

# Collateral Bar and Contempt: Challenging a Court Order after Disobeying It

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## NOTE

# COLLATERAL BAR AND CONTEMPT: CHALLENGING A COURT ORDER AFTER DISOBEYING IT

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### INTRODUCTION

While many lawyers remember only fragments of the collateral bar rule from first-year civil procedure class, those whom the rule most regularly affects—counsel for labor leaders, demonstration organizers, and newspaper publishers—understand the awesome power that this rule gives to a court order.<sup>1</sup> Collateral bar allowed, for exam-

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† B.S., Cornell University, 1997; candidate for J.D., Cornell Law School, 2003. The author thanks Professor Kevin M. Clermont for his invaluable comments and suggestions.

<sup>1</sup> For the purposes of this Note, "court order" refers to any equitable remedy by which a court commands a person to act or refrain from acting in a particular way, the disobedience of which is punishable by criminal contempt. The term thus encompasses, among other things, preliminary and permanent injunctions, temporary restraining orders, subpoenas, and decrees. For a discussion of these types of remedies, see generally 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2 (2d ed. 1993).

ple, a federal district court to fine the United Mine Workers for disobeying an anti-strike injunction without regard to whether Congress had specifically deprived the court of jurisdiction to issue such injunctions.<sup>2</sup> It allowed a Birmingham court to fine and imprison Martin Luther King, Jr. for disobeying an anti-demonstration injunction without regard to whether the injunction violated King's First Amendment rights.<sup>3</sup> Very likely, collateral bar influenced the *New York Times* to refrain from publishing the famous Pentagon Papers in the face of a federal district court's unconstitutional gag order.<sup>4</sup>

The collateral bar rule limits the grounds on which a person who has disobeyed a court order can challenge that order to avoid being punished for criminal contempt. At its core, the rule generally prevents such a person from challenging the merits of the order, even if the order infringed on constitutional rights.<sup>5</sup> In addition, the rule generally prevents such a person from challenging the court's jurisdiction to have issued the order.<sup>6</sup> The rule thus forces people to obey erroneous and invalid court orders and to challenge them directly (if at all), unless they are willing to incur the cost of punishment.

In spite of these significant consequences, collateral bar remains an obscure and often misunderstood rule. It receives scant treatment in law school texts, seeming to exist on the periphery of both civil procedure and constitutional law, but not entirely within either subject. There has been some valuable commentary on the rule, but the commentary has focused specifically on the rule's application in the First Amendment context and on the extent to which the rule is justified.<sup>7</sup> When the courts discuss collateral bar, they often use formulaic

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<sup>2</sup> See *United States v. United Mine Workers*, 330 U.S. 258, 293-95 (1947); *infra* Part I.B.2.

<sup>3</sup> See *Walker v. City of Birmingham*, 388 U.S. 307, 315-21 (1967); *infra* Part I.A.

<sup>4</sup> See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding the order unconstitutional); Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 *FORDHAM L. REV.* 289, 309-10 (1999) (discussing possible reasons for the *New York Times's* obedience); *infra* note 14. Admittedly, the reasons for the *New York Times's* decision to obey are not entirely clear, and factors other than collateral bar probably contributed. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 71 (1978); Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 *CASE W. RES. L. REV.* 1, 62 n.305 (2000).

<sup>5</sup> See *Walker*, 388 U.S. at 315-21; *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *infra* Part I.A.

<sup>6</sup> See *United Mine Workers*, 330 U.S. at 293-94 (1947); *United States v. Shipp*, 203 U.S. 563, 573 (1906); *infra* Part I.B.

<sup>7</sup> See, e.g., Richard E. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 *AM. U. L. REV.* 323 (1988) [hereinafter Labunski, *Collateral Bar Rule*] (surveying federal and state case law and advocating exceptions to the collateral bar rule in the First Amendment context); Richard Labunski, *A First Amendment Exception to the "Collateral Bar" Rule: Protecting Freedom of Expression and the Legitimacy of Courts*, 22 *PEPP. L. REV.* 405 (1995) [hereinafter Labunski, *First Amendment Exception*] (same); Hal Scott Shapiro, *The Collateral Bar Rule—Transparently Invalid: A Theo-*

(and inaccurate) language,<sup>8</sup> and they rarely look closely at the rule's precise scope or its underlying justification.<sup>9</sup>

More importantly, although the Supreme Court has recognized the need to temper the collateral bar rule with some exceptions, it has not clearly explained the exact scope of these exceptions.<sup>10</sup> The lower federal courts have responded by interpreting the Supreme Court's exceptions as narrowly as possible, and by generally applying the collateral bar rule in a harsh and mechanical fashion.<sup>11</sup> As a result, collateral bar ends up placing undue burdens on people confronted with court orders.<sup>12</sup> Those who disobey, thinking they can rely on exceptions to the rule, are often in for a nasty shock.<sup>13</sup> Those who know

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*retical and Historical Perspective*, 24 COLUM. J.L. & SOC. PROBS. 561 (1991) (reviewing cases from the First Amendment context in arguing that the rule should be abrogated). One exception is Professor Zechariah Chafee, Jr.'s 1950 discussion of collateral bar. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 296-380 (1950). Chafee placed the rule in the broader context of collateral attack in general by stressing the fundamental distinction between the merits of a court order and the court's authority to issue the order. *See id.* At that time, however, Chafee refused to recognize significant developments in the rules surrounding collateral attack, *see id.* at 319 n.42, and his approach deserves to be revisited and updated now that these developments have become permanent fixtures.

<sup>8</sup> *See* *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) (inaccurately stating, without qualification, that collateral bar does not apply to an order that exceeds a court's jurisdiction); *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1098 (1st Cir. 1992) (inaccurately citing, among other cases, *United Mine Workers* to support the proposition that "[i]t is established beyond peradventure that a party may bring an appeal to challenge a contempt order, notwithstanding the failure to obtain a stay or comply with the order's terms, if the order was entered by a court lacking jurisdiction over . . . the subject matter"); *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991) (inaccurately stating that "if the issuing court lacks subject-matter jurisdiction over the underlying controversy . . . its order may be violated with impunity"); *Dep't of Labor OSHA v. Hern Iron Works, Inc.* (*In re Establishment Inspection of Hern Iron Works, Inc.*), 881 F.2d 722, 726 & n.12, 727 (9th Cir. 1989) (observing the lack of judicial certainty as to the exceptions to the collateral bar rule and inaccurately stating that collateral bar does not apply if the court issuing the order lacked subject-matter jurisdiction); *FTC v. Verity Int'l, Ltd.*, 140 F. Supp. 2d 313, 315 (S.D.N.Y. 2001) (inaccurately stating that the only exceptions to collateral bar are where the order exceeds the court's jurisdiction or is transparently invalid); *In re Criminal Contempt Proceedings Against Crawford*, 133 F. Supp. 2d 249, 260 (W.D.N.Y. 2001) (same); *United States v. Walker*, No. 94-CR-32S, 1994 WL 759866, at \*3 (W.D.N.Y. Dec. 21, 1994) (inaccurately stating that "if the issuing court lacks subject-matter jurisdiction over the underlying controversy . . . its order may be violated and no contempt sanction may be imposed").

<sup>9</sup> To the extent that courts do seek to explain the rule's justification, it is often with more rhetorical flourish than substance. *See infra* notes 139-40 and accompanying text.

<sup>10</sup> *See infra* Part II.B.

<sup>11</sup> *See infra* Part II.B.

<sup>12</sup> *See infra* Part II.A-B.

<sup>13</sup> For instance, litigants in the First, Second and Ninth Circuits, and in the District of New Mexico, have all faced courts intent on applying the Supreme Court's exceptions narrowly. *See infra* notes 171-72, 206-09 and accompanying text. Another litigant, CNN, probably would have found the Eleventh Circuit equally intent on narrowly applying the Supreme Court's exceptions after it confidently disobeyed a 1990 gag order; in that case, however, the case's procedural posture combined with the court's anger over CNN's brazen disobedience led the court to actually uphold the order itself. *See* *United States v.*

better tend to go out of their way to comply, even if the orders trample their rights.<sup>14</sup>

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Noriega, 917 F.2d 1543 (11th Cir. 1990). The case arose when a federal district court ordered CNN not to broadcast tapes of former Panamanian leader Manuel Noriega speaking with his legal defense team while in U.S. custody. See Amy Singer, *How Prior Restraint Came to America*, AM. LAW., Jan.-Feb. 1991, at 88. CNN's lawyers apparently were so confident that the order fell within one of the Supreme Court's ambiguous exceptions that they did not raise a single concern about the repercussions of broadcasting the tapes. In addition, they refused to permit the judge to listen to the tapes for the purpose of evaluating the harm their broadcast might cause to Noriega's rights, and even let CNN's president announce to the press that CNN was disobeying the order. See *id.* at 91-92. In fact, far from allowing CNN's defense, the Eleventh Circuit upheld the restraining order (which CNN was still trying to quash after the fact). See *Noriega*, 917 F.2d at 1552. Although this mooted the question of whether the collateral bar rule would apply at the contempt proceeding, it appears that this decision—the first federal appellate decision in over twenty-five years upholding a prior restraint—was largely influenced by CNN's disobedience. See Singer, *supra*, at 90, 92-93. The court stressed that “[w]hile appealing to our nation's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions.” *Noriega*, 917 F.2d at 1551. This turn of events made the press statement by CNN's president especially embarrassing at the subsequent contempt proceeding, as the statement obviously undercut CNN's defense that it had not willfully violated the order. See *United States v. CNN, Inc.*, 865 F. Supp. 1549, 1561-63 (S.D. Fla. 1994); *CNN Asks Judge to Ignore Its 1990 Report on Use of Noriega Tapes*, N.Y. TIMES, Sept. 17, 1994, at A9. For more on CNN's Noriega fiasco, see *CNN Found in Contempt for Use of Noriega Tapes*, N.Y. TIMES, Nov. 2, 1994, at A14 (explaining the judge's rationale for holding CNN in contempt); David Lyons, *CNN Argues Its Side on Noriega Jail Tapes*, NAT'L L.J., Sept. 26, 1994, at A12 (explaining CNN's failed argument that Noriega's counsel had waived confidentiality); Ruth Marcus, *Rights of Press and Defendants Collide in Noriega Tapes Case*, WASH. POST, Nov. 12, 1990, at A1 (summarizing the conflict between freedom of the press and the attorney-client relationship).

<sup>14</sup> In the Pentagon Papers case, a federal judge had ordered the *New York Times* to temporarily refrain from publishing a set of internal defense department documents on U.S. decision making in Vietnam. See *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (granting a temporary restraining order, but not a preliminary injunction), *remanded by* 444 F.2d 544 (2d Cir. 1971) (instructing the District Court to reconsider granting the preliminary injunction). Although the *Times* had been willing to violate a federal statute to publish the documents, see Bendor, *supra* note 4, at 309, and although the order appeared to be an unconstitutional prior restraint, the paper nonetheless obeyed the order during the fifteen days it took to convince the Supreme Court to overturn it. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714-15 (1971).

Similarly, in September 1995, a federal judge ordered *Business Week* magazine not to publish an article that relied on documents under court seal in a pending case, and also ordered one of the magazine's editors to testify about the confidential source from whom she had obtained the documents. Although *Business Week's* counsel was convinced that the first order was an unconstitutional prior restraint, and although the second order clearly trod in the sensitive area of journalistic privilege, that magazine was nonetheless prepared to obey both. See Deirdre Carmody, *A Close Call for Business Week Shows the Weakness in Journalists' Protective Armor*, N.Y. TIMES, Oct. 16, 1995, at D7; Deirdre Carmody, *Magazine Pulls Article Under Order*, N.Y. TIMES, Sept. 15, 1995, at A16.

These cases represent just a handful of the frequent situations in which parties obey court orders that they believe trample on their rights. The frequency of these situations is only likely to increase in the near future, given the secrecy surrounding terrorism investigations and the Bush administration's frequent clashes with the press. On the former, see, for example, Reporters Committee for Freedom of the Press, *Reporter Held in Contempt for Refusing to Name Source* (July 26, 2002) (discussing a case in which a federal judge ordered a Virginia reporter to disclose who showed him the sealed arrest warrant of a material wit-

This Note seeks both to illuminate the contours of the federal collateral bar rule and to define the precise way in which courts should temper it as a matter of constitutional law.<sup>15</sup> Part I suggests that the rule is best understood within the conceptual framework of collateral attack on prior judgments in general. Using this framework as a guide, it becomes clear that collateral bar limits attacks on court orders much in the same way that *res judicata* limits attacks on final judgments in general. Part II examines the Supreme Court's ambiguous pronouncements on the exceptions to collateral bar, and compares these exceptions to the rule's underlying justification. The most important yet least understood exception focuses on the disobedient party's opportunity to appeal the order. Specifically, courts should allow a party to challenge the merits of an order as a defense to criminal contempt when that party was unable to obtain full appellate review of the order without permanently sacrificing a significant right. This Note concludes that the Supreme Court should clarify the scope of collateral bar and its exceptions if an appropriate case reaches the Court. In the meantime, however, the lower courts should interpret the Supreme Court's existing precedent in the manner suggested, particularly with regard to collateral bar's key exception.

## I

### UNDERSTANDING COLLATERAL BAR: SCOPE OF THE RULE

The best way to understand the collateral bar rule is to think of it in the context of collateral attack on judgments in general. A court order is a type of judgment,<sup>16</sup> and when a party challenges a court order as a defense to criminal contempt charges, this is a collateral attack.<sup>17</sup> In this context, there is a fundamental distinction between

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ness in a terrorism investigation), at <http://www.rcfp.org/news/2002/0726united.html> (last visited Sept. 7, 2002). On the latter, see, for example, Russ Baker, *What Are They Hiding?*, THE NATION, Feb. 25, 2002, at 11; *Magazine Protests Writer's Treatment by State Department*, N.Y. TIMES, July 14, 2002, at 16; David Stout, *Pentagon Pursues Leak of Anti-Iraq Plan*, N.Y. TIMES, July 19, 2001, at A3.

<sup>15</sup> Collateral bar is a common-law rule, and its scope varies from jurisdiction to jurisdiction. See Labunski, *Collateral Bar Rule*, *supra* note 7, at 348-64. This Note looks specifically at the scope of the rule as it exists in the federal common law. In addition, this Note looks at the limits that the federal Constitution places on the rule's application in all U.S. jurisdictions.

<sup>16</sup> Although the Federal Rules of Civil Procedure limit the types of court orders that fall within the definition of "judgment" to those that are appealable, see FED. R. CIV. P. 54(a), this Note refers to "judgments" in a broader sense to include also non-appealable orders, such as subpoenas *duces tecum*.

