Criminal and Civil Contempt

Second Edition

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DEDICATION

This book is dedicated to Dr. Joan V. Dobbs and my wife, Joanne. One picked me up and the other kept me from falling down. Thanks to them and God, I am a cancer survivor—nearly 30 years and counting. Also, my children: Lauren, John and Allyson whose father loves them. And, my grandchildren: Lily, Emma, Michael and Judah.

TABLE OF CONTENTS

FOREWORD TO THE FIRST EDITION

As a writer and scholar, Larry Gray is unique. He seems to find areas of the law with which most attorneys have had little or no experience. He then proceeds to pursue those areas with a passion for knowledge. In the past he has written extensively about evidentiary privileges that are asserted in the grand jury as well as the role of counsel in the grand jury. In *Criminal and Civil Contempt*, Larry has written the definitive work on the law of contempt in New York. Building on a prior book, written ten years ago, this treatise is the 25-year product of research, writing and experience as a New York State Special Assistant Attorney General.

Larry's crisp style provides us with an entertaining and thoughtful analysis of criminal and civil contempt under New York's Judiciary and Penal Laws. It focuses substantially on contempt arriving out of grand jury and trial proceedings. The topic is divided into 48 chapters that take the reader through a logical progression of subject matter.

Once again, Larry Gray has done a great service to the bar. He has taken an extremely dense and technical subject and transformed it into a reference book that will be a welcome addition to the libraries of judges, prosecutors and attorneys in criminal and civil matters.

BARRY KAMINS
October 2006

PREFACE

Criminal and Civil Contempt is more than three decades of research, writing and experience. In 1979, I and another New York State Special Assistant Attorney General were assigned by the state's Attorney General to carry out an executive order of the Governor. The order related to crimes possibly committed by state officials in Albany County. In May 1981, after a six-week trial, a New York City Councilman, in his capacity as the Vice-Chairman of the Temporary State Commission on Child Welfare, was convicted of conspiracy, grand larceny and solicitation of perjury. A few years later, a State Senator, who was the Commission's chairman, was convicted of various federal crimes in the District Court for the Southern District of New York based, in substantial part, on testimony and exhibits transferred to the United States Attorney pursuant to court order. The verdicts were the culmination of a long, nasty legal dogfight. One attorney smacked me in the back of the head in open court with his legal papers. My partner and another attorney had to be physically separated from one another by the judge in chambers. One witness is illustrative.

Served with an Albany Grand Jury's subpoena *ad testificandum*, the lady witness moved to quash it. A Supreme Court Justice from Plattsburgh was designated by the Governor to sit as an Extraordinary Term of the Supreme Court to preside exclusively over all proceedings. Before he took the bench in Manhattan to hear the motion, her lawyer approached our table and served his motion papers. My partner had a "Bull____ Stamp" and began to stamp the pages with it. The lawyer suddenly realized that he had given us his original papers and came back to retrieve them so he could tender them to his honor. Halfway back to his table, he saw the infamous word all over the pages. He accused us of doing it deliberately. So there was a pre-argument argument at the bench with the judge ruling, "All right, I'll take the papers, the 'bull___' papers." The Appellate Division heard her appeal from the order of the Supreme Court denying her motion to quash three times before it affirmed the lower court's order. Actually, it was four times. I argued in opposition to her stay application pending appeal for almost an hour before the Appellate Division. The justices went on and off the bench two or three times to confer. During his argument, her lawyer accused my partner of murdering another witness. The presiding justice directed court officers to intercept my partner, who had left his seat and was coming around to lay hands on the lawyer.

The Court of Appeals affirmed the Appellate Division's decision almost one year later. After that, the lady witness refused to appear before the grand jury until she was served with a second order of the Supreme Court incorporating the *remittitur* of the Court of Appeals and adopting its decision as its order and fixing a new appearance date. Beginning at 9:30 A.M., she sat in the witness chair in front of an Albany County Grand Jury refusing to testify without her lawyer, who was at the U.S. Supreme Court seeking a stay of her appearance pending the outcome of her petition for a writ of *certiorari.* Every half-hour she was excused from the grand jury room—first being ordered on the record by the foreman to return!—to report on the whereabouts of her attorney. At 5:00 P.M., I was called to the telephone. It was the Clerk of the U.S. Supreme Court. Justice Harry Blackmun had just denied her stay application. Back in the grand jury, she said that her lawyer was flying to Albany from Washington. "Okay, we'll wait," I said. About 7:30 P.M. she began to testify. After several questions, she was ordered by the foreman to return at 9:30 A.M. the next day to continue her testimony. The legitimacy of the Governor's executive order and the grand jury's investigation thus established, my partner and I had to play dentist with this nasty, recalcitrant witness (among many others over the next year). One day she took it upon herself to just walk out of the grand jury. She was adjudicated in criminal contempt and punished with 30 days in jail. The Appellate Division held her appeal in abeyance pending her going back into the grand jury and testifying. She "testified" and the Appellate Division set her free. As a witness in the federal trial of the State Senator, she testified that the state prosecutors had tried to kill her. At one point, the New York State Senate sued the Attorney General, claiming that we were in violation of the State Constitution's Speech or Debate Clause. Article 78 Proceedings in the nature of Prohibition, motions to quash subpoenas, contempt proceedings and appeals from this, that and the other thing, were the background music for the grand jury's investigation. One spring day the truth broke through but the legal brawl continued.

Experienced, tenacious, ethically challenged lawyers represented the opposition. They had to be met with tough, scholarly lawyering. Among other topics pertinent to the task, I decided to become an expert on the law of contempt by reading every case I could lay my hands on. The proof of the pudding was in the taste. *Additional January 1979 Grand Jury v. Doe*, 50 N.Y.2d 14 (1980); *United States v. Pisani*, 773 F.2d 397 (2d Cir. 1985); *People v. Riccio*, 91 A.D.2d 693 (3d Dep't 1982). Law reviews and the lecture circuit came to pass. Right up to the final editing of *Criminal and Civil Contempt*—Medicaid fraud prosecutions and their attendant con-

tempt proceedings against those whose subpoenaed business records were lost due to lightning, fires, floods, midnight burglaries and plagues of locusts intervening—I have continued to do so.

[1.0] I. INTRODUCTION

This book explores a number of aspects of criminal and civil contempt under New York's Judiciary and Penal Laws, with substantial focus on contempt arising out of grand jury and trial proceedings. Rather than having a rigid central theme, it has a definite undercurrent—created by the judiciary's imprecision of expression, sometimes inaccurate citation of precedent, improvident policymaking and tautological reasoning. Hence, it occasionally criticizes and questions, rather than parrots, judicial pronouncements.[1] The reason is simple. In the case law of contempt, confusion is not so much in the eye of the beholder as it is in what the eye is beholding. The reader will be exposed to what "the law" is as of the time a case found its way into a law reporter but at the same time will be alerted to what may be anomalous, contradictory or just plain erroneous. Too often the "it-is-well-settled" gospel of one case is incompatible with the gospel of an earlier or later one. The book attempts to provide an antidote for gut reaction, catchword, cliché and predisposition dressed up as law. Style will occasionally bow to the goal of providing a ready reference tool for dealing with a subject having few contours of its own. Block quotes from the cases are used liberally. The lawyer may judge them as they appear.

1 Such criticism and questioning may provide the litigant with arguments to attack decisions that should not be carved in stone. A prime example is *People v. Stewart*, 158 Misc. 2d 776 (Sup. Ct., N.Y. Co. 1993) (Andrias, J.), *rev'd,* 230 A.D.2d 116 (1st Dep't 1997), *appeal dismissed*, 91 N.Y.2d 900 (1998). Another is *Levine v. Recant*, 278 A.D.2d 124 (1st Dep't 2000), where the court affirmed Acting Supreme Court Justice Bruce Allen's exercise of a "discretion" he did *not* possess, that is, vacating the 10–day jail punishment imposed by another court of record (Donna Recant, J.) but otherwise affirming an "immediate view–and–presence" criminal contempt citation. Justice Allen's decision was seat–of–the–pants ignorance affirmed in the Appellate Division in aid of contemptuous courtroom behavior below. N.Y. Judiciary Law § 750(A) gives unqualified power to a court of record to punish immediate view and presence contempt. Section 751(1) thereof fixes the range of punishment at $1,000 and/or 30 days in jail maximum. *Levine* ignores *Typothetae of New York v. Typographical Union No. 6,* 138 A.D. 293, 294 (1st Dep't 1910) (purgation or suspension of punishment *sine die* rests with the court contemned). The reliance in *Levine* on a "*cf*" citation to Appellate Division Rule Title 22 of the New York Code of Rules and Regulations § 604.2(c) (N.Y.C.R.R.) provides no authority to set aside an otherwise statutorily authorized punishment for an otherwise valid contempt citation. An Appellate Division Court Rule may not increase, abrogate or alter a legislative enactment. Rule 604.2(c) essentially states only that, except for "the most flagrant and offensive behavior," a court "*should* warn and admonish" the contemnor before imposing contempt (emphasis added). There is *no* right to be warned for its own sake. There is no right in a warning for its own sake. Neither the Judiciary Law, nor the Supreme Court, nor the Court of Appeals have even hinted at such an erroneous and counterproductive requirement which would effectively eviscerate the contempt powers of a presiding judge. *How a contempt citation may be affirmed but the punishment excised because a brazen contemnor was not warned is anyone's guess*. There is a curious aura surrounding *Levine v. Recant*.

Contempt jurisprudence is, to a substantial degree, jurisprudence by nomenclature. It is law written on the run, written with not enough analytical precision because the judiciary conflates concern in law with coercion in fact and punishment in fact with punishment in law, thereby compounding both in decisions that laugh at each other. Using nomenclature desired by the necessity of the moment, courts have achieved varying results. Metaphorically speaking, contempt jurisprudence is often akin to plutonium which, under certain circumstances, is like glass—only to resemble plastic in others. Burning and crumbling quickly when heated in air, it will slowly disintegrate at room temperature. In two of its phases, it actually contracts when heated. Contempt, in the hands of the judiciary, is also erratically volatile. No one on either side of the gavel wants to get too close to it. The author has tried to lend some sense of a hodgepodge. It is hoped that if he has committed any errors that they are few.

One way or the other, the law of contempt permeates all law because force—not morality—is the ultimate sanction. Those who will not obey, or disrupt, are to be coerced and punished in the name of the law. In law school, contempt is a word frequently used but seldom defined beyond a few maxims, such as something about the key to one's own jail cell. After law school, contempt becomes a word secretly feared by those who threaten it—probably as much as those who are threatened with it. Contempt should be a required course in law school or at least 90% of any course in professional responsibility. From a personal perspective, if one reads and studies it for close to 30 years, one obtains an overview of its decisional law such that the latest erroneously reasoned decision holds no awe because there is always an inventory of other erroneous decisions available to neutralize its pontifications about something being "well settled"—leaving the comparatively precious few classics, which have been soundly reasoned and correctly decided, free to fix the right. Right up to the United States Supreme Court, an *intra mural* reassessment should take place. With rare exception, appellate contempt law decisions are of extraodinarily poor quality, bearing the marks of hurried carelessness and shocking poor judgment—mixing and matching truth and falsity in what seems to be a never-ending inaccurate citation of precedent, or, the convenient ignoring of it.[2]

2 *Int'l Union-United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994); *U.S. v. Dixon*, 509 U.S. 688 (1993); *People v. Leone*, 44 N.Y.2d 315, 317–318 (1978); *McCormick v. Axelrod*, 59 N.Y.2d 574 (1983); *Kuriansky v. Ali*, 176 A.D.2d 728 (2d Dep't), *lv. denied*, 79 N.Y. 848 (1991); *Additional January 1979 Grand Jury v. Jane Doe*, 84 A.D.2d 588 (3d Dep't 1981); *Ferrara v. Hynes*, 63 A.D.2d 675 (2d Dep't 1978).

Additional material may be found in the following sources, authored by Lawrence N. Gray: *A Practice Commentary to Judiciary Law Article 19*, 1 Cardozo Pub. L. Pol'y & Ethics J. 61 (2003); *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337 (1998) *reprinted in* 13 J. Suffolk Acad. L. 1 (1999); *Contempt in New York: A Critical Survey*, 3 Brooklyn J. L. & Pol'y 81 (1994); Evidentiary Privileges, "Contempt and the Grand Jury" Chap. XIX (2003); *The Judge's Benchbook*, Section C (1995); *Contempt*!, N.Y.St.B.J. (December 1997) p. 22; *Judiciary and Penal Law Contempt in New York: A Critical Survey*, N.Y.St.B.J. (November 1994) p. 42; *Contempt and the News Media—New York's Shield Law*, Crim. Just. J., Vol. 7, No. 1 (1999) p. 80.

[1.1] II. STATUTES

For purposes relevant to this handbook, Judiciary Law § 750, in part, provides:

Power of Courts to Punish for Criminal Contempts

A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due its authority.

***

3. Willful disobedience to its lawful mandate.

***

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

In pertinent part, Judiciary Law § 753 provides:

Power of Courts to Punish for Civil Contempts

A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced in any of the following cases:

> 1. [F]or disobedience to a lawful mandate of the court, or of a judge thereof . . . .
>
> ***
>
> 5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.
>
> ***
>
> 8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy . . . in that court, or to protect the right of a party.

Penal Law § 215.51(a) provides as follows:

Criminal Contempt in the First Degree

A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or when after having been sworn as a witness before a grand jury, he refuses to answer any legal and proper interrogatory.

Penal Law § 215.50, in part, provides:

Criminal Contempt in the Second Degree

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

2. Breach of the peace, noise or other disturbance, directly tending to interrupt a court's proceedings; or

3. Intentional disobedience or resistance to the lawful process or other mandate of a court . . . ; or

4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory . . .

Civil Practice Law and Rules § 2308 (CPLR), in part, states:

Disobedience of Subpoena

Judicial—Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court.

[1.2] III. THE NATURE OF LEGISLATIVE INHERENT CONTEMPT POWER

The bedrock case from the United States Supreme Court recognizing the existence of the legislative inherent contempt power is replete with *dicta* recognizing the judiciary's inherent contempt power. It upheld a legislative contempt issuing out of the United States House of Representatives, with one of the protagonists being the great compromiser, Henry Clay. Because the decision astutely recognizes and confirms the judiciary's inherent contempt power as the "older" Siamese twin of the inherent legislative contempt power, it is cited again and again as confirmation of both. Besides the mutuality of benefit visited on both institutions of constitutional government, repeated citation of the Court's decision—as Blackstone might have said—lends it the quality of that which has been settled "since the memory of man runneth not to the contrary." The decision is here synopsized.

The contempt power

> must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of

> implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the Framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxilliary and subordinate.[3]
>
> The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeal to public approbation.[4]
>
> ***
>
> But if there is one maxim that necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of the particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms which makes every individual the tyrant over his neighbor's rights.[5]
>
> That the "safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety cannot guarded. On this principle it is

3 *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 225–26 (1821).

4 *Id.* at 226.

5 *Id*. at 226–27.

> that courts of justice are universally acknowledged to be vested by their very creation with the power to impose silence, respect and decorum in their presence and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach of insults and pollution [corruption].
>
> It is true, that the Courts of justice of the United States are vested, by express statutory provision, with the power to fine and imprison for contempts; but is does not follow from this circumstance that they would not have exercised that power without the aid of statute, or not, in cases, if such should occur, to which such statutory provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledge limits of fine and imprisonment.[6]

New York's Legislature has inherent contempt powers:

> Each house may punish by imprisonment not extending beyond the same session . . . as . . . a contempt . . . the following offenses only:
>
> 1. arresting a member or officer of either house in violation of his privilege from arrest;
>
> 2. disorderly conduct of its members, officers or others in the immediate view and presence of the house tending to interrupt its proceedings;
>
> 3. the publication of a false and malicious report of its proceedings, or of the conduct of a member in his legislative capacity;[7]

6 *Id.* at 227–28.

7 This subsection is, to most intents and purposes, unconstitutional. *Groppi v. Leslie*, 404 U.S. 496 (1972); *Bridges v. State of California*, 314 U.S. 252 (1941).

> 4. giving or offering a bribe to a member, or attempting . . . directly or indirectly, to influence a member in giving or withholding his vote, or in not attending meetings of the house of which he is a member;
>
> 5. neglect to attend or be examined as a witness before the house or committee thereof, or upon reasonable notice to produce any materials . . . or documents when duly required to give testimony or to produce . . . (the same) . . . in a legislative proceeding . . . or investigation.[8]

The legislature's contempt power is reviewable in the courts but not dependent upon them.[9]

[1.3] IV. THE NATURE OF THE JUDICIARY LAW CONTEMPT POWER

"Force is an absolutely essential element of all law whatever. Indeed law is nothing but regulated force subjected to particular conditions and directed towards particular objects. The abolition of the law of force cannot therefore mean the withdrawal of the element of force from law, for that would be the destruction of law altogether."[10] And so "[c]ourts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities."[11] "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[12] But "[p]rinciples of deference counsel restraint in resorting to inherent power . . . and require its use to be a reasonable response to the problems and needs that provoke it."[13]

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8 Legislative Law § 4.

9 *Groppi*, 404 U.S. 496; *Jurney v. MacCracken*, 294 U.S. 125 (1938); *Marshall v. Gordon*, 243 U.S. 521 (1917); *Anderson*, 19 U.S. 204; *U.S. v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *In re Doyle*, 257 N.Y. 244 (1931); *McDonald v. Keeler*, 99 N.Y. 463 (1885).

10 James Fitzjames Stephen, Liberty, Equality, Fraternity, p. 200 (1990).

11 *Degen v. U.S.*, 517 U.S. 820, 823 (1996).

12 *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999).

13 *Degen*, 517 U.S. at 823–24 (citations omitted).

A judicial tribunal lacking the power to enforce its orders or punish disobedience thereof is a contradiction in terms. The Japanese "courts" have no contempt powers.[14] "Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."[15] "The power of a court to make an order carries with it the equal power to punish for a disobedience of that order.[16] English common law recognized the judicial contempt power as inherent and unfettered—this principle constituting the ancestral basis of American contempt jurisprudence. In New York the non-delegable power of the courts[17] to punish disregard of their authority—after adjudication in *open* court[18]—has two facets, to an extent molded by the tension between society's need of a judiciary capable of enforcing its own orders and its abhorrence of unchecked power where personal liberty is concerned. The facets are criminal (or public) and civil (or private) contempt.[19] (As may be gleaned from various discussions throughout this book, had history adopted the terms "public" and "private" instead of "criminal" and "civil" as adopted by the Judiciary Law, much of the confusion and mischief now attending New York's blindly nomenclature-oriented contempt jurisprudence might have been avoided).

14 Karel Van Wolferen, The Enigma of Japanese Power 225 (1989). In the United States by contrast, "[t]he contempt power lies at the core of the administration of a State's judicial system," says *Juidice v. Vail*, 430 U.S. 327, 335 (1977) (citing *Ketchum v. Edwards*, 153 N.Y. 534, 539 (1897)); *see also Eilenbecker v. Dist. Court of Plymouth Cnty.*, 134 U.S. 31, 36 (1890).

15 *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911).

16 *In re Debs*, 158 U.S. 564, 594 (1895).

17 *Goldberg v. Extraordinary Special Grand Juries*, 69 A.D.2d 1, 7 (4th Dep't 1979); *People ex rel. Stearns v. Marr*, 88 A.D. 422, 424 (4th Dep't 1903), *aff'd as modified*, 181 N.Y. 463 (1905); *Chicago Truck Drivers Union Pension Fund v. Bhd. Labor Leasing,* 207 F.3d 500, 504 (8th Cir. 2000); *Church v. Steller*, 35 F. Supp. 2d 215, 216–17 (N.D.N.Y. 1999); *Stein Indus., Inc. v. Jarco Indus., Inc.*, 33 F. Supp. 2d 163, 165–67 (E.D.N.Y. 1999).

18 *In re Oliver*, 333 U.S. 257, 264–65 (1948); *In re Rosahn*, 671 F.2d 690, 696–97 (2d Cir. 1982); *Westchester Rockland Newspapers, Inc. v. Leggett,* 48 N.Y.2d 430, 438 (1979); *People v. Jones*, 47 N.Y.2d 409 (1979); *People v. Hinton*, 31 N.Y.2d 71, 73 (1972); *Oliver v. Postel*, 30 N.Y.2d 171 (1972); *United Press Ass'ns v. Valente*, 308 N.Y. 71, 87 (1954) (dissenting opinion); *Poughkeepsie Newspapers v. Rosenblatt*, 92 A.D.2d 232 (2d Dep't 1983); *see also Adams v. McIlhany*, 593 F. Supp. 1025, 1028–29 (N.D. Tex. 1984).

19 *Hicks v. Feiock*, 485 U.S. 624 (1988); *Michaelson v. U.S.*, 266 U.S. 42 (1924); *U.S. v. Ayer*, 866 F.2d 571 (2d Cir. 1989); *McCormick v. Axelrod*, 59 N.Y.2d 574 (1983); *Douglas v. Adel,* 269 N.Y. 144, 146 (1935); *In re Barnes*, 204 N.Y. 108, 113–15 (1912); *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245 (1886); *see also Adams*, 593 F. Supp. at 1028–29 ("constructive" versus "direct" contempts).

A *criminal* contempt involves a violation of public rights with any imprisonment imposed vindicating public justice,[20] not the interests of a private litigant. Any fine imposed is received into the public treasury as a penalty, not an indemnity. Necessarily, criminal contempts in their origin and punishment—connoting an evil motive or a degree of willfulness—*partake of the nature of crimes*. *Civil* contempts entail the vindication of private rights. An injury or wrong done to a *private litigant* gives rise to a right to monetary indemnity, or court-compelled action or inaction by the transgressor.[21] Punishment for a Judiciary Law criminal contempt is up to 30 days in jail and/or $1,000; the coercion of its civil contempt cousin includes jail or money to make a civil litigant whole.[22] *One note on this score*:[23]

> It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.[24] But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.[25]

20 For instance, an unlawful refusal to testify as a witness at a criminal trial. *See U.S. v. Wilson*, 421 U.S. 309 (1975); *Ex parte Hudgings*, 249 U.S. 378, 382 (1919); *O'Neil v. Kasler*, 53 A.D.2d 310 (4th Dep't 1976); *People v. Clinton*, 42 A.D.2d 815 (3d Dep't 1973).

21 *McNeil v. Dir. Patuxent Inst.*, 407 U.S. 245, 251 (1972); *People ex rel. Munsell*, 101 N.Y. at 247–49, *applied in McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994); *see also Conrail v. Yashinsky*, 170 F.3d 591, 595 (6th Cir. 1999); *Fischer v. Fischer*, 237 A.D.2d 559 (2d Dep't 1997); *First Nat'l Bank v. Reoux*, 9 A.D.2d 1005, 1006 (3d Dep't 1959).

22 N.Y. Judiciary Law §§ 751, 753 (Jud. Law); *see e.g.*, *Craft v. Craft*, 282 A.D.2d 422 (2d Dep't 2001).

23 *Gompers v. Bucks Stove & Range Co*., 221 U.S. 418, 443 (1911) (footnotes added) (emphasis in original).

24 *See, e.g.*, *Second Additional Grand Jury v. Cirillo*, 16 A.D.2d 605, 607, *aff'd*, 12 N.Y.2d 206 (1963).

25 *Int'l Bus. Machs. v. U.S.*, 493 F.2d 112, 116 (2d Cir. 1973) (magnitude of fine does not change civil into criminal contempt, nor does jail turn a civil into a criminal contempt).

It is occasionally urged that lengthy incarceration for civil contempt, or an "oath" that one will never obey, transforms it into criminal contempt. "[T]here is no temporal limitation on the amount of time that a contemnor can be confined for civil contempt when it is undisputed that the contemnor has the ability to comply with the underlying order."[26]

Under the Judiciary Law, criminal and civil contempts are further distinguished and defined by the scope of the judicial power pertaining to each. While the Judiciary Law criminal contempt power is limited to acts specifically enumerated,[27] a common law catch-all has been preserved for civil contempts.[28] This catch-all was deemed safe and consistent with prudence since civil contempt affects only the private rights of private litigants where courts are under little or no temptation to abuse their power. In contrast, Judiciary Law criminal contempts pose one particular danger—it is the court contemned which punishes, virtually always, without intervention of a jury.[29] In sum, a statutorily undefined, common law, *criminal* contempt power in the courts of New York simply does not exist; for *civil* contempt one may, in contrast, look to the common law. Stated differently, an act that is not a civil contempt, and is not enumerated among the statutorily defined criminal contempts, is not a contempt at all.[30] Contempts declared to be Penal Law crimes by the legislature must be prosecuted by an accusatory instrument sufficient to commence a criminal action.[31] Moreover, while criminal contempt may be visited on a con-

26 *U.S. v. Harris*, 582 F.3d 512, 517 (3d Cir. 2009) (A civil contemnor's continued disobedience does not inure to his benefit thus invoking the due process protections of criminal contempt. A civil contempt does not become criminal because the contemnors persists in punishing himself A civil contempt only becomes criminal (punitive) if compliance is impossible, or if circumstances so dictate.).

27 Jud. Law § 750(A) provides that: "A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, *and no others*" (emphasis added); *see also* Jud. Law § 750(C); *James v. Powell*, 26 A.D.2d 295, 296, *aff'd*, 18 N.Y.2d 931 (1966).

28 Jud. Law § 753(A)(8) refers to "any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record . . ." *See People ex rel. Brewer v. Platzek*, 133 A.D. 25 (1st Dep't 1909).

29 *Bloom v. Illinois*, 391 U.S. 194 (1968); *Green v. U.S.*, 356 U.S. 165, 187 (1958); *U.S. v. Lumumba*, 598 F. Supp. 209, 211 (S.D.N.Y. 1984); *Rankin v. Shanker*, 23 N.Y.2d 111, 119–20 (1968).

30 *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 247–54 (1886); *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 448–51 (2d Dep't 1985); *see also Nye v. U.S.*, 313 U.S. 33, 45–48 (1941).

31 *See, e.g., People v. DeJesus,* 298 A.D.2d 525 (2d Dep't 2002).

temnor *sua sponte* or on motion of the People, it appears that a court may invoke its civil cousin only on the motion of an aggrieved civil litigant.[32]

> Although there does not appear to be much express authority on the point, we believe that logic, and to some extent precedent as well, support the proposition that civil contempt proceedings may be instituted only by the parties primarily in interest.[33] ***
>
> It would appear from these authorities, and indeed from the very nature of the judicial function, that the trial court can have only a public as distinguished from a private interest in the enforcement of its own decrees. It seems to us, therefore, that regardless of what label may be appended to the proceedings by the court, any action of contempt initiated by the court of its own motion must be regarded as criminal in nature for the vindication of the court's authority and the punishment of the public wrong. "A civil contempt proceeding is wholly remedial, to serve only the purposes of the complainant, not to deter offenses against the public or to vindicate the authority of the court."[34] *** It is clear that in a criminal contempt proceeding both a fine and imprisonment may not be imposed for a single act of contempt . . . . It is equally clear that both may be imposed where the same act constitutes civil and criminal contempt. So long as civil contempts are restricted to those initiated by the parties primarily in interest we see nothing objectionable in the double sentence—one remedial, the other punitive. We believe, however, that such a double sentence is not proper where the parties primarily in interest have not complained and where the trial judge, in effect, seeks to turn the remedial sentence for civil contempt into additional punishment for an offense to the public interest. If the court may accomplish this by merely adding the word

32 *See Jones v. Clinton*, 206 F.3d 811 (8th Cir. 2000); *U.S. v. Russotti*, 746 F.2d 945, 949 (2d Cir. 1984) ("A federal judge may not insist that a criminal or civil proceeding be begun or continued."); *U.S. v. Vague*, 697 F.2d 805, 807 (7th Cir. 1983) (Posner, J.).

33 *MacNeil v. U.S.*, 236 F.2d 149, 153 (1st Cir. 1956).

34 *Id.* at 154.

> "civil" to his charge of criminal contempt, then the provisions of § 401 become meaningless.[35]

Sometimes criminal and civil contempt steal each other's clothes. Three defendants were indicted. Two pleaded guilty and were sentenced to long imprisonment. One of them was immunized but refused to testify. The federal trial court imposed six months imprisonment with the proviso that the contemnor-prisoner could purge if he relented during the remainder of the trial and testified. On appeal, the contemnor-prisoner argued that since the trial was over he could no longer be coerced and, therefore, his "civil" contempt citation was defeated by its own terms. The First Circuit Court of Appeals held that the contempt was "criminal" even though it had "civil" contempt's escape hatch proviso seeking to coerce his testimony. "Otherwise," held the court,

> a trial judge faced with an incarcerated, recalcitrant witness during an ongoing trial would have to choose between a civil contempt sanction with little or no coercive value, or a determinate sentence with no possibility of purging the sentence should the contemnor testify. Under either choice, the judge cannot fashion a contempt sanction to provide a meaningful incentive to testify. If we were to hold that an offer to purge, under the facts of this case, automatically converts the contempt sanction from criminal to civil, we would effectively strip the trial judge of the recognized discretion . . . to provide an incentive to testify.[36]

One, Harris, was convicted of conspiracy and fraud and sentenced to 188 months' imprisonment, the clock for which did not begin ticking for five years since he was incarcerated for contempt for refusing to obey the court's order in the same underlying proceeding. The order of contempt tolled commencement of Harris's 188-month criminal sentence. *Affirmed*.[37]

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35 *Id.* at 155–55 (citation omitted).

36 *U.S. v. Winter*, 70 F.3d 655, 664 (1st Cir. 1995), *cert. denied*, 517 U.S. 1126 (1996).

37 *U.S. v. Harris*, 582 F.3d 512 (3d Cir. 2009).

Civil or criminal, the essential predicate for a contempt adjudication is a clear court order *previously*[38] *communicated to those who are to be sanctioned for disobeying the order. "Acts of a respondent prior* to the entry of the order or judgment which he is charged with disobeying, do not constitute contempt of court, regardless of the intentions of the respondent to avoid the impact of an order or judgment expected by him to be thereafter entered."[39] One cannot be held in contempt of an uncommunicated or vague court order—or a subpoena which is also a court mandate.[40] "[C]ourts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a kind of judicial tyranny."[41] Court orders must contain "an operative command capable of 'enforcement'" not merely "an abstract conclusion of law."[42] "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one."[43] "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."[44] However, court orders need not take on any special form or mode of delivery.[45] Oral or written, they need only be effectively communicated and clear. In determining whether an order is sufficiently clear to justify contempt sanctions, an objective standard is applied. That standard takes into account both the language of the order and the circumstances surrounding its issuance, as well as the audience to whom it is addressed.[46] Graphically illustrative is a case involving a

38 *Perfect Fit Industries v. Acme Quilting Co.*, 646 F.2d 800, 808 (2d Cir. 1981); *U.S. v. Voss*, 82 F.3d 1521, 1525 (10th Cir. 1996); *Dep't of Envtl. Prot. v. DEC*, 70 N.Y.2d 233, 240 (1987); *People v. Roblee,* 70 A.D.3d 225, 227 (3d Dep't 2009); *In re Hirschfeld*, 184 Misc. 2d 119 (Sup. Ct., N.Y. Co. 2000).

39 *NLRB v. Deena Artware, Inc.*, 261 F.2d 503, 509 (6th Cir. 1958) (citation omitted), *rev'd on other grounds*, 361 U.S. 398 (1960).

40 *People v. McCowan*, 85 N.Y.2d 985 (1995); *Kinney v. Simonds*, 276 A.D.2d 882, 884 (3d Dep't 2000); *Petkovsek v. Snyder*, 251 A.D.2d 1085 (4th Dep't 1998); *Vacco v. Consalvo*, 176 Misc. 2d 107, 111 (Sup Ct., Bronx Co. 1998).

41 *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949) (Frankfurter, J., concurring); *EEOC. v. Local 638*, 81 F.3d 1162 (2d Dep't 1996).

42 *Int'l Longshoreman's Ass'n v. Philadelphia Mar. T. A.*, 389 U.S. 64 (1967).

43 *Id.* at 76.

44 *Id.; see also McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994).

45 *Police Benevolent Assoc. of N.Y. State v. N.Y. State Police*, 29 A.D.3d 68, 70 (3d Dep't 2006) ("Since court orders must be obeyed as a matter of public policy and personal service of an order is not a prerequisite to holding a person in contempt where he or she has actual knowledge of the order . . . it is of no consequence that the past court orders may not have been properly served.").

46 *U.S. v. Young*, 107 F.3d 903, 907–908 (D.C. Cir. 1997).

former public official who was "ordered" *to provide handwriting exemplars* in aid of an election fraud investigation. The trial court held him in contempt and imposed a sentence of 30 days imprisonment for deliberately providing handwriting exemplars "in a disguised fashion."[47] However, "[a]fter . . . argument in [the Appellate Division] and during consideration of the appellate papers, it was discovered that the order [which the public official] allegedly violated required only that he '*appear* at the Office of the District Attorney . . .'"[48] *Nowhere* did the order actually command him to give handwriting exemplars. In reversing as a matter of law, the court stated:

> In the absence of a specific valid order that has been disobeyed, there can be no contempt. The order which serves as the basis of this contempt proceeding contains no specific direction that [appellant] was required to follow other than to appear at the District Attorney's office, and he concededly complied with that direction . . . . It is well settled that criminal contempt is established when there is a clear and definite order of the court, the contemnor knows of the order, and he willfully disobeys it . . . . Where the terms of an order are vague and indefinite as to whether or not particular action by a party is required, then, of course, he may not be adjudged in criminal contempt for the willful failure to take such action.
>
> ***
>
> Here, the order was specific and regardless of any other intent [appellant] may have had he complied with the specific terms of the order. The District Attorney argues, nevertheless, that the order should be construed as though it contained a direction to give handwriting exemplars, because that was the belief of all the parties. This contention ignores "[t]he longstanding, salutary rule in contempt cases * * * that ambiguities and omissions in orders redound to the benefit of the person charged with

47 *Holtzman v. Beatty*, 97 A.D.2d 79 (Sup. Ct., Kings Co. 1983) (Kuffner, J.).

