"voluntarily commenced" the court says that the compulsory counterclaimant remains a defendant for appeal purposes. This result might be explained as the necessary result of the tension between the court's principal arguments: The original plaintiff has the right of appeal because the counterclaim is a "separate action," yet the compulsory counterclaimant has the right of appeal because he did not "voluntarily commence" the claim. But the result can also be explained on the "voluntary commencement" theory alone.[30] Therefore, *Skaff* is probably not sufficient authority to maintain the separate status of the counterclaim in the face of countervailing policy considerations. The case actually blurs and confuses the distinction between cross-complaints and counterclaims.

Skaff brings a new fairness to the small claims court by assuring that the right of appeal will not turn on the fortuity of who commenced the action.[31] It encourages the use of that forum[32] by relieving the plaintiff of a significant risk. Finally, *Skaff* brings more ambiguity to California's cross-claim law, further highlighting the need for reform of that body of procedure.

III

CONSTITUTIONAL LAW

A. First Amendment

1. *Political Advertising*

Wirta v. Alameda-Contra Costa Transit District.[1] The court held that a transit district which sells advertising space on its buses may not constitutionally restrict such advertising to commercial solicitations, but must also accept political messages.

An organization known as Women for Peace requested permission to place on defendants' coaches, at the standard rate, a message reading:

> "Mankind must put an end to war or war will put an end to mankind." President John F. Kennedy

30. Surely the original plaintiff has not "voluntarily commenced" the cross-claim. It might be argued that the original plaintiff does in fact "voluntarily commence" a compulsory counterclaim by forcing it into the small claims court. While this argument might have force in other forums, it supposes too sophisticated a grasp of cross-claim law on the part of the uncounseled small claims plaintiff.

31. 68 A.C. at 75, 435 P.2d at 826, 65 Cal. Rptr. at 66.

32. *Id.* See note 5 *supra.*

1. 68 A.C. 46, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

Write to President Johnson: Negotiate Vietnam.

Women for Peace P.O. Box 944, Berkeley[2]

Pursuant to its general policy of accepting only noncontroversial, commercial messages,[3] the district declined to accept the advertisement. The organization thereupon brought suit, alleging that the district's action violated its federal constitutional right of free speech and denied them equal protection of the laws. The trial court granted an injuction barring the district from refusing the advertisement. The court of appeal reversed,[4] holding that because there was a rational, nondiscriminatory basis for the district's general policy of refusing political messages its action did not infringe the plaintiff's constitutional rights.[5]

The supreme court's reversal of the court of appeal's decision expanded the concept of the public forum. Pointing out that in deciding to sell advertising space on its carriers the transit district itself had impliedly recognized that its buses constituted an appropriate forum for the expression of ideas,[6] the court was able to avoid the question of whether this public facility *must* be made available as a public forum.[7] The court then rejected the appellate court's "reasonableness" test, holding instead that once the transit district decided to accept any advertisements, it could refuse only those which, under the first amendment presented a clear and present danger that a substantive evil would result.[8]

The court relied heavily on *Danskin v. San Diego Unified School District*,[9] which held that once a school district adopts rules permitting the use of school facilities for public meetings, it cannot condition such use on its approval of the views to be expressed.[10] The *Danskin* court recognized, however, that while a school facility constitutes a discretionary forum—the school district may deny permission for its use as a public forum altogether[11]—not all forums are discretionary. In *Schneider v. State (Town of Irvington)*,[12] for

2. *Id.* at 48, 434 P.2d at 984, 64 Cal. Rptr. at 432.

3. One narrow exception to this general rule was a provision allowing political advertising during and in connection with elections. *Id.* The court apparently did not view this exception as significant.

4. 253 A.C.A. 507, 61 Cal. Rptr. 419 (1967).

5. *Id.* at 513-14, 61 Cal. Rptr. at 423.

6. 68 A.C. at 49, 434 P.2d at 985, 64 Cal. Rptr. at 433.

7. *Id.*

8. *Id.* at 54-55, 434 P.2d at 988, 64 Cal. Rptr. at 436.

