Constitutional Law - Procedural Limitations on Defenses Available in Contempt Proceedings

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NOTES

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Proponents of integration focus upon the use of well-publicized acts of civil disobedience as a tool to achieve racial, social and economic equality for the Negro. This tool is utilized by small groups of demonstrators or picketers and in large mass demonstrations, parades and marches on the "seats of government." Precise timing is essential. With the goal of dramatization of their cause, civil rights leaders build sympathy and support to a climactic stage. But, as the climax is about to be reached, the leaders find themselves facing a revitalized tool of the past, the *ex parte* temporary restraining order or injunction. The injunction is obtained by the local officials, based usually on the pretext of public safety; but its real purpose is often just to disrupt the movement by temporarily halting the activity. At this time the leaders have to make a difficult choice. If the activity ceases and the injunction is fought in the courts, there will be a period when the emotions and sympathy that have been generated can cool off; but if the activity is continued and the injunction temporarily ignored, constitutional grounds for its violation may be advanced at a later time.

I. The Developing Role of the First Amendment Right of Free Speech

The protection of the constitutionally guaranteed right of expression has undergone, and is undergoing, constant change. Inherent in this change is the conflict between expanding the constitutional protection and determining where, in light of current societal mores, the line is to be drawn for the greater benefit of society. In dealing with the right of free speech, the courts and legislatures, after recognizing that the right was not "absolute,"[1] attempted to delineate its boundaries. In *Schenck v. United States*[2] the Supreme Court enunciated its first[3] major test for determining whether particular speech was to be afforded the protection of the Constitution, the "clear and present danger" rule.[4] The clear and present danger doctrine was temporarily replaced as the rationale of a majority of the Supreme Court by the "dangerous tendency" doctrine.[5] This test attempted to weigh the probable effect of speech or expression on other social values. As

[1] Gitlow v. New York, 268 U.S. 652, 666-68 (1925); Fox v. Washington, 236 U.S. 273 (1915) (speech is not protected if it is to encourage a man to commit a crime); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[2] 249 U.S. 47 (1919).

[3] The Court adopted the common law rule of proximate causation which required proof of the speaker's unlawful intent through a showing of a direct and immediate relation between a spoken word and an illicit act.

[4] "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. 47, 52 (1919).

[5] Pierce v. United States, 252 U.S. 239, 249 (1920). *See also* Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919).

a guideline for determining boundaries of free speech, the dangerous tendency test offered no real protection to speech. If there was a conflict between the speech and other social values, the speech would be prohibited.[6] This was far too restrictive on the constitutional right of speech and so the clear and present danger test was "re-adopted."[7] A state was allowed to prohibit speech only when that speech overstepped the "danger" boundary. Moreover, as a practical tool, the test was vague and hard to apply in everyday situations.[8] The difficulty facing the courts was that the test did not recognize "shades" of "evil,"[9] nor was the "present" requirement a very realistic one.[10]

The clear and present danger doctrine also left unanswered the problem resulting when there was a conflict between freedom of speech and another constitutionally guaranteed right. As a result of this conflict the Court adopted the "ad hoc balancing" test,[11] which provided that in each case the Court was to balance the individual's interest of free expression with the social interest sought by the regulation restricting that expression. This test, while purporting to give full weight to values of free speech, has been criticized as being too broad and lacking clearly defined standards to guide a court in its decision-making. The doctrine has also been criticized because if applied seriously, the factual determinations involved would be enormously difficult and time-consuming.[12] Another attempt at delineating a workable test for determining the boundary of free speech occurred when the Supreme Court adopted the test of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[13] This test, while balancing the evil against its improbability, has not been satisfactory as a workable rule of law, and currently the Supreme Court is deciding cases on a case-by-case approach using any one of these tests to fit the facts, but usually using a "balancing" test of some kind whereby it decides whether the speech is to be prohibited in favor of some other social value.[14]

II. Picketing as an Expression of Speech

One particular way in which speech has conflicted with other rights has been in the area of picketing. Picketing as an expression of speech has never been recognized as an absolute constitutional right,[15] nor has it been placed

[6] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910 (1963).

[7] Herndon v. Lowry, 301 U.S. 242 (1937).

[8] The doctrine applied mainly where the restrictions at issue were direct prohibitions of expression by criminal sanction. Emerson, *supra* note 6, at 911.

[9] If the speech proposed the crime of jay-walking, it could be curtailed just as legally as if the words proposed murder.

[10] If the evil was in fact a "substantive evil," what difference would it matter whether the evil was to occur in one day, three weeks or five years?