<sup>17</sup> The concept of a collateral attack, as distinguished from a direct attack, hinges on the purpose and nature of the proceeding in which the attack occurs. A collateral attack is one that is advanced to avoid the effects of a judgment in a particular proceeding. A direct attack is generally one that is advanced to overturn the judgment itself. A collateral attack is made defensively and in a separate proceeding from the one in which the judgment was rendered. A direct attack is generally made offensively and either in the same proceeding

the merits—correctness—of the court’s judgment and the court’s authority to render the judgment at all.<sup>18</sup> The latter issue turns on whether the court had subject-matter and territorial jurisdiction, and whether the parties received adequate notice, including an opportunity to be heard.<sup>19</sup>

When it comes to final judgments, the basic rules of *res judicata* limit the grounds on which parties can advance collateral attacks. *Res judicata* lays down the fundamental principle that one cannot collaterally attack flaws in a judgment’s merits, whereas one can sometimes collaterally attack flaws in the court’s authority to have rendered the judgment.<sup>20</sup> If one is successful in the latter attack, then the judgment is said to be invalid, and it has no *res judicata* effect in the collateral proceeding, regardless of its merits.<sup>21</sup>

Whereas the normal rules of *res judicata* deal with all types of *final* judgments, collateral bar deals with specific types of judgments—court orders—regardless of their finality.<sup>22</sup> If the court order is a final judgment, then the normal rules of *res judicata* will treat it in the

in which the judgment was rendered (via a motion for relief) or in an independent proceeding brought specifically to obtain relief from the judgment. See RESTATEMENT (SECOND) OF JUDGMENTS introductory note to ch. 5 at 140–43 (1982); ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA* 248–49 (2001). Although the distinction between collateral and direct attacks is not always clear or useful, see CASAD & CLERMONT, *supra*, at 256–57, a challenge to a court order made as a defense in a criminal contempt proceeding clearly functions as a collateral attack.

<sup>18</sup> See CHAFEE, *supra* note 7, at 296–301.

<sup>19</sup> See RESTATEMENT (SECOND) OF JUDGMENTS §§ 1–12 (1982); CASAD & CLERMONT, *supra* note 17, at 49–50.

<sup>20</sup> See RESTATEMENT (SECOND) OF JUDGMENTS §§ 12, 17, 65 (1982); CASAD & CLERMONT, *supra* note 17, at 249–61.

<sup>21</sup> See CASAD & CLERMONT, *supra* note 17, at 259–61.

<sup>22</sup> One might view collateral bar as a special area of *res judicata*. Under this view, it is *res judicata* itself that limits collateral attacks on court orders, and the term “collateral bar” simply connotes the special situations in which *res judicata* does so in the context of criminal contempt, and without regard to its normal rules about finality. See E-mail from Kevin M. Clermont, Flanagan Professor of Law, Cornell Law School, to John R.B. Palmer (July 25, 2002, 10:13:15 AM) (on file with author).

On the other hand, one might view *res judicata* and collateral bar as similar, yet distinct doctrines. Under this view, one would note that *res judicata* is normally driven by the need for finality, see CASAD & CLERMONT, *supra* note 17, at 29–31, whereas collateral bar is driven by the need for obedience, *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring). Furthermore, while “*res judicata*” literally translates to “the thing adjudicated,” see BLACK’S LAW DICTIONARY 1312 (7th ed. 1999), collateral bar often affects matters that are still in the process of being adjudicated, see, e.g., *supra* notes 2–4 and accompanying text. Thus a more appropriate label might be “*res judicatur*” (a made-up term suggested by one Latin expert that translates to “the thing being decided,” see E-mail from Fabián Guevara to John R.B. Palmer (July 26, 2002, 09:45:01 AM) (on file with author)), or “*res litigiosae*” (a Roman law doctrine that translates to “the thing being litigated,” see BLACK’S LAW DICTIONARY 1312 (7th ed. 1999)). Of course, the drawback to these labels is that they would not capture the situations in which the court order in question *has* been fully adjudicated.

same way as any other final judgment.<sup>23</sup> However, courts issue many orders in the preliminary stages of litigation<sup>24</sup> that are not final for normal *res judicata* purposes.<sup>25</sup> It is with respect to these non-final orders that the impact of collateral bar is most strongly felt.

#### A. The Collateral Bar Rule's Fundamental Core: No Collateral Attack on the Merits of a Court Order

At its most basic, collateral bar has long held that a person who disobeys a court order cannot challenge the merits of that order as a defense to criminal contempt charges. Thus, in the 1922 case of *Howat v. Kansas*, the Supreme Court stressed that "[a]n injunction . . . must be obeyed . . . 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."<sup>26</sup> Perhaps the most striking example of this rule came when the Supreme Court upheld an Alabama court's contempt conviction against Martin Luther King, Jr. in *Walker v. City of Birmingham*.<sup>27</sup>

Birmingham, Alabama, became the focus of the civil rights movement in 1963, when Martin Luther King, Jr.'s Southern Christian Leadership Conference (SCLC) joined forces with Fred L. Shuttlesworth's Alabama Christian Movement for Human Rights (ACMHR)<sup>28</sup> in a campaign to end segregation in the city's commercial sector.<sup>29</sup> Birmingham was known as one of the most intransigent bastions of segregation in the South, with its city commission, police, courts, school board, and other city agencies all in the hands of "openly and fervently" anti-black, populist leaders.<sup>30</sup> It was therefore unsurprising

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Whichever position one takes, the important thing is to understand that collateral bar fits into the general subject of collateral attack on prior judgments, and that it is similar to the normal rules of *res judicata*.

<sup>23</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 13 & cmt. c (1982); CASAD & CLERMONT, *supra* note 17, at 50-51.

<sup>24</sup> See, e.g., FED. R. CIV. P. 65 (concerning preliminary injunctions and temporary restraining orders).

<sup>25</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 13 & cmt. c (1982); CASAD & CLERMONT, *supra* note 17, at 50-51.

<sup>26</sup> 258 U.S. 181, 189-90 (1922).

<sup>27</sup> See 388 U.S. 307, 315-21 (1967). For an excellent and comprehensive historical account of the case and the events surrounding it, see generally ALAN F. WESTIN & BARRY MAHONEY, *THE TRIAL OF MARTIN LUTHER KING* (1974).

<sup>28</sup> The ACMHR was an offshoot of the NAACP, which was banned in Alabama at that time. See WESTIN & MAHONEY, *supra* note 27, at 16.

<sup>29</sup> See MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 45-47 (1964); WESTIN & MAHONEY, *supra* note 27, at 20-22, 48-49.

<sup>30</sup> WESTIN & MAHONEY, *supra* note 27, at 14. King later wrote that "[i]n the entire country there was no place to compare with Birmingham" and that "brutality directed against Negroes was an unquestioned and unchallenged reality." KING, *supra* note 29, at 37, 41. Perhaps veteran *New York Times* reporter Harrison Salisbury best captured this atmosphere when he described Birmingham as a city of "fear, force and terror," in which

when Birmingham's Commissioner of Public Safety, Eugene "Bull" Connor,<sup>31</sup> denied the civil rights leaders' request for a parade permit for their demonstrations.<sup>32</sup> It was also unsurprising when the city obtained from an Alabama court, *ex parte*, a temporary injunction prohibiting King and 136 other named individuals from taking part in the demonstrations.<sup>33</sup>

The injunction was most likely an unconstitutional restraint on expression. In addition to likely being too vague and broad to survive a First Amendment challenge, it was based directly on the city's parade permit ordinance, which suffered from the same defects and had been administered in an arbitrary and discriminatory manner.<sup>34</sup> However, at the time that the Alabama court issued the injunction, King had less than two days before a scheduled march that he deemed critical to the campaign's success.<sup>35</sup> Therefore, instead of challenging the injunction directly, King violated it and challenged it as a defense to his criminal contempt charges.<sup>36</sup>

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segregation was enforced by "the whip, the razor, the gun, the bomb, the torch, the club, the knife, the mob, the police and many branches of the state's apparatus." Harrison E. Salisbury, *Fear and Hatred Grip Birmingham*, N.Y. TIMES, Apr. 12, 1960, at 1. He noted that the government had even banned a book featuring black and white rabbits, had allegedly tapped telephones, and had opened mail, and that between 1949 and 1960 there were twenty-two reported bombings of black churches and homes. *See id.* For more on Birmingham's troubled history, and in particular the events surrounding King's 1963 desegregation campaign, see DIANE MCWHORTER, *CARRY ME HOME* (2001); Robert Gaines Corley, *The Quest for Racial Harmony: Race Relations in Birmingham, Alabama, 1947-1963* (1979) (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

<sup>31</sup> Connor was notorious for his repressive police tactics and vocal opposition to desegregation. "[H]e exercised virtually unbridled power, 'arresting innocent citizens, openly monitoring and occasionally harassing civil rights activists, and stridently accusing segregation's critics of Communist sympathies.'" ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA* 112 (1987) (quoting Corley, *supra* note 30, at 166-67). As *Newsweek* described him, "Connor [was] as much a giant in Birmingham as the cast-iron statue of Vulcan, god of the forge, . . . just outside town. Both are monuments—Vulcan to the city's steel economy and Connor to her standing as the biggest, toughest citadel of segregation left in the Deep South." *'Bull' at Bay*, NEWSWEEK, Apr. 15, 1963, at 29, 29.

<sup>32</sup> *See* WESTIN & MAHONEY, *supra* note 27, at 65-66.

<sup>33</sup> *See* Transcript of Record at 25-45, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (No. 249) (reprinting the injunction and the affidavits on which it was based).

<sup>34</sup> Indeed, the Supreme Court unanimously held the city ordinance unconstitutional when it examined it in 1969. *See* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 153 (1969).

<sup>35</sup> The judge signed the injunction on the evening of April 10, 1963, and Birmingham officials served it on King at 1:15 AM the next morning. *See* WESTIN & MAHONEY, *supra* note 27, at 71, 76. King had scheduled a large march for the afternoon of April 12. The timing was important because the campaign was beginning to pick up momentum after a slow start, *see* FAIRCLOUGH, *supra* note 31, at 121-22; WESTIN & MAHONEY, *supra* note 27, at 68, and because April 12 was Good Friday, and therefore had special significance for King's church-oriented movement, *see* Brief for the Petitioners at 70-71, *Walker* (No. 249).

<sup>36</sup> *See* WESTIN & MAHONEY, *supra* note 27, at 81-84, 89-126. Aside from the fact that it led to King's arrest (or perhaps in part because of it), the march was a huge success. The *New York Times* reported it as being the "most spectacular" since the start of the campaign, Foster Hailey, *Dr. King Arrested at Birmingham*, N.Y. TIMES, Apr. 13, 1963, at 1, and it was

Predictably, the Alabama courts applied their own version of the collateral bar rule to reject King's defense.<sup>37</sup> The trial court sentenced King to five days in jail and imposed a \$50 fine.<sup>38</sup> Thus, when the case finally reached the U.S. Supreme Court,<sup>39</sup> the Justices faced the question of whether Alabama could constitutionally punish someone for disobeying what was likely an unconstitutional injunction.<sup>40</sup>

On one hand, the question before the court was fairly straightforward: if the injunction were unconstitutional, that would be a flaw in its merits, and the basic core of collateral bar would clearly preclude King from challenging those merits as a defense to criminal contempt charges.<sup>41</sup> King should have challenged the injunction directly before violating it. On the other hand, an openly segregationist state court system had convicted a national civil rights hero for demonstrating in

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followed by other marches throughout the Easter weekend, *see* WESTIN & MAHONEY, *supra* note 27, at 87–88. By keeping the campaign's momentum going, and by managing to garner direct intervention from the Federal Department of Justice, King eventually was able to bring Birmingham's business community to the negotiating table, and ultimately to force them to agree to desegregation in certain areas. *See id.* at 142–50 (noting, however, that the agreement was still a compromise, and that many people criticized it for not going far enough). More broadly, the momentum in Birmingham contributed to the national civil rights movement and, in particular, put pressure on Congress ultimately to pass the Civil Rights Act of 1964. *See id.* at 155–56.

<sup>37</sup> Not only was collateral bar an established rule in Alabama, but the Alabama Supreme Court was notorious for using state procedural grounds to defeat civil rights cases, and the panel of justices who heard King's case were all ardent segregationists. *See* WESTIN & MAHONEY, *supra* note 27, at 158, 179. One of the members of the panel, the court's Chief Justice, had been quoted as bragging, "I'm for segregation in every phase of life . . . I would rather close every school from the highest to the lowest before I would go to school with colored people." *See id.* at 179 (internal quotation marks omitted).

<sup>38</sup> *See* Walker v. City of Birmingham, 181 So.2d 493, 502–03 (Ala. 1966) (affirming the trial court decision); Transcript of Record at 419–25, Walker (No. 249) (reprinting the Alabama trial court decision); WESTIN & MAHONEY, *supra* note 27, at 142, 180–83.

<sup>39</sup> The Alabama Supreme Court agreed to hear the case in March 1963, but did not announce its decision until December 1965. *See* Transcript of Record at 23–24, 447–48, Walker (No. 249). This delay may have affected the Supreme Court's ultimate decision. As Professors Westin and Mahoney write:

If the Birmingham contempt case had reached the U.S. Supreme Court in 1964 or 1965, when memories of Bull Connor's police dogs were still fresh and national support for civil rights groups was at an all-time high, it is hard to resist the conclusion that the justices would have found a way to void the convictions of the Birmingham leaders.

WESTIN & MAHONEY, *supra* note 27, at 161. But the national mood had changed by the time the case finally reached the Supreme Court, as large-scale violence replaced King's nonviolent civil disobedience. The summer of 1965 saw riots in the Watts area of Los Angeles and Chicago's West Side. *See id.* at 177–78, 192. These were repeated the following summer in Chicago, Cleveland, and San Francisco, the former two cities requiring National Guard troops to restore order. *Id.* at 200. Thus, it was not an ideal time to be asking the Supreme Court to decide a case in which the "rule of law" arguments cut in favor of the opposing side. In fact, King's lawyers recognized this and structured their arguments accordingly. *See id.* at 219–20.

<sup>40</sup> *See* Walker, 388 U.S. at 337–38 (Douglas, J., dissenting).

<sup>41</sup> *See* Howat v. Kansas, 258 U.S. 181, 189–90 (1922).

violation of a highly questionable injunction. As King's attorneys stressed, timing was key to the demonstrations: "The injunction . . . was calculated and effective to interrupt the momentum of [the civil rights leaders'] effort to arouse the conscience of the community and the nation, halting their activities before they could build a broader base of support for their assault on segregation . . . ."42 Obeying the injunction during the time necessary to appeal it would have broken the campaign's momentum. In addition, it would have prevented King from demonstrating on Good Friday and Easter Sunday, "days of special sacramental significance on which church-oriented organizations could hope to attract broad attention to their programs and protests."<sup>43</sup> Thus, the injunction "subjected [King's] activities to Commissioner Connor's discretion at precisely the moment when repression could be most crippling."<sup>44</sup>

Nonetheless, in a 5-4 decision, the Supreme Court upheld the Alabama ruling.<sup>45</sup> The Court acknowledged that the defendants had raised substantial constitutional issues,<sup>46</sup> but it found no fault with Alabama's collateral bar rule.<sup>47</sup> In fact, the Court noted that the Alabama rule was identical to its federal counterpart.<sup>48</sup>

#### B. Twentieth Century Expansion: No Collateral Attack on the Rendering Court's Authority

Historically, *res judicata* and collateral bar affected only collateral attacks on a judgment's merits.<sup>49</sup> However, in the beginning of the

<sup>42</sup> Brief for the Petitioners at 70, *Walker* (No. 249).