9. 28 Cal. 2d 536, 171 P.2d 885 (1946).

10. *Id.* at 547, 171 P.2d at 892.

11. *See id.*

12. 308 U.S. 147 (1939).

example, the United States Supreme Court indicated that some places are mandatory forums in that they naturally lend themselves to the dissemination of information and opinion.[13] When the *Wirta* court states that *Danskin* is directly in point,[14] it implies that the transit district's buses are discretionary rather than mandatory forums. The validity of this implied conclusion is uncertain. However, the court had two reasons for not facing the question directly: First, by selling advertising space on its carriers, the district conceded their appropriateness as a forum for the expression of ideas;[15] and second, since the clear and present danger test was found applicable to both discretionary and mandatory forums, it was unnecessary to distinguish between the two for purposes of the result in this case. Nevertheless, the court has recently extended the concept of the mandatory forum to cover public transportation terminals,[16] and in view of proposals to expand the doctrine even further,[17] the carriers themselves may well become mandatory forums.

Moreover, in order to find *Danskin* directly applicable to the *Wirta* facts, the court had to assume that when the transit district's buses became a forum for commercial messages, they became a forum for all purposes within the orbit of the first amendment. In *Danskin*, the school district decided that the facilities could be used for public meetings on public issues, and the court was clearly justified in pointing out that the views expressed were no more the concern of the school administrators than they would be the concern of city officials if parks or streets were the chosen forum.[18] The *Wirta* court concluded that once it is determined that the facility is a proper place for the expression of ideas, the clear and present danger test is the only acceptable criterion for excluding a particular message.

The two cases are factually distinguishable, however, in that while *Danskin* originally involved the opening of the facilities to the discussion of public issues, *Wirta* involved the mere acceptance of commercial advertising. It may be difficult to distinguish between commercial advertising and political expression, however, on at least one occasion the Supreme Court has recognized the distinction.[19]

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13. *See id.* at 163.

14. 68 A.C. at 50, 434 P.2d at 985, 64 Cal. Rptr. at 433.

15. *Id.* at 49, 434 P.2d at 985, 64 Cal. Rptr. at 433.

16. *See In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); *accord*, Wolin v. Port of New York Authority, 268 F. Supp. 855 (S.D.N.Y. 1967), *aff'd*, 36 U.S.L.W. 2550 (2d Cir. March 1, 1968).

17. *E.g.*, Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

18. 28 Cal. 2d at 547, 171 P.2d at 892.

19. Valentine v. Chrestensen, 316 U.S. 52 (1942).

Furthermore, while the school administrators in *Danskin* discriminated among the various groups desirous of holding public meetings, the transit district engaged in no such discrimination among commercial advertisers; it merely applied its established standard uniformly and without regard to the nature of the political views which were excluded. Unlike the arbitrary and subjective standard in *Danskin*, the existence of which was inconsistent with the purpose of the creation of the forum in that case, the objective standard employed in *Wirta* was wholly consonant with the comparatively limited, revenue raising purpose for which the transit bus forum was created.[20]

It may well be that the court felt that any attempt by the transportation agency to administer a standard more restrictive than "clear and present danger" would inevitably result in unjustifiable censorship. The use of the test, which looks to the immediate factual context as well as the statement's content, however, would appear to compel the transit district to accept not only political messages, but also all commercial advertisements except those which are obscene or libelous.[21]

2. Distributing Leaflets

In re Hoffman.[1] This case involved the first amendment rights of persons attempting to distribute leaflets in a railroad terminal. On September 5, 1966, a group of about 15 persons entered Union Station in Los Angeles and began to distribute leaflets protesting the United States' involvement in Vietnam. Although there was some littering of the premises, the protestors did not impede the flow of traffic or the conduct of business in the terminal. When the protestors refused to leave at the request of the station's security guard, the Los Angeles Police were summoned and they arrested the entire group.[2]

The trial court found the petitioners guilty of violating a city trespass ordinance[3] that expressly prohibited loafing and loitering in terminals, or remaining longer than necessary to transact business. The supreme court reversed, finding the statute to be

20. 253 A.C.A. at 513-14, 61 Cal. Rptr. at 423.

