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Toward Due Process in Injunction Procedure

Doug Rendleman
Washington and Lee University School of Law, rendlemand@wlu.edu

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I. INTRODUCTION

FIVE recent Illinois cases illustrate the law of collateral attack on injunctions. These decisions not only reveal the strengths of the present law, but also the confusion, complexity, and inutility of the doctrine which currently exists. This article will discuss the existing law, point out problems, and suggest an analysis which will clarify the law and allow it to serve the underlying social interests.

II. THE PRESENT LAW

City of Chicago v. King[1] grew out of Martin Luther King's civil rights activity in Chicago in August 1966. Several major disturbances had resulted from a series of planned demonstrations in different Chicago neighborhoods at approximately the same time. These demonstrations attracted large, hostile crowds which allegedly endangered the persons and property of the marchers and other citizens. Thereafter the police sought an injunction because they were concerned about unreasonable waste of police manpower. On August 19, following a hearing, a temporary injunction was awarded to the plaintiffs requiring that written notice be given to the police 24 hours before any march.

Frank Ditto, one of the leaders of the marches, was present in court when the injunction was granted. On August 22 he called a 10:00 a.m. press conference to state his belief that the injunction was an unwarranted usurpation of his constitutional rights and to announce his intention to defy the court injunction. A copy of the injunction was served on Ditto at 10:30 a.m; and on the same day he conducted a march without giving prior notice to the police.

Ditto was charged with contempt of court. As a defense, he maintained that the temporary injunction order abridged his constitutional rights and therefore was void. The circuit court ruled that the only proper questions before it were jurisdiction of the parties, jurisdiction of the subject matter, and whether the injunction had been disobeyed. The constitutionality of the injunction was held not rele-

* *Assistant Professor of Law, Marshall-Wythe College of Law; J.D. 1968, University of Iowa; LL.M. 1970, University of Michigan.*

1. 86 Ill. App. 2d 340, 230 N.E.2d 41 (1st Dist.), *cert. denied*, 393 U.S. 1028 (1967).

vant to the charge of contempt. Ditto did not refute the evidence of disobedience, was convicted of contempt, and sentenced to six months in jail. He appealed, and the appellate court affirmed.

The second case, *Board of Junior College District 508 v. Cook County College Teachers Union, Local 1600*,[2] originated in a teachers strike. The union, which had been recognized as the exclusive representative for the faculty, and the board which operated junior colleges in the Chicago area, were negotiating a collective bargaining agreement. Progress was slow and on November 30, 1966, the board obtained a temporary injunction which prohibited the union from striking or picketing. Nevertheless, Norman Swenson and others picketed after a strike was called. The strike was settled and the board's attorney moved to dissolve the temporary injunction. The trial judge refused to dissolve, however, and ordered the board's attorneys to commence contempt proceedings against Swenson and the union. The board's attorney declined to proceed further, and when the trial judge requested the state's attorney to prepare contempt proceedings, that office also declined. The trial judge then appointed a member of the bar as amicus curiae to investigate.

In April of 1967, the amicus curiae recommended that the union and Swenson show cause why they should not be held in contempt of court. A hearing was held and the amicus presented evidence of breach of the injunction. The union was convicted of contempt and fined $5,000; Swenson was convicted of contempt, sentenced to 30 days in jail, and fined $1,000. Both appealed, arguing that the temporary injunction was void and erroneous because it violated the Constitution and certain statutes. The appellate court affirmed.

The next case, *Board of Education v. Kankakee Federation of Teachers, Local 886*,[3] was a result of a teachers strike in Kankakee County. On April 25, 1969, the union communicated an immediate intent to strike to the board and picketing began the next morning. On Saturday April 26, at 5:45 p.m., the board's attorney, without attempting to give notice to the union, secured a temporary restraining order which prohibited the union from striking and picketing. The sheriff served the order on the union members that evening, but the strike continued.

On the 29th of April the board initiated contempt proceedings against the union. During the time between the board's petition to show cause and the hearing on it, the court held a hearing and issued a preliminary injunction. Union members attended the hearing but did not participate, and ignored the preliminary injunction as they had

2. 126 Ill. App. 2d 418, 262 N.E.2d 125 (1st Dist.), *cert. denied*, 402 U.S. 998 (1970).

3. 46 Ill. 2d 439, 264 N.E.2d 18 (1970).

the temporary restraining order. Hearing on contempt for breach of the temporary restraining order was had on May 5. The union moved to dismiss, arguing that the order violated due process because it was granted without notice or a hearing. The trial judge denied the motion, heard evidence, found certain union members in contempt, fined the union $12,000, fined several union members and sentenced several of them to 60 days in jail. The strike ended. Those who were convicted of contempt appealed and the Illinois Supreme Court affirmed.

The fourth appellate decision, *County of Peoria v. Benedict*,[4] was a consequence of a nursing home strike. The union and the Peoria County Bel-Wood Nursing Home were at loggerheads. The superintendent of the nursing home concluded that a strike was likely to begin on November 30, 1968. On November 27, the Wednesday before Thanksgiving, the union's staff representative, Harold Z. Benedict, and the union's secretary-treasurer were notified that a hearing on the county's complaint requesting an injunction would be held on Friday, November 29. The union did not appear at the hearing. A temporary injunction which barred the union from striking or picketing the Bel-Wood Nursing Home was awarded to plaintiffs. The union struck at midnight on November 30 and set up picket lines at the nursing home.

The county began proceedings on December 3. The union filed motions to dismiss the complaint, to vacate the injunction, and to dismiss the contempt proceedings. Pursuant to an interim order, a work force was maintained at the nursing home and controlled picketing was allowed. At a hearing on January 2, 1969, the union's attorney admitted disobedience of the injunction; the court found contempt and fined the union $2,400; Benedict, $1,500; and 13 employees, $50 each. Benedict was sentenced to 60 days in jail. On the same date the injunction was made permanent. The employees, the union, and Benedict appealed. The Illinois Supreme Court held that the injunction was erroneous and vacated it, but affirmed the fines and sentences for contempt.

The final case, *United Mine Workers of America Union Hospital v. United Mine Workers District 50*,[5] began with a strike vote against a nonprofit hospital in West Frankfort. The union contract with the hospital expired on October 31, 1969. The union decided not to work without a contract, and picket lines were set up at 12:02 a.m. on November 1. At 5:33 a.m. on November 1 the hospital filed a complaint and the circuit court granted a temporary restraining order which prohibited the strike and picketing. At 7:00 a.m. the order was served

4. 47 Ill. 2d 166, 265 N.E.2d 141 (1970).

5. 1 Ill. App. 3d 822, 275 N.E.2d 231 (5th Dist. 1971), *rev'd*, 52 Ill. 2d 496, 288 N.E.2d 455 (1972) (facts taken from appellate court opinion).

on the union members who were in front of the hospital. The picketing stopped when the order was served but began again at 1:00 p.m. that afternoon and continued until midmorning the next day.

On November 3 the hospital initiated contempt proceedings. Following a hearing, the circuit court found that the picketing violated the injunction, held the picketers in contempt of court, and levied fines totaling $16,270. The picketers who had been convicted of contempt appealed. The appellate court reversed. The Supreme Court of Illinois reversed the appellate court and affirmed the circuit court's finding of contempt.

In all of these cases there is a common thread: an injunction or restraining order is issued against the defendants; the defendants act contrary to the injunction; the defendants are charged with contempt of court for violating the injunction; and the defendant-contemnors seek to defeat contempt by arguing that there were defects in the underlying injunction. Nevertheless, the courts did not treat each case the same.

The distinguishable results spring from the collateral bar rule, a part of the doctrinal apparatus of collateral and direct attack. Contempt is a proceeding collateral to the injunction suit, and the contemnor, when charged with disobeying the injunction, may not argue as a defense to contempt that the injunction was erroneous, but only that it was void.[6] The difficulty is in distinguishing between orders which are void and subject to collateral attack and those which are merely erroneous.

As illustrated by the recent cases, Illinois courts apply the collateral bar rule to preclude relitigation of injunction issues in a subsequent contempt proceeding. Even though the injunction which was disobeyed is asserted to be erroneous, but not void, contempt will be affirmed, as it was in *Benedict.*[7] If the injunction is void because the court lacks the power to act, however, voidness of the order may be shown to defeat contempt.[8] The distinction between lack of power or voidness, and mistaken use of power or error turns on the elusive concept of jurisdiction. Thus, the only issues which will be examined upon a charge of contempt are whether the enjoining court had jurisdiction over the person of the contemnor, whether the enjoining court

6. Musgrove v. United States Pipe & Foundry Co., 274 So. 2d 640, 642 (Ala. 1972); Walker v. City of Birmingham, 279 Ala. 53, 181 So. 2d 493 (1966), *affirmed with a few variations,* 388 U.S. 307 (1967); City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1st Dist.), *cert. denied,* 393 U.S. 1028 (1967); Z. CHAFEE, SOME PROBLEMS OF EQUITY 297-380 (1950).

7. *See also* AMF, Inc. v. International Fiberglass Co., 469 F.2d 1063, 1065 (1st Cir. 1972); United States v. Christie, 465 F.2d 1002 (3d Cir. 1972); United States v. Fidanian, 465 F.2d 755, 759 (5th Cir. 1972); Mathison v. Felton, 90 Idaho 87, 408 P.2d 457 (1965).

8. *Ex parte* Bryant, 155 Tex. 219, 485 S.W.2d 719 (1956).

had jurisdiction over the subject matter, and whether the contemnor violated the injunction or order.[9] Seldom do the cases contain any difficult questions about whether the contemnor disobeyed the injunction.[10] Instead, the problems arise in the areas of personal jurisdiction, subject matter jurisdiction, and the civil-criminal contempt distinction.[11]

Personal jurisdiction is more often assumed than examined. It is generally held that the defendant in an injunction proceeding must, at risk of contempt, obey the injunction from the time he has actual notice of it.[12] Thus, if a person knows of the injunction by service upon him or otherwise, and proceeds nevertheless to act contrary to it, he may be held in contempt.[13] It is irrelevant that the procedure was ex parte and that the plaintiff neither served nor attempted to serve notice on the defendant before the injunction was granted.[14] Furthermore, the defendant is bound even though he was accorded no opportunity to litigate the granting of the injunction.[15] If a defendant is informed of an ex parte injunction, he must obey it. Otherwise, because of the col-

9. City of Chicago v. King, 86 Ill. App. 2d 340, 349-51, 230 N.E.2d 41, 46 (1st Dist. 1970); Board of Junior College Dist. No. 508 v. Cook County College Teachers Union, Local 1600, 126 Ill. App. 2d 418, 427-28, 262 N.E.2d 125, 129 (1st Dist. 1970).