<sup>43</sup> *Id.* at 70-71.

<sup>44</sup> *Id.* at 71. The Department of Justice also intervened on King's behalf, arguing that the Court should not apply the collateral bar rule to a void order that "broadly suppresses the exercise of First Amendment rights, in a context that permits no effective alternate means of expression and no timely opportunity to obtain relief from the ban." Memorandum for the United States as Amicus Curiae at 9, *Walker* (No. 249) (drafted, in part, by then-Solicitor General Thurgood Marshall).

<sup>45</sup> *Walker*, 388 U.S. at 320-21.

<sup>46</sup> *See id.* at 316-18; *see also* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (overturning, without a single dissent, the Alabama ordinance on which the injunction was based).

<sup>47</sup> *Walker*, 388 U.S. at 315.

<sup>48</sup> *See id.* at 321 n.16.

<sup>49</sup> *See, e.g., Ex parte Young*, 209 U.S. 123, 143 (1908) (noting that a person could not be punished for disobeying an order issued by a court lacking jurisdiction); *In re Sawyer*, 124 U.S. 200, 220 (1888) ("Where a court has jurisdiction . . . whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court: but, if it act without authority, its judgments and orders are regarded as nullities." (internal quotation marks omitted)); *Ex parte Fisk*, 113 U.S. 713, 718, 726 (1885) ("When . . . a court . . . undertakes . . . to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."); CHAFEE, *supra* note 7, at 296-300 ("[T]he situation is entirely different if the court had no jurisdiction to decide the case and render the decree. Then the judge's order is void since he had no

twentieth century, *res judicata* expanded to limit the bases of collateral attack on the rendering court's authority. The major development was the doctrine of "jurisdiction to determine jurisdiction," which posits that a court's determination of its own jurisdiction is itself *res judicata*, and therefore not subject to collateral attack.<sup>50</sup>

The doctrine of jurisdiction to determine jurisdiction limits the availability of collateral attack on territorial jurisdiction and notice to situations in which the issues were neither waived nor litigated in the prior proceeding.<sup>51</sup> Even apart from this doctrine, courts usually deem that a party waives any objections to territorial jurisdiction and notice by simply appearing in an action.<sup>52</sup> Although a party may sometimes make a special appearance to challenge territorial jurisdiction or notice without waiving subsequent objections,<sup>53</sup> doing so requires the actual litigation of those issues and thereby makes them *res judicata* in collateral proceedings under the doctrine of jurisdiction to determine jurisdiction.<sup>54</sup> Thus, a party may collaterally attack territorial jurisdiction or notice only if the party never appeared at all—even by special appearance—in the prior proceeding.<sup>55</sup>

The doctrine of jurisdiction to determine jurisdiction goes even further in limiting the availability of collateral attack on subject-matter jurisdiction. It precludes attack not only in cases in which subject-matter jurisdiction was litigated in the prior proceeding, but also in cases in which it was *not* litigated.<sup>56</sup> The doctrine holds that simply by coming to a decision, a court has necessarily—even if only implicitly—determined that it has jurisdiction over the subject matter.<sup>57</sup> That determination is *res judicata* in collateral proceedings.<sup>58</sup> Thus, even if a party never appeared in the prior proceeding, the party is usually precluded from collaterally attacking the court's subject-matter jurisdiction.

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power to make it; and any punishment for violating a void order is equally void."); Edward P. Krugman, Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 165-71 (1977).

<sup>50</sup> See *Durfee v. Duke*, 375 U.S. 106, 111-14 (1963); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-78 (1940); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-27 (1931). See generally CASAD & CLERMONT, *supra* note 17, at 263-72; Bennett Boskey & Robert Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 57-63 (2001); Krugman, *supra* note 49, at 171-81.

<sup>51</sup> CASAD & CLERMONT, *supra* note 17, at 266-68.

<sup>52</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 1 & cmt. a (1982); CASAD & CLERMONT, *supra* note 17, at 266.

<sup>53</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 10 cmt. b (1982).

<sup>54</sup> See *id.* § 10(2).

<sup>55</sup> CASAD & CLERMONT, *supra* note 17, at 268.

<sup>56</sup> *Id.* at 268-71.

<sup>57</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 12 & cmt. d (1982).

<sup>58</sup> See *id.*; CASAD & CLERMONT, *supra* note 17, at 268-71.

However, courts have carved out a few extremely narrow exceptions to the doctrine. For instance, in *Kalb v. Feuerstein*, the Supreme Court held that a party could collaterally attack the subject-matter jurisdiction of a state court that lacked jurisdiction due to federal preemption.<sup>59</sup> The Court reasoned that to preclude collateral attack in such a case would undermine the authority of the federal courts.<sup>60</sup> The Second Restatement of Judgments places this holding within a more general exception that exists when “[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government.”<sup>61</sup> The Second Restatement also describes two other exceptions as existing when “[t]he subject matter of the [prior] action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority,”<sup>62</sup> or when “[t]he judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court’s subject matter jurisdiction.”<sup>63</sup>

The expansion of *res judicata* has substantially limited the availability of collateral attack on final judgments in general, but what about its effect with regard to collateral attack on court orders—final or otherwise—in criminal contempt proceedings?

First, the normal rules of *res judicata* may be directly applicable in many cases: jurisdictional findings by the court that issued an order may be sufficiently final for the purposes of *res judicata* so as to preclude collateral attack.<sup>64</sup> In this regard, the availability of collateral attack on territorial jurisdiction and notice should be the same as for any other type of judgment: if a party appears in the prior proceeding, the party waives any objections to these issues;<sup>65</sup> if the party makes a

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<sup>59</sup> 308 U.S. 433, 438–39 (1940).

<sup>60</sup> *See id.*

<sup>61</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 12(2) (1982).

<sup>62</sup> *Id.* § 12(1).

<sup>63</sup> *Id.* § 12(3). For earlier formulations of the exceptions to jurisdiction to determine jurisdiction and discussions thereof, see generally *Durfee v. Duke*, 375 U.S. 106, 114 & n.12 (1963) (discussing the exceptions in dicta); RESTATEMENT OF JUDGMENTS § 10 (1942); RESTATEMENT OF CONFLICT OF LAWS § 451(2) (Supp. 1948); Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967); Dan B. Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C. L. REV. 49, 54–58 (1961) [hereinafter Dobbs, *Consent*]; Dan B. Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEX. L. REV. 854 (1965); Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pts. 1 & 2), 53 VA. L. REV. 1003, 1241 (1967); Krugman, *supra* note 49, at 175–81.

<sup>64</sup> *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 & cmt. c (1982); CASAD & CLERMONT, *supra* note 17, at 250–51.

<sup>65</sup> *See supra* note 52 and accompanying text.

special appearance, then he or she has litigated the issues and the normal rules of *res judicata* preclude subsequent collateral attack.<sup>66</sup>

What about collateral attack on subject-matter jurisdiction? Here, the normal rules of *res judicata* preclude certain attacks even if the issue was not previously litigated, but only if the judgment is final.<sup>67</sup> Thus, the normal rules of *res judicata* themselves would not necessarily preclude collateral attack on the subject-matter jurisdiction of a court that has issued a temporary restraining order or prelim-

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<sup>66</sup> See *supra* notes 53–54 and accompanying text. One open question is whether a person who was not a party to the original proceeding can collaterally attack the original court's territorial jurisdiction over himself or herself in subsequent proceedings as a defense to criminal contempt charges. The Eleventh Circuit Court of Appeals answered this question in the negative in *In re Novak*, 932 F.2d 1397 (11th Cir. 1991). In that case, it was clear that the court had personal jurisdiction over the parties and over the defendant's non-party insurer, which was controlling the litigation. See *id.* at 1399–1402. During pre-trial settlement negotiations, however, the trial judge became frustrated with the fact that the defendant's attorney did not have power to enter a settlement agreement without the insurer's express approval. See *id.* at 1399. The judge therefore ordered one of the insurer's employees, whom he believed had such power, Roger Novak, to personally appear in court on a certain date. See *id.* When Novak failed to appear, the judge fined him \$500 for criminal contempt. See *id.* at 1400. On appeal, the Eleventh Circuit held that the collateral bar rule precluded any collateral attack on territorial jurisdiction other than an attack on the court's jurisdiction over the parties to the underlying action. See *id.* at 1402–03. Because the court found that the trial court had jurisdiction over the parties, it declined to consider whether it had jurisdiction over Novak. See *id.* at 1403.

The court offered no explanation as to why a non-party should be given such harsh treatment as compared to a party. While a party faced with a court order may choose to stay home and litigate territorial jurisdiction during subsequent criminal contempt proceedings, *cf.* *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) (“[The party] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action . . .”), the Eleventh Circuit's holding requires a non-party anywhere in the world to appear in the initial proceeding if she ever wants to challenge the rendering court's jurisdiction over her person. In some situations, the court may not need jurisdiction over a non-party to bind that non-party to a particular order. For instance, a court may sometimes hold a non-party in contempt for aiding and abetting a party to violate a court order, regardless of the court's jurisdiction over the non-party. See *CASAD & CLERMONT*, *supra* note 17, at 157–58. However, in cases in which a court needs personal jurisdiction over a non-party before it can bind it, that non-party should be able to collaterally attack that jurisdiction, as long as he or she neither waived nor litigated the issue in the prior proceeding. *Cf. id.*; *supra* notes 52–54 and accompanying text.

The Eleventh Circuit's holding appears especially harsh given that the Supreme Court has indicated in dicta that a non-party has no standing to challenge a court's lack of personal jurisdiction over the parties to an action. See *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76–77 (1988) (“We are not confronted here with a nonparty witness attempting to challenge its civil contempt by raising matters in which it has no legitimate interest, for instance the District Court's lack of personal jurisdiction over the parties . . .”). Although the Court might back off from such a rule if it were actually faced with the issue, the Supreme Court's current dicta, combined with the Eleventh Circuit's holding, would effectively bar a non-party from challenging personal jurisdiction at all.

<sup>67</sup> See *supra* note 56 and accompanying text.

inary injunction. The courts have relied on collateral bar to fill this gap.

### 1. *United States v. Shipp*

The Supreme Court first began expanding collateral bar into the jurisdictional realm in an unusual 1906 case involving disobedience to one of its own orders. In *United States v. Shipp*, the Court had ordered a Tennessee sheriff, Joseph Shipp, to stay the execution of one of his prisoners while it considered the prisoner's habeas corpus appeal.<sup>68</sup> Instead of obeying the order, Shipp allowed a mob to drag the prisoner out of his cell, hang him from a nearby bridge, and then shoot him to death.<sup>69</sup> This incident infuriated the Supreme Court Justices and led the Attorney General to charge Shipp with criminal contempt.<sup>70</sup>

In his defense, Shipp argued that the Supreme Court's order was invalid for lack of subject-matter jurisdiction.<sup>71</sup> Based on controlling precedent (which at that time had not yet extended the Bill of Rights's applicability to the states), Shipp argued that the prisoner's habeas corpus petition had failed to raise any constitutional claims, and that the federal courts therefore lacked jurisdiction to hear it.<sup>72</sup> In the absence of subject-matter jurisdiction, he argued, the Supreme Court's order was invalid and could be disobeyed with impunity.<sup>73</sup>

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<sup>68</sup> 203 U.S. 563, 571–72 (1906). For a narrative history of this case, see MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM* (1999). The prisoner, Ed Johnson, was a black man convicted of raping a white woman in what appears to have been a seriously flawed trial, largely driven by racist mob violence and the sheriff's own political ambitions. *See id.* at 30, 33–37, 40–129. Although Johnson's habeas corpus petition had been denied by a federal district court, the Supreme Court agreed to hear an appeal from that denial. *See id.* at 3–19, 152–68, 192–97.

<sup>69</sup> *See* CURRIDEN & PHILLIPS, *supra* note 68, at 200–14. The mob included uniformed police officers, one of whom cut off Johnson's finger as a souvenir. *See id.* at 217. One of the leaders pinned a large note to Johnson's body, reading: "To Justice Harlan. Come get your nigger now." *Id.* at 214. The local police did not even file a report on the lynching, let alone investigate or make any arrests. *See id.* at 217.

<sup>70</sup> *See id.* at 221–24, 230–32, 253–54. The *New York Times* described the mob's "open defiance of the Supreme Court" as having "no parallel in . . . history" and as having "shocked the members of the [C]ourt beyond anything that has ever happened in their experience on the bench." *Lynching Mob to Feel Supreme Court's Anger*, N.Y. TIMES, Mar. 21, 1906, at 1. Ultimately, the Attorney General filed an information charging Sheriff Shipp, his deputies, and sixteen other people who had participated in the lynching with criminal contempt. *See United States v. Shipp*, 215 U.S. 580, 580–81 (1909); CURRIDEN & PHILLIPS, *supra* note 68, at 253–54. It was the first time in history that anyone had been charged with disobeying a Supreme Court order. *See id.* at 270 (quoting then-Solicitor General Henry M. Hoyt).

<sup>71</sup> *See* CURRIDEN & PHILLIPS, *supra* note 68, at 260.

<sup>72</sup> *See id.* at 274–75.

<sup>73</sup> *See id.* at 260.

However, the Court did not need to reach the question of whether the habeas petition raised constitutional issues to reject unan- imously Shipp's argument.<sup>74</sup> Speaking for the Court, Justice Holmes wrote:

[E]ven if . . . this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. . . . 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 sub- ject of the petition . . . .<sup>75</sup>

The Court then proceeded to try<sup>76</sup> and convict Shipp.<sup>77</sup> As the attorney for the murdered prisoner later commented, "The very rule of law upon which this country was founded and on which the future of this nation rests ha[d] been enforced with the might of our highest tribunal."<sup>78</sup>

Many commentators minimize *Shipp's* importance to the collat- eral bar rule, stressing the unusual nature of the case. For example, some interpret the case as standing for the limited proposition that a party cannot collaterally attack subject-matter jurisdiction when the "violation of the order operated in itself to defeat the jurisdiction of the court, such as by destroying the object of the dispute and thereby making the case moot."<sup>79</sup> Others stress that *Shipp* is unusual in that it involved contempt of an order issued by the Supreme Court itself, as opposed to a district court,<sup>80</sup> and that the disobedient party was a court officer, as opposed to a private citizen.<sup>81</sup>

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<sup>74</sup> Eight Justices made the decision, with the newly appointed Justice Moody recusing himself because he had himself filed the information in the case during his tenure as United States Attorney General. *See id.* at 264, 283.

<sup>75</sup> *United States v. Shipp*, 203 U.S. 563, 573 (1906).

<sup>76</sup> This was the first time that the Supreme Court had ever conducted trial. *See CURRIDEN & PHILLIPS, supra* note 68, at 286. After requesting proposals from both sides as to how to proceed, the Court appointed its deputy clerk to preside over the evidentiary hearings and thereby save the Justices from that burden. *See id.* at 286–87. These hearings were conducted in the United States Circuit Courtroom in Chattanooga over the course of about four-and-a-half months. *See id.* at 292–316. The Supreme Court then heard oral arguments from both sides before finding Sheriff Shipp and five other defendants guilty. *See United States v. Shipp*, 214 U.S. 386, 425 (1909); *CURRIDEN & PHILLIPS, supra* note 68, at 319–34.