21. An almost identical case, also recently decided, is Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967). However, in *Kissinger* there was evidence that some political messages had been accepted other than those connected with upcoming elections. 274 F. Supp. at 442 n.2.

1. 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

2. *Id.* at 847-48, 434 P.2d at 354, 64 Cal. Rptr. at 98.

3. *Id.* at 846 n.1, 434 P.2d at 353 n.1, 64 Cal. Rptr. at 97 n.1 (citing ordinance).

unconstitutionally overbroad in its regulation of activities protected by the first amendment.[4]

The court did not face squarely the problem of state action, but tacitly assumed its presence, thus indicating that the court will give broad scope to the doctrine. The most obvious justification for this assumption was the ordinance itself, which applied expressly to railroad terminals and reflected a governmental decision to prohibit any conduct, such as that engaged in by the petitioners, which did not involve conducting business with a carrier operating in the terminal. Thus, insofar as Union Station's guards felt they were implementing public policy—and the police and prosecutor confirmed this belief—their conduct approximated direct action by the government itself to prevent the petitioners' activities.[5]

An obvious question remains: Could the court still find state action if the statute were repealed or construed so as not to prohibit distribution of leaflets and the station continued to bar the petitioners' activities? There are several factors which, if taken together, might justify such a finding. Since *Marsh v. Alabama*,[6] it seems clear that the more a private property owner opens his property to the general public, the more his personal rights are constitutionally limited by the rights of those who use the property.[7] While Union Station is owned by the railroads, it is open to the entire community as the main local railroad terminal. In addition, the entire railroad industry is subject to pervasive governmental regulation. Just as it is unlikely that the railroad could bar certain groups of people from using its facilities,[8] so too is it unlikely that it could regulate their conduct on the ground that no state action is involved.[9]

State action aside, the fundamental question involved in *Hoffman* was whether the nondisruptive distribution of political leaflets in a public

4. To avoid interfering with any constitutionally protected activities the court construed the first part of the ordinance (loafing and loitering) as bearing a sinister or wrongful implication. *Id.* at 853, 434 P.2d at 358, 64 Cal. Rptr. at 102. The second part of the ordinance (remaining in the terminal longer than necessary to transact business with a carrier) was held to be unconstitutionally overbroad on its face because it completely prohibited protected activities. The court thought that narrower measures could achieve the ends desired without infringing upon constitutional rights. *Id.*

5. *See* Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1949); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 358 (1963).

6. 326 U.S. 501 (1946).

7. *See id.* at 506.

8. *See* Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 368 (1963).

9. In view of the close governmental regulation of railroad operations, state action in the railroads' infringement on first amendment rights could be based on governmental acquiescence. *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

transportation terminal can be prohibited by law.[10] The United States Supreme Court has considered similar problems in the past,[11] and *Hoffman* can only be discussed in the context of those decisions.

Until recently, the Supreme Court refused to affirm criminal convictions involving peaceful demonstrations unless they interfered with the normal functioning of the picketed facility.[12] However, in 1966, in *Adderley v. Florida*,[13] the Court modified its approach. In that case the Court upheld trespass convictions against students who had demonstrated on jailhouse grounds against state and local segregation policies. The Court distinguished the trespass statute from the vague breach of peace statutes involved in the earlier cases on the ground that the trespass statute was "aimed at conduct of one limited kind"[14] and there were no notice problems or traps for the unwary.[15] The Court's opinion could merely mean that the arrests were necessary because the security and operation of the jail were imperiled[16] and the statute was not overbroad. If so, the case is consistent with earlier decisions recognizing that there is no absolute right to conduct demonstrations which imperil a public facility's safety or operations.[17]

