223 (codified as amended at 18 U.S.C. §§ 2510-2520 (1982)).

[13] U.S. CONST. amend. IV.

[14] *Providence Journal*, 809 F.2d at 66. For the contents of the restraining order, see Patriarca v. F.B.I., 630 F. Supp. 993, 995 (D.R.I. 1986).

[15] *Patriarca v. F.B.I.*, 630 F. Supp. at 995.

[16] The *Providence Journal* was less than discreet in its publication of the restricted materials. Among the headlines of the morning and evening editions were, "Court restricts media use of FBI tapes on Patriarca; Journal decides to print."; "Court, Journal clash over use of tapes."; and "Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings." *Id.* at 994.

[17] *Id.* at 1004.

[18] Since Patriarca refused to prosecute his criminal contempt motion, the district court appointed a special prosecutor pursuant to Fed. R. Crim. P. 42(b). *Id.* at 995.

[19] *In re* Providence Journal Co., 809 F.2d 63, 68 (1st Cir. 1986), *withdrawn, modified on reh'g*, 14 Media L. Rep. (BNA) 1029 (1st Cir. 1987).

[20] Judge Wisdom sat by designation from the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 29(a) (1982).

[21] *Providence Journal*, 809 F.2d at 69-70.

[22] *Id.* at 71. The court dismissed Patriarca's statutory and fourth amendment claims. Judge Wisdom noted that the Supreme Court in Chrysler Corp. v. Brown, 441 U.S. 281

the extraordinary remedy of injunctive relief. Applying the test developed by the Supreme Court preserving a criminal defendant's sixth amendment right to a fair and impartial trial from the adverse effects of excessive media coverage,[23] the court held the order to be "transparently invalid," thus allowing the *Journal* to disregard it with impunity. Judge Wisdom noted that the normal appellate process would not afford the Journal sufficient protection of its right to publish.[24] Although the particular information in question was not news *qua* news, its dissemination to competing media in the New England area argued for a timely response on the *Jour-*

(1979), had interpreted the FOIA as precluding courts from issuing injunctions against agencies seeking to disclose information. *Providence Journal*, 809 F.2d at 70-71. He continued by stating that "[i]f the FOIA does not allow a court to prevent a federal agency from disclosing information to the public, it is beyond dispute that it cannot serve as the basis for an order prohibiting a newspaper that has received such information from publishing it." *Id.*

The court, likewise, dismissed Patriarca's claim based on Title III of the Omnibus Crime Control and Safe Streets Act. *Id.* at 71. The court pointed to the absence of a provision for injunctive relief in the express words of the statute. *Id.* Furthermore, the court observed that the Act had been interpreted so as not to provide retroactive relief. *Id.* at 71, n.52 (citing Zerilli v. Evening News Ass'n, 628 F.2d 217 (D.C. Cir. 1980)). Since the wiretap of Patriarca, Sr. occurred prior to the statute's enactment in 1968, any inference toward injunctive relief would remain inadequate. *Id.* at 91.

Finally, the court dismissed Patriarca's fourth amendment claim. *See id.* at 71-72. Judge Wisdom pointed out that the fourth amendment only protected individuals against government action. *Id.* at 71. Since Patriarca had not alleged collusion between the *Journal* and the F.B.I. amounting to inferable government action, *see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Journal could not violate the fourth amendment. *Providence Journal*, 809 F.2d at 71-72.

[23] The *Providence Journal* court applied the test of Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). *Providence Journal*, 809 F.2d at 70. In *Nebraska Press Ass'n*, a state trial judge in a highly publicized mass murder trial issued an order which, as modified by the Nebraska Supreme Court, precluded the media from publishing or broadcasting accounts of "confessions or admissions made by the accused or facts 'strongly implicative' of the accused." 427 U.S. at 541. The Supreme Court found this order to be violative of the media's first amendment rights. *Id.* at 570. After canvassing the historical relationship between the first and sixth amendments, *id.* at 541, Chief Justice Burger found that the gag order had failed to overcome the " 'heavy presumption' against [the] constitutional validity" of prior restraints. *Id.* at 558 (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

Relying upon the "clear and present danger" test enunciated by Judge Learned Hand in United States v. Dennis, *id.* at 562 (citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)), Chief Justice Burger formulated a three-pronged test to determine the validity of restraints based on the sixth amendment. 427 U.S. at 562-68. This test, as articulated by the *Providence Journal* court, requires proof that (1) the nature and extent of the pretrial publicity would impair the defendant's right to a fair trial; (2) there was no alternative measures which could mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm. *Providence Journal*, 809 F.2d at 70.