<sup>77</sup> *See CURRIDEN & PHILLIPS, supra* note 68, at 334–35. Shipp's sentence, however, was only ninety days. *See id.*

<sup>78</sup> *Id.* at 336 (reprinting the attorney's November 1909 statement to the *Atlanta Independent*).

<sup>79</sup> 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3537, at 541–42 (2d ed. 1984).

<sup>80</sup> *See* Hugh B. Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 101–02 (1948).

<sup>81</sup> *See CHAFEE, supra* note 7, at 376 n.24.

One can read the opinion more broadly, however. Although Justice Holmes did note that the prisoner's murder made it impossible to decide the jurisdictional question, he made it clear that it was his expanded version of the collateral bar rule, not the murder, that made it unnecessary to consider whether the Court had lacked jurisdiction.<sup>82</sup> Furthermore, nothing in the opinion itself suggests that the ruling would not apply equally to district court orders or to orders directed at private citizens.

## 2. United States v. United Mine Workers

Whatever the actual limits of the *Shipp* holding, the Supreme Court signaled its broad implications in *United States v. United Mine Workers*.<sup>83</sup> The case arose after the federal government took over most of the nation's bituminous coal mines in 1946<sup>84</sup> and then became embroiled in a dispute with the United Mine Workers and its charismatic leader, John L. Lewis, over a wage agreement.<sup>85</sup> When discussions broke down, the government sued for declaratory relief and, ex parte, persuaded a federal district court to issue a temporary restraining order forbidding the United Mine Workers and Lewis from terminating the agreement, encouraging a strike, or taking any action to "interfere with the court's jurisdiction and its determination of the case."<sup>86</sup>

It was not clear, however, that the court had jurisdiction to issue such an order. In particular, the Norris-LaGuardia and Clayton Acts appeared expressly to deprive federal courts of jurisdiction to issue

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<sup>82</sup> Justice Holmes declared: "The murder of the petitioner has made it impossible to decide [the jurisdictional question], and *what we have said* makes it unnecessary to pass upon it as a preliminary to deciding the question before us." *United States v. Shipp*, 203 U.S. 563, 573-74 (1906) (emphasis added). The phrase "what we have said" refers to Holmes's previous paragraph, quoted above in the text accompanying note 75, in which he wrote that the Court had jurisdiction to make orders to preserve existing conditions while deciding its own jurisdiction. Thus, it was not the murder of the petitioner, but rather the collateral bar rule itself, that made it unnecessary to consider whether the Court had jurisdiction over the appeal.

<sup>83</sup> See 330 U.S. 258 (1947).

<sup>84</sup> The government did this to prevent labor disturbances and protect the national economy during the transition to peace after World War II. See Exec. Order No. 9728, 11 Fed. Reg. 5593 (May 21, 1946).

<sup>85</sup> Specifically, Lewis claimed that pursuant to the so-called Krug-Lewis agreement between the mine workers and the government, either party, on notice, could require the other party to attend negotiations and could terminate the agreement. Based on this interpretation, Lewis gave notice that he intended to renegotiate wages, hours, rules, and other matters. The government, on the other hand, disagreed that the Krug-Lewis Agreement contained any such terms; therefore, it denied that Lewis had the power to require renegotiation. See *United Mine Workers*, 330 U.S. at 264-65; Transcript of Record at 26-29, *United Mine Workers* (Nos. 759, 760, 781, 782, 811).

<sup>86</sup> See *United Mine Workers*, 330 U.S. at 266-67, 267 n.12; see also Transcript of Record at 60-61, *United Mine Workers* (Nos. 759, 760, 781, 782, 811) (reprinting the temporary restraining order); Louis Stark, *Contract Upheld*, N.Y. TIMES, Nov. 19, 1946, at 1 (reporting the temporary restraining order).

restraining orders in labor disputes.<sup>87</sup> If this were the case, it would not mean that the district court lacked subject-matter jurisdiction, but only that it lacked what is known as equity jurisdiction—jurisdiction to issue a particular order.<sup>88</sup> Still, the prevailing view at the time was that equity jurisdiction was analogous to subject-matter jurisdiction in terms of its effect on a court's authority to render judgment.<sup>89</sup>

In any event, the United Mine Workers did not wait to test the court's jurisdiction directly. On the same day that the court issued its order, the mine workers began a walkout which quickly turned into a full-fledged strike,<sup>90</sup> shutting down most of the nation's bituminous coal production.<sup>91</sup> In response, the court found Lewis and the United Mine Workers guilty of both civil and criminal contempt, and fined them \$10,000 and \$3,500,000, respectively.<sup>92</sup>

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<sup>87</sup> For example, Section 4 of the Norris-LaGuardia Act states: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . ." Pub. L. No. 72-65, § 4, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 101 (1994)). Section 20 of the Clayton Act states that, in cases between employers and employees, "no . . . restraining order or injunction shall prohibit any person or persons . . . from . . . recommending, advising, or persuading others" to strike. Pub. L. No. 63-212, § 20, 38 Stat. 730, 738 (1914) (codified at 29 U.S.C. § 52 (1994)).

<sup>88</sup> For a discussion of equity jurisdiction, see CHAFEE, *supra* note 7, at 301–03; Stanley L. Sabel, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships*, 19 IOWA L. REV. 406 (1934).

<sup>89</sup> See CHAFEE, *supra* note 7, at 303–04, 320–21. In contrast to the prevailing view, Professor Chafee argued persuasively that equity jurisdiction is really a question of whether the court has made a correct decision to grant equitable relief. Thus, he argued, equity "jurisdiction" is really a question of merits, not jurisdiction. See *id.* at 304–21.

<sup>90</sup> See *United Mine Workers*, 330 U.S. at 267; A.H. Raskin, *Miners in Exodus*, N.Y. TIMES, Nov. 21, 1946, at 1 [hereinafter Raskin, *Miners in Exodus*]; A.H. Raskin, *33,000 Miners Halt*, N.Y. TIMES, Nov. 19, 1946, at 1 [hereinafter Raskin, *Premature Action*]. Although Lewis did not specifically call for the strike after the court issued its order, he had already instructed the miners to strike in the absence of any subsequent countermanning instruction. See Raskin, *Premature Action*, *supra*.

<sup>91</sup> See *United Mine Workers*, 330 U.S. at 267. For a sense of the strike's far-reaching and potentially massive effects, see *Alabama Coal Off 85%*, N.Y. TIMES, Nov. 21, 1946, at 24; *B. & O. Cancels 23 Trains*, N.Y. TIMES, Nov. 21, 1946, at 24; *Brownout Plans Ready*, N.Y. TIMES, Nov. 21, 1946, at 24; *Canada Curtails Coal*, N.Y. TIMES, Nov. 22, 1946, at 2; *New Dimout Seen if Strike Endures*, N.Y. TIMES, Nov. 22, 1946, at 2; *ODT Makes 25% Travel Cut on Coal-Burning Railroads*, N.Y. TIMES, Nov. 19, 1946, at 1; *Railroads Curtail Service in Chicago*, N.Y. TIMES, Nov. 21, 1946, at 25; A.H. Raskin, *Grip Is Tightening*, N.Y. TIMES, Nov. 22, 1946, at 1; Lawrence Resner, *Schedules Change*, N.Y. TIMES, Nov. 22, 1946, at 1; *Tonnage Famine in Port Is Feared*, N.Y. TIMES, Nov. 22, 1946, at 1; *25,000,000 May Be Idle if Coal Strike Is Prolonged*, N.Y. TIMES, Nov. 22, 1946, at 1. The War Department was even prepared to send troops into the coalfields if requested. Raskin, *Miners in Exodus*, *supra* note 90.

<sup>92</sup> See *United Mine Workers*, 330 U.S. at 267–69. The fine came after a somewhat heated seven-day trial, during which Lewis spent much of his time glowering at the audience and had a brief standoff with the bailiff over whether he needed to remove his hat in the courtroom. See *Lewis Runs Afoul of Court Bailiff*, N.Y. TIMES, Nov. 30, 1946, at 2 ("[After the judge had already] taken his place on the bench, Mr. Lewis stalked in with his large black hat pulled firmly down to his eyebrows."). Lewis also almost incurred a second contempt

Lewis and the United Mine Workers temporarily called off the strike<sup>93</sup> and appealed their convictions.<sup>94</sup> When their cases came before the Supreme Court,<sup>95</sup> they collaterally attacked the order by arguing that the Norris-LaGuardia and Clayton Acts deprived the district court of equity jurisdiction to enjoin the strike.<sup>96</sup> While a majority of five Justices rejected that argument, a separate majority (composed of three of the first five plus two others) agreed that even if the district court did lack jurisdiction under those Acts, it could still hold the United Mine Workers and Lewis in criminal contempt for their disobedience.<sup>97</sup>

The Court relied on two lines of cases to support its holding. First, it cited *United States v. Shipp*<sup>98</sup> and a Fifth Circuit decision, *Carter v. United States*,<sup>99</sup> to support the propositions that a court, in the process of determining its own subject-matter jurisdiction over a controversy, has the power to issue orders to preserve existing conditions, and that these orders must be obeyed regardless of the court's ultimate determination.<sup>100</sup> Second, the Court cited *Howat v. Kansas*<sup>101</sup> and two similar cases<sup>102</sup> for the older proposition that a party cannot collaterally attack a court order's merits.<sup>103</sup> The facts in *United Mine Workers* presented aspects of both lines of cases: the district court had subject-matter jurisdiction, but it was in the process of determining whether the Clayton and Norris-LaGuardia Acts had deprived it of eq-

citation when he accused Assistant Attorney General John F. Sonnett of lying. See Louis Stark, *Defense Is Enraged*, N.Y. TIMES, Dec. 5, 1946, at 1.

<sup>93</sup> See MAIER B. FOX, UNITED WE STAND: THE UNITED MINE WORKERS OF AMERICA 1890-1990, at 408 (1990); *Lewis Yields*, N.Y. TIMES, Dec. 8, 1946, at E1.

<sup>94</sup> See *United Mine Workers*, 330 U.S. at 269.

<sup>95</sup> As soon as Lewis and the United Mine Workers filed notices of appeal, the government petitioned the Supreme Court for certiorari, which the Court granted. See *id.*

<sup>96</sup> See *id.*; Brief for United Mine Workers of America and John L. Lewis at 12-43, *United Mine Workers* (Nos. 759, 760, 781, 782, 811).

<sup>97</sup> See *United Mine Workers*, 330 U.S. at 262-335. The Justices' opinions broke down as follows: Justices Vinson, Reed, and Burton believed that the district court had jurisdiction, and that even if it lacked jurisdiction, the defendants could be held in criminal contempt by virtue of collateral bar. Justices Jackson and Frankfurter believed that the district court lacked jurisdiction, but that the defendants could be held in criminal contempt anyway by virtue of collateral bar. Justices Black and Douglas believed that the district court had jurisdiction, and they did not address the issue of collateral bar. However, they believed that a criminal contempt sanction was excessive under the circumstances of the case. Finally, Justices Murphy and Rutledge believed that the district court lacked jurisdiction, and that therefore the defendants could not be punished. See *id.* at 262-385; CHAFEE, *supra* note 7, at 365-67.

<sup>98</sup> 203 U.S. 563 (1906).

<sup>99</sup> 135 F.2d 858 (5th Cir. 1943).

<sup>100</sup> See *United Mine Workers*, 330 U.S. at 290-93.

<sup>101</sup> 258 U.S. 181 (1922).

<sup>102</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Worden v. Searls*, 121 U.S. 14 (1887).

<sup>103</sup> See *United Mine Workers*, 330 U.S. at 293-94.

uity jurisdiction to issue the injunction.<sup>104</sup> Therefore, the Supreme Court “insist[ed] upon the same duty of obedience” that it had demanded in the previous cases.<sup>105</sup>

The Court’s holding, however, has been a source of confusion for the lower federal courts, probably due to the fact that it dealt with equity rather than subject-matter jurisdiction. Although they have discussed the issue of subject-matter jurisdiction (in the context of collateral bar) only in dicta, lower federal courts often confidently state that a party *can* collaterally attack subject-matter jurisdiction as a defense to criminal contempt.<sup>106</sup> In one such case, the Ninth Circuit remarked that *United Mine Workers* “is now frequently cited for the proposition that a lack of jurisdiction is a complete defense to an order of contempt,” although it conceded that “some commentators have interpreted the case as standing for the opposite principle.”<sup>107</sup>

Indeed, commentators have so interpreted *United Mine Workers*,<sup>108</sup> and their’s is the more accurate position. By relying on *Shipp*, the *United Mine Workers* Court implicitly endorsed an expansion of the collateral bar rule to limit collateral attacks on subject-matter jurisdiction. Although its holding technically dealt with equity jurisdiction,<sup>109</sup> it clearly viewed equity and subject-matter jurisdiction as analogous for the purposes of collateral bar.<sup>110</sup> This conclusion is particularly apparent from Justice Frankfurter’s concurring opinion, in which he stated: “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.”<sup>111</sup>

This interpretation is also supported by dicta from the *United Mine Workers* majority opinion in which the Court suggested a narrow exception<sup>112</sup> to its rule. The Court stated that the district court “had

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<sup>104</sup> *Id.* at 293–95.

<sup>105</sup> *Id.* at 294.

<sup>106</sup> See cases cited *supra* note 8.

<sup>107</sup> *Dep’t of Labor OSHA v. Hern Iron Works, Inc. (In re Establishment Inspection of Hern Iron Works, Inc.)*, 881 F.2d 722, 726 & n.12 (9th Cir. 1989).

<sup>108</sup> See, e.g., 13A *WRIGHT ET AL.*, *supra* note 79, § 3537, at 543.

<sup>109</sup> See *United Mine Workers*, 330 U.S. at 314.

<sup>110</sup> As noted above at note 89, one could view equity jurisdiction as a question of merits, not of validity. In that case, one might argue that the *United Mine Workers* holding was simply that a party cannot collaterally attack the merits of a court order to avoid criminal contempt. See *CHAFEE*, *supra* note 7, at 374–79. However, that rule was already firmly established, see *supra* note 49 and accompanying text, and if that was all the Court intended to say, then it would not have needed to rely on *Shipp* and *Carter*.

<sup>111</sup> *United Mine Workers*, 330 U.S. at 310.

