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I. INTRODUCTION

Freedom of the press is a cherished right in a free society. The right to publish and to speak without "any previous restraints"[1] is a birthright of all Americans and is a major underpinning of the United States Constitution. Thomas Jefferson, recognizing the importance of a free press, stated "were it left to me to decide whether we should have government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter. . . . "[2]

The authority of the courts to enforce laws is another fundamental principle at the foundation of a free society.[3] The American govern-

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1. See 4 W. Blackstone, *Commentaries* 151. Blackstone, whose *Commentaries* on the laws of England were widely read in the colonies, is often credited with originating the doctrine of prior restraints. "The liberty of the press is indeed essential to the nature of a free state; but this consists of laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. . . ." *Id. See also* L. LEVY, EMERGENCE OF A FREE PRESS 12 (1985).

2. Thomas Jefferson, "Letter to Edward Carrington, January 16, 1787," THE PAPERS OF THOMAS JEFFERSON 48-49 (Julian P. Boyd, XI. ed. 1955). *See also* L. LEVY, JEFFERSON AND CIVIL LIBERTIES 11 (1963). Levy argues that although Jefferson was against prior restraints on the press, he was not beyond punishing troublesome editors.

3. 18 U.S.C.A. § 401 (1966) provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration

ment's protection of individual rights is based upon laws, not men.[4] To enforce laws, courts must command respect and be unencumbered by challenges to their authority that defy the judicial process.[5] The Supreme Court has stated that respect for the judicial process "is a small price to pay for the civilizing hand of law."[6]

The free press and judicial authority collide, however, when a court orders a communication medium not to print or broadcast information in the medium's possession.[7] The potential conflict between judicial authority and the free-press clause of the first amendment poses an important legal question: Whether a publisher, faced with what it believes to be a patently unconstitutional prior restraint in the form of a court order,[8] may violate that order and later challenge its constitutionality if held in contempt by the court?

II. JUDCIAL AUTHORITY/PRIOR RESTRAINT ISSUE UNRESOLVED

A. *Collateral Bar Rule*

Until the 1988 *United States v. Providence Journal* case, the highest legal authority on the matter of publishers violating what they

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of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Id. See also FED. R. CRIM. P. 42.

4. United States v. United Mine Works, 330 U.S. 258 at 307, 309 (1947) (Frankfurter, J., concurring).

5. United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973). In *Dickinson*, Judge Brown distinguished between violation of statutes and court orders. He noted that disobedience of judicial orders requires further action by the judicial system, which directly affects a court's ability to discharge its duties. Without contempt authority, courts are "mere boards of arbitration whose judgments and decrees would be only advisory." *Id.* at 510; *see generally* Z. CHAFEE, SOME PROBLEMS WITH EQUITY (1950), R. GOLDFARB, THE CONTEMPT POWER (1963) and O. FISS & D. RANDLEMAN, INJUNCTIONS (2d ed. 1984).

6. Walker v. City of Birmingham, 388 U.S. 307, 321 (1967) (holding the invalidity of a court order is no defense in criminal contempt cases); *see also* United States v. United Mine Workers, 330 U.S. 258 (1947); Howat v. State of Kansas, 258 U.S. 181 (1922); Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911). In *Gompers* the Court stated:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then the courts are impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be mere mockery.

Id. at 450.

7. *See generally* Near v. Minnesota, 283 U.S. 697 (1931); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971).

8. *See infra* note 113 and accompanying text. The definition of a transparently invalid prior restraint is problematic and will be dealt with in detail later in the paper.

considered patently unconstitutional judicial orders was *United States v. Dickinson*.[9] Under the *Dickinson* rule,[10] publishers or broadcasters who disobeyed judicial orders, even orders believed to be unconstitutional, knew they could be summarily held in contempt of court. In *Dickinson*, the Fifth Circuit rejected the appeals of two reporters who had disobeyed a judge's order not to publish information from an open court hearing.[11] The two reporters had attended a federal district court hearing involving two VISTA workers charged with conspiracy to kill the mayor of Baton Rouge, Louisiana.[12] The district court judge, interpreting the court's Free Press-Fair Trial Rules,[13] ordered the media not to report testimony from the open hearing.[14] The reporters, however, published stories based on the hearing the following day.[15] The court held both reporters in contempt and fined each $300.00.[16]