[24] *Id.* at 72.

nal's behalf.[25] The court concluded that application of the collateral bar rule under these circumstances would clothe a patently void order with the imprimatur of judicial authority, thereby exceeding the judiciary's constitutional mandate.[26]

In establishing a narrow exception to the collateral bar rule for transparently invalid prior restraints upon the press, the *Providence Journal* court sought to recognize the primacy of the first amendment. It is submitted that the court correctly refused to give deference to a judge-made rule of law when found to be in conflict with a fundamental constitutional right. However, it is suggested that application of the gag order test for protection of a criminal defendant's sixth amendment right to a fair and impartial trial fails to properly recognize the limited scope of privacy claims under the first amendment's prior restraint doctrine. This Comment will examine the theoretical underpinnings of the collateral bar rule and its relationship to the first amendment, suggesting an alternative approach in which the procedural safeguards associated with administrative licensing schemes would guide courts in their imposition of the collateral bar rule to defenses based on pure speech.

THE COLLATERAL BAR RULE — THEORY AND APPLICATION

A requirement of absolute obedience to judicial orders appears facially inconsistent with a party's right to violate a statute and then allege its unconstitutionality in court.[27] Consequently, courts have often taken a varied approach in their application of the col-

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[25] *Id.*

[26] *Id.* at 68. In discussing the constitutionality of enforcing "transparently invalid" orders, Judge Wisdom stated that "[r]equiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress." *Id.*

[27] Many articles have questioned the parochial nature of this quirk of law. Most commentators have emphasized the disruption of the judicial process when a court order is disobeyed and have argued that the legislative process is not similarly affected when a statute is violated. *See* Redish, *supra* note 3, at 94; Rendleman, *supra* note 1, at 246; Bickel, *Civil Disobedience and the Duty to Obey*, 8 GONZ. L. REV. 199 (1973); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 620 (1969). A somewhat lyrical interpretation of this problem was expressed by the Lord Chancellor in Gilbert and Sullivan's Iolanthe:

> The law is the true emobodiement
> Of everything that's excellent.
> It has no kind of fault or flaw
> And I, m'lords embody the law.

Quoted in O. FISS & D. RENDLEMAN, INJUNCTIONS 304 (2d ed. 1984).

lateral bar rule.[28] Justifications for this inconsistency have focused upon the contumacious consequences implicit in self-help remedies. This rationale has been most frequently invoked in the context of labor disputes where work stoppages have threatened imminent violence or damage to national interests.[29] In these instances, adjudication of lower court injunctions has been confined to questions of personal and subject matter jurisdiction.[30] Absent a blatantly "frivolous" claim to jurisdiction, a party's sole recourse was

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[28] *Compare* Walker v. City of Birmingham, 388 U.S. 307, 321 (1967) (collateral bar rule applied to civil rights activists violating injunction against demonstrations) *and* Poulos v. New Hampshire, 345 U.S. 395, 414 (1953) (collateral bar rule applied to Jehovah's Witness violating park permit statute) *and* United States v. United Mine Workers of America, 330 U.S. 258, 307 (1947) (collateral bar rule applied to coal miners disobeying anti-strike injunction) *and* United States v. Dickinson, 465 F.2d 496, 509 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973) (collateral bar rule applied to reporters violating gag order) *with* Maness v. Myers, 419 U.S. 449, 470 (1975) (reporter cannot be held in contempt for refusing subpoena *duces tecum* on fifth amendment grounds) *and* United States v. Ryan, 402 U.S. 530, 534 (1971) (subpoena may be challenged in contempt proceeding) *and* Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (reversed contempt order for Negro's failure to obey judge's order to sit in segregated section of courtroom) *and* Thomas v. Collins, 323 U.S. 516, 543 (1945) (violator of injunction against union solicitation could challenge constitutionality on contempt).

