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Free Press-Fair Trial: Review of Silence Orders

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FREE PRESS—FAIR TRIAL: REVIEW OF SILENCE ORDERS

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Free press-fair trial stands at the intersection of the first amendment and criminal procedure. The substantive problems of reconciling the incongruous constitutional interests create a "civil libertarian's nightmare."[1] Those who would disclose public business to the public are normally protected from state interference. The rights of the media to publish and the public to receive full reports of criminal proceedings may, however, encroach upon the rights of the litigants. The media may express opinions, reach conclusions and publish facts which are inadmissible at trial or which stir group hostilities. When this occurs, a fair trial may be difficult or impossible since a jury or potential jury may have been improperly influenced. Thus some limit on disseminating information about criminal trials is considered necessary.

Although the problem is far from new, a fresh impetus to examine free press-fair trial questions has been generated by Supreme Court decisions reversing criminal convictions because of presumed media influences.[2] Generally, defendants will seek to limit publicity, but occasionally they may want to bring alleged injustices to the attention of the public in order to promote a particular cause or to finance their defense.[3] On the other hand, the state seeking a conviction that will stand on appeal, rarely desires publicity[4] and oftens attempts to limit it.[5] The media's interest is straightforward. It argues that the public has a right to be informed of public business and states that "the rules of evidence

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[1]Hentoff, *Civil Libertarian's Nightmare: Free Press Fair Trial*, CIVIL LIBERTIES, Feb. 1973, at 4.

[2]Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Irvin v. Dowd, 366 U.S. 717 (1961).

[3]*See* Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969); Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51, 84-85 (1972).

[4]See the prosecutor's interesting predicament in Younger v. Smith, 30 Cal. App. 3d 138, 152-53, 106 Cal. Rptr. 225, 234-35 (1973) (discussed note 181 *infra*).

[5]In Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973), the state asked for an order to prevent the newspapers from publishing the names of witnesses. Since the witnesses were prisoners, the prosecution asserted that, if names were published, the witnesses would be subject to retaliation.

have no relevance whatever to the right of the public to know about the administration of criminal justice."[6] The judiciary possesses several methods or techniques to resolve these conflicts and to accommodate the rights of the press and the public with those of the defendant and the state: continuance of the trial, change of venue, care in selecting the jury, sequestering the jury after it is selected, use of a silence order to control the sources of publicity,[7] and finally, sanctions against those who release or publish proscribed information.

The problem to be described and analyzed in this article is how to obtain appellate review of a silence order issued in a criminal proceeding. Primary attention will be focused upon the media. This article will examine the media's procedural routes from the criminal action into an appellate court: terminal review, interlocutory review, review by prerogative writ and review of contempt. Several aspects of silence order review will be before the reader almost continually. These are questions about the party status of the media, the uncertain legal nature of the order, and the lack of time for full dress review. They will be mentioned when relevant and discussed when appropriate. Differing and even inconsistent conclusions will be drawn about each as the article progresses. The practical and conceptual procedural problems are important and merit study for their own sake. In addition, some generalizations will emerge concerning the relations between procedural alternatives and the development of substantive law.

TERMINAL REVIEW

Normally federal and many state appellate courts wait until a lawsuit is completed before reviewing the rulings of a lower court under what is termed the final decision requirement.[8] Because the prosecution rarely takes an appeal, most criminal appeals are taken by the defendant. A defendant's appeal, however, provides an impossible forum for the media to obtain review of a silence order.[9] The convicted defendant may be asserting in favor of reversal that excessive publicity deprived him of a fair trial.[10] Furthermore, the appellate court will be

[6]Warren & Abell, *supra* note 3, at 81.

[7]The term "silence order" is used in preference to "gag order" which is perjorative, Younger v. Smith, 30 Cal. App. 3d 138, 143 n.1, 106 Cal. Rptr. 225, 228 n.1 (1973), and "protective order" which means something else, *see* FED. R. CIV. P. 26(c).

[8]28 U.S.C. § 1291 (1970); IOWA R. CIV. P. 331.

[9]*Cf.* Chase v. Robson, 435 F.2d 1059, 1062 (7th Cir. 1970).

[10]*Cf.* Judge Frossell dissenting in United Press Ass'ns v. Valente, 308 N.Y. 71, 94-95, 123

urged to hold that the defendant did not have a fair trial because the silence order was not protective enough. The media are not parties to either the trial or the appeal. Nevertheless, they could participate in an appeal from a conviction as *amicus curiae*. An *amicus* posture is, however, irregular and incongruous. The media would direct its efforts against the order rather than the conviction and presumably would argue for its affirmance. In addition, since the trial has ended, the issue of the validity of the silence order becomes moot. Moreover, if the silence order were obeyed, review of the order in defendant's appeal from the sentence will be rare because of the lack of prejudicial publicity.

Silence orders may arguably fall under the federal collateral order-practical finality doctrine. This doctrine allows appeals from interlocutory rulings which produce a substantial impact on litigants, are tangential to the merits and will either be moot on terminal review or not merged in the final judgment.[11] Because of the "final" impact of these orders, they are termed final decisions.[12] Silence orders meet several of the requirements for appealability under this doctrine. The order, as it relates to the media, will not be merged in the final judgment,[13] nor does it relate to the ultimate issue, the guilt or innocence of the defendant. The media's interest will rarely, if ever, be asserted on terminal review. If the media obeys the silence order, the order will have achieved its purpose before terminal review can be secured, and the question will be moot on terminal appeal.[14] Finally, an order limiting publication is a prior restraint and, if erroneous, attenuates the basic constitutional right of the media to publish.[15] If no effective review is provided, constitutional error may be uncorrected.

N.E.2d 777, 789 (1954).

[11]*See, e.g.*, Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Peterson v. Nadler, 452 F.2d 754, 756-57 (8th Cir. 1971); Carter Products, Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966); Staggers v. Otto Gerdau Co., 359 F.2d 292 (2d Cir. 1966).

[12]C. WRIGHT, LAW OF FEDERAL COURTS 455-58 (2d ed. 1970).

[13]*Cf.* Chase v. Robson, 435 F.2d 1059, 1062 (7th Cir. 1970).

[14]*Cf.* Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972).

[15]United States v. Dickinson, 465 F.2d 496, 499-501 (5th Cir. 1972); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966); State *ex rel.* Miami Herald v. Rose, 271 So. 2d 483 (Fla. App. 1972); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 75-76, 483 P.2d 608, 612, *cert. denied*, 404 U.S. 939 (1971). *See also In re* Oliver, 452 F.2d 111, 114-15 (7th Cir. 1971). Concerning prior restraints, *see generally* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 503-12 (1970).

However, difficulties arise in applying the collateral order doctrine to silence orders. Appeals in criminal cases before final judgment are rare.[16] Additionally, the representatives of the media are not parties to the criminal case.[17] Even if review were granted, a practical remedy might not be forthcoming. Unless the appeal from the silence order stays or continues the criminal proceeding or the silence order itself was stayed, the criminal case would proceed to verdict and perhaps moot the issues in the appeal.[18] Thus the media could be effectively stilled during the pendency of an appeal and, because cold news is dead news, be the practical losers in an appeal which upholds their right to publish.[19]

INTERLOCUTORY REVIEW

Review of final and collateral orders is by right. Many procedural systems provide for discretionary interlocutory review before a final decision under certain specified conditions. In the federal system, an appeal may be allowed from an interlocutory order if the district judge certifies the need for an appeal and the court of appeals accepts the appeal.[20] The standard is imposing: the district judge must certify that the interlocutory order concerns "a controlling question of law as to which there is a substantial ground for difference of opinion,"[21] and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[22] If the appeal is granted by the court of appeals, proceedings in the district court are not halted pending a decision on the appeal unless the district judge or a judge of the court of appeals orders a stay.[23]

This means of appeal may have value in some cases,[24] but it provides little aid in attaining relief from a silence order. First, it only

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[16]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 28-40 (Approved Draft 1970).

[17]United States v. Dickinson, 465 F.2d 496, 508 (5th Cir. 1972); State *ex rel.* Superior Court, 79 Wash. 2d 69, 78-79, 483 P.2d 608, 614, *cert. denied*, 404 U.S. 939 (1971) (Rosellini, J., concurring). They are parties to the extent that the public's interest is represented by the public prosecutor.

[18]*Cf.* Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (Article 78 proceeding dismissed as moot).

[19]Warren & Abell, *supra* note 3, at 62, 87-88.

[20]28 U.S.C. § 1292(b) (1970). *See generally* C. WRIGHT, *supra* note 12, at 462-64.

[21]28 U.S.C. § 1292(b) (1970).

[22]*Id.*

[23]*Id.*

[24]Carrington, *Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 510 (1969).

applies to "civil" actions.[25] While a silence order may seem "civil" because it does not relate to the criminal defendant, the underlying action is criminal. Interpreted most favorably, a silence order is merely a civil order in a criminal case, enforceable by criminal contempt. Secondly, while there may be "substantial ground for difference of opinion" about legal validity of the order, the order does not control the rights of the state or the defendant who are the parties to the criminal action. The defendant might consider himself aggrieved by the lack of a silence order or by one that is not sufficiently restrictive, but these situations would not likely concern the media. Thirdly, an appeal from a silence order presumably could not "materially advance the ultimate termination" of the criminal trial. Finally, both the trial and appellate courts must exercise their discretion to grant the appeal.

Some states have less restrictive methods of discretionary interlocutory review. In Iowa, for example, "any party aggrieved" by an interlocutory order "may apply to the Supreme Court . . . to grant an appeal in advance of final judgment."[26] The supreme court must find that the interlocutory order "involves substantial rights and will materially affect the final decision"[27] and that an immediate appeal "will better serve the interests of justice."[28] The order granting an interlocutory appeal halts proceedings in the trial court,[29] and filing dates may be advanced in order to accelerate submission and decision.[30] A rule similar to Iowa's is, for the media, an improvement over the federal statute. However, difficulties in the Iowa-type rule compromise its usefulness. First, although the rule is not limited to civil actions, only a party can petition for an interlocutory appeal. The media may, in some sense, be parties to the order, but they are not formal parties to the underlying lawsuit. Secondly, although only one level of discretion is imposed before an appeal is heard, discretion exists, nevertheless, and appeal does not lie as of right. Finally, an appeal by the media from a silence order will normally not affect the final decision in the criminal case. Thus under the federal statute and the somewhat more liberal Iowa rule, a discretionary interlocutory appeal is not a satisfactory avenue to re-

[25] 28 U.S.C. § 1292(b) (1970).
[26] IOWA R. CIV. P. 332.
[27] *Id.*
[28] *Id.*
[29] IOWA R. CIV. P. 332(b).
[30] *Id.*

view a silence order. Interlocutory appeal rules in other jurisdictions reveal similar difficulties.[31]

APPEAL FROM AN INTERLOCUTORY INJUNCTION

Appeal by right is available in the federal system[32] and many state systems[33] from orders granting or denying certain interlocutory injunctions. Several of the difficulties encountered above are obviated if a silence order can be denominated an appealable preliminary injunction. In general, although a mere order is not appealable, an injunction is,[34] and although a temporary restraining order is not appealable, a preliminary injunction is.[35] The courts without much apparent thought have labelled silence orders both injunctions and orders.[36] Silence orders might appear to be injunctions since those with knowledge of the order are bound to refrain from performing a prohibited act, and violators are subject to contempt.[37] On the other hand, Moore states that "an order incidental to a pending action that does not grant part or all of the ultimate injunctive relief sought is not an injunction, however mandatory or prohibitory its terms, and indeed, notwithstanding the fact that it purports to enjoin."[38] Since the silence order is ancillary to the sentence, under Moore's analysis, the order is not appealable as an injunction.