The Fifth Circuit found that the district court judge's application of the Free Press-Fair Trial Rules was "bottomed irrevocably on a mistake of law" and therefore was unconstitutional.[17] However, the Fifth Circuit concluded that the district court's order, while premised on an "erroneous view," was not "transparently invalid."[18] The Fifth Circuit upheld the contempt order, affirming the collateral bar rule. The collateral bar rule states that court orders, regardless of their constitutionality, must be obeyed until set aside for the judicial system to function.[19] In his opinion, Chief Judge John R. Brown acknowledged that news can lose its value even after a short delay.[20] However, the judge stated that the proper action would have been to appeal and obey it unless the order was "disrobed of authority by delay or frustration in the appellate process regardless of the ultimate determination of constitutionality, or lack thereof."[21]

Dickinson appears to be the only case to apply the reasoning of *Walker v. Birmingham*[22] to a pure speech case where speech was not

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9. United States v. Dickinson, 465 F.2d at 496.
10. *See* K. MIDDLETON & B. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 420 (1988).
11. *Dickinson*, 465 F.2d at 496.
12. *Id.* at 499.
13. *Id.* at 500.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 514.
18. *Id.* at 509, 514.
19. *Id.* at 510.
20. *Id.* at 512.
21. *Id.*
22. 388 U.S. 307 (1967).

combined with a public activity, such as a protest march, in a way that prevents a publisher cited for contempt from attacking the constitutionality of the original order. In *Walker*, the Supreme Court affirmed the collateral bar rule in a case involving the Reverend Martin Luther King Jr.[23] The Reverend King and other civil rights demonstrators defied a court order and held a protest march in Birmingham, Alabama. Justice Stewart, writing for the majority in *Walker*, ruled that although the injunction against the planned march was unconstitutional, it should have been obeyed.[24]

The Court emphasized two distinguishing characteristics in its holding. First, the Court had consistently recognized the strong interests of state and local governments in regulating the use of their streets and public places.[25] Therefore, the Court reasoned, this was "not a case where the injunction was transparently invalid or had only a frivolous pretense of validity."[26] Second, the Court observed that it had "emphatically rejected the notion" that the first amendment afforded the same freedom to communicate ideas by actions, such as marching and picketing on streets and highways, as it affords those who "communicate their ideas by pure speech."[27] In other words, the injunction in *Walker* was an arguably valid attempt to regulate the use of public streets and not an attempt to suppress pure speech. Justice Stewart reasoned "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."[28]

B. *Cases Contrary to the* Dickinson *Rule*

Courts in several states held contrary to *Dickinson* when publishers have defied court orders not to publish. The Washington Supreme Court in *State ex. rel. Superior Court of Snohomish Co. v. Sperry*[29] reversed contempt citations of two reporters whose stories were published based on information from an open court proceeding.[30] The court, allowing a collateral attack on a contempt ruling, held that the reporters could safely ignore a court order that was patently uncon-

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23. *Id.* at 307.
24. *Id.* at 320-21.
25. *Id.* at 315.
26. *Id.* at 315-16.
27. *Id.* (quoting Cox v. Louisiana, 379 U.S. 536, 555 (1967)).
28. *Id.* at 320-21.
29. 79 Wash. 2d 69, 483 P.2d 608 (Wash.), *cert. denied*, 404 U.S. 939 (1971).
30. *Id.* at 78, 483 P.2d at 613.

stitutional.[31] The court distinguished the case from *Walker* noting that the court order in *Walker*, which banned a civil rights march, though unconstitutional, was not transparently invalid.[32]

In *State v. Coe*,[33] the Washington Supreme Court rejected the collateral bar rule. The court held that a lower court order prohibiting a Spokane station from broadcasting taped recordings was patently invalid.[34] The recordings were played in open court in a case involving solicitation for murder. The Washington Supreme Court, relying on the state constitution,[35] held that the trial court's prior restraint on information from open court was invalid and could not support a contempt charge.[36] The court, citing *Sperry*,[37] noted the collateral bar rule of *Walker* was inapplicable because *Walker* dealt with a court order that was not transparently invalid. Instead the court order in *Coe* was patently invalid.[38]