10. UMWA Union Hosp. v. UMWA Dist. 50, 1 Ill. App. 3d 822, 275 N.E.2d 231 (5th Dist. 1971), *rev'd*, 52 Ill. 2d 496, 288 N.E.2d 455 (1972); Carolina Freight Carriers Corp. v. Local Union 61, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971); *Ex parte* Bryant, 155 Tex. 219, 485 S.W.2d 719 (1956).

11. Walker v. Birmingham, 388 U.S. 307, 315 (1967); County of Peoria v. Benedict, 47 Ill. 2d 166, 170-71, 265 N.E.2d 141, 144 (1970); Board of Junior College Dist. 508 v. Cook County College Teachers Union, Local 1600, 126 Ill. App. 2d 418, 427, 262 N.E.2d 125, 129 (1st Dist. 1970); City of Chicago v. King, 86 Ill. App. 2d 340, 354-55, 230 N.E.2d 41, 48 (1st Dist. 1967). *See also* United States v. Dickinson, 465 F.2d 496, 511 (5th Cir. 1972). *But see* Hitchman Coal & Coke v. Mitchell, 245 U.S. 229, 334-35 (1917).

12. ILL. REV. STAT. ch. 69, § 3-1 (1971). *See also* United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972); Consolidation Coal Co. v. Disabled Miners of West Virginia, 442 F.2d 1261, 1267-68 (1971) (*semble*); Backo v. Local 281, 438 F.2d 176, 180 (1970); United States *ex rel.* Carter v. Jennings, 333 F. Supp. 1392, 1396 (E.D. Pa. 1971); *In re* Herndon, 325 F. Supp. 779 (D. Ala. 1971); United States v. Puerto Rico Independence Party, 324 F. Supp. 1333 (D.P.R. 1971); Sumbry v. Land 195 S.E.2d 228, 234 (Ga. App. 1972); Riehe v. District Court, 184 N.W.2d 701 (Iowa 1971); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 123-25 (1930); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 249-61 (1971).

13. County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970); Board of Junior College Dist. 508 v. Cook County College Teachers Union, Local 1600, 126 Ill. App. 2d 418, 262 N.E.2d 125 (1st Dist.), *cert. denied*, 402 U.S. 998 (1970); Board of Educ. v. Kankakee Fed. of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970); City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1st Dist.), *cert. denied*, 393 U.S. 1028 (1967).

14. UMWA Union Hosp. v. UMWA Dist. 50, 1 Ill. App. 3d 822, 275 N.E.2d 231 (5th Dist. 1971), *rev'd*, 52 Ill. 2d 496, 288 N.E.2d 455 (1972); Board of Educ. v. Kankakee Fed. of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970). *See also* United States v. Hall, 472 F.2d 261 (5th Cir. 1972).

15. Tefft, *Neither Above the Law nor Below It: A Note on Walker v. Birmingham*, 1967 SUPREME COURT REVIEW 181.

lateral bar rule, he may be convicted of contempt for acts which he had a legal right to perform without ever having an opportunity to litigate the underlying issues.

The question of subject matter jurisdiction presents quite a different problem. The state constitution provides: "Circuit courts shall have original jurisdiction of all justiciable matters,"[16] and the legislature has provided that the circuit courts shall have power to grant writs of injunction.[17] The circuit court thus has power or subject matter jurisdiction over cases where the plaintiff requests an injunction. Moreover, the power to decide a case includes the power to decide it incorrectly. It is irrelevant to the issue of subject matter jurisdiction whether the injunction was unconstitutional[18] or erroneously issued in the face of the Anti-Injunction Act.[19] Thus, in accord with the collateral bar rule, an injunction not meeting constitutional or statutory criteria could be expunged, while at the same time a contempt conviction for breaching that erroneous injunction could be affirmed.[20]

According to the Illinois law, an injunction granted by a circuit court could be erroneous, but almost never void. The circuit court has power to grant injunctions and this includes the power to grant erroneous injunctions. The collateral bar rule precludes a defendant from breaching an injunction and then arguing error as a defense to contempt. The enjoined defendant's proper course is either to move to dissolve or modify the injunction, to appeal, or, if time is short, to request an expeditious stay of the injunction.[21] The rationale for this rule lies not in doctrine, but in policy. To allow an enjoined defendant to flout an injunction and then to argue against it in contempt is said to encourage disrespect for the courts because it allows the defendant to become judge in his own case.[22] Thus, when Frank Ditto announced his conscious intent to defy the court injunction, the issue was not whether the injunction was constitutional, but whether Ditto could con-

16. ILL. CONST. art. 6, § 9.

17. ILL. REV. STAT. ch. 69, § 1 (1971).

18. *See generally* Z. CHAFEE, *supra* note 6, at 344-48; Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 553 n.67 (1970). *But see* State *ex rel.* Superior Ct. v. Sperry, 79 Wash. 2d 69, 73-78, 483 P.2d 608, 611-13 (1971).

19. The Anti-Injunction Act, ILL. REV. STAT. ch. 48, § 2(a) (1971), provides that no injunction or restraining order shall be granted in a case involving terms or conditions of employment.

20. County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970). *See generally* Comment, *Collateral Attack upon Labor Injunction Issued in Disregard of Anti-Injunction Statutes*, 47 YALE L.J. 1136 (1937).

21. Board of Educ. v. Kankakee Fed. of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970); Z. CHAFEE, *supra* note 6, at 362, 380.

22. Board of Junior College Dist. 508 v. Cook County College Teachers Union, Local 1600, 126 Ill. App. 2d 418, 262 N.E.2d 125 (1st Dist. 1970) (citing Walker v. City of Birmingham, 388 U.S. 307 (1967)). *See, e.g.*, United States v. Fidanian, 465 F.2d 755, 757-58 (5th Cir. 1972); United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972).

sciously transgress the court decree. So also, in *Cook County College Teachers*, it was not incongruous for the circuit judge, after both the plaintiff and the state's attorney had rejected the opportunity to act upon contempt, to appoint another lawyer to charge and convict Norman Swenson of contempt.[23] The court was vindicating its own dignity, integrity, and authority, and not furthering any interest of the parties.

Because preserving respect for the court is the primary reason for the collateral bar rule, the rule should operate only in criminal contempt where the judgment is punative and intended to punish and preserve respect. In civil contempt the judgment is remedial or coercive, and the contempt is usually said to rest upon the underlying decree and to fall with it.[24] The distinction between civil and criminal contempt, unfortunately, is abstract rather than operational and has not worked very well in practice.[25] The already confused distinction between civil and criminal contempt has been exacerbated by the more recent cases. In *UMWA Union Hospital*, the circuit court found the contemnors to be in civil contempt,[26] but nevertheless levied fines. The fines could not have been coercive for the disobedience had ceased before the rule to show cause issued;[27] and it seems clear that the fines, although denominated civil, were punative and criminal.[28] In *Benedict*, 13 individual defendants were fined for criminal contempt, but the fines were to be suspended upon compliance with the permanent injunction. A determinate sentence, suspended upon the condition that the contemnor comply with the order, is coercive and blurs, if it does not extirpate, the distinction between civil-coercive and criminal-punative contempt.[29] These cases and earlier decisions[30] are unfortunate because they confuse the distinction between civil and criminal contempt, extend the collateral bar rule beyond the reasons for its existence, deter or prevent the courts from examining the merits of contempt appeals, and distort the concepts of voidness and subject matter jurisdiction.

23. *See generally* Halligan, *Enjoining Public Employees' Strikes: Dealing with Recalcitrant Defendants*, 19 DEPAUL L. REV. 298, 299 (1969).

24. The criminal-civil contempt distinction is made in *College Teachers*. *See generally* Dobbs, *supra* note 12, at 235-39, 243; United States v. UMWA, 330 U.S. 258, 294-95 (1947).

25. Dobbs, *supra* note 12, at 246-47. *See also, e.g.*, Emery Air Freight Corp. v. Teamsters Local 295, 449 F.2d 586 (2d Cir. 1971); United States *ex rel.* Carter v. Jennings, 333 F. Supp. 1392 (E.D. Pa. 1971). The same conduct can be both criminal and civil contempt. *See* Mitchell v. Fiore, 470 F.2d 1149 (3d Cir. 1972); Hadnott v. Amos, 325 F. Supp. 777 (M.D. Ala. 1971).

26. 1 Ill. App. 3d at 823, 275 N.E.2d at 232.

27. *Id.* at 824, 275 N.E.2d at 233.

28. *See* Dobbs, *supra* note 12, at 274-78.

29. *Id.* at 244.

30. Faris v. Faris, 35 Ill. 2d 305, 220 N.E.2d 210 (1966); County of Du Page v. Molitor, 26 Ill. App. 2d 232, 167 N.E.2d 592 (2d Dist. 1960).

Subject matter jurisdiction reveals the perpetual irony of the conflict between the romantic imagination and real life; and jurisdiction, the helpless abstraction, has been persistently manipulated in the process of deciding particular cases.[31] Some federal cases illustrate this tendency. In *United States v. United Mine Workers*,[32] the union was held in contempt for ignoring an injunction. It contended that the injunction was void because the Norris-LaGuardia Act[33] deprived the district court of jurisdiction. The Supreme Court held that the injunction was not void, but that even if it were void, the collateral bar rule would preclude relitigating injunction issues in the contempt proceeding as long as jurisdiction were not frivolous.[34] The *Mine Workers* doctrine suffers from a lack of intelligibility,[35] and has come in for some spirited criticism.[36] Another major case came in 1967 when the United States Supreme Court decided *Walker v. City of Birmingham*.[37] A group of black ministers paraded despite an ex parte injunction and were adjudged in contempt of court. The Alabama Supreme Court affirmed, holding that if the enjoining court had a general grant of equity power and achieved jurisdiction over the persons enjoined, then the defendant who disobeyed the injunction is precluded from advancing injunction infirmities as a defense to contempt.[38] The United States Supreme Court held, in a divided opinion, that the Alabama rule was permissible state procedure, even in a constitutional case. Two qualifications were noted. If the "injunction was transparently invalid or had only a frivolous pretense to validity,"[39] the defendant would be able to ignore it and argue its defects in a contempt hearing. The second qualification in *Walker* was practical and procedural rather than abstract. The ministers had not attempted to modify, dissolve, or appeal the injunction, but had called a press conference to denounce Alabama justice and marched in defiance of the injunction. "This case would arise in quite a different constitutional posture," the majority stated "if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay

31. Z. CHAFEE, *supra* note 6, at 296-363.

32. 330 U.S. 258 (1947).