In distinguishing non-appealable restraining orders from appealable interlocutory injunctions, courts have stressed the order's purpose,

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[31]*See, e.g.*, 32 FLA. APP. R. 4.2 (civil cases, listing classes of appealable orders).

[32]28 U.S.C. § 1292(a)(1) (1970); C. WRIGHT, *supra* note 12, at 459-61.

[33]*E.g.*, ARIZ. REV. STAT. ANN. § 12-1201(F)(2).

[34]Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); 9 J. MOORE, MOORE'S FEDERAL PRACTICE § 110.20 (2d ed. 1973) [hereinafter cited as MOORE].

[35]Smith v. Jackson State College, 441 F.2d 278 (5th Cir. 1971) (per curiam); Annot., 19 A.L.R.3d 403 (1968); Annot., 19 A.L.R.3d 459 (1968). *But see* Financial Serv. Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973).

[36]An order is a generic term which includes any judicial conclusion granting or denying relief. An injunction is more specifically an order directing those bound to do or refrain from doing certain specified acts. Thus, all injunctions are also orders and to call an act by the court an order does not mean that it is not an injunction. The silence order cases are United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) (*id.* at 499, protective order), (*id.* at 500, order), (*id.* at 506, special orders), (*id.* at 508, injunction); Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (*id.* at 143 n.1, 106 Cal. Rptr. at 228 n.1, protective order), (*id.* at 158, 106 Cal. Rptr. at 239, not civil judgments granting injunctions); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971) (order throughout).

[37]United States v. Dickinson, 465 F.2d 496, 512 (5th Cir. 1972).

[38]9 MOORE ¶ 110.20[1], at 233.

duration and procedural background.[39] If the purpose of the order is to preserve the status quo until a more rigorous proceeding can be held, the order is generally considered a restraining order and not appealable.[40] If, on the other hand, the merits of the case are decided or substantial rights affected and a later proceeding is not contemplated, the order is appealable as a preliminary injunction.[41] Thus under the purpose criteria, silence orders appear to be appealable because they affect substantial rights and do not lay the foundation for a later, more rigorous proceeding.

Appealability is frequently denied to orders of short duration and granted to those of indefinite or lengthy duration.[42] Silence orders range from indefinite duration[43] to definite but lengthy duration[44] to merely overnight.[45] Those which limit publicity until the end of the trial or until further order of court might, because of the time involved, be appealable under this criteria. However, the length of time does not, because of the other interests at issue, provide a crucial basis to distinguish appealable from nonappealable silence orders.

Frequently appealability is denied if an order is issued without notice and a hearing for the defendant[46] but granted if the order is issued following an adversary proceeding.[47] This variable seems more applicable to the cases for which it was formulated, two party litigation in which immediate relief is appropriate, rather than to silence orders. If the silence order is merely announced from the bench,[48] the lack of adversary procedure could be used to deny an appeal. But the lack of media participation, rather than an excuse for denying appealability, provides the very reason why review should be granted.[49] Since the media are potentially affected by a silence order, they should participate in the process of deciding whether an order is necessary and draft-

[39]*See generally* Annot., 19 A.L.R.3d 403 (1968); Annot., 19 A.L.R.3d 459 (1968).

[40]*See generally* Annot., 19 A.L.R.3d 403, 422 (1968).

[41]*Id.* at 451-52.

[42]*Id.* at 429-31.

[43]Younger v. Smith, 30 Cal. App. 3d 138, 169, 106 Cal. Rptr. 225, 246 (1973).

[44]Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873, 878 (1973) (6 months).

[45]Wood v. Goodson, 485 S.W.2d 213, 215 (Ark. 1972).

[46]*See* Wahpeton Pub. School Dist. No. 37 v. North Dakota Educ. Ass'n, 166 N.W.2d 389, 392 (N.D. 1969).

[47]*See* Graham v. Minter, 437 F.2d 427, 428 (1st Cir. 1971) (per curiam).

[48]United States v. Dickinson, 465 F.2d 496, 500 (5th Cir. 1972). *See also* Wood v. Goodson, 485 S.W.2d 213 (Ark. 1972) (telephone).

[49]*Cf.* Dobbs, *Contempt of Court—A Survey*, 56 CORNELL L. REV. 183, 218-19 (1971).

ing any order determined to be necessary.[50] The absence of the media might, but should not, affect appealability. Applying the usual appealability analysis to silence orders does no more than illustrate the unique character of the silence order; it clearly does not produce certain results.

Characterizing a silence order as an appealable preliminary injunction, however, may be contrary to precedent. In *Miller v. United States*[51] the district judge forbade a convicted defendant from contacting jury members, and the defendant appealed that order.[52] On appeal, the issue whether the circuit court possessed jurisdiction to review the order was taken up sua sponte. Reviewing the order as a petition for mandamus, the court doubted first that the district judge's order was an injunction and secondly that, even if the order was an injunction, an interlocutory appeal could be allowed from a preliminary injunction in a criminal case.[53] Basing its decision on these doubts, the court denied injunctive review. The court reasoned that the order was unrelated to the substantive issues in the case, and that, in general, criminal cases should not be delayed by interlocutory appeals.[54] Both these reasons apply equally to silence orders and both point to denying review to silence orders as preliminary injunctions. Review of a silence order as an injunction, nevertheless, remains at least arguable in the federal system and in those state systems which allow immediate review of interlocutory injunctions. Reliance on an injunction theory to obtain review, however, would be premature, and in states that do not have pre-final judgment review of injunctions, another method must be sought.

Even if a silence order is construed to be a final order, an appealable interlocutory order, or a preliminary injunction, formidable barriers exist to securing review, attaining a reversal and profiting from the victory. If the silence order is treated as an injunction, the first step is to move in the trial court to dissolve, set aside or modify. Then the media faces the normal stages of the appellate process: notice, briefing, submission and decision. An appeal from a silence order cannot follow a customary briefing schedule which frequently takes several months, for if the criminal trial proceeds while the appeal is pending, the asserted

[50]This possibility was mentioned in Younger v. Smith, 30 Cal. App. 3d 138, 148, 106 Cal. Rptr. 225, 231 (1973).

[51]403 F.2d 77 (2d Cir. 1968). *See also* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972).

[52]The criminal conviction had already been affirmed. Miller v. United States, 381 F.2d 529 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968).

[53]Miller v. United States, 403 F.2d 77, 78-79, 84 (2d Cir. 1968).

[54]*Id.* at 79.

right to publish may be lost. The appeal, accordingly, must be placed before an appellate court as expeditiously as possible. This may be done by an accelerated appeal as provided by appellate rule[55] or by suspending the rules.[56] An alternative route is a motion, addressed to the appellate court, to stay or suspend the order or injunction.[57] Because of the need for haste, the silence order may be won or lost on motion to the appellate court to stay the lower court's order. When the interests are significant and the need for a timely decision is clear, appellate courts have been able to respond quickly through these mechanisms.[58]

THE PREROGATIVE WRITS

An extraordinary or prerogative writ is another potential route to review of a silence order. Certiorari, mandamus or prohibition are the relevant writs treated here. The use of prerogative writs for review of a silence order should be distinguished from use of writs (1) to obtain judicial review of administrative action, (2) to request a second appellate review, for example, the United States Supreme Court's statutory writ of certiorari and (3) to review contempt. In this narrow area, doctrine and tradition tend to be parochial and precedents from one jurisdiction do not apply to another.[59] However, three analytically separate inquiries must be made before use of a prerogative writ is deemed appropriate: (1) whether the appellate court has jurisdiction under the applicable statutes; (2) whether the appellate court, having determined that it has jurisdiction, will exercise its discretion to hear the writ; and (3)whether the ambit of appellate inquiry or scope of review is sufficiently comprehensive. Appellate courts tend to use vague, all-purpose phrases like "abuse of discretion" when discussing all three problems, but analysis

[55]Alabama Supreme Court Rule 47 allows the court, upon application, to reduce filing times and advance the date of submission, ALA. S. CT. R. 47; IOWA R. CIV. P. 345.1; N.J. CT. R. 2:9-2.

[56]FED. R. APP. P. 2.

[57]FED. R. APP. P 8(a); IOWA R. CIV. P. 347; N.C. CT. APP. R. 34.

[58]Southeastern Promotions, Ltd. v. City of Mobile, 457 F.2d 340 (5th Cir. 1972); Tape Head Co. v. RCA, 452 F.2d 816 (10th Cir. 1971); United States Servicemen's Fund v. Shands, 440 F.2d 44 (4th Cir. 1971); Kolden v. Selective Serv. Local Bd. No. 4, 406 F.2d 631 (8th Cir. 1969), *vacated on other grounds*, 397 U.S. 47 (1970); *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); United States v. Wood, 295 F.2d 772, 774-75 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

[59]*See, e.g.*, Guaranty Funding v. Bolling, 288 Ala. 319, 260 So. 2d 589 (1972); Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) [hereinafter cited as *Mandamus*].

is furthered by keeping the distinct issues separately in mind.

The litigant, assertedly aggrieved by a trial court ruling, files an application for the writ in the appellate court.[60] The writ may be denied with a brief order.[61] However, if the writ is granted, a response is filed and the cause is submitted.[62] The reported cases normally deal with the merits of the issue rather than with the decision to grant the writ, and the standards both of jurisdiction and discretion are obscure and uncertain.[63] Traditionally, the writs were granted only to test trial court jurisdiction. Chafee has maintained that jurisdiction subject to challenge by the writs meant simply jurisdiction over the person and jurisdiction of the court to decide the subject matter of the case before it.[64] This doctrinal view would restrict writs to a limited class of cases and would remit almost all litigants to the delay of a trial and to a time consuming appeal from a final judgment. Appellate courts have evaded this doctrinalism[65] by defining jurisdiction in relation to the type of issue before the trial court,[66] incorporating the line between law and equity into the definition of jurisdiction[67] or expanding jurisdiction to include more classes of asserted error.[68] Thus today appellate courts have jurisdiction to review almost everything that a trial court may do. The question becomes whether the court in its discretion should issue the writ. The

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[60]FED. R. APP. P. 25(a); IOWA R. CIV. P. 309; 9 MOORE ¶ 110.30.

[61]Will v. United States, 389 U.S. 90, 93-94 nn. 2-3 (1967); Long v. District Court, 385 U.S. 192, 193 n.2 (1966) (order denying writ); United States v. Dickinson, 465 F.2d 496, 519 n.18 (5th Cir. 1972); Warren & Abell, *supra* note 3, at 62 n.46. The California Court of Appeals described District Attorney Younger's experience concerning an earlier order:

> After the assassination of Senator Kennedy in June 1968, the Los Angeles Superior Court had issued a protective order which Younger attacked in this court. What he got for his pains was mostly postcards: one from this court, denying his petition without issuance of an alternative writ, another from the California Supreme Court, denying his petition for a hearing. The United States Supreme Court denied certiorari . . . .

Younger v. Smith, 30 Cal. App. 3d 138, 144 n.6, 106 Cal. Rptr. 225, 229 n.6 (1973) (citations omitted). The court then sent Younger another. *Id.* at ____, 106 Cal. Rptr. at 235, discussed in note 181 *infra*.

[62]FED. R. APP. P. 21(b).

[63]Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 775 (2d Cir. 1972); *see Mandamus, supra* note 59, at 605, 607-08, 612.

[64]Z. CHAFEE, SOME PROBLEMS OF EQUITY, LACK OF POWER AND MISTAKEN USE OF POWER 296 (1948).