48 *Holtzman*, 97 A.D.2d 79 (emphasis added) (cited in *People v. Roblee*, 70 A.D.3d 225, 227-228 (3d Dep't 2009)); *Watson v. Esposito*, 231 A.D.2d 512, 515 (2d Dep't 2006). Beatty was also federally prosecuted for obstruction of justice for giving disguised handwriting exemplars to a federal grand jury, *U.S. v. Beatty*, 587 F. Supp. 1325 (E.D.N.Y. 1984) (which charge withstood pretrial motion).

> contempt." There is no rule of construction of which we are aware that would permit us retroactively to rewrite the order to the detriment of the accused—indeed to sustain his conviction—in order to correct an error made by the prosecutor or the judicial system.
>
> We also reject the District Attorney's claim that [the appellant] waived his right to raise the issue of the absence of the crucial direction in the order. A waiver is the intentional relinquishment of a known right. Knowledge and intent are essential elements of waiver. Whatever the negligence involved in his lawyer's failure to examine the order, [the appellant] never knew its actual contents; he was never served with a signed or conformed copy of the order and at the contempt hearing he heard the District Attorney incorrectly assure the court that the order contained the language in question.[49]
>
> [i]n contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read.[50]

While formal service may underline the message of required obedience, knowledge of a court's order, not the manner by which that knowledge is obtained, is sufficient to predicate a contempt adjudication for disobedience. More than 100 years ago the Court of Appeals observed that it "has upheld proceedings . . . punishing parties for contempt in violating an injunction who had knowledge of it, though not served, and also the agents and attorneys of parties having like knowledge of the granting

49 *Holtzman*, 97 A.D.2d at 82–83 (citations omitted); *see also U.S. v. Charmer Indus.*, 722 F.2d 1073 (2d Cir. 1983); *Powell v. Ward*, 643 F.2d 924, 931–33 (2d Cir. 1981); *Dunn v. N.Y.S. Dep't of Labor*, 594 F. Supp. 239, 241–42 (S.D.N.Y. 1984); *Pereira v. Pereira*, 35 N.Y.2d 301, 308 (1974); *Prinzo ex rel. Campbell v. Jenkins*, 251 A.D.2d 709 (3d Dep't 1998); *In re Wilson*, 98 A.D.2d 666 (1st Dep't 1983); *Puro v. Puro*, 39 A.D.2d 873, (1st Dep't 1972), *aff'd,* 33 N.Y.2d 805 (1973); *King v. King*, 124 Misc. 2d 946, 947–48 (Sup. Ct., N.Y. Co. 1984).

50 *Terminal R.R. Ass'n v. U.S.*, 266 U.S. 17, 29 (1924); *see also U.S. v. Vezina*, 165 F.3d 176, 179 (2d Cir. 1999); *Berry v. Midtown Serv. Corp.,* 104 F.2d 107, 111 (2d Cir. 1939).

of the order, though it was imperfectly or irregularly served."[51] A modern-day commentator has noted that:

> some courts sway back and forth on the point, but any holding disregarding knowledge and letting the contemnor off because he was not perfectly served not only conflicts with clear pronouncements of the Court of Appeals, but also encourages evasion of judicial process. The function of the contempt remedy is to uphold judicial process and the reasonable expectations of those who turn to it. Distinctions that disregard actual knowledge and turn on overly nice procedural points are not in harmony with that purpose.[52]

To punish for contempt, it is no more necessary to serve a court's order than it would be to serve a copy of a penal statute as a condition precedent to punishment for crime. Knowledge, not service and certainly not the formality of service, is determinative.[53] But this knowledge must be personal. It is not to be merely imputed through an agent or attorney,[54] a slight exception being civil contempt against a governmental agency head where the knowledge of subordinates may be imputed to him. *Two cave-*

51 *Daly v. Amberg*, 126 N.Y. 490, 496 (1891); *see also McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994); *Raes Pharmacy, Inc. v. Perales*, 181 A.D.2d 58, 61–62 (1st Dep't 1992); *Vacco v. Consalvo*, 176 Misc. 2d 107, 111 (Sup. Ct., Bronx Co. 1998). *See generally U.S. v. Voss*, 82 F.3d 1521, 1525, 1526, 1528 (10th Cir. 1996).

52 David D. Siegel, New York Practice § 481, at 811 (4th ed. 2005).

53 *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *In re Kaplan (Blumenfeld)*, 8 N.Y.2d 214, 219–20 (1960); *Spector v. Allen*, 281 N.Y. 251, 258 (1939); *People ex rel. Drake v. Andrews*, 197 N.Y. 53, 56 (1909); *Daly*, 126 N.Y. at 496; *People v. Sturtevant*, 9 N.Y. 263, 277–78 (1853); *In re Comm'r of Soc. Servs.*, 67 A.D.2d 815, 815–16 (4th Dep't 1979); *Paine, Webber, Jackson & Curtis Inc. v. Pioneer Warehouse Corp.*, 61 A.D.2d 756, 757 (1st Dep't 1978); *Schenectady City School Dist. v. Fed'n of Teachers*, 49 A.D.2d 395, 398 (3d Dep't 1975); *Puro*, 39 A.D.2d 873; *People v. Balt*, 34 A.D.2d 932, 933 (1st Dep't 1970); *People v. Diefendorf*, 281 A.D. 465, (1st Dep't 1953), *aff'd*, 306 N.Y. 818 (1954); *Wilwerth v. Levitt*, 262 A.D. 112 (1st Dep't 1941); *People ex rel. Springs v. Reid*, 139 A.D. 551 (1st Dep't 1910); *People ex rel. Illingworth v. Court of Oyer & Terminer*, 10 A.D. 25, 29 (1st Dep't 1896); *Kanbar v. Quad Cinema Corp.*, 151 Misc. 2d 439 (App. Term 1991), *aff'd as modified*, 195 A.D.2d 412 (1st Dep't 1993); *N.A. Dev. Co. v. Jones*, 114 Misc. 2d 896, 897, 899–900 (Civ. Ct., N.Y. Co. 1982), *aff'd in part and rev'd in part*, 99 A.D.2d 238 (1st Dep't 1984); *Wiggins v. Ithaca Journal News*, 57 Misc. 2d 356, 363 (Ithaca City Ct. 1968); *In re Mullen*, 177 Misc. 734, 737 (1941); *Ahmed v. Reiss S.S. Co.*, 580 F. Supp. 737 (N.D. Ohio 1984), *aff'd sub nom. In re Jaques*, 761 F.2d 302 (6th Cir. 1985); David D. Siegel, New York Practice § 481, at 811 (4th ed. 2005).

54 *In re Depue*, 185 N.Y. 60, 69–70 (1906); *Broman v. Stern*, 172 A.D.2d 475 (2d Dep't 1991); *Balt*, 34 A.D.2d 932; *Kanbar*, 151 Misc. 2d 439; *cf. U.S. v. Thompson*, 214 F.2d 545, 546 (2d Cir. 1954); *U.S. v. Hall*, 198 F.2d 726, 730–731 (2d Cir. 1952).

ats: First, if knowledge of a court order is, in fact, imparted to a person by an attorney or agent, such intermediary must thereafter either remain silent or counsel obedience, for one who aids, procures or advises disobedience of a court order is equally guilty with the one who actually disobeys it.[55] Second, a court's order endures through an appeal though its enforcement may be stayed during the appellate process. As stated by the Court of Appeals:

> [t]he power of the court below to enforce its decisions may be suspended, as the result of an appeal; but its decision loses none of its strength pending the appeal and . . . to the extent that it is sustained, it is the same order, to the validity and force of which has been added the sanction of this court.[56]

Generally, absent such a stay pending appeal, all court orders not void on their face, (e.g., "go kill someone") must be promptly obeyed even though later ruled incorrect. "A party is obliged to comply with a court order, however incorrect the party may consider that order to be, until that order is set aside, either by appeal or otherwise, so long as the court issuing the order had jurisdiction to do so."[57]

Judgmental error in failing to obtain a stay or "good faith disobedience" are not defenses.[58] Nor may an appeal from a contempt citation be used to revive a challenge to a court's order that was neither stayed nor appealed in the first instance but rather disobeyed. This legal principle is

55 *McCormick*, 59 N.Y.2d at 584; *Voss*, 82 F.3d at 1526; *Roe v. Operation Rescue*, 54 F.3d 133, 139, 140 (3d Cir. 1995); *Davis v. Goodson*, 276 Ark. 337, 635 S.W.2d 226 (1982), *cert. denied*, 459 U.S. 1154 (1983); *People ex rel. Drake*, 197 N.Y. at 56; *King v. Barnes*, 113 N.Y. 476, 479–80 (1889); *In re Landau*, 230 A.D. 308, 311–12 (2d Dep't 1930); *see also In re Abrams (John Anonymous)*, 62 N.Y.2d 183, 198–99 (1984).

56 *People ex rel. Platt v. Rice*, 144 N.Y. 249, 262 (1894).

57 *Gloveman Realty Corp. v. Jefferys*, 29 A.D.3d 858–859 (2d Dep't 2006).

58 *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *U.S. v. United Mine Workers*, 330 U.S. 258, 290–93 (1947); *U.S. v. Shipp*, 203 U.S. 563 (1906) (Holmes, J.); *U.S. v. Remini*, 967 F.2d 754, 757 (2d Cir. 1992); *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1207–09 (11th Cir. 1985); *Balter v. Regan*, 63 N.Y.2d 630 (1984); *Daly v. Amberg*, 126 N.Y. 490, 494 (1891); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 408–09 (1882); *Kampf v. Worth*, 108 A.D.2d 841, 842 (2d Dep't 1985). *Compare Walker v. City of Birmingham*, 388 U.S. 307 (1967) *and Zapon v. U.S. Dep't of Justice*, 53 F.3d 283 (9th Cir. 1995), *with Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), *and In re Green*, 369 U.S. 689 (1962). *See generally La Rossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583 (1984); *SEC. v. Diversified Growth Corp.*, 595 F. Supp. 1159, 1170 (D.D.C. 1984).

often referred to as "the collateral bar rule," the "cornerstone of a system of orderly and efficient adjudication."[59]

[1.4] V. PREPARATION OF THE ORDER TO SHOW CAUSE FOR A CRIMINAL CONTEMPT PROCEEDING

Who must prepare the order to show cause for a contempt committed outside the presence of the court is a question that is anecdotal, implicit and customary. The attorney for the aggrieved party may do so as an officer of the court. The court or its law secretary may do so.[60] A case from the 1950s provides an example.

> The basis for the contention that the order to show cause was void is that it was drawn by Judge Bryan while in chambers and not by an attorney for the United States or another attorney. . . . The case was not tried summarily . . . The fact that the judge drew the order to show cause upon his own motion . . . is immaterial. . . It becomes the duty of the judge to take affirmative action when the lawful commands of the court are defied; and it was not the purpose of [Federal Rules of Criminal Procedure] Rule 42(b) to limit the authority of the judge or to make the institution of a contempt proceeding contingent upon the consent of any attorney, but rather to aid the judge by providing for the prosecution of the charge by the attorney rather than the court.[61]

[1.5] VI. THE MANDATE OF COMMITMENT FOR CRIMINAL CONTEMPT

Assuming that an adjudication of criminal contempt has occurred, Judiciary Law § 752 requires that the "particular circumstances" underlying such contempt be set forth in the "mandate of commitment"—the factual adjudication of guilt and pronouncement of punishment thereon reduced to a written, formal order. This requirement is said to be *stricti*

59 *In re Establishment Inspection of Hern Iron Works*, 881 F.2d 722, 730 (9th Cir. 1989); *People ex rel. Sassower v. Cunningham*, 112 A.D.2d 119 (1st Dep't 1985); *see also U.S. v. Nightingale*, 703 F.2d 17, 18–19 (1st Cir. 1983).

60 *See, e.g.*, *Cooke v. U.S.*, 267 U.S. 517 (1925).

61 *In re Fletcher*, 216 F.2d 915, 917 (4th Cir. 1954).

juris, though its purpose is functional not formalistic. Fundamentally, it permits adequate appellate review of a judicial finding of guilt, the factual precision of which must be sufficient so as to preclude double jeopardy or *post litem motam* factual findings. Like a criminal indictment—here drawn up after accusation, trial and conviction—a mandate of commitment for criminal contempt must recite the offense along with succinct, but sufficient, evidentiary facts as to how the offense was committed. Conclusory characterizations of the contemnor's conduct as disobedient, disrespectful or contumacious are insufficient, whether the contempt is committed within or without the immediate view and presence of the court.[62] As pointedly stated by the Court of Appeals: "A failure to comply with the requirements of section 752 . . . renders the mandate order null."[63]

As to the form of appellate review, such is by CPLR article 78 or by appeal. Where the criminal contempt is committed in the immediate view and presence of the court—"summary contempt" as it is not quite accurately called—the judge then and there decides the facts based on his own knowledge. It is properly reviewed *via* an article 78 proceeding[64] since such is the only way to create a record for review. What the judge personally saw and its effect on him takes the place of formal proof which would otherwise have to be developed by a hearing stenographically recorded. Thus, if the "proof" of an immediate-view-and-presence contempt, as written into its mandate of commitment, does not make out such a con-

62 *In re Rotwein*, 291 N.Y. 116, 121 (1943); *Douglas v. Adel*, 269 N.Y. 144, 146, 147 (1935); *People ex rel. Barnes v. Court of Sessions*, 147 N.Y. 290 (1895); *Paine, Webber, Jackson & Curtis Inc. v. Pioneer Warehouse Corp.*, 61 A.D.2d 756, 757 (1st Dep't 1978); *Sickmen v. Goldstein*, 59 A.D.2d 731 (2d Dep't 1977); *Solano v. Martin*, 55 A.D.2d 620 (2d Dep't 1976); *In re Boasberg*, 286 A.D. 951, 952 (4th Dep't 1955); *Berkon v. Mahoney*, 180 Misc. 659, 663 (Sup. Ct., Kings Co. 1943), *rev'd on other grounds*, 268 A.D. 825 (2d Dep't 1944), *aff'd,* 294 N.Y. 828 (1945) (in criminal contempt proceeding mandate's failure to recite the word "willful" was fatal for § 750(3) adjudication).

63 *Briddon v. Briddon*, 229 N.Y. 452, 459 (1920); *Rutherford v. Holmes*, 66 N.Y. 368, 372 (1876) (failure to adhere to statutory requirement specifying that refusal to testify pertained to a "material" matter vitiated contempt); *see also Seaman v. Duryea*, 11 N.Y. 324, 329–30 (1854); *Daniel P. Foster, P.C. v. Morgenthau*, 115 A.D.2d 375 (1st Dep't 1985); *People ex rel. Bernstein v. La Ferta*, 171 A.D. 269 (1st Dep't), *aff'd,* 219 N.Y. 591 (1916).

64 "[A] proceeding under this article shall not be used to challenge a determination . . . which was made in a civil action or criminal matter *unless it is an order summarily punishing a contempt committed in the presence of the court*." N.Y. Civil Practice Law and Rules 7801(2) (emphasis added) (CPLR).

tempt, then—according to the mandate—no such contempt was committed.[65] Where an adequate record already exists, appeal may also lie.

The federal counterpart to New York's mandate of commitment is Federal Rules of Criminal Procedure Rule 42(b)'s "saw-and-heard certification."[66] A case paraphrased from the Ninth Circuit Court of Appeals illustrates the "saw-and-heard-certification" analog to New York's "mandate-of-commitment" requirement under Judiciary Law § 752.[67]

> The phrase "in the actual presence of the court" . . . reflects the case law requirement that summary procedure may be employed only for the trial and punishment of direct contempts, i.e., those which occur "under [the] eye and within the hearing" of the court. It means no less than that the use of summary power is proper only if the trial judge actually witnesses the misbehavior deemed contumacious. In Rule 42(a) cases, the judge is his own best witness of what occurred. If he must depend upon the testimony of other witnesses or the confession of the contemnor for his knowledge of the offense, Rule 42(a) does not apply.
>
> The ever-present danger that these summary powers may be abused . . . [calls for] caution and circumspection.
>
> This means, among other things . . . that the order entered by the judge . . . "shall recite the facts"—"the facts," in this context, being "the conduct constituting the contempt," which the judge must certify he "saw or heard committed in the actual presence of the court."
>
> This recitation of the facts in the certificate is of critical importance. "A criminal contempt order like any other conviction of crime must stand or fall on the sufficiency

65 *Douglas*, 269 N.Y. at 146–48; *In re Barnes*, 204 N.Y. 108, 122 (1912); *Daniel P. Foster, P.C.*, 115 A.D.2d 375.

66 Historically, subsection (a) of Rule 42 addressed summary dispositions and subsection (b) addressed dispositions on notice. The December 1, 2002, amendments, however, rewrote and reordered Rule 42 so that it is subsection (b) which relates to summary dispositions. Consequently, quotes from cases decided before the new rule went into effect will refer to summary proceedings as those under Rule 42(a); for the sake of clarity, the rule references in such quotes have not been altered to reflect the updated subsections.

67 *U.S. v. Marshall*, 451 F.2d 372 (9th Cir. 1971).

of the specifications of wrongdoing upon which it is based."

The reason for this requirement is obvious. Because the [contemnor] has been convicted without notice or hearing, there is no record of the conviction upon which appellate review may be based. The factual recitation in the certificate supplies this deficiency. Accordingly, "[t]his requirement is more than a formality. It is essential to disclosure of the basis of decision with sufficient particularity to permit informed appellate review."

"Informed appellate review" is possible only if the facts are stated in sufficient detail for the appellate court to determine whether the conduct upon which the conviction rests was contemptuous, factually and legally; whether it was of such character, and occurred in such circumstances, as to permit summary conviction under Rule 42(a), and because Rule 42 sentences are subject to appellate review and revision, whether the conduct relied upon justified the sentence imposed.

This means that the judge must recite the specific facts upon which the contempt adjudication rests. Conclusory language and general citations to the record are insufficient. . . .

Incorporation of the entire transcript by general reference does not correct deficiencies in the certificate. The transcript can assist the appellate court in performing its function only if the specific facts constituting the contempt are clearly identified in the certificate. . . .

The point is, however, that the reporter's transcript may not reflect the particular conduct that the judge saw and heard and that he relied upon.

Much that the judge saw and heard may not be reflected in the transcript. . . .

[T]his prerequisite to conviction under Rule 42(a) is satisfied *only* if the judge himself recites or unmistakably refers to the particular facts upon which he relies and cer-

> tifies that he personally witnessed them. And that is true, of course, even as to conduct that *is* reflected in the reporter's transcript.
>
> [A judge may be] faced with a tumultuous, confused and confusing situation. It might have been difficult for him to immediately draw a certificate specifically describing the improper conduct of each [contemnor]. But this does not justify the [following of blind procedure].
>
> First, to the extent that the problem [is] lack of time, he [can] cite[ ] and punish [ ] the [contemnors] for contempt immediately but prepare [ ] the certificate at his leisure. The function of the certificate is not to give notice to the [contemnor] or to frame an issue to be tried, but solely to permit an appellate court to review the judge's action.
>
> Second, if the situation [is] so confused that the judge [cannot] clearly observe and accurately record what each [contemnor did], summary conviction [is] simply inappropriate. As . . . noted, the theory of Rule 42(a) is that no hearing is necessary because the judge already knows the facts. If he does not know the facts, a hearing is necessary to discover what the facts are. If, despite the uncertainty, no evidentiary hearing is had, the obvious risk is that innocent persons may be summarily adjudicated and punished.[68]

As to contempt committed outside the presence of the court, the proceeding must be on advance notice to the contemnor—an order to show cause—with adjudication only after an adversary hearing which creates a record for review on appeal.[69] *Query*: Where the Judiciary Law criminal contempt arises out of a refusal to testify or produce evidence before a grand jury, is the appeal governed by the Civil Practice Law and Rules or by the Criminal Procedure Law, which by its own terms strictly limits appeals to those specified? The answer is not completely free from

68 *Marshall*, 451 F.2d 372, 374–77 (citations and footnotes omitted) (emphasis in original).

69 Jud. Law § 755; CPLR 7801; *Douglas v. Adel*, 269 N.Y. 144, 147 (1935); *Traynor v. Lange*, 178 A.D.2d 481 (2d Dep't 1991); *Solano v. Martin*, 55 A.D.2d 620 (2d Dep't 1976); *People v. Zweig*, 32 A.D.2d 569, 570 (2d Dep't 1969); *see also Ungar v. Sarafite*, 12 N.Y.2d 1013 (1963), *aff'd*, 376 U.S. 575 (1964).

doubt.[70] May the People as petitioner appeal the denial of their application to hold a contemnor in Judiciary Law criminal contempt?

[1.6] VII. ORDERING A GRAND JURY WITNESS TO ANSWER—THE PROSECUTOR, THE WITNESS AND THE ROLE OF THE COURT

When an immunized grand jury witness refuses to answer questions *under claim of legal privilege or objection*, the prosecutor *must* seek a court order commanding the witness to testify prior to any action under the Judiciary or Penal Laws. When the witness *flatly refuses* to answer or *avoids answering by evasiveness*, the prosecutor *may* seek a court order and thus postpone his election to proceed under the Penal or Judiciary Laws. The witness may be taken directly before the court or may be served with an order to show cause commanding his appearance on a date certain. Nothing in the cases indicates that the witness must have counsel present when he receives the court's order, though counsel is often present to argue why a question or line of inquiry should not be answered, thus fending off or limiting the scope of the court's direction in the first place. Prior to the court's order the grand jury stenographer may read the stenographic tape, or the questions asked and refused may be stipulated, or the grand jury foreman may state on the record the questions or line of inquiry rebuffed. Alternatively, the prosecutor may proceed by order to show cause with the questions and answers refused contained in a supporting affidavit. After determining the legality, relevancy and propriety of the questions asked, the court either orders or excuses the witness from

70 *In re Abe A.*, 56 N.Y.2d 288, 293 (1982); *Alphonso C. v. Morgenthau*, 38 N.Y.2d 923, 925 (1976); *Santangello v. People*, 38 N.Y.2d 536 (1976); *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 223–24 (1894); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 406–407 (1882); *People v. Doe*, 38 A.D.2d 905, 906 (1st Dep't 1972) (Kupferman, J., dissenting); *see also Nye v. U.S.*, 313 U.S. 33, 41–44 (1941); *Hanbury v. Benedict*, 160 A.D. 662 (2d Dep't 1914).

answering.[71] If the witness thereafter persists in refusing to answer, he has disobeyed a mandate of the court and may be punished for a Judiciary Law criminal contempt of court, or, in the alternative, prosecuted for the crime of criminal contempt.[72]

From the perspective of the immunized witness, the proper procedure to follow in asserting a *testimonial* privilege or other objection to questioning is to clearly and continuously assert such privilege or objection until vindicated or instructed to answer by the court. By "forcing the prosecutor to take the matter into open court," the "proceeding is expedited and the danger of stalling tactics reduced."[73] Bare refusal to answer is not sufficient to stave off a criminal contempt indictment should the prosecutor elect to bypass the Judiciary Law criminal contempt procedures previously outlined. This concept is demonstrated below in the opinions concerning contemptuous crooked court clerks:

> The refusal to answer, without contemporaneously asserting a basis therefore, casts doubt upon the legitimacy of a subsequent claim of privilege as a defense to [Penal Law] criminal contempt. The failure to assert a legal basis for the refusal before the grand jury precludes

71 *Carlson v. U.S.*, 209 F.2d 209, 216–217 (1st Cir. 1954); *Additional January 1979 Grand Jury v. Doe*, 50 N.Y.2d 14 (1980); *People v. Rappaport*, 47 N.Y.2d 308 (1979); *Keenan v. Gigante*, 47 N.Y.2d 160 (1979); *People v. Leone*, 44 N.Y.2d 315, 318 (1978); *Gold v. Menna*, 25 N.Y.2d 475 (1969); *Koota v. Colombo*, 17 N.Y.2d 147, 151 (1966); *Second Additional Grand Jury v. Cirillo*, 12 N.Y.2d 206 (1963); *People ex rel. Cirillo v. Warden*, 11 N.Y.2d 51 (1962); *People ex rel. Hackley v. Kelly*, 24 N.Y. 74, 79–80 (1861); *Capio v. Justices of the Supreme Court*, 41 A.D.2d 235 (2d Dep't 1973), *aff'd*, 34 N.Y.2d 603 (1974); *People v. Zweig*, 32 A.D.2d 569, 570–71 (2d Dep't 1969); *People v. Woodruff*, 26 A.D.2d 236, 237 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848 (1968); *Second Additional Grand Jury v. Cirillo*, 19 A.D.2d 555 (2d Dep't 1963); *Comm'n of Investigation v. Lombardozzi*, 7 A.D.2d 48 (1st Dep't 1958), *aff'd*, 5 N.Y.2d 1026 (1959); *People v. Paperno*, 98 Misc. 2d 99, 105 (Sup. Ct., Nassau Co. 1979), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981); *People v. Failla*, 74 Misc. 2d 979 (Nassau County Ct. 1973); *People ex rel. Vario v. Krueger*, 58 Misc. 2d 1023 (Sup. Ct., Nassau Co. 1969); *Marangelo v. Criminal Ct.*, 49 Misc. 2d 414 (Sup. Ct., N.Y. Co. 1966); *In re Amato*, 204 Misc. 454 (Sup. Ct., Richmond Co. 1953); *People v. Finkelstein*, 202 Misc. 1080, 1081 (Ct. Gen. Sess., N.Y. Co. 1953).

72 *See* Jud. Law § 750(A)(3), (5); Penal Law § 215.51. In slight practical contrast, a *trial* witness need not be formally "ordered" to answer questions prior to being held in contempt. As stated in *O'Neil v. Kasler*, 53 A.D.2d 310, 320 (4th Dep't 1976): "'[O]rdered' . . . is not a term of art and need not be given its precise literal meaning, at least where . . . the record leaves no doubt that the witness fully understood that he was under judicial compulsion to answer . . . and . . . . would be held in contempt if he refused." *Compare Spector v. Allen*, 281 N.Y. 251 (1939), *with People v. Christopher*, 109 Misc. 2d 767 (Sup. Ct., Erie Co. 1981).

73 *People v. Ianniello*, 21 N.Y.2d 418, 425 (1968); *see also Carlson*, 209 F.2d at 212–213, 214, 215–217.

> the possibility of meaningful judicial intervention and supervision. When the witness invokes a specific ground for refusing to answer, the area of privilege may be identified and circumscribed and the grand jury availed of the non-privileged portion of the witness's testimony. If the witness's claims are unfounded, the investigation may proceed without needless obstruction.[74]

In another case the same court held:

> In the context of testimonial contempt, the witness who believes that he has a lawful basis for refusing to answer must assert the basis of his belief and obtain a judicial ruling. The person who refuses to testify, after having been advised of his duty as a witness, without having articulated a reason for his refusal, may be assumed to have acted deliberately and not out of misapprehension of his legal rights.[75]

Simply put, a legal ground not raised before the grand jury is unavailable as a later defense to an indictment for criminal contempt since it is "waived."[76] Naked refusals or evasive answers, based on nonverbalized grounds, are simply refusals to answer.[77] In such cases, there is no requirement that the witness be directed by the court to answer prior to indictment, although, as noted, the prosecution at this juncture retains the

74 *People v. Roseman*, N.Y.L.J., July 7, 1978, p. 7 col. 6 (Sup. Ct., N.Y. Co.) (Rothwax, J.), *aff'd*, 78 A.D.2d 878 (2d Dep't 1980), *appeal denied*, 53 N.Y.2d 845 (1981).

75 *Paperno*, 98 Misc. 2d at 104 (citation omitted).

76 *People v. Tantleff*, 40 N.Y.2d 862 (1976); *People v. Breindel*, 35 N.Y.2d 928 (1974); *People v. DeSalvo*, 32 N.Y.2d 12, 14 (1973); *People v. Gentile*, 47 A.D.2d 930 (2d Dep't 1975), *aff'd*, 39 N.Y.2d 779 (1976); *People v. St. John*, 40 A.D.2d 763 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 914 (1973).

77 Penal Law § 215.51; *People v. Schenkman*, 46 N.Y.2d 232, 237 (1978) (Breitel, C.J.); *People v. McGrath*, 46 N.Y.2d 12, 29 (1978); *Tantleff*, 40 N.Y.2d 862; *People v. Ianniello*, 36 N.Y.2d 137, 142 (1975) (Breitel, C.J.); *People v. DeSalvo*, 32 N.Y.2d at 16–17; *Ianniello*, 21 N.Y.2d at 426 (Breitel, C.J.); *People v. Lombardozzi*, 73 A.D.2d 695 (2d Dep't 1979); *People v. McGrath*, 86 Misc. 2d 249, 257 (Sup. Ct., N.Y. Co. 1976), *rev'd on other grounds*, 57 A.D.2d 405 (1st Dep't 1977), *rev'd*, 46 N.Y.2d 12 (1978).

option of applying for a court direction to answer as a predicate for contempt under the Judiciary Law *in lieu of* indictment.[78]

Assuming that the witness does claim a privilege or other objection, he must be brought before the court and ordered to answer. If after being so ordered his refusal to answer continues, he may then be indicted for the crime of criminal contempt or punished under the Judiciary Law. Should the witness's objection be later sustained by the trial court on a pretrial motion or on appeal from a conviction, such objection will then constitute an absolute "defense"—what has been called a defense by way of "confession and avoidance," or, a defense because the questions refused are held not "legal" and "proper" in the first place, or, as having lost their "potency" as predicates for contempt.[79] (*Note*: The grand jury that heard the contemptuous testimony may also indict for it since it only accuses. It does not adjudicate its own accusation.)[80]

[1.7] VIII. ORDERING THE CRIMINAL TRIAL WITNESS TO TESTIFY—THE ROLE OF THE PROSECUTOR, THE COURT AND THE WITNESS

In the midst of a criminal trial, a witness may refuse to testify on Fifth Amendment or evidentiary privilege grounds. If the court overrules an asserted evidentiary privilege (e.g., attorney-client), only the Fifth Amendment may remain. It must be supplanted with immunity from criminal prosecution as discussed below.

First, the prosecutor should ask the court to simultaneously excuse the jury and order the witness to remain in the witness chair. Second, and only

78 *People v. Rappaport*, 47 N.Y.2d 308, 314 (1979); *People v. Buonoraba*, 27 N.Y.2d 604 (1970); *People v. Ruggiano*, 39 A.D.2d 113, 114 (2d Dep't 1972); *Paperno*, 98 Misc. 2d at 105.

79 *See, e.g.*, *Keenan v. Gigante*, 47 N.Y.2d 160 (1979); *McGrath*, 46 N.Y.2d at 29–30; *Santangello v. People*, 38 N.Y.2d 536, 540 (1976); *Ianniello*, 36 N.Y.2d at 140; *People v. Einhorn*, 35 N.Y.2d 948 (1974); *DeSalvo*, 32 N.Y.2d at 16–17; *In re Second Additional Grand Jury (Cioffi)*, 8 N.Y.2d 220 (1960); *Spector v. Allen*, 281 N.Y. 251 (1939); *People v. De Martino*, 71 A.D.2d 477, 483–84 (1st Dep't 1979); *People v. Leo*, 109 Misc. 2d 933 (Sup. Ct., N.Y. Co. 1981); *People v. Moschelle*, 96 Misc. 2d 1030, 1035 (Sup. Ct., Suffolk Co. 1978); *see also U.S. v. Edgerton*, 734 F.2d 913 (2d Cir.1984).

80 *People v. Mulligan*, 29 N.Y.2d 20, 24 (1971); *People v. Chestnut*, 26 N.Y.2d 481, 482–83, 491 (1970); *People v. Ward*, 37 A.D.2d 174, 177 (1st Dep't 1971).

if appropriate,[81] he should state for the record that the witness's refusal to answer is a complete surprise. Uncontradicted, this representation may be important on appeal. Third, he must request the court to order the witness to testify and request an instruction to the witness that upon doing so truthfully and responsively he will automatically receive immunity. Further, the witness must have immunity explained to him and should be warned about perjury and contempt. Fourth, after so advising and ordering the witness to answer, the court should inquire if the witness has understood everything. If the witness thereafter refuses to answer, he should be warned about contempt and ordered again to testify. Upon continued refusal, the court is to ask him whether he has anything to say before being held in contempt and punished. This over with, the court simply adjudges the witness in contempt for not merely disobedience to its order but disobedience to its order in its immediate view and presence thus obstructing the court's proceedings. It would appear certain that before contempt is actually imposed, the witness-contemnor must be asked if he has any reason why he should not be held in contempt. "Indeed, if the court [fails] to do just that, the action taken would [be] high-handed if not wholly null, given the summary power that [is] being exercised."[82] The punishment may be up to 30 days in the county jail and/or a fine up to $1,000. Next, the court is to order that the witness-contemnor be taken into custody, with a brief recess called so that the court may draw up the mandate of commitment specifying the facts constituting the contempt and ordering the punishment to be imposed. Here follows the legal nuts and bolts that ultimately authorize the summary punishment of a recalcitrant witness.[83]

Judiciary Law § 750 states that a court of record has the power to punish for a criminal contempt, a person guilty of the following acts: (1) dis-

81 If apprised in advance of calling the witness that he will assert the Fifth Amendment, the prosecutor should inform the court so that the witness may be placed on the stand and ordered to testify without the presence of the jury. Saying that one is going to assert the Fifth Amendment is not the same as actually asserting it. What if the witness in an organized crime or white–collar corruption case through his attorney apprises the prosecutor that he will not claim the Fifth Amendment but will merely refuse to testify? *Compare People v. Berg*, 88 A.D.2d 919 (2d Dep't 1982), *rev'd*, 59 N.Y.2d 294 (1983) and cases cited therein *with People v. Payne*, 89 A.D.2d 872 (2d Dep't 1982).