[11] American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[12] Emerson, *supra* note 6, at 912-14. *See also* Barenblatt v. United States, 360 U.S. 109 (1959) for summary of factors which would have to be balanced.

[13] Dennis v. United States, 341 U.S. 494, 510 (1951).

[14] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (external security vs. free speech); Roth v. United States, 354 U.S. 476 (1957) (obscenity vs. free speech); Feiner v. New York, 340 U.S. 315 (1951) (internal order vs. free speech).

[15] Cox v. Louisiana, 379 U.S. 536 (1965) (Justice Black's concurrence indicates that there is no constitutional right to picket, only a right insofar as it is an expression of speech which is constitutionally protected. *Id.* at 578); Hughes v. Superior Court, 339 U.S. 460 (1949) (picketing is

beyond the control of a state if the manner in which it is conducted or the purpose which it seeks to effectuate gives adequate grounds for its disallowance.[16] The early cases that upheld picketing as an expression of speech[17] followed the clear and present danger rule[18] and pointed out the necessity that the picketing be "peaceful"[19] and as long as the picketing was not violent, it could not be enjoined merely because it provoked violence in others.[20]

As an extension of the picketing freedom, parades, demonstrations, and marches have come into vogue as the way to express one's self. But parades are often restricted by local permit systems or ordinances which are issued by local city officials. A permit system for parades or processions is not a denial of free expression as long as the control exercised is not so stringent as to abridge speech or communication of thought as has been associated in public places.[21] If the ordinance subjects speech to license and censorship, such ordinance is invalid.[22] In 1951, the Court extended the doctrine of "prior restraint" to the area of free speech. The Court held that an ordinance which vested discretionary power in an administrative official to grant or deny a permit to speak on public streets was a prior restraint on

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not the equivalent of speech as a matter of fact).

[16] Hughes v. Superior Court, 339 U.S. 460, 465 (1949). *See also* Cox v. Louisiana, 379 U.S. 559 (1965); Cox v. Louisiana, 379 U.S. 536 (1965); Kelly v. Page, 335 F.2d 114 (5th Cir. 1964) where the court stated:

> Peaceful picketing for the object of eliminating racial discrimination in department stores open to the general public is a right embraced in free speech under the First Amendment of the Constitution, and made applicable to the states by the Fourteenth Amendment. . . . And these rights to picket and to march and to assemble are not to be abridged by arrest or other interference so long as asserted within the limits of not unreasonably interfering with the right of others to use the sidewalks and streets, to have access to store entrances, and where conducted in such manner as not to deprive the public of police and fire protection.

Id. at 119 (citations omitted).

[17] Hague v. CIO, 307 U.S. 496 (1939) held that the rights of speech and of assembly through picketing were also protected against infringement by state action by the provisions of the fourteenth amendment relating to the due process and privileges and immunities of citizens of the United States. *See also* Thornhill v. Alabama, 310 U.S. 88 (1940).

[18] In Thornhill v. Alabama, 310 U.S. 88 (1940), the Supreme Court, in holding that a state statute which prohibited picketing was invalid, declared that:

> The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.

Id. at 105.

[19] *Id. See also* Carlson v. California, 310 U.S. 106 (1940).

[20] Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

[21] Cox v. New Hampshire, 312 U.S. 569, 574 (1941). *See also* Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940); Schneider v. State, 308 U.S. 147, 160 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938). In Hague v. CIO, 307 U.S. 496, 515-16 (1939) the Court stated that:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but *it must not, in the guise of regulation, be abridged or denied.* (Emphasis added).

[22] Lovell v. Griffin, 303 U.S. 444, 451 (1938).

the exercise of first amendment rights and clearly invalid in the absence of appropriate standards to guide the official's action.[23] *Staub v. City of Baxley*[24] went one step further in holding that "failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review . . . of a judgment of conviction under such an ordinance. . . . 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands.' "[25]

III. WALKER V. CITY OF BIRMINGHAM[26]

Eight leaders of national and local civil rights groups made plans to stage mass parades on Good Friday and Easter Sunday of April 1963 in Birmingham, Alabama. Two prior attempts had been made to comply with a vague city ordinance that required parade permits,[27] but these requests were refused with no clear reason given for the refusal. When the city officials learned of the definiteness of the parades, they filed a petition in the state circuit court asking for an *ex parte* temporary restraining order to prohibit the leaders from participating in an unlawful parade without a permit. The city alleged that such conduct would provoke breaches of the peace and place a strain on the police department. The injunction was issued[28] and these eight leaders were served. At a press conference the next day, they stated that they intended to disobey the injunction.[29]

On Good Friday and Easter Sunday the marches took place as planned. The actual marchers were very orderly, stayed on the sidewalks, stayed off private property, stopped at traffic lights and obeyed safety laws of the city. The crowd that followed was not as well-controlled or law-abiding. On the Sunday march, violence occurred between the followers and onlookers, both white and Negro. People were injured, property destroyed and most of the leaders were arrested.