33. "No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute." 29 U.S.C. § 104 (1970).

34. 330 U.S. at 309-10 (Frankfurter, J., concurring).

35. Z. CHAFEE, *supra* note 6, at 376-77; C. WRIGHT, LAW OF FEDERAL COURTS § 16 (1970).

36. Cox, *The Void Order and the Duty To Obey*, 16 U. CHI. L. REV. 86 (1948); Watt, *The Divine Right of Government by Judiciary*, 14 *id.* 409 (1947).

37. 388 U.S. 307 (1967). The case is superficially similar on the facts to *King*. Rev. Martin Luther King was a defendant to both injunctions, but a contemnor only in *Walker*.

38. Walker v. City of Birmingham, 279 Ala. 53, 181 So. 2d 493 (1966).

39. 388 U.S. at 315.

or frustration of their constitutional claims."[40] This may be called the requirement of a timely challenge. The defendant, even though the injunction was secured ex parte, must first attempt a direct review of the injunction.[41] Thus the pristine subject matter jurisdiction wall was breached on both sides: in *Mine Workers*, the Supreme Court held that there were some void orders which must be obeyed; and in *Walker*, the court inferred that there were two classes of valid though erroneous orders which could be disobeyed with impunity.

Before returning to subject matter jurisdiction in Illinois, it is well to note one other development in the federal law of constitutional procedure. In *Carroll v. Princess Anne*,[42] the United States Supreme Court, on direct appeal, held unconstitutional an ex parte injunction against a National State's Rights Party rally. In regulating protected expression, the Court reasoned, prior restraints are to be eschewed; and, to assure accuracy in the adjudicating process, if it is possible to give notice to the defendants before they are enjoined, the plaintiff must "invite or permit their participation in the proceedings."[43] The *Carroll* case has, however, proven to be easy to distinguish; and while the principle is commendable, in practice it has not protected many defendants from ex parte injunctions.[44] The Illinois response was typical. In *Kankakee Teachers*, the temporary injunction to stop a strike in progress was granted ex parte and there was neither notice nor an attempt to give notice, although the strikers were manning picket lines. The order was served, but the strike continued. Some of the strikers were convicted of contempt. Affirming, the Illinois Supreme Court distinguished *Carroll* as not applicable to picketing which is not dogmatically equated with constitutionally protected speech, and as not binding precedent for an illegal strike which was in progress when enjoined.[45] The injunction procedure, moreover, was not even before

40. *Id.* at 318. See on this point Judge Brown's opinion in United States v. Dickinson, 465 F.2d 496, 511 (5th Cir. 1972).

41. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 385 (1970); Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1562 (1970); Brantigan, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1513, 1521 (1972); Cox, *supra* note 36, at 113; Rodgers, *The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings*, 49 B.U.L. REV. 251 (1969); Note, *Collateral Attack of Injunction Restraining First Amendment Activity*, 45 S. CAL. L. REV. 1083, 1097 (1972); Note, *Injuria Non Excusat Injuriam: Unconstitutional Injunctions and the Duty To Obey*, 1970 WASH. U.L.Q. 51.

42. 393 U.S. 175 (1968).

43. *Id.* at 180. The instances when notice need not be given are variously stated by the Court. *Compare id.* at 180 *with id.* at 182-83, *and id.* at 184-85.

44. *See, e.g.*, Duke v. Texas, 327 F. Supp. 1218 (E.D. Tex. 1971); Go v. Peterson, 14 Ariz. App. 12, 480 P.2d 35 (1971); Lieberman v. Marshall, 236 So. 2d 120 (Fla. 1970); Kleinjans v. Lombardi, 52 Hawaii 427, 478 P.2d 320 (1970); Mechanic v. Gruensfelder, 461 S.W.2d 298 (Mo. App. 1970). Contrast United Farm Workers Organizing Comm. v. Superior Court, 4 Cal. 3d 556, 94 Cal. Rptr. 263, 483 P.2d 1215 (1971); Commonwealth *ex rel.* Costa v. Boley, 441 Pa. 495, 272 A.2d 905 (1971).

45. 46 Ill. 2d at 444, 264 N.E.2d at 21. *See* Mims v. Duval County School Bd.,

the contempt court—the contemnors were precluded by the collateral bar rule from advancing injunction issues in the contempt proceeding.[46] In other words, before *Carroll* will be applied, the defendant must have engaged in legal, pure speech, the injunction must have issued before the enjoined event, and the defendant must attack the injunction directly, by motion to dissolve or modify or by appeal.

This was the law of Illinois as it stood before the fifth district appellate court decided *Mine Workers Hospital.* The rules relating to subject matter jurisdiction were simple and fairly clear; the courts adhered to the collateral bar rule precluding relitigation of injunction issues in contempt; the distinction between civil and criminal contempt was not always observed; and the collateral bar rule was, perhaps incorrectly, applied to both criminal and civil contempts. *Mine Workers Hospital* was an appeal from an order holding a group of strikers in contempt for picketing in breach of a circuit court injunction. The appellate court held that the injunction was void because the circuit court had no jurisdiction over the subject matter, and reversed the contempt order. The Illinois Supreme Court reversed the appellate court and affirmed the contempt. An analysis of the dialogue between the appellate court and the Illinois Supreme Court provides a vehicle for examining the confusion of subject matter jurisdiction and collateral attack.

The appellate court's first reason for reversing the contempt order was that because of the Anti-Injunction Act, the circuit court had no power to enjoin peaceful picketing in a legal labor dispute.[47] A literal reading of the decision would indicate that the appellate court believed the Act to be jurisdictional. If that is the intended meaning, it is, as the Illinois Supreme Court held, incongruent with past cases.[48] The Illinois Supreme Court was right.[49] Injunctions which are granted but should not be granted are not void, but erroneous, and these injunctions are not correctable by collateral attack in contempt. The Anti-Injunction Act does not void a labor injunction that has been mistakenly granted. Had the legislature intended the Act to be jurisdictional and an injunction to be void, it could have used either those words or their equivalents in order to override the jurisdiction of the circuit court which is clearly set out by statute and the state constitution.[50] The Act is intended to channel an inquiry, not to limit the jurisdiction of the courts.

350 F. Supp. 553 (M.D. Fla. 1972).

46. 46 Ill. 2d at 445, 264 N.E.2d at 22. *See also* Anderson v. Dean, 354 F. Supp. 639 (N.D. Ga. 1973).

47. 1 Ill. App. 3d at 825-26, 275 N.E.2d at 233-34.

48. 52 Ill. 2d at 501-02, 288 N.E.2d at 458.

49. *See* ILL. REV. STAT. ch. 48, § 2(a) (1971).

50. ILL. CONST. art. 6, § 9; ILL. REV. STAT. ch. 69, § 1 (1971). *Cf.* Z. CHAFEE, *supra* note 6, at 371.

Professor Chafee argued that the line between power and non-power should be a bright line rather than tortured and obscure: A trial judge should be able to tell quickly and easily which cases belong in his court and which do not. This so-called "bright line policy" is intended to prevent lengthy trials and difficult decisions which do not bind anyone; to prevent judges from refraining from deciding cases because of an excess of caution; and to prevent concentrating scarce judicial resources on jurisdictional issues rather than the merits of the cases.[51] Jurisdictional questions should not turn on minor issues which involve many factors. Jurisdictional issues, moreover, should be able to be disposed of before the trial judge turns to the merits. It is wasteful to try the entire case and then decide that the court had no jurisdiction.

> [O]nly a strong demonstration of necessity can justify extending the list of defects of power so as to include errors which, by their very nature, often cannot be established satisfactorily until the trial of the merits has been going on for days and weeks. . . . Power ought to be settled at the beginning of a suit. A horse should be disqualified before the race starts and not after a photo finish.[52]

The inquiry under the Anti-Injunction Act is complex and requires evidence on the merits. Only peaceful picketing is protected; and the circuit court has power to enjoin mass picketing and violence.[53] Only legal strikes are protected under the Act; and the circuit court has the power to enjoin illegal strikes.[54] When purpose or intent is at issue, it is necessary to take evidence.[55] Must the court take evidence to decide whether the strike is legal or illegal, violent or nonviolent, the picketing is massed or informational, and, if it decides that the strike cannot be enjoined, decline jurisdiction? The circuit court from the outset either has jurisdiction or does not have it. Jurisdiction "never drops out of the sky into the middle of a case weeks after suit was begun."[56] The limits on the injunctive power of the circuit court are not susceptible of easy determination at the outset, but rather re-

51. Z. CHAFEE, *supra* note 6, at 312.

52. *Id.* at 317-18.

53. Eads Coal Co. v. UMWA, Dist. 12, 131 Ill. App. 2d 1082, 269 N.E.2d 359 (1971); Twin City Barge & Towing Co. v. Licensed Tugmen's & Pilots' Protective Ass'n of America, 48 Ill. App. 2d 1, 197 N.E.2d 749 (1st Dist. 1964); General Elec. Co. v. Local 997, UAW, 8 Ill. App. 2d 154, 130 N.E.2d 758 (3d Dist. 1955).

54. Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965) (may enjoin strike by custodial employees of school district). *Redding* is explained somewhat in Peters v. South Chicago Community Hosp., 44 Ill. 2d 22, 253 N.E.2d 375 (1969). *See also* School Comm. v. Westerly Teachers Ass'n, 299 A.2d 441, 443 (R.I. 1973) (may enjoin illegal strike).

55. Cielesz v. Local 189, Amalgamated Meat Cutters, 25 Ill. App. 2d 491, 167 N.E.2d 302 (2d Dist. 1960); Simmons v. Retail Clerks Int'l, 5 Ill. App. 2d 429, 125 N.E.2d 700 (4th Dist. 1955).

56. Z. CHAFEE, SOME PROBLEMS OF EQUITY 372 (1950).

quire the taking and weighing of evidence. Therefore, to assert that the Anti-Injunction Act is jurisdictional is to ignore the practical realities and conceptual underpinning of the "bright line policy." Questions concerning which strikes are inside and which are outside the Act go to the merits of the individual case and affect erroneousness, but are not proper limits on subject matter jurisdiction. The appellate court was wrong in holding that the circuit court lacked jurisdiction over the subject matter, and the Illinois Supreme Court correctly reversed.