However, *Adderley* arguably goes further than this. The Court focused on the fact that jail premises—unlike the state capital grounds in *Edwards v. South Carolina*[18]—are built for security purposes, and are not traditionally available for public demonstrations.[19] For that reason the sheriff had the authority to remove the demonstrators from the premises. This reading of *Adderley* suggests a standard based on the purposes and traditional uses of the facility; however, the results of such a test would be extremely unpredictable. Until the Court ruled that a particular site was an appropriate one, demonstrators would risk conviction due to a possible error in their assessment of the facility's purpose and traditional availability as a site for public demonstrations. In the *Hoffman* situation, for example, it could be

10. This is the same issue as was involved in Wolin v. Port of New York Authority, 268 F. Supp. 855 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83 (2d Cir. 1968).

11. *See* Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

12. *See id.*

13. 385 U.S. 39 (1966).

14. *Id.* at 42.

15. *Id. See also* Cameron v. Johnson, 390 U.S. 611 (1968), upholding the Mississippi antipicketing law.

16. The majority contended that the demonstrators blocked the entrance drive to the jail, 385 U.S. at 45; the minority claimed that the drive was open to those who wished to use it, 385 U.S. at 51-52.

17. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

18. 372 U.S. 229 (1963).

19. 385 U.S. at 41.

argued that a railroad terminal is built to facilitate transportation and has not in the past been, nor should it now be, opened to political demonstrators. On the other hand, it could also be argued that a terminal, unlike a jail, resembles a public thoroughfare, and therefore is an appropriate place for peaceful political demonstrations.[20]

This problem was avoided in *Hoffman*, because the California supreme court read *Adderley* very narrowly. It viewed that case as a mere restatement of the proposition that if the operations of the facility are imperiled, the demonstrators can legitimately be asked to leave.[21] Since the demonstrators' conduct did not interfere with the public use of the facility, it followed that their demonstration could not constitutionally be prohibited. While this may well be an overly narrow interpretation of *Adderley*, the California court clearly arrived at the correct resolution of the fundamental question presented by the facts before it. There was no danger to the operations of the terminal, there was no threat of violence, and it was governmental policy—not a private person—which was the target of the demonstration. To suppress effective but orderly objection to governmental policies under such circumstances is to lack confidence in our heritage of peaceful dissent. The results of suppression may not be a diminution of dissent, but rather a resort to other, less peaceful means for its effective expression.[22]

3. *Injunctions*

In re Berry.[1] This is one of those not-so-rare cases[2] where the court is apparently ahead of the United States Supreme Court in the protection of fundamental rights. The latter court's 1967 decision in *Walker v. Birmingham*[3] held that a state may constitutionally compel one to seek judicial relief from an order infringing first amendment

20. *See* Wolin v. Port of New York Authority, 268 F. Supp. 855, 861 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 83 (2d Cir. 1968).

21. 67 Cal. 2d at 853, 434 P.2d at 358, 64 Cal. Rptr. at 102.

22. *See* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

1. 68 A.C. 135, 436 P.2d 273, 65 Cal. Rptr. 273 (1968).

2. *See, e.g.*, People v. Johnson, 68 A.C. 674, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), cert. denied, 37 U.S.L.W. 3262 (Jan. 21, 1969); Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881, *aff'd*, 387 U.S. 369 (1967); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); Perez v. Sharpe, 32 Cal. 2d 711, 198 P.2d 17 (1948).

3. 388 U.S. 307 (1967).

rights and punish for contempt those who violate the order before seeking such relief.[4] *In re Berry*, however, reaffirmed California's rule that a court lacks power to punish a violator of an order which is constitutionally void on its face.[5] The court held that one subject to such an order can freely violate it and can assert his first amendment challenge for the first time in a contempt hearing or by habeas corpus pending the contempt prosecution. As the court noted, the California rule—as compared with *Walker*—"is considerably more consistent with the exercise of First Amendment freedoms."[6]

In an ex parte proceeding, the County of Sacramento sought an injunction and a temporary restraining order five days prior to a threatened strike by its social workers.[7] The complaint alleged that the strike would include mass picketing at various county facilities and would interfere with the county's performance of welfare services.[8]

The superior court issued the temporary restraining order the same day. It forbade:

> Defendants[9] . . . and all persons in active concert or participation with them *or in concert among themselves*[10] . . . directly or indirectly *by any means*, method or device whatsoever, [from doing] any and all of the following things:

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4. *Id.* There are possible limitations on this broad statement. *See* Note, 56 CALIF. L. REV. 517, 520-22 (1968).