[65]"Jurisdiction" is not used in the "technical" sense. Will v. United States, 389 U.S. 90, 95 (1967).

[66]State *ex rel.* Zeller v. Montgomery Circuit Court, 223 Ind. 476, 62 N.E.2d 149 (1945).

[67]Tawas & Bay County Ry. v. Iosco, 44 Mich. 479, 7 N.W. 65 (1880).

[68]Abelleira v. District Court, 17 Cal. 2d 280, 285-91, 109 P.2d 942, 946-49 (1941); McHenry v. State, 91 Miss. 652, 44 So. 831 (1907).

factors considered are the importance of the challenged ruling and the need for a quick review.[69] The appellate court might also consider whether the occasion demands judgment detached from the dispute at hand as well as collective judgment and responsibility.[70] These considerations which are matters of judgment and discretion[71] are frequently concealed by a fog of arcane doctrine and archaic over-conceptualism.

Although extraordinary writs have the advantage of speed, they detract from the policies of finality and orderly terminal review. The writs, accordingly, are not available to test all potentially reversible errors but are reserved to review "extraordinary" matters.[72] Therefore difficulties do not end when the writ is granted, for the appellate court may apply a limited scope of review. Thus, contentions which might be reversible for error on terminal review may not be included in the ambit of appellate inquiry. The appellate court might observe that the writ is not a substitute for an appeal or that the writ is available only to test gross abuses of discretion and might therefore either deny the writ or find against the petitioner.

Silence orders appear to satisfy the criteria for obtaining review by extraordinary writ. Prior restraints imposed by silence orders impinge drastically upon first amendment rights.[73] The urgency for a prompt decision is clear. The necessity for a collective and detached judgment of the merits is also apparent, for in many silence order cases, the trial judge seems to be personally involved.[74] In others, the judge appears to overlook the interests of the press completely in his zeal to protect the criminal trial from potentially prejudicial publicity.[75] In addition, most of the free press-fair trial law has been formulated in appeals from

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[69]The standards for issuing the writ are called "standards of propriety" in an excellent recent note on federal cases, *Mandamus*, *supra* note 59, at 596 n.7.

[70]Carrington, *supra* note 24, at 512-13.

[71]Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943); Needles v. Kelley, 261 Iowa 815, 156 N.W.2d 276 (1968).

[72]Will v. United States, 389 U.S. 90 (1967); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945) (usurpation of power). *See also* 9 MOORE ¶ 110.28; *Mandamus, supra* note 59; *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1077 (1965); Note, *Appellate Review of Stay Orders in the Federal Courts*, 72 COLUM. L. REV. 518, 535 (1972).

[73]Authorities cited note 15 *supra*.

[74]*See* Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (per curiam); *cf.* People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[75]United States v. Dickinson, 465 F.2d 496, 500 (5th Cir. 1972); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Younger v. Smith, 130 Cal. App. 3d 138, 156-57, 106 Cal. Rptr. 225, 237 (1973); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971).

criminal convictions in which the defendant argued that pretrial publicity was prejudicial to him. Trial courts need guidelines from appellate courts on the other side of the free press-fair trial question, that is, when does an order unnecessarily circumscribe the right of the press to report and the public to know. Thus, review of a silence order by extraordinary writ, at the instance of the media, seems to be a propitious point for an appellate court to interpose on behalf of an important interest.[76]

However, even when jurisdiction to hear the writ is assumed, several barriers are encountered in the path of effective review. First, the appellate court must exercise its discretion to grant review, and the issues must be placed before the appellate court in a timely fashion. Secondly, the appellate court must find that the media possesses the requisite interest or standing to compel a decision. Finally, the appellate court's scope of review must be broad enough to include the question presented, and the decision must be handed down in time to allow the media to provide timely news. The author has found only one reported case in which the media, with apparent success, attained appellate review of a silence order by extraordinary writ. In *State ex rel. The Miami Herald v. Rose*[77] the trial judge issued a pretrial order part of which forbade the media from disseminating anything about the murder trial except testimony in open court. *The Miami Herald* sought a writ of prohibition in the district court of appeal.[78] The court of appeal, in a two paragraph, per curiam opinion, construed the procedural device as a constitutional writ,[79] and held that the ban on publishing was an invalid prior restraint.[80] The assailed order was not reversed but stayed. The stay, presumably, ended the controversy, for unless the defendant were to be convicted and were to appeal citing prejudicial publicity, the publicity issue would probably not be in controversy again. If the jury were sequestered, as the court of appeal suggested, a successful attack would be unlikely. This case is an example of a flexible appellate system responding promptly to a difficult problem. By use of the prerogative writ and the stay, the court was able to shape a preventative remedy and to surmount the problems of the media's lack of party status and the need for a prompt decision.

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[76] *Cf. Mandamus, supra* note 59, at 618-19.

[77] 271 So. 2d 483 (Fla. Ct. App. 1972) (per curiam).

[78] FLA. APP. R. 4.5(c).

[79] 271 So. 2d at 484, *construing*, FLA. APP. R. 4.5(g).

[80] 271 So. 2d at 484. *See also* Younger v. Smith, 30 Cal. App. 3d 138, 155-56, 106 Cal. Rptr. 228, 236-37 (1973) and cases cited note 15 *supra*.

Several other appellate decisions are sufficiently analogous to bear review. In *Miller v. United States*,[81] a convicted defendant appealed from the district judge's order interdicting inquiries to jurors. Judge Friendly, examining appellate jurisdiction, expressed doubt that the order was appealable as a preliminary injunction,[82] and rejected appealability as a collateral order,[83] but reviewed the appeal from the order as a petition for mandamus or prohibition because an important issue of first impression was presented.[84] The *Miller* case, however, does not reach the problem of a review at the request of a media representative not a party to the criminal action. In addition, because the order was given after, rather than before or during the trial, the need for prompt review was not at issue.

Chase v. Robson[85] is somewhat more on point. In that case the petitioners were indicted for events arising out of destruction of selective service records. About ten weeks before the trial was scheduled to begin, the district judge, sua sponte, ordered the parties to refrain from generating any publicity about the case. The defendants petitioned the court of appeals for mandamus and prohibition. The court of appeals found that mandamus was appropriate to raise the question because the order was unrelated to the issues at trial and a prior restraint,[86] immediate appellate review was imperative,[87] and the matter could not be adequately reviewed on direct appeal.[88] The court reviewed the silence order to determine whether it was "a clear abuse of discretion" and held that it must be vacated because it infringed on first amendment freedoms,[89] was overbroad[90] and lacked specific findings of fact.[91] *Robson*, like *Miller*, did not reach the problem of a media representative not a party to the criminal action seeking review. However, *Robson* provides an insight into the response of the appellate process to the time element involved in most silence order cases. The district judge's order was dated

[81]403 F.2d 77 (2d Cir. 1968). *Miller* is reviewed and criticized in *Mandamus, supra* note 59, at 616 n.89, 619 n.97.

[82]403 F.2d at 78-79. Text at notes 51-53 *supra*.

[83]403 F.2d at 79 n.1; *see* text accompanying notes 11-19 *supra*.

[84]403 F.2d at 79, *citing* Schlagenhauf v. Holder, 379 U.S. 104 (1964).

[85]435 F.2d 1059 (7th Cir. 1970).

[86]*Id.* at 1062.

[87]*Id.*

[88]*Id.*

[89]*Id.*

[90]*Id.* at 1061.

[91]*Id.* at 1061-62.

February 24. The court of appeals directed that the order be vacated on May 1. The trial was scheduled to begin on May 4. If the defendants had obeyed the order, they would have lost their first amendment freedoms for about nine weeks. These weeks may have been crucial because of the defendants' desire to raise funds to finance their defense and to communicate their grievances to the public. While mandamus may be an available remedy in the federal system, it is far from a fully satisfactory remedy.

In California the extraordinary writs are flexible devices to review many kinds of pretrial orders. For example, when extensive pre-trial publicity has occurred, a defendant may, prior to trial, use the writ of mandate to review a decision refusing to change the venue to a location less saturated with publicity.[92] Three California cases bear review here. The first grew out of an application to enjoin official release of almost all pre-arraignment publicity in criminal cases.[93] The officials who were to be enjoined sought a writ of prohibition in the district court of appeals to prevent the trial court from granting the injunction. Local newspapers appeared as *amicus curiae*. The court of appeals issued prohibition[94] holding that an injunction was an improper remedy to prevent excessive publicity and that the proposed remedy was too broad for the evil assertedly involved.[95] Like the federal cases previously discussed, this case indicates that an extraordinary writ possesses the elements of a proper remedy. It does not, however, solve the question of whether the media has standing to contest the order. The case, moreover, was in litigation for about a year from the request for the injunction to the grant of the writ.[96] Even though the injunction was not directed toward a particular prosecution and did not take effect, this lapse of time undercuts the media's requirement of prompt review.

In *Oxnard Publishing Co. v. Superior Court*[97] the district court of appeals faced several of these issues. The judge who was trying a criminal case entered an order closing to the public portions of the trial which took place outside the presence of the jury. Newspaper representatives petitioned the court of appeals for mandate to vacate the order. The

[92]Frazier v. Superior Court, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971); Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968). *See also* Lloyd v. District Court, 201 N.W.2d 720 (Iowa 1972); Pollard v. District Court, 200 N.W.2d 519 (Iowa 1972).

[93]County of Los Angeles v. Superior Court, 253 Cal. App. 2d 670, 62 Cal. Rptr. 435 (1967).

[94]*Id.* at ____, 62 Cal. Rptr. at 449.

[95]*Id.* at ____, 62 Cal. Rptr. at 441-49.

[96]*Id.* at ____, 62 Cal. Rptr. at 437-38.

[97]261 Cal. App. 2d 505, 68 Cal. Rptr. 83 (1968).

issue was public trial, not free press and the newspaper's standing was asserted and found in the general right of the public to have access to a criminal trial.[98] The writ was issued ordering the trial judge to vacate the exclusion order.[99] The opinion lacks precedential value because the California Supreme Court subsequently granted a hearing and, because of a change of venue of criminal trial, dismissed the appeal as moot.[100] The ultimate disposition of *Oxnard Publishing Co.* indicates that the interest in proceeding with the criminal trial may take precedence over the rights of the press and the public. In a more recent case[101] the trial court prohibited newspapers from publishing the names and photographs of witnesses in a criminal trial. The newspapers compiled with the order and refrained from publishing but sought a writ of mandate to vacate the order. The criminal trial proceeded, and the defendants were convicted long before the court of appeals vacated the order. Thus, by obeying the order and testing it in an orderly fashion, the newspaper lost the right that the appellate court later said it had. The writ, in the absence of a stay of the order[102] is not a practical solution for the silence order.

New York and Ohio cases support the conclusion that, while an extraordinary writ is the media's proper legal remedy for an overreaching silence order, it is an impractical solution. *United Press Associations v. Valente*,[103] decided by the New York Court of Appeals, was an Article 78 proceeding[104] brought by a media group petitioning to open up a criminal trial which had been closed to the public. The New York Court of Appeals affirmed the closing of the trial, although the criminal conviction from the underlying trial was later reversed because it had been closed.[105] The court held that the appeal by the media turned on the right to a public trial which the majority found to be a right of the

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[98]*Id.* at ___, 68 Cal. Rptr. at 88-96. *But see* ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 116 (Approved Draft 1968) (public trial not a guarantee to public) [hereinafter cited as REARDON REPORT].

[99]261 Cal. App. 2d at ___, 68 Cal. Rptr. at 97.

[100]Warren & Abell, *supra* note 3, at 66 n.63, 78 n.123.

[101]Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973).