82 *Katz v. Murtagh*, 28 N.Y.2d 234, 238 (1971).

83 This is a different situation from that presented by a defense witness who, on cross–examination by the prosecution, refuses to testify further on Fifth Amendment grounds. The prosecutor is under no obligation to immunize him. Such conduct may result in all or some of the witness's direct testimony being stricken or the jury being instructed to take into consideration the witness's Fifth Amendment invocation in assessing his credibility. *People v. Siegel*, 87 N.Y.2d 536, 543–46 (1995).

orderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority; (2) willful disobedience to its lawful mandate; (3) resistance willfully offered to its lawful mandate; and (4) contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory. Alternatively, what would otherwise constitute a Judiciary Law criminal contempt of court may be prosecuted by indictment or information under Penal Law § 215.50(1), (3), and (4) which mirrors the pertinent subdivisions of Judiciary Law § 750.[84]

Punishment for a violation of Judiciary Law § 750 "may be by fine, not exceeding one thousand dollars or by imprisonment not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court."[85] And, as required by Judiciary Law § 752, there is the "mandate of commitment" that must be filled out by the court. It requires that the "particular circumstances" of the contempt, such as refusing to answer after being ordered to do so by the court under a grant of immunity, be set forth in writing. Here, the contemnor's commitment for contempt—"committed in the immediate view and presence of the court"—is reviewable in an article 78 proceeding as contained in the CPLR Rules.

What constitutes a court's order or mandate to a witness during trial commanding him to testify under pain of contempt? A court's direction in the language of a command to a witness to answer a legal and proper interrogatory is an order or mandate that may serve as a predicate for contempt purposes. A few quotations are illustrative. "There are many orders given by a judge . . . that are not reduced to writing or directed in writing to the person who is bound to obey them."[86] "The fact [of] an oral direction . . . given in open court has been held to be just as binding upon those who heard it as if it were written."[87] "We are reluctant to hold . . . that one cannot be held in contempt for failing to heed an order orally delivered . . . personally in open court and preserved in the minutes of the proceeding. . . . Oth-

84 *People ex rel. Sherwin v. Mead,* 92 N.Y. 415 (1883); *see also People v. Giglio*, 74 A.D.2d 348 (2d Dep't 1980).

85 Jud. Law § 751.

86 *People ex rel. Illingworth v. Court of Oyer & Terminer*, 10 A.D. 25, 29 (1st Dep't 1896); *see also People v. Diefendorf*, 281 A.D. 465 (1st Dep't), *aff'd*, 306 N.Y. 818 (1954). *But see People ex. rel. Donnelly v. Miller*, 213 A.D. 88 (1st Dep't 1925).

87 *Wiggins v. Ithaca Journal*, 57 Misc. 2d 356, 363 (Ithaca City Ct. 1968).

erwise, the power of a court to maintain order or to secure compliance with its directions would be seriously undercut."[88]

How is a criminal trial witness "lawfully" ordered to answer over a claim of Fifth Amendment privilege? N.Y. Criminal Procedure Law § 50.20(1) provides that, "any witness in a legal proceeding, other than a grand jury proceeding, may refuse to give evidence requested of him on the ground that it may tend to incriminate him and he may not, except as provided in subdivision two, be compelled to give such evidence." What is a "legal proceeding?" It is "a proceeding in or before any court." To "give evidence" means "to testify or produce physical evidence."[89]

The jurisdictional prerequisite and procedure for compelling a trial witness to answer over an immunity-replaced Fifth Amendment refusal is set forth in CPL § 50.20(2). A witness may be compelled to give evidence in a criminal proceeding notwithstanding an assertion of his privilege against self-incrimination if the person presiding is declared by statute to be competent authority to confer immunity upon the witness and "such competent authority (i) orders such witness to give the requested evidence notwithstanding his assertion of his privilege against self-incrimination, and (ii) advises him that upon doing so he will receive immunity." "Competent authority," as per CPL § 50.30, is the court when acting in accordance with the above procedures "but only when expressly requested by the district attorney to do so."

There are a few cases nicely illustrating a trial judge's exercise of his power to order a witness to answer following its conferral of immunity on the witness and the exercise of its "immediate-view-and-presence" contempt power to jail the witness when the witness still refuses to testify. In an article 78 proceeding, the Appellate Division, Fourth Department reviewed a mandate of the Supreme Court, Erie County, summarily punishing a trial witness for contempt.[90] The mandate recited that the peti-

88 *Giglio*, 74 A.D.2d at 354–55 (citation omitted). Although stating the proposition correctly, *Giglio* ignorantly engrafted some new but unelucidated procedural strictures onto a trial court's authority to order voice exemplars during a trial—as the basis for a later contempt prosecution under Penal Law § 215.50—which were inexplicably, perhaps suspiciously, oblivious to established authority to contrary. *Giglio*'s foray into the creative was rejected by the Appellate Division, Third Department, in *People v. Smith*, 86 A.D.2d 251, 252 (3d Dep't 1982). *Smith* is cited as authority by the Court of Appeals in *People v. Scarola*, 71 N.Y.2d 769 (1988). Implicitly to the same effect as *Smith* is *People v. Sanders*, 58 A.D.2d 525 (1st Dep't 1977).

89 N.Y. Criminal Procedure Law § 50.10(2), (3) (CPL).

90 *O'Neil v. Kasler*, 53 A.D.2d 310 (4th Dep't 1976).

tioner, having been sworn as a witness at a criminal trial, refused to answer questions put to him by the prosecutor even though the court had advised him that he had immunity. Further, the mandate provided, he was to be committed to the county jail for 30 days unless he should earlier agree to answer the prosecutor's questions. The petitioner argued that since the trial court never mouthed the word "order" in commanding him to testify, the purported conferral of immunity which preceded it was ineffective. Therefore, he contended, the court could not punish him for contempt. His contention was rejected. Judiciary Law § 750 does not, by its own terms, require that a witness be "ordered" to answer before he can be held in contempt for a refusal to do so. After discussing the history of CPL § 50.20, the court concluded that the requirement that the witness be "ordered" to answer questions in order to trigger immunity plays a relatively minor role in the statutory scheme and is not essential in every case to achieve the legislature's purpose. It concluded that the term, "ordered"—as found in CPL § 50.20(2)—is not a term of art and need not be given a literal meaning, so long as the record leaves no doubt that a witness fully understands that he is under judicial compulsion to answer questions and that he would be held in criminal contempt if he refused to do so. Here, the petitioner's "order" argument was held to be an "afterthought," not a contemporaneous, good faith reliance on a literal reading of CPL § 50.20(2).[91]

To recapitulate, conferral of immunity in a criminal trial is a five-step process. First, the witness must assert his privilege against self-incrimination; second, the prosecutor must expressly request the court to confer immunity, otherwise the court does not become the "competent authority" to do so; third, the court must then order the witness to give the demanded evidence despite his assertion of privilege; fourth, the court must advise the witness that upon complying with the order he will receive immunity; and fifth, the witness must comply with the order and by doing so receives immunity.[92]

[1.8] IX. CONTEMPT AND THE MEDIA—NEW YORK'S SHIELD LAW

Be they deemed privileges or, more accurately, exemptions, there are two questionable exceptions to traditional contempt jurisprudence. First,

91 *O'Neil*, 53 A.D.2d at 316, 320.

92 *People v. Clinton*, 42 A.D.2d 815 (2d Dep't 1973). *Cf. Wilwerth v. Levitt*, 262 A.D. 112 (1st Dep't 1941).

as to questions rebuffed by journalists regarding their *confidential* news sources, the contempt sanction has been precluded by New York's Civil Rights Law § 79-h(b).[93] Second, a qualified privilege-exemption for *non-confidential* news sources under § 79-h(c) provides that contempt sanctions may not be visited on a journalist:

> unless the party seeking such news [sources] has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news [sources] sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing.

Section 79-h(g) provides that both the unqualified and qualified privileges, and their contempt exemptions, may be waived if a journalist "voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemption" of §§ 79-h(b) and (c).

None of New York's media-contempt jurisprudence is rooted in the First Amendment of the U.S. Constitution.[94] The statute does not protect published information from a disclosed source.[95] New York's Shield Law has been criticized as pure parochial special interest legislation. Here follow some analytical considerations in this regard.

Concerning New York's *confidential* news source statute, Article I, § 6 of the State's Constitution mandates that the power of the grand jury to inquire into misconduct in public office shall never be impaired by law. Yet a Court of Appeals decision states that the confidential news source shield does not impair the grand jury's power to inquire into official misconduct in office, even to the point of quashing its subpoena in advance of

93 *Knight-Ridder Broad. Co. v. Greenberg*, 70 N.Y.2d 151 (1987); *Beach v. Shanley*, 62 N.Y.2d 241 (1984); *Oak Beach Inn Corp. v. Babylon Beacon Inc.*, 62 N.Y.2d 159, 164–66 (1984); *see also Stern v. Morgenthau*, 62 N.Y.2d 331, 335 (1984) (dicta); *DiDomenico v. C & S Aeromatick Supplies, Inc.*, 252 A.D.2d 41, 50–51 (2d Dep't 1998); *Sharon v. Time Inc.*, 599 F. Supp. 538, 582–83 (S.D.N.Y. 1984).

94 *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991); *People v. Cheche*, 151 Misc. 2d 15, 16 (Cayuga Co. Ct. 1991).

95 *Cheche*, 151 Misc. 2d 15; *People v. Craver*, 150 Misc. 2d 631, 633–34 (Albany Co. Ct. 1990).

a reporter actually taking the witness stand in the grand jury and actually being asked a question.[96] Does this privilege-exemption confer *de facto* immunity on corrupt prosecutors who commit the crime of unlawful grand jury disclosure in violation of Penal Law § 215.70?

The history of the *nonconfidential* news source privilege-exemption is more than interesting. In a *civil* case, the Court of Appeals found that there was a privilege for *nonconfidential* news sources to be found in Article I, § 8 of the State's Constitution.[97] One may be respectfully skeptical. Article I, § 8's language has been in the Constitution since 1821. And—to boot—in 1936 a unanimous Court of Appeals affirmed a denial of a writ of habeas corpus sought by a jailed newspaper reporter *who had refused to disclose his confidential news source to a grand jury.*[98] While the court was not called upon to construe Article I, § 8, it did hold that:

> [o]n reason and authority, it seems clear that this court should not now depart from the general rule in force in many of the States and in England and *create a privilege in favor of an additional class*. If that is to be done, it should be done by the Legislature which has thus far refused to enact such legislation.[99]

Following what the Court of Appeals held regarding the State Constitution in 1988,[100] the legislature enacted the qualified privilege for *nonconfidential* news sources *and made it applicable to criminal as well as civil litigation.*[101] On a related note, the Second Circuit Court of Appeals has construed New York's *nonconfidential* Shield Law to mean that if a litigant has a bare bones *prima facie* case then that which is highly material and relevant *is not critical and necessary to one's cause.*[102] It is submitted that the difference between trying a bare bones, *prima facie* case is quite different than trying one supported by evidence.

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96 *Beach*, 62 N.Y.2d 241 (The witness was a reporter and his confidential source was a prosecutor-turned-felon who divulged secret grand jury testimony to the reporter); *compare Cunningham v. Nadjari*, 39 N.Y.2d 314 (1976).

97 *O'Neil v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521 (1988).

98 *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291 (1936). To date, later Court of Appeals cases simply ignore rather than overrule or distinguish *Mooney*.

99 *Id.* at 295 (emphasis added).

100 *Id.*

101 1990 N.Y. Laws ch. 33.

102 *Gonzales. v. NBC*, 155 F.3d 618 (2d Cir. 1998).

None of New York's shield law jurisprudence finds any home in the U.S. Constitution. There is no federal constitutional requirement that members of the media be privileged or exempt from the law's right to everyone's evidence.[103]

States other than New York see matters differently. For example, the Supreme Court of Indiana wrestled with the case of a murder defendant who had been interviewed by television stations while being held in jail. Her attorney wanted a copy of the footage, even the unaired footage out of fear that the prosecution would obtain a copy and spring it on him at trial. The court held a number of things. Disclosure would not reveal a confidential source because the source is already known. Lack of constitutional privilege does not result in automatic enforcement of a subpoena for news materials. Lack of good faith, irrelevancy, burdensomeness and other objections may still come into play. But no qualified reporter's privilege exists under the First Amendment as construed by the United States Supreme Court. News reporting is still uninhibited, robust and wide open notwithstanding that media people occasionally must testify in grand juries and at trials. It is purely speculative that the media will destroy its own products in order to avoid producing them. "If the claim is that somehow the media are exempt from the obligations of citizenship because compliance may distract them from a higher calling, we reject that just as we reject similar claims from public officials, clergy, and others."[104] "Freedom of the press . . . is basic to a free society. But basic too are courts of justice, armed with the power to discover truth."[105] New York's Shield Law has been criticized as pure special interest legislation.[106]

The First Amendment to the United States Constitution and the common law here warrant exposition. The governing authority comes from the United States Supreme Court.[107] It has, in no uncertain terms, rejected a "First Amendment reporter's privilege," reasoning that grand juries and

103 *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); 405 F.3d 17; 438 F.3d 1138; 438 F.3d 1141 (D.C. Cir. 2005); *People ex rel. Mooney*, 269 N.Y. 291.

104 *State v. Cline* (*In re WTHR-TV)*, 693 N.E.2d 1, 14 (Ind. 1998).

105 *Id.* at 15 (quoting *Garland v. Torre*), 259 F.2d 545, 548 (2d Cir. 1958).

106 For a more comprehensive discussion and criticism of the News Media Shield Law, *see* Lawrence N. Gray, *Evidentiary Privileges*, "The Newspaperman's Privilege" ch. XI. (NYSBA 2003).

107 *Branzburg v. Hayes*, 408 U.S. 665 (1972).

courts operate under the long-standing principle that the law has a right to every man's evidence—except for those persons protected by constitutional, common law, or statutory privilege. The only testimonial privilege rooted in the constitution is the Fifth Amendment's privilege against self-incrimination. The First Amendment does not contain one for news reporters. The public interest in future news reporting does not take precedence over the public interest in pursuing and prosecuting crimes reported by the media based on undisclosed informants. Pursuit and prosecution deter crime.[108] "Agreements to conceal information relevant to the commission of crime have very little to recommend them from the standpoint of public policy."[109] As to the courts of the common law, they consistently refused to recognize the existence of any privilege permitting the news media to refuse to reveal confidential information.[110] All this to the side, how does one define who is a "newsman?" Any attempt to do so would be "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.[111] Should a privilege be created for the *New York Times* but not a "blogger" in his pajamas? How about the worldwide websites?

> How could one draw a distinction consistent with . . . [a] court's vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in . . . unlawful leaking . . . to call a trusted friend or politically, advise him to set up a web log . . . and then leak to him under a promise of confidentiality which the law forbids the official to disclose? [Furthermore,] if the courts extend the privilege only to a defined group of reporters, are we in danger of creating a "licensed" or "established" press? If we do so, have we run afoul of the breadth of the freedom of the press, that 'fundamental personal right' for which the [Supreme] Court . . . expressed its concern *** Conversely, if we

108 *Id.* at 695.

109 *Id.* at 696.

110 *Id.* at 685, 688.

111 *Id.* at 704.

> extend that privilege to the easily created blog, or the ill-defined pamphleteer, have we defeated legitimate investigative ends . . . ?[112]

It is one man's opinion that the nature of the news media and reporters should inform all debate as to whether legislative or court-created "shield laws" are necessarily the better part of wisdom. Henry Louis Mencken, the Sage of Baltimore, had much to say: "A newspaper's function is to tell the truth, not to run things"; "Newspapers seldom accomplish any public good by trying to take over the functions of the police and the courts, and they never work any ponderable benefit to themselves. The enterprise for a while is thrilling enough, and it gets eager support from morons"; "If the average American read only the newspapers, as is frequently alleged, it would be bad enough, but the truth is that he reads only the most imbecile parts"; "My belief is that the rising power of newspapers has tended to drive intelligent and self-respecting men out of politics, for newspapers are operated by cads and no such man wants to be at their mercy"; "The exploits of the press . . . [give] startling proof of how easy it is . . . to drive the boobs crazy with propaganda—to make them believe anything, no matter how idiotic. The lesson was not lost on the moneyed . . . who actually run the republic in peace and war. Almost every large American city has seen at least one more popular newspaper fall into their hands"; "Try to imagine anything printed in English that is more savagely designed to put readers to flight than the orthodox American editorial page."[113]

[1.9] X. CONTEMPT AND DOUBLE JEOPARDY

When a witness unlawfully refuses to testify before a grand jury, the prosecutor has two options. He may seek an indictment for the crime of criminal contempt or he may seek a court order directing the witness to answer. If the order is disobeyed, the witness may be punished under the Judiciary Law or the Penal Law. Years of litigation involving two organized crime figures—Colombo and Menna—indicate that the double jeopardy clause may well preclude the *in-tandem* use of both sanctions for the same act or transaction of disobedience. It is not possible to be certain simply because the Supreme Court is not clear on the matter.

112 *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1156–58 (D.C. Cir. 2005) (Sentelle, J. concurring).

113 The Gist of Mencken: Quotations from America's Critic (The Scarecrow Press, Inc., Metuchen, N.J. & London 1990).

Colombo was cited for Judiciary Law criminal contempt for his refusal to obey a court's order commanding him to return to a grand jury and answer its questions. After being sentenced to 30 days' imprisonment, he was indicted for the crime of criminal contempt for the exact same disobedience. While his contempt citation was affirmed with little fanfare,[114] his indictment for criminal contempt posed a double jeopardy question that took years to resolve. Originally, Colombo's contempt indictment had been dismissed by a trial court. On appeal, the indictment was reinstated with the Appellate Division and the Court of Appeals rejecting Colombo's double jeopardy contention out of hand.[115] The U.S. Supreme Court, however, vacated and remanded for further consideration in light of the court's decision barring a state's prosecution of a crime that had been previously prosecuted by one of its municipal subdivisions.[116]

On remand, the Court of Appeals reaffirmed its prior judgment reasoning that: (a) Colombo was being punished for two distinct acts, that is, refusal to testify before the grand jury and disobedience to the order of the court; (b) punishment for the crime of criminal contempt and punishment for criminal contempt of court under the Judiciary Law served two different purposes, that is, protection of the state's interest in obtaining evidence of crime as opposed to vindication of judicial authority; and (c) criminal contempt under the Judiciary Law was civil in nature—remedial and coercive, not punitive—and thus not subject to double jeopardy proscriptions.[117]

Finding that Colombo's contempt citation was criminal, not civil, the Supreme Court again vacated and remanded for further consideration "[i]n view of the New York Court of Appeals' misconception of the nature of the contempt judgment [under the Judiciary Law] . . . for purposes of the Double Jeopardy Clause"[118] Justice Douglas dissented in favor of outright reversal.

> Suffice it to say that a 30-day sentence and a . . . fine imposed for refusal to testify before a grand jury constitutes criminal punishment within the meaning of the double jeopardy provision of the Bill of Rights, at least where the witness' willingness to purge himself of con-

114 *Koota v. Colombo*, 17 N.Y.2d 147, *cert. denied*, 384 U.S. 1001 (1966).

115 *People v. Colombo*, 32 A.D.2d 812 (2d Dep't), *aff'd*, 25 N.Y.2d 641 (1969).

116 *Colombo v. N.Y.*, 400 U.S. 16 (1970).

117 *People v. Colombo*, 29 N.Y.2d 1 (1971).

118 *Colombo v. N.Y.*, 405 U.S. 9, 11 (1972).

> tempt by testifying does not result in the vacation of the sentence.[119]

On this second remand the Court of Appeals reversed its judgment, but did so in a manner which left open another facet of the double jeopardy question posed by a *sequential* imposition of punishment for *distinct but transactionally related* acts of disobedience under the Judiciary and Penal Laws. Making a rather subtle distinction, the court stated:

> Although [Colombo] could have properly been indicted for his refusal to testify before the Grand Jury . . . and such indictment would not be barred by double jeopardy, he was not indicted for that crime, but, instead, was indicted for his refusal to obey the [same] order of [the court] to return to the same Grand Jury and testify.[120]

Simply put, Colombo had been indicted for the exact same act of disobedience to the court's order for which he had been previously cited and punished by the court and "[s]ince the Supreme Court . . . held that defendant's previous punishment for contempt of court was for 'criminal' contempt under the particular facts of this case defendant's subsequent indictment for the same offense . . . is barred by the double jeopardy clause."[121]

Left open and apparently permissible under the Court of Appeals' final encounter with *Colombo*, was the situation where a witness is cited for contempt for disobedience to a court's order to testify, and, contemporaneously or subsequently, is indicted for his initial refusal to testify before a grand jury. The witness's contempt before the grand jury would be complete as and when it occurred—his disobedience to the court's order would occur only *after* such order was issued. Hence, an indictment could charge a refusal to testify on a given day before a grand jury; a correlative contempt citation could be limited to a separate and distinct act of disobedience to a court's order to testify.

This precise reasoning was seized upon by the Appellate Division, Second Department in a case where a defendant had refused to testify before

119 *Colombo*, 405 U.S. at 12–13 (Douglas, J., dissenting). The constitutionality of Judiciary Law § 776 and Penal Law § 215.54, allowing offender to be convicted under both the Penal Law and the Judiciary Law for the same contemptuous misconduct, may be doubtful.

120 *People v. Colombo*, 31 N.Y.2d 947, 949 (1972).

121 *Id.* (citation omitted).

a grand jury and, on a subsequent date, had disobeyed a court order commanding him to do so.[122] He was cited for contempt "for his contumacious and unlawful refusal . . . to answer . . . interrogatories [before the Grand Jury] *and* for his willful disobedience to the lawful mandate of [the] Court."[123] Following judicial punishment, defendant was indicted for criminal contempt. In granting prohibition, the Second Department held that:

> [i]f the order finding . . . the petitioner guilty of criminal contempt were based *solely* on his refusal to obey the direction of the court to return to the grand jury and to there answer . . . as permitted by . . . the Judiciary Law we would, on constraint of *People v. Colombo*, deny his application . . . since his refusal to testify before the Grand Jury . . . was a separate and distinct violation of . . . the Penal Law.[124]

The legal vitality of this distinction was (at the time) short-lived, for while *Colombo* was back and forth between the Court of Appeals and the Supreme Court, the *Menna* cases were working their way through the appellate process.

Menna refused to testify before a grand jury. He was brought before the court on an order to show cause, but disobeyed its order to return to the grand jury and testify. His contempt citation was upheld on appeal,[125] but his subsequent criminal contempt conviction, based solely on his initial recalcitrance before the grand jury, was eventually vacated and remanded by the U.S. Supreme Court.[126] Reasoning that Menna's double jeopardy claim survived his plea of guilty, the court vacated and remanded this issue back to the Court of Appeals. Justice Brennan concurred, claiming that the case was an example of outright double jeopardy under some sort of an unelucidated "same criminal transaction" theory. Chief Justice Berger and his successor wanted the case set down for full oral argument.[127] On remand, the Court of Appeals reversed in a memorandum

122 *Capio v. Justices of the Supreme Court*, 41 A.D.2d 235 (2d Dep't 1973) (Shapiro, J.), *aff'd*, 34 N.Y.2d 603 (1974).

123 *Id.* at 236 (citing the lower court's opinion).

124 *Id*. at 236–37 (citation omitted); *see also People v. Matra*, 42 A.D.2d 865 (2d Dep't 1973).

125 *Gold v. Menna*, 25 N.Y.2d 475 (1969).

126 *Menna v. N.Y.*, 423 U.S. 61 (1975).

127 *Id.* at 63.

decision stating: "On review of such [double jeopardy] claim on the merits we conclude, with the concurrence of the prosecutor, that the double jeopardy clause precludes the prosecution of defendant on the charge to which he pleaded guilty."[128] No case has since emanated from the Court of Appeals precisely delineating its reasons for holding that Menna's prosecution for the crime of criminal contempt, under facts reminiscent of its final holding in *Colombo*, constituted double jeopardy. The reasoning behind the prosecutor's concession remains a mystery except that, in *dicta*, the Supreme Court has stated that Menna's "indictment was facially duplicative of [his] earlier [Judiciary Law contempt adjudication] . . . so that the admissions [in his] guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense."[129] How an indictment for the crime of criminal contempt in the first degree can be "facially duplicative" of its *analogue*—as contained in an order to show cause—is a mystery. The admissions in Menna's guilty plea to the crime of contempt could not conceivably match all of the elements or proof at his earlier Judiciary Law criminal contempt proceeding.

Subsequent Supreme Court encounters with criminal contempt of court and later criminal prosecutions for the legislatively enacted crimes which were the analogue of the prior contempts indicates that the Second Department's 1973 analysis—prior to *Menna*—may be viable unless the Court of Appeals decides differently. Thus far, by constraint, if not by constant inclination, New York has followed the U.S. Supreme Court's double jeopardy clause jurisprudence on its sometimes up-and-down, tortuous path.[130] The Federal Constitution's Fifth Amendment and Article I, § 6 of the New York State Constitution contain the same "twice put in jeopardy for the same offense" language—with the former specifying "life or limb" as punishment was known in olden days.

128 *People v. Menna*, 38 N.Y.2d 850, 851 (1976); *see also People v. Prescott*, 66 N.Y.2d 216, 218, 220–21 (1985).

129 *U.S. v. Broce*, 488 U.S. 563, 575–76 (1989).

130 *See People v. Wood*, 95 N.Y.2d 509 (2000); *People v. Vasquez*, 89 N.Y.2d 521, 527 (1997) (*construing U.S. v. Halper*, 490 U.S. 435 (1989), *disavowed in Hudson v. U.S.*, 522 U.S. 93 (1997)); *People v. Latham*, 83 N.Y.2d 233, 238 (1994); *Corbin v. Hillery*, 74 N.Y.2d 279 (1989), *aff'd sub nom. Grady v. Corbin*, 495 U.S. 508 (1990) (5–4 decision), *overruled*, *U.S. v. Dixon*, 509 U.S. 688 (1993) (5–4 decision); *Prescott*, 66 N.Y.2d at 218, 220–21 (citing and following Supreme Court authorities on double jeopardy); *People v. Key*, 45 N.Y.2d 111, 118–20 (1978); *Menna*, 38 N.Y.2d at 851; *People v. Brown*, 40 N.Y.2d 381 (1976); *People v. Sabella*, 35 N.Y.2d 158 (1974); *People v. Colombo*, 31 N.Y.2d 947 (1972); *see also Shoener v. Pennsylvania*, 207 U.S. 188, 192–95, 196 (1907); *People ex rel. Zakrzweski v. Mancusi*, 22 N.Y.2d 400, 403 (1968); *People v. Jackson*, 20 N.Y.2d 440, 446 (1967); *People ex rel. Meyer v. Warden*, 269 N.Y. 426, 429–430 (1936).

A later Supreme Court excursion into contempt double jeopardy involved a murderer-drug dealer named Dixon, a wife beater named Foster, and a Supreme Court as splintered as it was bereft of craftsmanship and respect for its own prior pronouncements. It is suggested that the case reveals a Supreme Court hell-bent on overruling one of its own double jeopardy decisions—one that was barely 3 years old—which it found to be a mistake. The case's contempt aspects seem to have been treated more like obstacles to be shoved away from the pursuit of the main goal, namely restoring the "same elements" test for double jeopardy.

Both Dixon and Foster were the objects of "a historically anomalous use of the contempt power,"[131] that is, court orders forbidding the commission of crime. Dixon was arrested for murder and released on bail. The court's bail order was conditioned on him not committing any new offense. It warned him that any violation of this condition would subject him to "prosecution for contempt of court."[132] While awaiting trial, Dixon was arrested *and indicted* for possession with intent to distribute cocaine. He was later found in criminal contempt of court before a judge without a jury and "sentenced" to 180 days in jail. His subsequent motion to dismiss his indictment on double jeopardy grounds was granted.[133] Foster's estranged wife obtained a civil order of protection against him which required that he not assault her. After almost killing her, he was found guilty of four "counts" of criminal contempt of court and "sentenced" to 600 days' aggregate imprisonment. The prosecutor then obtained an indictment against Foster for various counts and types of assault. Counts 1 and 5 "were based on the events for which Foster had been held in contempt, and . . . [three others] were based on events for which Foster was acquitted of contempt." The trial court rejected his double jeopardy claim but did not rule on Foster's collateral estoppel assertion.[134]

In Dixon's case the court's order, by reference, incorporated the entire criminal code of the nation; in Foster's case the court's order incorporated the criminal offense of simple assault.[135]

The question presented by *Dixon* and *Foster* was "whether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal

131 *Dixon*, 509 U.S. at 694.

132 *Id.* at 691.

133 *Id.* at 691.

134 *Id*. at 690–93.

135 *Id*. at 694.

charges based upon *the same conduct* for which he previously has been held in criminal contempt of court."[136] Five justices (Scalia, Rehnquist, O'Connor, Kennedy, Thomas) said that the answer was "*obvious* . . . that the protection of the Double Jeopardy Clause . . . attaches."[137] Three other Justices (White, Stevens, Souter) agreed. "[T]he Double Jeopardy Clause bars prosecution *for an offense* if the defendant already has been held in contempt for its commission."[138] *Perhaps* speaking more precisely for themselves and the six aforementioned Justices with whom they agreed (the six not disputing them), Justices Souter and Stevens said that they agreed "*as far as it goes* in . . . that a citation for criminal contempt and an indictment for violating a substantive criminal statute may amount to charges of the 'same offense' *for purposes of the Double Jeopardy Clause. . . .*"[139]

Justice Blackmun *could not agree* "that contempt of court is the 'same offense' under the Double Jeopardy Clause as either assault . . . or possession of cocaine. . . ."[140] Difficulty arose when the Justices tried to apply their double jeopardy pronouncements. First, the *Colombo* and *Menna* cases are cited in "*accord,*" but only once in the entire case—and then only as support for the opinion of Justices Scalia, Rehnquist, O'Connor, Kennedy and Thomas—that the Double Jeopardy Clause is applicable. Second, the concurring-dissenters make no reference to *Colombo* and *Menna.* Third, they play a very small, practically insignificant, part in the court's double-jeopardy analysis.[141] The reasoning of *Colombo* and *Menna* is only obliquely referred to in Justice Blackmun's dissent which rejects the reasoning of these splintered *per curiam* opinions, in particular the *ipse dixits* of Justices Douglas and Brennan contained therein.[142]

Justices Scalia, Rehnquist, O'Connor, Kennedy and Thomas held that "the same-elements test . . . inquires whether each offense [the prior compared with the subsequent] contains an element not contained in the other; if . . . [they do not contain at least one different element], they are the 'same offense' and double jeopardy bars additional punishment and suc-

136 *Id.* at 694 (emphasis added).

137 *Id.* at 696 (emphasis added).

138 *Id.* at 720 (emphasis added).

139 *Id.* at 743 (emphasis added).

140 *Id.* at 741.

141 *Id.* at 696.

142 *Id.* at 741–43.

cessive prosecution."[143] From this five-Justice point of agreement, Chief Justice Rehnquist and Justices O'Connor and Thomas part company with Justices Scalia and Kennedy. First, "there is no double-jeopardy bar to successive prosecutions for criminal contempt [of court] and substantive criminal offenses based on the same *conduct*."[144] Second, "two offenses are different for purposes of double jeopardy if 'each *provision* requires proof of a *fact* which the other does not.'"[145]

Justices Rehnquist, O'Connor and Thomas thus reason as follows: Contempt of court comprises two elements—knowledge of a court order plus willful violation of it. Neither "element" is necessarily satisfied by proof that a legislatively enacted substantive offense, analogously encompassed by the court order, has also been committed. Likewise, no element of a legislatively enacted substantive offense forbidding certain conduct is necessarily proven by evidence that a court's order forbidding such conduct has been willfully violated.[146] They conclude that, "[o]ur double jeopardy cases applying [the same-elements test] have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment . . . an indictment being the closest analogue to [a] court order. . . ."[147]

For their part, Justices Scalia and Kennedy hold that the offense of violating a court order "*cannot be abstracted from the 'element' of"* that which constituted the violation of the court order.[148] For example, with respect to a court order stating "don't sell drugs," these Justices opine that "the Double Jeopardy Clause . . . looks to whether the *offenses* are the same, not the interests that [they] violate," and, where "[a] drug offense [does] not include any element not contained in [a] previous contempt offense, [a] subsequent prosecution violates the Double Jeopardy Clause."[149] Such was their view of Dixon, the alleged murderer-drug pusher. But, curiously, the same reasoning did not apply to Foster, the wife beater. On the contrary, they essentially stated that a court order stating, "don't assault your wife," did not have all the elements of an "assault

143 *Id*. at 696.

144 *Id*. at 715 (emphasis added).

145 *Id*. at 715–16 (second emphasis added).

146 *Id.* at 716.

147 *Id*. at 716–17.

148 *Id*. at 689 (emphasis added).