Lower courts have utilized the principles expounded in the latter line of cases in a variety of situations. *See, e.g.*, United States v. Arthur Anderson & Co., 623 F.2d 720, 725 (1st Cir. 1980) (party must challenge interlocutory order through contempt to avoid mootness), *cert. denied*, 449 U.S. 1021 (1980); *In re* Halkin, 598 F.2d 176, 199-200 (D.C. Cir. 1979) (restraining order under Fed. R. Civ. P. 26(c) on discovered CIA documents may be challenged by mandamus proceeding); Goldblum v. National Broadcasting Corp., 584 F.2d 904, 907 (9th Cir. 1978) (order requiring screening on film of stock fraud may be challenged in contempt proceeding).

[29] *See United Mine Workers of America*, 330 U.S. at 289, 307 (court applies collateral bar rule to coal miners where mines run by government in interest of World War II effort); Howat v. Kansas, 258 U.S. 181, 183 (1922) (parties in certain industries bound by arbitration clause where "continuity is essential to public peace, the public health and the proper living conditions and general welfare of the people"); *In re* Debs, 158 U.S. 564 (1894) (collateral bar rule applied where disobedience to injunction would disrupt interstate commerce). *See also* F. FRANKFURTER & N. GREEN, THE LABOR INJUNCTION (1930).

[30] See *United Mine Workers of America*, 330 U.S. at 307, where the Supreme Court rejected a union's contention that the Norris-Laguardia Act deprived the federal courts of jurisdiction to issue an injunction during labor disputes with the government. Indeed, the Court found this issue to be superfluous to the holding of the case. Noting that the applicability of the Act under such circumstances presented an issue of first impression, Chief Justice Vinson found:

> impressive authority for the proposition that an 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.

Id. at 293 (footnotes omitted).

to appeal an order directly.[31]

Notwithstanding the breadth of these earlier precedents, exceptions to the collateral bar rule have been recognized where use of its prohibitive powers would ride roughshod over rudimentary constitutional principles. In *Walker v. City of Birmingham*,[32] the Supreme Court acknowledged such an exception for "transparently invalid" orders impinging upon irretrievable first amendment rights.[33] To demand compliance with such orders *pendente lite* would corrupt the constitutional process by elevating form over substance at the expense of individual liberties.[34] It is suggested,

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[31] *Id.* The *United Mine Workers of America* Court observed that "a different result would follow were the question of jurisdiction frivolous and not substantial." *Id.* The Court, however, limited this exception by upholding the district court's jurisdiction to determine jurisdiction. *Id.* at 292 n.57. This aspect of the *United Mine Workers of America* case has been derisively named the "bootstrap principle," since a court theoretically may confer jurisdiction upon itself by "tugging on [its own] bootstraps." O. FISS & D. RENDLEMAN, *supra* note 27 at 285. *See also* Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pts. 1 & 2), 53 VA. L. REV. 1003, 1020-24 (1967); Z. CHAFEE, *supra* note 1, at 319 n.42.

The *Providence Journal* attacked the temporary restraining order as an exercise of "frivolous" subject matter jurisdiction under the FOIA, Title III, and the fourth amendment. *See* Brief for Appellant at 34-39, *In re* Providence Journal Co., 809 F.2d 63 (1st Cir. 1986) (No. 86-1336) (citing *United Mine Workers of America*, 330 U.S. at 293). The district court rejected this attack and explicitly reaffirmed its jurisdiction in the contempt proceeding. Patriarca v. F.B.I., 630 F. Supp. 993, 999-1000 (D.R.I. 1986). The First Circuit did not address this issue given its conclusion that the order could be ignored on first amendment grounds. However, it is noteworthy that the court found no valid claim under the FOIA, Title III, or the fourth amendment. *See Providence Journal*, 809 F.2d at 70.