On Monday, the city officials went to the circuit court for an order to show cause why the leaders of the march should not be held in contempt for violating the injunction. An attempt was made to raise the constitutional issues that the injunction was vague, overbroad, and restrained free speech, and also that the ordinance behind the injunction was unconstitutional on its face because it could be, and actually had been, administered in an arbitrary and discriminatory manner. The court refused to hear the constitutional issues because there had been no attempt to comply with the injunction or an attempt to get a permit after its issuance. The only issues

[23] Kunz v. United States, 340 U.S. 290 (1951). In the dissent to this case, Justice Jackson attempted to show how the clear and present danger doctrine enunciated by Justice Holmes was ignored. He states: "In this case the Court does not justify, excuse, or deny the inciting and provocative character of the language, and it does not, and on this record could not, deny that when Kunz speaks he poses a 'clear and present' danger to peace and order." *Id.* at 302.

[24] 355 U.S. 313 (1958).

[25] *Id.* at 319.

[26] 388 U.S. 307 (1967).

[27] BIRMINGHAM, ALA., GENERAL CODE § 1159 (1944).

[28] Appendix "A" of Supreme Court opinion. 388 U.S. at 321.

[29] Appendix "B" of Supreme Court opinion. *Id.* at 323.

the court would decide were whether there was jurisdiction to issue the injunction and, if so, whether it had knowingly been violated. The court found the leaders guilty of contempt. The Supreme Court of Alabama summarily affirmed the circuit court and also refused to hear the constitutional issues raised, stating that these issues should have been raised in a motion to dissolve or discharge the injunction prior to violating it.[30]

The Supreme Court of the United States, in a five-to-four decision,[31] affirmed the Alabama Supreme Court's opinion. The Court relied on the doctrine enunciated in *Howat v. Kansas*[32] that if a court has jurisdiction to issue an injunction, the only way that the injunction can be attacked is directly in the court of original jurisdiction and then by appeal from that decision, but not by proceedings in a collateral action. The injunction was to be obeyed, however erroneous that action of the court may have been, and disobedience constituted contempt of court.[33] Rigid enforcement of this rule is a means by which the judiciary can command respect for their position. The Court indicated,[34] however, that if any step had been taken to show respect for the Alabama judicial process by complying with the injunction, the constitutional issues could have been raised and would probably have been decided in petitioners' favor in the Supreme Court.

When the first amendment right of free speech and other social values have collided, the judiciary has often undertaken a "balancing" of these interests.[35] In *Walker* the interest of the state of Alabama in having its court orders enforced collided with the right of free speech.[36] The Supreme Court has decided that the preservation of respect for the judiciary outweighs the constitutionally guaranteed right of free speech. The cases that the Court relied on, *Howat v. Kansas*[37] and *United States v. United Mine Workers of America*,[38] must be read in light of their particular facts. These cases involved the use of the injunctive power by the courts, forty years before *Walker*, to preserve already existing conditions in the labor field when it was reasonably necessary to enable the administrative tribunal (*Howat*) or the court (*United Mine Workers*) to decide an underlying controversy. *In re Green*,[39] relied on by both the majority and dissents, seems to have qualified the broad language of *Howat*. In *Green* the Supreme Court said: "Even if we assume that an *ex parte* order could properly issue as a matter of state law, it violates the due process requirements of the Fourteenth Amendment to convict a person of a contempt of this nature without a hearing and an opportunity to establish that the state court was acting in a field reserved exclusively by Congress for the federal

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

[31] Walker v. City of Birmingham, 388 U.S. 307 (1967).

[32] 258 U.S. 181 (1922). *See* United States v. United Mine Workers of America, 330 U.S. 258 (1947).

[33] 258 U.S. at 189-90.

[34] *E.g.*, "The generality of the language contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions." 388 U.S. at 316. *See* note 56 *infra*.

[35] *See* notes 8-21 *supra*, and accompanying text.

[36] 388 U.S. at 344 (Brennan, J., dissenting).

