

Class 78:

Collateral Bar and Contempt

- I. The basic rule and its justifications
- II. A closer look

FEAR AND HATRED GRIP BIRMINGHAM

Racial Tension Smoldering
After Belated Sitdowns

By HARRISON E. SALISBURY

Special to The New York Times.

BIRMINGHAM, Ala., April 8

—From Red Mountain, where a cast-iron Vulcan looks down 500 feet to the sprawling city, Birmingham seems veiled in the poisonous fumes of distant battles.

.....
No New Yorker can readily measure the climate of Birmingham today.

Whites and blacks still walk the same streets. But the

streets, the water supply and the sewer system are about the only public facilities they share. Ball parks and taxicabs are segregated. So are libraries. A book featuring black rabbits and white rabbits was banned. A drive is on to forbid "Negro music" on "white" radio stations.

Every channel of communication, every medium of mutual interest, every reasoned approach, every inch of middle ground has been fragmented by the emotional dynamite of racism, reinforced by the whip, the razor, the gun, the bomb, the torch, the club, the knife, the mob, the police and many branches of the state's apparatus.

In Birmingham neither blacks nor whites talk freely. A pastor carefully closes the door before he speaks. A Negro keeps an eye on the sidewalk outside his house. A lawyer talks in the language of conspiracy.

Telephones are tapped, or there is fear of tapping. Mail has been intercepted and opened. Sometimes it does not reach its destination. The eavesdropper, the informer, the spy have become a fact of life.

Volunteer watchmen stand guard twenty-four hours a day over some Negro churches. Jewish synagogues have floodlights for the night and caretakers. Dynamite attempts have been made against the two principal Jewish temples in the last eighteen months. In eleven years there have been twenty-two reported bombings of Negro churches and homes. A number were never reported officially.



Eugene "Bull" Connor
Birmingham, 1963



Demonstrations against segregation
Birmingham, 1963



Martin Luther King, Fred Shuttlesworth, and Ralph Abernathy
Birmingham, 1963

Statute v. Court Order

Should we treat them differently?

Statute	Court Order
•Must be interpreted by a court before it actually applies to a particular party.	•Court simultaneously makes and interprets its order.
•Usually a general command that applies to the population at large.	•Court issues order only after an individual determination about particular parties. Court order must often balance competing rights of each party and is often a stop-gap emergency measure that courts use to preserve the status quo until they issue a final decision.
•Often the only way to challenge a statute is to disobey it.	•Court orders can usually be challenged without disobeying them.
•Legislature does not stand as a final barricade to anarchy and disorder in the same way that courts do.	•Whereas legislature just lays down the rules, it is the courts that must apply them every day to preserve order.
•Disobedience to statutes does not interfere with the functioning of the legislature.	•Disobedience to court orders does in fact interfere with the functioning of the courts.

To What Extent Is the Collateral Bar Rule Justified?



Justice Frankfurter

If one man can be allowed to determine for himself what is the law, every man can. That means first chaos, then tyranny. – *United Mine Workers*, 330 U.S. at 312 (concurring opinion).

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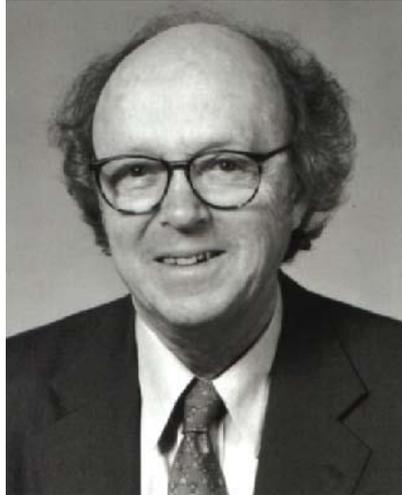
We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

We have waited for more than 340 years for our constitutional and God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse-and-buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging mark of segregation to say, "Wait." – *Letter From Birmingham Jail*, Apr. 16, 1963.

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Anthony Lewis



Justice Frankfurter

This country depends on law more than any other on earth. Courts have to pass on the tensest issues of public policy: race relations, the environment, Presidential power. If it became the practice to ignore court orders on the belief that they will later be found invalid, the system would not work. – *Abroad at Home: "The Civilizing Hand,"* N.Y. Times, Apr. 7, 1986, at A27.

What Do We Want in a Collateral Bar Rule?

A balance between the rights of those seeking orders and the rights of those subject to them