<sup>112</sup> This Note uses the term “exception,” as opposed to “condition,” to indicate an element that the defendant would have the burden to prove in a criminal contempt proceeding. To make out a prima facie case for criminal contempt, the prosecutor simply must show that (1) there was a reasonably specific court order, (2) the defendant knew of

the power to preserve existing conditions while it was determining its own authority to grant injunctive relief" but that "a different result would follow were the question of jurisdiction frivolous and not substantial."<sup>113</sup> This statement looks very similar to the first of the narrow grounds for collateral attack on subject-matter jurisdiction laid out in the Second Restatement of Judgments, which covers cases in which "[t]he subject matter of the [prior] action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority."<sup>114</sup> Understood this way, it looks as though the rule established by *Shipp* and *United Mine Workers* mirrors the normal rules of *res judicata*.<sup>115</sup>

This mirroring is further exemplified by two subsequent cases in which the Supreme Court carved out another narrow exception to the collateral bar rule to allow parties to collaterally attack subject-matter jurisdiction as a defense to criminal contempt charges. In *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees, Division 988 v. Wisconsin Employment Relations Board*<sup>116</sup> and *In re Green*,<sup>117</sup> the Court held that parties could make such attacks after disobeying state court orders in cases in which the state courts were deprived of subject-matter jurisdiction by virtue of federal preemption.<sup>118</sup> This exception clearly mirrors the *Kalb v. Feuerstein* exception to jurisdiction to determine jurisdiction with respect to judgments in general.<sup>119</sup>

### C. Civil Versus Criminal Contempt: When Is the Attack Collateral?

Thus far, this Note has discussed collateral bar's effects only in criminal contempt proceedings. Yet in many cases, a party's disobedience leads to a civil contempt judgment, either instead of or in addition to a criminal contempt judgment. Does collateral bar prevent a party from challenging a court order in order to avoid civil contempt?

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this order, and (3) the defendant willfully violated the order. *See United States v. Young*, 107 F.3d 903, 907 (D.C. Cir. 1997); *United States v. Cutler*, 58 F.3d 825, 834 (2d Cir. 1995). (Courts discuss these elements in different ways, sometimes appearing to combine one or more of them. *See, e.g., United States v. Dixon*, 509 U.S. 688, 716 (1993); *Young*, 107 F.3d at 907.)

<sup>113</sup> *United Mine Workers*, 330 U.S. at 293. This statement appears to track the language of the *Shipp* Court, which also stressed that the jurisdictional question before it was not "frivolous or a mere pretense." *United States v. Shipp*, 203 U.S. 563, 573 (1906).

<sup>114</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 12(1) (1982). I am indebted to Professor Kevin M. Clermont for pointing out this similarity.

<sup>115</sup> *See supra* text accompanying notes 56-63.

<sup>116</sup> 340 U.S. 383 (1951).

<sup>117</sup> 369 U.S. 689 (1962).

<sup>118</sup> *See Green*, 369 U.S. at 692 & n.1., 693; *Amalgamated Ass'n*, 340 U.S. at 399. Indeed, the Court held that the Due Process Clause of the U.S. Constitution requires state courts to hear such challenges. *See Green*, 369 U.S. at 692 & n.1., 693.

<sup>119</sup> *See supra* text accompanying note 59.

The answer is clearly no, but the Supreme Court's precedent on this subject requires some further explanation.

In *United Mine Workers*, the Supreme Court, relying on existing precedent, indicated that collateral bar would not apply to a civil contempt proceeding. It explained:

It does not follow . . . that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order.<sup>120</sup>

The Court later reaffirmed this proposition as part of its holding in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*<sup>121</sup> However, the line between civil and criminal contempt has always been somewhat fuzzy,<sup>122</sup> and the Court has slightly shifted the line's location subsequent to its decision in *Abortion Rights*.<sup>123</sup>

Courts generally draw the line between civil and criminal contempt based on the "character and purpose" of the sanction im-

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<sup>120</sup> *United States v. United Mine Workers*, 330 U.S. 258, 294–95 (1947).

<sup>121</sup> 487 U.S. 72, 78 (1988). In that case, the Supreme Court faced non-party witnesses, whom a judge had held in civil contempt for failure to comply with subpoenas duces tecum. *Id.* at 75. *Abortion Rights Mobilization, Inc.* (ARM), had sued to revoke the Roman Catholic Church's tax-exempt status, on the ground that the Church had participated in political activities in violation of the Internal Revenue Code. *Id.* at 74. ARM had served subpoenas on the United States Catholic Conference and the National Conference of Catholic Bishops as non-party witnesses, seeking documents to support their claim. *See id.* at 74–75. For three years, the Conferences refused to comply, and a judge finally found them to be in civil contempt and liable for fines of \$50,000 for each day of further non-compliance. *See Abortion Rights Mobilization, Inc. v. Baker (In re United States Catholic Conference)*, 824 F.2d 156, 159–60 (2d Cir. 1987).

On appeal to the Court of Appeals for the Second Circuit, the Conferences argued that the trial court had lacked subject-matter jurisdiction over the underlying controversy. *Id.* at 160. The court of appeals rejected this argument, basing its decision not directly on the collateral bar rule but instead on the conclusion that non-party witnesses lack standing to raise subject-matter jurisdiction on appeal. *Id.* at 165. Its reasoning, however, was partly based on an interpretation of *United Mine Workers* that would have extended the collateral bar rule to cover civil as well as criminal contempt. *See id.* at 160–67.

The Supreme Court overruled the Court of Appeals for the Second Circuit, holding that a non-party witness does have standing to challenge subject-matter jurisdiction on appeal of a civil contempt judgment. *See Catholic Conference*, 487 U.S. at 80. In doing so, the Court clearly held that the collateral bar rule does not apply to civil contempt. *See id.* at 78–80 ("When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction.").

<sup>122</sup> *See Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 & n.3 (1994); RONALD L. GOLDFARB, *THE CONTEMPT POWER* 49–67 (1963); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1047–62 (1993); Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 347 n.11, 349–56 (2000); Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 681–84 (1981); Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943).

<sup>123</sup> *See infra* notes 130–34 and accompanying text.

posed.<sup>124</sup> Criminal contempt sanctions punish parties for disobeying court orders or otherwise disrespecting judicial authority, and seek to deter future transgressions.<sup>125</sup> Civil contempt sanctions either coerce parties into doing or refraining from doing particular acts,<sup>126</sup> or compensate injured parties for another party's disobedience.<sup>127</sup> The civil/criminal distinction is important because it affects the procedures required for a court to impose a sanction. A court may not impose criminal contempt sanctions without the constitutional safeguards required in any other criminal proceeding.<sup>128</sup> In contrast, a court imposing civil contempt sanctions need ensure only the constitutional safeguards required in normal civil proceedings.<sup>129</sup>

In 1994, however, the Supreme Court shifted the line between civil and criminal contempt to extend the Constitution's criminal safeguards to a broader range of contempt cases.<sup>130</sup> In *International Union, United Mine Workers v. Bagwell*, the Court held that, in addition to the "character and purpose" test, and especially in situations in which that test yields ambiguous results, a judge may need to follow criminal contempt procedures before imposing sanctions for out-of-court disobedience to complex injunctions.<sup>131</sup> The Court's rationale was that proving such contempts generally requires "elaborate and reliable factfinding,"<sup>132</sup> that such contempts "do not obstruct the court's ability to adjudicate the proceedings before it,"<sup>133</sup> and that adjudicat-

<sup>124</sup> See *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911).

<sup>125</sup> See *id.*; Livingston, *supra* note 122, at 353-54.

<sup>126</sup> See *Gompers*, 221 U.S. at 441-42; Livingston, *supra* note 122, at 351-52 (labeling this type of contempt as "coercive civil contempt"). A judge usually employs coercion by imprisoning or regularly fining the party until he complies. Because the party can end the sanction at any time by complying, it is often said that the disobedient party "carries the keys of his prison in his own pocket." *Bagwell*, 512 U.S. at 828 (quoting *Gompers*, 221 U.S. at 442).

<sup>127</sup> See *Gompers*, 221 U.S. at 441-42; Livingston, *supra* note 122, at 351-52 (labeling this type of contempt as "remedial civil contempt").

<sup>128</sup> See *Bagwell*, 512 U.S. at 826-27. These safeguards include the right to counsel, see U.S. CONST. amend. VI; *Cooke v. United States*, 267 U.S. 517, 537 (1925), the right to a jury when being tried for a "serious" offense, see U.S. CONST. amend. VI; *Bloom v. Illinois*, 391 U.S. 194, 198-200 (1968), the right against self-incrimination, see U.S. CONST. amend. V; *Gompers*, 221 U.S. at 444, the right to proof beyond a reasonable doubt, see U.S. CONST. amend. V; *Gompers*, 221 U.S. at 444, and the right against double-jeopardy, see U.S. CONST. amend. V; *In re Bradley*, 318 U.S. 50 (1943).

As Livingston notes, however, some states, see, e.g., *State ex rel. Chassing v. Mummert*, 887 S.W.2d 573, 579 n.3 (Mo. 1994), continue to hold that full criminal protections are not always required before a judge may impose criminal contempt. See Livingston, *supra* note 122, at 353 n.39.

<sup>129</sup> See Livingston, *supra* note 122, at 352 & nn.32-33, 353 & n.38.

<sup>130</sup> See *Bagwell*, 512 U.S. at 838-39; Livingston, *supra* note 122, at 345-47, 378-90, 401.

<sup>131</sup> See 512 U.S. at 833-34.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 834.

ing such contempts without a jury creates a “substantial” risk that a judge will erroneously deprive a party of her rights.<sup>134</sup>

Whatever *Bagwell*'s merits for ensuring that contemnors receive adequate procedural protection, the case could have the unintended consequence of extending the applicability of the collateral bar rule. This result would clearly be a mistake, because the Supreme Court has never indicated that collateral bar's scope hinges on the complexity of an injunction or the availability of procedural protections. Rather, the Court's language in *United Mine Workers* suggests that collateral bar's scope turns more on the character and purpose of the sanction.<sup>135</sup>

In fact, if one looks at collateral bar in the context of collateral attacks on judgments in general, the reason that the rule does not apply to civil contempt—as defined by the “character and purpose” test—becomes much clearer: when a party attacks a court order to avoid coercive and compensatory sanctions, he or she is not seeking simply to avoid the effects of the order, but rather to overturn the order itself. If the order falls, there is nothing to coerce the defendant into doing, and there is no injury to other parties requiring compensation. Such an attack appears to be more in the nature of a direct attack than a collateral one,<sup>136</sup> and so, by definition, neither collateral bar nor any of the other rules surrounding collateral attack should apply. The best way to read *Bagwell*, therefore, is to assume that any changes it causes to contempt procedures do not affect collateral bar. In other words, if the character and purpose of a particular sanction a court seeks to impose is coercive or compensatory, the court should still allow the defendant to challenge the order itself, even if the court follows criminal procedures pursuant to *Bagwell*.

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<sup>134</sup> *Id.* For a critique of *Bagwell*'s reasoning, arguing that neutral fact-finding may be just as necessary to proving disobedience of simple orders, see Livingston, *supra* note 122, at 387–88 (giving the example of disobedience of a simple child support order over which a complicated factual dispute might arise concerning the contemnor's ability to pay).

The *Bagwell* Court also relied in part on the “character and purpose” test and boned it with regard to the prospective fines involved in the case. See *Bagwell*, 512 U.S. at 835–37. In doing so, the Court somewhat weakened its holding with regard to the purported independent need for criminal contempt procedures for disobedience of complex injunctions. Furthermore, the lower courts, having a natural tendency to resist any weakening of their own coercive powers, have tended to either ignore or distinguish *Bagwell*. See Livingston, *supra* note 122, at 390–99. Nonetheless, *Bagwell* clearly indicates a new direction in the distinction between criminal and civil contempt, which the Court might continue to pursue in the future.

<sup>135</sup> See *supra* text accompanying note 120.

<sup>136</sup> See *supra* note 17.

#### D. Summary

By viewing collateral bar in the context of collateral attack on judgments in general, we see that the rule operates much like the normal rules of *res judicata*. A defendant in a criminal contempt proceeding is limited in his ability to collaterally attack the order he has disobeyed in much the same way that a civil litigant is limited in his ability to collaterally attack a final judgment. The defendant is precluded from attacking the order's merits. The defendant is also precluded from attacking the rendering court's assertion of personal jurisdiction or the adequacy of notice, unless he never appeared at all before the rendering court. Finally, the defendant is precluded from attacking the rendering court's subject-matter jurisdiction, other than in the narrow circumstances laid out in the Second Restatement of Judgments.<sup>137</sup>

Furthermore, by viewing collateral bar in the context of collateral attack on judgments in general, we see why the collateral bar rule does not apply to a defendant in a civil contempt proceeding: when such a defendant seeks to challenge the court order in question, the defendant is making a direct challenge rather than a collateral one, and therefore neither collateral bar nor any of the other rules surrounding collateral attack apply.

With the scope of collateral bar now in better focus, the questions become, to what extent is the rule justified, and how should the courts temper it?

## II

### TEMPERING COLLATERAL BAR: SCOPE OF THE EXCEPTIONS

Courts usually justify collateral bar in vague terms that stress the importance of protecting judicial authority and maintaining the rule of law. For example, in concurring in the *United Mine Workers* decision, Justice Frankfurter wrote: "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."<sup>138</sup> Similarly, the *Walker* Court reasoned that "in 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."<sup>139</sup> The Court went on to explain that "respect for judicial process is a small price to pay for the

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<sup>137</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982).

<sup>138</sup> *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring).

<sup>139</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967).

civilizing hand of law, which alone can give abiding meaning to constitutional freedom.”<sup>140</sup>

As compelling as these statements are, one ought to seek a more precise and concrete justification for a rule that has such a significant impact on society. Moreover, in looking more closely at the collateral bar rule’s justification, it may turn out that the rule is justified only to a certain point, and that it should be tempered beyond that point. Indeed, there are strong arguments for tempering the collateral bar rule, and the Supreme Court has itself suggested that the rule must have exceptions. Yet the Court’s vague justification for the rule provides no guidance on how to tailor these exceptions.

### A. The Justification for Collateral Bar

Many people argue that collateral bar is not justified at all, or that it is unjustified any time a constitutional right is at stake.<sup>141</sup> These people argue that one should always be free to attack a court order after violating it—in other words, that the Supreme Court should either scrap the rule or define the exceptions to it so broadly as to effectively scrap the rule by swallowing it.<sup>142</sup> One argument in support of

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<sup>140</sup> *Id.* at 321; *see also In re Providence Journal Co.*, 820 F.2d 1342, 1344 (1st Cir. 1986) (referring to the collateral bar rule as the “sine qua non of orderly government”); *United States v. CNN, Inc.*, 865 F. Supp. 1549, 1564 (S.D. Fla. 1994) (“The thin but bright line between anarchy and order—the delicate balance which ultimately is the vital protection of the individual and the public generally—is the respect which litigants and the public have for the law and the orders issued by the courts.”).

<sup>141</sup> *See, e.g.*, Norman G. Rudman & Richard C. Solomon, *Who Loves a Parade?* *Walker v. City of Birmingham*, 4 *LAW TRANSITION Q.* 185, 185 (1967) (warning that with respect to the rule’s application in *Walker*, “[i]ndividual liberty seems to be the loser, and the casualty list remains to be completed”); Shapiro, *supra* note 7, at 582 (arguing that the rule should be “ceremoniously interred in the legal graveyard alongside the fellow-servant rule, one federal common law, privity requirements in product liability cases, and separate but equal” (footnotes and internal quotation marks omitted)); *Justice Confused*, *L.A. TIMES*, Mar. 20, 1986, Pt. 2, at 6 (“Doesn’t it strike the judge as odd to be punishing someone for disobeying an unlawful order that never should have been issued in the first place?”); Irving R. Kaufman, *Awaiting an Answer on Courts as Censors*, *L.A. TIMES*, July 1, 1988, Pt. 2, at 7; *A Question of Contempt*, *WASH. POST*, Apr. 6, 1986, at C6.