Another reason given by the appellate court for striking down the injunction was that it came under the exception in *Walker v. Birmingham* because it was "transparently on its face invalid."[57] The Illinois Supreme Court dismissed this argument with the statement "we do not believe any such transparent invalidity was present in the case at bar."[58] The Illinois Supreme Court was correct. The *Walker* opinion discussed when error of constitutional magnitude in an injunction could be collaterally asserted, and assumed that the court which had granted the injunction had jurisdiction or power. In *Mine Workers Hospital*, the appellate court held that the circuit court had no power to grant the injunction and then went on to assert transparent invalidity, a basis for allowing collateral attack, as a reason for lack of power in the issuing court. If the appellate court was correct about jurisdiction, transparent invalidity is superfluous. The circuit court either had jurisdiction or it did not; and the seriousness of error has no bearing on the question of jurisdiction. The appellate court could have stated it in the alternative: the order was void but if the order was not void, then it was erroneous and this erroneousness was of sufficient magnitude (transparently invalid) to allow the error to be asserted on collateral attack.

Even if "transparently invalid" is properly a reason for the result reached, it remains to determine whether the order was transparently invalid. In early November 1969, at the time of the injunction in *Mine Workers Hospital*, the law of Illinois was that strikes against nonprofit hospitals were illegal and could be enjoined;[59] and it was not until more than three weeks after the operative facts in *Mine Workers Hospital* that the Illinois Supreme Court reversed and held that these strikes

57. 1 Ill. App. 3d at 826-27, 275 N.E.2d at 234-35. The appellate court also found that exception in United States v. UMWA, 330 U.S. 258 (1947). This seems incorrect. The *Walker* case applied the collateral bar rule but stated that this barrier might be lowered if the injunction was transparently invalid. 388 U.S. at 315. *United States v. UMWA* held that an injunction must be obeyed, even though the issuing court had no jurisdiction, unless the asserted jurisdiction was "frivolous and not substantial." 330 U.S. at 293.

58. UMWA Union Hosp. v. UMWA Dist. 50, 52 Ill. 2d 496, 501, 288 N.E.2d 455, 458 (1972).

59. Peters v. South Chicago Community Hosp., 107 Ill. App. 2d 460, 264 N.E.2d 840 (1st Dist. 1969).

were legal and could not be enjoined.[60] Moreover, the weaknesses which were said by the appellate court to raise the error in *Mine Workers Hospital* to the level of transparent invalidity flowed from failure to give notice to the defendants when the injunction would constitute a prior restraint.[61] The Illinois Supreme Court had earlier recognized the difference between the rally in *Carroll v. Princess Anne*[62] and picketing, and held that *Carroll* only requires enhanced procedural protections in pure speech cases and not in speech plus picketing cases.[63] The Illinois Supreme Court had also held that *Carroll* defects related to error and not jurisdiction, and were not of sufficient magnitude to be heard on collateral attack.[64] The appellate court holding and the Illinois Supreme Court reversal open up the problem of what exactly is meant by the term "transparently invalid" as an exception to the general rule against collateral attack on injunctions. That the level of frivolous or transparent invalidity is somewhat above simple constitutional error appears from the *Walker* case because there the injunction was unconstitutional in two respects: the ordinance which the injunction redacted was invalid on its face;[65] and the injunction had been granted ex parte without the hearing later required by *Carroll*. Thus, while the *Mine Workers Hospital* injunction might have been erroneous, it is hard to say that it was transparently invalid.

III. Analysis of the Present Law

The injunction in *Mine Workers Hospital* was granted at 5:33 a.m. No attempt was made to give notice to the pickets who were on the public sidewalks adjacent to the hospital. There was no hearing: the complaint was filed and the order was signed the same minute. The order forbade picketing and the strike. The picketing did not stop, and the picketers were charged with contempt.[66] The evil, in this writer's opinion, is the ex parte injunction against peaceful picket-

60. Peters v. South Chicago Community Hosp., 44 Ill. 2d 22, 253 N.E.2d 375 (1969).

61. 1 Ill. App. 3d at 827, 275 N.E.2d at 235.

62. 393 U.S. 175 (1968).

63. Board of Educ. v. Kankakee Fed. of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970). *See also* United States Steelworkers v. Alabaster Line Co., 286 Ala. 489, 242 So. 2d 658 (1970) (illegal picketing can be enjoined without a hearing if decree permits legal picketing); Go v. Peterson, 14 Ariz. App. 12, 480 P.2d 35 (1971) (political speech in *Carroll* not analogous to movie theater); Kleinans v. Lombardi, 52 Hawaii 427, 478 P.2d 320 (1970) (*Carroll* inapplicable to conduct).

64. Board of Educ. v. Kankakee Fed. of Teachers, Local 886, 46 Ill. 2d 439, 264 N.E.2d 18 (1970). *See also, e.g.*, United States v. Puerto Rico Independence Party, 324 F. Supp. 1333 (D.P.R. 1971).

65. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 153 (1969). When *Walker* was decided, the Alabama Court of Appeals had declared the ordinance unconstitutional. Shuttlesworth v. Birmingham, 43 Ala. App. 68, 180 So. 2d 114 (1965).

66. 1 Ill. App. 3d at 824, 275 N.E.2d at 232-33.

ing. The appellate court's result, reversing contempt, is surely correct. What end could be served by punishing those strikers who picketed peacefully for a few hours? But, in order to release the strikers from contempt, the appellate court mercilessly tortured the doctrine of subject matter jurisdiction. The Illinois Supreme Court straightened out the law of jurisdiction, but at the price of affirming a contempt order which should have been reversed.

The appellate court's mistake is an example of what Chafee called judicial thinking on two levels.[67] On one level the appellate court asked elaborate, technical questions about the concept of subject matter jurisdiction. On the other level, the court asked a more basic question about the wise conduct of human affairs: Who should have the last word on the question of whether these pickets should be punished? It answered this question correctly. But, in order to reverse the punishment for contempt, the collateral bar rule required the appellate court to void the judgment. The order was voided in order to accomplish a wise practical result—freeing the strikers—but the concept of subject matter jurisdiction suffered. The Illinois Supreme Court affirmed the contempt and revealed more concern for consistent doctrine than compassion for the striking hospital workers.

The solution Chafee advocated was a stay or supersedeas and a quick review.[68] This has also been suggested by the United States Supreme Court.[69] At times, an expeditious appeal or stay can provide relief from an incorrect or oppressive order.[70] Sometimes, however, the enjoined conduct is in progress,[71] or the order is mandatory and requires affirmative conduct. Furthermore, a stay is not always granted; an appeal is time consuming and costly; a reversal may come too late to help the defendant; and, if the events which gave occasion to the conduct have passed, a reversal will often be a practical victory for the plaintiff.[72] Furthermore, to enjoin a strike is to break it, for time is of the essence and once the momentum is lost, the strike is over.[73] A stay or speedy review cannot be the full answer when the enjoined conduct is in progress or about to begin: ex parte procedure

67. Z. CHAFEE, *supra* note 56, at 334-35.

68. *Id.* at 358-63.

69. Walker v. City of Birmingham, 388 U.S. 307, 319 n.12 (1967), cites Alabama Supreme Court Rule 47 which allows the court to accelerate filing dates for appellate papers.

70. *See, e.g.*, United States Servicemen's Fund v. Shands, 440 F.2d 44 (4th Cir. 1971); *cf.* Southeastern Prods. Ltd. v. City of Mobile, 457 F.2d 340 (5th Cir. 1972).

71. *See, e.g.*, Lieberman v. Marshall, 236 So. 2d 120 (Fla. 1970).

72. *See, e.g.*, Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947); Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946).

73. Walker v. City of Birmingham, 388 U.S. 307, 330 (1967) (Warren, C.J., dissenting). *See also* School Comm. v. Westerly Teachers Ass'n, 299 A.2d 441 (R.I. 1973); Watt, *supra* note 36.

combined with the collateral bar rule requires the defendant to cease or abandon his conduct at the price of contempt, even though the order may be incorrect. No matter how careful the appellate court is,[74] ex parte injunctions can and will create hardship for the defendant.

New solutions must be sought. Discussion generally has bogged down in subject matter jurisdiction,[75] or concentrated on first amendment problems.[76] The focus of inquiry, however, could be shifted from the first amendment and subject matter jurisdiction to jurisdiction over the person. The rest of this article will deal with the idea that many ex parte injunctions are void because the court lacks jurisdiction over the person of the defendants.

Ex parte injunctions are interlocutory procedural devices designed to preserve the plaintiff's rights until a hearing can be scheduled.[77] An injunction is a conservative instrument which halts or prevents conduct. The stated purpose of the ex parte injunction or temporary restraining order is to preserve the status quo—"the last actual, peaceable, uncontested status which preceded the controversy."[78] In the rush of events, however, it is often difficult to identify the precise time the status quo existed.

There are two related reasons for ex parte procedure in injunction cases. The first relates to certainty. The subject of the litigation must be preserved so that the court will have something to pass upon when the full hearing comes and so that the plaintiff will be able to enjoy the fruits of his victory.[79] The second relates to speed and secrecy. There is thought to be a class of defendants who, upon receipt of notice, may destroy, remove, or sell the subject of the litigation or otherwise render full relief impossible.[80]

Ex parte practice in injunctions is ancient and almost universal.[81] It has been approved by the United States Supreme Court,[82] and respected commentators.[83] There has also been criticism and it is felt

74. *See, e.g.*, Schaefer v. Stephens-Adamson Mfg. Co., 36 Ill. App. 2d 310, 183 N.E.2d 575 (1st Dist. 1962). *See also* United Steelworkers of America v. Seminole Asphalt Ref. Co., 269 So. 2d 28 (Fla. App. 1972).

75. Z. CHAFEE, *supra* note 56, at 296-380. Cox, *supra* note 36.

76. *See, e.g.*, Note, 45 S. CAL. L. REV., *supra* note 41.

77. *See generally* Nussbaum, *Temporary Restraining Orders and Preliminary Injunctions—The Federal Practice*, 26 SW. L.J. 265 (1972); *Developments in the Law —Injunctions*, 78 HARV. L. REV. 994, 1055-61 (1965).

78. Schlicksup Drug Co. v. Schlicksup, 129 Ill. App. 2d 181, 187, 262 N.E.2d 713, 716 (3d Dist. 1970).

79. *Developments in the Law*, *supra* note 77. *See also* Nussbaum, *supra* note 77.

80. *See, e.g.*, Lieberman v. Marshall, 236 So. 2d 120, 126 (Fla. 1970).

81. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 182 n.189 (1930). Early federal practice did not allow *ex parte* injunctions. *Id.*

82. Carroll v. Princess Anne, 393 U.S. 175, 180 (1968).

83. *See, e.g.*, Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 537 (1970).

by many that some kind of notice is preferable to ex parte practice.[84] There are two reasons for requiring notice. The first relates to the concept of status quo. There are times when orders are intended to end temporary emergencies rather than to lead to a hearing in the future. If the order succeeds in ending the temporary emergency, there will be no need for further proceedings. Ex parte procedure in emergencies is commonly used to suppress dissent,[85] and to break strikes.[86] It is argued, accordingly, that if the order does not lay the foundation for effective final relief, but *is* effective final relief, then the status quo rubric is inapposite and not very utilitarian.[87] In fact these orders are final orders.[88]

These final orders obtained ex parte and backed up by the collateral bar rule create a superstructure which contains a latent but imposing potential for injustice, and the second reason for giving notice relates to this possibility. Justice Brennan has commented that ex parte injunctions were "obtained invisibly and upon a stage darkened lest it be open to scrutiny by those affected."[89] Ex parte procedure, by definition, excludes a hearing; the facts will be found from a sworn petition or affidavits.[90] Verification is the only guarantee of accuracy. Disinterested equanimity cannot be expected of plaintiffs; the request for an injunction will often be presented to the judge in a fashion which is at best one-sided because of the possibility of excessive zeal, mistake, selection, and omission. Ex parte procedure, therefore, creates an incentive for partisanship and chicanery. Allegations and affidavits are "a wholly untrustworthy class of proof."[91] "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.' "[92] Ex parte procedure frustrates

84. Pennsylvania R.R. v. Transport Workers Union, 278 F.2d 693 (3d Cir. 1960); Arivida Corp. v. Sugarman, 259 F.2d 428 (2d Cir. 1958); Ford Motor Co. v. Cottingham, Inc., 228 F.2d 911 (6th Cir. 1955); School Comm. v. Westerly Teachers Ass'n, 299 A.2d 441 (R.I. 1973); F. FRANKFURTER & N. GREENE, *supra* note 81, at 224.

85. Carroll v. Princess Anne, 393 U.S. 175 (1968); Walker v. City of Birmingham, 388 U.S. 307 (1967).

86. School Comm. v. Westerly Teachers Ass'n, 299 A.2d 441 (R.I. 1973); F. FRANKFURTER & N. GREENE, *supra* note 81, at 63-65.

87. State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971). *Cf.* Geisinger v. Voss, 352 F. Supp. 104 (E.D. Wis. 1972).

88. Rendleman, *Legal Anatomy of an Air Pollution Emergency*, 2 ENVIR. AFFAIRS 90, 107-08 (1972); Note, S. CAL. L. REV., *supra* note 41, at 1088.

89. Walker v. City of Birmingham, 388 U.S. 307, 346 (1967) (dissenting opinion).

90. ILL. REV. STAT. ch. 60, § 3-1 (1971).

91. Great Northern R.R. v. Brosseau, 286 F. 414, 416 (D.N.D. 1923). *See also* Marshall Durbin Farms, Inc. v. National Farmers Organization, 446 F.2d 353 (5th Cir. 1971); United States Servicemen's Fund v. Shands, 440 F.2d 44, 46 (4th Cir. 1971); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7 (1966); F. FRANKFURTER & N. GREENE, *supra* note 81, at 65, 188-89.

92. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

the adversary system because in the absence of both parties there is a greater chance that the facts will be ascertained inaccurately, the law will be applied incorrectly, and the order will be drafted incautiously. These reasons, which relate to accuracy in the litigation process, may be termed pragmatic reasons to oppose ex parte procedure.

There are also a priori reasons to avoid ex parte procedure. In a democracy, the state exists to promote the welfare of individuals and the emphasis is upon private decisionmaking, unfettered by government interference.[93] It seems fundamental to a democracy that people who are affected by a decision should participate in making it. If a person is ordered to cease conduct by an injunction thrust upon him as an accomplished fact, it appears to be government by fiat.[94] He has had no opportunity to participate in the process which curtailed his conduct; and even if the order is correct under law, it is odious and unpalatable because of the way it came about,[95] and it is likely to cause resentment toward the decision, the decisionmakers, and the decisionmaking process. This bitter and disaffected reaction to ex parte procedure relates to the principle of legitimation: Decisions will be more readily complied with if both sides have had ample opportunity to state their position and persuade others to adopt it.[96] The judicial process has a symbolic function. Professor Paul Carrington has observed that the decisionmaking process is "a ritual which celebrates our common concern for the right of each individual to insist that official decisions affecting him be made subject to general principles of humane quality

93. "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Fuentes v. Shevin, 407 U.S. 67, 81 (1972); *cf.* Boddie v. Connecticut, 401 U.S. 371 (1971); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

94. 6 J. WIGMORE, EVIDENCE § 1832 (3d ed. 1940); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 250 (1971).

95. F. JAMES, CIVIL PROCEDURE § 1.2 (1965). *See also* F. FRANKFURTER & N. GREENE, *supra* note 81, at 52-53; Millar, *The Formative Principles of Civil Procedure I*, 18 ILL. L. REV. 1, 4-9 (1923); Rosenberg, *Devising Procedures that Are Civilized To Promote Justice that Is Civilized*, 69 MICH. L. REV. 797 (1971). It might be argued that defendants are more aggravated by the fact of the injunction than the method of securing it. Some of the anger at having been had is no doubt due to the fact of the injunction, but it is reasonable to conclude that ex parte procedure exacerbates the outrage. *See* Rendleman, *supra* note 88, at 103-04.

96. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 12 (1966). The legitimation concept is related to the political science concept of legitimacy which "involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society." S. LIPSET, POLITICAL MAN 64 (1963). Access to decisionmaking institutions seems to be basic to a feeling that the institutions are legitimate ones. *Id.* at 65, 67. That notions of illegitimacy may stem from denial of access to decisions is relevant to a study of ex parte injunctions is almost too obvious to state. Lipset couples the symbolic value of legitimacy with the instrumental value of effectiveness which relates to how things work. *Id.* at 64. Lipset's legitimacy-effectiveness analysis is close to the priori-pragmatic analysis discussed herein.

enforced by high officials personally familiar with his problem."[97] When the adversary process is short circuited at the outset, these values are frustrated. On the other hand, in a judicial proceeding where both sides are allowed a full opportunity to present a case there is a better chance that the loser will think that an adverse result, even though not to his liking, is a legitimate decision.

In deciding whether there is a need for an adversary presentation, therefore, it is necessary to consider both the accuracy of the adjudicating process and the impact on those who would be required to submit to a decision which they had no part in shaping. Full publicity is the best guarantee against abuse; a result following full publicity will be both a more accurate decision and one more easily accepted by the loser.

The policy reasons underlying the collateral bar doctrine are preserving respect for the courts, preventing defendants from appointing themselves judge in their own cases, and resolving disputes in a neutral forum rather than upon the initiative of private and interested parties. There is surely something to preserving respect, and the system runs better if some wisdom is presumed in judges—it reinforces the judges and reassures the rest of us. Respect for the courts, however, should not be allowed to degenerate into a complacent belief that the personnel of our court system possess intelligence approaching omniscience.

Some who support ex parte practice impute an almost supernatural quality to the judicial function. Justice Frankfurter, concurring in a decision that defendants must obey orders which the judge had no power to grant,[98] stated:

> The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for.[99]

97. ABA Proceedings, *Improving Procedures in the Decisional Process,* 52 F.R.D. 51, 78 (1971).

98. United States v. UMWA, 330 U.S. 258, 310-12 (1947) (Frankfurter, J., concurring). Contrast Justice Frankfurter's dissent in Bridges v. California, 314 U.S. 252, 289 (1941).

99. 330 U.S. at 308-09.

Many disagree and reject the idea that judges are something more than normal people. Professor Richard Watt, commenting on *United States v. United Mine Workers* and Justice Frankfurter's encomium to judges, stated:

> The history of the assumption and usurpation of power by the judiciary in America is a familiar story. But this doctrine, . . . is as flagrant an instance as our constitutional history provides. . . . The flavor of long-discarded divine right which has lingered around the concept of contempt has finally emerged as a doctrine—the doctrine that the Court can do no wrong.[100]

Judges, in his view, should receive no more respect than they earn. As the Mississippi Supreme Court recently observed: "Respect for courts is that voluntary esteem the public has for judicial rectitude. Punishment for contempt will not insure or preserve respect, for it cannot be compelled."[101] Thus, insisting that allowing disobedience of incorrect orders encourages disrespect for correct orders and requiring that incorrect decrees be obeyed without possibility of challenge may diminish rather than preserve respect for the courts.[102] The collateral bar rule, it has been charged, requires misplaced respect for the person of the judge who may be wrong, while the proper respect is to some higher law.[103] The defendant-contemnors in many of the collateral bar cases have been opponents of the existing order, exponents of social change, and authors of social ferment.[104] The plaintiffs, on the other hand, have been the voice of order and continuity; their desire is to preserve the status quo. The defendant groups cannot be expected to pay the same obeisance to judges, courts, or court orders as the plaintiff groups. No prefabricated formula, in the view of the defendants, should be allowed to impede social change or to prevent the courts from deciding issues on the merits.

The emphasis to be placed upon preserving the status quo and

100. Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409, 448 (1947).

101. Boydstun v. State, 259 So. 2d 707, 709 (Miss. 1972).

102. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 384, 385 (1970); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 635 (1970).

103. See the arguments of the ministers in *Walker*, 388 U.S. at 323-24; and of Frank Ditto in *King*, 86 Ill. App. 2d at 348, 230 N.E.2d at 45 (1967).

104. *See generally* T. EMERSON, *supra* note 102, at 286-90. Union president and civil rights leader A. Philip Randolph put it this way:

"Demonstrations are the hallmark of every revolution since the birth of civilization. . . . These are the outbursts, . . . the manifestations of deep convictions about the evils that people suffer. While they sometimes take the form of some irrational upsurge of emotionalism, they come from the fact that the peoples are the victims of long-accumulated wrongs and deprivations. Therefore, these are an outburst and an outcry for justice, for freedom. And there is no way . . . to stop these demonstrations until the cause is removed, and the cause is racial bias, the cause is exploitation and oppression, the cause is a second-class citizen in a first-class nation. . . . This is the reason for the civil rights revolution." *Quoted in* J. Anderson, *Profiles* (A. Philip Randolph III), New Yorker, Dec. 16, 1972, at 40, 73-74.

maintaining respect for the courts is a matter of ideology and the question is not so simple as whether respect can be purchased with deprivation. The order or decree of the court is presumptively correct until dissolved, modified, or overruled on appeal. Obedience, therefore, is required. One who would contest the constitutionality of a criminal statute is, however, not precluded from doing so following a violation.[105] Thus the collateral bar rule is an anomaly in the law.[106] Chief Judge John Brown of the Fifth Circuit offers pragmatic and institutional reasons for distinguishing obedience to statutes from obedience to judicial decrees:

> The problem is unique to the judiciary because of its particular role. Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. . . .
>
> On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, "while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."[107]

The collateral bar rule should be used only when required by the reasons asserted in support of it; it should be relaxed when countervailing interests of sufficient weight are interposed.[108]

An interest which must be considered is the value of litigating issues on the merits. To command respect, court orders should be adjudicated in a procedural process which will allow them to be worthy of respect. Respect for court orders is marginal in ex parte procedure. First, the order is more likely to be defective. The court has heard only one side before finding facts, applying the law, and formulating the order. Second, the injunction is the product of an atmosphere

105. Walker v. City of Birmingham, 388 U.S. 307, 327 (1967) (Warren, C.J., dissenting). In fact, he might be required to violate the criminal statute to test its constitutionality. *See, e.g.*, Boyle v. Landry, 401 U.S. 77 (1971); Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972).