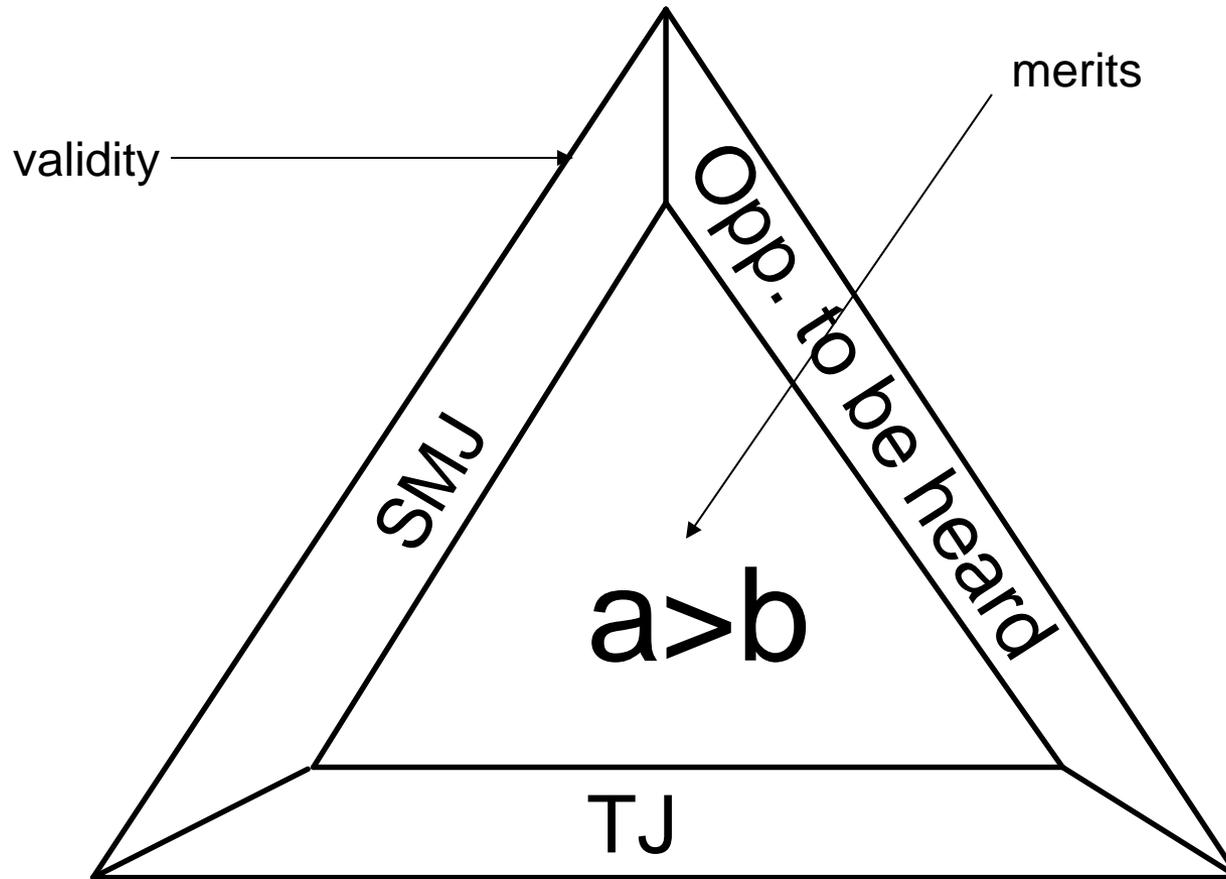


Mississippi, 1962.
James Meredith is escorted to registration at U. Mississippi by Chief U.S. Marshal James McShane (left) and John Doar of the U.S. Justice Department.



Mississippi, Oct. 2, 1962
Meredith being escorted to class.

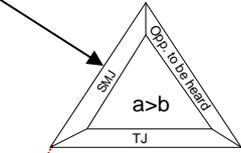
The Anatomy of a Prior Judgment



Collateral Attack to Avoid Criminal Contempt

F1

Preliminary or final order

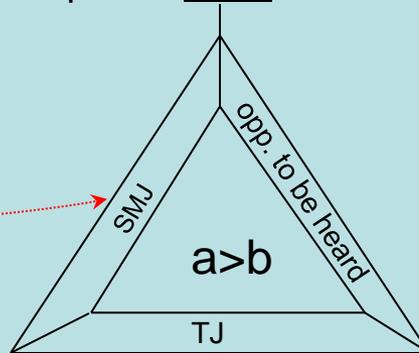


DISOBEDIENCE!!!

F2

Criminal contempt proceeding for disobeying order

Prima Facie Case = specific order + knowledge + willful disobedience



The Key Exception: Opportunity for Review Before Irreparable Injury

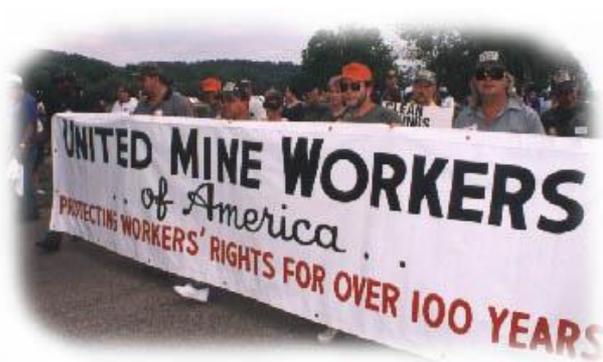
1. Good faith effort to overturn the order prior to disobedience.
2. Full appellate review was not yet possible at time of disobedience.
3. At time of disobedience, any further delay would have permanently destroyed a significant right.
4. Order was erroneous on the merits.

The Key Exception: Opportunity for Review Before Irreparable Injury

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But how do we know when any further delay would have permanently destroyed a significant right? How do we stop this from swallowing the entire rule?

Adopt a contextual approach



Summary

Grounds on which judgment may be collaterally attacked to avoid criminal contempt:

- (SMJ – but only on the very limited grounds specified in RS-J § 12)
- TJ -- if not waived or litigated in prior proceeding, as when party defaulted
- No opportunity to be heard --
 1. Good faith effort to overturn order
 2. No full appellate review possible yet
 3. Further delay would have permanently destroyed significant right
 4. Order was erroneous on the merits

same



same



different



Grounds on which judgment may be collaterally attacked for other purposes:

- (SMJ – but only on the very limited grounds specified in RS-J § 12)
- TJ -- if not waived or litigated in prior proceeding, as when party defaulted
- No opportunity to be heard – procedural due process requirements not satisfied