[32] 388 U.S. 307 (1967).

[33] *Id.* at 315. In *Walker*, civil rights activists, including Dr. Martin Luther King Jr., applied for a permit to conduct demonstrations over the Easter weekend. *Id.* at 311. The notorious Eugene "Bull" Conner adamantly refused to grant the permit. *Id.* at 317-18 & nn.9-10. Birmingham officials then received an *ex parte* restraining order from an Alabama circuit court judge enjoining any action prohibited by the permit statute. *Id.* at 309. The parties marched despite the order and were subsequently held in contempt. *Id.* at 310-12. In affirming their conviction, Justice Stewart noted that although the statute raised "substantial constitutional issues . . . this [was] not a case where the injunction was transparently invalid or had only a 'frivolous pretense of validity'." *Id.* at 315 (citations omitted). Justice Stewart pointed to the legitimate state interest in regulating street demonstrations. *Id.* at 316 (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941)). The *Providence Journal* court distinguished *Walker* on these grounds stressing that, although there is a valid state interest in regulation of speech plus conduct, no such interest exists for the "pure" speech at issue in their case. *Providence Journal*, 809 F.2d at 67-70. *See also* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1558-59 (1970) (*Walker* is good decision only if "transparently invalid" exception is given broad interpretation); Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt*, 4 HARV. C.R.-C.L. L. REV. 135, 152-54 (1968) (vague and overbroad restrictions on speech are patently unconstitutional and may not serve as basis for implementing collateral bar rule).

[34] In his dissent in *Walker*, Chief Justice Warren argued that the *ex parte* injunction

therefore, that the scope of exceptions for transparently invalid orders under the collateral bar rule must be a function of the judiciary's protection of the underlying right asserted. It is at this point that the *Providence Journal* court failed to incorporate fully the Supreme Court's first amendment analysis.

PRIOR RESTRAINT AND THE COLLATERAL BAR RULE

A democracy's need for uninhibited public discourse has limited privacy claims against the media to monetary damages subsequent to publication.[35] The *Providence Journal* court found this presumption against prior restraints dispositive in its definition of transparently invalid orders under the collateral bar rule.[36] Nevertheless, the court applied the more stringent test[37] of *Nebraska Press Association v. Stuart*.[38] Although the court obviously wished to ensure that the temporary restraining order was truly beyond the pale of reasonable restraint, use of the gag order test would appear inapposite to those claims which plead the lesser protected right to privacy.

The free press/fair trial connundrum has proved to be among the most nebulous areas of constitutional law.[39] In developing the least restrictive alternative test of *Nebraska Press Association*, the

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"was such potent magic that it transformed the command of an unconstitutional statute into an impregnable barrier, challengeable only in what likely would have been protracted legal proceedings and entirely superior in the meantime even to the United States Constitution." *Walker*, 388 U.S. at 330 (Warren, C.J., dissenting).

[35] *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-06 (1979) (state may not prohibit newspaper from publishing name of juvenile offender when obtained through lawful means); Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 310-12 (1977) (same); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494 (1975) (first amendment does not permit restraint of rape victim's name when discovered in public records); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (nonpublic figure's claim for libel limited to damages for actual injury); Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971) (real estate developer's right to privacy does not warrant injunction of distribution of leaflets accusing him of racial bias); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (public official's libel claim limited to post-publication action for damages).

[36] *In re* Providence Journal Co., 809 F. 2d at 69-70.

[37] *See id.* at 70.

[38] 427 U.S. 539 (1976).

[39] *See generally* Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 415 (1981); Cox, *The Supreme Court 1979 Term, Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 19 (1980); Note, *Closure of Pretrial Suppression Hearings: Resolving the Fair Trial/Free Press Conflict*, 51 FORDHAM L. REV. 1297, 1305-06 (1983). See also Chief Justice Burger's discussion of the historical relationship between the first and sixth amendments in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 545-56.

