NOTES

INJURIA NON EXCUSAT INJURIAM: UNCONSTITUTIONAL INJUNCTIONS AND THE DUTY TO OBEY

The contempt power is understandable when seen through the perspectives of its age of inception, an age of alleged divinely-ordained monarchies, ruled by a king totally invested with all sovereign legal powers and accountable only to God. Under any circumstances resistance to the king was a sin which would bring damanation.

Goldfarb, The History of the Contempt Power, 1961 WASH. U.L.Q. *1, 7.*

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, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of 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.

Howat v. Kansas, 258 U.S. 181, 189-90 (1922) [cited with approval in Walker v. City of Birmingham, 388 U.S. 307, 314 (1967].

In 1967 the Supreme Court in *Walker v. City of Birmingham*[1] affirmed criminal contempt convictions of the late Dr. Martin Luther King and several of his followers[2] for intentional violation of an Alabama Circuit Court's *ex parte* temporary injunction, ordering the petitioners to refrain from participating in several scheduled Easter weekend protest marches.[3] In affirming, the Court refused to permit a collateral attack on first amendment grounds against either the injunction or the municipal permit ordinance which it incorporated.[4] In

1 388 U.S. 307 (1967).

2 The petitioners in *Walker* were eight Negro ministers, including King, Ralph Abernathy, and Fred Shuttlesworth. *See id.* at 341 (Brennan, J., dissenting).

3 The injunction, set out in full in Appendix A of *Walker, id.* at 321-22, did little more than incorporate the text of the Birmingham parade ordinance. *See* Walker v. City of Birmingham, 388 U S 307, 327 (1967) (Douglas, J.) (dissenting).

4. It shall be unlawful to organize or hold, or to assist in organizing or holding, or to

1968, the Court, in *Carroll v. President & Commissioners of Princess Anne*,[5] reversed a Maryland circuit court's *ex parte* restraining order issued against members of a "white supremacist" organization, holding that no *ex parte* order is valid if an adversary hearing on the issue of interim restraint of first amendment privileges is practicable.[6] The *Walker* decision has been severely criticized,[7] particularly in light of the Court's decision in *Shuttlesworth v. City of Birmingham*,[8] which held the ordinance in question in *Walker* void on its face. The Court's subsequent decision in *Carroll* mandates, however, that *ex parte* injunctions such as issued in *Walker* are no longer ordinarily acceptable in first amendment litigation. Nonetheless, the question remains whether *Walker* would deny assertion of first amendment defenses in contempt proceedings for violation of an overbroad injunction issued after an *adversary* contest. It is the purpose of this note to explore this issue, particularly in light of a suggested re-evaluation of the *Walker* opinion.

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take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions.

BIRMINGHAM, ALA., CODE § 1159 (1944).

5. 393 U.S. 175 (1968).

6. There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968). *See* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 536 (1970).

7. *See, e.g.*, Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 135 (1968) [hereinafter cited as Selig]; Comment, 56 CALIF. L. REV. 517 (1968); Comment, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 633 (1970); Comment, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 141 (1967); Comment, *Constitutional Law-Procedural Limitations on Defenses Available in Contempt Proceedings*, 22 SW. L.J. 334 (1968); Comment, 19 SYRACUSE L. REV. 124 (1967).

8. 394 U.S. 147 (1969).

I. WALKER V. CITY OF BIRMINGHAM

In April of 1963, King and his followers were engaged in a series of civil rights demonstrations in Birmingham, Alabama. Aware that mass civil rights marches were scheduled for the Easter weekend, city officials filed a complaint in the Alabama Circuit Court alleging that the activities were "calculated to provoke breaches of the peace", "threaten(ed) the safety, peace and tranquility of the City," and placed "an undue burden and strain upon the manpower of the Police Department".[9] The court issued an *ex parte* injunction of indefinite duration restraining the petitioners and all those persons with notice of the order from participating in or encouraging mass street parades or mass processions without a permit as required by the Birmingham parade ordinance.[10] Petitioners were served with copies of the court order early the next morning, which was a day before the first of the planned demonstrations. Apparently convinced that they would receive no co-operation or permit from the city, and that the Alabama state court would be unwilling to reconsider its order in an adversary proceeding,[11] the *Walker* petitioners made no effort either to comply with the Birmingham ordinance or to inform the Circuit Court of what they believed to be constitutional error. Thus, without first having made any attempts to co-operate with the local authorities or court, the petitioners held, in violation of the injunction, marches and demonstrations over the weekend which were marred by sporadic violence and property damage.[12] The following Monday, when the

9. *See* Walker v. City of Birmingham, 388 U.S. 307, 309 (1967).