<sup>142</sup> *See, e.g.*, Shapiro, *supra* note 7, at 588–93. Many of the arguments on this issue are closely related to the question of whether the contempt power itself is justified, and obviously those who answer this question in the negative view collateral bar as, a fortiori, unjustified. Punishment for contempt can be swift and severe. *See United States v. Dixon*, 509 U.S. 688, 724 n.2 (1993) (White, J., concurring in part and dissenting in part) (noting that “some courts have found no bar to the imposition of a prison sentence for contempt even where the court order that was transgressed was an injunction against violation of a statute that itself did not provide for imprisonment as a penalty”); *United States v. Berardelli*, 565 F.2d 24, 30–31 (2d Cir. 1977) (affirming the imposition of a five-year sentence for appellant’s refusal to testify after being ordered to do so and granted immunity); *United States v. Sternman*, 433 F.2d 913, 914 (6th Cir. 1970) (affirming the imposition of a three-year sentence for the same); GOLDFARB, *supra* note 122, at 15 (discussing a seventeenth century English case in which a defendant who threw a “brickbat” at the Chief Justice had his “right hand . . . cut off and fixed to the gibbet” and “was immediately hanged in the presence of

this position is that courts do allow people to challenge statutes after violating them.<sup>143</sup> Why then are courts so hesitant to allow people to do the same with court orders?<sup>144</sup> Indeed, one should be skeptical when the courts themselves argue that their commands are more important for maintaining the rule of law than the commands of the legislature.

There are, however, a number of responses to this argument. First, the commands of a court *are* different from the commands of the legislature. A statute must be interpreted by a court before it actually applies to a particular party, whereas a court simultaneously makes and interprets a court order. More importantly, whereas a statute is usually a general command that applies to the population at large, a judge issues a court order only after an individual determination about particular parties.<sup>145</sup> To the extent that an order impinges on one party's rights, it is (or should be) individually tailored to protect the other party's rights.<sup>146</sup> In many cases, courts must balance

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the court"). Indeed, as one judge described it, the court's power of contempt is "perhaps, nearest akin to despotic power of any power existing under our form of government." *State ex rel. Attorney Gen. v. Circuit Court of Eau Claire County*, 72 N.W. 193, 194-95 (Wis. 1897). Although it is deeply ingrained in common law thinking, the contempt power is alien to many civil law countries, which tend to view it as both unnecessary and contrary to basic notions of governance. See *Prosecutor v. Milan Vujin*, No. IT-94-I-A-R77, ¶ 17 and n.20 (Int'l Crim. Tribunal for the Former Yugoslavia 2000) (noting that instead of using the contempt power to discourage conduct that interferes with the administration of justice, civil law systems rely on statutes that proscribe narrow and clearly-defined conduct); GOLDFARB, *supra* note 122, at 2; Ruth Greenspan Bell & Susan E. Bromm, *Lessons Learned in the Transfer of U.S.-Generated Environmental Compliance Tools: Compliance Schedules for Poland*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10,296, 10,299 (1997) (noting the absence of the contempt power in Polish courts); John O. Haley, *Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?*, 4 PAC. RIM L. & POL'Y J. 303, 311 (1995); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 29 (1996) (discussing alternatives to the contempt power used in France, Belgium, the Netherlands and Luxembourg); James D. Fry, Note, *Struggling to Teethe: Japan's Antitrust Enforcement Regime*, 32 LAW & POL'Y INT'L BUS. 825, 854-56 (2001) (noting the absence of the contempt power in Japanese courts).

Yet, this is not to say that the contempt power has no place in a democratic society. As noted in one classic work on the subject, "Throughout our history contempt has been the vehicle for deciding a variety of dramatic and significant social problems." GOLDFARB, *supra* note 122, at 5. While many countries' legal systems utilize alternatives to the contempt power, the United States's system relies on it and is adapted to it. For the same reasons that collateral bar is justified, *see infra* Part II.A, so too is contempt power, a fortiori, justified within our particular legal system.

<sup>143</sup> *Staub v. Baxley*, 355 U.S. 313, 319 (1958); 1 LAURENCE M. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-9, 3-10 (3d ed. 2000).

<sup>144</sup> See *Walker v. City of Birmingham*, 388 U.S. 307, 324, 334 (1967) (Warren, C.J., dissenting); Shapiro, *supra* note 7, at 578-83.

<sup>145</sup> See FED. R. CIV. P. 65; Anthony Lewis, *The Civilizing Hand*, N.Y. TIMES, Apr. 7, 1986, at A27.

<sup>146</sup> See *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (describing the standard for granting preliminary injunctions); *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247, 250 (2d Cir. 1973) (same).

constitutional rights against each other, as, for instance, when a criminal defendant seeks to order a newspaper not to publish certain information that would prejudice jurors.<sup>147</sup> Furthermore, court orders in the form of injunctions are often stop-gap emergency measures that courts use to preserve the status quo until they issue a final decision.<sup>148</sup>

Second, courts permit people to disobey statutes and to challenge them subsequently not because they are unconcerned with the rule of law when it comes to the legislature, but because the courts' rules on justiciability generally prevent people from challenging statutes without disobeying them.<sup>149</sup> In contrast, justiciability rules do not prevent people from challenging court orders without disobeying them.<sup>150</sup>

Third, society can live with a rule that allows a person to challenge a statute she has disobeyed, even if it cannot afford to grant the same right to a person who has disobeyed a court order. The legislature does not stand as a final barricade to anarchy and disorder in the same way that courts do. Whereas the legislature lays down the rules, it is the courts that must apply them daily to preserve order. Moreover, disobedience to statutes does not interfere with the functioning of the legislature, whereas disobedience to court orders does in fact interfere with the functioning of the courts.

A more basic argument against collateral bar is that it simply gives courts too much power to stifle conduct. This is an important point, especially if one considers some of the more blatant historical examples of courts abusing their contempt power.<sup>151</sup> Furthermore, collat-

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<sup>147</sup> See *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990).

<sup>148</sup> See FED. R. CIV. P. 65.

<sup>149</sup> See *TRIBE*, *supra* note 143, §§ 3-9, 3-10.

<sup>150</sup> See *id.* Indeed, the Federal Rules of Civil Procedure anticipate challenges to court orders at the trial level prior to disobedience, see FED. R. CIV. P. 59, 60, 65(b), and the U.S. Code anticipates such challenges at the appellate level prior to disobedience, see 28 U.S.C. §§ 1291, 1292 (2000).

<sup>151</sup> On the abuse of the contempt power, the Supreme Court has remarked: "Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament, and its fusion of legislative, executive, and judicial powers summons forth . . . the prospect of the most tyrannical licentiousness." *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (alteration in original) (internal quotation marks and citations omitted) (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) and *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)). For examples of such abuse, see *Labunski, First Amendment Exception*, *supra* note 7, at 424-30. One of the more notable examples *Labunski* discusses is *Zarcone v. Perry*, in which a Long Island judge had a street vendor handcuffed, paraded through the courthouse, and interrogated for selling him unsatisfactory coffee. 572 F.2d 52, 53-54 (2d Cir. 1978). Perhaps even more unnerving is *Malina v. Gonzales*, in which a judge sentenced a driver to five hours in jail for honking and motioning at him on the highway. 994 F.2d 1121, 1123 (5th Cir. 1993); see also *Livingston*, *supra* note 122, at 356 ("The history of contempt procedures reveals an ongoing and overt tension between the view of contempt as an inherent and necessary weapon of courts to en-

eral bar can be a particularly powerful weapon for stifling social change. Simply by forcing people to delay their actions while appealing orders directly, courts can effectively kill strikes and demonstrations.<sup>152</sup> As Martin Luther King, Jr. wrote from his jail cell in Birmingham: "For years now I have heard the word 'Wait!' It rings in the ear of every Negro with piercing familiarity. This 'Wait' has almost always meant 'Never.' . . . Perhaps it is easy for those who have never felt the stinging darts of segregation to say, 'Wait.'"<sup>153</sup>

The response, however, is that collateral bar can cut both ways. Although it can function as an oppressive weapon, it can function equally well as a tool for social change.<sup>154</sup> Indeed, court orders were critical in the civil rights movement: it was often through the threat of contempt sanctions that the federal courts coerced intransigent state officials into implementing desegregation.<sup>155</sup> King himself recog-

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force their orders and the fear that courts will misuse their authority to punish unpopular individuals or groups." (footnote omitted)); *Ohio Judge Wasn't Afraid to Play Many Parts in Court*, NAT'L L.J., Apr. 22, 2002, at A12 (discussing an Ohio judge's fall from grace when he conducted, among other things, a contempt hearing at which he acted as judge, prosecutor, and witness).

<sup>152</sup> See FISS, *supra* note 4, at 1-4; FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 200-01 (1930). As Professor Chafee notes, "One of the great evils of labor injunctions . . . was that an appeal from a wrongful or grossly broad, temporary injunction often did the union no good when it won. The injunction broke the strike in a week. The appeal might be decided favorably in a year or more . . ." CHAFEЕ, *supra* note 7, at 373. The comments of Representative Celler of New York in discussing the Norris-LaGuardia Act are also illuminating: "Time is the essence of the strike. Keeping the injunction alive by dilatory tactics blunts the edge of the only effective instrument that labor possesses, namely, the strike." 75 CONG. REC. 5489 (1932).

<sup>153</sup> KING, *supra* note 29, at 83.

<sup>154</sup> Cf. GOLDFARB, *supra* note 122, at 9 (discussing the contempt power in general).

<sup>155</sup> See FISS, *supra* note 4, at 4-6. In one of the most famous cases, the Court of Appeals for the Fifth Circuit held both the Governor and Lieutenant Governor of Mississippi in civil contempt for violating a restraining order by obstructing a black student's admission to the University of Mississippi. See *Meredith v. Fair*, 313 F.2d 532, 533 (5th Cir. 1962) (per curiam) (holding Governor Ross R. Barnett in civil contempt and threatening a fine of \$10,000 per day until he purged himself); *Meredith v. Fair*, 313 F.2d 534, 535 (5th Cir. 1962) (per curiam) (holding Lieutenant Governor Paul B. Johnson, Jr. in civil contempt and threatening a fine of \$5,000 per day until he purged himself); see also *United States v. Barnett*, 376 U.S. 681, 700 (1964) (denying the Governor and Lieutenant Governor the right to a jury trial in their criminal contempt proceedings for the same disobedience); *United States v. Barnett*, 346 F.2d 99, 101 (5th Cir. 1965) (finding that the Governor and Lieutenant Governor had substantially complied with the previous court orders and, therefore, dismissing the criminal contempt proceedings and declining to impose the threatened sanctions from the civil contempt proceedings). For other examples of the use of contempt to implement desegregation, see *Kasper v. Brittain*, 245 F.2d 92, 96-97 (6th Cir. 1957) (affirming segregationist John Kasper's criminal contempt conviction for violating a court order restraining him from obstructing desegregation of Tennessee high schools); *Bullock v. United States*, 265 F.2d 683, 695 (6th Cir. 1959) (affirming criminal contempt convictions, including a second conviction of Kasper, for obstructing Tennessee desegregation). For a brief discussion of the Justice Department's strategy of using court orders to back up its civil rights enforcement activities in the South between 1960 and 1963, see WESTIN & MAHONEY, *supra* note 27, at 39-44. As an example of one such order,

nized this reality and as a result often went out of his way to obey court orders.<sup>156</sup> In the words of former *New York Times* columnist Anthony Lewis:

This country depends on law more than any other on earth. Courts have to pass on the tensest issues of public policy: race relations, the environment, Presidential power. If it became the practice to ignore court orders in the belief that they will later be found invalid, the system would not work.<sup>157</sup>

Although absence of the rule might not lead to “chaos” and “tyranny,”<sup>158</sup> its absence would encourage greater disobedience and, thus, unduly burden those parties who rely on court orders to protect their rights. To understand this, imagine the choices available to a party, D, faced with an appealable court order in the absence of the collateral bar rule. If D believes that the order is in some way flawed, D can choose between appealing directly or disobeying and then challenging the order collaterally if D is charged with contempt. Direct appeal may be safer because the worst that can happen is that the order will be upheld—D will not risk punishment for contempt. However, disobeying the order might also have its advantages. First, disobedience gives D’s opponent, or the state, the burden of coming forward to prosecute the contempt,<sup>159</sup> a burden which may entail prohibitive financial or political costs. Second, even if a party does come forward to prosecute the contempt, if that party seeks to impose a significant punishment, D will likely be entitled to a jury trial,<sup>160</sup> and a jury may be more sympathetic than a judge would be on direct appeal. Third, if D is an organization that regularly confronts court orders, such as a newspaper, D might simply fear that obedience during direct appeal

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which formed an integral part of the Justice Department’s strategy, see *United States v. United States Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961).

Another important function of court orders is to protect individuals from physical harm, particularly in the context of domestic violence. See David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153 (1995) (arguing for a greater use of criminal contempt sanctions for violations of protection orders in domestic violence cases).

<sup>156</sup> See WESTIN & MAHONEY, *supra* note 27, at 45–46, 152–53.

<sup>157</sup> Lewis, *supra* note 145 (arguing in favor of applying the collateral bar rule to a Rhode Island newspaper that violated a restraining order). Lewis goes on to note that “[i]f we think Southern segregationists had to obey court orders in the old days, if we think Richard Nixon had to obey the Supreme Court decision that forced him out of the Presidency, why should the press be different?” *Id.* The *New York Times*’s editors were similarly supportive of the collateral bar rule in the wake of the *Walker* decision. While noting that it was “profoundly embarrassing to the good name of the United States” to send King to jail, they argued that the rule was, nonetheless, “absolutely basic to a democratic society” and that the Supreme Court was right not to make an exception in this case. See . . . and *Dr. King to Jail*, N.Y. TIMES, June 14, 1967, at 46.

<sup>158</sup> See *supra* note 138 and accompanying text.

<sup>159</sup> See 3 WRIGHT ET AL., *supra* note 79, § 711, at 852.

<sup>160</sup> See *id.* § 712, at 856.

will establish a practice that could weaken its position in the future.<sup>161</sup> Finally, obedience during the time necessary to appeal may impose direct costs that D may wish to avoid.

Because the court will have already determined that the order is necessary to prevent some harm—in many cases, irreparable harm—allowing D to make this choice seems to undermine the whole purpose of the court order. This is certainly true if the system allows D to base the choice on any of the first three factors discussed above. To a large extent, it is also true if the system allows D to base the choice on the fourth factor. Collateral bar is the device by which the system prevents these outcomes. The rule's justification is that it keeps the decision as to whether the order is flawed in the hands of the court, where it belongs, by forcing D to obey the order while pursuing direct review.