[102]*Cf.* Younger v. Smith, 30 Cal. App. 3d 138, 149, 106 Cal. Rptr. 225, 232 (1973) (stay denied on one petition and granted in another—criminal trial evidently pending when silence order petitions decided).

[103]308 N.Y. 71, 123 N.E.2d 777 (1954).

[104]Article 78 proceedings are herein classified as extraordinary writ cases rather than interlocutory appeals. There is no good reason for this except the author's preference, the presence of the judge as respondent and hints in the opinions about the scope of review.

[105]People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

criminal defendant; and, because of the chaos that might result from stays and appeals at the behest of the public at large, the media representatives were held to lack standing to attack the order.[106]

Valente was distinguished in 1972 in *Oliver v. Postel*[107] in which a criminal trial was closed to the press. The Appellate Division dismissed the Article 78 proceeding commenced by newspaper representatives.[108] On appeal the Court of Appeals dismissed the proceeding as moot because the criminal trial had ended.[109] However, the court stated in dicta that, because the order was directed to the newspapers, they had standing to challenge the order and that the order closing the trial was "an unwarranted effort to punish and censor the press."[110]

E.W. Scripps Co. v. Fulton,[111] an Ohio case, is similarly inconclusive. The public was excluded from a criminal trial, and the newspapers sought prohibition in the court of appeals. The criminal trial ended before a decision on prohibition, but the court of appeals, nevertheless, allowed the writ and held that the defendant could not waive the public's right to a public trial and that the exclusion order was, under the circumstances, unjustified.[112] The Supreme Court of Ohio dismissed a direct appeal from the court of appeals because the issues were moot before the court of appeals had decided them and because the matter was not cognizable by prohibition.[113]

The value of direct review is not difficult to summarize. With the exception of *State ex rel. Miami Herald Publishing Co. v. Rose*, the

[106]United Press Ass'ns v. Valente, 308 N.Y. 71, 81-85, 123 N.E.2d 777, 781-83 (1954). Six judges participated; two concurred in the majority opinion. Judge Desmond concurred in the result, asserting that the newspapers had standing to contest the closing of the trial but that it was permissible to close the trial. *Id.* at 85-87, 123 N.E. 2d at 783-84. Judge Frossell dissented, Judge Dye with him, contending that there was an individual or citizen interest in public trials and that the newspapers had standing to assert the interest but would have dismissed the proceeding as moot. *Id.* at 87-92, 123 N.E.2d at 784-87. Thus, there is a lack of solidarity to the holding and certainty to the case. The standing issue tied three to three. Concerning status of the public trial issue, *see* Warren & Abell, *supra* note 3, at 77-78; authorities cited note 98 *supra*.

[107]30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972).

[108]Oliver v. Postel, 37 App. Div. 2d 498, 327 N.Y.S.2d 444 (1971).

[109]30 N.Y.2d at 183, 282 N.E.2d at 312, 331 N.Y.S.2d at 415-16.

[110]*Id.*, 282 N.E.2d at 311, 331 N.Y.S.2d at 415.

[111]100 Ohio App. 157, 125 N.E.2d 896 (1955), *appeal dismissed as moot*, 164 Ohio 261, 130 N.E.2d 701 (1955).

[112]100 Ohio App. at ____, 125 N.E.2d at 903-04.

[113]E.W. Scripps Co. v. Fulton, 164 Ohio 261, 263-64, 130 N.E.2d 701, 703 (1955) (per curiam). Two judges concurred in dismissing the appeal maintaining that the trial judge could not appeal because the court of appeals order did not prohibit him from doing anything and was, therefore, not prejudicial.

prospects for effective direct review are dim. Doctrinal limitations, statutory limitations and limitations on time available render direct review difficult, if not impossible. Time problems are intractable because the media's contentions are inextricably locked in with the progress of the criminal trial. Pre-judgment appeals are exceptional; interlocutory appeals in criminal cases are rare; and persons lacking party status who cannot intervene in the main action are strangers in the appellate court. The administrative problems are also formidable. Will collateral proceedings in an appellate court cause chaos in the underlying trial?[114] Who has standing to seek review?[115] Does the criminal trial stop during the pendency of review? May the media seek a continuance? Can there be a stay of a silence order without a continuance of the trial? Would a stay of the order pending review prejudice a conviction in a later appeal? If the defendant's interest is opposed to the media, may his objections be heard and considered?[116] Might review and a continuance interfere with the defendant's right to a speedy trial?[117] If there is no continuance, is it possible to attain an appellate decision in time to be of any practical assistance?[118] What is true of review by extraordinary writ is also true

[114]*Compare* the opinion of Judge Fuld in United Press Ass'ns v. Valente, 308 N.Y. 71, 83, 123 N.E.2d 777, 782 (1954), "[I]f every member of the public were free to challenge any order . . . , the court might well be overwhelmed with a host of collateral proceedings", *with* the dissenting opinion of Judge Frossell, *id.* at 95, 123 N.E.2d at 789, "This view is wholly unrealistic and without slightest foundation."

[115]Judge Frossell, dissenting in *United States Ass'ns v. Valente*, asked, "Unless some member of the public is entitled to bring a proceeding such as this, how else could it be settled?" *Id.* at 95, 123 N.E.2d at 789. *See also* Phoenix Newspapers Inc. v Jennings, 107 Ariz. 557, 563, 490 P.2d 563, 567 (1971): "[A]ny member of the public has a standing to question his exclusion from a judicial hearing."

[116]In State *ex rel.* Miami Herald Publishing Co. v. Rose, 271 So. 2d 483 (Fla. Ct. App. 1972) (per curiam), the defendant is listed as having appeared before the appellate court. In Younger v. Smith, 30 Cal. App. 3d 138, 142, 147 n.14, 106 Cal. Rptr. 225, 227, 231 n.14 (1973), one criminal defendant did not appear in the appellate court but another did. In Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873, 874 (1973), neither defendant argued the silence order in the appellate court. The trial had long since ended. Judge Fuld, in *United Press Ass'ns v. Valente*, observed "[P]etitioners sought, in effect, to have us pass upon the merits of [the defendant's] appeal although he could not be heard. There is something essentially wrong and unreasonable about a procedure that permits such a result." 308 N.Y. at 83, 123 N.E.2d at 782. Judge Frossell remonstrated "[E]ven though [defendant] did appeal, he would be testing his own right, not the public's. . . . The public right did not depend upon the happenstance that defendant might be convicted, and if so, that he might appeal." *Id.* at 94, 123 N.E.2d at 789.

[117]This may be especially important where the defendant has a statutory right to a speedy trial within a fixed time. *See, e.g.*, IOWA CODE ANN. § 795.2 (Supp. 1973); WASH. REV. CODE ANN. 10.46.010 (1961).

[118]In *E.W. Scripps Co. v. Fulton*, the newspapers sought a writ the day the trial judge closed the criminal trial. The trial was completed during the pendency of the extraordinary proceeding

of other forms of terminal or interlocutory review. There is no realistic route to relief in the appellate hierarchy.[119]

APPEAL FROM SANCTION

Another route to relief, although a drastic one, is for the media to ignore the silence order and publish. Many silence order appeals by the media occur as follows. The judge trying a criminal court case issues a silence order. When the media publishes despite the order, the court finds the publisher or reporter in contempt of court, and the contemnor appeals from the order finding contempt and imposing sanction. In addition to avoiding the practical and legal perplexities of securing direct or extraordinary review of a silence order, there are additional reasons for the media to prefer review from contempt. The media representatives might not have the time and money to challenge every silence order; also the law of prior restraints is reasonably clear and, under the pressure of a deadline, time is not available to consult counsel.

To hold a newspaperman in contempt for publishing what happens in open court is a drastic step. The Advisory Committee on Fair Trial and Free Press of the American Bar Association disavowed "direct restrictions on the media."[120] The committee stated that contempt raised "grave constitutional questions"[121] and could "cause unnecessary friction and stifle desirable discussion."[122] The committee added, however, that contempt "should be exercised against a person who knowingly violates a valid judicial order not to disseminate, until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing . . ." held before trial or out of the presence

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and the latter was dismissed as moot. *See* text accompanying note 113 *supra*.

[119]Counsel might consider procedural alternatives which do not require a direct step up in the judicial hierarchy. One possibility is to seek relief from a judge of equal rank to the judge who issued the silence order. This will not work. Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969). Another is to ask a federal court to enjoin a state court silence order because the order impinges upon federal constitutional rights. *See* Mitchum v. Foster, 407 U.S. 225 (1970); Sutton v. County Court, 353 F. Supp. 716 (E.D. Wis. 1973). This route is, of course, closed if the silence order is issued by a federal court. If the silence order is issued by a state judge, it may be effective. *See* Rosen v. North Carolina, 345 F. Supp. 1364 (W.D.N.C. 1972). *But see* King v. Jones, 450 F.2d 478 (6th Cir. 1971) (per curiam); McLucas v. Palmer, 427 F.2d 239 (2d Cir.), *cert. denied*, 399 U.S. 937 (1970). The federal injunction should always be considered a live possibility in the state silence order case.

[120]REARDON REPORT 151.

[121]REARDON REPORT 150.

[122]REARDON REPORT 150.

of the jury.[123] Under these circumstances, the committee felt contempt would not be an unconstitutional abridgment of speech or press.[124] The Medina Report[125] also disavowed any intent to control the media and eschewed contempt against anyone in the pretrial period. However, the report did note that "the trial judge has power also to enforce and to punish deliberate and willful conduct in flagrant disobedience of such "orders" or other "directions".[126] A report to the Judicial Conference of the United States[127] observed that "any direct curb or restraint on publication . . . is both unwise as a matter of policy and poses serious constitutional problems" and could not be recommended.[128] It did recommend special orders in widely publicized and sensational cases but did not mention contempt for publication.[129] The main thrust of the effort to insure a trial untainted by prejudicial publicity, then, is by control of those amenable to control, court personnel and officers of the court, and by devices such as venue changes or sequestering the jury. Contempt is retained as a deprecated but distinct final alternative.

Contempts are divided conceptually into several different but overlapping categories, and contempt for publishing material about a criminal trial despite a silence order fits two of these recognized categories. It is indirect contempt because it is performed out of the presence of the court. It is also criminal because, when contempt is charged, the harm has already been done. The penalty is, thus, punitive and cannot be coercive or remedial. Procedural protections flow from the indirect-criminal classification, and the contemnor is entitled to a hearing and some criminal safeguards in guilt determining process.[130]

Ignoring a silence order is difficult to classify within the usual acts-of-contempt categories. Disseminating information might be considered obstruction of the courts processes because, if present or potential jurors learn of inadmissible evidence, the court is not challenged directly, but

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[123]REARDON REPORT § 4.1, at 150.

[124]REARDON REPORT 153.

[125]SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FINAL REPORT WITH RECOMMENDATIONS, FREEDOM OF THE PRESS AND FAIR TRIAL vii (1967) [hereinafter cited as MEDINA REPORT].

[126]MEDINA REPORT 1, 6, 10-11, 39-40, 36-37.

[127]REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM IN THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391 (1969).

[128]*Id.* at 401-02.

[129]*Id.* at 409-12.

[130]United States v. Dickinson, 465 F.2d 496, 500 (5th Cir. 1972); Dobbs, *supra* note 49, at 183, 221-23, 224-25.

the fairness of the trial may be affected.[131] However, distinguishing features exist. First, acts normally considered obstruction, such as persuading witnesses to leave the jurisdiction, bribing witnesses, and direct attempts to influence jurors have as their immediate goal a desire to alter the trial. Secondly, such obstructive acts are against the general moral code, while publishing material about public proceedings is usually felt to be in the public interest and, except for the silence order, a laudable activity.