10 *See* notes 3 & 4, *infra*.

11. The majority in *Walker* set forth fully in an appendix the text of petitioner's statement issued shortly after service of the writ. That statement included the following remarks:

> Alabama has made clear its determination to defy the law of the land. Most of its public officials, its legislative body and many of its law enforcement agents have openly defied the desegregation decision of the Supreme Court. We would feel morally and legal (sic) responsible to obey the injunction if the court of Alabama applied equal justice to all of its citizens. This would be sameness made legal. However, the ussuance (sic) of this injunction is a blatant *difference* made *legal*.
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> We believe in a system of law based on justice and morality. Out of our great love for the Constitution of the U.S. and our desire to purify the judicial system of the State of Alabama, we risk this critical move . . . .

Walker v City of Birmingham, 388 U.S. 307, 323-24 (1967) (Appendix B).

12. The *Walker* opinions reveal two distinct assessments of the quantity of violence which occurred *Compare* Justice Stewart's description: "Some 300 or 400 people from among the onlookers followed in a crowd that occupied the entire width of the street and overflowed onto the sidewalks. Violence occurred. Members of the crowd threw rocks that injured a newspaperman and damaged a police motorcycle.", 388 U.S. 307, 311, *with* Justice Brennan's: "The participants

petitioners filed a motion to dissolve the injunction, the court held them in contempt.[13] The Circuit judge refused to consider petitioner's attack on the constitutionality of both the ordinance and restraining order, noting that there had been no efforts to either comply with or to vacate the injunction before it was willfully and deliberately violated.[14]

On appeal, petitioners defended their non-compliance by asserting the invalidity of the parade ordinance and the injunction enforcing it on the ground that both were vague and overbroad, operating in prior restraint of a protected speech activity. The Alabama Supreme Court, upon the authority of *Howat v. Kansas*,[15] held these issues could be appropriately raised only in a direct attack, and not collaterally in a contempt proceeding.[16] The Supreme Court, splitting five to four,[17] affirmed the contempt conviction.

Unfortunately, Justice Stewart's majority opinion is less than unequivocal. For example, the decision has been severely criticized for its heavy reliance on the language and authority of *Howat*, a decision seemingly inapplicable as precedent and insensitive to the special procedural safeguards demanded by the Court for first amendment activities.[18] A closer reading of the Stewart opinion reveals that the majority opinion utilized *Howat* only to explain the decision of the *Alabama* Supreme Court. This is an important distinction. While the Court was willing to allow *these* contempt convictions to rest on *Howat's* authority, *Walker* refuses to accept *Howat* as an inflexible rule which will bar all collateral first amendment attacks. The Court stated its exact holding as follows:

> In the present case, however, we are asked to hold that this rule of

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in both parades were in every way orderly; the only episode of violence . . . was rock throwing by three onlookers . . . immediately taken into custody by the police." 388 U.S. 307, 341.

Justice Brennan infers in his dissent that the majority's overemphasis of the disruptions stemmed from their fear of generating a rule of law which would sanction riots and civil disobedience. *See* Walker v. City of Birmingham, 388 U.S. 307, 349 (1967). It is equally plausible that the majority credited the disorder to the unwillingness of the petitioners to seek a modified court order regulating both the police and demonstrators' conduct. *Cf.* Williams v. Wallace, 240 F. Supp. 100 (D.C. Ala. 1965) (Selma-Montgomery march); City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S. 1028 (1968); City of Louisville v. King, 12 Race Rel. L. Rep. 673 (Cir. Ct. Ky. 1967).

13. The sentence was five days in jail and a $50 fine, the maximum under the contempt statute. *See* ALA. CODE tit. 13, § 143 (1958).

14. *See* Walker v. City of Birmingham, 388 U.S. 307, 311-12 (1967).

15. 258 U.S. 181 (1922).

16. Walker v. City of Birmingham, 279 Ala. 53, 181 So. 2d 493 (1965).

17. Dissenting were the Chief Justice and Justices Brennan, Fortas, and Douglas.

18. *See generally* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

> law, upon which the Alabama court relied, [*Howat*] was constitutionally impermissable. We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction . . . without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit, in accordance with its terms. Whatever the limits of Howat v. Kansas, [footnote; *In re Green*, 369 U.S. 689 (1963)] we cannot accept the petitioners' contentions in the circumstances of this case.[19]

Therefore, *Walker* holds technically that *Howat* was an acceptable precedent to sustain the contempt conviction, despite first amendment challenges, under the circumstances of the case presented. Perhaps designedly, the *Walker* opinion did not foreclose the question whether the defendants might have permissibly raised the invalidity of the ordinance or injunction if the Alabama Circuit Court had refused to modify or dissolve its order after the petitioners had co-operatively and respectifully informed the court of its error and sought reasonable alternatives.