149 *Id*. at 699, 700 (emphasis in original).

with intent to kill" indictment, and, in a further distinction of elements, acknowledged, *and relied upon*, the very premise they rejected in *Dixon*, to wit: that a contempt of court for assaulting one's wife *requires knowledge of a court's order to keep one's hands to one's self, while the crime of "assault with intent to kill one's wife" does not*.[150]

In their concurring-dissenting analysis, Justices White, Stevens and Souter held that, "the Double Jeopardy Clause bars prosecution *for an offense* if the defendant already has been held in contempt for its commission."[151] These three Justices would "*put to the side*" the element of "knowledge of a court's order" for purposes of double jeopardy analysis.[152] *Query*: if there is no "court order" and thus no "knowledge" of it, then how could there be a criminal contempt of court proceeding in the first place?[153] This question suggests a flaw in a reasoning process that would "put to the side" these ever-present "elements" of criminal contempt of court so that those elements which remain will match up with, *rather than overlap*, the elements of a legislatively enacted crime which is the subject of a subsequent criminal prosecution for the same conduct. In voting to affirm *Dixon* but to reverse *Foster*, these three Justices—White, Stevens and Souter—clung to the "old"[154] double jeopardy test (which *Dixon* and *Foster* now overruled) whereby a "*proof-of-the-same-conduct-constituting-an-element-of-the-other-offense*" inquiry was superimposed on the "same elements" test.[155]

Justice Blackmun—the lone dissenter—was very concise. "If this were a case involving successive prosecutions under the substantive criminal law . . . I would agree that the Double Jeopardy Clause could bar the subsequent prosecution. But we are concerned here with contempt of court, *a special situation*,"[156] for "the interests served in vindicating the authority of the court are fundamentally different from those served by the prosecution of violations of the substantive criminal law."[157]

150 *Id*. at 701.

151 *Id.* at 720.

152 *Id*. at 734, 738 n.10.

153 *Id*. at 729 n.5.

154 *See Grady v. Corbin*, 495 U.S. 508 (1990); *Blockburger v. U.S.*, 284 U.S. 299 (1932).

155 *Dixon*, 509 U.S. at 740, 741.

156 *Id*. at 741–42 (emphasis added).

157 *Id*. at 743.

The *Dixon-Foster* cases would now appear to invite if not allow the *in-tandem* use of Judiciary Law criminal contempt of court and Penal Law criminal contempt first or second degree against criminally recalcitrant grand jury witnesses. There is no present majority on the U.S. Supreme Court as to whether such *in-tandem* use for *the exact same act of disobedient conduct is permissible*—as it was once understood to be *prior to Colombo* and *Menna*. New York's Court of Appeals ruled on this issue in the context of two "no contact whatsoever" court orders issued to a defendant regarding his former wife.[158] The defendant's ex-wife obtained two separate orders of protection, one from a local criminal court under the Criminal Procedure Law, the other from Family Court under article 8 of the Family Court Act. On Christmas day, defendant made 11 prank phone calls to her. Family Court found the defendant in contempt and sentenced him to six months incarceration.[159] Thereafter, he was indicted for five counts of criminal contempt in the first degree and, after conviction in Supreme Court, was sentenced for violation of the order of the local criminal court. The Court of Appeals noted that, "the problematic double jeopardy situation presented by this case has its genesis in the parallel family offense jurisdiction of Family Court and our criminal courts. This overlap is the key to our resolution of the issue at hand."[160] (Why? The defendant could have been indicted for violations of the Family Court's and the Criminal Court's orders with all sentences running *concurrently.*) The court held that, "[a] comparison of the two statutes in this case . . . reveals that *each* provision does not contain an additional element which the other does not."[161] The court also stated:

> The People cannot circumvent the double jeopardy bar simply by seeking to prosecute the criminal action for violation of another court order based on the same conduct. Indeed, if the separate origin of each court order were alone determinative, thereby removing subsequent prosecutions from the double jeopardy protection, the constitutional prohibition would be eviscerated.[162]

158 *People v. Wood*, 95 N.Y.2d 509 (2000).

159 *Id.* at 511.

160 *Id.* at 512.

161 *Id*. at 514 (emphasis added).

162 *Id*. at 515.

[1.10] XI. EVASIVE CONTEMPT—WHAT IS IT?

Criminal contempt by evasive answer, whether prosecuted under the Judiciary or Penal Law, has been the subject of various judicial formulations—distinct, similar, shading into one another or seemingly contradictory. Trying to capture their cumulative essence would only add another formulation. Hence, 15 of the various distillations are set forth here.

> [W]hether the witness may reasonably be said to have made a bona fide effort to answer.[163]

> The 'technique' of evasive testimony has been described as . . . "characterization[s] of probability or even possibility and never with the assertion of certainty or [any] reasonable degree of assurance."[164]

> [W]hether the witness had directly respond[ed] with unequivocal answers which are clear enough to subject him to a perjury indictment. . . .[165]

> "[F]alse and evasive professions of an inability to recall" and hopelessly contradictory responses repeatedly changed or altered.[166]

> [W]here a witness has answered questions, but his answers (1) can be proven false by extrinsic evidence or (2) are so improbable, inconsistent, evasive, contradictory or obviously untruthful as to constitute contempt.[167]

> [T]he telling of self-evident falsehoods in reply to such inquiries could be such a refusal to answer as to make it a criminal contempt.[168]

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163 *People v. Roseman*, N.Y.L.J., July 7, 1978, p. 7, col. 6 (Sup. Ct., N.Y. Co.).

164 *People v. Paperno*, 98 Misc. 2d 99, 103 (Sup. Ct., N.Y. Co. 1979), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981).

165 *People v. Stahl*, N.Y.L.J., Mar. 13, 1979, p. 12, col. 2 (Sup. Ct., N.Y. Co.) (Rothwax, J.), *aff'd*, 75 A.D.2d 765 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 1048 (1981).

166 *People v. Schenkman*, 46 N.Y.2d 232, 237 (1978).

167 *People v. Tilotta*, 84 Misc. 2d 170, 172 (Sup. Ct., Kings Co. 1975).

168 *Steingut v. Imrie*, 270 A.D. 34, 48 (3d Dep't 1945).

> "[U]nder certain circumstances a response to a question may be so [inherently] false and evasive as to be equivalent to no answer at all and, thus, subject the witness to punishment for contempt."[169]
>
> [P]erjury, evident without resort to extrinsic evidence, which on its face by its patent improbability is calculated to be obstructive . . .[170]
>
> [F]alse and evasive testimony [which] . . . goes beyond the raising of an issue of credibility . . .[171]
>
> [P]ersistent equivocations . . . despite earlier formal, unqualified denials constitute [ ] a pattern of sophisticated evasion.[172]
>
> [F]alse and evasive profession of an inability to recall . . .[173]
>
> [T]estimony [which is] not only false but patently improbable, inconsistent and evasive . . .[174]
>
> [W]hether defendant had been criminally evasive and uncooperative in failing to give definite answers . . .[175]
>
> An "answer" considered in relation to other answers of the same witness may be so absurd, deceptive and prevaricated to such an extent that it amounts to a refusal to answer.[176]

169 *In re Epstein*, 43 Misc. 2d 987, 989 (Sup. Ct., N.Y. Co. 1964) (citation omitted).

170 *In re Kamell*, 170 Misc. 868, 875, Ct. Gen. Sess., N.Y. Co., *aff'd sub. nom. Kammell v. Koenig*, 258 A.D. 723 (1st Dep't 1939).

171 *People ex rel. Valenti v. McCloskey*, 8 A.D.2d 74, 78 (1st Dep't) (Breitel, J.P.), *rev'd on other grounds*, 6 N.Y.2d 390 (1959).

172 *People v. Renaghan*, 33 N.Y.2d 991, 993 (1974) (Breitel & Jasen, J.J., dissenting).

173 *People v. Ianniello*, 36 N.Y.2d 137, 142 (1975).

174 *In re Grand Jury (Reardon)*, 278 A.D. 206, 213 (2d Dep't 1951).

175 *People v. Saperstein*, 2 N.Y.2d 210, 216–17 (1957).

176 *Finkel v. McCook*, 247 A.D. 57, 62 (1st Dep't), *aff'd*, 271 N.Y. 636 (1936).

> Evasive testimony falls generally into two categories: that which is patently frivolous, and that which is patently false. Testimony of the first sort is "so frivolous upon its face that it does not constitute an answer at all;" as where "the answer [is] so absurd that mere inspection makes it necessary to conclude that the witness did not intend his answer to be seriously considered." The witness who recited nursery rhymes before the Grand Jury would be guilty of contempt of the patently frivolous kind. Testimony of the second sort is that "which is so plainly inconsistent, so manifestly contradictory and so conspicuously unbelievable as to make it apparent from the face of the record itself that the witness has deliberately concealed the truth and has given answers which are replies in form only . . ." The witness who testified "that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week" would be guilty of contempt of the patently unbelievable kind . . .[177]

> It is the constant repetition of "I can't remember" in respect to matters of which the witness must in all likelihood have recollection, and a comparison between his ability to testify as to some matters and his failing recollection as to others, that raises the inference of an intentional refusal to [answer] . . .[178]

A 1983 decision from the Court of Appeals, cautioning that an answer should not be considered "in isolation," but rather "in the context in which it was made," presents the newest formulation:

> [E]xplicit testimony which is neither incredible as a matter of law nor patently false and which could provide the basis for a perjury charge if later shown to be false, is not a refusal to answer. . . . Conversely, it has been held that the false and evasive profession of an inability to recall events or details which were significant and therefore memorable is . . . [a] criminal contempt. . . . A general denial followed by professions of an inability to recall

177 *People v. Paperno*, 98 Misc. 2d 99, 103 (Sup. Ct., N.Y. Co.), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981).

178 *O'Connell v. U.S.*, 40 F.2d 201, 203–204 (2d Cir. 1930).

> particular events which would have left an impression on the defendant had they occurred is the equivalent of a failure to answer.[179]

Evasive contempt, like perjury, is a crime of the intellect to be factually apprehended only by other intellects. It follows that appellate courts, though pronouncing legal theories, will always be assessing questions which are essentially factual.

A further refinement of what constitutes evasive contempt may be discerned in decisions making subtle distinctions between perjury, Penal Law criminal contempt, and Judiciary Law criminal contempt.

"Every falsehood is an evasion, and every evasion, of necessity, amounts to some degree of falsehood."[180] But, recognizing that false swearing and refusal to answer are defined by conceptually distinct statutes, is there a degree of falsehood amounting to a refusal to answer? Alternatively, are there types of evasive testimony which are also perjurious? The cases admit of both possibilities and appear to contain no language prohibiting an indictment pleading both perjury and contempt together or in the alternative. If this assessment is correct, then in each case the witness's testimony itself will determine whether a jury may convict for both crimes or whether it will have to make an election. As for Judiciary Law contempt *vis-à-vis* the conspicuously perjurious answer, it is clear that such sanction is restricted to a certain level of an egregiously false answer. Presiding Judge Breitel, speaking for a unanimous Appellate Division, distinguished between the false answer which may only serve as a basis for a perjury or contempt indictment, and the false answer upon which *summary* proceedings for contempt under the Judiciary Law (or CPLR) may be predicated:

> [W]here a witness gives an explanation but it is an incredible one the sanction is by prosecution for perjury or the crime of contempt, and not by summary contempt. But where the answers are purely evasive in that they deny knowledge or recollection of that which must be known or recalled, or are so false as to offer not the

179 *People v. Arnette*, 58 N.Y.2d 1104, 1106 (1983); *see also People v. Gottfried*, 61 N.Y.2d 617, 619 (1983).

180 *People ex rel. Valenti v. McCloskey*, 8 A.D.2d 74, 78 (1st Dep't), *rev'd on other grounds*, 6 N.Y.2d 390 (1959).

> slightest probability of truthfulness, then the summary sanction may be applied on the ground that although the witness has uttered words he, in fact, has given no answers.
>
> * * *
>
> On the analysis made thus far, if [relators] gave only false answers, even incredible ones—but short of palpably false and obstructively evasive ones—they have satisfied the statute and . . . they must be released. For if there is any issue of credibility then it is one which can only be resolved in a criminal prosecution for perjury or for the crime of contempt, and not in a summary proceeding. On the other hand, since the theory of the evasive answer is that it is not an answer, if [relators] have obstructed the inquiry and by evasive maneuver avoided giving information, they have failed to comply with the orders of commitment and to purge themselves of the contempt involved. It is, of course, for the . . . court to determine whether the answers supplied create an issue of credibility or whether they are so false and preposterous as to preclude the raising of any issue of fact.[181]

Judge Breitel's formulation insofar as it dealt with the evasive answer and summary proceedings (here, a civil order of commitment until relators answered questions) was apparently accepted in theory but rejected in its application by the Court of Appeals.

> The problem is to give meaningful content to the distinction between the false answer and the answer that is so false and evasive as to be tantamount to no answer at all.
>
> ***
>
> [I]f the witness directly responds with *unequivocal answers* which are clear enough to subject him to a *perjury indictment*, then he has made a "bona fide effort to

181 *Id.* at 82–84 (citation omitted).

> *answer*" and may not be summarily committed for refusing to answer.
>
> The obvious advantage of this test is that it focuses exclusively on the internal content of the witness's answers, and avoids any need of characterizing the testimony by nebulous elusive standards. . . . The chief difficulty in applying these nebulous standards is that the mere statement of any one of them requires a further definition of just what it means, and the process of definition and redefinition can continue *ad infinitum*.[182]

It is submitted that the Court of Appeals may have stated the problem, but did not render much "meaningful content" to the distinction between the false answer and the answer that is "so false and evasive as to be tantamount to no answer at all." For "meaningful content" one may have to revert to Judge Breitel's opinion in the Appellate Division. A later Court of Appeals (including Judge Breitel) seems to have done just that:

> The fact that the witness gives some response to a legal and pertinent question is not dispositive of the issue of whether he has refused to answer.
>
> We find it to be incredible as a matter of law, as well as obstructive to the purposes of the investigation, that the appellants could not recall the nature of the common scheme. Accordingly, we hold that the appellants did not make bona fide efforts to answer the questions put to them, and, consequently, that they refused to answer legal and pertinent questions without reasonable cause.[183]

Other cases have stated the problem in similar terms:

> The record here discloses that the petitioner deliberately testified falsely. On his own admission he is chargeable

182 *People ex rel. Valenti*, 6 N.Y.2d at 398–99, 403 (emphasis in original); *see also In re Epstein*, 43 Misc. 2d at 987, 989 (Sup. Ct., N.Y. Co. 1964).

183 *Ruskin v. Detken*, 32 N.Y.2d 293, 297 (1973) (Jasen, J.) (citation omitted). In his *Valenti* opinion at the Appellate Division 14 years earlier, Judge Breitel defined "incredible" as "what is not believed, or would not be believed by any, as a matter of probability." 8 A.D.2d at 80 n.1.

with perjury. Although he may be subject to punishment for the . . . crime of perjury, there is nothing to prevent the court from treating the same conduct as a contempt.

***

It is not our intention to hold, however, that all false swearing may be punished as a contempt. Where there is an issue as to the falsity of the testimony, the conflicting evidence should not be passed on in a criminal contempt proceeding . . . where the contemnor is entitled to a jury trial.

***

There is a distinction between the untruthful statement which does not clearly appear to be such from the face of the record but is uncovered only with the aid of extrinsic evidence and testimony which is so plainly inconsistent, so manifestly contradictory and so conspicuously unbelievable as to make it apparent from the face of the record itself that the witness has deliberately concealed the truth and has given answers which are replies in form only and which, in substance, are as useless as a complete refusal to answer.[184]

***

When the answers of a witness amount to the crime of perjury, the offender may be guilty of contempt, provided there is also some obstruction of justice in addition to the necessary elements of that crime. But the power to punish for contempt does not reside in the court to compel a witness to testify in accord with the court's conception of the truth. On the other hand, a witness who obstructs the course of justice by so acting that the court's performance of its duty is frustrated is not beyond the reach of the contempt power because he chooses false swearing as the means to his end in so doing. Of course, the contempt power does not afford the alternative method for trying an accused for perjury. No deprivation of the right of one

184 *Finkel v. McCook*, 247 A.D. 57, 62–63 (1st Dep't), *aff'd*, 271 N.Y. 636 (1936).

> charged . . . to a trial by jury can be sanctioned. Perhaps the best way to put it is that, where the court is justified in believing, and does believe, that a witness obstructed the administration of justice, the witness may be adjudged in contempt whether he has sworn falsely or not, but, where the court is not justifiably convinced that the performance of its duties has been obstructed, it cannot act under the contempt power even though perjury has been committed.[185]
>
> ***
>
> The rule, I think, ought to be this: If the witness's conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its face, and without inquiry collaterally, the testimony is not a *bona fide* effort to answer the question at all.[186]

"Evasive" is one of those few English words without a Latin root peeking through it. *Latebra* is a hiding place, a subterfuge or loophole. *Ambages* means going around. *Tergiversatio* equates with backwardness or reluctance. *Ambiguus* signifies moving from side to side or of doubtful nature.[187] Perhaps this is because the concept of evasion itself—in Roman times and now—has never been captured in one "correct," all-encompass-

185 *U.S. v. McGovern*, 60 F.2d 880, 889 (2d Cir. 1932).

186 *U.S. v. Appel*, 211 F. 495–96 (S.D.N.Y. 1913) (Hand, J.) (emphasis added); *see also Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Clark v. U.S.*, 289 U.S. 1, 12 (1933); *In re Michael*, 326 U.S. 224, 228 (1945).

187 Cassell's Latin–English Dictionary (Macmillian ed. 1968).

ing and precise definition. The day that occurs, the concept will lose most, if not all, of its utility. The reason for this, according to a tenet of objectivist epistemology, is that the word "evasive" is but a symbol for the concept of evasion and, as such, has no meaning apart from the content of the concept of evasion, which content, itself, is but a momentary integration of the factual units which comprise it. In sum, "evasion" has no content or meaning apart from its transient factual units as perceived by the intellect.[188]

As a further note, it is prudent to remember that questions that begin or end with "do you recall" or "do you remember," when answered with "no," *have been answered*, thus virtually negating a charge of evasive contempt.[189]

[1.11] XII. IS EVASIVE-ANSWER CRIMINAL CONTEMPT TRIED ON THE RECORD ALONE?

The general rule is that a charge of criminal contempt "stands or fails on the basis of the record of testimony, without regard to collateral proof."[190] In some cases the transcript of testimony will be redacted by the court to exclude unnecessary and prejudicial collateral matters. However, where evasiveness takes the form of a feigned inability to recall, the entire record may be admissible—*with* prejudicial but probative matters—to demonstrate an otherwise precise memory. If 10 pages of the record comprise the contemptuous answer, should 90 others laced with references to a witness's precise recall of mobster connections be admissible? Suppose a witness's "convenient amnesia" as to the names of mobsters he spoke with over a telephone is juxtaposed with his clear recall of the names of certain mobsters he acknowledges being seen with?[191]

188 Ayn Rand, Introduction to Objectivist Epistemology (Meridian ed. 1968).

189 *People v. Marinaccio*, 90 Misc. 2d 128, 133–34 (Sup. Ct., Bronx Co. 1977).

190 *People v. Roseman*, N.Y.L.J., July 7, 1978, p. 7, col. 6 (Sup. Ct., N.Y. Co.) (Rothwax, J.), *aff'd*, 78 A.D.2d 878 (2d Dep't 1980), *appeal denied*, 53 N.Y.2d 845 (1981); *People v. Hirsch*, N.Y.L.J., Feb. 13, 1979, p. 12, col. 3 (Sup. Ct., N.Y. Co.) (Rothwax, J.); *Marinaccio*, 90 Misc. 2d at 130.

191 *Compare People v. McGrath*, 57 A.D. 2d 405, 413 (1st Dep't 1977), *rev'd on other grounds*, 46 N.Y.2d 12, 32 (1978) *with People v. Saperstein*, 2 N.Y.2d 210, 216–17 (1957); *see also People v. Gottfried*, 61 N.Y.2d 617, 620 (1983).

One development from the Court of Appeals warrants discussion. In reviewing a contempt conviction based on feigned lack of recollection, the Court held that:

> Conviction of the offense is not to be grounded . . . on the truth or falsity of the answer . . . as would be the case were the defendant charged with perjury. The essence of any conviction for evasive contempt is that the jury shall find beyond a reasonable doubt that the defendant's response was intended as no answer at all and was thus tantamount to a refusal to answer. . . . It is only when the jury makes this determination that conviction for contempt is warranted. For this purpose it is *unnecessary* to determine whether the underlying event, conversation or fact did or did not occur.[192]

To this the Court added the following footnote:

> We do not suggest that evidence that the event, conversation or fact did occur would be *inadmissible* if offered by the People, or that evidence that it did not occur would be *inadmissible* if offered on behalf of the defendant.[193]

This footnote appears ill-considered. First, it is logically inconsistent with the rule enunciated in the text to which it refers. If contempt is not to be founded on the truth or falsity of an answer's content, but on whether an answer was given in the first place, then proof of whether the underlying event in fact occurred is irrelevant. Second, the footnote appears totally inconsistent with prior case law insofar as it obscures the fundamental distinction between perjury (an untruthful answer as to antecedent fact) and contempt (a refusal to answer). Third, where an indictment charges contempt, independent evidence that the contemptuous answer was a lie proves perjury, a crime not charged in the indictment. Fourth, the footnote ignores the obvious: Assuming that the underlying event in fact occurred, the question for the jury still remains whether lack of recollection as to such event was feigned (contempt) or genuine (innocence), not whether the event actually occurred. Fifth, the court's footnote coupled with its text curiously states that evidence proving that the underlying

192 *People v. Fisher*, 53 N.Y.2d 178, 184 (1981) (emphasis added) (citation omitted).

193 *Id.* at 184 n.3 (emphasis added). One federal court has found a Sixth Amendment claim based on reasoning similar to the footnote in *Fisher* as "not only without substance but border[ing] on the specious." *Stahl v. N.Y.*, 520 F. Supp. 221, 225 (S.D.N.Y. 1981) (Weinfeld, J.).

event did or did not occur is admissible, but "unnecessary" to the actual issue confronting the jury. In law, "unnecessary" smacks of the irrelevant and the immaterial. It is submitted that the admissibility of the evidence suggested by the court's footnote may be harmonized with logic and prior case law only if confined to indictments where contempt and perjury are charged for the same "I don't recall" answer. A person who states, "I don't recall" when he does recall, is lying. He is also giving a response which is tantamount to a refusal to answer. Proof as to the underlying event, one way or the other, would at least be admissible on the perjury count and probably on the contempt count—the rationale being that proof *dehors* the transcript tends to prove actual recollection and thus, professing amnesia a mere dodge rather than a responsive answer.[194] In such a case must the jury choose in the alternative or may it convict on both the contempt and perjury counts for the same answer?[195]

[1.12] XIII. ADMONISHING THE EVASIVELY CONTEMPTUOUS GRAND JURY WITNESS

A prosecutor confronted by an evasively contemptuous grand jury witness once had a potentially "no-win" situation on his hands. If he warned the witness about contempt, he risked an accusation that he had prejudiced the grand jury. If he refrained from doing so, he risked a claim that he wrongfully lulled the witness into believing his answers were responsive.[196]

The two-part rule has been settled as follows: First, a prosecutor *must*, plainly and correctly,[197] inform a grand jury witness of the scope of his immunity and *should* advise him that such immunity does not encompass

194 *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983); *In re Battaglia*, 653 F.2d 419 (9th Cir. 1981).

195 *People v. Schenkman*, 46 N.Y.2d 232, 236 (1978), involved perjury and contempt charged in the alternative. *Schenkman* was only convicted of contempt. Other than noting: "At trial the People relied largely on the Grand Jury minutes," the court made no comment on the matter. *See also Gottfried*, 61 N.Y.2d 617; *People v. Hirsch*, 83 A.D.2d 811 (1st Dep't 1981).

196 *Compare People v. Cutrone*, 50 A.D.2d 838 (2d Dep't 1975), *with People v. Didio*, 60 A.D.2d 978 (4th Dep't 1978).

197 *People v. Masiello*, 28 N.Y.2d 287 (1971) (Breitel, J.). As held by the Supreme Court: "A witness has . . . a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens v. Marks*, 383 U.S. 234, 246 (1966) (Douglas, J.); *see also People v. Tramunti*, 29 N.Y.2d 28, 29 (1971) (prosecutor's immunity "advice" almost "unintelligible"); *People v. Mulligan*, 29 N.Y.2d 20 (1971); *People v. Sparaco*, 39 A.D.2d 753 (2d Dep't 1972) (Shapiro, J., dissenting), *aff'd*, 32 N.Y.2d 652 (1973).

perjury or contempt.[198] Second, while not required to do so, a prosecutor, where appropriate, may repeat questions, as well as remind and admonish an evasive witness about the perils of contempt in a good-faith effort to encourage responsiveness. Of course, this is not to say that a prosecutor has a license to prejudice a grand jury against a witness turned putative contempt defendant, or to register disappointment or disapproval of otherwise unequivocal answers under the guise of admonishment.[199]

Here follows a suggested script for advising a witness who will be automatically immunized.

Mr.(s)_____, pursuant to §§ 50.10 and 190.40 of the Criminal Procedure Law, you are going to be permitted to testify with immunity. That immunity is two-fold.

First, you will receive transactional immunity, which simply means that for any transaction, occurrence, event, thing or happening about which you testify responsively to my questions, or the questions of the grand jurors, you cannot and will not be criminally prosecuted for by the state of New York. Do you understand that?

The second facet of this immunity is known as testimonial immunity, which simply means that your testimony itself, anything you say, cannot and will not be used against you in a criminal prosecution, either state or federal. Do you understand that?

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198 *People v. Rappaport*, 47 N.Y.2d 308, 313–14 (1979):

> We have held that "fundamental fairness" requires that the witness be informed of the extent of the immunity conferred by the statute. "At the very least *** the witness must be advised that he may not be prosecuted criminally concerning any transaction about which he might be questioned." And although it may appear to be obvious that a sworn witness who has been granted immunity must testify truthfully and, perhaps less obvious, answer all lawful questions, the statute expressly provides, and the witness should be informed, that he will not be immune from prosecution for perjury if he lies, or for contempt if he refuses to answer or gives evasive replies. This should not require an extended explanation, nor should the prosecutor be required to repeat the admonition, or have the court direct an answer, every time the witness' testimony becomes vague or evasive. (citations omitted).

199 *People v. Rappaport*, 60 A.D.2d 565 (1st Dep't 1977), *aff'd*, 47 N.Y.2d 308 (1979); *People v. Roseman*, N.Y.L.J., July 7, 1978, p. 7, col. 6 (Sup. Ct., N.Y. Co.) (Rothwax, J), *aff'd*, 78 A.D.2d 878 (2d Dep't 1980); *People v. Knyper*, N.Y.L.J., Oct. 5, 1978, p. 5, col. 6 (Sup. Ct., N.Y. Co.) (Rothwax, J.); *People v. Hirsch*, N.Y.L.J., Feb. 13, 1979, p. 12, col. 3 (Sup. Ct., N.Y. Co.) (Rothwax, J.); *see also People v. Davis*, 53 N.Y.2d 164 (1981); *People v. Pomerantz*, 46 N.Y.2d 240 (1978); *People v. Tyler*, 46 N.Y.2d 251 (1978); *Schenkman*, 46 N.Y.2d at 232.

It also means that your testimony, anything you say, cannot even be used as the source of a lead or clue for the purpose of conducting a different or independent criminal investigation leading to a criminal prosecution of yourself by either state or federal authorities. Do you understand that?

Now, there are crimes that immunity will not shield you from: The first crime is the crime of perjury, which could be committed by you if you intentionally lie to this grand jury under oath. Do you understand that?

The second crime that this immunity will not shield you from is the crime of criminal contempt, which could be committed by you in a number of ways. First, if you refuse to be sworn by the foreman of this grand jury. Second, if you refuse to answer legal and proper questions asked by myself or the grand jury. Third, if you willfully give patently false, patently absurd or conspicuously unbelievable answers which amount to no answer at all or a refusal to answer. Do you understand that?

Let me give you an example. Let's assume in the context of this investigation it were a legal and proper question for me to ask you did you get married last week. And let's assume that you answered, "Maybe yes, maybe no. It's possible I got married last week, and indeed it is probable I got married last week but I don't remember." That type of response to that type of question may subject a witness to prosecution for the crime of criminal contempt because, as I am sure you'll agree, it is so evasive, so equivocal and so conspicuously false that it is the same thing as saying I am not going to answer that. Now, do you understand that?

By refusing to be sworn, or answer legal and proper questions, or by giving evasive answers which amount to no answer at all, you may also be liable to prosecution and punishment under the Judiciary Law. Do you understand?

Perjury and criminal contempt whether under the Penal Law or Judiciary Law are punishable by fine, imprisonment or both. Do you understand?

[1.13] XIV. THE *MENS REA* OF TESTIMONIAL CRIMINAL CONTEMPT

In general, "willfulness" is said to characterize criminal contempt. As to testimonial contempt, "willfulness" and phrases such as "tending to

obstruct" have been used in defining its *mens rea*,[200] despite the fact that the Penal and Judiciary Laws are cast solely in terms of an intentional refusal to answer. To the extent "willfulness" is synonymous with "knowing and intentional," it adds little, if anything, to testimonial contempt's *mens rea*, that is, intentional refusal to answer. "Tending to obstruct" and like phrases, used in the context of a flat refusal to answer or refusal by evasive answer, seem too often to be used imprecisely or needlessly. Obviously, testimonial contempt necessarily and foreseeably obstructs inquiry. But obstruction is here the effect of the criminal conduct, not its *mens rea*. The distinction between testimonial contempt by evasive answer and flat refusal to answer illustrates the point.

When accused of contempt by evasive answer, a defendant may testify or introduce evidence concerning his intent and state of mind at the time he was interrogated,[201] but such evidence relates to whether there was an intentional refusal to answer, not whether there was an intent to obstruct inquiry. Two Court of Appeals decisions make this clear. While a defendant is "not entitled to a separate, explicit charge that among the essential elements of the crime of criminal contempt in the first degree, which the prosecution [is] required to establish to obtain a conviction, [is] an intent . . . to obstruct the Grand Jury investigation,"[202] it is "error to exclude proof relative to [a] defendant's intent and state of mind at the time he was interrogated . . ."[203]

Evasive contempt is simply another way of intentionally refusing to answer,[204] but to say that an evasive witness may simultaneously harbor

200 *See, e.g.*, *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 248–49 (1886); *People v. Giglio*, 74 A.D.2d 348, 353–54 (2d Dep't 1980); *People v. Dercole*, 72 A.D.2d 318, 334 (2d Dep't 1980); *People v. Gorgone*, 47 A.D.2d 347, 351 (1st Dep't 1975); *People ex rel. Valenti v. McCloskey*, 8 A.D.2d 74, 80 (1st Dep't), *rev'd on other grounds*, 6 N.Y.2d 390 (1959); *Steingut v. Imrie*, 270 A.D. 34, 48 (3d Dep't 1945); *Finkel v. McCook*, 247 A.D. 57, 63 (1st Dep't, *aff'd*, 271 N.Y. 636 (1936); *People v. Paperno*, 98 Misc. 2d 99, 104 (Sup. Ct., N.Y. Co. 1979), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981); *People v. Stahl*, N.Y.L.J., Mar. 13, 1979, p. 12, col. 2 (Sup. Ct., N.Y. Co.), *aff'd*, 75 A.D.2d 765 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 1048 (1981); *People v. McGrath*, 86 Misc. 2d 249, 257 (Sup. Ct., N.Y. Co. 1976), *rev'd on other grounds*, 57 A.D.2d 405 (1st Dep't 1977), *rev'd*, 46 N.Y.2d 12 (1978); *In re Berkon v. Mahoney*, 180 Misc. 659, 662 (Sup. Ct., Kings Co. 1943), *rev'd on other grounds*, 268 A.D. 825 (2d Dep't 1944), *aff'd*, 294 N.Y. 828 (1945); *In re Kamell*, 170 Misc. 868, 875–76 (Ct. Gen. Sess., N.Y. Co. 1938), *aff'd,* 258 A.D. 723 (1st Dep't 1939).

201 *People v. Martin*, 47 A.D.2d 883, 884 (1st Dep't 1975), *aff'd*, 42 N.Y.2d 882 (1977); *People v. Renaghan*, 40 A.D.2d 150, 152 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 991 (1974).

202 *People v. Tantleff*, 40 N.Y.2d 862, 863 (1976).

203 *Martin*, 42 N.Y.2d at 883.

204 *People v. Schenkman*, 46 N.Y.2d 232, 237 (1978).

an intent to obstruct inquiry is not to say that the same is part and parcel of evasive criminal contempt's *mens rea*.

As to criminal contempt by flat refusal to answer, or flat refusal on legal grounds found meritless, the *mens rea* still remains an intentional refusal to answer.[205] Here the contemptuous witness may be sincere and harbor not the slightest intention to obstruct—his intent being simply to refuse to answer. Yet, if his legal grounds are found meritless, but he nevertheless persists in his refusal, he is guilty of contempt. New York's leading case illustrates the point:

> In the alternative, defendant maintains that . . . the fact that he raised [legal grounds] before the Grand Jury indicates that his stance before that body was not contumacious but rather one of "forthright and honest" concern over the potential violation of his Fifth Amendment rights, an attitude which, he avers, negates the existence of the requisite intent. Subdivision 1 of CPL 190.40 provides, however, that "Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or *belief* on his part that it may tend to incriminate him." . . . To accept defendant's argument would be to eliminate the contempt sanction for any witness represented by an imaginative lawyer alert to issues pending in appellate courts . . . . Having rolled the dice and lost, he may not now be heard to complain.
>
> In establishing the existence of the requisite intent . . . of the contemnor's Grand Jury testimony it is sufficient merely to find . . . that [defendant's] refusal to answer questions was the product of a rational choice. The fact

205 *Keenan v. Gigante*, 47 N.Y.2d 160 (1979); *People v. McGrath*, 46 N.Y.2d 12, 29 (1978); *In re Second Additional Grand Jury (Cioffi)*, 8 N.Y.2d 220 (1960); *DiBiasi v. Schweitzer*, 22 A.D.2d 684 (1st Dep't 1964).