In *Wood v. Goodson*,[39] the Arkansas Supreme Court followed the Washington Supreme Court's decisions. In *Wood*, a newspaper editor disobeyed a circuit court judge's order not to publish the results of a jury verdict.[40] In invalidating the court order, the Arkansas Supreme Court noted that "no court . . . has the power to prohibit the news media from publishing that which transpires in open court."[41] The court noted that a subsequent contempt charge against the editor could be challenged collaterally.[42]

Similarly, the Appellate Court of Illinois allowed a collateral attack in *Cooper v. Rockford Newspapers, Inc.*[43] In *Cooper*, a newspaper was cited for contempt when it violated a court order not to publish editorials about a libel suit filed against the newspaper.[44] The appellate court reversed the contempt finding and the court held that in balancing the competing interests of the free press and the integrity of the

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31. *Id.* at 74, 483 P.2d at 611.
32. *Id.*
33. 101 Wash. 2d 364, 679 P.2d 353 (Wash. 1984).
34. *Id.* at 374, 679 P.2d at 359.
35. *Id.*
36. *Id.*
37. *Id.* at 374, 679 P.2d at 358 (citing State ex rel. Superior Court v. Sperry, 72 Wash. 2d 69, 483 P.2d 608, 611 (Wash. 1971), *cert. denied*, 404 U.S. 939 (1971)).
38. *Coe*, 679 P.2d at 358.
39. 253 Ark. 196, 485 S.W.2d. 213 (Ark. 1972).
40. *Id.* at 197, 485 S.W.2d at 214.
41. *Id.* at 203, 485 S.W.2d at 217.
42. *Id.*
43. 50 Ill. App. 3d 250, 365 N.E.2d 746 (Ill. App. 2 Dist. 1977).
44. *Id.* at 251, 365 N.E.2d at 747.

courts, the defendant should not be held responsible for violating the court order.[45] The court distinguished the case from *Walker*, noting that the order in *Walker* banned a civil rights march, not pure speech.[46] Furthermore, the mere fact that the newspaper did not attempt to appeal the injunction before defying it did not preclude the newspaper from challenging the validity of the order, according to the court.[47]

The California Supreme Court also rejected the collateral bar rule in a free speech case decided the year after *Walker*. In *In re Berry*,[48] the court held that a temporary restraining order against a county employees' union was unconstitutionally overbroad and improperly restricted employees' first amendment rights.[49] The county argued that the collateral bar rule expressed in *Walker* precluded the employees from raising a constitutional challenge because they had disobeyed the order without first attempting to have it vacated.[50] The court noted that the *Walker* ruling held that violation of frivolous or transparently invalid orders might be permissible.[51] The court concluded that *Walker* was consistent with the California rule that an order that is invalid cannot support a contempt judgment.[52]

In *Mayer v. Florida*,[53] the Second District Court of Appeal did not invoke the collateral bar rule and allowed constitutional arguments on appeal of a contempt conviction of a reporter whose newspaper published information from a closed child custody hearing.[54] In *Mayer*, the reporter was allowed to attend the hearing after agreeing not to report anything without the judge's permission.[55] The court weighed arguments concerning the constitutionality of the order restricting reports on the closed hearing, but upheld the contempt charge.[56] The court, however, based its decision on state case law and statutes related to custody hearings.[57]

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45. *Id.* at 255, 365 N.E.2d at 750.
46. *Id.* at 257, 365 N.E.2d at 751.
47. *Id.* at 254-55, 365 N.E.2d at 749-750.
48. 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (Cal. 1968).
49. *Id.* at 150, 436 P.2d at 286, 65 Cal. Rptr. 286.
50. *Id.* at 146, 436 P.2d at 282, 65 Cal. Rptr. 282.
51. *Id.*
52. *Id.*
53. 523 So. 2d 1171 (Fla. 2d D.C.A. 1988).
54. *Id.* at 1174.
55. *Id.* at 1173-76.
56. *Id.*
57. *Id.* at 1174-75.