II. CRITICISM AND DISMAY OVER WALKER

Legal commentary on *Walker* has not generally read that decision narrowly.[20] The absence of such consideration may flow from the voting split of the Court, with the 'liberal' defenders of first amendment activity in dissent. However, it is perplexing that general commentary on the decision has imputed unhesitantly to the Justices in the majority a willingness to fashion a tool for the indiscriminate injunctive suppression of free expression. In any event, the basic "collateral bar" rule thought to eminate from *Walker* is:

> An erroneous injunction impermissably infringing First Amendment

19. Walker v. City of Birmingham, 388 U.S. 307, 315 (1967). In addition to the *In re Green* limitation, the Court noted that *Walker* "is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Id.* at 315. The Court also declined to decide whether the parade ordinance was void on its face or whether the injunction suffered from overbreadth. *Id.* at 317. The California Supreme Court has read through this refusal an additional limitation. *See In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968). The difficulty with these supposed "limitations" is that the Court made no attempt to explain them and the commentators have had difficulty breathing life into them. *See, e.g.*, Comment, 56 CALIF. L. REV. 517, 521 (1968).

20. *But see* Comment, 56 CALIF. L. REV. 517, 521-22 (1968). At least one article has discounted the possibility of a reversal in *Walker* had petitioners sought modification of the injunction prior to its violation by noting that the Court cited no authority supporting such a principle. This conclusion overlooks both the express language of the *Walker* opinion and its citation to *In re* Green, 369 U S 689 (1963). *See* Comment, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 635 n.54 (1970).

> freedoms issued by a court with proper jurisdiction must be obeyed until reversed by the issuing court or on direct appeal, and is not subject to a collateral constitutional attack in a contempt proceeding following its violation.[21]

This construction of *Walker* subjects itself automatically to numerous and substantial objections. First, the "collateral bar" rule forces a destructive delay in relief from an erroneous ruling. Especially in political speech activity, timeliness has consistently been recognized as crucial. "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances."[22] Obviously, an inflexible "collateral bar" rule envisages both the delay and expenses of a direct attack on appeal far in excess of that which even unsympathetic state officials may deem necessary to quash the expected impact of unwanted local demonstrations.[23] Likewise, the rule would seemingly permit local authorities to acquire "eleventh hour" injunctions which would in effect stifle all possibility of attack on the injunction because of the insufficient time remaining for adequate preparation to resist in the trial court or through an expedited appeal.[24]

The *Walker* majority attempted to dissipate contentions of unconstitutional delay by noting that Alabama provided an expedited

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21. *See e.g.*, Selig; Comment, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 141 (1967). *But see In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968); City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S. 1028 (1968).

22. A Quantity of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) cited with approval in Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 182 (1968); *cf.* Lovell v. Griffin, 303 U.S. 444, 452 (1937); *In re* Jackson, 96 U.S. 727, 733 (1877).

23. The degree of success of dilatory tactics may depend upon the form of the injunction. If the body of the injunction contains both (1) a reference to the underlying ordinance or statute and (2) the substantially complete text of the enactment, it would seem that if the injunction and the ordinance are facially void, this will appear on the face of the injunction. Whether this is true when only one of the above elements is incorporated into the injunction is doubtful. An injunction which merely prohibits first amendment activity and enjoins violation of a certain section of the municipal code, without more, may be void as a prior restraint; but unless the injunction also contains the text of the legislation, the facial voidness of the latter will not be apparent. In such a case, the question on direct review *could* be limited solely to the validity of the injunction. A successful litigant would then conclude the first attack, possibly after extended appellate review, in precisely the same position in which he began. A second, equally time-consuming process would be required to destroy the statute or ordinance as well.

24. *See e.g.*, Comment, *Collateral Attack upon Labor Injunctions Issued in Disregard of Anti-Injunction Statutes*, 47 YALE L.J. 1136, 1144 (1938); *cf.*, Z. CHAFEE, SOME PROBLEMS OF EQUITY 347 (1950).

process of appellate review.[25] To the extent that this reference limits the *Walker* holding, the Court clearly departs from the *Howat* precedent. Moreover, the Court neglected to note that the expedited appeal procedure would still have extended litigation beyond Easter Sunday and prevented the protest at its scheduled time.[26] The burden of delay created by a direct appeal perhaps takes a back seat to the threat of enormous expense, even in an expedited appeal. The state or federal government might, on the other hand, be obligated to supply appointed counsel and to assume the expenses of appeal in a collateral contempt proceeding. Of course, the value of an appointed counsel would diminish significantly if the demonstrator were estopped from raising constitutional defenses.