> that his choice may have been predicated upon the advice of counsel is irrelevant.[206]

Not only is advice of counsel irrelevant to intent, so also mere fear for one's life or that of one's child—as opposed to demonstrated imminent peril—does not negate an intentional refusal to testify.[207] Nor may a witness refuse to testify, asserting the Fifth Amendment privilege when his fear of committing perjury arises out of his current refusal to testify truthfully out of fear of physical harm thus risking committing perjury. This is just a Fifth Amendment claim based on fear of reprisal.[208] Nor do sincere religious beliefs or the mere husband-wife relationship negate intent or outweigh the interests of the grand jury in obtaining every man's evidence.[209] Similarly, a gratuitous offer to return to the grand jury and testify further is irrelevant.[210] "Free association and speech" and "common decency" are also of no avail.[211] These grounds are actually warmed up versions of those previously rejected.

> The Fifth Amendment plainly—and properly—was intended as a shield against self incrimination; the First Amendment was not. The use of the First Amendment to

206 *People v. Breindel*, 73 Misc. 2d 734, 737–38 (Sup. Ct., N.Y. Co. 1973) (citation omitted) (emphasis in original), *aff'd*, 45 A.D.2d 691 (1st Dep't), *aff'd*, 35 N.Y.2d 928 (1974) (What this amounts to is that a witness who has sufficient sophistication to find a lawyer who will advise him that he need not answer is immune from the consequences of defying the grand jury and may freely disobey the court's direction to answer. Such is not and never was the law.); *People v. Einhorn*, 45 A.D.2d 75, 81 (1st Dep't) (Steuer, J., dissenting) *rev'd on other grounds*, 35 N.Y.2d 948 (1974); *see also Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988); *Sinclair v. U.S.*, 279 U.S. 263, 299 (1929); *U.S. v. Armstrong*, 781 F.2d 700, 707 (9th Cir. 1986); *Butterly & Green, Inc. v. Lomenzo*, 36 N.Y.2d 250, 250, 256 (1975); *People v. Forsyth*, 109 Misc. 2d 234 (Sup. Ct., N.Y. Co. 1981).

207 *Piemonte v. U.S.*, 367 U.S. 556, 559 n.2 (1961); *U.S. v. Remini*, 967 F.2d 754, 759 (2d Cir. 1992); *In re Grand Jury Investigation (Detroit Police Special Cash Fund)*, 922 F.2d 1266, 1272–73 (6th Cir. 1991); *In re Grand Jury Proceedings*, 903 F.2d 1167 (7th Cir. 1990); *U.S. v. Ryan*, 810 F.2d 650, 656 (7th Cir. 1987); *Simkin v. U.S.*, 715 F.2d 34 (2d Cir. 1983); *Dupuy v. U.S.*, 518 F.2d 1295 (9th Cir. 1975); *In re Waterfront Comm'n*, 245 A.D.2d 63, 65 (1st Dep't 1997); *Widger v. U.S.*, 244 F.2d 103, 104–105, 107 (5th Cir. 1957); *People v. Clinton*, 42 A.D.2d 815 (2d Dep't 1973); *People v. Gumbs*, 124 Misc. 2d 564 (Sup. Ct., N.Y. Co. 1984).

208 *U.S. v. Allman*, 594 F.3d 981, 986–987 (8th Cir. 2010).

209 *Smilow v. U.S.*, 465 F.2d 802 (2d Cir.), *vacated on other grounds*, 409 U.S. 944 (1972); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102–04 (2d Cir. 1985); *People v. Woodruff*, 26 A.D.2d 236 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848 (1968); *In re Fuhrer*, 100 Misc. 2d 315 (Sup. Ct., Richmond Co.), *aff'd on opn below*, 72 A.D.2d 813 (2d Dep't 1979); *see also U.S. v. Chase Manhattan Bank*, 590 F. Supp. 1160 (S.D.N.Y. 1984); *People v. Garlock*, 15 N.Y.2d 543 (1964).

210 *People v. Renaghan*, 33 N.Y.2d 991, 992 (1974).

211 *People v. Zweig*, 32 A.D.2d 569 (2d Dep't 1969).

> shield one from supplying "obviously incriminating information about himself" would be a perversion of the Constitution, needless so long as the Fifth Amendment stands. Should this perversion be sanctioned it would not be long before repeated use of the First as a haven from incrimination would "contaminate" that Amendment. Mere recital of these factors demonstrates the folly of trying to adjust constitutional interpretation to meet the shifting breezes of segments of public opinion and the prevailing modes of witnesses. . . . [212] Testimonial criminal contempt is simply the intentional refusal to answer legal and proper questions.[213]

[1.14] XV. CONTEMPT TRAPS ARE LEGALISMS IN SEARCH OF FACTS

The function of a grand jury is to seek evidence of antecedent crime, not the creation of new crimes in the course of its proceedings.[214] As to a "perjury trap," the Court of Appeals has held that where a prosecutor, "in his question[s], demonstrate[s] no palpable interest in eliciting facts material to the authorized substantive investigation of antecedent crime,"[215] or "exhibits no palpable interest in eliciting facts material to a substantive investigation," but instead "substantially tailors his questioning to extract a false answer, a valid perjury prosecution should not lie."[216] Similarly, "false answers about peripheral details may [not] support a perjury prosecution without the prosecutor laying enough of a foundation to recall to the witness's mind what, without some prodding, may have in truth escaped the witness's recollection."[217] Simply put, the examiner has "an inescapable burden to provide a transcript which demonstrates that the witness is testifying falsely intentionally, rather than mistakenly, whether it is with respect to surrounding neutral details or to substantive matters

212 *Sacher v. U.S.*, 252 F.2d 828, 837 (D.C. Cir.), *rev'd on other grounds*, 356 U.S. 576 (1958).

213 *People v. Ianniello*, 36 N.Y.2d 137 (1975); *Ruskin v. Detkin*, 32 N.Y.2d 293, 297 (1973); *see also Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 476–77 (1972).

214 *People v. Tyler*, 46 N.Y.2d 251, 258, 259 (1978); *see also In re Sinadinos*, 760 F.2d 167, 169 (7th Cir. 1985).

215 *Tyler*, 46 N.Y.2d at 243.

216 *Id.* at 259.

217 *Id.* at 254.

relevant to an authorized investigation."[218] "Critical" is the restatement and repetition of questions, cues and prodding of the witness, the required extent and degree of which is to be measured against "the intrinsic significance, or insignificance of the event to be recalled."[219]

By *dicta* and footnote the court has also coined the phrase "contempt trap"—"an argument grounded, by analogy, on the concept of a perjury trap."[220]

> Of course even when the witness has been fairly warned at the outset the prosecutor may not thereafter attempt to trap the witness into giving confusing or evasive replies. But in this case it cannot be said that the witness was caught in a "contempt trap" in view of the prosecutor's careful reframing and repetition of the questions and his representation, acknowledged by the witness, that the inquiry was important to the matter under investigation.[221]

A "contempt trap" like a "perjury trap" is "ordinarily" one of fact for a jury unless "as a matter of law" such is found to exist by the court.[222] Since the defense of a contempt trap "is essentially grounded upon the same concepts as the perjury trap,"[223] its contours are here informed by those principles pertaining to a perjury trap. First, "the mere anticipation of [contempt] in an inquiry [will not] invalidate an indictment for the anticipated [contempt]. That would be unrealistic, and a boon to which [contemnors] are not entitled."[224] Second, "cues are not to inform the witness of the information already acquired, but to make certain that the witness is not failing sincerely to recall details of no memorable significance."[225] Third, "[i]t is not so much that the witness deserves an opportunity to refresh his recollection; it is that the foundation established by stimulation of recollection bears on resolution of the ultimate issue: whether the defendant is deliberately

218 *Id*. at 262.

219 *Id*. at 261; *see also People v. Davis*, 53 N.Y.2d 164 (1981); *People v. Pomerantz*, 46 N.Y.2d 240, 243–44, 249–50 (1978); *People v. Schenkman*, 46 N.Y.2d 232, 234, 238–39 (1978).

220 *People v. Fisher*, 53 N.Y.2d 178, 183 n.1 (1981).

221 *People v. Rappaport*, 47 N.Y.2d 308, 314 (1979) (citation omitted).

222 *Fisher*, 53 N.Y.2d at 183, n.1; *Tyler*, 46 N.Y.2d at 258–259.

223 *People v. D'Alvia*, 171 A.D.2d 96, 111 (2d Dep't 1991).

224 *Tyler*, 46 N.Y.2d at 262.

225 *Id*. at 260–61.

[refusing to answer]."[226] Fourth, a witness suspected of being contemptuous by evasive answer need not be "wetnursed" or be given a "last clear chance" to testify responsively. "A rigid rule would deny the prosecutor the right to exercise judgment."[227] Fifth, "the intrinsic significance, or insignificance, of the event to be recalled will, almost invariably, be critical in determining the cues, if any, the prosecutor should provide for the witness, if it is the truth that is being sought."[228] Sixth, "it is not suggested that full disclosure of the information known to the prosecutor must [be] made to [the witness], especially if disclosure would reveal too much of how the investigation was conducted and how far it has proceeded,"[229] "lest [the witness] conform his testimony to what [is] already known and fail to add to the prosecutor's knowledge."[230] Seventh, the prosecutor has the inescapable burden of demonstrating on the record that the witness is intentionally refusing to answer, not merely suffering from *bona fide* confusion or lack of recollection.[231]

None of the Court of Appeals' decisions regarding contempt or perjury traps go so far as to state that there is such a thing as "excusable" perjury or contempt before a grand jury. Indeed, the court has made it quite clear that "no witness has a license to testify evasively or falsely before the Grand Jury"[232] and that "[i]t is fundamental that a witness may not disregard his oath to tell the truth in the first instance."[233] As previously noted, it has expressly disavowed that any significance is to be attached to

226 *Id.* at 261.

227 *Id.*

228 *Id.*

229 *Id.* at 262.

230 *People v. Pomerantz*, 46 N.Y.2d 240, 249 (1978).

231 *Id.* at 250 ("An investigatory examination which may seem to parallel what is approved in this case would not stand if on the record it were demonstrable that what was ultimately involved was a sophisticated facade to trap the defendant into a new crime of perjury or contempt, and not to establish evidence of antecedent crime. The court is concerned with substance, not form."); *People v. Schenkman*, 46 N.Y.2d 232, 239 (1978) ("A formalistic adherence to any kind of questioning which does not in fact relate to a search for evidence of antecedent crime will not suffice to sustain a conviction for the crime of contempt. There must not only be an appearance of the pursuit of evidence of antecedent crime but it must also be a reality.").

232 *People v. McGrath*, 46 N.Y.2d 12, 29 (1978); *People v. Ianniello*, 21 N.Y.2d 418 (1968).

233 *People v. Ezaugi*, 2 N.Y.2d 439, 443 (1957).

whether or not contempt or perjury may be anticipated.[234] Obviously, the court's concern is with the reality, not the illusion of justice—here, specifically, the integrity of the prosecutorial, grand jury and judicial process. Perhaps the court could have achieved the same objective—without the use of metaphors—by casting the problem in terms familiar and prosaic to both prosecution and defense bar. Is the evidence before the grand jury legally sufficient as a matter of law to create a question of fact for a trial jury? It is submitted that this ordinary, pretrial-motion rubric is broad enough to deal effectively with the issues and considerations labeled by the court as contempt and perjury "traps." Beyond this, it is submitted that such issues should ordinarily be left for counsel's summation and the common sense of the jury. Notably analogous is the court's own comment on the meaning of its seminal "perjury trap" case, holding the same to stand for "*no more* than that a perjury [or contempt] indictment requires a demonstration of intentional falsity [or contumaciousness] in response to 'purposeful substantive inquiry'—that such an indictment may not be predicated upon interrogation techniques that have perjury [or contempt] as the sole object."[235] If the evidence before a grand jury demonstrates intentional falsity or contumaciousness in response to purposeful substantive inquiry, what would constitute "interrogation techniques that have perjury [or contempt] as the sole object?" *What about the witness's own intellect and free will?* "A 'universal and persistent' foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the 'belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'"[236] "[I]t is difficult to conceive of a truly 'inadvertent' criminal contempt, inasmuch as intent is a necessary element of the offense."[237]

An Appellate Division holding states, "Whether [a] defendant was the victim of a perjury [or contempt] trap, generally is a question of fact to be

234 *People v. Tyler*, 46 N.Y.2d 251, 262 (1978). The United States Supreme Court has apparently rejected any doctrine of "anticipatory contempt" or "anticipatory perjury." *U.S. v. Apfelbaum*, 445 U.S. 115, 131 (1980); *U.S. v. Bryan*, 339 U.S. 323, 340–41 (1950). *See generally People ex rel. Hofsaes v. Warden*, 302 N.Y. 403, 408 (1951).

235 *People v. Davis*, 53 N.Y.2d 164,172 (1981) (emphasis added) (citation omitted.).

236 *U.S. v. Grayson*, 438 U.S. 41, 52 (1978) (quoting *Morissette v. U.S.*, 342 U.S. 246, 250 (1952)).

237 *O'Neil v. Kasler*, 53 A.D.2d 310, 321 (4th Dep't 1976).

submitted to the triers of fact for appropriate resolution. . . ."[238] Evidently, one may not call an expert to the stand to offer his or her opinion as to what constitutes a contempt trap or what constitutes legal and proper questions.[239] But if a court rules as a matter of law that there was no "perjury or contempt trap" then what permissible argument may be made thereon to a jury, other than the usual summation interpreting the "Qs and As" contained in the grand jury minutes? Are the courts now ready to say that there are cases where as a matter of law the existence of a "trap" is a jury question? Is the jury to decide whether a witness lied or was contumacious or that he was "trapped?" Will the jury, in reality, be merely considering two sides of the same coin? What is the scope of appellate review? In the seminal perjury trap case, the Court of Appeals talked about a perjury trap as involving a situation where no valid oath was administered. Is this question for the jury too? It is submitted that, try as the Court of Appeals might, the "perjury, contempt trap" will remain an unnecessary legalism in search of a factual home. That new home may be a motion to quash a grand jury subpoena on the ground that a "contempt trap" is contemplated, a result so far rejected since such ground is, in essence, a challenge to the grand jury's authority to inquire in the first place.[240] Because of its nature, one suspects that the "contempt trap" will remain more of an orphan than the "perjury trap." A witness has exclusive control over the answer he gives to a question, and thus it would be almost impossible for the questioner to make him appear contumacious. Some cases of an earlier era—one involving a Manhattan Supreme Court Justice and "Spanish Raymond"—were the fodder for some Court of Appeals

238 *People v. Tempera*, 94 A.D.2d 748 (2d Dep't 1983); *see also People v. Kenny*, 100 A.D.2d 554 (2d Dep't 1984); *cf. People v. Leo*, 109 Misc. 2d 933, 936–37 (Sup. Ct., N.Y. Co. 1981) stating:

> In Grand Jury interrogation, a prosecutor may be motivated to trap a witness into either (1) contempt, or (2) perjury or (3) the truth. Euchre into the first two traps corrupts and vitiates the subsequent prosecution. . . . However, [the Court of Appeals in *Tyler* and *Pomerantz*] differentiated them from the third so-called "trap" (which is *more accurately denominated a rescue* rather than a trap) holding that maneuverance into truthful testimony does not offend principle. (emphasis added).

This reasoning seems "high falutin" and paternalistic.

239 *People v. Kirsh*, 176 A.D.2d 652, 653 (1st Dep't 1991).

240 *In re Grand Jury Subpoenas (Clay)*, 603 F. Supp. 197, 200 (S.D.N.Y. 1985); *McGinley v. Hynes*, 51 N.Y.2d 116, 122–26 (1980). *See generally People v. Casalini*, 126 Misc. 2d 665 (Sup. Ct., N.Y. Co. 1984); *Rodriguez v. Morgenthau*, 121 Misc. 2d 694 (Sup. Ct., N.Y. Co. 1983). The less than enthusiastic reception of the "perjury contempt trap" doctrine as well as the gamesmanship and legalized witness tampering to which it may lend itself is well illustrated in *Kinsella v. Andreoli*, 95 Misc. 2d 915, 919–20 (Sup. Ct., Onondaga Co. 1978) (Smith, J.) and *People v. Knyper*, N.Y.L.J., Oct. 5, 1978, p. 5, col. 6 (Sup. Ct., N.Y. Co.) (Rothwax, J.) (There is no right to inspect tape transcripts prior to testifying in the grand jury on "faulty memory" grounds.).

decisions, it is suggested. In the years since the Court of Appeals created its "trap" doctrine, only the Manhattan Supreme Court Justice has ever successfully invoked it. It is suggested that the case be viewed as *sui generis.* The Second Circuit Court of Appeals has noted that the existence of a legitimate basis for an investigation and for questions asked pursuant thereto precluded any application of a perjury trap doctrine—a subject that the court discussed but did not adopt. Assumedly, it would hold the same perspective on a contempt trap.[241]

[1.15] XVI. MULTIPLICITOUSNESS AND CONTEMPTS

There are two tests for determining whether the counts of a contempt indictment are "multiplicitous." First, the number of distinct subject areas of inquiry; second, the objectively assessed ability of the examiner to recognize in advance the scope of a witness's refusal.[242] While the remedy for "multiplicitousness" is not dismissal, but rather a limitation on punishment,[243] it has been held improper for a prosecutor to create an aura of extensive wrongdoing by charging repeated refusals to answer *the same* questions as separate contempts.[244] Questions relating to the same subject matter, met by outright refusal to answer or evasion, present an issue of multiplicity comparatively easy to resolve on pretrial motion. Difficulty arises from situations combining different subject areas of inquiry with a lack of an objectively assessable ability on the part of the prosecutor to gauge and anticipate the scope of a witness's refusals to answer. One court has opted for the "subject area rule," reasoning that it would be unfair to charge multiple counts against a witness who raises assorted claims and gives various evasive answers to subjects asked while limiting

241 *U.S. v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997).

242 *People v. Riela*, 7 N.Y.2d 571 (1960); *People v. Saperstein*, 2 N.Y.2d 210 (1957); *People v. Cavalieri*, 36 N.Y.2d 284 (1st Dep't), *aff'd*, 29 N.Y.2d 762 (1971), *cert. denied,* 406 U.S. 962 (1972); *People v. Stahl*, N.Y.L.J., Mar. 13, 1979, p. 12, col. 2 (Sup. Ct., N.Y. Co.) (Rothwax, J.), *aff'd*, 75 A.D.2d 765 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 1048 (1981); *People v. Paperno*, 98 Misc. 2d 99 (Sup. Ct., N.Y. Co. 1979) (Rothwax, J.), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981); *Knyper*, N.Y.L.J., Oct. 5, 1978, p. 5, col. 6; *People v. Cianciola*, 86 Misc. 2d 976, 981 (Sup. Ct., Queens Co. 1976), *rev'd on other grounds sub nom. People v. Dercole*, 72 A.D.2d 318 (2d Dep't 1980), *appeal dismissed*, 52 N.Y.2d 956 (1981).

243 *People v. Mulligan*, 29 N.Y.2d 20, 24 (1971) (Fuld, C.J.). *But see Casalini*, 126 Misc. 2d at 670–72.

244 *Riela*, 7 N.Y.2d at 578; *cf. U.S. v. Lach*, 874 F.2d 1543, 1548–49 (11th Cir. 1989).

the counts charged against a witness who adamantly refuses to answer all questions in any subject area under a single claim or outright refusal.[245] It would seem that the best method is to apply *both* tests where logic and common sense permit, at all times recognizing that while the examiner controls the questions (subject area), it is the contemptuous witness who controls the answers (carved out, objectively assessable area of refusal). Where the facts of a case render multiplicitousness an issue too close to preliminarily call, resolution may properly await post-verdict motion.[246]

As for Judiciary Law criminal contempt, it is clear that considerations of multiplicitousness are, for the most part, inapplicable, *provided the questioning occurs on different dates or before different grand juries*. The *Cirillo* cases illustrate the point dramatically.[247] Cirillo was adjudged in contempt and sentenced to 30 days for refusing to answer questions before a grand jury. Two days later his writ of habeas corpus was dismissed by the Appellate Division. While his appeal was pending before the Court of Appeals, he was again summoned to the grand jury, refused to answer and, again, received 30 days. Brought before the grand jury a third time, Cirillo's refusals persisted and a further 30-day commitment resulted. All of Cirillo's contempt citations—involving questions on the same subject matter—were upheld on appeal. The reasoning of the Appellate Division and Court of Appeals is traced as follows:

> The People did not know beforehand that the appellant would persist in his assertion of a memory failure concerning only this period. Indeed, they could properly assume that the appellant would recall his activities on the afternoon of August 20, 1961, particularly since he

245 *Cianciola*, 86 Misc. 2d at 981. A better rationale is:

> that "[t]he policy of the law must be to encourage testimony" and, by treating "a witness willing to testify freely as to all areas of investigation but one" no worse "than a witness unwilling to give any testimony at all," the [Supreme] Court hoped to encourage witnesses to testify at least on those subjects they find unobjectionable.

U.S. v. Coachman, 752 F.2d 685, 691–92 (D.C. Cir. 1985) (quoting *Yates v. U.S.*, 355 U.S. 66, 73 (1957)); *cf. U.S. v. Costello*, 198 F.2d 200 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

246 "[T]he result will not be dismissal . . . but, rather, a limitation on the quantum of punishment to be imposed . . ." *People v. Mulligan*, 29 N.Y.2d at 24; *see also People v. Chestnut*, 26 N.Y.2d 481 (1970); *People v. Knyper*, N.Y.L.J., Oct. 5, 1978, p. 5, col. 6 (Sup.Ct., N.Y. Co.). *Cianciola*, 86 Misc. 2d at 984.

247 *People ex. rel. Cirillo v. Warden*, 14 A.D.2d 875 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 51 (1962); *Second Additional Grand Jury v. Cirillo*, 16 A.D.2d 605 (2d Dep't 1962), *aff'd*, 12 N.Y.2d 206 (1963); *Second Additional Grand Jury v. Cirillo*, 19 A.D.2d 555 (2d Dep't 1963).

> had theretofore been committed for contempt of court because of his "don't remember" answers covering this very time.
>
> Moreover, [w]e do not believe that a witness may impede or thwart an investigation by contumacious conduct and then claim that he is insulated or immunized from co-operating with lawful authority.[248]
>
> * * *
>
> Every citizen is subject to be[ing] recalled as a witness before the same Grand Jury . . . . There is no reason why one should get immunity as to subsequent contempts by serving a term of imprisonment and paying a fine. The State has a right to his truthful testimony and has a right to try again to get it after he has once been found guilty of contempt and punished.[249]

Applying *Cirillo*'s reasoning, the record for successive Judiciary Law punishments for refusals to testify about the same subject at successive grand jury appearances appears to remain at three.[250]

[1.16] XVII. PURGATION OF CRIMINAL CONTEMPTS

While the Court of Appeals has held that an indictment for criminal contempt before a grand jury may not be purged,[251] it has also posited the following *Leone* dictum:

248 *Cirillo*, 16 A.D.2d at 607; *see also Walker v. Walker*, 86 N.Y.2d 624 (1995).

249 *Cirillo*, 12 N.Y.2d at 210; *accord Coachman*, 752 F.2d at 692; *In re Boyden*, 675 F.2d 643 (5th Cir. 1982).

250 *See Cirillo* cases, *supra*; *see also Goldstein v. Gellinoff*, 19 N.Y.2d 792 (1967); *Ushkowitz v. Helfand*, 15 N.Y.2d 713 (1965), *petition dismissed sub nom. U.S. ex. rel. Ushkowitz v. McCloskey*, 359 F.2d 788 (2d Cir. 1966); *Vario v. County Court*, 32 A.D.2d 1038 (3d Dep't 1969); *In re Amato (People v. John Doe)*, 204 Misc. 454 (Sup. Ct., Richmond Co. 1953). *See generally People v. Di Maria*, 126 Misc. 2d 1 (Sup. Ct., N.Y. Co. 1984) (Rothwax, J.) (Defendant charged twice with misdemeanor contempt for failure to obey successive subpoenas of a grand jury, and once with felony contempt for refusal to be sworn.).

251 *People v. Leone*, 44 N.Y.2d 315, 317–18 (1978).

> *Unnecessary to reach*, and *probably incorrect*, is the conclusion that under no circumstances may a "criminal" summary contempt be purged. In fact, this court has concluded, in some circumstances at least, that one summarily adjudged in criminal contempt pursuant to section 750 of the Judiciary Law 'holds the key to his freedom.' *Arguably, implicit* in such a conclusion is the ability to purge *some* criminal contempts as distinguished from crimes of contempt.[252]

The court's dictum seems at odds with the traditional distinction between civil and criminal contempt under Judiciary Law §§ 750 and 753, as well as its own prior holdings.[253] Perhaps what is actually involved is a poorly reasoned or not so clearly articulated resort to the inherent power of a court to modify its own order (mandate of commitment), while still

252 *Id.* at 318 (emphasis added) (citation omitted). The *Leone* case contains its own irony. Leone, after being indicted for contempt, returned to the grand jury and answered all questions. This act of "contrition" was neither a "purge" nor was it admissible in his defense at trial. *See People v. Leone*, No. 10423/1972 (Sup. Ct., Kings Co., Jan. 18, 1976), *aff'd*, 56 A.D.2d 936 (2d Dep't 1977). Had he been proceeded against under the Judiciary Law—according to the Court of Appeals' dictum—his second trip into the grand jury would have "purged" his original contempt.

253 *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 247–49 (1886) (There are two classes of contempts. "Private" (civil) is for the vindication of private rights, i.e., cases where an injury or wrong is done to a private litigant who establishes his right before the court to monetary indemnity or a compulsory act or omission to be enforced for his benefit. "Public" (criminal) contempts consist of those caused by or as a result of a violation of the rights of the public as represented by their constituted tribunals. The punishment for the wrong is in the interest of public justice, not in the interest of a private litigant. Any fine collected pursuant to a public contempt goes into the public treasury as a penalty, not an indemnity. "Necessarily these [public] contempts in their origin and punishment partake of the nature of crimes, which are violations of the public law, and end in the vindication of public justice; and hence are named criminal contempts."); *McCormick v. Axelrod*, 59 N.Y.2d 574 (1983) ("[i]nasmuch as the objective [of criminal contempt] is deterrence of disobedience of judicial mandates, the penalty imposed is punitive in nature."); *see also Gompers v. Bucks Stove Range Co.*, 221 U.S. 418 (1911).

executory in the face of thirteenth-hour obedience.[254] This aside, the three cases cited by the court in support of its *Leone* dictum seem to be rather slender reeds. One was a 1910 Appellate Division case involving disobedience to an injunction in a labor dispute.[255] It did *not* involve a purging of a criminal contempt. Rather, its *plurality* decision related to the nature and extent of the discretion of an offended court to stay its punishment indefinitely after its contempt adjudication has been affirmed by the Court of Appeals—"*in effect*" a purging. *There was no majority opinion*, a fact curiously overlooked by the Court of Appeals. It in no way alter[ed] the determination that a criminal contempt had been committed."[256] The second case was from the Court of Appeals and involved a civil commitment under the former Civil Practice Act for a witness's refusal to answer questions in a civil proceeding. There the Court of Appeals posited a similar unsupported, *Leone*-type dictum, to wit: "The function of both a *civil* contempt [under Judiciary Law section 753] and a [CPA] section 406, subdivision 3 commitment is remedial and coercive, and the recalcitrant witness holds the key to his freedom. We think that it is likewise so as to *criminal* contempt under subdivision 5 of section 750 of the Judiciary Law."[257] The third case was also a Court of Appeals decision on remand from the U.S. Supreme Court. It held that a criminal contempt commitment under Judiciary Law § 750, as opposed to a contempt indictment, "was not the result of a criminal prosecution," but "was *civil in nature* and, hence, the doctrine of former jeopardy [was] not applicable."[258] This

254 *Ferrara v. Hynes*, 63 A.D.2d 675 (2d Dep't 1978); appellant was held in contempt for failing to comply with a court's order to appear and testify before a grand jury pursuant to a subpoena. On a stay application before the Appellate Division he promised to do so later in the day. "[B]y appearing and testifying . . . [appellant] has fully, albeit belatedly, complied with the subpoena and has purged himself of the contempt." *Id.* at 675. *But see Ferraro v. Ferraro*, 272 A.D.2d 510 (2d Dep't 2000). A different view is presented by *People v. Belge*, 59 A.D.2d 307, 309 (4th Dep't 1977), where the court found appellant's belated disclosure of subpoenaed information unavailing, but remanded for further proceedings stating that, "the County Court may then impose whatever punishment upon appellant it deems appropriate." Other courts allude to the purging of a Judiciary Law Criminal Contempt without analysis. *See, e.g., People v. Paperno*, 98 Misc. 2d 99 (Sup. Ct., N.Y. Co. 1979), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294. The Appellate Division, Third Department, has followed *Ferrara*, in *January 1979 Grand Jury v. Doe*, 84 A.D.2d 588 (3d Dep't 1981).

255 *Typothetae of N.Y. v. Typographical Union No. 6*, 138 A.D. 293 (1st Dep't 1910). It is also noteworthy that the Appellate Division specifically discussed "purge" in terms clearly referable to civil contempt.

256 *Id.* at 294.

257 *People ex rel. Valenti v. McCloskey*, 6 N.Y.2d 390, 399 (1959) (first emphasis added).

258 *People v. Colombo*, 29 N.Y.2d 1, 4 (1972) (emphasis added).

double jeopardy "side-step" rationale was rejected by the Supreme Court.[259]

It is submitted that in the context of a criminal proceeding—grand jury or criminal trial—the dictum of the Court of Appeals reveals no practical policy justification for obfuscating the distinction between Judiciary Law coercion for the benefit of a private litigant and its punishment for a public wrong. On the contrary, its dictum seems at odds with later policy statements from the court, such as "taking the witness before the court may reduce stalling tactics and expedite the [grand jury's] proceeding." . . .[260] Proving a witness guilty beyond a reasonable doubt[261] of disobedience to a court's prior order regarding his conduct before a grand jury only to allow the witness to purge his criminal contempt—by doing what he was ordered to do in the first place—would seem to do anything but expedite matters. At best a 13th-hour purgation should only be a possible discretionary consideration on a motion to reduce punishment, after appellate affirmance,[262] but prior to actual execution thereof—provided some clearly defined, positive public benefit will unequivocally attend the same. Most important, and subject to objective standards, 13th-hour purgation should be the exclusive province of the court contemned, not an appellate court. One of the cases relied on by the Court of Appeals in support of its *Leone* dictum states as much:

> The application . . . is addressed to the discretion of the court *which alone had power to punish for the contempt and to allow its being purged*, and whose direction and authority were in nowise destroyed or abridged by the affirmance upon appeal. . . . Having been satisfied that it was proper that the *full* enforcement of its own mandate should be stayed, and no valid reason appearing why its discretion should not be exercised to that end, the court was within *its* rights in so ordering.[263]

259 *Colombo v. N.Y.*, 405 U.S. 9, 10–11 (1971); *People v. Leone*, 44 N.Y.2d 315, 318 (1978).

260 *People v. Rappaport*, 47 N.Y.2d 308, 314 (1979); *People v. Ianniello*, 21 N.Y.2d 418, 425 (1968).

261 *County of Rockland v. Civil Serv. Employees Ass'n*, 62 N.Y.2d 11, 14 (1984).

262 *Dep't of Envtl. Prot. v. DEC*, 70 N.Y.2d 233 (1987); *People v. Williamson*, 136 A.D.2d 497 (1st Dep't 1988).

263 *Typothetae of N.Y. v. Typographical Union No. 6*, 138 A.D. 293, 295 (1st Dep't 1910) (emphasis added); *see also People ex rel. Day v. Bergen*, 53 N.Y. 404, 411 (1873); *Carlson v. U.S.*, 209 F.2d 209, 217 (1st Cir. 1954).

In a state where a grand jury subpoena may be litigated to the Court of Appeals,[264] allowing a grand jury witness to purge a Judiciary Law contempt arising out of a grand jury proceeding—except in very extraordinary circumstances—seems, to say the least, unwise and a boon to which contemnors should not be entitled. The Court of Appeals' Judiciary Law purge dictum appears reminiscent of what it observed a century ago concerning the ease with which civil and criminal contempt may be confused: "The occasion and result of proceedings for contempt furnish a clear and well-defined line of division separating them into two classes which have become somewhat mingled and confused by the use of fixed but ambiguous nomenclature."[265]

It may well be that mingling invites confusion—especially when contempt's "fixed but ambiguous nomenclature" is itself improvidently used as a vehicle for the achievement of objectives momentarily perceived as desirable. Some examples underscore the point. In applying the exclusionary rule to a civil contempt proceeding, the Court of Appeals held that although "civil in form" the punishment imposed was "penal in nature."[266] But, in sustaining a Penal Law criminal contempt indictment against a double jeopardy challenge, the court stated that a prior Judiciary Law criminal contempt adjudication was "civil in nature" with its punishment merely "remedial and coercive."[267] Yet, in a later case, involving the final disposition of $500,000 in fines, the court stated: "Criminal contempt of court, though it may be charged in a civil proceeding, has, as its name implies, criminal overtones."[268] The court was not here implying an option. When it said "may," it was using that word to mean "is."

One further perspective warrants brief comment. Prosecutors are duty bound not to waste public resources on efforts reasonably perceived to be heroic but futile. If a Judiciary Law criminal contempt is, without predictable intelligible limit, subject to a "right" of purgation *after* adjudication,

264 *Cunningham v. Nadjari*, 39 N.Y.2d 314 (1976); *cf. People v. Johnson*, 103 A.D.2d 754 (2d Dep't 1984) (motion to quash *after* criminal action actually commenced not appealable). Motions to quash grand jury subpoenas are not appealable in the federal court system. *U.S. v. Ryan*, 402 U.S. 530, 532–33 (1971); *Cobbledick v. U.S.*, 309 U.S. 323, 327–28 (1940). For the year-and-a-half legal battle leading up to a Jane Doe's purging of her contempt, *see Additional Grand Jury v. Doe*, 69 A.D.2d 955, *supplemental opinion*, 71 A.D.2d 965, *aff'd*, 71 A.D.2d 1038 (3d Dep't 1979), *aff'd*, 50 N.Y.2d 14 (1980), *contempt purged*, 84 A.D.2d 588 (3d Dep't 1981).