106. *See generally* Note, *supra* note 105. *See also* United States v. Fidanian, 465 F.2d 755 (5th Cir. 1972); *accord,* Mitchell v. Fiore, 470 F.2d 1149 (3d Cir. 1972).

107. United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972).

108. *In re* Oliver, 452 F.2d 111 (7th Cir. 1971). Also note the result in United States v. Dickinson, 465 F.2d 496, 513-14 (5th Cir. 1972). *But see* the *Dickinson* case on remand, 349 F. Supp. 227 (D. La. 1972).

which might seem to be one of subterranean intrigue and is thrust upon the defendant like a fiat. The defendant has had no opportunity to participate in the adjudicating process and may justifiably feel overreached. Defendants in injunction suits should be treated not only with fairness, but with the assiduous appearance of fairness. Ex parte procedure only exacerbates their estrangement from constituted authority.

IV. A Proposal: Notice and Hearing

This article has examined the reasons for ex parte practice and the policy behind the collateral bar rule. When considered in relation to democratic values and the goals of our procedural system, both the collateral bar rule and ex parte practice were found guilty of excesses and held capable of creating serious injustice. The need is to construct a doctrinal mechanism which will allow the courts to function yet not require obedience to court orders which are unworthy of respect. The article turns next to the recent due process cases which have brought the propriety of ex parte injunction procedure out of the region of generalities and into one where decisions are inevitable. It will be argued that all injunctions and orders with practical finality must be preceded by notice and a hearing or else be void.

Defendants to an ex parte injunction do not have an adequate interest to impose the dictates of due process, it could be argued, because the order is not final and is subject to a motion to dissolve or modify. This argument was considered in *Fuentes v. Shevin*,[109] which concerned summary prejudgment repossession of household chattels purchased by time payments. The Supreme Court held that even though the repossession was not final, the purchaser's interest was not vitiated because his bare possessory interests in the chattels were enough to call due process onto the field before the chattels were taken. The Court observed that even a temporary deprivation of property falls under the fourteenth amendment.[110] In the Illinois cases here considered, the defendants' property interests were not hampered. Instead, the injunctions circumscribed the defendants' liberty interests: their freedom to locomote, to exhort, to inform, and to apply economic and other pressure. These interests in conduct or liberty would seem to be equally protected by the due process guarantees. In addition, it is clear that when a court issues an order which prohibits conduct already in progress, the order has practical finality. The defendant must alter his plans to conform his conduct to the order or pay the price of contempt. Time is a perishable commodity; in a strike or a demonstration, timing

109. 407 U.S. 67 (1972).

110. *Id.* at 85. *See also* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (Harlan, J., concurring); Pervis v. LaMarque Independent School Dist., 446 F.2d 1054 (5th Cir. 1972).

and momentum are particularly vital. If nothing happens, the status quo can, from the plaintiff's position, be said to have been preserved. But if conduct in progress is stopped or if planned conduct is prevented, then, from the defendant's vantage point, the status quo has been modified and his conduct has been restricted and hampered. In injunction cases, the due process guarantees should be held to attach when the defendant's interest in his conduct is such that the order or injunction has practical finality.

Problems which arise in deciding whether an injunction or order has practical finality could be partially solved by looking to the cases which determine whether an order is sufficiently final to be appealable.[111] The key to the inquiry is whether the order affects the defendant's interest in his present conduct. Any order which deters or inhibits the defendant's interest in his present conduct is a decision on the merits as to that conduct and has practical finality.[112] An or-

111. Construction Laborers, Local No. 438 v. S.J. Curry & Co., 371 U.S. 542, 550 (1963); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); United States v. Wood, 295 F.2d 772 (5th Cir. 1961). *See generally* C. WRIGHT, FEDERAL COURTS §§ 101, 102 (1970); Annot., 19 A.L.R.3d 403 (1968); Annot., 19 *id.* 459.

Ex parte orders have frequently been held unappealable. *See* Annot., 19 A.L.R. 3d at 439-44, 480-83. This factor, however, is not relevant to the question of whether the order has practical finality because in determining practical finality the question is whether the order affects significant interests and hence should not be ex parte.

112. Some understanding of the admittedly imprecise concept of practical finality can be attained by comparing two recent ex parte theatre-obscenity injunctions. In State v. Gulf States Theatres, 270 So. 2d 547 (La. 1972), on the basis of a sworn statement of facts in a petition, the judge enjoined, pending a hearing, the showing of the motion picture. This order had practical finality. The theatre could not exhibit the picture at all pending the first adversary hearing five days later. Nothing happened and, in that sense, the status quo was preserved, but as to the defendants, the order was final for five days and the order was permanent for the same time. The majority, however, observed incorrectly that the order was temporary and to preserve the status quo. 270 So. 2d at 552, 554-55 (McCabb, C.J., concurring). The dissents are persuasive. 270 So. 2d at 555-60, 562-78. *See especially* Justice Barham's discussion on ex parte procedure in a civil obscenity case. *Id.* at 568-70. On the other hand, in United States v. Little Beaver Theatre, Inc., 324 F. Supp. 120 (S.D. Fla. 1971), the government scheduled a hearing on whether a search warrant should be issued. In the meantime, because the theatre management was aware of possible trouble, an ex parte order was obtained. The order restrained "all interested parties from 'disposing of, relinquishing possession of, or in any manner cutting, altering, splicing, destroying or mutilating subject motion picture "Turned on Girl". . . .'" *Id.* at 120. This order did not have practical finality for it did not deter present or planned conduct. Nor did the order interfere with expression in any meaningful sense. To the contrary, the decree insured that if showings of the movie continued, expression would continue unabated. Thus the principle of *Carroll v. Princess Anne* was not violated. The preliminary order, accordingly, preserved the subject of litigation for the court to pass upon since the court could hardly decide obscenity if the questionable segments of the print were in the projectionists' wastebasket.

So conceived, the practical finality concept is similar to the Solicitor General's argument in *Walker v. City of Birmingham* that the Supreme Court should not apply the collateral bar rule but instead consider the merits because the injunction therein did not preserve the status quo. Selig, *Regulation of Street Demonstrators by Injunction*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 135, 150 (1968).

der with practical finality impairs a substantial right of the defendant, and that is enough of an interest to call the due process guarantees into operation.

If the defendant has a sufficient interest to give rise to due process protection, then the question must be: what sort of procedure does due process require before an injunction with practical finality is granted? Due process is a concept which varies in relation to the particular set of interests at stake.[113] Notice and a hearing in advance of an adjudication which may affect defendant's rights are core values in our adversary system and have been said to be the very essence of procedural due process.[114] The defendant should have notice, and he should receive it far enough in advance to allow him to prepare.[115]

Practical problems may arise, and flexibility must be considered as well as the plaintiff's need for haste. The Constitution requires no more than "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,"[116] and the plaintiff must, in any event, inform the defendant of the accomplished fact of the injunction in order to bind him. In many cases telephonic notice to the attorney for the adverse party should be enough.[117] The constitutional issues do not turn on formalities but revolve around fairness[118] and actual notice.[119] The plaintiff should give notice as soon as he can and not just before he leaves for the courthouse or the judge's home.

There are, it could be argued, countervailing interests sufficient to outweigh the need for notice. The plaintiff, arguably, has a need for speed and efficiency and in many ex parte cases a desire to prevent the defendant from destroying or concealing the subject property. These arguments, however, were considered in the context of summary repossession and rejected. The due process clause was "designed to

113. Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886 (1961); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

114. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); F. JAMES, CIVIL PROCEDURE § 12.1 (1965).

115. *See* Fuentes v. Shevin, 407 U.S. 67 (1972); *In re* Gault, 387 U.S. 1 (1967); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

116. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). *See also* Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972).

117. Advisory Committee's Note to 1966 Amendments to Rule 65(b), 39 F.R.D. 124-25 (1966). FED. R. CIV. P. 65(b)(2) requires the plaintiff's attorney to make a record of what he has done to give notice.

118. International Shoe Co. v. Washington, 326 U.S. 310 (1945); Nowell v. Nowell, 384 F.2d 951 (5th Cir. 1967).

119. Robinson v. Hanrahan, 409 U.S. 38 (1972); Weaver v. O'Grady, 350 F. Supp. 403 (S.D. Ohio 1972).

protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[120] In dealing with the need for prompt action to prevent the debtor from destroying or concealing the goods, the Supreme Court observed that the statutes were too broad to encompass that purpose and that "no such unusual situation is presented by the facts of these cases."[121] An allegation of immediate and irreparable injury is necessary for an ex parte temporary restraining order.[122] Nevertheless, in the absence of an adversary process, there is no realistic check on the truth of the allegations; and the state has abandoned effective control over private use of state power and "acts largely in the dark."[123] That a quick motion to dissolve or modify is available[124] could be argued to obviate the need for notice in advance. But it must be remembered that we are dealing with conduct in progress or about to begin. The order binds the defendant from the time he has actual knowledge of it; and if the order has practical finality, the reasoning in Justice Harlan's concurrence in *Sniadach v. Family Finance Corp.*[125] should control: "I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . *before* [defendant] can be deprived of his property or its unrestricted use."

Notice, it could also be argued, is obviated because, if the injunction is improper, the defendant may recover on the bond. This argument must also be rejected. First, the government which has been the litigant in many of these cases is not required to post security,[126] and any remedy against the bond is generally held to be the exclusive remedy.[127] Even where the plaintiff is a private party the argument for recovery on the bond must be repudiated. To allow a plaintiff to post bond and prevent a defendant's conduct at the cost of later paying damages is to allow a plaintiff to buy up the defendant's right to liberty. "[N]o later hearing and no damage award can undo the fact

120. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (citing Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

121. 407 U.S. at 93.