Whatever alternative federal remedies might provide relief from a state court injunction in a particular case, such as injunction before proceedings instituted, *Dombrowski v. Pfister*,[27] after suit filed, *Machesky v. Bizzell*,[28] or declaratory relief, *Zwickler v. Koota*,[29] stifling delay and expense would still seem relatively certain. If *Walker* meant to require such hardships, the Court offered no explanation why the balanced interest of the state court's dignity versus first amendment freedom demands so much.[30]

Second, this "collateral bar" rule offers a strong incentive to local officials to suppress unwanted protests and acts as a "chilling effect" on the exercise of the first amendment rights. It is significant to note that the duty of obedience under *Walker* is not limited to injunction prohibiting violations of statutes or ordinances, but will apply equally to an order restraining first amendment activities not prohibited by statute.[31] It would seem that local officials eager to collar civil rights or student demonstrators, but unassisted by the state legislature, will soon discover the *Walker* injunction a powerful club, easily reshaped for indiscriminate use.[32] Indeed, a discriminatory injunction may be far

25. Walker v. City of Birmingham, 388 U.S. 307, 319 (1967).

26. *See* ALA CODE tit. 7, Sup. Ct. Rules (1951).

27. 380 U.S. 479 (1965).

28. 414 F.2d 283 (5th Cir. 1969).

29. 389 U.S. 241 (1967).

30. *See generally* Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968).

31 *See* City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S 1028 (1968).

32 *Cf*. Brief for Appellants at 30 n. 15, Fields v. City of Fairfield, 375 U.S. 248 (1963) (detailed history of cases involving discriminatory local suppression of speech activities); Niemotko v. Maryland, 340 U.S. 268 (1951).

less difficult to obtain than an overbroad ordinance, the latter presumably requiring the combined shortsightedness or prejudice of several lawmakers rather than one vindictive jurist. This analysis quickly reveals that the underlying theory to the "collateral bar" rule—undoubting respect for the judiciary—threatens to permit profitable and unrestrained disrespect *by* the judiciary of the Constitution, when personal motives override judicial neutrality.

Finally, elevation of the *Walker* injunction above the protective shield of the Constitution logically must have the same "chilling effect" which the Court has thought present in vague and overbroad free speech regulatory statutes.[33] In short, *Walker v. City of Birmingham*, read as a judicial off-spring of the broad rule stated in *Howat v. Kansas* appears inconsistent and insensitive to a long line of Court decisions erecting special procedural safeguards against discriminatory suppression of first amendment activity.

It should be obvious that the dismay expressed over these potent dangers rests on the premise that the prosecutors and judiciary may be corruptable and prejudiced; and moreover, that this prejudice may receive priority by those officials over the obligations of their office *and* to the Constitution. Absent this premise, there is no reason to presume that an informed court will deliberately confront demonstrators with a repressive, unconstitutional injunction.[34] While it might be forcefully argued that the conduct of the trial court in *Walker* illustrates the accuracy of the premise, it is clear that the Supreme Court has been traditionally unwilling in other civil rights contexts to presume that the state judiciary will not enforce the Constitution even-handedly and accurately.[35] In this regard it is significant that there are two equally strong inferences which may be drawn from the circuit court's issuance of the overbroad *ex parte* injunction in *Walker*. First, it may be inferred that the judge in the *ex parte* proceeding heard only evidence

33. *See, e.g.*, F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 80-81 (1930); Selig at 142. "This injunction was such potent magic that it transformed the command of an unconstitutional statute into an impregnable barrier . . . entirely superior . . . to even the United States Constitution." Walker v. City of Birmingham, 388 U.S. 307, 330 (1967) (Warren, Ch. J., dissenting).

34. *See* Williams v. Wallace, 240 F. Supp. 100 (D.C. Ata. 1965); *cf.* City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S. 1028 (1968).

35. *See, e.g.*, Cameron v. Johnson, 390 U.S. 611 (1968); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

self-serving to the interests of the complainants, and that he remained otherwise uninformed of the relevant law and facts.[36] The decision in *Walker*, clarified by *Carroll*, suggests that the petitioners, by their resolute distrust of the local court and consequent refusal to co-operate or even appear before the circuit court, failed to diminish the possibility of the second inference and therefore were unentitled to the benefit of the first as a part of their defense in the contempt proceeding. In short, *Walker can* be sensibly read to deny the shelter of first amendment defenses in contempt proceedings for violation of a court order only where a defendant's unreasonable refusal to seek protection of his first amendment privilege before the issuing court *invited* the error sought to be asserted.[37] This would limit the *Walker* precedent, except in the unusual case of default, to the *ex parte* proceeding, now antiquated for first amendment adjudication. The opinion in *Walker* will, of course, still be influential in assessing the continued vitality of *Howat* as an absolute bar of collateral defenses.