But what if the order is not appealable and compliance will irreparably harm D? Or, what if it is appealable, but compliance during the time necessary for appeal will irreparably harm D? In such cases, mechanically applying the collateral bar rule would place a huge burden on D, and it is not clear that applying the rule would be necessary to protect the system.

One solution might be to rely on the fact that a judge always has discretion to lessen or waive punishment even if D is convicted of contempt.<sup>162</sup> Certainly, it would seem appropriate for a judge to do so if the order were flawed.<sup>163</sup> However, this solution relies on the discre-

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<sup>161</sup> See *A Question of Contempt*, *supra* note 141 (noting that fear of establishing a practice of delay, and not the need for speedy publication, was what motivated a Rhode Island newspaper to violate a 1985 restraining order).

<sup>162</sup> See 18 U.S.C. § 401 (2000).

<sup>163</sup> For example, in *Donovan v. City of Dallas*, the Supreme Court suggested that the Texas Court of Civil Appeals might decline to punish a number of parties who had disobeyed an invalid court order, regardless of Texas's collateral bar rule. See 377 U.S. 408, 414 (1964). After the Texas court had convicted the parties for contempt, the Supreme Court granted certiorari to review both a direct appeal of the order as well as an appeal of the contempt conviction. See *id.* at 411. After holding that the order was in fact invalid, the Supreme Court also vacated the contempt conviction on the ground that the Texas court might not have chosen to punish the parties had it known that its order was invalid. *Id.* at 414. On remand, the Texas court indeed did not wish to punish the parties. See *City of Dallas v. Brown*, 384 S.W.2d 724, 725–26 (Tex. Civ. App. 1964) (dismissing a motion to reinstate the contempt conviction and refunding the fines and costs the court already imposed).

One might ask, then, why the Supreme Court did not vacate and remand the *Walker* conviction, as it did in *Donovan*, to allow the lower court to reconsider, in its discretion, whether to impose punishment. One reason is that in *Donovan*, the Court ruled on the order's validity because it faced a direct appeal of the order in addition to the appeal of the contempt conviction. *Donovan*, 377 U.S. at 411. In *Walker*, on the other hand, the Court reviewed only the contempt conviction, see *infra* text accompanying note 178, so it did not change any of the factors that the lower court had considered when it initially exercised its discretion to impose punishment. Had the Supreme Court remanded *Walker*, there would have been nothing for the lower court to reconsider.

tion of the very judge who issued the problematic order. That fact, combined with the risk of judicial abuse of the contempt power,<sup>164</sup> suggests that something more is needed to adequately protect D's rights.

#### B. What Should Be the Rule's Exceptions?

The Supreme Court has suggested a number of exceptions to the collateral bar rule. As discussed above, in *United Mine Workers*, the Court suggested that a disobedient party might be able to attack subject-matter jurisdiction if the assertion of such jurisdiction were "frivolous and not substantial."<sup>165</sup> In *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees, Division 988 v. Wisconsin Employment Relations Board* and *In re Green*, the Court held that a party can attack subject-matter jurisdiction on the ground that jurisdiction was lacking due to federal preemption.<sup>166</sup> However, these are the usual, extremely narrow grounds for collateral attack on subject-matter jurisdiction, and they do not address the potential burden on D that the courts should try to eliminate. Subject-matter jurisdiction simply relates to the allocation of power between courts;<sup>167</sup> it has little to do with the burden a court order may place on a party. While the first exception may encompass some considerations of fairness to the parties involved, the second exception is concerned solely with the effect that the court's exercise of jurisdiction will have on other courts.

In *Walker*, the Supreme Court suggested two additional exceptions<sup>168</sup> to the collateral bar rule. First, the Court stressed that this was "not a case where the injunction was transparently invalid or had only a frivolous pretense to validity,"<sup>169</sup> thus suggesting an exception to the rule in such situations. However, the opinion itself provides no clear guidance as to the contours of this exception, because many

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<sup>164</sup> See *supra* note 151.

<sup>165</sup> See *supra* notes 112–14 and accompanying text.

<sup>166</sup> See *supra* note 118 and accompanying text.

<sup>167</sup> See Dobbs, *Consent*, *supra* note 63, at 54 (observing that "the jurisdictional concept [historically] was a fundamental constitutional tool for allocating power"). Indeed, the idea of collaterally attacking jurisdiction originated in medieval England, where royal courts struggled for power against local and ecclesiastical courts. Because direct appellate review by the royal courts was difficult in the case of local courts, or impossible in the case of ecclesiastical courts, the royal courts used lack of jurisdiction to collaterally attack these courts' judgments and thereby stop these courts from usurping royal power. See *id.* at 56–57, 60. For an interesting discussion of the mechanics of this procedure, see Krugman, *supra* note 49, at 165 & n.7, 166.

<sup>168</sup> As with the exception suggested in *United Mine Workers*, this Note refers to the *Walker* Court's suggestions as exceptions because the defendant would apparently have the burden of proving them. See *supra* note 112.

<sup>169</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967).

would argue that the Alabama injunction *was* transparently invalid, and yet the Court did not apply the exception to King's case.<sup>170</sup>

The ambiguity of this exception has led the lower federal courts to interpret it narrowly, if they acknowledge it at all. For instance, the First and Second Circuits have both held that a party can rely on the transparently-invalid-order exception only if the party has made a "good faith effort to seek emergency relief from the appellate court"<sup>171</sup> prior to violating the order, or can show compelling circumstances, such as a need to act immediately, excusing the decision not to seek some kind of emergency relief.<sup>172</sup> Yet the Supreme Court's plain language does not support this requirement. What the Supreme Court's precedent may warrant is simply a narrow reading of what constitutes a transparently invalid order.<sup>173</sup>

To the extent that this exception will ever come into play, it still does not address the potential burden on D that courts should try to eliminate. When the First Circuit first discussed this exception, it reasoned that a court has "no right to expect compliance" with a "transparently invalid" order.<sup>174</sup> This seems like a particularly odd reason to make an exception, especially if the exception's purpose is to protect the rights of the parties: the purpose of tempering collateral bar is not to punish courts, but to protect people from having to choose between irreparable harm and punishment for contempt. The degree to which an order is erroneous does not necessarily affect the burden that the order places on the affected party. In fact, the more erroneous or "transparently invalid" an order is, the easier it should be for D to correct it on direct appeal.<sup>175</sup>

One might argue that if the order is "transparently invalid," D should not even have to go through the motions of a direct appeal.<sup>176</sup> For instance, why should the courts require Martin Luther King, Jr. to appeal his anti-demonstration injunction in the prejudiced Alabama

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<sup>170</sup> See Shapiro, *supra* note 7, at 572-76; cf. Charles L. Black, Jr., *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 143-44 (1966) ("[I]f 'transparency' is an independent precondition for collateral attacks upon injunctions, it seems that such attacks will rarely be allowed, for the *Walker* decree, which was held not to be 'transparent,' was extremely broad.").

<sup>171</sup> *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) (quoting *United States v. Terry*, 17 F.3d 575, 579 (2d Cir. 1994) (quoting *Providence Journal*) (internal quotation marks omitted); *In re Providence Journal Co.*, 820 F.2d 1354, 1355 (1st Cir. 1987) (en banc).

<sup>172</sup> *Cutler*, 58 F.3d at 832; *Providence Journal*, 820 F.2d at 1355.

<sup>173</sup> See Black, *supra* note 170, at 144 ("Possibly, an injunction would be considered 'transparent' only if it had no rational relation to the promotion of any legitimate state interests, as in the case of the suppression of 'pure speech.'").

<sup>174</sup> *In re Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir. 1986), *modified*, 820 F.2d 1354 (en banc).

<sup>175</sup> See CHAFEE, *supra* note 7, at 361.

<sup>176</sup> See, e.g., Note, *Liability of the Lawyer for Advising Disobedience*, 39 COLUM. L. REV. 433, 435 (1939).

court system? Although King's case is certainly a compelling and extreme example, the response is, why not? If D is not unduly burdened by obeying the order while it is on direct appeal, why not force D to do so, thereby keeping the decision in the hands of the courts?<sup>177</sup> The real question should be whether D is unduly burdened, a question that the "transparently invalid" standard simply does not reach.

The second exception that the Supreme Court suggested in *Walker* comes much closer to addressing the burden issue: the Court stated that "[t]his 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."<sup>178</sup> This exception appears to have formed the basis for the Court's subsequent holding in *Maness v. Meyers*,<sup>179</sup> a case that clearly illustrates the type of burden on D that the courts should seek to eliminate.

### 1. *Maness v. Meyers*

*Maness* arose out of a Texas court subpoena commanding a local magazine-seller, Michael McKelva, to produce fifty-two<sup>180</sup> pornographic magazines and to testify in a civil proceeding under a local obscenity statute.<sup>181</sup> McKelva's lawyers, Karl A. Maley and Michael A. Maness, counseled McKelva to disobey the order and moved to quash the subpoena on the ground that obedience would entail a substantial possibility of self-incrimination.<sup>182</sup> The Texas judge denied the motion, but McKelva still refused to testify or produce the magazines, stating that he was doing so on the advice of counsel to protect his Fifth Amendment rights.<sup>183</sup> The judge held McKelva, Maley, and Maness in criminal contempt and sentenced them each to ten days in jail

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<sup>177</sup> See CHAFEE, *supra* note 7, at 361.

<sup>178</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1958).

<sup>179</sup> 419 U.S. 449, 460-63 (1975).

<sup>180</sup> The parties subsequently stipulated that McKelva was not in possession of five of the magazines; therefore, they reduced the list to forty-seven. See Petition for Certiorari app. at 5, 7-8, *Maness* (No. 73-689).

<sup>181</sup> See *Maness*, 419 U.S. at 450-51; Petition for Certiorari app. at 2-4, *Maness* (No. 73-689) (reprinting the subpoena).

<sup>182</sup> See *Maness*, 419 U.S. at 451-52; Petition for Certiorari app. at 4-11, 13-15, *Maness* (No. 73-689) (reprinting Defendant's Motion to Quash Subpoena and transcript of oral arguments presented at hearing).

<sup>183</sup> See *Maness*, 419 U.S. at 453.

and a \$200 fine.<sup>184</sup> Only Maness's conviction ultimately reached the Supreme Court.<sup>185</sup>

Maness's arguments before the Court focused on both McKelva's predicament of facing an order that would have required him to give up his Fifth Amendment rights against self-incrimination, and also on his own predicament of owing allegiance to both the court and his client.<sup>186</sup> Maness argued that the application of the collateral bar rule is appropriate only if there are effective avenues for judicial review to challenge suspect orders, and that the rule does not apply if this review is unavailable and the only choice, therefore, is between disobedi-

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<sup>184</sup> See *id.* at 455; Petition for Certiorari app. at 29, *Maness* (No. 73-689) (reprinting the hearing transcript). The judge held McKelva in contempt for "willfully and knowingly . . . failing and refusing to obey" the subpoena duces tecum, and he held the lawyers in contempt for "advising and counseling" this disobedience. *City of Temple v. McKelva*, No. 57,284-C (Dist. Ct. of Bell Co., Tex., 169th Jud. Dist. Feb. 2, 1973), *reprinted in* Petition for Writ of Certiorari at 30, *Maness* (No. 73-689). With regard to the lawyers, the judge noted his reluctance to hold attorneys in contempt, stating that this was the first time the court had done so; he found, however, that the defendants had "usurped" the court's authority by denying it the ability to rule on the admissibility of the evidence. See Petition for Certiorari app. at 31, *Maness* (No. 73-689). The judge believed that the proper way to protect McKelva's Fifth Amendment rights would have been to move to suppress the evidence, or to make an objection to its introduction in any subsequent criminal trial. See *Maness*, 419 U.S. at 455; Petition for Certiorari app. at 32, *Maness* (No. 73-689).

As a deputy sheriff led McKelva out of the courtroom and summarily jailed him, an apparently shaken Maness attempted, unsuccessfully, to salvage the situation by apologizing to the court, and by stressing that his and his co-counsel's behavior resulted merely from a "philosophical difference" with the court regarding the applicable law. See *Maness*, 419 U.S. at 455; Petition for Certiorari app. at 17, 32, *Maness* (No. 73-689) (reprinting the hearing transcript).

<sup>185</sup> McKelva spent seven days in jail and filed a habeas corpus petition in federal district court before the judge ordered him released for "good behavior" and remitted the entire \$200 fine, thus mooted his habeas petition. See Brief for the Petitioner at 12, 71, 73, *Maness* (No. 73-689). It appears that he then pursued a direct appeal of the contempt judgment in Texas court and ultimately reached a settlement with the City Prosecutor. See *McKelva v. City of Temple*, 506 S.W.2d 260 (Tex. Civ. App. 1974) (remanding McKelva's appeal "to the district court on showing of the parties that all matters in controversy [had] been settled").

The court permitted Maness and Maley, as attorneys, to post personal recognizance bonds and granted them a separate contempt hearing before a different judge, as required under Texas law. See *Maness*, 419 U.S. at 456-57; Petition for Certiorari at 17, *Maness* (No. 73-689). The new judge, James R. Meyers, agreed with the contempt finding, but he changed the penalty to a \$500 fine with no confinement. See *Maness*, 419 U.S. at 457. After exhausting all of his state remedies, Maness then petitioned the Supreme Court for a writ of certiorari, which it granted. See *id.* at 457-58.

At the same time, Maley pursued a separate avenue for relief, filing a habeas corpus petition in a federal district court. See *id.* That court granted Maley's petition. See *Maley v. Meyers*, No. W-73-CA-87 (W.D. Tex. Dec. 20, 1973), *reprinted in* Brief for the Petitioner at 74, *Maness* (No. 73-689). On appeal, the Court of Appeals for the Fifth Circuit waited for the Supreme Court's *Maness* decision before affirming the district court, in accordance with *Maness*. See *Maness*, 419 U.S. at 458; *Maley v. Meyers*, 512 F.2d 1404 (5th Cir. 1975) (unpublished table decision).

<sup>186</sup> See Brief for the Petitioner at 26-58, *Maness* (No. 73-689).

ence and the irreparable loss of a fundamental right.<sup>187</sup> The Texas Criminal Defense Lawyers Association filed an amicus brief, stressing the importance of the case not only for Maness, but for all attorneys in the United States.<sup>188</sup> The brief argued that Maness faced much more than just the \$500 fine: opposing parties could use his contempt conviction for impeachment and sentencing purposes in any future criminal proceeding, and, moreover, the conviction could lead to disciplinary action by the bar association, foreclose opportunities for appointment to the bench, and damage his reputation in the legal community.<sup>189</sup>

In response, the Texas judge who had convicted Maness argued<sup>190</sup> that the subpoena did not threaten McKelva's Fifth Amendment right against self-incrimination because the subpoena was issued in a civil trial and the evidence could always be suppressed in any subsequent criminal trial.<sup>191</sup> He argued further that, even if the subpoena did threaten McKelva's rights, the collateral bar rule required obedience.<sup>192</sup>

The Supreme Court disagreed with the Texas judge and unanimously reversed Maness's contempt conviction.<sup>193</sup> In doing so, the Court stressed that an order by a court to reveal information at trial presents a different situation than do other types of orders to which the collateral bar rule applies.<sup>194</sup> In the former situation, "[c]ompliance 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."<sup>195</sup> Therefore, a party to whom such an order is directed may disobey the order and

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<sup>187</sup> See *id.* at 42-43.