Supreme Court attempted to keep the "barriers to prior restraint[s] . . . high,"[40] while simultaneously refusing to categorically subordinate a criminal defendant's sixth amendment rights.[41] However, subsequent interpretations of *Nebraska Press Association* have failed to reach a consensus on the extent to which courts may impose gag orders to protect these "sacred safeguards."[42] It is submitted that, since a transparently invalid order must necessarily lack all semblance of constitutionality to avoid the collateral bar rule, this incertitude as to the scope of the sixth amendment's protection injects unwarranted confusion into an analysis based on the lesser protected right to privacy.[43] It is, therefore, proposed

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[40] *Nebraska Press Ass'n*, 427 U.S. at 561.

[41] *See id.* Chief Justice Burger stated:

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

Id.

[42] *Id.* at 572 (Brennan, J., concurring). Recent cases construing the *Nebraska Press Ass'n* holding have primarily been concerned with the first amendment right of access to various phases of the judicial process. Although the *Nebraska Press Ass'n* test has proven to be a formidable barrier to prior restraints, cases continue to stress that the public's right of access is not absolute. *Compare* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-10 (1984) (right of access is not absolute but extends to voir dire proceedings) *and* Globe Newspapers Co. v. Superior Court, 457 U.S. 596, 607 (1982) (state statute requiring closure order during testimony of juvenile victim of sex crime is unconstitutional) *and* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980) (first and fourteenth amendments create presumption of openness in criminal trials) *with* Seattle Times Co. v. Rhinehardt, 467 U.S. 20, 36-37 (1984) (court upholds protective order against publication of information disclosed to newspaper through pretrial discovery) *and* Gannett Co. v. DePasquale, 443 U.S. 368, 392 (1979) (right of access does not extend to pretrial suppression hearing).

[43] *See* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Ass'n v. Stuart, 29 STAN. L. REV. 497 (1977). Professor Goodale observes that "the *nonabsolute* 3-part test announced by Chief Justice Burger . . . may make collateral attack a less obvious alternative for the press because of the press's inability to demonstrate an order's *obvious* constitutional validity." *Id.* at 507 (emphasis in original). *See also* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 548-51 (1977). This same factual situation was presented to the Fifth Circuit in United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973).

In *Dickinson*, the district court issued a gag order on testimony taken during an evidentiary hearing in an action by an accused assassin for malicious prosecution. 465 F.2d at 499-500. While finding the gag order to be unconstitutional, the court applied the collateral bar rule to the noncomplying newspaper. *Id.* at 513-14. The *Providence Journal* court declined to follow *Dickinson*, questioning its validity in light of the *Nebraska Press Ass'n* decision. *Providence Journal*, 809 F.2d at 73 n.65. The court noted that *Dickinson* involved the more

that the interest of orderly judicial process would best be served by ensuring that a party's claim to protected speech has received the requisite procedural safeguards implicit in first amendment due process before being subjected to the collateral bar rule.[44]

ADMINISTRATIVE LICENSING SCHEMES AND THEIR RELEVANCY TO THE COLLATERAL BAR RULE — A PROPOSED ANALYSIS

The *Providence Journal* court found two results especially pernicious in the district court's application of the collateral bar rule. First, the court had issued the temporary restraining order without a full hearing on the merits.[45] Second, since the temporary restraining order "froze" the speech prior to dissemination, effects from publication were judged in the abstract.[46] It is noteworthy that these are the criticisms most often levied at administrative licensing schemes.[47] Moreover, it is manifest that when a judge is-

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protected right to a fair trial, while "the order in the instant matter was issued merely to protect an individual's interest in privacy." *Id.* This argument, however, proves too much, for if the sixth amendment is paramount to the right to privacy, the *Nebraska Press Ass'n* test is not the best of all possible alternatives.

[44] *See* Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518 (1970). Professor Monaghan argues that "courts have . . . come to realize that procedural guarantees play an equally large role in protecting freedom of speech; indeed, they 'assume an importance fully as great as the validity of the substantive rule of law to be applied.' " *Id.* at 518 (quoting Speiser v. Randall, 357 U.S. 513, 520 (1958)). *See also* Blasi, *supra* note 3, at 15-34.