[37] 258 U.S. 181 (1922).

[38] 330 U.S. 258 (1947).

[39] 369 U.S. 689 (1962).

agency."[40] If the injunction can be challenged without prior attempts to obey it on the basis that the underlying issue is arguably subject to the exclusive jurisdiction of the National Labor Relations Board, certainly the injunction can be challenged on the grounds that it violated the first amendment of the Constitution.[41]

As a method of safeguarding the right of free speech, the "prior restraint" rule[42] could have been applied in this case. In *Thomas v. Collins*,[43] a case with facts similar to *Walker*, the Supreme Court did not consider whether or not petitioner should be able to raise the constitutional issues because he did not fight the *ex parte* restraining order: it reversed his conviction, holding that the statute on which the injunction was issued was a prior restraint on his rights of free speech and assembly in violation of the first and fourteenth amendments.[44] The use of the *ex parte* restraining order as a tool for placing prior restraints on the first amendment freedoms was discussed in the dissents of Justices Warren and Brennan.[45] Chief Justice Warren concluded: "Such injunctions, so long discredited as weapons against concerted labor activities, have now been given new life by this Court as weapons against the exercise of First Amendment freedoms."[46]

The Court could also have used an analogy to cases involving the use of permit systems[47] to regulate parades and picketing. In *Cox v. Louisiana*[48] the Court was faced with the facts similar to *Walker*: the picketers were orderly and violence occurred between the onlookers and the followers initially.[49] The Court looked at the permit statute and said: "The statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit. Nor are there any administrative regulations on this subject. . . . From all the evidence . . . it

[40] *Id.* at 692-93.

[41] Walker v. City of Birmingham, 388 U.S. 307, 332 (1967) (Warren, C.J., dissenting). *See also* Justice Brennan's dissent, *id.* at 347.

[42] *See* note 23 *supra.*

[43] 323 U.S. 516 (1945). This case involved a Texas statute that required a person to obtain a soliciting card before he could talk with union members. An *ex parte* restraining order was issued in anticipation of a speech Thomas was to give to a labor meeting. He ignored the order and gave the speech. He was subsequently charged with and convicted of contempt. In a more recent case, Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th Cir. 1963), it was held that an injunction which prohibited the exercise of a constitutionally guaranteed right is a prior restraint. "These fundamental rights to speak, assemble, seek redress of grievances and demonstrate peacefully in pursuance thereto cannot be abridged merely because a riot might be threatened to be staged or that the police officers are afraid that breaches of the peace will occur if these rights are exercised." 318 F.2d at 102. *See also* Johnson v. Virginia, 373 U.S. 61 (1963), where a person was convicted of contempt when he did not obey a state judge's order to get into his own segregated section. The Supreme Court said that: "State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws. *Id.* at 62.

[44] 323 U.S. at 540.

[45] 388 U.S. at 330-32, 346-49. Justices Warren and Brennan also agreed on another point of dissension: that this holding of the Supreme Court completely ignored the Supremacy Clause of the Constitution by giving the desire for respect of a state judicial system superiority over the First Amendment right of free expression. *Id.* at 317, 338.

[46] *Id.* at 331.

[47] *See* note 21 *supra.*

[48] 379 U.S. 536 (1965).

[49] In this case, as well as Edwards v. South Carolina, 372 U.S. 229 (1963), the Court stated that petitioners were arrested because they expressed views contrary to those of the city officials and the white onlookers and held that until a breach of the peace had in fact taken place, a restraint on expression infringed on petitioners' "constitutionally protected rights of free speech, free assembly and freedom to petition for redress of their grievances." 372 U.S. at 235, *referred to* at 379 U.S. at 551.

appears that the authorities . . . permit or prohibit parades or street meetings in their complete uncontrolled discretion."[50] While stating that those who communicate ideas by conduct rather than pure speech are not afforded the same kind of freedom under the first and fourteenth amendments,[51] the Court concluded that if it was the practice to allow unfettered discretion in local officials to regulate the use of the streets for peaceful parades and meetings, this was "an unwarranted abridgement of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment . . . ."[52] Even if the *Walker* Court would not look at the constitutionality of the ordinance itself,[53] or at the arbitrary action of the non-judicial officials' action involving attempts at obtaining the required permit,[54] it could have looked at the judge's action in granting the *ex parte* injunction as a judicial extension of the "unfettered discretion" that the parade ordinance contained.