III. Prior Federal Decisions

The Court in *Walker* sustained the Alabama Supreme Court's reliance on *Howat v. Kansas* in part by stating that contemporary lower federal decisions had adopted a parallel collateral bar for their general administration of contempt.[38] This aura of precedent in the federal court system is unduly misleading. Quite obviously, *Walker* involved a direct clash between the mandates of the first amendment and the power of contempt—and was not a question of general administration. Only one of the cases cited by the Court in its lengthy footnote even considered the sensitive issue raised in *Walker* and, moreover, *Brougham v. Oceanic Steam Navigation Co.*,[39] the origin of the federal collateral bar rule, seemingly countenanced some constitutional defenses.

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36. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.

The same is true of the fashioning of the order.

Carroll v President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

37 City of Chicago v. King, 86 Ill. App.2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S. 1028 (1968)

38 Nine federal and five Supreme Court decisions are cited. *See* Walker v. City of Birmingham, 388 U.S. 307, 314 (1967).

39 205 F. 857 (2nd Cir. 1913).

Brougham was a part of the legal aftermath of the Titanic disaster. Following the sinking of the ship, Oceanic, an English corporation, sought to limit its liability in the United States under some protective federal statutes, and as part of its protection, was granted an injunction by the Southern District of New York restraining the commencement and prosecution of suits predicated on the disaster. Brougham, an attorney, filed as personal representative an action for wrongful death. For this conduct he was held in contempt for violating the injunction. Affirming the conviction, the Second Circuit stated:

> The injunction having been issued by the District Court within its jurisdiction and the plaintiff in error having disobeyed it, he was . . . properly adjudged in contempt. We find nothing in the contentions made in his behalf . . . to excuse him. We are satisfied that he acted with sufficient knowledge; . . . and that no constitutional right of his client justified his disobedience.[40]

The exact meaning of the last sentence in the above extract is not without ambiguity. It certainly does not lend ready support to an *absolute* collateral bar of first amendment defenses *of the defendant* in a contempt proceeding.

Walker cited only one decision, *Kasper v. Brittain*,[41] involving alleged first amendment defenses to a contempt citation. In *Kasper*, the Sixth Circuit applied the *Howat* collateral bar rule to uphold the contempt conviction of a race agitator whose inflamatory speeches against desegregation in violation of an *ex parte* temporary injunction had led to violence. Although the opinion recites the "absolute" language of *Howat*, the Court of Appeals permitted the defendant to assert a first amendment defense and held that his speech, constituting a clear and present danger, was not entitled to first amendment protection. It was only after this finding that the court cited *Howat* to support affirmation of the conviction.[42] Because the defendant's speeches in *Kasper* were not of a privileged first amendment variety, the court may have heard the constitutional defense in form only—so as to "cover all the bases." Thus *Kasper*, like *Brougham* and the cases following it cited by the Court, are ambigious and simply do not assist in an evaluation, clarification or support of Walker.

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40. *Id.* at 861.

41. 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957).

42. *Cf.* Ford v. Boeger, 362 F.2d 999 (8th Cir.), *cert. denied*, 386 U.S. 914 (1966) (first amendment defense considered); *In re* Block, 50 N.J. 494, 236 A.2d 589 (1967); Comment, 56 CALIF. L. REV. 517 (1968).

V. CARROLL V. PRESIDENT & COMMISSIONERS OF PRINCESS ANNE.

On the evening of August 6, 1966, the National States Rights Party, a "white supremacist" organization, held a militant, provocative rally directed against Negroes and Jews. The atmosphere of the meeting was tense, and city and county officials, fearing outbreaks of racial violence at the next evening's scheduled assembly, obtained an *ex parte*, ten day restraining order from the local county circuit court. The order enjoined the organization from holding meetings "which will tend to disturb and endanger the citizens of the County."[43] No notice of the proceeding was given, or apparently attempted to be given, to the members of the organization until after the order was issued. Complying with the order, the scheduled meeting was cancelled. At a trial held after the expiration of the ten day order, the circuit court extended the substance of the ten day order for another ten months. Without violating either order, the "Party" appealed to the Maryland Court of Appeals, where the ten month order was vacated, but the original *ex parte* order affirmed. On a direct appeal to the Supreme Court, the *ex parte* order was set aside, the Court holding that no *ex parte* order is valid if an adversary hearing on the issue of restraint of first amendment privileges is practicable.[44] The respondents in *Carroll* argued that since the order had expired, the case was moot and should be dismissed without reaching the merits. In rejecting this contention, the Court made clear that it considered it particularly appropriate to decide the case in view of its decision in *Walker*.[45] In this respect, the Court observed that the petitioners had ". . . pursued the course indicated by Walker." The Court stated that this compliance by the *Carroll* petitioners was ". . . to seek judicial review of the injunction and not to disobey it . . . ."[46] This subtle statement of course does nothing to clarify *Walker*. "Compliance" by seeking "judicial review"

43. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 177 (1968).