Furthermore, Professor Monaghan states that courts have looked primarily to the first amendment itself to define first amendment due process. Monaghan, *supra*, at 518-19. He finds the procedural safeguards associated with the licensing of obscene materials to be the controlling standard, for "if the Constitution requires elaborate procedural safeguards in the obscenity area, a fortiori, it should require equivalent procedural protection when the speech involved . . . implicates more central first amendment concerns." *Id.* at 519.

This standard would appear well-suited to determining transparently invalid free speech restraints under the collateral bar rule. As Professor Monaghan notes, protection for obscene speech lies at the periphery of the first amendment continuum. Consequently, the "core" speech published by the Providence Journal deserves, at minimum, equal protection from prior restraints; or, conversely, if an order fails to satisfy the procedural safeguards rendered to unprotected speech, it must be a patently invalid order not entitled to obedience.

[45] *Providence Journal*, 809 F.2d at 72.

[46] *Id.* at 67.

[47] *See* Blasi, *supra*, note 3, at 20-21. Since the era of the English Licensing Acts of 1662, no system has been found more repugnant to free expression than the administrative licensing system. *See* Emerson, *supra* note 3, at 650-52. In *Areopagatica*, John Milton delivered a scathing polemic upon the English licensing system, claiming that it not only procedurally deprived the individual of his right to speak, but additionally fostered a paternalistic society anathema to a government of the people. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliment of England*, in THE PORTABLE MILTON (D. Bush ed. 1949). He asserted:

sues a temporary restraining order without an adversarial hearing on the merits, the court is placed in the identical role of administrative censor.[48] It should, then, be subject to commensurate procedural standards.

In *Freedman v. Maryland*,[49] the Supreme Court set forth the test for constitutional administrative licensing schemes.[50] First, the

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> [s]o far to distrust the judgment and the honesty of one who hath but a common repute in learning, and never yet offended, as not to count him fit to print his mind without a tutor and examiner, lest he should drop a schism or something of corruption, is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.

Id. at 178 (quoted in Blasi, *supra* note 3, at 71). *See also* 4 W. BLACKSTONE, COMMENTARIES 152 (Tucker ed. 1803); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 239-41 (1965).

The American experience with the Alien and Sedition Acts engendered similar debate on the rights of free speech and the powers of the central government and has been said to have "first crystallized a national awareness of the central meaning of the First Amendment." New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964). The attack mainly focused upon the abuse of power and unbridled discretion of the Federalist administration of John Adams in prosecuting members of the Jeffersonian Democratic-Republican Party. *See* L. LEVY, JEFFERSON & CIVIL LIBERTIES —THE DARKER SIDE 46 (1963); Z. CHAFEE, FREEDOM OF SPEECH 1 (1920).

The role of prior restraints on the press as a usurpation of power by a democratic government became a central tenet of John Stuart Mill's classic work on individual liberty. *See* J.S. MILL, ON LIBERTY 22 (1948). Later this usurpation could be restated as follows:

> The allocation of authority between the state and the individual is a function not simply of how much trust should be placed in the capacity of private individuals to process communications thoughtfully and responsibly. Distrust of the state, particularly in its censorial capacity, is a fundamental value that informs the first amendment. The decision to adjudicate the legal status of a communication before its initial dissemination embodies a premise of comparative distrust: better trust the regulatory process not to suppress salutary communications than trust the populace to reject or ignore unsalutary ones. To trust the censor more than the audience is to alter the relationship between state and citizen that is central to the philosophy of limited government.

Blasi, *supra* note 3, at 73. Clearly, this suggests that application of the collateral bar rule in instances of transparently invalid prior restraints would subjugate the individual liberty of free expression to the coercive power of the state, thereby disrupting the aforementioned role of limited government.

[48] *See* Jeffries, *supra* note 3, at 420 (arguing that judges are better regulators of speech only so long as they receive the benefits of adversarial process). *See also* Blasi, *supra* note 3, at 14. Professor Blasi observes that "[t]he identification of salient common features shared by licensing systems and injunctions would . . . be a logical starting point for constructing a general theory of prior restraint that would help in deciding what additional methods of speech regulation should be disfavored." *Id.*

[49] 380 U.S. 51 (1965).