If the parade ordinance[55] was unconstitutional on its face,[56] or patently unconstitutional, it "is not made sacred by an unconstitutional injunction that enforces it. It can and should be flouted in the manner of the ordinance itself."[57] Under the *Staub* rule,[58] if the ordinance was invalid, petitioners had the right to act first in violation of the injunction and later challenge both the injunction and the ordinance in one proceeding.

IV. Conclusion

Walker v. City of Birmingham is difficult to justify in light of recent cases which have recognized the right of speech and expression in a changing American society. Two possible reasons can be given for the decision. First, as a reaction to civil rights extremism and the violence and lawlessness that has accompanied some demonstrations, the Court felt that this is the time and place to "clamp down" on demonstrations and protestors. Second, and more likely, the Court felt that the result of allowing constitutional defenses to be raised at a contempt proceeding would deprive courts with injunctive power of their most valuable weapon, the automatic contempt conviction. If this was the reasoning of the Court, the rationale it used is outdated and defective. Under a strict interpretation of the facts, this case could have been decided on a "police-power" argument. But instead, the Court has given a decision based on a strict procedural rule and as a result has left one very important question unanswered: How much respect must be given to state courts in circumstances like this? If *any* respect, however minute, is all that is required, it seems an idle requirement.

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[50] 379 U.S. at 556-57.
[51] *Id.* at 555.
[52] *Id.* at 558.
[53] 388 U.S. 307, 318 (1967).
[54] *Id.* at 317, note 9.
[55] *See* note 27 *supra.*
[56] In a subsequent case involving the same march in Birmingham, an Alabama appellate court held that the Birmingham parade ordinance which was the basis for the injunction was unconstitutional on its face as a repression of free speech. Shuttlesworth v. City of Birmingham, 43 Ala. App. 68, 180 So. 2d 114 (1964).
[57] 388 U.S. at 338 (Brennan, J., dissenting.).
[58] *See* note 24 *supra*, and accompanying text.

In *Walker*, had the action been taken by the city officials themselves in refusing the permit in an arbitrary or capricious manner, petitioners would have been allowed to ignore the lack of permit, to march, and to fight the ordinance as unconstitutional. And, they probably would have successfully defended their actions even before this very Court. The burden on the constitutional rights of free speech and free assembly are the same whether placed there by local officials administering an unconstitutional permit system or by a state court requiring applicants to spend months or years contesting an injunction in the courts in order to win a right which the Constitution says no government shall deny.[59]

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The Constitutionality of Welfare Residence Requirements

Green, his wife and their eight minor children moved to Delaware to establish residence. After two unproductive periods of employment Green and his wife applied for and were granted welfare.[1] Subsequently the assistance was disallowed when it was discovered that they had not resided in Delaware for one full year prior to applying for welfare.[2] The Greens then initiated a class action for a declaratory judgment against the Delaware Department of Public Welfare, claiming that the residence requirement violated the United States Constitution.[3] *Held*: A statute which requires an individual to reside within a state for one year before becoming eligible for state welfare benefits creates an invidious discrimination against a class of needy persons who have otherwise satisfied welfare requirements and therefore violates the equal protection clause of the fourteenth amendment to the United States Constitution. *Green v. Department of Public Welfare*, 270 F. Supp. 173 (D. Del. 1967).

I. Relevant Constitutional Concepts

Durational residence as a prerequisite to receiving welfare benefits originated with the English Poor Laws[4] and is predicated upon the traditional concept of settlement.[5] The basis of this concept is that an individual's belonging to a community obligated the community to support him in time of need. Today the various states have applied this rationale to welfare

[59] Poulos v. New Hampshire, 345 U.S. 395, 424 (1953) (Douglas, J., dissenting.).

[1] Green was employed successively by two contractors, but due to bad weather and lay-offs, he averaged less than $40 per week net income.

[2] Del. Code Ann. ch. 31, § 504(4) (Supp. 1966) provides that assistance is available to needy persons of Delaware who have resided therein for at least one year prior to the filing of their application, except that the residence period does not apply to medical treatments.

[3] A three-judge court was convened pursuant to 28 U.S.C. § 2284 (1964).

[4] English Poor Laws, 47 Eliz. c. 2 (1601).

[5] *See* Mandelker, *The Settlement Requirement in General Assistance*, 1955 Wash. U.L.Q. 355. The 1601 English Poor Laws initiated a system of public tax supported relief and the establishment of the alms house and the work house. The early concept conferred settlement through parents, by birth or by a residence period in the community. The settlement doctrine was carried over to the colonies in a strict form with common requirements for settlement remaining essentially the same.