44 We need not here decide that it is impossible for circumstances to arise in which the issuance of an ex parte restraining order for a minimum period could be justified because of the unavailability of the adverse parties or their counsel . . . (I)n the present case, it is clear that the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding before the holding of the rally was restrained, is incompatable with the First Amendment.

Id. at 184-85.

45. *Id.* at 179.

46. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it . . . Petitioners have pursued the course indicated by Walker . . . .

Id. at 179.

of an *ex parte* order could mean as little as filing a motion to dissolve or as much as carrying an appeal to the Supreme Court. Petitioners in *Carroll* did both, and in addition, indicated a willingness to cooperate with the local court rather than hold it in disdain.[47] Because the petitioners in *Carroll* exhausted all available appellate procedures rather than violating the ten day order, it can certainly be argued that *Carroll* and *Walker* require an absolute bar to a constitutional defense in a contempt proceeding, unless those under restraint seek relief solely through appeal. The difficulty with this interpretation is that it is seemingly out of step with the otherwise sensitive approach to the First Amendment expressed by the Court, and as such, should not be readily accepted.

> Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.
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> The Court has emphasized that "[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" . . .[48]

The conveniently cross-referenced reasoning of *Carroll* to *Walker* suggests that the Court, perhaps in response to the criticism drawn by *Walker*, is unwilling to foreclose the future opportunity of a narrow reading.

Justice Fortas' majority opinion in *Carroll* submits two primary reasons for the Court's rejection of *ex parte* first amendment adjudication. First, he posits that the *ex parte* injunction interferes with the timely exercise of protected political speech, where a delay of ". . . even a day or two may be of crucial importance in some instances."[49] Second, Justice Fortas flatly states that non-adversarial first amendment adjudication ". . . reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the [First] Amendment seeks to assure."[50] These dual propositions tendered by the

47. *See* note 11, *supra*.

48. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180-81 (1968).

49. *Id.* at 182.

50. *Id.* at 184. The Court emphasized particularly the dangers of judicial reliance on the versions of events and dangers presented by the prosecuting officials, because of their "special interest."

Carroll Court to support its holding are pertinent, however, only if it is first conceded that *Walker* would permit collateral constitutional defenses in subsequent contempt proceedings following the violation of an *ex parte* injunction if the petitioners had in a co-operative spirit appeared before the court to inform the court of its error and seek alternative solutions without avail. For example, *Carroll* posits that the *ex parte* injunction, unlike injunctions following an adversary contest, can obstruct the timely exercise of political expression. Demonstrators confronted with an unconstitutionally vague injunction issued following an adversary hearing likewise have no guarantee of timely exercise if they too are inflexibly required to attack the injunction only by a direct appeal. For the emphasis on timeliness to acquire meaning in *Carroll*, therefore, one of two possible premises must be accepted. It must be assumed that demonstrators will, if necessary for a timely expression, violate the order in complete disregard of the absolute certainty of conviction for contempt or that the collateral bar rule is not absolute in first amendment adjudication. The second of the alternatives is a necessary choice by common sense alone.[51]

By conceding that there are inherent difficulties in shaping a constitutionally precise injunction in *ex parte* litigation, the Court in *Carroll* confirms that two inferences should be drawn from the issuance of a faulty *ex parte* injunction.[52] However, *Carroll* asserts that active participation by all interested parties on a petition to enjoin speech activities significantly reduces the probability that a trial court has unintentionally issued a suppressive decree. Thus, the inference that the overbroad injunction is the by-product of a procedurally deficient *ex parte* hearing, is substantially weakened. Moreover, active participation negates the inference of *invited* error.[53] Under this analysis, limiting challenges of an erroneous ruling solely to appeal, rather than by a defensible violation, can no longer be strongly supported. Certainly when required pursuit of relief solely by appeal will frustrate timely exercise of the protected activity, chill by expense and dilatory tactics the desire to engage in political expression, and provide a vicious tool for indiscriminate suppression to a powerful minority, respect for the first amendment ought to receive priority over the orderliness of direct appeals. This is, as will be seen, the rationale of *In re Green* as distinguished from *Howat* by the *Walker* Court.