Publications despite a silence order also partake of contempt for out of court publication.[132] The thrust of this form of contempt, however, is to protect the dignity of the court rather than the fairness of a trial. Moreover, in the leading cases dealing with this category of contempt, which were decided before the important free press-fair trial cases, an order was not issued to provide warning of the conduct that was forbidden.[133] Nor does the contempt for violation of a silence order fit neatly into the category of contempt for violating an order.[134] In the usual court order-contempt case, an in personam order, temporary or final, is requested by a plaintiff as part of the main relief in the case and is directed against a party to the lawsuit over whom jurisdiction has been obtained,[135] for example, requiring a defendant to abate a nuisance, or forbidding a defendant's demonstration or ordering defendant to convey property. By contrast, a silence order which is issued often on the judge's own motion and sometimes on the motion of one of the parties is often directed against persons not parties to the criminal action who do not receive formal notice and who are not represented.[136] Thus, contempt for publishing material about a criminal proceeding despite a silence order is similar to several categories of acts-of-contempt but, at the same time, sufficiently different not to fit neatly into the conventional analytical categories.

In the federal system, orders finding a contemnor guilty of con-

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[131]*See* Dobbs, *supra* note 49, at 189-94.

[132]*Id.* at 208-19.

[133]Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 368 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). *Contra*, United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

[134]Dobbs, *supra* note 49, at 219-20; *cf.* Wood v. Goodson, 485 S.W.2d 213 (Ark. 1972).

[135]Dobbs, *supra* note 49, at 219; *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1056-61 (1965).

[136]*Compare* Younger v. Smith, 30 Cal. App. 3d 138, ___, 106 Cal Rptr. 225, 231 (1973); *with* Sun Co. v. Superior Court, 29 Cal. App. 3d 815, ___, 105 Cal. Rptr. 873, 875-76 (1973) (press invited; attorney present).

tempt and imposing sentence are appealable.[137] In the various states, indirect, criminal contempts are reviewable either by direct appeal, writ of error, certiorari, prohibition or habeas corpus.[138] Many of the difficulties encountered in attaining review of a silence order are obviated in a contempt appeal. The convicted contemnor is a party and has standing. The material has already been published, and the time required for appeal is generally not crucial.

While a silence order is easier to place before an appellate court upon a review of contempt than by direct review, the appellate court's ambit of inquiry on contempt frequently places barriers in the path of full review on the merits. The problem in contempt appeals is not in securing review but in securing complete and effective review. The major difficulty in determining the scope of review flows from the classification of criminal contempt for breach of an order as a collateral attack on that order.[139] Definite results flow from classifying an attack as collateral rather than direct. While the review on direct appeal is for legal error, properly preserved and asserted, the permissible grounds for successful attack in a collateral proceeding are limited. In general, only a judgment void for lack of jurisdiction is vulnerable to collateral attack.[140] Thus, since contempt is often held to be collateral to the order violated, the contemnor is precluded from asserting mere legal error in the underlying order,[141] but must assert only that the order is void[142] for lack of jurisdiction.[143] In contempts for violating injunctions this concept is termed the collateral bar rule, and many courts hold that even though the order or injunction was granted ex parte,[144] or improperly

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[137]9 MOORE ¶ 110.13[4], at 164.

[138]The subject is tangled and no substitute exists for a careful search of the statutes, procedural rules, and case law in the particular jurisdiction. *See* United States Pipe & Foundry Co. v. Local 7918 UMW, 274 So. 2d 637 (Ala. Ct. Crim. App. 1971), *rev'd per curiam*, 290 Ala. 156, 274 So. 2d 640 (1972), *on remand*, 274 So. 2d 644 (Ala. Ct. Crim. App. 1973) (per curiam). A good place to find the cases is Annot., 33 A.L.R.3d 448 (1970); Annot., 33 A.L.R.3d 589 (1970). That the two annotations comprise over 200 pages is an indication of the variety and complexity of the subject.

[139]United States *ex rel.* Bowles v. Seidmon, 154 F.2d 229, 231 (7th Cir. 1946), *citing* Howat v. Kansas, 258 U.S. 181 (1922).

[140]F. JAMES, CIVIL PROCEDURE 534 (1965).

[141]Maggio v. Zeitz, 333 U.S. 56 (1948); Walker v. City of Birmingham, 279 Ala. 53, 181 So. 2d 493 (1966), *aff'd*, 388 U.S. 307 (1967).

[142]Carolina Freight Carriers Corp. v. Teamsters Local 61, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971); F. JAMES, *supra* note 140, at 535 (1965).

[143]*Ex parte* Bryant, 155 Tex. 219, 285 S.W.2d 719 (1956).

[144]Anderson v. Dean, 354 F. Supp. 639 (N.D. Ga. 1973); Sumbry v. Land, 127 Ga. App. 786, 195 S.E.2d 228, 234 (1972); UMW Hosp. v. UMW Dist. 50, 52 Ill. 2d 496, 288 N.E.2d 455 (1972).

circumscribed constitutionally protected freedoms,[145] or was otherwise erroneous,[146] the contemnor who has disobeyed the order is precluded from arguing these matters as a defense to contempt. The only issues raised on a charge of contempt are whether the court had jurisdiction over the subject matter and whether the contemnor knew of the order and violated it.[147] The reasons for the collateral bar rule are not based merely on the conceptual direct-collateral attack distinction but on the idea that the collateral bar rule preserves respect for courts and provides for the orderly settlement of disputes. Thus according to the courts which apply the collateral bar rule, the defendant should not be allowed to flout the order and thereby appoint himself judge in his own case.[148]

Other courts reject the collateral bar rule in reviewing contempt for breach of an injunction.[149] Under this view decisions on the merits are more important than preserving respect for the courts, and while orderly litigation is important, a defendant, because "he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril," has the alternative of disobeying the order and arguing infirmities in the order on a charge of contempt.[150]

When a judge orders a newspaper not to publish the proceedings of a trial, he subjects the newspaper to prior restraint.[151] The issue in the contempt appeal is whether a media representative who has published despite the order is precluded, by the collateral bar rule, from raising constitutional defenses to a charge of contempt of court. Should the collateral bar rule be imposed to insulate potential errors of constitutional magnitude from judicial scrutiny? Several reasons suggest dispensing with the collateral bar rule in silence order contempts. The first argument is that the crucial or basic nature of the substantive right

[145]City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S. 1028 (1969). Z. CHAFEE, *supra* note 64, at 344-48. *But see* State *ex rel.* Liversey v. District Court, 34 La. Ann. 741 (1882).

[146]County of Peoria v. Benedict, 47 Ill. 2d 166, 265 N.E.2d 141 (1970).

[147]*See generally* Tefft, *Neither Above the Law Nor Below It: A Note on Walker v. Birmingham*, 1967 SUP. CT. REV. 181.

[148]Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967); United States v. Fidanian, 465 F.2d 755, 757-58 (5th Cir. 1972); Board of Junior College Dist. No. 508 v. Teachers Local 1600, 126 Ill. App. 2d 418, 428-29, 262 N.E.2d 125, 130, *cert. denied*, 402 U.S. 998 (1971); Tefft, *supra* note 147.

[149]*In re* Berry, 68 Cal. 2d 137, 483 P.2d 273, 65 Cal. Rptr. 273 (1968); State *ex rel.* Liversey v. District Court, 34 La. Ann. 741 (1882).

[150]Younger v. Smith, 30 Cal. App. 3d 138, 151-53, 106 Cal. Rptr. 225, 233-34 (1973).

[151]*See* authorities cited note 15 *supra*.

asserted should warrant review of the silence order on the merits.[152] Clearly, review of the constitutionality of the order will not allow the media to publish with impunity in the face of a valid silence order. The order will be judged on the merits, and if it was justified, contempt will be properly affirmed.[153] Secondly, as previously discussed, excruciating practical and legal difficulties prevent securing effective direct review of a silence order.[154] Moore states this qualification on the collateral bar rule "if . . . review cannot be had in the absence of a contempt conviction, the contemnor may challenge the underlying order on appeal from the judgment of contempt."[155] In view of the basic right asserted, these difficulties should compel review of the contempt order on the merits.

Several additional arguments against application of the collateral bar rule appear when silence orders are examined in relation to the classic statement of the collateral bar rule. In *Howat v. Kansas*,[156] a 1922 appeal from a finding of contempt for striking in defiance of an injunction, the Supreme Court, affirming the contempt in a unanimous opinion by Chief Justice Taft, stated what seem to be several limits on the operation of the collateral bar rule:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, . . . It is for the court of the first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.[157]

The Court, first of all, states that the collateral bar rule will come into play when there is "an injunction". While "injunction" has been expanded to include a temporary restraining order or other interlocutory device issued without notice to the defendants,[158] it is questionable

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[152]T. EMERSON, *supra* note 15, at 449-65; *cf.* C.V.C. v. Superior Court, 29 Cal. App. 3d 909, 918-19, 106 Cal. Rptr. 123, 129-31 (1973).

[153]Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969).

[154]*See* notes 8-119 and accompanying text *supra*.

[155]9 MOORE ¶ 110.13[4] at 165. *See also* Justice Rosellini's concurring opinion in State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 78, 483 P.2d 608, 614, *cert. denied*, 404 U.S. 939 (1971).

[156]258 U.S. 181 (1922).

[157]*Id.* at 189-90.

[158]Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. UMW, 330 U.S. 258 (1947). *But cf.* Carroll v. Princess Anne, 393 U.S. 175 (1968) (ex parte order invalidated on due

whether the courts will consider a silence order an injunction at least for purposes of appeal.[159] The phrase "upon pleadings properly invoking its action" has not been extensively discussed.[160] The functional meaning of this language must relate to the need for written warning of the substantive relief sought by the plaintiff against a defendant, rather than to pretrial orders or directions to persons not parties which are unrelated to the merits of the action.[161] The "pleadings" language implies that injunctions are normally preceded by adversary adjudication and that for the collateral bar rule to apply, the contemnors must be parties to an action, and the order must be part of the relief sought.[162] The statement that the injunction be "served" before the court will wield the collateral bar rule relates to the notice function. The requirement of formal service of an injunction before the defendant is bound has been substantially qualified.[163] The larger point of "service", however, is that before the collateral bar rule will apply to an appeal of indirect criminal contempt, some device must bring home to the potential contemnor the idea that this order is serious business. The symbolic function of the service ritual fulfills this function while the oral order from the bench, frequent in silence order cases, may not.[164]

The phrase stating that the injunction be served "upon persons

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process grounds on direct appeal).

[159]*See* notes 32-54 and accompanying text *supra*.

[160]*But see* the opinion of the Illinois Appellate Court in UMW Hosp. v. UMW Dist. 50, 1 Ill. App. 3d 822, 826-27, 275 N.E.2d 231, 234-35 (1971), a short lived attempt to lift a comtempt citation from a group of strikers who had picketed in violation of an ex parte injunction, by declaring that injunction to be erroneous and void. The Appellate Court was reversed by the Illinois Supreme Court. 52 Ill.2d 496, 288 N.E.2d 455 (1972). The Supreme Court did not mention the Appellate Court's "no pleadings" reason for voiding the injunction. The Mine Workers' Union Hospital cases are discussed at length in an article by the author herein, entitled *Toward Due Process in Injunction Procedure*, which will appear in an early issue of the *University of Illinois Law Forum*. Recent cases which appear to invoke the reasoning of the "pleadings" requirement for applying the collateral bar rule include Lynch v. Snepp, 350 F. Supp. 1134, 1140 (W.D.N.C. 1972), *rev'd*, 472 F.2d 769 (4th Cir. 1973); Mar-Pak Michigan, Inc. v. Pointer, 226 Ga. 189, 173 S.E.2d 206 (1970); Carolina Freight Carriers Corp. v. Teamsters Local 61, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971).