5. Void "on its face" is the label attached to the analysis which, as the words suggest, have as their primary subject the language of the promulgation rather than its enforcement. In the language, the court looks for potential for arbitrary exercise. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 113 (1960). The defendant can defeat his conviction by showing that enforcement of the promulgation would be unconstitutional in some possible application even if not under his circumstances. *Id.* at 109 n.224. *But see id.* at 68 n.4 where Professor Amsterdam notes that courts often review statutes *as construed* by the courts. It would seem that this would not be a factor in injunctions which are, of course, issued in the first instance by courts. Recent developments indicate a disallowance of this "interpreting out" the unconstitutionality from a promulgation. *See* Zwickler v. Koota, 389 U.S. 241 (1967).

6. *Id.* at 148, 436 P.2d at 282, 65 Cal. Rptr. at 282.

7. The court did not decide whether public employees could legally strike. Assuming, without deciding, that public employees could be lawfully enjoined from striking and from carrying on specific activities in support of a strike, the court held that even upon this assumption, the order violated constitutional safeguards. *Id.* at 149, 436 P.2d at 283, 65 Cal. Rptr. at 283.

8. *Id.* at 139, 436 P.2d at 276, 65 Cal. Rptr. at 276.

9. The defendants were the Social Workers Union (Sacramento chapter), eight of its officers and directors, 750 Does and 150 Doe associations. *Id.*

10. The court held that this phrase was vague and indefinite as to the scope of the injunction. *Id.* at 153-54, 436 P.2d at 285-86, 65 Cal. Rptr. at 285-86. The court also noted its doubts as to the jurisdictional validity of an injunction directed at persons not in active concert or participation with the defendants. *Id.* at 154 n.14, 436 P.2d at 286 n.14, 65 Cal. Rptr. at 286 n.14.

a. From ordering . . . asking or requesting, *or otherwise inducing or attempting to induce*[11] any employee of the Plaintiff to cease work . . . ;[12]

. . .

c. From striking or engaging in a work stoppage *or other similar concerted activity*[13] against Plaintiff, *or inducing* or calling [such]. . . ;[14] and

d. *From picketing* . . . and from causing, participating in *or inducing* others to participate in any demonstration . . . on any grounds . . . contiguous to any . . . street which adjoins any grounds which are owned, possessed or controlled by the Plaintiff and on which [is] situated any . . . structures . . . occupied by Plaintiff *and in which employees of Plaintiff are assigned to work.*[15]

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11. The County conceded that the term "induce" is broad enough to reach a newspaper advertisement asking support of the strike. In re Berry, 249 A.C.A. 613, 620 (1967). The supreme court quoted from Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940): "Every expression of opinion on matters that are important has the potentiality of inducing action . . . . But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be pursuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

The inclusion of protected activity in a prohibition renders it void on its face, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Winters v. New York, 333 U.S. 507 (1948), even though the particular activity of defendants alone is regulable. Thornhill v. Alabama, 310 U.S. 88, 98 (1940). The need for narrowly drawn statutes and injunctions—and a reason to allow standing to those defendants whose conduct could have been regulated—is to protect against the "throttl[ing] [of] protected conduct. [Overbroad prohibitions] have a coercive effect since rather than chance prosecution people will tend to leave utterances unsaid though they are protected by the Constitution." Note, *supra* note 5, at 76.