[50] *Id.* at 59-60. In *Freedman*, the Court struck down an administrative licensing scheme screening potentially obscene films. *Id.* Since obscene speech generally remains beyond the protection of the first amendment, *see* Miller v. California, 413 U.S. 15, 23 (1973), use of the *Freedman* test would, a priori, ensure the "transparent invalidity" of orders restraining protected speech.

burden of proving unprotected speech must remain with the censor. Second, the restraint must be administered in a manner so as not to lend finality to the censor's decision.[51] Third, the restraint must do no more than maintain the status quo.[52] Fourth, the decision of the censor must be subject to prompt and independent judicial review.[53] Since the collateral bar rule and the *Freedman* test are both primarily rules of procedure,[54] use of the *Freedman* test would appear more consonant in determining applicability of the collateral bar rule to defenses based on pure speech.

APPLICATION OF THE *Freedman* TEST

Application of the *Freedman* test to the temporary restraining order in *Providence Journal* yields the identical result, albeit on somewhat dissimilar grounds. The imposition of the temporary restraining order subject to the collateral bar rule shifted the burden of proof to the party alleging free speech. The *Journal* was faced with the "Hobson's choice"[55] of either obeying the temporary restraining order and surrendering its right to publish or seeking emergency relief requiring a heavy burden of proof.[56] This placed the initiative upon the *Journal* contrary to the *Freedman* requirements.[57] In addition, the temporary restraining order failed to maintain the status quo. As noted by the court, the function of a newspaper is to publish the news.[58] Any judgment by the court as to the quality or nature of this news would impinge upon the *Journal's* editorial discretion and hinder its position *vis-à-vis* similarly

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[51] *Freedman*, 380 U.S. at 58-59.

[52] *Id.* at 59.

[53] *Id.*

[54] *See* Redish, *supra* note 3, at 89. "The theoretical basis for the prior restraint doctrine is . . . a question of process, not substance." *Id.* at 89.

[55] *See In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979). In a footnote to his opinion, Justice Bazelon posited a scenario noticeably similar to the Journal's case. He stated:

> If the collateral bar rule applies to an order restraining expression, the would-be speaker faces a Hobson's choice: either violate the order, risking almost certain conviction for contempt, and lose the right to challenge the order's constitutionality, or alternatively, obey the order, seek review, and forfeit, at least temporarily, the very right the would-be speaker seeks to vindicate. The dilemma is particularly acute where First Amendment interests are at stake, for even a temporary restraint on expression may constitute irreparable injury.

Id. at 184, n.15 (citations omitted).

[56] *Providence Journal*, 809 F.2d at 71.

[57] *Id. See also supra* notes 51-55 and accompanying text.

[58] *Id.* at 73.

situated competitors.[59] Finally, application of the collateral bar rule precluded prompt and independent judicial review in a manner demanded by the *Freedman* test.[60] The *Providence Journal* court noted that first amendment theory precluded a strict exhaustion of remedies requirement on a party asserting pure speech[61] since the cost and delay of pursuing extraordinary appellate relief would most often lead to irreparable damage to first amendment rights.[62] Thus, application of the collateral bar rule foreclosed the only viable avenue of judicial relief available to the Journal.

CONCLUSION

In an attempt to recognize the status of the first amendment and its distinct presumption against imposition of prior restraints on the press, the *Providence Journal* court properly confirmed an exception to the collateral bar rule for transparently invalid judicial orders. While the result of the case was clearly speech-protective, it is submitted that use of the Supreme Court's test for constitutional restraints in protection of a criminal defendant's sixth amendment rights fails to fully recognize the scope of the first amendment protection. It is urged that the *Freedman* procedural safeguards for administrative licensing schemes would provide a better scheme for the determination of transparently invalid orders under the first amendment by allowing courts to gauge the effects of restraints in terms of their impact on the profferred speech.

Paul W. Butler

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[59] *Id.* (citing Elrod v. Burns, 427 U.S. 347 (1976)).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 73-74.