C. *The Providence Journal Case*

While courts in several states have not followed the *Dickinson* rule,[58] it was not until the Providence Journal defied a temporary restraining order against publishing legally obtained information that a case rivaling *Dickinson* reached the United States Court of Appeals. In 1988, the United States Supreme Court in *United States v. Providence Journal Co.*[59] refused to address this dilemma of balancing the needs of courts to maintain their authority with the first amendment rights of publishers to publish without prior restraints. In *Providence Journal*, a newspaper defied a judge's temporary restraining order that the newspaper delay publication of information legally obtained from the Federal Bureau of Investigation.[60]

The *Providence Journal* case began on November 8, 1985, when Raymond J. Patriarca filed suit against the FBI, the Justice Department, the United States Attorney General, a television station and the Providence Journal.[61] The suit sought to prohibit publication of logs and memoranda relating to information about Patriarca's father, the late Raymond L.S. Patriarca, a reputed mobster.[62] The logs and memoranda were based on information gathered by the FBI using illegal wiretaps. The illegal wiretap information itself had previously been destroyed.[63]

The Providence Journal was served with a temporary restraining order on November 12, 1985, prohibiting it from publishing the information obtained from the FBI.[64] On the following day, attorneys for the involved parties met with the chief judge for the United States District Court of Rhode Island. The judge then entered a temporary restraining order barring publication and set a hearing on the order for the following day, November 14.[65] Since the Journal's attorney asked for more time to prepare, the judge reset the hearing for November 15.[66]

On the night of November 13, 1985, a Journal official briefed Editor Charles M. Hauser on the restraining order.[67] The official explained

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58. *Dickinson*, 465 F.2d at 510.

59. 820 F.2d at 1342 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987) (enbanc), *cert. dismissed*, 485 U.S. 693 (1988).

60. *Id.* at 1345.

61. *Id.* at 1344.

62. *Id.*

63. *Id.* at 1344.

64. *Id.* at 1345.

65. *Id.*

66. *Id.*

67. *Id.* at 696.

the consequences of publishing in defiance of the order and advised that there were no practical means of appealing the order that night.[68] Hauser, aware that some of the information released by the FBI had already been made public elsewhere, decided to publish two articles.[69] One article contained information obtained from the FBI.[70] The other article detailed the Journal's conflict with the court.[71]

Patriarca's lawyer filed a motion that the Journal be held in contempt of court. Since the United States Attorney's Office in Rhode Island represented the federal defendants in related civil actions, the district judge invoked a federal regulation allowing appointment of a special prosecutor to pursue the contempt motion.[72] After a hearing on February 10, 1986, the district court found the Journal and its executive editor in criminal contempt.[73] At a sentencing hearing on April 2, 1986, the Journal was fined $100,000.[74] The executive editor received a suspended sentence with the requirement that he perform two hundred hours of community service and was also placed on probation for eighteen months.[75]

The Journal appealed to the United States Court of Appeals for the First Judicial Circuit, which reversed the judgment.[76] Judge John Minor Wisdom, Chief Judge for the Fifth Circuit, admitted that the appeal posed a question with no easy answer.[77] Judge Wisdom stated that in reaching its opinion, the court endeavored "to avoid deciding which principle should take precedence by reaching a result consistent with both principles."[78] The First Circuit found that the district court's order was transparently invalid.[79] As a result, the Providence Journal could challenge the order's constitutionality collaterally in the contempt proceedings.[80] The court found that none of the grounds asserted by the special prosecutor provided even a colorable basis for the temporary restraining order.[81]

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68. *Id.*
69. *Id.*
70. *Id.* at 696.
71. *Id.*
72. *See* FED. R. CRIM. P. 42(b).
73. *Patriarca*, 630 F. Supp. at 1345.
74. *Id.* at 697.
75. *Id.* at 697.
76. 820 F.2d at 1342, 485 U.S. at 697.
77. *Id.*
78. *Id.*
79. *Id.* at 1353.
80. *Id.*
81. *Id.* at 1349-50. The special prosecutor asserted three grounds supporting the request for an injunction. The court rejected each claim: The Freedom of Information Act (finding the

The First Circuit, sitting en banc, reheard the case at the request of the special prosecutor.[82] The court upheld the opinion, but modified it to minimize the disharmony between respect for court orders and respect for free speech.[83] The court, recognizing that it was speaking "technically in dicta"[84] by modifying the opinion without altering the holding, added the requirement that a publisher make a good faith effort to secure appellate relief.[85] If timely access to an appellate court were not available or if a timely decision not forthcoming, a publisher may violate an order and challenge its constitutionality at a later contempt hearing.[86]