In light of *In re Berry*, a number of California statutes would seem to be subject to constitutional attack for overbreadth. *See, e.g.*, CAL. PEN. CODE § 272 (West Supp. 1967) ("inducing" a minor to do an act or follow a course of conduct or to so live as would cause or tend to cause such minor to remain or become a ward of the juvenile court); CAL. PEN. CODE § 266 (West 1955) ("inducing" a female to become a prostitute). A bill in the 1968 session of the California Legislature prohibiting the "inducing" of truancy, S.B. 967 (1968), failed of passage after a hearing in which the decision in *In re Berry* was brought to the attention of the Assembly Committee on Criminal Procedure.

12. (Emphasis added). This part of the injunction was declared overbroad because it was not limited to efforts in support of the strike. 68 A.C. at 153, 436 P.2d at 285, 65 Cal. Rptr. at 285. Section (b), not reproduced in the text, was similarly overbroad in prohibiting acts against those who dealt with the county, but not limiting such acts to those in support of the strike. *Id.*

13. Defendants urged that the prohibition of "similar activity" created a crime by analogy in violation of due process. Answer to Petition for Hearing at 13, *id.*

14. (Emphasis added). The court noted that even if advocacy of a public employees' strike was enjoinable, the language "other concerted activity" was broad enough to include constitutionally protected activity, such as circulation of petitions, distribution of literature, 68 A.C. at 152, 436 P.2d at 285, 65 Cal. Rptr. at 285, or peaceful picketing, *id.* at 150 & n.12, 436 P.2d at 283 & n.12, 65 Cal. Rptr. at 283 & n.12.

15. (Emphasis added). This seetion prohibited *all* demonstrating and picketing at county

In the belief that the court's mandate was unconstitutional,[16] the union proceeded with the strike. During the five intervening days before the strike neither the union nor any of the defendants sought judicial relief from the order.[17]

On the second and third days of the strike, the defendants, all private citizens unaffiliated with the union or the welfare department, were arrested for peacefully picketing a county building in violation of the temporary restraining order. They each carried a sign, one of which supported the strike; the other three were blank pieces of cardboard.[18] While on bail they petitioned for habeas corpus,[19] challenging the legality of the order, and obtained dismissal of the charges.[20] All parties appealed to the supreme court.[21]

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buildings. 68 A.C. 150, 436 P.2d at 283, 65 Cal. Rptr. at 283. Absent compelling state interests, *see, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966), peaceful picketing may not be restricted. The court held that the county's interest in efficient administration of its welfare functions, together with its assumed right to enjoin activities in support of a public employees' strike, did not suffice to enjoin picketing and demonstrating, for whatever reason and in whatever form, at its public buildings. 68 A.C. at 150-52, 436 P.2d at 283-85, 65 Cal. Rptr. at 283-85. Indeed, these are the very places where speech can be the most produetive and should be carefully protected. *See* Edwards v. South Carolina, 372 U.S. 229 (1963).

An example of the arbitrary discretion a broad prohibition affords is the fact that while the language "assigned to work" was a limitation designed to implement the county's interest in noninterruption with its employees' work, the arrest of Berry occurred after working hours. Answer for Petition for Hearing at 13, 68 A.C. 135, 436 P.2d 273, 65 Cal. Rptr. 273.

16. 68 A.C. at 141 & n.3, 436 P.2d at 277 & n.3, 65 Cal. Rptr. at 277 & n.3.

17. 68 A.C. at 142, 436 P.2d at 278, 65 Cal. Rptr. at 278. Such relief might have included prohibition. *See* Crittenden v. Superior Court, 61 Cal. 2d 565, 567, 393 P.2d 692, 694, 39 Cal. Rptr. 380, 382 (1964).

18. 68 A.C. at 142-43 & n.6, 436 P.2d at 278 & n.6, 65 Cal. Rptr. at 278 & n.6.

19. One may seek habeas corpus while under the constructive restraint of bail. *In re* Peterson, 51 Cal. 2d 177, 331 P.2d 24 (1958). *Contra, e.g.*, in federal habeas, Odell v. Haas, 280 F. Supp. 208 (W.D. Wisc. 1968). Most other states are also contrary to California. 39 C.J.S. *Habeas Corpus* § 9, at 440 n.54 (1944 & Supp. 1968). *But see* Jones v. Cunningham, 371 U.S. 236, 240 (1963).