51 *Cf.* Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).

52. *See* note 31, *supra* and accompanying text.

53. *See* City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41, 48 (1967), *cert. denied*, 393 U.S. 1028 (1968).

IV. HOWAT V. KANSAS & IN RE GREEN

In 1920, following an economically disasterous coal miner's strike, Kansas passed the Industrial Court Act, requiring compulsory arbitration to prevent strikes in critical industries. Two years later coal strikes again threatened, and an injunction was obtained to prevent shutdowns while an industrial board investigated alleged grievances. Arguing that the Industrial Act was unconstitutional,[54] and therefore that the court was without jurisdiction to compel obedience by injunction, the miners ignored the order. The criminal contempt conviction which followed was upheld by the Kansas Supreme Court. The Supreme Court dismissed a writ of error from that decision for want of a substantial federal question, framing an apparently absolute "collateral bar" rule (set out in full in the introduction) for the presentation of a constitutional defense.[55] Immediately following *Howat's* recitation of the general doctrine is a qualifying paragraph unmentioned in *Walker*. The Court found that the injunction was not issued to enforce the Industrial Courts Act[56] but rather ". . . was a proceeding wholly independent of that Act, and the district court, in entertaining it, did not depend on the constitutionality of that act for its jurisdiction or the jurisdiction of its order."[57] Thus, *Howat* did not decide whether a constitutional attack was permissable in contempt proceedings for violation of an injunction issued solely on the authority of an unconstitutional statute. That issue was for the first time reached in *Walker*.

In *Walker*, while the circuit court's order included extracts of the parade ordinance, declared subsequently unconstitutional in *Shuttlesworth*,[58] it is clear that the trial court could have issued originally, or by amendment, a narrowly drawn injunction designed to prevent violence, etc. without reliance on enforcement of the overbroad

54. The first amendment was not one of the grounds asserted.

55. Compare the *Howat* rule with Mr. Justice Black's dissenting statement in *Feiner v. New York*, 340 U.S. 315 (1915): "I understand that people in authoritarian countries must obey arbitrary orders. I had hoped that there was no such duty in the United States." *Id.* at 327-28. Justice Black was in the *Walker* majority.

56. The injunction issued on the grounds that the "proposed strike was a conspiracy to stop the railroads, and . . . institutions, and industries of the state in the conduct of its government affairs, and to cut off the supply of coal . . . ; that all said acts would seriously affect and injure the public welfare and the public health of the people." Howat v. Kansas, 258 U.S. 181, 187 (1922).

57. *Id.* at 190.

58. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

ordinance.[59] Thus, if the trial court had been unwilling in *Walker* to attempt a construction of the ordinance without appellate guidance, but nevertheless was aware of the substantial constitutional issues raised by enforcement of the ordinance,[60] the court had as an available option the power to issue a protective injunction free from the ordinance's taint.[61] However, any judicial attempt to shape a narrow injunction, independent of an overbroad permit ordinance, which would balance the interests of the state and demonstrators, itself seems constitutionally hazardous in an *ex parte* proceeding. Accepting for a moment the realities of an Alabama circuit court judgeship, it seems relatively safe to conclude that a judge may well be, perhaps by political necessity, unsympathetic to civil rights activists. These sympathies, coupled with the self-serving presentation of the state's case in an *ex parte* proceedings[62] and the "inescapably imprecise"[63] first amendment legal standards, represents a fertile ground for overbroad restraining orders. It does not mean, however, that the judge will automatically permit his personal value judgments to override constitutional mandates and alternatives (such as that suggested above) where the facts and law are adequately argued and evaluated in an adversary proceeding.[64] On the contrary, a party's deliberate refusal to inform the court of its error in its original order, and to submit alternative proposals to protect each party's interests (especially where there is sufficient time to do at *least* that),[65] bypasses all orderly judicial review and abandons all respect for the judiciary. Under these circumstances of contemptuous behavior, if not actual contempt, an estoppel of invited constitutional defenses in a collateral contempt proceeding is clearly something far short of the absolute collateral bar postulated in *Howat*. Rather, the estoppel would rest on the proposition that contemptuous violation of a court injunction can not be justified on errors invited by an unreasonable refusal to appear and

59. *Cf* City of Chicago v. King, 86 Ill. App. 2d. 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U S 1028 (1968).

60. *Cf.* Walker v. City of Birmingham, 388 U.S. 307, 316 (1967).

61. *Cf* United States v. Shipp, 203 U.S. 563 (1906) (alternative holding).