The special prosecutor petitioned for writ of certiorari on behalf of the federal district court judge whose contempt order was overturned on appeal.[87] The Journal argued that since the temporary restraining order was "transparently invalid" and unconstitutional, the newspaper was entitled to defend itself on those grounds in contempt proceedings.[88] The Journal also filed a motion seeking dismissal of certiorari, arguing, among other things, that the special prosecutor was not lawfully empowered to petition the Supreme Court.[89] The special prosecutor asserted that the district judge was justified in issuing a temporary restraining order to maintain the status quo while considering the apparent conflict between first amendment and fourth amendment rights.[90]

On May 2, 1988, the Supreme Court dismissed the writ of certiorari.[91] Justice Blackmun, writing for the majority, stated the court-appointed special prosecutor had acted without the authorization of the solicitor general.[92] Therefore, the special prosecutor did not prop-

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disclosure fell within the F.B.I.'s discretion and holding an injunction for federal agency disclosure was outside the court's authority); Title III, 18 U.S.C. § 2520 (providing an action for damages to individuals injured as a result of illegal disclosure of private communications but not providing for injunctive relief); U.S. Constitution fourth amendment (finding fourth amendment protection of citizens limited to abuses by the government, not private parties and holding fourth amendment does not apply to the newspaper and editor as private parties). *Id.*

82. *Matter of Providence Journal Co.*, 820 F.2d at 1354.

83. *Id.* at 1355.

84. *Id.*

85. *Id.*

86. *Id.* (stating that asking the publisher to attempt to attain emergency appellate relief despite the apparant unconstitutionality of the order is not too great a burden).

87. United States v. Providence Journal Co., 484 U.S. 814 (1987).

88. *Providence Journal*, 485 U.S. at 693 (citing brief for the respondents at 20).

89. *Id.* at 697 (citing brief for the respondents at 7 n.7).

90. *Id.* at 695-6 (citing brief for the petitioner at 7).

91. *Id.* at 694, 697.

92. *Id.* at 694.

erly represent the United States before the court.[93] The opinion emphasized that the Court had granted certiorari because of the importance of the issues raised in the First Circuit's *Providence Journal* ruling.[94] The Court, however, left unresolved an apparent conflict between the First and Fifth Judicial Circuits regarding publishers' rights to violate what they believe to be patently invalid judicial orders and to challenge the constitutionality of the orders at subsequent contempt hearings.[95]

D. *Comparison of* Dickinson *and* Providence Journal

While the First Circuit in *Providence* reached a different conclusion from the Fifth Circuit in *Dickinson*,[96] regarding publishers' rights to violate what they believe to be patently invalid orders, the legal reasoning underlying the cases, as articulated in *Walker v. Birmingham*,[97] seems consistent. The *Walker* Court affirmed the collateral bar rule that a party who violates a judicial order gives up the right to challenge the constitutionality of the order.[98] However, the *Walker* Court also envisioned an exception should a judicial order be deemed "transparently invalid."[99] In *Walker*, the Court held that the court order was unconstitutional, but that the City of Birmingham had a legitimate interest in maintaining order on its streets.[100] The Court also distinguished between pure speech and speech combined with actions, such as a protest march that might disrupt traffic.[101] The order, while unconstitutional, was not "transparently invalid" because it was not directed at pure speech and because the city had legitimate interests in regulating traffic.[102]

The Fifth Circuit in *Dickinson* reasoned that the fair-trial concerns expressed by the district judge were legitimate, but that the judge's order was misguided and constituted an unconstitutional prior restraint.[103] The Fifth Circuit concluded that the judge's concerns could

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93. *Id.*

94. *Id.* at 698.

95. *Compare Dickinson*, 465 F.2d 496 (5th Cir. 1972) *with Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987).

96. *See Dickinson*, 465 F.2d 496 (5th Cir. 1972).

97. 388 U.S. 307 (1967).

98. *Id.* at 307.

99. *Id.* at 315.

100. *Id.* at 315-16.

101. *Id.* at 316 (citing Cox v. Louisiana, 379 U.S. 536, 555 (1964); Cox v. New Hampshire, 312 U.S. 569 (1940)).