265 *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 247 (1886).

266 *Village of Laurel Hollow v. Laverne Originals, Inc.*, 17 N.Y.2d 900, 901 (1966).

267 *People v. Colombo*, 29 N.Y.2d 1, 4 (*vacated*, 405 U.S. 9 (1971)).

268 *Goodman v. State*, 31 N.Y.2d 381, 385 (1972).

then it is definitely not an expeditious—but measured—punitive response to contemptuous conduct before a grand jury. This appears to be the bottom line of a trend of cases from the Appellate Divisions[269]—a trend which *may or may not be* waning[270] but which still invites an "all or nothing" prosecutorial response which will serve no one's best interest. That is, prosecutors may elect to do nothing about a grand jury witness's contemptuous conduct, or they may seek *unpurgable* indictments for the exact same conduct.[271] Doing nothing in the face of contemptuous conduct mocks the grand jury as an institution of effective citizen government. An unpurgable indictment on the other hand, may be a disproportionate prosecutorial reaction. What is needed is a "middle ground." Until this trend of appellate decisions, it was thought that Judiciary Law criminal contempt—arising out of a grand jury proceeding—constituted that happy medium, with appellate courts adhering to what the Court of Appeals held long ago:

> An affidavit is annexed to the record, but which, in the nature of things, can make no part of the return to the appeal, to the effect that after the making of the order at Special Term, which is the subject of the appeal, the defendant did comply with the suggestion of the court made upon suspending the final decision. If this were so, and the defendant had any claim, founded upon such action, to be absolved from the contempt, he should have applied for relief to the court. *He cannot have the benefit of such action upon an appeal from the order punishing him for contempt*. That must be disposed of upon the papers before the court below.[272]

It is submitted that the threat of sanctions perceived to be hollow is appropriate to neither child-rearing nor a court system. Perhaps objective

269 *See People v. Tyler*, 46 N.Y.2d 251 (1978).

270 *See Dep't of Envtl. Prot. v. DEC*, 70 N.Y.2d 233 (1987), where the court permitted parties to settle a civil contempt *but refused* to allow the same concerning a criminal contempt. *See also People v. Williamson*, 136 A.D.2d 497 (1st Dep't 1988). *But see Kuriansky v. Ali*, 176 A.D.2d 728 (2d Dep't 1991), *appeal denied*, 79 N.Y.2d 848 (1992).

271 "When the crime of contempt, prosecuted by indictment, is involved, a court may not permit the contempt to be purged." *People v. Leone*, 44 N.Y.2d 315, 317 (1978); *see also People v. Rappaport*, 47 N.Y.2d 308, 314 (1979); *People v. Roseman*, N.Y.L.J., July 7, 1978, p. 7, col. 6, *aff'd*, 78 A.D.2d 878 (2d Dep't 1980), *appeal denied*, 53 N.Y.2d 845 (1981); *People v. Paperno*, 98 Misc. 2d 99, 105 (Sup. Ct., N.Y. Co. 1979), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981).

272 *People ex rel. Day v. Bergen*, 53 N.Y. 404, 411 (1873).

standards will someday come from the Court of Appeals as to whether, and under what circumstances, a Judiciary Law criminal contempt arising out of a grand jury proceeding should be purgable. Its dictum, indiscriminately aped by other courts, implicitly acknowledges as much. Finally and fundamentally, the Judiciary Law civil contempt statute specifically provides for purgation by performance of the act to be coerced.[273] There is not a hint of purgation in the Judiciary Law criminal contempt statute[274]—an enactment which "do[es] not extend to . . . a case specified in section seven hundred and fifty-three" (i.e., civil contempt).[275] The judicially formulated "purge doctrine" imports into the Judiciary Law criminal contempt statutory construct something which the legislature did *not* choose to employ—"to a certain extent recasting and remodeling the statute, or, in other words, invading the province of the legislature itself."[276] The Judiciary Law criminal contempt purgation doctrine should fall victim to the prudence of judicial restraint, such that courts will not encourage more rather than fewer criminal contempt proceedings by inviting experimentation with disobedience at the expense of the public interest. The doctrine might at least be explicated so as to set right the foolish notion of the impenetrably thick that there is such a thing as "the automatic purge rule."[277] Sometimes humorously referred to as the "Stein Rule," there is no such stupidity as yet widely and explicitly recognized in law. A criminal contemnor's delayed compliance "does not render the contempt proceeding academic since his willful failure to obey the lawful mandates of [a] court ha[s] already occurred, and . . . punishment for his contemptuous disobedience is warranted despite the fact of compliance with those mandates on the eve of the contempt hearing."[278]

273 Jud. Law §§ 774, 775.

274 Jud. Law §§ 750–752.

275 Jud. Law § 754.

276 *People v. Sharp*, 107 N.Y. 427, 455 (1887) (quoting *Garland v. Carlisle*, 4 Cl. & Fin. 726).

277 *See*, *e.g.*, *U.S. v. Perry*, 116 F.3d 952, 956 (1st Cir. 1997).

278 *Ferraro v. Ferraro*, 272 A.D.2d 510, 512 (2d Dep't 2000).

[1.17] XVIII. MATERIALITY AND JUDICIARY LAW CRIMINAL CONTEMPT; LEGALITY AND PROPRIETY AND PENAL LAW CONTEMPT, FIRST AND SECOND DEGREE

A judicially created proviso has been grafted onto the Judiciary Law criminal contempt statute (§ 750) pertaining to recalcitrant grand jury witnesses. There can be no punishment for Judiciary Law criminal contempt for refusing to testify or produce documents "unless the court is shown that the evidence demanded may be relevant and proper."[279] Commonly referred to as "materiality," only an "intelligent estimate" thereof need be formed; an accused contemnor is not entitled to a hearing on this issue.[280]

As to definitional content, materiality is a concept precluding a rigid calculus, though for grand jury investigative purposes it is "necessarily a term of broader import than when applied to evidence at trial."[281] Materiality is not a matter of degree. In the context of perjury—a distinction without a material difference—it renders a witness more or less credible or a fact more or less certain, or both.[282] Nor is it a subject about which a court should substitute its judgment for that of the grand jury or engage in speculation concerning the probable importance of evidence.[283] Neither the source nor the rationale for the materiality proviso in Judiciary Law criminal contempt proceedings is completely clear. It is submitted that since a court in a Judiciary Law criminal contempt proceeding is exercising an inherent power (defined and restricted, *but not conferred ab initio* by the Judiciary Law), it has the concomitant inherent power to require a pre-punishment showing of materiality as both a shield against oppression

279 *Virag v. Hynes*, 54 N.Y.2d 437, 445 (1981); *see also Spector v. Allen*, 281 N.Y. 251, 257 (1939); *Manning v. Valente*, 272 A.D. 358, 362, *aff'd*, 297 N.Y. 681 (1947).

280 *Gold v. Menna*, 25 N.Y.2d 475, 482 (1969); *see also Koota v. Colombo*, 17 N.Y.2d 147, 150 (1966); *Spector v. Allen*, 281 N.Y. 251, 258 (1939); *Manning*, 272 A.D. at 362.

281 *See also Virag*, 54 N.Y.2d at 444; *U.S. v. R. Enter., Inc.*, 498 U.S. 292 (1991); *In re Grand Jury Subpoenas*, 72 N.Y.2d 307 (1988); *In re Congregation B'Nai Jonah v. Kuriansky*, 172 A.D.2d 35, 37, 38 (3d Dep't 1991).

282 *People v. Perino*, 19 N.Y.3d 85, 88–90 (2012).

283 *Manning*, 272 A.D. at 362; *N.Y. State Comm'n on Gov't Integrity v. Congel*, 156 A.D.2d 274, 278 (1st Dep't 1989); *Vanderbilt v. Hickey*, 87 A.D.2d 528, 529 (1st Dep't), *modified on other grounds*, 57 N.Y.2d 66 (1982); *In re Greenleaf*, 176 Misc. 566, 570 (Ct. Gen. Sess., N.Y. Co. 1941).

(punishment for "no-harm—no-foul" disobedience) and a necessary corollary to a witness's "right to refuse to answer irrelevant inquiries."[284]

To be contrasted with Judiciary Law criminal contempt (§ 750(A)(3) only) is its corollary, Penal Law criminal contempt in the second degree (§ 215.50(3) only).[285] As to physical evidence *only*, it does not include materiality as one of its elements. Conviction of the crime of criminal contempt in the second degree might be based on the same evidence as would support an adjudication of Judiciary Law criminal contempt, but without the latter's required showing of materiality or an intelligent estimate thereof. Even our Court of Appeals, assumedly, would not presume to add an element to criminal contempt in the second degree—a crime already defined by the legislature. As to *testimonial trial* contempt (§ 215.50(4)), however, the questions rebuffed must be, in the eyes of the court, legal and proper.

Penal Law criminal contempt in the first degree (§ 215.51) presents a further mutation. Concerned with grand jury testimony *only*, it is visited with the severest sanction a recalcitrant grand jury witness can face. Penal Law criminal contempt in the first degree punishes "contumacious[ ] and unlawful[ ] refus[al] to be sworn as a witness before a grand jury," or having been so sworn, "refus[al] to answer any legal and proper interrogatory." What is a "legal" and "proper" question?

> Obviously one that violates no legal right of the witness, and that is pertinent—that is relevant and material—to the purpose of the proceeding or investigation in which the witness is being examined. If the question goes beyond this limitation it is illegal and impertinent and the witness cannot be compelled to answer it.[286]
>
> A "legal" question is one "required or permitted by law." A "proper" question is one that is "fit, suitable or appropriate." In any legal proceeding, a determination of what

284 *Additional January 1979 Grand Jury v. Doe*, 50 N.Y.2d 14, 21 (1980); *People v. Ianniello*, 21 N.Y.2d 418, 425 (1968).

285 Penal Law § 215.50(3) *inter alia* provides: "A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct: . . . Intentional disobedience or resistance to the lawful process or other mandate of a court. . . ."

286 *In re Barnes*, 204 N.Y. 108, 125 (1912) (Werner, J,. concurring).

> is a legal and proper question will depend on the issues involved or likely to become involved.[287]

Although conviction for refusing to testify under criminal contempt in the first or second degree hinges on "legal" and "proper" questions having been put to the witness, "whether they were legal and proper is a question of law."[288] "Indeed, the statutory use of the word 'legal' makes particularly incongruous and self-contradictory a treatment of the standard as one of fact."[289]

Once a court determines legality and propriety as a matter of law, "it should charge the jury on that element as it does on any other question of law."[290] Criminal contempt in the first (grand jury testimonial) and second degree (trial testimonial) are probably the only crimes where an element thereof is taken away from the jury. One further observation warrants comment.

Penal Law criminal contempt in the first degree, by its terms, requires publication of the purpose of a grand jury's investigation in order to show the legality and propriety of the questions rebuffed by a grand jury witness. It is punished by four years' imprisonment. Penal Law criminal contempt in the second degree (documents only), in relation to a grand jury proceeding (§ 215.50(3)), contains no requirement of legality, propriety or materiality. It is punished by one year of incarceration. Judiciary Law criminal contempt for a grand jury witness's refusal to produce evidence or testify carries with it a maximum of 30 days' imprisonment and a $1,000 fine—certainly enough to make a martyr, but not severely punish, and certainly punishment which an organized criminal "could do standing on one leg" rather than have both broken by his criminal peers. It is submitted that since Judiciary Law criminal contempt requires only that materiality be shown to *an intelligently estimating court without a hearing thereon*,[291] the nature of the grand jury's investigation need not be

287 *People v. McAdoo*, 45 Misc. 2d 664, 667 (Crim. Ct. 1965), *aff'd*, 51 Misc. 2d 263 (Sup. Ct., N.Y. Co. 1966).

288 *People v. Ianniello*, 36 N.Y.2d 137, 140 (1975).

289 *Id.* at 145; *In re Barnes*, 204 N.Y. at 114, 125; *People v. Kirsh*, 176 A.D.2d 652, 653 (1st Dep't 1991); *see also Sinclair v. U.S.*, 279 U.S. 263, 298 (1929); *Sands v. Cunningham*, 617 F. Supp. 1551, 1554–55 (D.N.H. 1985).

290 *People v. Ianniello*, 36 N.Y.2d at 145–46.

291 *People ex. rel. Cirillo v. Warden*, 14 A.D.2d 875 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 51 (1962); *Second Additional Grand Jury v. Cirillo*, 16 A.D.2d 605 (2d Dep't 1962), *aff'd*, 12 N.Y.2d 206 (1963); *Second Additional Grand Jury v. Cirillo*, 19 A.D.2d 555 (2d Dep't 1963).

publicly disclosed in such a limited-punishment proceeding—an *in camera* showing to the court *ex parte* after public proof of its mandate and disobedience thereto should suffice. Thirty days is not enough flesh to trade for the compromising of a grand jury's investigation through public disclosure of its nature and scope. A definitive answer to the validity of this submission has not yet been written by the courts, *albeit* whether public disclosure in a Judiciary Law criminal contempt proceeding is a matter of uncritical custom and usage, or has the force of law behind it, are issues which thus far have not been squarely presented to the courts. Early on, it was stated that "*any circumstance* permitting 'intelligent estimate' of relevancy is sufficient to support a direction that the subpoena's mandate be obeyed."[292] A court does not have to reach the question of a question's or document's relevancy where a subpoenaed witness—unexcused—simply walks out of the grand jury room. "Any circumstance permitting 'an intelligent estimate' of relevancy is sufficient to support a decision that the subpoena's mandate be obeyed."

[1.18] XIX. JUDICIARY LAW CRIMINAL CONTEMPTS ARE NOT CRIMES

Before our federal and state constitutions were adopted, the courts possessed their contempt powers. Federal and New York State judiciary contempt statutes are not so much legislative grants of power to the courts as they are legislative *limitations* placed upon inherent powers already possessed by the courts to prevent abuse thereof. The apparent authority for such limitations is the legislative power to establish and define the jurisdiction of courts in the first place under the auspices of federal and state constitutions. But while a legislature may limit a court's contempt powers, it seems doubtful that it could legislate such powers completely out of existence without exceeding its authority, or violating the separation of powers principle or causing a grave constitutional crisis. The contempt power inheres in the very concept of the word "court." Without the inherent power to enforce its orders, a court is not a court. Case law characterizations of a court's inherent contempt power as "criminal" or "civil" are actually labels placed upon the secondary beneficiaries of that power's exercise, that is, the public generally or private suitors. The primary beneficiary is always a court as a court vindicating its authority. Viewed thusly, Judiciary Law contempt proceedings (as opposed to prosecutions for the

292 *Manning v. Valente*, 272 A.D. 358 (1st Dep't), *aff'd*, 297 N.Y. 681 (1947) (emphasis added). *See generally People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 484 (1885).

crime of contempt under the Penal Law) are neither civil nor criminal—they are special proceedings, historically brought on the civil side of the court, to coerce obedience in the future or to punish past disobedience.[293] The *Rosario* rule,[294] which is applicable to criminal prosecutions, "is not applicable to criminal contempt proceedings arising out of a civil action."[295] Supreme Court decisions construing and "harmonizing" the judiciary's inherent contempt power with double jeopardy, petty offense and due process standards in no way dilute these core principles.[296] A few lower court, result-oriented, statements to the contrary are not consistent with binding precedent.[297]

Justice Holmes, speaking of criminal contempts, said that, "[i]f such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."[298] But "in spite of this statement," according to Judge Learned Hand, "there has been much confusion in the language used by the courts to describe criminal contempts; for certainly they have not consistently been called

293 *U.S. v. Barnett*, 376 U.S. 681, 687, 692–700 (1964); *Green v. U.S.*, 356 U.S. 165, 183, 184–85, 187 (1958) (Harlan, J.); *Nye v. U.S.*, 313 U.S. 33, 47–48 (1941); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327 (1904); *In re Terry*, 128 U.S. 289, 303, 307–09 (1888); *Ex Parte Wall*, 107 U.S. 265, 302–303 (1883) (Field, J., dissenting); *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *People v. Rappaport*, 47 N.Y.2d 308, 314 (1979); *People v. Leone*, 44 N.Y.2d 315, 317–18 (1978); *People v. Colombo*, 29 N.Y.2d 1, 4, *vacated sub nom. Colombo v. N.Y.*, 405 U.S. 9 (1972); *Douglas v. Adel*, 269 N.Y. 144 (1935); *King v. Barnes*, 113 N.Y. 476, 480–81 (1889); *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 248–49 (1886); *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 448–49, 450–51 (2d Dep't 1985); *Schenectady City Sch. Dist. v. Fed'n of Teachers*, 49 A.D.2d 395, 399 (3d Dep't 1975); *People ex rel. Supreme Court v. Albertson*, 242 A.D. 450, 451 (4th Dep't 1934); *People ex rel. Frank v. McCann*, 227 A.D. 57–58, (1st Dep't 1929), *aff'd*, 253 N.Y. 221, 224 (1930); *People v. McLeod*, 150 Misc. 2d 606, 611–12 (Crim. Ct., Kings Co. 1991); *People v. Hayden*, 129 Misc. 2d 444, 446 (Suffolk Co. Ct. 1985), *aff'd*, 128 A.D.2d 726 (2d Dep't 1987); *Trice v. Ciuros*, 127 Misc. 2d 289, 290 (Sup. Ct., Onondaga Co. 1985); *see also Mezetin v. Cunningham*, 628 F. Supp, 173, 176 (S.D.N.Y. 1986).

294 *People v. Rosario*, 9 N.Y.2d 286 (1961).

295 *People v. Metro. Police Conference*, 231 A.D.2d 445, 446 (1st Dep't 1996).

296 *Lewis v. U.S.*, 518 U.S. 322 (1996); *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994); *U.S. v. Dixon*, 509 U.S. 688 (1993); *Colombo v. N.Y.*, 405 U.S. 9 (1972); *Bloom v. Illinois*, 391 U.S. 194 (1968); *Green v. U.S.*, 356 U.S. 165, 183–87 (1958); *Gompers v. U.S.*, 233 U.S. 604 (1914); *U.S. v. Eichhorst*, 544 F.2d 1383, 1386–87 (7th Cir. 1976).

297 For an embarrassing example of a court ignoring the teachings of unambiguous precedent that Judiciary Law criminal contempts are not crimes nor criminal prosecutions regulated by the CPL and engaging in jurisprudence by nomenclature, *compare Kuriansky v. Azam*, 151 Misc. 2d 176 (Sup. Ct., Kings Co. 1991) (Gerges, J.) *with People v. Morales*, 15 Misc. 3d 695 (Sup. Ct., Kings Co. 2007) (Leventhal, J.).

298 *Gompers*, 233 U.S. at 610 (Holmes, J.).

'crimes.'"[299] Chief Justice Vinson saw "no advantage in rehashing the discussions on whether criminal contempt is *sui generis*, offense, crime, or felony. Criminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes; and some of it is not."[300] "In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land. . . ."[301] "Our insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings."[302]

The law here is a patchquilt. The Appellate Division, First Department, for a very curious instance, following *its* assessment of statute and other authorities, has held that an *indigent* contemnor has a right to counsel at his *civil* contempt proceeding, which is triggered by the indigent's "interest in personal freedom,"[303] and "not simply the special Sixth and Fourteenth Amendments right to counsel" in *criminal* cases. The court's conclusion appears more a philosophical premise than the product of precedent. The Second Department, for its part, has held that the mere fact of non-presence may lend itself to an inference that a contemnor has waived his right to be present at his contempt proceeding. For example, one lawyer's intentional utilization of court appearances which conflicted with the scheduled hearing date for his criminal contempt proceeding was held to be "equivalent to [his] outright refusal to attend the hearing and constitute[d] a waiver."[304] The Appellate Term, Second Department, in "the context of an 'HP' special proceeding" where the criminal contemnor was adjudicated *in absentia*, has called criminal contempt proceedings "quasi

299 *U.S. v. Green*, 241 F.2d 631, 633 (2d Cir. 1957) (Hand, J.), *aff'd*, 356 U.S. 165 (1958).

300 *Warring v. Huff*, 122 F.2d 641 (D.C. Cir. 1941) (Vinson, J.) (footnotes omitted); *see also People v. Leone*, 44 N.Y.2d 315, 317–18 (1978); *People v. Colombo*, 29 N.Y.2d 1, 4 *vacated solo nom. Colombo v. N.Y.*, 405 U.S. 9 (1972); *Gabrelian v. Gabrelian*, 108 A.D.2d 445 (2d Dep't 1985); *People ex rel. Frank v. McCann*, 227 A.D. 57, 58 (1st Dep't 1929), *aff'd*, 253 N.Y. 221, 224 (1930); *Trice v. Ciuros*, 127 Misc. 2d 289, 290 (Sup. Ct., Onondaga Co. 1985).

301 *In re Debs*, 158 U.S. 564, 596 (1895); *see also Juidice v. Vail*, 430 U.S. 327, 335–336 (1977); *People ex rel. Sherwin v. Mead*, 92 N.Y. 415, 419–420 (1883).

302 *Young v. U.S.*, 481 U.S. 787, 800 (1987); *Blackmer v. U.S.*, 284 U.S. 421, 440 (1932). *See generally Hanbury v. Benedict*, 160 A.D. 662 (2d Dep't 1914).

303 *See People ex rel. Lobenthal v. Koehler*, 129 A.D.2d 28, 32 (1st Dep't 1987) (relying on *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–27 (1981)). Reliance in *Lobenthal* might have been more accurately placed on *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975).

304 *People ex rel. Sassower v. Sheriff*, 134 A.D.2d 641, 644 (2d Dep't 1987), *accord Sassower v. Sheriff,* 824 F.2d 184, 190 (2d Cir. 1987).

criminal" in nature thus dispensing with the need for "*Parker* warnings," which are traditionally associated with criminal prosecutions for crime.[305] The correct view, it is submitted, is that contempts are *sui generis*, special proceedings brought on the civil side of the court by order to show cause or motion. All would benefit if the appellate courts stopped using catch phrases and "mix-and-match"—largely incorrect—nomenclature in pursuit of result-oriented decisions.

[1.19] XX. CRIMINAL CONTEMPT AND THE GRAND JURY'S SUBPOENA

A grand jury subpoena issued by a prosecutor is a mandate of the court for purposes of a criminal prosecution for criminal contempt in the second degree—Penal Law § 215.50(3)—and for a Judiciary Law criminal contempt proceeding under Judiciary Law §§ 750(A)(3), (4).[306] *"A default does not mature until the return date of the subpoena, whatever the previous manifestations of intent to default.*"[307] "The subpoena must be in writing, and only disobedience of the written command is subject to the drastic punishment meted out for a criminal contempt."[308] There is no such thing as an oral subpoena, much less an oral motion to quash.[309] As a prerequisite to punishment for contempt a valid subpoena has been said to be "jurisdictional and conclusive."[310] A subpoena is not an oral direction of a prosecutor or grand jury foreperson. It is not a registered letter from the grand jury, or an agreement or promise of a person to appear. It is not a *modus vivendi* between counsel.[311]

305 *N.Y. City Dep't of Hous. Pres. & Dev. v. Outram*, 160 Misc. 2d 156 (App. Term, 2d Dep't 1994) (citing *People v. Parker*, 57 N.Y.2d 136 (1982)).

306 *Manning v. Valente*, 272 A.D. 358, 361, *aff'd*, 297 N.Y. 681 (1947); *Spector v. Allen*, 281 N.Y. 251, 259 (1939); *see also People ex rel. Van Der Beek v. McCloskey*, 18 A.D.2d 205, 209 (1st Dep't 1963). "I doubt that there is any lawyer in the United States who does not know that a subpoena is a court order. . . ." *Waste Conversion, Inc. v. Rollins Envtl. Servs., Inc.*, 893 F.2d 605, 613 (3d Cir. 1990) (Scirica, J., dissenting)**;** *see also U.S. Securities & Exchange Com. v. Hyatt*, 621 F.3d 687, 693 (7th Cir. 2010).

307 *U.S. v. Bryan*, 339 U.S. 323, 330 (1950).

308 *Spector*, 281 N.Y. at 260; *Loubriel v. U.S.*, 9 F.2d 807, 809 (2d Cir. 1926) (Hand, J.) (The witness's duty is measured by the terms of the subpoena—"the only process under which he could be required to appear and testify at all.").

309 *People v. McIntosh*, 199 A.D.2d 540 (2d Dep't 1993).

310 *In re Kaplan (Blumenfeld)*, 8 N.Y.2d 214, 219–20 (1960).

311 *Spector*, 281 N.Y. at 259, 260 (1939); *In re Mullen*, 177 Misc. 734, 737 (Queens Co. Ct. 1941); *Schenectady Grand Jury v. Jung*, No. 91–0101 (Sup. Ct., Schenectady Co. August 23, 1991) (Mycek, J.).

> A subpoena . . . is self-limiting. Whoever issues it has the authority to determine in advance as to when and where the witness shall appear. When the subpoena is properly served, it must be obeyed to the full extent of its terms. When the witness fully obeys, then the subpoena has been complied with, and new terms may not be subsequently imposed by the issuer . . . or the grand jury.[312]

> To protect the liberty of the individual from possible abuse of power, punishment for contempt is hedged about with restrictions and subject to regulations imposed by the Legislature. Disobedience only of mandates of the court given in accordance with law are subject to such punishment. The command must be clear; disobedience must be willful. Guilt arises only where the authority of the court is flouted. Formality in giving the command may bring home to a person the importance of obedience.[313]

Assuming proper and sufficient service of the subpoena,[314] which "courtesy service" or court-ordered "proxy service" on a witness's attor-

312 *In re Mullen*, 177 Misc. 734, 738–39 (Queens Co. Ct. 1941); *see also Nixon v. Sirica*, 487 F.2d 700, 709–710 (D.C. Cir. 1973).

313 *Spector*, 281 N.Y. 260. The reader should note CPL § 610.10(2) with respect to *merely adjourning* a subpoena to an adjourned or recessed date *once the witness has appeared but cannot complete* his testimony or document production: "If the witness is given reasonable notice of such recess or adjournment, no further process is required to compel his attendance on the adjourned date."

314 A subpoena is served "in the same manner" as a summons (CPLR § 2303). For cases dealing with the "hare and hounds" of subpoena service, *see Fashion Page, Ltd. v. Zurich Ins. Co.*, 50 N.Y.2d 265, 272–73 (1980); *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115 (1968); *In re Depue*, 185 N.Y. 60, 69–70 (1906); *Kuriansky v. Ali*, 176 A.D.2d 728, 729 (2d Dep't 1991), *appeal dismissed*, 79 N.Y.2d 848 (1992); *Busher v. Ehrich*, 12 A.D.2d 887, 888 (4th Dep't 1961); *Gumperz v. Hofmann*, 245 A.D. 622, 624, *aff'd*, 271 N.Y. 544 (1936); *Heller v. Levinson*, 166 A.D. 673, 674 (1st Dep't 1915); *Temp. State Comm'n on Living Costs & Econ. v. Bergman*, 80 Misc. 2d 448 (Sup. Ct., N.Y. Co. 1975); *Davidman v. Ortiz*, 63 Misc. 2d 984, 986–88 (Sup. Ct., Queens Co. 1970); *In re Barbara*, 14 Misc. 2d 223, 228 (Sup. Ct., Tioga Co. 1958), *aff'd*, 7 A.D.2d 340, 343 (3d Dep't 1959); *Levine v. Nat'l Transp. Co.*, 204 Misc. 202, 203 (Sup. Ct., Queens Co.), *aff'd*, 282 A.D. 720 (2d Dep't 1953); *Martin v. Raffin*, 2 Misc. 588 (N.Y. City Ct. 1893); *Boeck v. State Highway Comm'n.*, 36 Wis. 2d 440, 153 N.W.2d 610 (1967); *Gallyn v. Hibernia Bank & Trust Co.*, 182 Wis. 40, 195 N.W. 703 (1923).

ney on behalf of the witness is generally *not*,[315] what must be proved in a Penal Law contempt trial or a Judiciary Law criminal contempt proceeding where disobedience takes the form of either an outright failure to appear or a failure to produce documents? For nonappearance a *prima facie* case consists of proof of service of the subpoena and a failure to appear. It is not initially incumbent on the People to prove a contemnor's lack of good cause for nonappearance. The burden of coming forward, *not proof,* rests upon a contemnor should he elect to prove "good cause" for noncompliance.[316] The policy reasons for not requiring the prosecution-petitioner, in the first instance, to adduce affirmative evidence negating good cause are stated thusly:

> [I]t is the . . . general rule that where the circumstances constituting the alleged justification or excuse for acts otherwise criminal in nature are facts peculiarly and almost exclusively within the defendant's firsthand knowledge with the details not readily available to the People, he has the burden of going forward in the first instance with proof to establish the circumstances.
>
> The circumstances in a particular case constituting an alleged good cause for a defendant's failure to respond to a subpoena duly served would generally be peculiarly within his knowledge. Generally he alone would be the one person who would know his reasons for not appearing on the return day. Thus, in a given case, if the prosecution were required in the first instance to present and explain away the reasons of the witness for his nonappearance, it could very well result in placing upon it an intolerable burden. We hold, therefore, that the burden was upon the defendant to come forward and show the alleged circumstances constituting the claimed "good cause" for his failure to appear in response to the sub-

315 *In re Depue*, 185 N.Y. 60, 69–70 (1906). *Id.* at 69 (emphasis in original). S*ee also Cooper Fry v. Kolket*, 245 A.D.2d 846, 847 (3d Dep't 1997); *Broman v. Stern*, 172 A.D.2d 475 (2d Dep't 1991); *People v. Balt*, 34 A.D.2d 932 (1st Dep't 1970); *Kanbar v. Quad Cinema Corp.*, 151 Misc. 2d 439 (App. Term 1991), *aff'd as modified*, 195 A.D.2d 412 (1st Dep't 1993).

316 *People v. D'Amato*, 12 A.D.2d 439 (1st Dep't 1961); *accord U.S. v. Fleischman*, 339 U.S. 349, 362–64 (1950); *Morrison v. California*, 291 U.S. 82, 88–89 (1934); *Rossi v. U.S.*, 299 U.S. 89, 91–92 (1933); *see also Borgenicht v. Bloch*, 280 A.D.2d 306 (1st Dep't 2001).

> poena; but it is clear that the over-all burden of the entire case remained upon the People.[317]

Regarding disobedience to a subpoena *duces tecum*, a *prima facie* case requires proof of service, nonproduction of the documents subpoenaed *and* some proof of the documents' present existence and the contemnor's control over them. Speculation, surmise or logical deduction alone are not adequate substitutes for proof of existence and control.[318] However, once proof is adduced showing existence and control, the burden of coming forward, *not proof*, shifts to the contemnor to give a reasonable explanation ("good cause") for nonproduction. Following proof of service, nonproduction, existence and control, a custodian of records must either produce them or supply a reasonable explanation in lieu thereof, with the alternative being jail.[319] While the custodian may assert his Fifth Amendment privilege rather than come forward with a reasonable explanation, the privilege is not a substitute for proof of good cause for noncompliance. The Fifth Amendment will not shield him from incarceration for nonproduction. Put another way, he may *not* be jailed for refusing to testify about subpoenaed documents not produced.[320] He may, however, be jailed for nonproduction of documents found to exist and over which he is found to have control.[321] Self-induced or inflicted inability to comply is

317 *D'Amato*, 12 A.D.2d at 445 (citation omitted); *People v. Davis*, 13 N.Y.3d 17, 31–32 (2009) (such information is uniquely within a defendant's knowledge).

318 *People v. Shapolsky*, 8 A.D.2d 122, 127 (1st Dep't 1959); *In re Wegman's Sons*, 40 A.D. 632, 633 (1st Dep't 1899); *see also U.S. v. Bryan*, 339 U.S. 323, 330, 331 (1950); *U.S. v. Patterson*, 219 F.2d 659 (2d Cir. 1955); *see also Powers v. Powers*, 86 N.Y.2d 63, 69–70 (1995); *Snyder v. Snyder*, 277 A.D.2d 734 (3d Dep't 2000) (Once the burden of establishing a *prima facie* case of a willful violation of a support order is satisfied, the burden then shifts to the alleged contemnor to offer some competent, credible evidence of an inability to make the required support payments. Conclusory and unsubstantiated assertions of such inability will not suffice. A history of alcohol and cocaine abuse neither explains nor justifies a decision to place such "expenses" ahead of an obligation to support one's offspring.).

319 *Bleakley v. Schlesinger*, 294 N.Y. 312 (1945); *Shapolsky*, 8 A.D.2d at 127, 128; *see also U.S. v. Sorrells*, 877 F.2d 346, 351 (5th Cir. 1989); *Sigety v. Abrams*, 632 F.2d 969 (2d Cir. 1980); *see also Powers*, 86 N.Y.2d at 69–70.

320 *Curcio v. U.S.*, 354 U.S. 118 (1957); *U.S. v. Edgerton*, 734 F.2d 913, 920, 921 (2d Cir. 1984); *Solerwitz v. Signorelli*, 183 A.D.2d 718, 719 (2d Dep't 1992); *Triangle Publ'ns v. Ferrare*, 4 A.D.2d 591 (3d Dep't 1957); *Bradley v. O'Hare*, 2 A.D.2d 436 (1st Dep't 1956).