62 *See* note 44, *supra.*

63. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

64. In refusing to consider petitioners' constitutional defense to the contempt charges, the Alabama Circuit Court judge in *Walker* expressly noted that there had been no motion to dissolve the injunction. Walker v. City of Birmingham, 388 U.S. 307, 311-12 (1967).

65 While the one day interim period in *Walker* may have prevented adequate preparation for an appearance to dissolve or modify the injunction, it did not prevent an appearance.

co-operate with the enjoining court. *Walker* did not deny that *Howat* was subject to limitation in first amendment adjudication—on the contrary, it suggested that there was a limitation. The question is what limitations the Court is or will be inclined to sanction as inroads on the contempt power.[66] The Court's decision, *In re Green*,[67] apparently was cited by the Court in *Walker* as the outer limit.

In *Green* an Ohio court issued an *ex parte* injunction restraining picketing in a labor controversy. Green, the union attorney, promptly requested the issuing court to vacate its order and to hold a hearing on the injunction, both requests being denied. Theorizing that the injunction was a nullity because issued without a hearing and because federal preemptive legislation had given jurisdiction of the suit exclusively to the NLRB, Green advised the union to test the injunction by disobedience. For this conduct, Green was held in contempt and convicted without a hearing. The Supreme Court reversed the conviction, holding that the state court should have allowed the claimed defense that the state was without power to regulate the labor dispute by injunction. The Court stated, ". . .[A] state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption."[68] Justices Harlan and Clark concurred in part and dissented in part. The dissent was directed at the Court's departure from *Howat*. They agreed, however, that the conviction should be set aside because petitioner had not been permitted to prove an agreement with the issuing judge that violation of the order was an appropriate procedure to test state court jurisdiction.

Although the alleged agreement with the issuing court was considered in *Green* only in the separate opinions, and the Court did not expressly rely on Green's attempt to vacate the order before violating it,[69] the *Walker* majority, referring to the undefined limitation of *Howat*, cited these two factors alone to distinguish the collateral attack permitted in *Green*.[70] The Court was unanimous in the belief that *Green* would have permitted, if applicable, the collateral

66. *See generally In re* Oliver, 333 U.S. 257 (1948); Goldfarb, *The History of the Contempt Power*, 1961 WASH. U.L.Q. 1.

67. 369 U.S. 689 (1962).

68. *Id.* at 692.

69. *See* Walker v. City of Birmingham, 388 U.S. 307, 332 (1967) (Warren, Ch. J., dissenting).

70. *Id.* at 315. The Court did not suggest that contempt standards were varied in the case for an attorney.

constitutional challenge asserted by the petitioners in *Walker*. However, Chief Justice Warren, in dissent, indicated that he was unable to discern why the Court regarded the two facts cited by the majority decisive in distinguishing *Green*, ". . . unless it means to imply that the petitioners . . . would have been free to violate the court order if they had first made a motion to dissolve in the trial court."[71] Admittedly, if *Walker* was intended to be so limited, the Court was unduly ambiguous in its explanation. As suggested earlier in a different line of reasoning,[72] the implication drawn by the Chief Justice would restrict the collateral bar rule of *Howat*, as a safeguard of judicial integrity and respect, to the particular difficuties of *ex parte* first amendment injunctions. *Carroll* limits *Howat's* influence even more, and in general, the scope of permissible defenses in the collateral contempt proceeding for violation of a "speech" injunction would be defined by the more tolerant holding in *Green*.

VI. Conclusion

Howat v. Kansas would impose an absolute collateral bar to first amendment defenses in contempt proceedings for violation of an erroneous injunction. *In re Green* recognizes no such collateral bar for any defenses. Although *Green* was decided after *Howat* and could be read as impliedly overruling that decision. *Walker v. City of Birmingham*, by distinguishing *Green*, makes it impossible to predict what the Court will do with those cases in the future. *Carroll v. President & Commissioners of Princess Anne* has demonstrated the Court's awareness of the possible suppression of first amendment rights through overbroad injunctions. To prevent such infringements, *Carroll* requires that the state invite participation in injunction proceedings by those sought to be restrained. A harmonious reading of *Walker*, consistent with both *Carroll* and the first amendment, would require no more than a petitioner's acceptance of the *Carroll* invitation to prevent a collateral bar. At least until the Court clarifies its position, the ambiguity of *Walker* offers the Court room for reanalysis and narrowing.[73]

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71. *Id.* at 332 n. 9.

72. *See* notes 28-31, *supra*, and accompanying text.

73. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations.
Thornhill v. Alabama, 310 U.S. 88, 96 (1940).