20. 249 A.C.A. 613, 57 Cal. Rptr. 645 (1967).

21. The defendants joined the petitioners in asking for a hearing for three interrelated reasons: First, the lower court distinguished between nonunion and union pickets leaving the latter without a remedy; second, the lower court based its decision on the greater chilling effect of criminal over civil contempt—holding that "when conduct is freighted with elements of free speech and assembly, the choice between civil and criminal deterrents cannot be left in the uncontrolled hands of administrative officials," 249 A.C.A. 613, 621, 57 Cal. Rptr. at 645, 652—rather than deciding the question of the unconstitutionality of the temporary restraining order; and third, the lower court, without argument or briefs on the question, commented negatively on the right of public employees to strike. Answer to Petition for Hearing, at 2-7, 68 A.C. 135, 436 P.2d 273, 65 Cal. Rptr. 273.

The supreme court did not even allude to the distinction of civil and criminal contempt. In California, there are three types of contempt: Civil and criminal under CAL. CIV. PRO. CODE § 1209 (West 1955); and a criminal prosecution for contempt under *id* § 166. *See Ex parte* Morris, 194 Cal. 63, 227 P. 914 (1924). Though the latter, which was involved in this case, may seem the harshest, the fact that it is a criminal prosecution would seem to require constitutional safeguards from which the summary contempt power has generally been immune. This is

Relying heavily on *Walker*,[22] the county argued that the defendants could not challenge the temporary restraining order because they had failed to seek relief prior to their willful disobedience. The supreme court, with a critical analysis not attempted by other state courts,[23] first attempted to reconcile, and then limited *Walker*, thereby affording more effective protection of first amendment rights.

The court attempted to reconcile its opinion with *Walker*, stating: "[I]t appears that the *Walker* decision is consistent with the California rule that an order void on its face cannot support a contempt judgment."[24] However, *Walker* did not decide the question of facial voidness. The appearance that it did is created by the United States Supreme Court's statement that the injunction was not "transparently invalid" or "frivolous."[25] But when contrasted with the Alabama supreme court's refusal to hear the appellants' contentions of facial voidness,[26] and the Supreme Court's repeated statements that the time to have raised such challenges was prior to the violation of the order,[27] it seems clear that transparent invalidity and facial voidness are not the same.[28] If *Walker* had been applied, the petitioners in *Berry* would have been held to have waived their right to challenge the facial validity of the order, since they made no attempt during the five days before the strike to comply with the state procedural requirements.[29]

In any event, the court went on to construe *Walker* as merely

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highlighted by the fact that because it is a criminal prosecution, a court other than the one against which the contempt was committed has jurisdiction to hear the contempt. *See id.* Thus, the ability of that court to punish the contempt is not an inherent power but comes from the Penal Code. As such, it would seem to be on no higher a constitutional plane than other criminal prosecutions. *Cf. In re* McKinney, 70 A.C. 6 (1969).

22. *See* 68 A.C. at 144-48, 436 P.2d at 279-82, 65 Cal. Rptr. at 279-82.

23. *See, e.g.*, Chicago v. King, 86 Ill. App. 2d 341, 354, 230 N.E.2d 41, 48 (1967).

24. 68 A.C. at 148, 436 P.2d at 282, 65 Cal. Rptr. at 282.

25. 388 U.S. at 315.

26. *Id.* at 312.

27. *Id.* at 316-17

28. *See id.* at 342-43 (dissenting opinion of Brennan, J.); Note, 56 CALIF. L. REV. 517, 521 & n.37 (1968). Justice Fortas has similarly interpreted *Walker* to not permit one to "disregard the injunction even if he was right that the injunction was invalid." A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 58 (1968).