<sup>188</sup> See Brief for the Amicus Curiae Texas Criminal Defense Lawyers Association at 11, *Maness* (No. 73-689).

<sup>189</sup> See *id.* (quoting *In re Butts*, 493 F.2d 842, 844 (5th Cir. 1974)).

<sup>190</sup> Note that Meyers's actual arguments, written by the Texas Attorney General, were relatively short, totaling fewer than thirteen pages. See Brief for the Respondent at 4-11, *Maness* (No. 73-689); Supplemental Brief of Respondent, *Maness* (No. 73-689). Maness's arguments, in contrast, totaled over thirty-nine pages. See Brief for the Petitioner at 26-58, *Maness* (No. 73-689); Reply Brief for the Petitioner at 2-8, *Maness* (No. 73-689). Although the Texas Attorney General presumably had a number of interests at stake in defeating Maness's petition, it is relevant to note that in 1973 the Texas legislature entirely repealed the obscenity statute under which the judge had subpoenaed McKelva, and under which local authorities could have prosecuted him. See *Maness*, 419 U.S. at 451 n.1 (noting the statute's repeal). Thus, the case may have been a low priority for the Texas Attorney General by the time he filed his brief in July 1974.

<sup>191</sup> See Brief for the Respondent at 8-9, *Maness* (No. 73-689).

<sup>192</sup> See *id.* at 7-9.

<sup>193</sup> *Maness*, 419 U.S. at 470.

<sup>194</sup> *Id.* at 460.

<sup>195</sup> *Id.*

collaterally attack its validity during contempt proceedings.<sup>196</sup> The Court found “[t]his method of achieving precompliance review . . . particularly appropriate where the Fifth Amendment privilege against self-incrimination is involved.”<sup>197</sup> Although the Court noted that the case would be different if a judge had granted McKelva immunity from prosecution, it rejected Judge Meyers’s argument that the possibility to suppress or object to the admission of the magazines in any future prosecution was sufficient protection to safeguard McKelva’s right against self-incrimination.<sup>198</sup> “Here the ‘cat’ was not yet ‘out of the bag’ and reliance upon a later objection or motion to suppress would ‘let the cat out’ with no assurance whatever of putting it back.”<sup>199</sup>

However, the Court went on to stress as an additional ground for reversal the fact that the case involved a lawyer advising his client. The Court noted the “crucial distinction between citing a recalcitrant witness for contempt, and citing the witness’s lawyer for contempt based only on advice given in good faith to assert the privilege against self-incrimination.”<sup>200</sup> Justice Stewart’s concurring opinion, which Justice Blackmun joined, also stressed this aspect of the case.<sup>201</sup> As a result, the breadth of the Court’s holding is undefined, and one cannot say with absolute certainty that the Court would have reversed McKelva’s conviction had that issue been before it.

Even assuming that the Court would have reversed McKelva’s conviction, it is still not immediately clear what *Maness* stands for. On one hand, the Court stressed that complying with the order would have caused “irreparable injury.”<sup>202</sup> On the other hand, one could

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<sup>196</sup> The Court stated:

[W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court’s order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

*Id.* (alteration in original) (quoting the dictum of *United States v. Ryan*, 402 U.S. 530, 532–33 (1971)).

<sup>197</sup> *Id.* at 461 (footnote omitted).

<sup>198</sup> *See id.* at 461, 462 & n.9 (“Counsel for respondent could cite no Texas statute or case giving assurance that the magazines would be suppressed because they were produced involuntarily . . .”). In contrast, Justice White argued in his concurring opinion that constitutionally imposed immunity from subsequent prosecution would protect a witness, such as McKelva, who releases information upon threat of contempt. *See id.* at 474–75 (White, J., concurring). Still, Justice White agreed with the Court’s reversal because the state had failed to make it sufficiently clear to McKelva and his lawyers that this immunity offered them protection. *See id.* (White, J., concurring).

<sup>199</sup> *Id.* at 463.

<sup>200</sup> *Id.* at 467 (citation omitted).

<sup>201</sup> *Id.* at 470–72.

<sup>202</sup> *Id.* at 460.

argue that complying with the orders in *United Mine Workers* and *Walker* also would have caused irreparable injury in that delay would have effectively killed Lewis's strike and King's demonstration.<sup>203</sup> Yet, the *Maness* Court cited *United Mine Workers* with approval<sup>204</sup> and did not indicate that it intended to overrule either that case or *Walker*. The *Maness* exception must, therefore, cover harm more narrow than that included in the ordinary meaning of "irreparable injury."

The Ninth Circuit, the Western District of New York, and the District of New Mexico have all limited *Maness*'s "irreparable injury" to infringements on the Fifth Amendment right against self-incrimination.<sup>205</sup> For instance, in *Hern Iron Works*, the Ninth Circuit refused to extend the *Maness* exception to a case in which a party disobeyed an administrative search warrant that allegedly would have violated his Fourth Amendment right against unreasonable searches.<sup>206</sup> The party argued that there would have been no way to suppress the evidence uncovered in the search, and that the only way to seek review of the order was to disobey it and to challenge it collaterally.<sup>207</sup> The Ninth Circuit did not dispute those points, but nonetheless refused to extend *Maness* to the Fourth Amendment context, essentially because it found that doing so would place too great a burden on the public's interest in conducting administrative searches.<sup>208</sup> The District of New Mexico has gone even further, limiting the *Maness* exception to both the context of self-incrimination and the context of lawyers advising clients.<sup>209</sup>

These interpretations of *Maness* are far too cramped, both in terms of what the Supreme Court actually meant and in terms of how the exception would be ideally tailored. There is no reason to think that the *Maness* Court was more concerned with the right against self-incrimination than with any other significant right. Rather, what the Court seemed focused on was the defendant's inability to obtain direct review before his right was destroyed.<sup>210</sup> The key factor was that subpoenas duces tecum are not appealable, so it was impossible for

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<sup>203</sup> See *supra* notes 42, 152 and accompanying text.

<sup>204</sup> See *Maness*, 419 U.S. at 459.

<sup>205</sup> See Dep't of Labor OSHA v. *Hern Iron Works, Inc.* (*In re* Establishment Inspection of *Hern Iron Works, Inc.*), 881 F.2d 722, 728 (9th Cir. 1989); *United States v. Walker*, No. 94-CR-32S, 1994 WL 759866, at \*4 (W.D.N.Y. Dec. 21, 1994); *Nat'l Excess Ins. Co. v. Civerolo, Hansen & Wolf, P.A.*, 139 F.R.D. 401, 404 (D.N.M. 1991).

<sup>206</sup> See *Hern Iron Works*, 881 F.2d at 728-29.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 728 ("In the administrative search warrant cases, unlike in *Maness*, the adverse consequences of delaying enforcement are predominant.")

<sup>209</sup> See *National Excess*, 139 F.R.D. at 404; see also Kathleen A. Manning, Note, *The Attorney and Contempt: How Can He Advise His Client?*, 36 LA. L. REV. 1057, 1065-66 (1976) (observing the harm that disclosure of privileged, but not constitutionally protected, information can cause).

<sup>210</sup> See *supra* text accompanying note 195.

the defendant to obtain direct review.<sup>211</sup> This interpretation accords with the Supreme Court's suggestion in *Walker* that it would have allowed collateral attack "if the petitioners, before disobeying the injunction, had challenged it [directly], and had been met with delay or frustration."<sup>212</sup> Furthermore, this interpretation would provide the exception needed to adequately protect people faced with court orders from undue burden.

## 2. *Interpreting and Applying the Walker/Maness Exception*

Courts should read *Walker* and *Maness* together as holding, as a matter of due process,<sup>213</sup> that if a party has no opportunity to obtain full appellate review of a court order without permanently sacrificing a significant right, then that party may disobey the order and challenge it as a defense to criminal contempt.<sup>214</sup> This exception ensures that a party always has the opportunity to appeal a court order at some point. In fact, a party always has exactly one opportunity: if it is possible to appeal directly, then the party must do so; if it is impossible or unduly burdensome to appeal directly, the party gets its one opportunity instead on collateral attack.

This exception is easy to apply in cases like *Maness*, in which it is procedurally impossible to appeal the order without disobeying it. The exception becomes more difficult to apply in cases like *Walker*, in which it is possible to appeal directly, but not without effectively destroying the right in question. In these cases, the court must make an objective determination as to exactly how much delay would have destroyed a significant right.

In *Walker*, the Court had an easy way around this, because King made no effort to appeal the order during the short time he had before his scheduled demonstration.<sup>215</sup> King had an opportunity to appeal without suffering any harm, but he did not make use of it. While one might question how much of an opportunity this was—given that the time for appeal was less than two days and would have entailed arguing before the segregationist Alabama courts—it was,

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<sup>211</sup> See *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

<sup>212</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1967). That this dictum is related to the *Maness* exception has been lost on a number of the lower courts. For example, in *Novak*, the Eleventh Circuit discussed one exception as being the absence of an effective opportunity for review, and then cited *Maness* to support an entirely separate exception—where the order would require an "irretrievable surrender of constitutional guarantees." *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991); accord *Hern Iron Works*, 881 F.2d at 726–28; *United States v. Walker*, No. 94-CR-32S, 1994 WL 759866, at \*3 (W.D.N.Y. Dec. 21, 1994).

<sup>213</sup> See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>214</sup> I am indebted to Professor Kevin M. Clermont for suggesting this interpretation of *Walker* and *Maness*.

<sup>215</sup> See *supra* note 36 and accompanying text.

nonetheless, an opportunity. Allowing someone to challenge an order collaterally after passing up an opportunity to do so directly puts that person in the position of our generic party D in the first example above: it allows that person to make the decision to disobey based on a number of factors that would unduly burden those whose rights depend on court orders.

More difficult questions will arise if a future Martin Luther King makes a good faith effort to appeal the order directly, but finally reaches a critical juncture at which he believes further delay would effectively kill the demonstration. Although courts may be tempted to apply the collateral bar rule mechanically in such a case to avoid a difficult decision, they should instead go through the fact-intensive inquiry needed to determine for themselves whether further delay would have effectively destroyed a significant right. Although this may seem like a difficult and imprecise determination for the courts to make, courts are regularly called upon to make such determinations. In fact, courts must often engage in similar inquiries when deciding whether to issue a court order to begin with.<sup>216</sup>

One drawback to this approach is that it will clearly leave a future King in some uncertainty as to exactly when he may disobey. The legitimacy of his actions necessarily will depend on whether a court subsequently agrees with his assessment of the complicated situation. However, many defenses to criminal charges pose similar problems and are thus equally difficult for a defendant to rely on at the time he acts. Self-defense and necessity are prime examples.<sup>217</sup> Furthermore, the more courts apply the *Walker/Maness* exception to particular cases, the more this uncertainty can be lessened.

In fashioning and applying this exception over time, courts should seek to delineate its boundaries in a clear and context-specific manner.<sup>218</sup> In the context of demonstrations and labor strikes, the exception should hinge on the amount of delay that would have destroyed the momentum needed to keep people in the streets or on the picket lines. The question should not be whether compliance would have prevented a future King from ever demonstrating again (in which case he will never pass the test), or whether compliance would

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<sup>216</sup> See *supra* notes 146–47 and accompanying text.

<sup>217</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 441–50, 454–63 (2d ed. 1986).

<sup>218</sup> Although each case will involve a fact-intensive inquiry, courts should subject the ultimate question—whether the defendant had an opportunity to appeal the order without having first to sacrifice permanently a significant right through compliance—to independent appellate review in order to lay out clear constitutional boundaries. *Cf.*, *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 504–05 (1984) (holding that appellate courts must independently review trial court findings of “actual malice” in defamation cases, so as to retain control over the scope of the First Amendment’s protections).

have prevented him from demonstrating according to schedule (in which case he will almost always pass the test), but whether compliance would have prevented him from carrying out a particular campaign—in the real King's case, for example, the 1963 campaign to end segregation in Birmingham's commercial sector. In the context of news publication, on the other hand, the exception should hinge on the amount of delay that would have prevented the public from receiving timely information. The question should not be whether a story would have been less sensational and thus less profitable, but whether the public would have been prevented from learning important information in time to act on it—for example, whether a newspaper would have had to delay publishing crucial information about an election until after that election.<sup>219</sup>

### CONCLUSION

When Professor Zechariah Chafee examined the collateral bar rule in 1950, he brought clarity to a confusing area of the law by focusing on the fundamental distinction between the merits of a court order and the court's authority to issue the order.<sup>220</sup> Thus, he approached the rule in the same way as one would approach collateral attack on judgments in general, rather than approaching it as an isolated doctrine. However, Chafee never accepted the doctrine of jurisdiction to determine jurisdiction.<sup>221</sup> He envisioned a "legal wall" separating orders that are flawed on their merits from those that the court never had authority to issue.<sup>222</sup> On one side of the wall, orders must be obeyed until set aside on direct appeal; on the other side, orders may be freely disobeyed and challenged collaterally.<sup>223</sup> Thus, Chafee's vision of collateral bar, while illuminating, failed to take into account the steady creep of *res judicata* that was already well under way.

Now fifty-two years later, Chafee's legal wall has been reduced to a small speed bump, with *res judicata* preventing most collateral attacks on prior judgments, regardless of the rendering court's power to decide. Nonetheless, Chafee's approach to collateral bar remains valuable. Viewing the rule in the context of collateral attack on judg-

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<sup>219</sup> See Lewis, *supra* note 145.

<sup>220</sup> See CHAFEE, *supra* note 7, at 296–380.

<sup>221</sup> See *id.* at 319 n.42 (describing jurisdiction to determine jurisdiction as an "absurd doctrine" akin to an "imaginary mongoose").

<sup>222</sup> See *id.* at 300.

<sup>223</sup> *Id.* Chafee complained that the confusion surrounding collateral bar had made this wall "as winding as the famous serpentine wall designed by Mr. Jefferson" at the University of Virginia," and he sought to straighten it. *Id.* (quoting Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County, 333 U.S. 203, 238 (1948) (Jackson, J., concurring)).

ments in general makes it clear that collateral bar operates much like the normal rules of *res judicata*, precluding attacks on both merits and authority, subject to a few narrow exceptions. Once the scope of the rule is in better focus, it should be easier for litigants to conform to it, and for courts to see exactly how the rule should be tempered.

Collateral bar is an important rule, but it is justified only to the extent that it strikes an appropriate balance between the rights of parties who depend on court orders and the rights of those confronted with them. In *Walker* and *Maness*, the Supreme Court fashioned an exception to the rule that might achieve this balance. However, it did so in an ambiguous manner, and the lower courts have insisted on interpreting the exception as narrowly as possible. To remedy this situation, the Supreme Court should clearly enunciate the *Walker/Maness* exception as allowing a party to collaterally attack a court order as a defense to criminal contempt if the party was unable to appeal that order directly without permanently sacrificing a significant right. Until the Court is presented with an opportunity to do so, however, the lower courts should simply interpret *Walker* and *Maness* accordingly.