102. *Walker*, 388 U.S. at 316.

103. *Dickinson*, 465 F.2d at 512.

have been resolved by applying less restrictive measures on the media.[104] Nonetheless, absent a showing that the order was transparently invalid, the contempt order could stand.[105] In *Providence*, the First Circuit followed similar reasoning, but concluded that the underlying order was transparently invalid, and that such an order could not form the basis for criminal contempt.[106]

Both *Dickinson* and *Providence* alluded to the reasoning of Justice Stewart in *Walker* that the "case would arise in a different constitutional posture" had the petitioners challenged the order and met with delays and frustration in the courts.[107] The Fifth Circuit, in affirming the collateral bar rule in *Dickinson*, noted that the proper action would have been to appeal and obey the order unless confronted with "strong indications that the appellate process was being deliberately stalled."[108] In *Providence*, the First Circuit's en banc ruling stated that a publisher faced with a transparently invalid court order may proceed to publish, but only after making a good-faith effort to seek emergency appellate relief.[109]

The *Providence* and *Dickinson* cases differ, however, on the circumstances of the violations and the subsequent penalties. In *Dickinson*, a decision was made to publish information from an open hearing that was already in the public domain. The Fifth Circuit was in a relatively easy position to allow contempt penalties to stand, based on an unconstitutional prior restraint found to be not transparently invalid. The penalties, a $300 fine for each of the reporters, amounted to a judicial slap on the hand.[110]

In *Providence*, the stakes for the media were much higher. The information, although legally obtained from the FBI, was not yet fully in the public domain. The newspaper, in publishing the information, not only violated the restraining order during a time when its lawyer had sought and been granted more time to prepare, but it also chose to publicize its disobedience in a news story that outlined its conflict with the court. The $100,000 fine, eighteen-month suspended sentence and requirement for community service reflected the apparent indig-

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104. *Id.* at 512-13.
105. *Id.* at 514.
106. *Matter of Providence Journal*, 820 F.2d at 1353.
107. *Walker*, 388 U.S. at 318.
108. *Dickinson*, 465 F.2d at 512.
109. *Matter of Providence Journal*, 820 F.2d at 1355.
110. *Dickinson*, 465 F.2d at 513 n.19.

nation of the court.[111] Given the severity of these penalties, the First Circuit was not in an easy position to chastise but affirm the lower court, which it found to be clearly in error.

III. A PUBLISHER'S OPTIONS

Where do these apparently conflicting opinions leave the publisher who has just been served with a restraining order prohibiting publication of information slated for the next day's editions? In the First Circuit's jurisdiction, a publisher faced with what it believes to be a transparently invalid order may publish after first seeking timely appellate relief. Likewise, a publisher in the Fifth Circuit may publish in violation of a transparently invalid prior restraint. However, the Fifth Circuit substantially narrowed the meaning of transparently invalid. If a prior restraint on an open court statement is not transparently invalid, given the Supreme Court's near-absolute prohibition against such orders,[112] it is difficult to imagine what might be.

In both the First and Fifth Circuits, a publisher must unravel the meaning of "transparently invalid."[113] Similarly, in several states, mentioned previously, a publisher who defies a court order may be allowed to raise a constitutional challenge if held in contempt.[114] However, the majority of the nation's publishers must act knowing that they likely would be held in contempt. The publishers' fates ultimately will depend on how a particular court, faced with the confusing precedents of two similar cases with opposite outcomes, chooses to balance the conflict between the principle of judicial authority and the near-absolute prohibition against prior restraints.

IV. QUESTIONS LEFT UNANSWERED

What questions might the Supreme Court have resolved had it reached the thorny issue of judicial authority versus freedom of the press as presented in *Providence Journal*?

Publishers are concerned that they must obey unconstitutional judicial orders based on the reasoning of *Walker* and earlier cases. Such decisions are more powerful than a statute. A statute may be violated

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111. *Matter of Providence Journal*, 820 F.2d at 1345.

112. *Dickinson*, 465 U.S. at 496.

113. Transparently invalid is a term legal scholar Lawrence Tribe has described as "a chimera, what does it mean?" "It's Ok for Press to Defy Courts, But . . . " *National Law Journal* 4 (Jan. 26, 1987). *See id. See also* Matter of Providence Journal, 485 U.S. 693 (1988).