122. ILL. REV. STAT. ch. 69, § 3-1 (1971). *See also* FED. R. CIV. P. 65(b); Chrysler Credit Corp. v. Waegele, 29 Cal. App. 3d 681, 105 Cal. Rptr. 914 (1972).

123. Fuentes v. Shevin, 407 U.S. 67, 93 (1972). *But see* Chrysler Credit Corp. v. Waegele, 29 Cal. App. 3d 681, 686, 105 Cal. Rptr. 914, 917 (1972).

124. ILL. REV. STAT. ch. 69, § 3-1 (1971) (2 days or less).

125. 395 U.S. 337, 343 (1969).

126. ILL. REV. STAT. ch. 69, § 9 (1971). *See also* FED. R. CIV. P. 65(c).

127. Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316 (D. Mass. 1966); Alabama Mills v. Mitchell, 159 F. Supp. 637 (D.D.C. 1958); Monolith Portland Midwest Co. v. Reconstruction Fin. Corp., 128 F. Supp. 824 (S.D. Cal. 1955); Note, *Interlocutory Injunctions and the Injunction Bond,* 73 HARV. L. REV. 333 (1959).

that the arbitrary taking that was subject to the right of procedural due process has already occurred." "[The bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property."[128] Plaintiffs should not be allowed to enjoin now and pay later.

Thus, it is clear that notice should be required before granting an injunction which has practical finality. The purpose of notice, of course, is to allow the defendant to participate in the process of adjudicating the issues;[129] and the notice should inform the defendant of the basis of the plaintiff's charges, the relief asked, and the time and place of the hearing. The manner and style of the hearing may vary with the interests at stake and the time available.[130] If defendant's constitutional rights are at issue, a more rigorous hearing might be required.[131] If the event sought to be enjoined is in progress, perhaps a less formal hearing may be permissible.[132] The hearing should be the best the circumstances allow and provide some guarantee of the truth of the plaintiff's assertions, the correctness of the law applied, and, if an order is necessary, some assurance that the order be tailored to the legitimate interests of both sides.[133] The hearing or adjudicative process must not be a farce[134] but must provide a real test.[135] In *Fuentes*, the United States Supreme Court condemned a process in which the creditor alleged his conclusions on a form and posted a bond before the writ which allowed him to take possession was issued by a nonjudicial state official. Ex parte injunction practice is somewhat different: the plaintiff must proceed upon affidavit or verified complaint charging specific facts which give rise to immediate and irreparable loss.[136] The injunction will be granted by a judge; and, if the government is the plaintiff, no bond is required.[137] The practical dif-

128. Fuentes v. Shevin, 407 U.S. 67, 82-83 (1972). *See also* Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972).

129. Fuentes v. Shevin, 407 U.S. 67 (1972); Marshall Durbin Farms, Inc. v. National Farmers Organization, 446 F.2d 353 (5th Cir. 1971); Consolidation Coal Co. v. Disabled Miners, 442 F.2d 1261 (4th Cir. 1971); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

130. Fuentes v. Shevin, 407 U.S. 67, 90 & n.21 (1972).

131. Blount v. Rizzi, 400 U.S. 410 (1971); Blasi, *Prior Restraints on Demonstrations,* 68 MICH. L. REV. 1481 (1970).

132. "[D]ue process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case.'" Fuentes v. Shevin, 407 U.S. 67, 82 (1972).

133. Carroll v. Princess Anne, 393 U.S. 179, 182-84 (1968). *See also* State *ex rel.* Matalik v. Schubert, 204 N.W.2d 13 (Wis. 1973).

134. Marshall Durbin Farms, Inc. v. National Farmers Organization, 446 F.2d 353 (5th Cir. 1971).

135. See the discussion of the nature of the hearing required and the standard of proof in Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 89-91 (1972).

136. ILL. REV. STAT. ch. 69, § 3-1 (1971). *See* People *ex rel.* Scott v. Aluminum Coil Anodizing Corp., 132 Ill. App. 2d 168, 268 N.E.2d 53 (2d Dist. 1971).

137. ILL. REV. STAT. ch. 69, § 9 (1971).

ferences may not, however, be always that great. The allegations, even if sworn, prove only the strength of the applicant's own belief in his rights.[138] Since there are forms available for ex parte injunctions, the drafting process may be no more than filling in blanks. The adjudicative role of the judge is frequently attenuated, and the injunction may be granted almost automatically. The underlying reality is the absence of a right to be heard. An adversary hearing, it has been said, is the constitutional norm.[139] If the process does not provide any realistic check on the self interest of the plaintiff, the title of the official who is purported to act for the state should not affect the right to a hearing.[140] Sworn oral testimony which is subject to cross examination should be preferred[141] and in some cases may be necessary.[142] "[W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[143]

There are good arguments for requiring notice for all injunctions with practical finality and holding that failure to give proper notice deprives the court of personal jurisdiction over the defendant who may ignore the order and prove lack of personal jurisdiction in any subsequent proceeding. The ex parte injunction is not fully worthy of respect. It is formulated in a process which calls both its accuracy and its legitimacy into question. A jurisdictional requirement for notice before granting injunctions with practical finality will surmount the collateral bar rule in ex parte cases where it should not apply and preserve it to operate within its proper scope in fully litigated cases where it should apply. Because an ex parte injunction with practical finality would be void, there would be no need for the defendant to hasten to the courthouse to interpose a timely challenge. Therefore, as a practical matter, plaintiffs will give notice. Requiring notice will allow the adversary system to function, decrease the number of overreaching injunctions, and enhance the legitimacy of the adjudicating process and the court system. The plaintiff will be deprived of an opportunity to act speedily and secretly but if successful, will attain the moral force of a decision on the merits. The court will decide cases more on the real issues and less on a one-sided presentation.

138. In *Fuentes* the Court observed that the ex parte procedure may even provide an incentive to state facts incorrectly. 407 U.S. at 83 n.13.

139. Crow v. California Dep't of Human Resources, 325 F. Supp. 1314, 1318 (N.D. Cal. 1970).

140. *Cf.* Shaffer v. Holbrook, 346 F. Supp. 762, 766 (D. W. Va. 1972). *But see* Chrysler Credit Corp. v. Waegele, 29 Cal. App. 3d 681, 687, 105 Cal. Rptr. 914, 917 (1972).

141. Goldberg v. Kelly, 397 U.S. 254 (1970).

142. *In re* Gault, 387 U.S. 1 (1967). *Cf.* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

143. 407 U.S. at 81.

The proposed jurisdictional requirement for notice and hearing for injunctions with practical finality rests on lines of cases: the *Carroll* case and other cases which require enhanced procedural protection before controlling expression-related conduct with an injunction; the due process cases which require notice and a hearing when a constitutionally cognizable interest is affected by state action or adjudication; and the line of constitutional cases which void a judgment which was issued without notice.[144] The notice requirement in *Carroll* would be expanded by the interest concept of the due process cases from a narrow group of first amendment cases to include all injunctions which have practical finality. And, because of the collateral bar rule in injunction cases, the due process-notice rules must be jurisdictional rather than erroneous to carry out their purpose. Illinois already has the beginning of a practical finality-personal jurisdiction rule. There are cases which hold that if notice should have been given but was not, an injunction will be reversed for that reason alone without inquiring further.[145] All that would be required is to solidify the point at which notice is required at practical finality and to apply a jurisdictional or voiding analysis when notice is not given.

Jurisdiction and due process are highly ambiguous terms. They are recondite abstractions which must be applied in a myriad of practical situations. They describe a variety of legal rules, and their meanings change with time and the context. The general problem considered here is the need, while preserving respect for the court, for rapid relief from oppressive decrees. The barrier has been the collateral bar rule. Jurisdiction of the court, while a useful concept, is overdoctrinal and out of touch with the underlying procederal reality and, therefore, a capricious variable to allow an escape from the harsh dictates of the collateral bar rule. One who considers the changes in due process in the last 10 years is struck with one feature. More emphasis is placed upon fairness and procedural protection for a variety of interests and the trend is decidedly away from ex parte and summary procedure.[146] As the courts, by the use of due process, have extended and expanded the adversary principle into spheres which had previously escaped its influence, many ancient redoubts which were once considered unassailable have precipitately crumbled.[147]

144. Hanson v. Denkla, 357 U.S. 235 (1958); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Polansky v. Richardson, 351 F. Supp. 1066 (E.D.N.Y. 1972).

145. Schaefer v. Stephens-Adamson Mfg. Co., 36 Ill. App. 2d 310, 183 N.E.2d 575 (1st Dist. 1962). Illinois also has cases which take up the problem of when notice is unnecessary. These cases include *UMWA Union Hosp. (S. Ct.)*, and General Elec. Co. v. Local 997, UAW, 8 Ill. App. 2d 154, 130 N.E.2d 758 (3d Dist. 1955).

146. *See, e.g.*, Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972); Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

147. *See, e.g.*, Veterans of Abraham Lincoln Brigade v. Attorney General, 470

The collateral bar rule should not be a formula to be universally and unthinkingly applied. A question which may reasonably be asked to limit the scope of the collateral bar rule is whether the injunction was formulated in a process which provides some guarantee of accuracy and legitimacy. If the Draconian operation of the collateral bar rule is to be restricted, the due process cases provide a frame of reference with a reasonable relation to the policies sought to be advanced. A due process rule which requires, at the cost of personal jurisdiction, such notice and a hearing as are practical under the circumstances before granting an injunction with practical finality, limits the collateral bar rule with proper regard to those variables. Yet the analysis suggested here in no way invalidates the collateral bar rule and does not consign it to the limbo reserved for trivialities but preserves it, somewhat shorn, to operate within its proper sphere.

V. A REEVALUATION OF THE ILLINOIS CASES

In *City of Chicago v. King* a hearing was held before the court granted the injunction which required demonstrators to inform the police before demonstrating. Contemnor Ditto was present at the hearing and made no objection thereto.[148] Three days later Ditto called a press conference and announced his intent to defy the injunction. The injunction was then served on Ditto who nevertheless demonstrated in defiance of it.

In Ditto's contempt hearing, the collateral bar rule was properly applied to preclude, as a defense to contempt, arguments that the injunction was unconstitutionally void. The injunction did not have practical finality for the August 22 demonstration does not even seem to have been planned when the injunction was granted on August 19th. If respect for the courts is to have any meaning, it must mean that ligitated decisions should be obeyed pending dissolution, modification, or review.[149] Instead of calling a press conference to denounce the court and the injunction, Frank Ditto should have made a motion to dissolve[150] or modify the assertedly unconstitutional injunction.