321 *U.S. v. Rylander*, 460 U.S. 752 (1983); *Armstrong v. Guccione,* 470 F.3d 89, 99–100 (2d Cir. 2006); *Bleakley*, 294 N.Y. at 316–17; *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995); *Am. Cyanamid Co. v. Fox*, 36 Misc. 2d 1070 (Sup. Ct., N.Y. Co. 1962). *See generally Baltimore City Dep't. of Social Servs. v. Bouknight*, 493 U.S. 549 (1990); *Kirtley v. Abrams*, 184 F. Supp. 65 (E.D.N.Y.1960).

not a defense.[322] One may not moot a proceeding to enforce a summons or subpoena by disabling himself. Service of the law's process imposes a duty to retain possession of documents demanded by that process pending a judicial determination of enforceability. A contrary position would create a severe limitation on the document production processes of the law.[323]

A legal doctrine unique to the enforcement of subpoenas *duces tecum* is the presumption (inference, actually a reasoning process) of continued existence and possession. What is a presumption? A presumption is simply an avowedly imperfect generalization founded in experience. Business books and records do not self-destruct. They are not perishable fruit sold by street-corner peddlers. Their value is almost exclusive to their owner. They are not articles of commerce flowing in and out of the marketplace. For a host of reasons, a businessman has a substantial interest in maintaining the records of his business. Premised on these commonplace understandings, the law gives prosecution-petitioners some assistance in establishing documentary existence and control.

> Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession. Such a process, sometimes characterized as a "presumption of fact," is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved.[324]
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> Of course, the fact that a man at one time has a given item of property is a circumstance to be weighed in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one

322 *U.S. v. Bryan*, 339 U.S. 323 (1950); *Jurney v. MacCracken*, 294 U.S. 125, 149 (1935); *F.T.C. v. Affordable Media LLC*, 179 F.3d 1228, 1239–44 (9th Cir. 1999); *U.S. v. Lay*, 779 F.2d 319 (6th Cir 1985); *U.S. v. Asay*, 614 F.2d 655 (9th Cir. 1980); *NLRB v. Deena Artware, Inc.*, 261 F.2d 503, 508 (6th Cir. 1958), *rev'd on other grounds*, 361 U.S. 398 (1960); *People ex rel. Day v. Bergen*, 53 N.Y. 404, 410 (1873).

323 *Asay*, 614 F.2d at 660; *compare Yeager v. Yeager*, 38 A.D.3d 534 (2d Dep't 2007) (husband met his burden of showing inability to comply) (2d Dep't 2006) *with Sisking v. Schael*, 33 A.D. 3d 806 (2d Dep't 2006) (the mother had in her possession a bank check for the entire amount).

324 *Maggio v. Zeitz*, 333 U.S. 56, 65–66 (1948).

> thing, that permissible from possession twenty months ago quite another. With what kind of property do we deal? Was it salable or consumable? The inference of continued possession might be warranted when applied to books of account which are not consumable or marketable, but quite inappropriate under the same circumstances if applied to perishable merchandise or salable goods in considerable demand. Such an inference is one thing when applied to a thrifty person who withdraws his savings account after being involved in an accident, for no apparent purpose except to get it beyond the reach of a tort creditor . . . ; it is very different when applied to a stock of wares being sold by a fast-living adventurer using the proceeds to make up the difference between income and outgo.[325]

The same principles stated a little differently are:

> The fact that the documents were once in existence and in the possession or under the control of the witness might create a presumption of continued existence and control sufficient to obligate the witness to come forward and show that he in good faith attempted to comply or require him to give a reasonable explanation for the nonproduction of the records.
>
> ***
>
> The People, by extrinsic evidence or independent proof, are required to show that the records were in existence when the subpoena was served. The inference of continued existence and continued possession weakens with the passage of a substantial period of time unless something be shown to revitalize it, or attendant or surrounding circumstances reasonably lead to the conclusion that the records exist and can be produced. When such occurs the witness must produce or reasonably account for the absence of the books.[326]

325 *Id.* at 66.

326 *People v. Shapolsky*, 8 A.D.2d 122, 127, 128 (1st Dep't 1959); *see also U.S. v. Patterson*, 219 F.2d 659 (2d Cir. 1955); *Brune v. Fraidin*, 149 F.2d 325 (4th Cir. 1945); *In re Arctic Leather Garment Co.*, 89 F.2d 871 (2d Cir. 1937).

The presumption of continued existence and control is not intended to fetter judgment. It is to aid reason, not override it. It is not intended to make contempt trials or proceedings over subpoenaed documents questionable experiments in punitive coercion. However, great deference is due the factual conclusions of the trier of fact. The presumption of continued existence and control depends heavily on credibility assessments. The same considerations apply to the good-cause explanations offered by contemnors in lieu of document production. The explanations must be believable and believed.[327] For example, a contemnor's "utter failure to explain what happened to the $8 million in marital assets . . . supposedly dissipated in only three years" did not meet this criteria.[328]

Supreme Court reasoning in a bankruptcy case is worth quoting.

> [T]he court may believe the bankrupt's assertion . . . but it is also true that the assertion may not be believed, and the bankrupt may be subject to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be unpleasant, but . . . [there is] no reason why the proceeding should be condemned, as if it interfered with the liberty of the citizen without sufficient reason or excuse. I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed and a reasonable amount of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need

327 *Nilva v. U.S.*, 352 U.S. 385, 395 (1957); *Maggio*, 333 U.S. at 66; *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 983, 984 (11th Cir. 1986); *U.S. v. Roberts*, 858 F.2d 698, 701, 702 (11th Cir. 1988); *Sigety v. Abrams*, 632 F.2d 969, 977 (2d Cir. 1980); *U.S. v. Johnson*, 247 F.2d 5, 8 (2d Cir. 1957); *Lopiparo v. U.S.*, 216 F.2d 87, 91 (8th Cir. 1954); *U.S. v. Goldstein*, 105 F.2d 150, 152 (2d Cir. 1939); *In re Schulman*, 177 F. 191, 192–94 (2d Cir. 1910); *Powers v. Powers*, 86 N.Y.2d 63, 69–70 (1995).

328 *Brand v. Brand*, 236 A.D.2d 229 (1st Dep't 1997); see New York Post, July 11, 2009:

> He should have shown them the money. A Pennsylvania attorney was released from prison yesterday after spending 14 years in the clink on a contempt of court citation—the longest such stretch in US history—after he was accused of hiding mounds of cash in a bitter divorce battle with his wife.

Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002) (during an equitable distribution conference, he disclosed that he had unilaterally transferred $2,502,000 skimming and scamming his wife).

> hardly say that he would always have the right to be released, as soon as the fact becomes clear that he cannot obey. Actual or virtual imprisonment for debt has ceased, but imprisonment to compel obedience to a lawful judicial order (if it appears that obedience is being willfully refused) has not yet ceased, and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees.[329]

To summarize, while the overall burden of proof in a Penal Law criminal contempt trial or Judiciary Law criminal contempt proceeding for failure to appear or to produce documents is proof beyond a reasonable doubt, such burden is met by proving service of the subpoena plus a failure to comply therewith. Though the overall burden of proof never shifts, the burden of coming forward with credible evidence of "good cause" for noncompliance rests with the accused contemnor. "Good cause" encompasses facts peculiarly and almost exclusively within his firsthand knowledge. The prosecution-petitioner is not initially required to adduce positive evidence of a contemnor's lack of good cause. Where documents are involved, the presumption of continued existence and possession may assist in sustaining proof beyond a reasonable doubt.[330] "It is, of course, a familiar doctrine that proof of the elements of criminal contempt may be established by circumstantial evidence."[331]

A case from the Appellate Division, Second Department nicely illustrating almost all of the above points (including what the author calls "assumptions at large") is here set forth:

> The petitioner, while conducting a criminal investigation, issued a subpoena *duces tecum* to the appellant Church Avenue Pharmacy Corp. Inc. and its co-owner the appellant Chowdhury Azam (hereinafter Azam). The subpoena directed that the appellants produce certain documents, including prescriptions, to the Grand Jury. The appellants

329 *Oniel v. Russell*, 278 U.S. 358, 366 (1929) (quoting *Esptein v. Steinfeld*, 206 F. 568, 569 (D. Pa. 1918).

330 *U.S. v. Bryan*, 339 U.S. 323, 330 (1950); *U.S. v. Fleischman*, 339 U.S. 349, 360 (1950); *Lopiparo v. U.S.*, 216 F.2d at 91–92 (8th Cir.), *cited with approval in Nilva v. U.S.*, 352 U.S. 385, 395 (1957); *County of Rockland v. CSEA*, 62 N.Y.2d 11 (1984); *People v. D'Amato*, 12 A.D.2d at 445.

331 *Walker v. City of Birmingham*, 388 U.S. 307, 312–13 n.4 (1967).

did not comply with the subpoena in full, in that approximately 9000 prescriptions were not produced. As a result of their disobedience they were adjudged guilty of criminal contempt. The petitioner argues that the items were in the possession of the appellants at the time the subpoena was served, and that there was a willful disregard with respect to the mandates of the subpoena. The appellants counter that they did produce all that they were able to find.

It is well-settled that in a motion to punish an individual for criminal contempt for failure to produce certain books and records, the movant is required to prove beyond a reasonable doubt that the documents were in existence when the subpoena was served and that at that time they were within the individual's control. Because there is a statutory requirement that pharmacies preserve records of all prescriptions filled for a period of at least five years (Education Law § 6810[5]), and an owner of a pharmacy is "responsible for the proper conduct of this pharmacy" (Education Law § 6808[3][e]), it can be presumed that the prescriptions called for in the subpoena existed when the subpoena was served. This presumption is further strengthened by the testimony of (1) a pharmacist who said that he kept and filed all prescriptions he filled while employed by the pharmacy, and that that had been the policy of his predecessors, and (2) the testimony of an inspector who stated that when he inspected the pharmacy in 1987, the records were properly maintained.

Moreover, we disagree with Azam's assertion that he did not have control over the records because he virtually took no part in the day-to-day management of the business. The record indicates that Azam had a one-half interest in the pharmacy, that he signed documents concerning Medicaid and renewal of the pharmacy registration in his capacity as Vice President, that he hired employees, that he was designated secretary and treasurer of the pharmacy, and that he had to approve all important decisions. Furthermore, Azam's partial compliance with the subpoena tacitly concedes control of the records by him.

> The petitioner, therefore, adequately demonstrated that the items called for in the subpoena *duces tecum* were in existence and under the control of the appellants at the time the subpoena was served.[332]

As applied to a podiatrist, one lower court explained the presumption of continuing possession in this manner:

> Because a licensed podiatrist must conduct himself in conformity with the requirements prescribed in the governing article relating to his particular profession respondent is presumed to know the rules and regulations of his profession. Hence, under the record retention requirements of the applicable regulations, it can be presumed that the patient charts sought herein existed at the time the subpoena was served. Petitioners in contempt proceedings may employ the presumption of continuing existence and control. This presumption derives from the commonly held belief that business books and records do not self-destruct and that a substantial interest exists in maintaining them. The presumption is "nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from the fact which is proved." As such, it is "no more than a common-sense inference, as strong or as weak as the nature of the surrounding circumstance permits." Hence, the validity and relative strength of the inference can be determined only on the facts of each particular case.[333]

> Under the federal recalcitrant witness statute,[334] a mere assertion of a lapse of memory would negate the statute as to testimonial contemnors unless the government is afforded an opportunity to show by clear and convincing evidence that it is a false assertion. Once the government makes out its *prima facie* case, the burden of production shifts to the witness to come forward with a claim of

332 *Kuriansky v. Azam*, 176 A.D.2d 943, 944 (2d Dep't 1991). *See generally Dep't of Hous. Pres. v. Deka Realty Corp.*, 208 A.D.2d 37, 46 (2d Dep't 1995) (Housing Code violations presumed to continue absent proof of correction.).

333 *Vacco v. Consalvo*, 176 Misc. 2d 107, 112–13 (Sup. Ct., Bronx Co. 1998) (citation omitted).

334 28 U.S.C. § 1826(a).

> memory lapse (which the government may then show to be false).[335]

[1.20] XXI. A CIVIL CONTEMPT CONTEMNOR HOLDS THE KEYS TO HIS OWN JAIL CELL

Martin Armstrong was arrested for securities fraud. He persuaded investors to entrust $3 billion in his companies. He engaged in risky and speculative trading and lost $1 billion. To hide his loss, he created fraudulent account statements and value confirmations which, over time, turned into a Ponzi scheme. He eventually pled guilty to parts of a 24-count indictment and was duly sentenced. The court appointed a receiver who demanded that Armstrong return misappropriated corporate records and assets, such as $16 million worth of rare coins, gold bullion bars, and various antiquities—six busts, 102 gold bars, 699 gold bullion coins, a bust of Julius Caesar and other coins worth $12.9 million. Documents Armstrong turned over included a computer with its hard drive removed and 500 files erased, and another computer with its clock reset in an effort to mask other deleted files.[336] In the face of a demand for corporate documents, Armstrong as their custodian said, "My position is I don't have to comply."[337] He never attempted to demonstrate an inability to comply. As to whether his confinement for civil contempt had lost its coercive-civil effect and morphed into criminal-punitive contempt thus requiring the due process safeguards appertaining, the court noted that

> Fifteen million dollars is a life-altering amount of money. We think that the value of the concealed property is a significant factor to the extent that it would lead the contemnor to conclude that the risk of continued incarceration is worth the potential benefit of securing both his freedom and the concealed property.[338]

As of January 2006, Armstrong was incarcerated for more than six years. "The length of incarceration, in and of itself, is not dispositive of its lawfulness." Armstrong brought many appeals and motions, even attempts

335 *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) (endorsing *In re Battaglia*, 653 F.2d 419 (9th Cir. 1981)).

336 *Armstrong v. Guccione*, 470 F.3d 89, 111 (2d Cir. 2006).

337 *Id*. at 110.

338 *Id.* at 111

at obtaining Supreme Court intervention. One may wonder if he was paying his lawyers with bottle caps. Is Armstrong still a guest of the Metropolitan Correctional Center? Is he still "willing to suffer time in jail in the hope of ending up in possession of $15 million in assets of a corporation to which he owes fiduciary duties? The Due Process Clause does not demand that the test of his obduracy end today or, for that matter, at any specific time."[339]

Talk about a no-good, deadbeat ex-husband! H. Beatty Chadwick was married to Barbara Jean Crowther Chadwick, and as of 2002, H. Beatty had applied eight times to the Pennsylvania courts and six times to the federal district court for release from incarceration for civil contempt for refusing to comply with an order directing him to pay $2.5 million into an escrow account. The federal district court accepted the state courts' repeated findings that the petitioner was *able* to comply with the order. However, the federal district court nevertheless held that the length of the petitioner's confinement—then almost seven years—meant that the contempt order had lost its coercive effect and that confinement for civil contempt was no longer constitutional. Wrong on the facts and wrong on the Constitution.

In 1992, Barbara Chadwick filed for divorce. H. Beatty Chadwick told the state court that he had unilaterally transferred $2,502,000 of the marital estate to satisfy an alleged debt to Maison Blanche, Ltd., a Gibraltar partnership. One of Maison Blanche's principals had returned $869,106 from Gibraltar to an American bank in H. Beatty's name. These funds were used to buy three insurance annuity contracts, while $995,726.41 had been transferred to a Union Bank account in Switzerland in H. Beatty's name. $550,000 is stock certificates that H. Beatty claimed he had transferred to an unknown barrister in England to forward to Maison Blanche had never been received. In 1994, H. Beatty redeemed the annuity contracts and deposited the funds in a Panamanian bank. The state court found that he had transferred the money and certificates in an attempt to defraud Barbara Chadwick and the court. Represented by his lawyer, H. Beatty was a no-show at three contempt hearings. The court found him in contempt and issued an arrest warrant. Beatty fled and was arrested in 1995. Bail was set at $3,000,000. Chadwick could post the bail or pay the escrow money as previously ordered.

On January 3, 2002, the district court granted H. Beatty's release, but stayed its order pending a decision to the contrary by the Third Circuit

339 *Id*. at 112–13.

Court of Appeals, which the appeals court indeed issued. The Supreme Court brushed aside H. Beatty's application to vacate the stay.[340]

Circuit Judge Alito wrote for the Third Circuit that *International Union v. Bagwell*[341] "seems to permit a contemnor who has the ability to comply with the underlying court order to be confined until he or she complies, and if this reading is correct, *Bagwell* directly contradicts the decision of the District Court."[342] "The present case . . . is not the ordinary case. On the contrary, it concerns an individual whom we must assume is fully capable of complying with the state court order but simply will not do so."[343] The Supreme Court has never endorsed the proposition that confinement for civil contempt must cease when there is no substantial likelihood of compliance.

Absent a plea of guilty or a formal stipulation of facts to the court with a waiver of a jury trial, either of the aforementioned contempts when charged as crimes under the Penal Law must be proven beyond a reasonable doubt to a jury. In the case of these types of criminal contempts being brought under the Judiciary Law, a hearing is necessary only when there are disputed issues of fact.[344]

[1.21] XXII. "WILLFULNESS" AND CONTEMPT

Neither Judiciary Law § 750 nor cases construing it specifically define "willfulness." The U.S. Supreme Court states that "willfully" is "a word of many meanings" whose construction is often dependent on the context in which it appears.[345] The Court of Appeals through dicta in a case imputing Judiciary Law § 753 civil contempt to the New York State Health Commissioner in his representative capacity opined that "the element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out."[346] This is epistemological nonsense worthy of a philosophy class dropout. How can one be

340 *Chadwick v. Janecka*, 312 F.3d 597 (3d Cir. 2002).

341 512 U.S. 821, 828 (1994)

342 *Id.* at 608.

343 *Id.* at 612.

344 *Compare Kuriansky v. Weinberg*, 121 A.D.2d 991 (1st Dep't 1986), *with Mulder v. Mulder*, 191 A.D.2d 541 (2d Dep't 1993). *See generally People v. Gruden*, 42 N.Y.2d 214 (1977).

345 *Bryan v. U.S.*, 524 U.S. 184, 191 (1998).

346 *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983).

more or less willful than willful? As a rule-of-thumb expression, "level of willfulness" is uninformative. If urged as a roughly stated burden of proof for Judiciary Law criminal contempt, it is superfluous to the required "beyond a reasonable doubt" standard,[347] if not downright unintelligible. Statements such as "[i]n the absence of a specification that the contempt was criminal and without a finding of willful disobedience, the alleged contempt must be considered . . . civil"[348] are similarly uninformative. The burden of proof for a Judiciary Law § 753 civil contempt is proof "with reasonable certainty."[349] Or, is it clear and convincing evidence?—an issue which the Court of Appeals in an uncharacteristic show of restraint has yet to determine.[350] If incarceration is imposed for disobedience to a Family Court order, and an Appellate Division concludes that the contempt finding was criminal in nature, then the proof of disobedience must be beyond a reasonable doubt.[351]A lower "level of willfulness" for civil contempt does not appear any more at home with "reasonable certainty" than it does with its criminal counterpart's "proof beyond a reasonable doubt."

It is submitted that "willfulness" need mean no more than knowing and intentional. Three definitions, of the functional and dictionary variety from other jurisdictions, warrant citation.

> Willfulness almost necessarily has to be proved as an inference from circumstantial evidence. . . . The government does not have the burden of negotiating all possible excuses for non-compliance with a court order. . . . [Refusal] to surrender [records] when they were in existence and within their control [is enough].[352]

> "Willfulness" is defined as "a volitional act done by one who knows or should reasonably be aware that his con-

347 *County of Rockland v. CSEA*, 62 N.Y.2d 11, 14 (1984).

348 *Sentry Armored Courier Corp. v. N.Y.C. Off–Track Betting Corp.*, 75 A.D.2d 344, 345 (1st Dep't 1980).

349 *McCormick*, 59 N.Y.2d at 582; *N.A. Dev. Co. v. Jones*, 99 A.D.2d 238, 242 (1st Dep't 1984). A reading of Judiciary Law §§ 750 and 753 cause doubt as whether "willful" is used in the same denotation in each section.

350 *Powers v. Powers*, 86 N.Y.2d 63, 68 (1995).

351 *Rubackin v. Rubackin*, 62 A.D.3d 11 (2d Dep't 2009).

352 *Goldfine v. U.S.*, 268 F.2d 941, 945 (1st Cir. 1959); *see also Vacco v. Consalvo*, 176 Misc. 2d 107, 111–12 (Sup. Ct., Bronx Co. 1998).

> duct is wrongful." It implies a "deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order."[353]
>
> The minimum requisite intent is . . . defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. . . . Of course, an actual design to subvert the administration of justice is a more grievous and perhaps more culpable state of mind, but proof of such an evil motive is unnecessary to establish the required intent.[354]

"Willfulness" (that is, knowingly or intentionally) is not negated by good-faith disobedience. In proving it, there is no requirement that a defendant be shown to have known of and intended to violate the contempt statute itself. Advice of counsel is irrelevant on the issue.[355]

Inter alia, the crime of criminal contempt in the second degree[356] uses the words "intentional" and "knowingly." It otherwise mirrors Judiciary Law criminal contempt (§§ 750(A)(3), (5)) in all material respects. "Knowing and intentional," under contemporary standards of due process, seem to be as good a definition of "willfulness" as any since there is both statute[357] and abundant case law defining these words. One who has knowledge of a court mandate and intentionally disobeys it may be found in criminal or civil contempt depending on the genesis of the disobedience and the level of proof, *not* willfulness, required. "Level of willfulness" should go the way of the Edsel because, like willfulness, it varies from context to context but still connotes intentional action.[358] Courts do not even agree on how many "*l's*" are in the word—Judiciary Law § 750(3) spells it "wilful." The U.S. Supreme Court does not appear to have adopted any "level-of-willfulness"

353 *U.S. v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986); *see also Ratzlaf v. U.S.*, 510 U.S. 135, (1994) (Blackmun, J., dissenting); *U.S. v. Nightingale*, 703 F.2d 17, 18–19 (1st Cir. 1983); *In re Mossie*, 589 F. Supp. 1397, 409 (W.D. Mo. 1984), *rev'd*, 768 F.2d 985 (8th Cir. 1985); *Vacco*, 176 Misc. 2d at 111–112; *People v. Paperno*, 98 Misc. 2d 99, 104 (Sup. Ct., N.Y. Co. 1979) (Rothwax, J.), *rev'd on other grounds*, 77 A.D.2d 137 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 294 (1981).

354 *Pennsylvania v. Local Int'l Union of Operating Eng'rs*, 542, 552 F.2d 498, 510 (3d Cir. 1977) (quoting *U.S. v. Seale*, 461 F.2d 345, 368–69 (7th Cir. 1972)).

355 *U.S. v. Remini*, 967 F.2d 754, 757 (2d Cir. 1992).

356 Penal Law §§ 215.50(3), (5), (6).

357 Penal Law §§ 15.05(1), (2).

358 *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1555 (11th Cir. 1996).

test for separating criminal from civil contempt.[359] Why this "level-of-willfulness" error keeps popping up in case law is anyone's guess.[360]

[1.22] XXIII. DURESS

In some circumstances, duress may serve as an equitable defense to contempt. The duress must consist of palpable, imminent danger. Fear by itself is not legal justification for disobedience to a court order—most often a command to testify.[361] Concerning an immunized prisoner, fear of reprisal gives him no more dispensation from testifying than it gives an innocent bystander without a record an excuse from giving the law his evidence.[362] What has thus far gone unexpressed by the courts is the rationale of this principle. Ultimately, it is a matter of sound policy. If the law has a right to every man's evidence, it must be the final arbiter of that duty—not a nameless thug, real or imagined, somewhere out there on a street corner.

[1.23] XXIV. CONTEMPT IN THE IMMEDIATE VIEW AND PRESENCE OF THE COURT—STATUTES, CASE LAW

Judiciary Law § 750, in part, provides:

A court of record has power to punish for a criminal contempt, a person guilty of . . .

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

* * *

359 *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). *See generally City of Poughkeepsie v. Hetey*, 121 A.D.2d 496, 497 (2d Dep't 1986).

360 *See*, *e.g.*, *Muraca v. Meyerowitz*, 49 A.D.3d 697 (2d Dep't 2008).

361 *In re Grand Jury Proceedings of December 1989*, 903 F.2d 1167, 1170 (7th Cir. 1990).

362 *U.S. v. Winter*, 70 F.3d 655, 665–666 (1st Cir. 1995).

> 5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

Judiciary Law § 751(1) states that a contempt "committed in the immediate view and presence of the court, may be punished summarily [but] when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense."

Whether "summary" or "on notice with an opportunity to defend," Judiciary Law § 752 requires that:

> Where a person is committed for contempt [up to 30 days and/or a fine of $1,000 under section 751[1]] . . . the particular circumstances of his offense must be set forth in the mandate of commitment. Such mandate, punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.

Somewhat redundant but more stringent is Judiciary Law § 755 that states:

> Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order *must* be made by the court, judge, or referee, *stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor.* Such order is reviewable by a proceeding under article seventy-eight of the civil practice law and rules.

On occasion, an Appellate Division, in the face of Judiciary Law § 755, will state that review must be denied for lack of a written mandate but then examine the record anyway while dismissing an article 78 proceeding brought by the contemnor to cure this defect. Perhaps an angered trial court will sometimes refuse to prepare and sign a written order to make appeal impossible, thus "requiring" an article 78 proceeding to get the contempt to the Appellate Division. There, an Appellate Division may, in *dicta*, restore a reputation and level some chastisement before dismissing

the petition.[363] (Judiciary Law § 755's federal counterpart contains similar language).[364]

[1.24] XXV. COURT RULES FOR IMMEDIATE VIEW CONTEMPT

Two Appellate Divisions of the Supreme Court, the First and Second Departments, have promulgated rules which regulate the exercise of a court's summary contempt power over misconduct committed in its immediate view and presence. Largely reflective of case law, the rules provide:

> (a) The power of the court to punish summarily any contempt committed in its immediate view and presence shall be exercised only in exceptional and necessitous circumstances, as follows: (1) Where the offending conduct disrupts or threatens to disrupt proceedings actually in progress; or (2) where the offending conduct destroys or undermines or tends seriously to destroy or undermine the dignity and authority of the court in a manner and to the extent that it appears unlikely that the court will be able to continue to conduct its normal business in an appropriate way, provided that in either case the court reasonably believes that a prompt summary adjudication of contempt may aid in maintaining or restoring and maintaining proper order and decorum.
>
> (b) Wherever practical, punishment should be determined and imposed at the time of the adjudication of contempt. However, where the court deems it advisable the determination and imposition of punishment may be deferred following a prompt summary adjudication of contempt which satisfies the necessity for immediate judicial corrective or disciplinary action.
>
> (c) Before any summary adjudication of contempt the accused shall be given a reasonable opportunity to make a statement in his defense or in extenuation of his con-

363 *Traynor v. Lange*, 178 A.D.2d 481 (2d Dep't 1991).

364 *See* Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 42. In 2002 the section of the rule addressing summary dispositions was relettered from (a) to (b).

> duct.[365] Except in the case of the most flagrant and offensive misbehavior which in the court's discretion requires an immediate adjudication of contempt to preserve order and decorum, the court should warn and admonish the person engaged in alleged contumacious conduct that his conduct is deemed contumacious and give him an opportunity to desist before adjudicating him in contempt. Where a person so warned desists from further offensive conduct, there is ordinarily no occasion for an adjudication of contempt. Where a person is summarily adjudicated in contempt and punishment deferred, if such person desists from further offensive conduct the court should consider carefully whether there is any need for punishment for the adjudicated contempt.[366]
>
> In all other cases, notwithstanding the occurrence of the contumacious conduct in the view and presence of the sitting court, the contempt shall be adjudicated at a plenary hearing with due process of law including notice, written charges, assistance of counsel, compulsory process for production of evidence and an opportunity of the accused to confront witnesses against him.[367]

These Appellate Division rules are as confusing as they are multidirectional. It is submitted that they are the product of personal "feel-good" predilection and a robotic tracking of Supreme Court decisions (1971 and post) which, in combination, have been as confusing as they are multidirectional. One sentence in the rules seems to hedge what was said in the proceeding one, only to be ambiguously qualified or effectively contradicted by a subsequent one. Lawyers, courts and commentators would be

365 22 N.Y.C.R.R. § 701.2; *accord* 22 N.Y.C.R.R. § 604.2(a).

366 22 N.Y.C.R.R. § 701.4; *accord* 22 N.Y.C.R.R. § 604.2(c).

367 22 N.Y.C.R.R. § 701.3; *accord* 22 N.Y.C.R.R. 604.2(b); *Katz v. Murtagh*, 28 N.Y.2d 234 (1971); *Marino v. Burstein*, 72 A.D.2d 814 (2d Dep't 1979). Federal Rule of Criminal Procedure 42(b) states: ". . . the court . . . may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. . . . The contempt order must recite the facts, be signed by the judge, and be filed with the clerk." Rule 42(a), the substance of which is now found in 42(b), is construed in *In re Williams*, 509 F.2d 949 (2d Cir. 1975).

well served by ignoring them and, instead focusing on statute and binding appellate case law.[368]

[1.25] XXVI. SUMMARY CONTEMPT'S SOURCE

"[U]pon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it."[369]

> On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach of insults and pollution.[370]

"The power to punish for contempts is inherent in all courts. . . . The moment the courts of the United States were called into existence and invested with jurisdiction over any subject matter, they became possessed of this power."[371] Viewed in this functional-historical light, statutes regulating the exercise of the judiciary's summary contempt power are limitations on, not conferrals of, such power.[372]

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368 *Compare In re Terry*, 128 U.S. 289 (1888); *In re Savin*, 131 U.S. 267 (1889); *Sacher v. U.S.*, 343 U.S. (1952); *Offutt v. U.S.*, 348 U.S. 11 (1954) *with Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Lewis v. U.S.*, 518 U.S. 322, 323–35, 340 (1996).

369 *U.S. v. Hudson*, 11 U. S. (7 Cranch) 32, 33 (1812), *cited with approval in Int'l Union-United Mine Workers v. Bagwell*, 512 U.S. 821 (1994)**;** *see also Chadwick v. Jenecka*, 312 F.3d 597 (3d Cir. 2002).

370 *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 227 (1821); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citing *Hudson* and *Anderson* as authority); *Armstrong v. Guccione*, 470 F.3d 89, 100–105 (2d Cir. 2006).

371 *Ex parte Robinson*, 86 U.S. 505, 510, 19 Wall. 505 (1874); *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245 (1886); *Dollard v. Koronsky*, 67 Misc. 90 (App. Term 1910).

372 *Ex parte Robinson*, 86 U.S. 505; *Munsell*, 101 N.Y. 245; *Dollard*, 67 Misc. 90. The United States Supreme Court, deriving its existence from the Constitution, not Congress, may be immune from legislative attempts to control its contempt authority. Like the New York Court of Appeals (a creature of the State Constitution) its own decisions regarding its contempt power are its own restraint. *See generally Ex parte Robinson*, 86 U.S. at 510 (whether an act of Congress "can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt'); *see also Cammer v. U.S.*, 223 F.2d 322, 324 (D.C. Cir. 1955), *rev'd*, 350 U.S. 399 (1956); *First Bank of Marietta v. Mascrette, Inc.*, 125 Ohio App. 3d 257, 708 N.E.2d 262, 267 (1998).

> It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend, on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.[373]

(Legislatures, like courts, have summary contempt powers implied from and implicit in the narrowly circumscribed necessity of protecting the order and decorum of their proceedings. It is a power whose exercise is reviewable in the courts but not dependent upon the courts for its existence.)[374]

[1.26] XXVII. "IMMEDIATE VIEW" AND "PRESENCE" OF THE COURT

Disorderly, contemptuous or insolent behavior committed during the sitting of a court, which directly tends to interrupt its proceedings or impair the respect due its authority, may occur in its "presence" but not always in its "immediate view." There is a difference between assaulting a court officer carrying out a court's directive in its immediate view and attempting to "fix" a petit juror in the cloakroom,[375] that is, in the court's "presence" but not in its "immediate view." Each tends to directly disrupt the court's proceedings and impair the respect due its authority, but only the assault in its "immediate view" authorizes summary punishment with-

373 *Anderson v. Dunn*, 19 U.S. at 227–228.

374 *Groppi v. Leslie*, 404 U.S. 496 (1972); *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Marshall v. Gordon*, 243 U.S. 521 (1917); *Anderson*, 19 U.S. 204; *Hudson*, 11 U.S. 32.

375 *U.S. v. Rangolan*, 464 F.3d 321 (2d Cir. 2006); *Cammer v. U.S.*, 223 F.2d at 329 (quoting *Kelly v. U.S.*, 250 F. 947 (9th Cir. 1918)):

> In order that one may be held for contempt for communications with jurors, on the ground of the harmful tendency thereof, it is not necessary to prove that the communications had or the acts done were accompanied with a wrongful intent. It is sufficient if such acts and communications were knowingly and willfully done and had, and had the tendency to influence the action of the jury.

out advance notice. The distinction is clearly stated in two holdings of the U.S. Supreme Court. As to "immediate view" contempts:

> [T]here is [a] rule of almost immemorial antiquity, and universally acknowledged, which is . . . vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of the court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance, as it does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule."[376]

Concerning contempts which may (or may not be) in a court's constructive *presence* but not in its actual *immediate view*, the Supreme Court was of the opinion that:

> [a] court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where

376 *In re Terry*, 128 U.S. 289, 307–308 (1888).

> the contempt is committed directly under the eye or within the view of the court, it may proceed "upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form" whereas, in cases of misbehavior of which the judge cannot have personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. But this difference in procedure does not affect the question as to whether particular acts do not . . . constitute misbehavior in the presence of the court.[377]

The procedural difference between the punishment of contempts occurring within and without the actual "immediate view" of the court:

> finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice" . . . is not instantly suppressed and punished, demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.[378]

"Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without

377 *In re Savin*, 131 U.S. 267, 277 (1889) (citation omitted); *Clark v. U.S.*, 289 U.S. 1 (1933); *People v. Campbell*, 284 A.D.2d 173 (1st Dep't 2001); *see also Farese v. U.S.*, 209 F.2d 312 (1st Cir. 1954). Somewhat humorous is a court's reversed holding that his seeing a contemnor's disobedience to his order on an evening T.V. news program was in his immediate view and presence. *People v. Jeter*, 116 A.D.2d 558 (2d Dep't 1986).