[161]*Cf.* International Prods. Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963).

[162]*See* Justice Rosellini's concurring opinion in State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 78, 483 P.2d 608, 614 (1971), *cert. denied*, 404 U.S. 939 (1971).

[163]*See, e.g., In re* Herndon, 325 F. Supp. 779 (M.D. Ala. 1971) (per curiam); Sumbry v. Land, 127 Ga. App. 736, 195 S.E.2d 228, 233-34 (1972); Reihe v. District Court, 184 N.W.2d 701 (Iowa 1971); Dobbs, *supra* note 49, at 249-61. *But cf.* Crysler Credit Corp. v. Waegele, ___ Cal. App. 3d. ___, ___-___, 105 Cal. Rptr. 914, 918-19 (1973).

[164]In Wood v. Goodson, 485 S.W.2d 213, 215 (Ark. 1972) the order was given over the telephone.

made parties therein" is a practical expression of the notion that courts, when they adjudicate, do not bind the whole world.[165] The media representatives are not parties to the criminal case. They receive no formal notice and do not participate in shaping the order.[166] They may, however, be parties to the order in one sense. The court has the duty and the power or jurisdiction to protect the defendant's right to an untainted criminal trial.[167] Since the silence order is an injunction[168] and since persons of the class enjoined are bound upon receipt of notice or knowledge of the order,[169] according to conventional analysis, personal jurisdiction is attained, and media representatives become subject to indirect, criminal contempt for conduct contrary to the order. This reasoning, built on the implied or inherent jurisdiction of the courts, is certainly faulty. In order to find contempt this reasoning assumes the conclusions that the media representatives are parties and that the order is an injunction. It subsumes the elusive matter of personal jurisdiction into the analysis of when a person not a party is bound by an injunction. Media representatives do not fit neatly into any of the traditional categories of persons not parties who are, nevertheless, bound by an injunction.[170] It could be argued that media representatives are not bound and are not subject to contempt at all. For present purposes, it is assumed that media representatives are bound in the sense that they are members of a class with notice and may be subject to contempt. The significant issue is whether if they ignore the order and are charged with contempt, they may contest the merits of the order. Due process requires notice so that no one is bound unless he has had an opportunity to contest. The lack of formal notice and party status, while perhaps not enough to

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[165]Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.); FED. R. CIV. P. 65(d); Gregory, *Government by Injunction*, 11 HARV. L. REV. 487 (1898); Note, *Binding Non-parties to Injunction Decrees*, 49 MINN. L. REV. 719 (1965). *But see* the distressing recent case United States v. Hall, 472 F.2d 261 (5th Cir. 1972).

[166]Younger v. Smith, 30 Cal. App. 3d 138, 148, 106 Cal. Rptr. 225, 231 (1973) *But cf.* Sun Co. v. Superior Court, 29 Cal. App. 3d 815, ____, 105 Cal. Rptr. 873, 875-76 (1973) (discussion with press: attorney appeared for press).

[167]Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

[168]*But see* notes 32-54 and accompany text *supra.*

[169]FED. R. CIV. P. 65(d); note 163 *supra.*

[170](Agents, aiders and abettors, successors in interest, purchasers of the res, members of a valid class). Note 49 MINN. L. REV., *supra* note 165. A student writer concludes "a court would exceed its powers insofar as it might attempt to hold a person in contempt solely on the ground that he violated an injunction after receiving knowledge of its provisions, *Id.* at 735. *But cf.* Dobbs, *supra* note 49, at 251-52; *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1028-31 (1965). *Contra*, United States v. Hall, 472 F.2d 261 (5th Cir. 1972) (school cases).

avoid binding media representatives, focuses attention on the sweeping or legislative nature of the order and the lack of a realistic opportunity to contest. If many are bound but a realistic opportunity to challenge is not provided, an opportunity to challenge should be provided as a defense to contempt.[171] Thus the collateral bar rule should not be employed to preclude review of the merits when a silence order is ignored because the order is arguably non-injunctive and issued by a criminal rather than a civil court, without the usual protections of adversary adjudication, purporting to bind, upon mere knowledge, persons not parties to the underlying action.

The persuasive force of the foregoing is strengthened by examining *In re Oliver*[172] in which the Seventh Circuit refused for reasons similar to those given above to resort to the collateral bar rule in an analogous situation. In *Oliver* the district court had promulgated a policy statement forbidding extrajudicial statements by members of the bar about pending litigation. Attorney Oliver, with knowledge of the policy statement, held a press conference and made public statements about a pending case. The executive committee of the district court found Oliver in breach of the policy statement and reprimanded him.[173] On appeal, the government argued that the collateral bar rule prevented Oliver from challenging the merits of the policy statement.[174] The court held that the collateral bar rule did not preclude review of the merits of the court rule. The court reasoned that although the collateral bar rule was operative in appeals of contempt for violating injunctions, the policy statement was distinguishable from an injunction. The court distinguished the rule from an injunction in part on the ground that an attorney who had not violated the rule might lack standing to appeal from it unless he had received notice that the rule bound him.[175]

A second reason used by the court for distinguishing the policy statement from an injunction is more instructive. The court stated that an injunction is adjudicative and determines, from facts brought before the court, the rights of parties brought under its jurisdiction. On the other hand, a rule of practice promulgated by a court is analogous to a legislative act since it is "based on facts largely anticipated" and is

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[171] *See* note 155 *supra.*

[172] 452 F.2d 111 (7th Cir. 1971). The final words in this controversy appear to be contained in *In re* Oliver, 470 F.2d 15 (7th Cir. 1972) and United States v. Oliver, 470 F.2d 10 (7th Cir. 1972).

[173] *In re* Oliver, 308 F. Supp. 1183 (N.D. Ill. 1970).

[174] *In re* Oliver,452 F.2d 111, 113 (7th Cir. 1971).

[175] *Id.*; *see* notes 98 & 106 *supra.*

binding on those not before the court. "As one who has violated a statute and is prosecuted for such violation may challenge the validity of the statute, so should one who has violated a rule of court be permitted to challenge the validity of the rule itself."[176] In *Oliver*, the binding nature of the court rule was not contested; the issue was whether the merits of the rule could be challenged after it was disobeyed. Therefore *Oliver* allows the lower court to bind by "legislating" but applies the usual standard of review when the rule is ignored first and challenged later.

Media representatives are not parties in the ordinary sense,[177] nor is the silence order injunctive in the usual sense.[178] These conceptual distinctions have functional significance since a silence order is frequently drafted without the usual precautions of adversary litigation to govern the conduct of non-litigants in an uncertain and largely anticipated future.[179] When a silence order is announced sua sponte or following consultation with only the attorneys in the criminal case, even though it is a rule for a specific case rather than a general rule, it looks very much like legislation rather than adjudication. The order, moreover, takes on more of the appearance of legislation if it is not limited to a specific group but purports to bind anyone who might publish.[180]

Several courts, dealing with contempt for publishing despite a silence order,[181] have held that the order was void[182] not because of lack

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[176]*In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1972). *See also* Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950) (review of contempt for breach of a rule without discussing the collateral bar rule).

[177]*See* notes 17, 98, 106, 165-71 and accompanying text *supra*.

[178]*See* notes 32-54 and accompanying text *supra*.

[179]*Cf.* Younger v. Smith, 30 Cal. App. 3d 138, 159-61, 106 Cal. Rptr. 225, 238-40 (1973).

[180]While discussing reviewability in *Oliver*, the question of whether a silence order was an order or an injunction was discussed. The court concluded that, although the silence order is somewhat like an injunction, it probably is a mere order and not an appealable preliminary injunction. *See* notes 34-54 and accompanying text *supra*. Now it is seemingly argued that the silence order is not even an adjudicative order but rather is legislative.

[181]These cases distinguish cases where there was no contempt because of either lack of notice of the order or intent to violate it. *See generally* Dobbs, *supra* note 49, at 261-65. The difficulty of the knowledge-intent issues in silence order contempts may be observed in the cited cases. Atlanta Newspapers, Inc. v. State, 216 Ga. 399, 116 S.E.2d 580 (1960); Worchester Telegram & Gazette, Inc. v. Commonwealth, 354 Mass. 578, 238 N.E.2d 861 (1968); *In re* Matzner, 59 N.J. 437, 283 A.2d 737 (1971); *see In re* Anderson, 306 F. Supp. 712 (D.D.C. 1969) (mem.).

In Evelle Younger's contempt appeal which is cited throughout this article, the court held that the press release was simply too innocuous to be a violation of the silence order. Younger v. Smith, 30 Cal. App. 3d 138, 153, 106 Cal. Rptr. 225, 235 (1973). Ths holding implies that in order for the prosecution effectively to test a silence order by violating it, the release must be extreme enough to endanger a possible conviction in the criminal case. The prosecutor's predicament is apparent.

of subject matter or personal jurisdiction but because the order was unconstitutional.[183] Some of the opinions do not discuss the collateral bar rule[184] while others do.[185] In either event, the reasoning is confusing. If the ambit of the appellate court's inquiry into the underlying order is for simple error, it is unnecessary to find the order void to reverse contempt. It suffices for the order to be wrong. If, on the other hand, the collateral bar rule is employed, and the silence order examined only for lack of jurisdiction, then, to defeat contempt, the court must find the order void. To define an unconstitutional order as void in order to escape the collateral bar rule[186] is to define lack of jurisdiction as congruent with constitutional error.[187] This reasoning distorts the usual meanings of jurisdiction, error, voidness and collateral attack. It is also contrary to the idea that, for the collateral bar rule, error of constitutional magnitude is simple error rather than jurisdictional error. Stated another way, a court with subject matter and personal jurisdiction has

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This predicament is exacerbated by the possibility that a more extreme statement is required to constitute contempt than to require reversal of a conviction. *Cf.* Worchester Telegram & Gazette, Inc. v. Commonwealth, *supra* at 581, 238 N.E.2d at 863 (publication prejudicial enough to require a mistrial not extreme enough to constitute contempt). Younger's basic contention was, however, decided adversely to him in the Busch petition which was consolidated with Younger's contempt appeal. 30 Cal. App. 3d at 165, 106 Cal. Rptr. at 243.

[182]Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 259-60, 418 P.2d 594, 596-97 (1966); Wood v. Goodson, 485 S.W.2d 213, 217 (Ark. 1972); State v. Morrow, 57 Ohio App. 30, 11 N.E.2d 273 (1937); *Ex parte* McCormick, 129 Tex. Crim. 457, 463, 88 S.W.2d 104, 107 (1935); State *ex rel* Superior Court v. Sperry, 79 Wash. 2d 69, 73-78, 483 P.2d 608, 611-13, *cert. denied*, 404 U.S. 939 (1971). *See also In re* Oliver, 452 F.2d 111, 115 (7th Cir. 1971); Hamilton v. Municipal Court, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969) (review of order—contempt affirmed); Oliver v. Postel, 30 N.Y.2d 171, 178-81, 282 N.E.2d 306, 309-10, 331 N.Y.S.2d 407, 411-14 (1972) (dicta); MEDINA REPORT 46 (no power); REARDON REPORT (valid judicial order). *See generally* Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

[183]Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 259-60, 418 P.2d 594, 596-97 (1966); Wood v. Goodson, 485 S.W.2d 213, 217 (Ark. 1972); *Ex parte* McCormick, 129 Tex. Crim. 457, 463, 88 S.W.2d 104, 107 (1935); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 73-78, 483 P.2d 608, 611-13, *cert. denied*, 404 U.S. 939 (1971). *See also In re* Oliver, 452 F.2d 111, 115 (7th Cir. 1971); Oliver v. Postel, 30 N.Y.2d 171, 178-81, 282 N.E.2d 306, 309-10, 331 N.Y.S.2d 407, 411-14 (1972) (dicta).