In *Cook County College Teachers* a temporary injunction against a strike was granted on November 30. A strike was called that day

F.2d 441 (D.C. Cir. 1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972).

148. 86 Ill. App. 2d at 347, 230 N.E.2d at 44.

149. It could be argued that the emergency obviated the need for notice. The writer, however, thinks notice should be required. *See The Supreme Court, 1971 Term,* 86 HARV. L. REV. 1, 88-89 (1972); MacQueen v. Lambert, 348 F. Supp. 1334, 1337-38 (M.D. Fla. 1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 448 (S.D.N.Y. 1972); Geisinger v. Voss, 352 F. Supp. 104, 110 (E.D. Wis. 1972); Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972); C. v. Superior Court, 29 Cal. App. 3d 909, 917, 106 Cal. Rptr. 123, 129 (1973).

150. ILL. REV. STAT. ch. 69, § 15 (1971).

and picketing began the next. Contemnor Swenson knew of the injunction when he spoke at the meeting on November 30 and later picketed in breach of the injunction. After the strike was settled, the plaintiff moved to dissolve the injunction and disdained to press contempt charges against Swenson. The circuit judge requested the state's attorney to bring contempt but that office declined and eventually a member of the bar was appointed to investigate. Swenson was charged with contempt and the collateral bar rule was applied.[151]

There may or may not have been notice and an adversary hearing; the order was titled a temporary injunction which should, but need not always follow notice;[152] and the reported case does not indicate whether there was notice.[153] If there was notice and an opportunity to present matter at the hearing, then the collateral bar rule was properly applied. If, on the other hand, there was neither notice nor opportunity to present defenses at an adversary hearing, the question is whether the injunction had practical finality. If an injunction with practical finality was granted without notice, then, following the analysis suggested here, the court did not obtain personal jurisdiction, the injunction was void, and Swenson could show the voidness to defeat contempt. This would be true even though the plaintiff was entitled to an injunction against an illegal strike,[154] and the defendant-contemnor knew of the injunction. The purpose of the practical finality-personal jurisdiction analysis is to require adversary adjudications *before* an injunction is granted; the clarity of the law might lead to an attenuated hearing, but not to no hearing at all, and actual knowledge after the injunction is granted is not legal notice before the hearing.[155]

The exact time sequence does not appear in the reported opinion;[156] and whether the injunction had practical finality cannot be stated with any certainty. The issue is whether, the defendants being available for notice, the injunction proscribed, circumscribed, or materially affected either conduct in progress or conduct which was so imminent that the injunction would prevent or alter the conduct before there was a reasonable and practical chance to modify or dissolve it. If the answer is in the affirmative, then the injunction had practical finality and could only issue upon notice and some kind of adversary

151. 126 Ill. App. 2d at 426, 262 N.E.2d at 128.
152. ILL. REV. STAT. ch. 69, § 3 (1971).
153. 126 Ill. App. 2d at 424, 262 N.E.2d at 127.
154. Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965).
155. *Cf.* Wuchter v. Pizzutti, 276 U.S. 13 (1928). If the injunction was granted following notice to the union and a hearing was held although Swenson was not notified to be present, and the injunction read so as to bind the defendant's officers, and Swenson had actual knowledge of the injunction before he violated it, then the collateral bar rule could be properly applied. *See* ILL. REV. STAT. ch. 69, § 3-1 (1971); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).
156. 126 Ill. App. 2d at 424-25, 262 N.E.2d at 127-28.

proceeding. Whether the plaintiff delayed his request for the injunction until the last moment is a question which should bear upon the question of practical finality. If the plaintiff, knowing that he will seek an injunction, waits until right before the planned strike to request the injunction, that would militate in the direction of declaring the injunction to have practical finality. The purpose of the practical finality-personal jurisdiction analysis is to prevent plaintiffs from delaying until the eleventh hour and fifty-ninth minute to petition for an injunction and, by the same token, to force the issues early into an adversary context.

In *Kankakee Teachers*, the defendants were engaged in an enjoinable strike and the plaintiffs obtained a temporary restraining order. There was neither notice to the defendants nor an attempt to give notice. The order was served upon the defendants but the strike continued. Two days later the plaintiffs moved for a preliminary injunction. The injunction was granted following a hearing. Defendants appeared at the hearing but did not participate. The strike continued. Defendants were charged with contempt for violating the temporary restraining order.[157]

The contempt conviction for breach of the temporary restraining order should not stand. The ex parte order forbade conduct in progress. The defendants, or some of them, were manning a picket line and thus available for notice. There must have been a moment between the decision to seek an injunction and the time the injunction was actually requested when the plaintiffs could have telephoned or otherwise notified the defendants. The temporary restraining order thus had practical finality; and following the analysis suggested here, because there was no advance notice, there was no jurisdiction over the person of the defendants and the order was void. It should be added that the plaintiffs did not lack a remedy. The preliminary injunction was granted after a hearing at which defendants appeared. While the injunction had practical finality, it was preceded by an adversary proceeding. Disobedience of the preliminary injunction was contempt, and the collateral bar rule could have been properly applied to preclude defenses to the injunction in the later contempt hearing. The defendants had an opportunity and an incentive to litigate those issues during the hearing on the preliminary injunction and, having not seen fit to do so, the court may refuse to hear those issues later.[158] Both the plaintiff and the defendant may be required to litigate before rather than after the event.

In *County of Peoria v. Benedict*, a strike of nursing home employees was likely on November 30. The plaintiff notified the de-

157. 46 Ill. 2d at 442, 264 N.E.2d at 20.
158. *Cf.* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

fendants on November 27 that there would be a hearing November 29th on a request for an injunction against the strike. The method of giving notice was by telephone in the afternoon and by service in the evening. Defendants did not appear at the hearing on the 29th, and a temporary injunction prohibiting the strike was granted and served before November 30. The strike began on November 30. Defendants were charged with contempt for breaching the temporary injunction.[159]

Contempt in this case was properly affirmed. According to the proposed analysis, the injunction might have had practical finality because it was granted on the day before the planned event. There was, however, notice both formal and informal; and, therefore, the court attained jurisdiction over the person of the defendant. Defendants elected not to appear at the hearing, did not request a continuance to prepare, and, after the injunction was granted, refrained from taking advantage of Illinois' liberal provisions to move to dissolve.[160] Instead they consciously chose to flout the commands of the injunction. The defendants had an opportunity and incentive to litigate and, therefore, the collateral bar rule was appropriately applied to preclude relitigation in contempt.

The difficulty in *Benedict* springs from the decision of the Illinois Supreme Court that the injunction was erroneous and should not have been granted. The injunction was vacated, but the contempt was affirmed.[161] Thus, the contemnors are punished for breaching an order which they should not have been required to obey and which would have been reversed on direct appeal. The decision of the circuit court to grant the injunction was, however, presumptively correct; and pending the appeal, no court had declared or held the injunction to be erroneous. To give effect to the policy of respect for the courts and to prevent litigants from appointing themselves judge in their own case, judicial orders must be tested in the courts in an orderly fashion. Only if the basic concepts of due process and jurisdiction are ignored in the granting process, may the defendants ignore an injunction with impunity: this is the basic policy underlying the distinction between lack of power and mistaken use of power. There are also sound practical reasons for arguing before rather than after violating an injunction. If the defendants had appeared at the November 29 hearing, there would have been a better chance that the circuit judge would rule in their favor as the Illinois Supreme Court later did. Instead, their arguments against the injunction were advanced to the circuit judge a month later. The circuit judge, at the later hearing, was asked to repudiate

159. 47 Ill. 2d at 169, 265 N.E.2d at 142.
160. ILL. REV. STAT. ch. 69, § 15 (1971).
161. 47 Ill. 2d at 171, 265 N.E.2d at 144.

a decision he had previously made. His injunction had been ignored. He was also presented with evidence of roofing nails thrown by the striking defendants on the driveway of the nursing home while volunteers were moving aged and infirm patients to another location. It does not require a deep understanding of human psychology to know that under these circumstances the circuit judge would be somewhat reluctant to dissolve the injunction.

The last case is *Mine Workers Hospital.* Pickets began patrolling the plaintiff's hospital at a little after midnight. The picketing was orderly and peaceful. At 5:33 a.m. the same morning, a complaint was filed and a temporary restraining order was granted. No notice was given to the defendants. The order was served on the defendants at 7:00 a.m. Picketing ceased but began again in the afternoon and continued until the next day. The defendants were charged with contempt for disobeying the temporary restraining order.

Following the analysis suggested here, the contempt convictions should be reversed. The injunction prohibited conduct in progress and therefore had practical finality. It was awarded without notice and hearing although the defendants were available for notice. Applying the practical finality-personal jurisdiction analysis, the court did not achieve jurisdiction over the person of the defendants; and the injunction was void. The defendants could ignore the putative exercise of judicial power with impunity and assert its imperfections in any subsequent proceeding. The appellate court was correct in holding that the injunction was void, but following the suggested analysis, the reason—lack of jurisdiction of the court—is incorrect. The Illinois Supreme Court was right in holding that the circuit court had jurisdiction of the subject matter, but further analysis along the lines suggested here leads to the conclusion that the circuit court did not attain jurisdiction over the person of the defendants. The practical finality-personal jurisdiction analysis is not doctrinal and abstract like subject matter jurisdiction, but responds to procedural realities. The plaintiff frustrated the adversary process. While the papers were being drafted or before, the union officers could have been called or the pickets told of the imminent request for an injunction. The plaintiff passed up that opportunity and instead secured an ex parte injunction against peaceful and, in retrospect, legal picketing. No realistic social goal is advanced by requiring obedience to such an order; and the practical finality-personal jurisdiction analysis releases the defendants from contempt without damaging the concept of subject matter jurisdiction.

VI. Conclusion

The practical finality-personal jurisdiction analysis does not change the result in many cases, but more often puts the result on an-

other basis. It is more in accord with the adversary nature of our legal system and the requirements of due process than the existing doctrine. Legal changes in past years demonstrate conclusively that it is not possible to conceive a legal rule which is regarded with such universal approbation as to make the discussion of alternatives to it an idle pastime. This article has suggested expanding due process and personal jurisdiction into equity procedure.

The Illinois Supreme Court has written one healthy addition to the law of personal jurisdiction[162] and might well write another. The result could be fewer clandestine injunctions but more honesty in litigation and a respect less ostentatious but more sincere.

162. Gray v. American Radiator Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).