29. *Walker* would require petitioner to seek relief at least during this period to preserve their constitutional challenge. *See* 388 U.S. 307, 310, 315 & n.6, 316-20; Note 56 CALIF. L. REV. 517, 521-22 (1968). In requiring such prior submission as a prerequisite to vindication of first amendment rights, however, the Court adopted a procedure that makes courts prior censors of first amendment activity. It has been argued that such a procedure should be constitutionally impermissible. *See id.* at 523 & n.50; Note, *supra* note 4, at 77 n.55. Such prior submission is impermissible as a preprequisite to disobedience of a *statute* void on its face. *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958). Further, the first amendment is undermined when its

providing minimum safeguards for first amendment freedoms.[30] Thus, a state may choose to afford greater protection to these rights. California has so chosen, holding that one has an absolute right to violate an injunction void on its face.[31] Like the dissenters in *Walker*,[32] the California court refused to establish a dichotomy between courts and legislatures whereby a violation of a constitutionally defective statute is permitted but a violation of a similarly defective court order may result in contempt.[33] Also like the *Walker* dissenters,[34] the court held that issuance of an unconstitutional order is beyond the jurisdiction of a court, and thus may not be the basis for a contempt conviction.[35] This is not only a difference of definition but of philosophy. While the majority in *Walker* felt that preservation of orderly judicial procedures was prerequisite to the maintenance of all

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freedoms are so easily lost to an ex parte judicial restraint. *See* Rudman & Soloman, *Who Loves a Parade?—Walker v. City of Birmingham*, 4 L. IN TRANS. Q. 185, 188 (1967).

The California supreme court specifically noted that the defendants made no effort during the time available to vacate or modify the order. 68 A.C. at 142, 436 P.2d at 278, 65 Cal. Rptr. at 278.

30. 68 A.C. at 148, 436 P.2d at 282, 65 Cal. Rptr. at 282.

31. *Id.* at 146-47, 436 P.2d at 281, 65 Cal. Rptr. at 281; *see* 1 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 155 (1954, Supp. 1967).

32. 388 U.S. at 334 (dissenting opinion of Warren, C.J.); *id.* at 336-38 (dissenting opinion of Douglas, J.); *id.* at 348-49 (dissenting opinion of Brennan, J.).

33. The court's opinion was based on Thornhill v. Alabama, 310 U.S. 88 (1940), a case involving a statute, not a court order.

34. 388 U.S. 332 (dissenting opinion of Warren, C.J.); *id.* at 337 (dissenting opinion of Douglas, J.): "A court does not have *jurisdiction* to do what a city or other agency of a state lacks *jurisdiction* to do. The command of the Fourteenth Amendment . . . is . . . applicable to the States. . . . The decree of a state court is 'state' action . . . ."

35. 68 A.C. at 145, 436 P.2d at 280, 65 Cal. Rptr. at 280. *Contra*, Walker v. Birmingham, 388 U.S. 307, 315 & n.6. The rule is well established in California. *See* Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (Tobriner, J.) (1962); Fortenbury v. Superior Court, 16 Cal. 2d 405, 106 P.2d 411 (1940); 1 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 155 (1954, Supp. 1967).

The question revolves around the meaning of "jurisdiction." It is almost universally accepted—even in Alabama, *Ex parte Connor*, 240 Ala. 327, 198 So. 850 (1940)—that a court does not have power to punish as contempt a violation of an order issued without jurisdiction. *See* 12 A.L.R. 2d 1059, 1067-72 (1950). Yet, it is also generally held that one may not violate an order based on an unconstitutional statute or injunction. *Id.* at 1079. The distinction is in the definition of "jurisdiction." The *Walker* definition encompasses only the parties and the subject matter (with an exception where the order is transparently invalid or frivolous). *See* 388 U.S. at 315 and the explanation in Note, 54 CALIF. L. REV. 517, 521 (1968). The California definition includes the situation where a court "may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power to act in the case except in a particular way. Under such circumstances, it is now generally held that the court had no jurisdiction." Fortenbury v. Superior Court, 16 Cal. 2d 405, 407-08, 106 P.2d 411, 412 (1940). *See* Abelleira v. District Court, 17 Cal. 2d 280, 288, 109 P.2d 942, 947 (1941); 1 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 1 (1954).