[184]Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); State v. Morrow, 57 Ohio App. 30, 11 N.E.2d 273 (1937); *Ex parte* McCormick, 129 Tex. Crim. 457, 88 S.W.2d 104 (1935). *But see Ex parte* Warfield, 40 Tex. Crim. 413, 50 S.W. 933 (1899) (collateral bar rule applied).

[185]State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 73-78, 483 P.2d 608, 611, *cert. denied*, 404 U.S. 939 (1971); *see In re* Oliver, 452 F.2d 111 (7th Cir. 1971), discussed in notes 172-80 *supra*.

[186]State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 73-78, 483 P.2d 608, 611-13, *cert. denied*, 404 U.S. 939 (1971).

[187]United States v. Dickinson, 465 F.2d 496, 511 (5th Cir. 1972).

jurisdiction to err, even to err unconstitutionally. This error must be corrected on direct review not by collateral attack. Thus, courts employing this faulty reasoning should hold that the collateral bar rule does not prevent courts from reversing contempt of silence orders because basic rights are at issue, or the contemnors were not parties, or they did not receive formal notice, or the order is not truly an injunction, or because direct appeals are an unrealistic remedy rather than because the silence orders are void.[188]

The conclusion from the foregoing is that the collateral bar rule should not and does not apply to silence order contempts. The second half of the conclusion is wrong. Two federal courts of appeals have wielded the collateral bar rule in appeals of silence order contempts apparently to preclude review of the silence order on the merits. These cases bear close examination.

The first, *United States v. Tijerina*[189] grew out of a highly charged criminal trial in New Mexico. Reiss Tijerina and a group of followers assumed putative sovereignty over certain land, maintaining that the land was held in violation of a treaty, and several United States forest rangers were "arrested" for trespassing. Several of the group were charged with the federal offenses of assault and conversion. A pretrial silence order was entered, without objection, forbidding public statements about the upcoming criminal trial. The order recited that it was formally served upon the parties and witnesses. Tijerina made a speech at a widely publicized Convention of Free States, which among other things, accused the judge of "using the law to take vengeance and drink blood and humiliate our race." Tijerina and another were charged with and convicted of contempt.[190]

On appeal, the Tenth Circuit first dismissed the contemnors' arguments which related to whether the order had been violated.[191] Then, in response to the contention that the order was invalid under the first, fifth

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[188]*See also* Wood v. Goodson, 485 S.W.2d 213, 218-22 (Ark. 1972) (Fogelman, J., *concurring*); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 78-79, 483 P.2d 608, 614 (Rossellini, J., *concurring*), *cert. denied*, 404 U.S. 939 (1971).

[189]412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

[190]The act of contempt partakes as muchof criticism of the court as it does of interfering with a fair trial. *See* notes 132-33 and accompanying text *supra*. The statements might interfere with a fair trial, but the prejudice would appear to be to Tijerina himself rather than the prosecution. Nevertheless, the contempt was treated as silence order contempt.

[191]The arguments were that the meeting was not public, that there was an unreasonable search, that certain other evidence was inadmissible, and that the contemnors did not violate the order. 412 F.2d at 663-66.

and sixth amendments, the court stated that it could decline review: "When a court had jurisdiction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review."[192] The court continued, "this should dispose of the matter, but the circumstances of the case are such that the constitutional claims merit discussion",[193] and it proceeded to deal with and subsequently dismiss the defendants' claims. Contempt was affirmed.[194]

Resort to the collateral bar rule may have been justified by some of the circumstances of the case. The contemnors were defendants in the criminal case. They were given notice and a hearing, and they neither objected to the order nor asked that the convention be excepted from its coverage.[195] The order was apparently served. Four days expired between the entry of the order and the convention. During this period, the defendants could have objected, or an appeal could have been mounted. Moreover, *Tijerina* was not a case in which contempt was affirmed for breach of an invalid order because the appellate court did discuss the merits of the order and dismissed the contemnors' arguments. Even so, the opinion leaves to speculation whether the discussion of the constitutionality of the order is dicta because the collateral bar rule precluded considering it on the merits. If the order had been unconstitutional, would the court have interposed the collateral bar rule to justify affirming contempt without ruling on the merits of the order?

The use of the collateral bar rule in *Tijerina* seemingly to preclude considering the constitutionality of the silence order has been criticized. Dobbs notes that the contempt involved the exercise of "primary constitutional rights" which might call for "special rules or procedures to avoid any limit on free speech that is not absolutely necessary."[196] He observes that "it is difficult to imagine the court upholding a contempt sentence where the only act of contempt was the violation of a constitutionally forbidden ex parte order."[197] Dobbs concludes that a distinct possibility exists that "a contempt charge based on violation of a court's silencing order will be upheld only if the order itself is valid."[198]

In 1972, the Fifth Circuit was presented with an opportunity to

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[192]412 F.2d at 666.

[193]*Id.*

[194]The criminal conviction was also affirmed. United States v. Tijerina, 407 F.2d 349 (10th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[195]Dobbs, *supra* note 49, at 217-18.

[196]*Id.* at 217.

[197]*Id.*

[198]*Id.*

resolve some of the questions left open by *Tijerina*.[199] One Stewart, a civil rights worker in Baton Rouge, was indicted by Louisiana officials for conspiracy to murder the mayor. Stewart sought, in federal court, to enjoin the conspiracy prosecution. The district court declined to join the prosecution but, on appeal, the Fifth Circuit remanded the action for an evidentiary hearing. Again the district court refused to enjoin the prosecution, and again on appeal the Fifth Circuit ordered an evidentiary hearing. At the second hearing in district court, Judge West, speaking from the bench, stated that "there shall be no reporting of the details of the evidence taken in this court today or in any continuation of this trial."[200] Dickinson and Adams, reporters for local papers, who knew of the order, wrote newspaper articles which summarized the evidence taken. The reporters were convicted of contempt and appealed.

Several factors in *Dickinson* contrast with *Tijerina*. In *Dickinson*, the contemnors were *not* parties to the criminal proceeding. Moreover, the silence order was apparently issued sua sponte. Notice was not given that an order was forthcoming; a hearing was not held; and Dickinson and Adams lacked an opportunity to object through counsel. Since the order forbade disseminating the testimony that very day, the reporters did not have four days to seek modification or clarification. Finally, while the order in *Tijerina* was not found unconstitutional, the contrary was found of the order in *Dickinson*. In the words of the court of appeals, "a blanket ban on publication of Court proceedings, so far transgresses First Amendment freedoms that it 'cannot withstand the mildest breeze emanating from the Constitution.' "[201] For these reasons, then, *Dickinson* would appear to be a propitious case to dispense with the collateral bar rule. The court of appeals, in an opinion by Chief Judge Brown, nevertheless, applied the collateral bar rule holding that a contemnor may not "knowingly violate an order which turns out to be invalid."[202]

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[199]United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

[200]*Id.* at 500. Although the silence order is criticized below, the reader should bear Judge West's dilemma in mind. The hearing concerned whether to enjoin the state prosecution. Judge West had to consider the effect of publicity on Stewart's trial should the state prosecution not be enjoined. Much of the evidence would be the same. Judge West could not change the venue of the state criminal trial. *See also* Wood v. Goodson, 485 S.W.2d 213 (Ark. 1972); Younger v. Smith, 30 Cal. App. 3d 138, 153-54, 106 Cal. Rptr. 225, 239-40 (1973).

[201]465 F.2d at 500.

[202]*Id.* at 509. The court did vacate the conviction because it was based on the mistaken conclusion by the district court judge, Judge West, that the order was authorized. The case was remanded to the district court to determine "[w]hether the judgment of contempt or the punish-

The *Dickinson* opinion is closely articulated, and the reasons for employing the collateral bar rule to refuse to pass on the merits of the order bear examination and criticism. The problems considered are whether Judge West's silence order was an injunction, whether the reporter-contemnors were parties, whether the reporters had a practical remedy by orderly review, whether the collateral bar rule applies in freedom of the press cases, whether the court should discard the collateral bar rule because the order was obviously invalid, and whether the order was adjudicative rather than legislative.

Judge Brown states the collateral bar rule as "the well established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction must be obeyed, irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt."[203] Judge Brown provides two reasons. The first reason is the need to follow an orderly, institutional process to resolve disputes, and the second reason is the need to preserve respect for courts and judicial orders.[204]

The first question considered is whether this silence order was an injunction. In short, it is doubtful whether Judge West's order was an injunction because, although prohibiting conduct, the order was ancillary to the ultimate issues in the underlying action and did not grant the ultimate relief sought.[205] Clearly, since silence orders are not appealable as injunctions, they should not be considered injunctions for the purpose of calling forth the collateral bar rule and attentuating the ambit of appellate inquiry.

Next, the question of whether these reporters were parties must be examined. This question has been dealt with previously with the conclu-

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ment therefor would still be deemed appropriate in light of the fact that the order disobeyed was constitutionally infirm." *Id.* at 514. Judge West declined the implicit invitation to dismiss the charges stating:

> At the time of the contempt citation, it was not the validity vel non of the Court's order that was primarily at issue. It was the intentional, willful, flagrant and contemptuous disregard of the Court's order before in any way attempting to have the order, which was obviously issued in good faith, judicially reviewed. It was upon this action, rather than a mistake of law, that the contempt citation was bottomed.

United States v. Dickinson, 349 F. Supp. 227, 229 (M.D. La. 1972). The convictions and fines were unchanged. *Id.* The contemnors again appealed to the Fifth Circuit arguing free press-fair trial issues. The court refused to reexamine the issues holding that the earlier appeal was the law of the case and affirmed the fines. United States v. Dickinson, 476 F.2d 373 (5th Cir. 1973) (per curiam).

[203]465 F.2d at 509.

[204]*Id.*

[205]*See* notes 34-54, 158-59 and accompanying text *supra*; 9 MOORE ¶ 110.20[1], at 233.

sion that media representatives are "parties" to a silence order only in the circular and self-fulfilling sense that they may be held in contempt if they violate it.[206] Judge Brown observes that there is "no problem" finding personal jurisdiction or jurisdiction of the court: "the District Court certainly has power to formulate Free Press-Fair Trial orders in cases pending before the court and to enforce those orders against all who have actual and admitted knowledge of its prohibitions."[207] Thus, the court has personal jurisdiction, and the reporters are parties because the court says so. On the other hand, the reporters were not styled as parties, the formalities of service of process were not accorded them, and apparently they did not have an opportunity to object through counsel. The practical protections of the adversary system and the adjudicative process were absent. As one of the reasons for finding the order itself invalid, Judge Brown stated:

> [W]hile the Court's power over particular conduct committed in his presence within the courtroom is unquestioned, the injunction challenged in this case was not directed at any named party or court official involved in the underlying litigation, but rather it sought to control activities of non-parties to the lawsuit—namely, two reporters—in matters not going to the merits of the substantive issues of the ongoing trial or the court's ability to effectuate any ultimate judgment on them.[208]

Thus, the reporters were not parties for the purpose of invalidating the order but were parties for the purpose of imposing the collateral bar rule and contempt.