114. *See* Cooper v. Rockford, 50 Ill. App. 2d 250, 365 N.E.2d 746 (Ill. App. 2d 1977); Mayer v. Florida, 523 So.2d 1171 (Fla. 2d D.C.A. 1988).

and constitutionally challenged.[115] In fact, Judge Brown pointed out in *Dickinson* that in some situations intentional disobedience is the only way a statute can be tested.[116] The imbalance between the judicial and legislative branches in this context poses an interesting constitutional question. A comparison of *Walker* and a related case, *Shuttlesworth v. City of Birmingham*,[117] is instructive. The court order in *Walker* paraphrased a Birmingham ordinance that the Supreme Court a year later in *Shuttlesworth* held to be an unconstitutional restraint on first amendment speech.[118] In effect, the Alabama courts could prevent the civil rights marchers from exercising their first amendment rights while denying the marchers who exercised those rights effective judicial relief.[119] One commentator, writing in the wake of *Walker v. Birmingham*, suggests that courts' refusals to hear collateral attacks in such cases create the appearance of "judicial lawlessness" instead of promoting public respect for the legal system.[120]

The Supreme Court could have articulated a procedure for courts to follow when faced with requests for restraining orders on pure speech. Compare Chief Justice Burger's approach to balancing free press concerns with the sixth amendment rights of a defendant to a fair trial in *Nebraska Press Association v. Stuart*.[121] In that case, Chief Justice Burger virtually eliminated the possibility of a constitutional prior restraint on what transpired in open court.[122] The Supreme Court has found the same heavy prohibition against prior restraints in non-courtroom situations.[123] As Justice Brennan noted in *New York*

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115. *Dickinson*, 465 U.S. at 510. *See* Shuttlesworth v. Birmingham, 394 U.S. 147 (1986). The Supreme Court held that the municipal ordinance, on which the injunction in Walker v. Birmingham was based, was unconstitutional. *Id.*

116. *Dickinson*, 465 F.2d at 510.

117. 394 U.S. 147 (1986).

118. *Id.*

119. *Id. See* V. Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482 (1970).

120. Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 635 (1970).

121. 427 U.S. 539 (1976). The Supreme Court set forth the following test to balance the first amendment Rights of the Press with the fair-trial rights of a defendant: First, the trial court's determination of the probable extent of publicity must be more than speculative; second, the trial court must have considered other less press-restrictive alternatives to protect the defendant's rights; last, the trial court must consider whether any press restrictions imposed will achieve their goals. *Id.* at 562-67.

122. *Id.* at 559-62.

123. *See generally* Near v. Minnesota, 283 U.S. 697 (1931); *see also* New York Times Co. v. Unites States 403 U.S. 713 (1971).

Times Co. v. United States, the Supreme Court has never upheld a prior restraint on publication of news.[124]

The Court also could have established a test similar to the licensing procedures in *Freedman v. Maryland.*[125] Such a test shifts the burden to the government when seeking a prior restraint, and requires a court ruling in a short period of time.[126] *Providence* provides a possible starting point where a publisher faced with a transparently invalid judicial order first seeks timely appellate relief and publishes only if met with delay. For example, the Supreme Court could require, in the case of a prior restraint on news slated for publication, that a court issue a ruling on any request to delay publication before the deadline for publication or forgo the collateral bar rule.

Short of a procedure that would ensure that first amendment speech is not lost while waiting for a judicial hearing, a workable definition of what constitutes a transparently invalid order would be essential. None of the foregoing cases provide a clear definition of the term. *Walker* seems to suggest that an order proscribing pure speech, as opposed to speech combined with action such as a protest march, might be transparently invalid.[127] Judge Brown, in *Dickinson*, offers some guidance, noting that "it is obvious that if the order requires an *irrevocable* and permanent surrender of a constitutional right, it cannot be enforced by the contempt power."[128] Such a definition would seem to cover loss of the right to publish information slated for immediate publication, but Judge Brown discounts this argument in *Dickinson.*[129]

The First Circuit, citing *Nebraska Press*, suggested that three criteria must be met before prior restraint orders could be found invalid.[130] A party seeking a prior restraint must show that publication would result in loss of a near-sacred right, that the prior restraint will be effective, and that no less restrictive means are available.[131]

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124. 403 U.S. 713, 724-27 (1971).