In *Walter v. Birmingham*, the Supreme Court in dictum qualified the application of the collateral bar rule by requiring that adequate and effective remedies for review be present before the rule can be properly invoked.[209] If a practical opportunity to challenge an order is not available, then, by inference, a defendant could disobey the order and challenge it on the merits in his appeal of contempt.[210] The silence order in *Dickinson* was pronounced from the bench in the morning and was ignored when the newspaper reporters met their deadline for the next day's papers, probably within a matter of hours. The reporters did not make an effort to challenge, modify or appeal the order between the

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[206] *See* notes 165-71 and accompanying text *supra*.

[207] 465 F.2d at 511-12.

[208] *Id.* at 508.

[209] 388 U.S. 307, 318 (1967).

[210] 465 F.2d at 511.

time Judge West issued it and when they published.[211] Judge Brown observed that "[t]imeliness of publication is the hallmark of 'news' and the difference between 'news' and 'history' is merely a matter of hours," but stated that "newsmen are citizens too . . . . They too may sometimes have to wait."[212] Judge Brown stated further that whether the collateral bar rule comes into play depends on "the immediate accessibility of orderly review." In *Dickinson* "both the District Court and the Court of Appeals were available and could have been contacted that very day."[213] Judge Brown, accordingly, held that the contemnors had access to orderly review and that the collateral bar rule applied.

The procedural problems involved in attaining effective direct review of a silence order have been treated above.[214] Nevertheless the particular practical problems in the *Dickinson* case should be mentioned. The reporters rather than remaining at the hearing would have had to retain an attorney, assist him in drafting documents and either interrupt the *Stewart* hearing in progress to object to the silence order or travel to the court of appeals in New Orleans or the nearest circuit judge. The view taken in *Dickinson* is perilously close to requiring that the reporters abandon their right to observe and report the hearing in the process of suing to vindicate that right. Normally the appellate process takes weeks and perhaps months rather than hours, and success could not be predicted. But when constitutional rights are at issue as they were in *Dickinson* and when the question is close, as it was in *Dickinson*, the court should not take refuge in merit avoidance devices like the collateral bar rule.[215]

The contemnors argued, in favor of dispensing with the collateral bar rule, that the rule does not "apply to injunctions or other judicial orders infringing freedom of the press"[216] as distinguished from other constitutional freedoms which are subsumed with non-constitutional

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[211] *Id.* at 512 n.18; *cf. In re* Green, 369 U.S. 689 (1962). In *Green* the contemnor made a motion to vacate the challenged order before violating it and, in contempt, the merits of the order were considered. *Green* was distinguished for that reason in Walker v. Birmingham, 388 U.S. 307, 315 n.6 (1967).

[212] 465 F.2d at 512. This was the position of the dissenters in New York Times Co. v. United States, 403 U.S. 713, 748-52 (Burger, C.J.), 752-59 (Harlan, J.), 759-63 (Blackmun, J.) (1971). *But cf.* Oxnard Publishing Co. v. Superior Court, 261 Cal. App. 2d 505, ____, 68 Cal. Rptr. 83, 95-96 (1968).

[213] 465 F.2d at 512.

[214] *See* notes 8-119 and accompanying text *supra.*

[215] *See* Walker v. Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting).

[216] 465 F.2d at 511.

error into the rule.[217] Judge Brown rejected this distinction by relating the mode of expression to the timeliness factor in the timely challenge requirement.[218]

New York Times Co. v. United States,[219] in which the Supreme Court affirmed the right of a newspaper to publish, was also cited by Judge Brown as support for resort to the collateral bar rule. Judge Brown noted that the separate opinions in *New York Times Co.* did not suggest "that the injunctions could have been ignored with impunity" and concluded that "an assumption that courts may punish as contempt violations of even its constitutionally defective orders infringing freedom of the press underlies the *Times* decision."[220] Judge Brown is clearly correct on that point. The distinction between erroneous and void orders should not be obscured by the additional distinction that some errors are sufficiently serious that they may be treated as if they were void. The problem, however, relates not to the magnitude of the asserted error but rather to the practical problem of whether the timely challenge requirement was read so narrowly as to destroy its usefulness. The practicalities of challenge should be considered rather than legalism and possibilities. The contemnors in *Dickinson* had an abstract rather than a practical opportunity to challenge the silence order before publishing. The collateral bar rule should, therefore, not be interposed to prevent a challenge to the order after publication.

Judge Brown mentioned but did not discuss another of the qualifications placed on the collateral bar rule in *Walker v. Birmingham*. In explaining why the Alabama courts could have recourse to the collateral bar rule in *Walker*, the Supreme Court said, "this is not a case where

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[217] *See* note 145 *supra*. Walker v. Birmingham, 388 U.S. 307 (1967), involved picketing. The argument that the collateral bar rule does not apply to prior restraints would fail because the more prior the restraint is, the more time there is for a timely challenge. *See* notes 209-13 and accompanying text *supra*. The collateral bar rule would not apply in a contemporaneous prior restraint (if there is such a thing), however, because there would be no time for a timely challenge. *Cf.* United States v. Dickinson, 465 F.2d 496, 511 (5th Cir. 1972).

[218] Of course the nature of the expression sought to be exercised is a factor to be considered in determining whether First Amendment rights can be effectively protected by orderly review so as to render disobedience to otherwise unconstitutonal mandates nevertheless contemptuous. But newsmen are citizens, too. They too may sometimes have to wait. They are not yet wrapped in an immunity or given the absolute right to decide with impunity whether a judge's order is to be obeyed or whether an appellate court is acting promptly enough.

465 F.2d at 512 (cite omitted).

[219] 403 U.S. 713 (1971).

[220] 465 F.2d at 511.

the injunction was transparently invalid or had only a frivolous pretense to validity" because of the local government's interest in traffic control.[221] It may be inferred from this statement that a frivolous or transparently invalid injunction may be disobeyed, and upon a charge of contempt, frivolousness or transparent invalidity may be shown to hurdle the barrier posed by the collateral bar rule and to reach a hearing on the merits of the injunction or order.[222] The frivolousness exception has never been expanded nor explained, and Blasi says, "[i]t is still unclear whether this language represents merely a makeweight argument or a careful delineation of doctrine."[223] Nevertheless, Judge West's silence order was a frivolous and transparently invalid one. The court of appeals states that "no decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court."[224] Thus, had Judge Brown followed the logic of the transparent invalidity exception which he cites,[225] contempt would have been reversed along with the order on which it was based.

In order to justify the collateral bar rule, injunctions should be distinguished from other governmental directives. A citizen may violate most unlawful exercises of government power but must, at the price of contempt, obey illegal, even unconstitutional injunctions.[226] Judge Brown's response to this apparent anomoly is in the best creative tradition. He begins by pointing out the "uniqueness" of judicial orders as compared to legislative, executive and administrative directives. The difference in scope of review is "not the product of self-protection or arrogance of Judges."[227] According to Judge Brown, breach of executive and legislative directives is passed to the courts where the final responsibility for enforcement lies. Disobedience of a statute or executive order does not prevent those bodies from discharging their duties to pass upon and execute public policy because the court system deals with the recusant. Defiance of court orders, in contrast, "requires further action by the judiciary, and therefore directly affects the judiciary's ability to

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[221]388 U.S. at 315.

[222]Note, *Constitutional law: The First Amendment and the Right to Violate an Injunction*, 56 CALIF. L. REV. 517, 521 (1968).

[223]Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1561 (1968).

[224]465 F.2d at 507.

[225]*Id.* at 509.

[226]*See generally* Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

[227]465 F.2d at 510.

discharge its duties and responsibilities."[228] Therefore, it is appropriate to require a citizen to test an injunction by orderly review rather than by ignoring it. Contempt power and the collateral bar rule are, by this reasoning, essential for the courts to carry out their duties under separation of powers.[229]

Judge Brown's reasoning in incisive and original. Nevertheless, the collateral bar rule is not applied to breach of all judicial orders. Due process requires that the courts expunge contempt for breach of an injunction which was granted without personal or subject matter jurisdiction.[230] Moreover, a decree of civil contempt rests upon the underlying order and falls with it.[231] Discovery sanctions under the federal rules apparently are treated in the same way.[232] One simple fact cannot be concealed. The collateral bar rule, although based on significant and respectable policies, is a merit avoidance technique devised by judges for the discipline of litigants and others.

CONCLUSION

This article has analyzed the media's problems in securing review of a silence order. They are imposing. The source of many of the difficulties in this study is easy to discern. It is the conflict between the ideals of the substantive standard and the procedural realities of enforcing them. The difficulty, in short, is a tyranny of labels. Review of silence orders is an exceptional problem which strains accepted terminology and analysis. It does not fit into a procedural framework which was designed with other things in mind. When analysis is trapped in a conventional conceptual framework, discussion of the issues is obscured by

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[228] *Id.*

[229] *Id.* at 510. *But cf.* Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

[230] *See* notes 142-43 and accompanying text, *supra.*

[231] United States v. UMW, 330 U.S. 258, 294-95 (1947). Judge Brown gives as an exception to the collateral bar rule breach of an order which requires "an irretrievable surrender of constitutional guarantees." The cases cited are civil contempt cases in which the order was coercive rather than punitive. Gelbard v. United States, 408 U.S. 41 (1972); Malloy v. Hogan, 378 U.S. 1 (1964); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[232] Under the present rule the court is to decide whether "opposition to the motion was substantially justified." FED. R. CIV. P. 37(a)(4), Hickman v. Taylor, 329 U.S. 495 (1947); *cf.* C. WRIGHT, *supra* note 12, § 16 at 52 n.17, § 90, at 398; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2006 n.85 (1970). *But see* Southern Ry. v. Lanham, 403 F.2d 119, *rehearing denied*, 408 F.2d 348, 349-50 (5th Cir. 1969) (Brown, C.J., dissenting) (criminal contempt and appeallable yet discovery order examined on the merits). Clarity would be served if it were recognized that discovery sanctions are in a separate class for the purposes of appealability and scope of review. *Cf.* 4 MOORE ¶ 26.83[8]; 9 MOORE ¶ 110.13[2], [4].

the opaque fog of an almost inapplicable terminology. Understanding of the underlying interests and policies is hampered.

The current procedural framework is not inadequate to secure review of silence orders. Workable mechanisms are available to enforce the commands of the substantive law. The extraordinary writs provide, almost everywhere, a potential safety valve for speedy review. The Florida court has pointed the way[233] and others would do well to follow.

If the media disdains to challenge the silence order but instead ignores it, the merits of the order should, nevertheless, be reviewed in contempt. The interests are too basic and the problem too general to require the media to choose between abandoning a constitutional right and being punished for exercising it. The need for objective, institutionalized judgment and authoritative standards for lower courts are also weighty reasons to review the constitutionality of the silence order. If, moreover, the collateral bar rule is rejected in silence order contempts, it should be rejected because the silence order does not match the requirments for the rule rather than because an erroneous silence order is unconstitutional and void.[234]

Procedure is an important instrument, but it is an instrument and nothing more. Procedure has been repeatedly remade and is being remade now. The only sound test of procedure is its practical effect in allowing the legal process to reach decisions on the merits. When decisions on the merits are prevented by failure to consider all affected interests, lack of convenient access to a neutral forum or refusal to reach the essential justice of a cause, complacent dogmatism has replaced thoughtful analysis. It is especially disheartening when the means for the task are at hand but, because inapplicable dogmas are inflexibly applied, they have not been brought into play. This modest effort has, it is hoped, suggested methods which will allow all interests to be conveniently considered and ensure that all cases in this narrow area are decided on their merits.

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[233] *See* notes 77-79 *supra.*

[234] *See* notes 182-88 *supra.*