125. 380 U.S. 51 (1965).

126. *Id.* The Supreme Court established a test to protect first amendment rights in film-licensing schemes. First, the party issuing the prior restraint has the burden of justifying it; second, action has to be taken by the issuing party in a short, specified, amount of time; finally, a court must render final decision in a short period time. *Id.* at 58-9.

127. *Walker*, 388 U.S. at 315-16.

128. *Dickinson*, 465 F.2d at 512. *See also* Elrod v. Burns, 427 U.S. 347 (1976) (recognizing that the loss of first amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury).

129. *Dickinson*, 465 F.2d at 511-12.

130. *Matter of Providence Journal*, 820 F.2d at 1351 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-68 (1976)).

131. *Matter of Providence Journal*, 820 U.S. at 1351.

Some state courts have suggested that any judicial order based on an error of law exceeds the jurisdiction of the court and is therefore transparently invalid.[132] Despite these possible definitions, the term "transparently invalid" generally seems to have slipped into the judicial realm of "I know it when I see it."[133]

V. CONCLUSIONS

Procedures for challenging prior restraint orders have several flaws when applied to news media. In the news business, the value of what is printed or broadcast often depends on how quickly it is made public. Any procedure that interferes with the publisher's ability to decide when and what to publish has the potential to destroy the news value of information. As Judge Brown noted in *Dickinson*, "Timeliness of publication is the hallmark of news and the difference between news and history is merely a matter of hours."[134] Court-imposed delays, even for only hours, could diminish or destroy the news value of information. Subjects of critical news accounts could seek a court hearing for spurious reasons, which the court might ultimately reject. In the meantime, the news value of information might be diminished or destroyed even if a publisher prevailed in court. The subject of a news account, under these circumstances, could delay critical information long enough to release a favorable account through another receptive outlet. Such a process could allow well financed special interest groups to impede or frustrate the legitimate news process of the media. Delays, as Justice Brennan pointed out in his concurring opinion in *Nebraska Press*,[135] often extend far beyond a matter of hours. Justice Brennan noted that gag orders, which were ultimately struck down, were in effect for an average of eleven weeks.[136]

The creation of procedures for challenging court-imposed prior restraints also overlooks the small publisher or pamphleteer, both of whom might lack the will, legal sophistication or financial resources to mount a creditable legal fight. In such instances, a legitimate first amendment right would be denied without an opportunity of redress.

The tension between the need for judicial authority and the strong presumption against prior restraints will likely reach the Supreme Court again because of the apparent conflict between rulings of the

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132. *In re* Berry, 436 P.2d at 288-89.
133. Ginsburg v. United States, 383 U.S. 463 (1966) (Stewart, J., dissenting).
134. *Dickinson*, 465 F.2d at 512.
135. *Nebraska Press*, 427 U.S. at 572-614.
136. *Id.* at 609 (Brennan, J., concurring).

First and Fifth Judicial Circuits.[137] The Court has already acknowledged "the importance of the issues" in its opinion in *Providence* dismissing certiorari.[138] Meanwhile, most publishers must live with the judicial ambiguity of the collateral bar rule. Publishers can either violate a judicial order and risk almost certain conviction for contempt and lose the right to challenge the order's constitutionality, or obey the order and lose, at least for a time, the first amendment right to publish timely information. As Justice Kennedy stated: "A broadcaster or publisher should not . . . be required to make a sudden appearance in court and then take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid court order constitutes a contempt."[139]

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137. *Compare Dickinson*, 465 F.2d 496 (5th Cir. 1972) *with Matter of Providence Journal*, 820 F.2d 1342 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987).

138. *Providence Journal*, 485 U.S. at 698.

139. Goldblum v. National Broadcasting Corp., 584 F.2d 904, 907 (9th Cir. Cal. 1976). *See also* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 529 (1977) (arguing that courts should reject gag orders because they put the press in the position of having to choose between relinquishing a constitutional right or obeying a potentially unconstitutional order); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984) (stating language in *Walker* should be interpreted to include first amendment precedents that would make transparently invalid a wide range of injunctions against pure speech).