378 *Cooke v. U.S.*, 267 U.S. 517, 536 (1925). *See generally Young v. U.S. ex. rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798–799 (1987).

aid of [a] jury is not open to question."[379] "*Such summary conviction and punishment accords due process of law.*"[380] It "is *not* controlled by the limitations of the Constitution *as to modes of accusation and methods of trial* generally safeguarding the rights of the citizen."[381] In 1948 the Supreme Court described summary "immediate view and presence" contempts as a "narrowly limited category of contempts" exception to the notice and hearing requirements usually associated with the phrase "due process of law" in the following passage:

> Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization to the court's authority". . . before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing as above set out.[382]

New York is bound by and agrees with the Supreme Court in its distinction between those contempts occurring in the "immediate view" of the court and those which do not.

379 *Fisher v. Pace*, 336 U.S. 155, 159 (1949).

380 *Id.* at 159–60 (emphasis added); *see also Green v. U.S.*, 356 U.S. 165, 183–85, 187–88 (1958), *cited in Pounders v. Watson*, 521 U.S. 982, 988 (1997); *U.S. v. Cooke*, 267 U.S. at 534; *Eilenbecker v. Dist. Court of Plymouth Cnty.*, 134 U.S. 31, 36, 38, 39 (1890); *In re Mfrs. Trading Corp.*, 194 F.2d 948, 956 (6th Cir. 1952).

381 *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (emphasis added).

382 *In re Oliver*, 333 U.S. 257, 275–76 (1948) (Black, J.) (citation omitted).

> Disorder in courtrooms and the summary control of such disorder is not new. The applicable rules are ancient, going back to common law, and there is little novelty to be discerned or devised. It is only the recent and frequent recurrence of courtroom disorder in so many places for protracted periods which makes the problem strikingly topical.[383]
>
> It is the need for the preservation of the immediate order in the courtroom which justifies the summary procedure—one so summary that the right and need for an evidentiary hearing, counsel, opportunity for adjournment, reference to another Judge, and the like, are not allowable because it would be entirely frustrative of the maintenance of order. Of course, such rigorous procedure is justified only by necessity and must then be based upon contemptuous conduct committed in the view and presence of the presiding Justice.[384]
>
> The cases have made quite clear that the power of the hearing or trial court to maintain order by immediate summary action, if immediate summary action is required, remains unimpaired, even in the grave instance of a criminal defendant entitled to the right of confrontation.[385]
>
> A criminal contempt in the "immediate view and presence" of the court may be punished summarily if the acts constituting such contempt are seen or heard by the presiding judge so that he can assert of his own knowledge the facts constituting the contempt in the mandate of commitment. . . . The knowledge of the judge takes the place of proof and his recital in the mandate of commitment of the facts upon which the adjudication of contempt is based is sufficient.[386]

383 *Katz v. Murtagh*, 28 N.Y.2d 234, 237 (1971) (Breitel, J.).

384 *Id.* at 238.

385 *Id.* at 239.

386 *Douglas v. Adel*, 269 N.Y. 144, 146–47 (1935).

> If, however, the acts constituting the contempt are not committed within his hearing or he does not see them and is, therefore, unable to so state in the mandate of commitment, it is necessary that the offender be given the opportunity to be heard after notice.[387]

[1.27] XXVIII. EXAMPLES OF "IMMEDIATE VIEW" CONTEMPT

In addition to calling the judge colorful epithets in the language of the street, examples of contempt in the "immediate view" of the court which directly tend to interrupt its proceedings and impair the respect due its authority include: brawling with court officers seeking to carry out a judge's order;[388] refusal of a trial witness, absent privilege, to answer questions when ordered to do so;[389] advising a client, in the presence of the court, to disobey an order just issued to the client by the court;[390] refusing to leave the courtroom;[391] returning to a courtroom after being ordered to leave for misbehavior;[392] advancing towards a testifying witness yelling "you're a damned liar;"[393] using profane and insulting language towards opposing counsel in open court after being warned by the judge not to do so;[394] deliberately bringing witnesses back into a courtroom in defiance of an order previously excluding them;[395] a defendant's refusal to remove his glasses at his *Wade* hearing;[396] raising a fist of "defi-

387 *Id*. at 147.

388 *In re Terry*, 128 U.S. 289 (1888).

389 *U.S. v. Wilson*, 421 U.S. 309 (1975); *Ex parte Hudgings*, 249 U.S. 378, 382 (1919); *In re Boyden*, 675 F.2d 643, 644 (5th Cir. 1982); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 582–83 (S.D.N.Y. 1984); *Cimino v. Elliot*, 227 A.D.2d 986, 987 (4th Dep't 1996); *O'Neil v. Kasler*, 53 A.D.2d 310 (4th Dep't 1976); *People v. Clinton*, 42 A.D.2d 815 (2d Dep't 1973); *People v. Woodruff*, 26 A.D.2d 236, 237 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848 (1968).

390 *Davis v. Goodson*, 276 Ark. 337, 635 S.W.2d 226 (1982), *cert. denied*, 459 U.S. 1154 (1983); *compare In re Watts*, 190 U.S. 1, 29 (1903); *In re Landau*, 230 A.D. 308 (2d Dep't 1930) (good faith, but erroneous, advice as to meaning of court's order is not counseling disobedience).

391 *Rodriguez v. Feinberg*, 48 A.D.2d 971 (3d Dep't 1975), *rev'd*, 40 N.Y.2d 994 (1976).

392 *Gumbs v. Martinis*, 40 A.D.2d 194 (1st Dep't 1972).

393 *Gridley v. U.S.*, 44 F.2d 716 (6th Cir. 1930).

394 *Olimpius v. Butler*, 248 F.2d 169, 170–171 (4th Cir. 1957).

395 *La Duca v. Bergin*, 86 A.D.2d 983 (4th Dep't 1982).

396 *People v. Sanders*, 58 A.D.2d 525 (1st Dep't 1977).

ant salute" as part of a group courtroom disturbance;[397] perjury, *but only with* the "exceptional circumstance" of "the further element of obstruction to the court in the performance of its duty;"[398] a grand jury witness's refusal, in the actual presence of the court, to answer questions before a grand jury;[399] a lawyer's pattern of abusive, intimidating and insolent intransigence to or disobedience of court rulings during trial;[400] disorderly, contemptuous and insolent behavior which disrupts a calendar call;[401] direct and unceasing challenges in open court to the integrity of the judicial process, made without foundation;[402] telling the judge that he should cite himself for misconduct and ought to be ashamed of himself;[403] and yelling "F—you, mother f—er" as a jury delivers its verdict.[404] Telling the judge to "drop dead" just after sentencing is another immediate view contempt warranting 30 days consecutive to the sentence.[405] Coming into a court room wearing a T-shirt which says, "If assholes could fly this place would be an airport," standing alone, is reprehensible and subject to court correction but not disruptively contemptuous.[406]

Or, configuring one's hand into the shape of a gun and placing it against one's temple under the gaze of a prosecution witness while he is testifying from the witness stand.[407] Or, urinating in open court in front of

397 *Katz v. Murtagh*, 28 N.Y.2d 234 (1971).

398 *In re Michael*, 326 U.S. 224, 228 (1945); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919), *cited in U.S. v. Dunnigan*, 507 U.S. 87, 93 (1993). *See generally Clark v. U.S.*, 289 U.S. 1 (1933) (Cardozo, J.); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 736–40 (7th Cir. 1999).

399 *People ex rel. Hackley v. Kelly*, 24 N.Y. 74, 79–80 (1861); *In re Epstein*, 43 Misc. 2d 987 (Sup. Ct., N.Y. Co. 1964); *cf. Harris v. U.S.*, 382 U.S. 162 (1965).

400 *Werlin v. Goldberg*, 129 A.D.2d 334 (2d Dep't 1987). Some rogue lawyers use their contemptuous courtroom behavior as trial strategy *per se*. *People v. Gonzalez*, 251 A.D.2d 51, 51–53 (1st Dep't 1998).

401 *Kuntsler v. Galligan*, 168 A.D.2d 146, 150 (1st Dep't), *aff'd*, 79 N.Y.2d 775 (1991).

402 *U.S. v. Lumumba*, 603 F. Supp. 913 (S.D.N.Y. 1985), *aff'd*, 794 F.2d 806 (2d Cir. 1986).

403 *MacInnis v. U.S.*, 191 F.2d 157, 159 (9th Cir. 1951).

404 *U.S. v. Rrapi*, 175 F.3d 742, 746, 753–54 (9th Cir. 1999).

405 *People v. Keno*, 276 A.D.2d 325 (1st Dep't 2000). "While defendant claims that he was denied the opportunity to make a statement in mitigation, the proper remedy for such a defect would be a remand for further proceedings and defendant has expressly declined to pursue such remedy on appeal." (citing *Roajas v. Recant*, 249 A.D.2d 95 (1st Dep't 1998)).

406 *In re Doyle v. Aison*, 216 A.D.2d 634 (3d Dep't 1995).

407 *U.S. v. McGainy*, 37 F.3d 682 (D.C. Cir. 1994); *cf. In re McClure*, 442 F.2d 836 (D.C. Cir. 1971). *See generally Commonwealth v. Baker*, 722 A.2d 718 (Pa. Sup. Ct. 1998, *aff'd*, 564 Pa. 192, 766 A.2d 328 (2001)).

both the judge and jury while the prosecutor is summing up.[408] In contrast, a mere accusation of bias or unfairness with a civil tongue does not constitute contempt, so too, strenuous, even vociferous advocacy.[409] But it must be remembered that:

> A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record.[410]

A court filling out a mandate of commitment will be well served by bearing in mind that: "It is difficult . . . in a written statement, to convey to the mind of the reader a photographic impression of what occurred at the time of an alleged contempt . . ."[411]

Rarely manifesting itself with such clear definition as to give certainty to the fact of its occurrence, there is nevertheless a unique type of perjury which may be punished by a court as a contempt committed in its immediate view and presence even though it is also a penal law violation. It is perjurious testimony which obstructs or halts the judicial process. To identify an "immediate view and presence" contempt in the form of perjury from the witness stand, one must understand the trial process itself:

> All perjured relevant testimony is at war with justice, since it may produce a judgement not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. *It need not necessarily, however, obstruct or halt the judicial process*. For the function of a trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear truthful and false witnesses. It is in this sense,

408 *U.S. v. Perry*, 116 F.3d 952 (1st Cir. 1997).

409 *Eaton v. City of Tulsa*, 415 U.S. 697 (1974); *In re Little*, 404 U.S. 553 (1972); *Holt v. Virginia*, 381 U.S. 131 (1965); *In re McConnell*, 370 U.S. 230 (1962); *Marino v. Burstein*, 72 A.D.2d 814 (2d Dep't 1979).

410 *In re Little*, 404 U.S. at 556 (Burger C.J. & Rehnquist, J., concurring).

411 *People ex rel. Palmieri v. Marean*, 86 A.D. 278, 279 (2d Dep't 1903).

> doubtless, that [the Supreme Court] spoke when it decided that perjury alone, does not constitute an "obstruction" which justifies exertion of the contempt power and that there "must be added to the essential elements of perjury under the [penal] law the further element of obstruction to the Court in the performance of its duty."[412]

The problem here is to give factual content to the definition of courtroom perjury which "obstructs or halts the judicial process." A man appearing cold sober on a witness stand, who swears that he is too drunk to answer a question relevant to the issues then being tried, fits the definition if one uses an "I-know-it-when-I-hear-it" analysis. Also, there is the venireperson who deliberately lies on voir dire to gain a seat on a jury so that she can sabotage a trial.[413]

[1.28] XXIX. HISTORICAL DEVELOPMENT OF "IMMEDIATE VIEW AND PRESENCE" SUMMARY CONTEMPT POWER

It is submitted that the safest, but certainly not the most desirable, approach to an analysis of those constitutionally mandated procedures circumscribing the use of summary punishment for contempts committed in the immediate view and presence of a court is a historical one. Supreme Court decisions simply defy synthesis as the following quotes illustrate.

> Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct

412 *In re Michael*, 326 U.S. 224, 228 (1945) (quoting *Ex parte Hudgings*, 249 U.S. 378, 383–84 (1919)); *see also U.S. v. Appel*, 211 F. 495, 496 (S.D.N.Y. 1913) (Hand, J.); *U.S. v. McGovern*, 60 F.2d 880, 889 (2d Cir. 1932); *Ruskin v. Detken*, 32 N.Y.2d 293, 297 (1973); *Foster v. Hastings*, 263 N.Y. 311, 314 (1934); *People ex rel. Valenti v. McCloskey*, 8 A.D.2d 74 (Breitel, J.), *rev'd on other grounds*, 6 N.Y.2d 390 (1959); *Finkel v. McCook*, 247 A.D. 57 (1st Dep't), *aff'd*, 271 N.Y. 636 (1936).

413 *Clark v. U.S.*, 289 U.S. 1 (1933) (Cardozo, J.).

> have left personal stings to ask a fellow judge to take his place.[414]
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> ***
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> Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court.[415]
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> But from the hodgepodge of legal doctrine embodied in these decisions, which have irretrievably blended together constitutional guarantees of jury trial in criminal cases, constitutional guarantees of impartial judges, and fragments of the law of contempt in federal courts, *the only consistent thread which emerges is this Court's inveterate propensity to second-guess the trial judge*.[416]

Summary punishment for contempt committed in the immediate view and presence of the court is a power peculiar to a unique evil, the measure between such power and evil being one which courts, from early on, have *characterized* as "the least possible power adequate to the end proposed."[417] This characterization actually derives from cases involving the implied contempt powers of legislative assemblies. It has, on occasion, been understood, misunderstood, deliberately applied and misapplied to achieve a result. Analytical, orderly, practical and comprehensible case law development has been its immediate victim. In contrast, more than 80 years ago the Supreme Court defined the *essence* of the summary contempt power:

> The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. . . .

414 *Mayberry v. Pennsylvania*, 400 U.S. 455, 463–64 (1971).

415 *Johnson v. Mississippi*, 403 U.S. 212, 214 (1971).

416 *Codispoti v. Pennsylvania*, 418 U.S. 506, 524 (1974) (Rehnquist, J. & Burger, C.J., dissenting) (emphasis added).

417 *Anderson v. Dunn*, 19 U.S. 204, 230–31 (1821).

> These principles are plainly the result of what was decided in a [case involving implied legislative contempt powers and] . . . it was declared to be "*the least possible power adequate to the end proposed*" which was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further than implication would justify.[418]

"The least possible power adequate to the end proposed," looked at differently, is an axiom which merely *characterizes* the essence of summary contempt power. The *essence* itself is a functioning judiciary's self-preserving power, born of and implied by the very evil which would destroy it.

Practical activity and theory go hand in hand. Theory guides practical activity. Practical activity roots theory in reality and prevents it from becoming mere abstraction. Immediate-view-and-presence summary punishment for criminal contempt has been the subject of a tug of war between decisions emphasizing its practical essence and those heavily relying on its characterizing axiom. Case law shows intelligible predictability clashing with sometimes justified, sometimes result-oriented, tinkering. Recognizing that cement and quicksand have their virtues and that mud partakes of each, leading decisions, decided after judicial abuse of the summary contempt power was curbed by clarifying legislation,[419] are here excerpted.

In 1888, a California federal court ordered one Terry's wife removed from the courtroom. Terry assaulted the marshall with a deadly weapon and fled the courtroom. He was seized shortly thereafter and summarily imprisoned for six months. Terry's contention that his contempt citation was void since it was made in his absence was rejected.

> In considering this suggestion, it must not be forgotten that the order of imprisonment shows . . . that it was made and entered on the same day on which, and, presumably, at the same session of the court at which, the contempt was committed; and there is no claim that any more time

418 *Marshall v. Gordon*, 243 U.S. 521, 541–42 (1917) (emphasis in original) (citation omitted).

419 *Nye v. U.S.*, 313 U.S. 33, 47–48 (1941); *Ex parte Wall*, 107 U.S. 265, 302–03 (1883) (Field, J., dissenting); *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245 (1886); *Dollard v. Koronsky*, 67 Misc. 90, 95–97, 121 N.Y.S. 987 (App. Term), *aff'd*, 138 A.D. 213 (1st Dep't), *aff'd*, 199 N.Y. 558 (1910).

> intervened between the commission of the contempt, and the making of the order, than was reasonably required to prepare and enter in due form such an order as the court, upon consideration, deemed necessary and proper.[420]
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> Jurisdiction of the person . . . attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the . . . court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment.[421]
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> Jurisdiction to inflict such punishment having attached while [Terry] was in the presence of the court, it would not have been defeated or lost by his flight and voluntary absence.[422]

Whether the court would have had the authority to summarily punish Terry on a later date without notice and opportunity to defend was specifically left open by the Supreme Court.[423] A year later the Court acknowledged that contemptuously disruptive misbehavior could occur in a court's immediate view and presence without the judge being personally and simultaneously cognizant of it.[424]

What sort of misbehavior wakes the summary contempt power?

Misbehavior in the immediate view and presence of the court, *standing alone*, is not enough to trigger the summary contempt power. It must also be, or threaten to be, an actual obstruction to the court's proceedings or its authority. For example, one Cooke sent a letter to a court asking it, in colorful terms, to recuse itself on the ground of bias. The Supreme Court set aside his contempt citation. His conduct was not "an open threat to the

420 *In re Terry*, 128 U.S. 289, 310 (1888), *cited in Pounders v. Watson*, 521 U.S. 982, 987 (1997).

421 *Id*. at 311.

422 *Id*. at 311–12.

423 *Id*. at 314. Absent sufficient averment to the contrary there is a presumption in favor of a court's summary jurisdiction. *In re Cuddy*, 131 U.S. 280, 286 (1889).

424 *In re Savin*, 131 U.S. 267, 278 (1889).

orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public," such that if not "instantly suppressed and punished, demoralization of the court's authority [would] follow."[425] (A false pleading is not a contempt of court.)[426]

From 1925 until 1952 the Supreme Court had no occasion to directly deal with summary contempt. In *dicta*, however, it occasionally mixed reaffirmation of its prior holdings with an amount of uncertainty as to whether summary contempt *was* due process of law, or, of necessity, *was suffered to be* at war with, or *was an exception* to due process of law. The groundwork was laid for what some laud as an accommodation between jail without trial to control a courtroom and prevention of an abuse of a power subject to only limited, and essentially regulatory, constraint from the democratic process. Two Chief Justices have viewed the mixing and matching and blending of the legal, theoretical and practical concepts which underpin this accommodation as having created the jurisprudential soil from which a "hodgepodge" has grown.[427] The hodgepodge or accommodation is illustrated by five Supreme Court cases.

Following a jury's verdict in a lengthy and extraordinarily contentious trial in the federal district court for the Southern District of New York, one Sacher and other lawyers were summarily imprisoned for clearly and outrageously contemptuous conduct during trial in the immediate view and presence of the court. It was contended that the trial court's summary contempt power expired when the trial was over. Therefore, any contempt proceeding had to be on notice, with a hearing and an opportunity to defend.[428] In affirming Sacher's citation and imprisonment the Supreme Court stated:

> Summary punishment always, and rightfully, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes. But the very practical reasons which have led every system of law to vest a contempt power in one who

425 *Cooke v. U.S.*, 267 U.S. 517, 536 (1925), *cited in Pounders v. Watson*, 521 U.S. 982, 987 (1997); *U.S. v. Oberhellmann*, 946 F.2d 50 (7th Cir. 1991).

426 *Fromme v. Gray*, 148 N.Y. 695, 697–98 (1896).

427 *See generally Nye v. U.S.*, 313 U.S. 33 (1941); *In re Oliver*, 333 U.S. 257 (1948); *Fisher v. Pace*, 336 U.S. 155 (1949).

428 *Sacher v. U.S.*, 343 U.S. 1, 5, 7 (1952) (Jackson, J.), *quoted in Pounders*, 521 U.S. at 990. William H. Rehnquist had just become Justice Jackson's law clerk when the *Sacher* decision was announced. Rehnquist, The Supreme Court, How It Was, How It Is, 37 (Morrow & Co. 1987).

> presides over judicial proceedings are also the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceeding presupposes, or at least stimulates, zeal in opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb the prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defendants.[429]

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The court held that the word "summary" did not refer to the timing of the summary contempt power's employment, "but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer. . . ."[430] The purpose of that procedure is only to inform the court of events not within its personal knowledge. "Reasons for permitting straightway exercise of summary power," the court held, "are not reasons for compelling or encouraging its immediate exercise."[431] A contrary holding "would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment."[432] Summary contempt could be immediately imposed if delay in the court's opinion would prejudice the trial. On the other hand, if it finds that trial exigencies require deferred action "he may do so without extinguishing his power."[433] As to the danger that a court will improperly or unconsciously confuse affront to his person with obstruction to his official function the court commented:

429 *Id*. at 8.

430 *Id*. at 9.

431 *Id*. at 9–10.

432 *Id*. at 11.

433 *Id*.

> It is almost inevitable that any contempt of court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions of this Court and generally in the literature of the law, and contempt of the one is contempt of the other. It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by added hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.[434]
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> That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one . . .[435]
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> Moreover, if power of contempt excites fear and terror in the bar, it would hardly be relieved by upholding petitioners' contention that the judge may proceed against a lawyer at the precise moment of maximum heat but may not do so if he awaits a cooler second thought.[436]

The compelling appeal of this logic notwithstanding, the court's later cases imported those difficulties inherent in either measuring or mitigat-

434 *Id*. at 12.

435 *Id*. at 12–13.

436 *Id*. at 13. Sacher was later convicted of contempt of Congress and jailed for six months for refusing to answer whether he was a Communist on First Amendment grounds. *Sacher v. U.S.*, 252 F.2d 828 (D.C. Cir.), *rev'd*, 356 U.S. 576 (1958).

ing a power whose very existence depends on its purpose, that is, instant punishment to keep order in the courtroom.

The court next wrestled with a situation where an "activist seeking combat" judge, according to the record, became personally embroiled with a contemptuous lawyer and did not act instantly but instead held him in contempt after trial. In reversing, the court stated:

> The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstruction to it. It is a mode of vindicating the majesty of the law, in its active manifestation, against obstruction and outrage. The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer.[437]

> Of course personal attacks or innuendoes by a lawyer against a judge, with a view to provoking him, only aggravate what may be an obstruction to the trial. The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.[438]

The court resurrected one of its prior observations, at best *dicta*, to require that an "embroiled" judge who does not act immediately recuse himself from punishing a contemnor. Where not "impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching

437 *Offutt v. U.S.*, 348 U.S. 11, 14 (1954).

438 *Id.*

from his duty, properly ask that one of his fellow judges take his place."[439] Offutt's criminal contempt adjudication—heard by a different judge—was affirmed with his punishment downwardly modified to six hours in the hoosegow.[440]

Generalizations are difficult, if not impossible, when theory and appearances become goals unto themselves at the expense of hard practicality. Stripped of all high-sounding but obscuring verbiage, a trial court's summary contempt power is raw power. It forcefully decides who runs a courtroom, the judge not the contemnor. While cool reflection, if practical under given circumstances, is preferable to heat and haste, such reflection presupposes delay in holding a contemnor summarily in contempt. Delay, in turn, draws into question whether summary contempt was necessary in the first place. If not necessary in the first place, then the summary contempt power never had necessity to give it birth at all. *The syllogism is reversed if heat and haste prevail*. This in mind, the last Supreme Court decisions—difficult jurisprudence—are tracked.

One Mayberry's conduct during trial came "as a shock to those raised in the Western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street."[441] The trial judge was not "an activist seeking combat;" he kept his cool and summarily punished Mayberry after trial. But the Supreme Court's majority psychologized that "a judge, vilified as was this . . . judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."[442] In reversing on "due process" grounds and requiring that a different judge preside over Mayberry's contempt hearing, the court made statements which can only be quoted:

> Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of

439 *Id.* at 14–15.

440 *Offutt v. U.S.*, 247 F.2d 88 (D.C. Cir. 1957).

441 *Mayberry v. Pennsylvania*, 400 U.S. 455, 456 (1971); *Caperton v. A.T. Massey Coal, Inc*., 509 U.S. 868 (2009) (citing *Mayberry* and discussing judicial bias that raise Constitutional concerns).

442 *Mayberry*, 400 U.S. at 465.

> a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.[443]
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> ***
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> It is, of course, not every attack on a judge that disqualifies him from sitting. . . . Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.[444]

The "new rule" from the court seemed clear until it passed on the appeal of a lawyer named Taylor. On nine occasions during trial Taylor was told "that he was in contempt of court."[445] At the conclusion of the trial the judge made a statement concerning Taylor's trial conduct. "Refusing [Taylor's] request to respond and declaring that 'I have you' on nine counts, (the judge) proceeded to impose a jail term on each count totaling almost four and one-half years."[446] In reversing, the court was persuaded by Taylor's contention "that he was entitled to more of a hearing and notice than he received prior to final conviction and sentence."[447]

> In each instance during the trial when respondent considered petitioner to be in contempt, petitioner was informed of that fact, and in most instances, had opportunity to respond to the charge at that time. . . . But no sentence was imposed during the trial, and it does not appear to us that any final adjudication of contempt was entered until after the verdict was returned. It was then that the court proceeded to describe and characterize petitioner's various acts during trial as contemptuous, to find him guilty

443 *Id*. at 463–64.

444 *Id*. at 465–66.

445 *Taylor v. Hayes*, 418 U.S. 488, 490 (1974).

446 *Id*.

447 *Id*. at 496.

> of nine acts of contempt, and to sentence him immediately for each of those acts.[448]
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> This procedure does not square with the Due Process Clause of the Fourteenth Amendment. We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. The usual justification of necessity is not nearly so cogent when final adjudication and sentence are postponed until after trial. Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings.[449]

An earlier case, said the Court, involving contempt of a legislature[450] but having no factual similarity to Taylor's courtroom conduct, "counsel[ed] that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and an opportunity to be heard in his own behalf."[451]

> This is not to say, however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court.[452]

448 *Id.* at 496–97.

449 *Id.* at 497–98 (citation omitted) (footnote omitted).

450 *Groppi v. Leslie*, 404 U.S. 496 (1972).

451 *Taylor v. Hayes*, 418 U.S. 488, 498–99 (1974).

452 *Id.* at 499. Making "amends with the court" imports a notion of personal affront, something the immediate-view-and-presence contempt power *per se* is *not* concerned with nor dependent upon.

The Court's solution notwithstanding, it was "convinced that if petitioner is to be tried again, he should not be tried by respondent" since "contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him . . . that he cannot 'hold the balance nice, clear and true.'"[453] The inquiry is not only whether there is actual bias, but whether there is "such a likelihood of bias or an appearance of bias."[454] In *Codispoti*, the dissenters pointed out that the wisdom of the majority was at odds with the very precedents its opinion reaffirmed.[455]

The last case from the court also involved a lawyer, Codispoti, who in the course of his contemptuous conduct accused the judge of "trying to protect the prison authorities," of "kowtowing and railroading the defendant into life imprisonment," of being a "Caesar," "crazy," and, involved in a "criminal conspiracy."[456] Following the Supreme Court's reversal of Mayberry's contempt citation and its instruction that "on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law sit in judgment on the conduct of Codispoti as shown by the record,"[457] Codispoti was tried before a different trial judge. The state rested on the trial transcript; Codispoti neither testified nor called witnesses. He was found guilty of six separate contempts and sentenced to five terms of six months each and one term of two months, all to be served consecutively. Should Codispoti have been afforded a jury trial? Generally "no" but in this instance "yes." A contemnor is not entitled to a jury trial simply because a strong possibility exists that he will face a substantial term of imprisonment regardless of the punishment actually imposed.[458] A judge does not "exhaust his power to convict and punish summarily whenever the punishment imposed for separable contemptuous acts during trial exceeds six months."[459] But, concluded the five-justice majority,

> [w]hen the trial judge . . . postpones until after trial the final conviction and punishment . . . for several or many

453 *Id*. at 501.

454 *Id*.

455 *Codispoti v. Pennsylvania*, 418 U.S. 506, 525–31 (1974) (Rehnquist, J. & Burger, C.J., dissenting).

456 *Id.* at 507 n.1.

457 *Id*. at 507.

458 *Id*. at 512, *cited in In re Hirschfeld*, 184 Misc. 2d 119 (Sup. Ct., N.Y. Co. 1999).

459 *Id*. at 514.

> acts of contempt committed during the trial, there is no overriding necessity for instant action to preserve order and no justification for dispensing with the ordinary rudiments of due process. . . . Moreover, it is normally the trial judge who, in retrospect, determines which and how many acts of contempt the citation will cover. It is also he or, as is the case here, another judge who will determine guilt or innocence absent a jury, who will impose the sentences and who will determine whether they will run consecutively or concurrently. In the context of the post-verdict adjudication of various acts of contempt, it appears to us that there is posed the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate.[460]

Codispoti's contempts were tried *seriatim* in one proceeding with separate consecutive sentences for each contempt "which necessarily extended the prison term" beyond the six months allowable for a petty offense.[461] Codispoti, in terms of the sentence imposed, "was tried for what was equivalent to a serious offense and was entitled to a jury trial."[462] The four-justice dissent was "at a loss" to see what role a jury should play for direct, in-court contempts. "The perceived need to remove the case from the contemned judge is fully served by assigning the case to a different judge," and "since the new judge, not the jury, will impose the sentence, there is nothing the jury can do by way of mitigating an excessive punishment."[463] Dissenting specially, Justice Rehnquist joined by Chief Justice Burger stated that, "the Codispoti litigation in this court is worthy of a chapter in Charles Dickens' *Bleak House*."[464]

The state had carried out the court's instructions "to the letter" but "without batting an eye" the court now decided that Codispoti was entitled to a jury trial.[465] Indeed,

> [t]he application of [a jury trial requirement] to the consecutive sentences imposed for the separate contemptu-

460 *Id*. at 515 (citation omitted).

461 *Id*. at 516.

462 *Id.* at 517.

463 *Id*. at 522–23 (Blackmun, J., dissenting).

464 *Id*. at 531.

465 *Id*. at 532.

> ous acts of Codispoti . . . is made even more questionable in light of the concession that the result would be different in other fact situations. [The majority opinion indicates] that a contemnor "may be summarily tried for an act of contempt during trial and punished by a term of no more than six months. Nor does the judge exhaust his power to convict and punish summarily whenever the punishment imposed for separate contemptuous acts during trial exceeds six months." The upshot of this, of course, is that trial judges are surely to be inclined to adjudicate and punish the contempt during the trial rather than awaiting the end of the trial. The answer that is made (by the majority) to this obvious . . . adjuration is that "[s]ummary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review." *** What this statement portends for the future of the Court's inveterate propensity to second-guess trial judges is, as they say, "anybody's guess."[466]

At the end of the Supreme Court's 1996 term, it handed down a decision concerning "petty" versus "serious" crimes and the Sixth Amendment's jury trial requirement.[467] In order to avoid, it is submitted, an implosion of American criminal justice with a decision that would have put virtually everyone on jury duty under another constitutional interpretation of the Sixth Amendment's jury trial requirement—while simultaneously keeping lawyer Codispoti's precedent intact for contempt purposes—the court engaged in historical-textual revisionism as assisted by the plainly erroneous notion that "immediate-view-and-presence" contempts, if adjudicated after trial, require a jury trial if, in the aggregate, th punishment actually imposed exceeds six months. "In such a situation, where the legislature has not specified a maximum penalty, courts use the

466 *Id*. at 537–38 (emphasis added) (citation omitted). Examples of what is submitted to be the result of confusion stemming from the court's decisions are *U.S. v. Lumumba*, 741 F.2d 12 (2d Cir. 1984), *criticized on remand*, 603 F. Supp. 913 (S.D.N.Y. 1985), and *U.S. v. Stratton*, 779 F.2d 820 (2d Cir. 1985). "Anybody's guess" is illustrated by *Caruso v. Wetzel*, 33 A.D.3d 161 (1st Dep't 2006), which reverted back to *Sacher* and glided by *Taylor*. Moreover, the Appellate Division ignored those portions of its rules as necessary to reach an affirmance. Stephen Caruso on voir dire called the defendant a "scumbag" and left the courtroom when ordered and escorted out. The next day he was held in contempt. *Caruso* cannot be squared with *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974) (Eaton called the defendant a "chicken shit." The single isolated use of street vernacular not directed at the judge or any officer of the court cannot constitutionally support the conviction of criminal contempt.).

467 *Lewis v. U.S.*, 518 U.S. 322, 323–324 (1996).

severity of the penalty actually imposed as the measure of the character of the particular offense."[468] The majority, concurring and dissenting opinions are here quoted at length, so that—until further "explication" by the Supreme Court—both courts and counsel will have to judge their import for themselves.

In pertinent part, the opinion of Justice O'Connor—joined by Chief Justice Rehnquist and Justices Scalia, Souter and Thomas—reads:

> This case presents the question whether a defendant who is prosecuted in a single proceeding for multiple petty offenses has a constitutional right to a jury trial where the aggregate prison term authorized for the offenses exceeds six months.
>
> ***
>
> We conclude that no jury trial right exists where a defendant is prosecuted for multiple petty offenses. The Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged.[469]
>
> To determine whether an offense is properly characterized as "petty," courts at one time looked to the nature of the offense and whether it was triable by a jury at common law. Such determinations became difficult, because many statutory offenses lack common-law antecedents. Therefore, more recently, we have instead sought "objective indications of the seriousness with which society regards the offense." Now, to determine whether an offense is petty, we consider the maximum penalty attached to the offense. This criterion is considered the most relevant with which to assess the character of an offense, because it reveals the legislature's judgment about the offense's severity. "The judiciary should not substitute its judgment as to seriousness for that of a leg-

468 *Id.* at 328.

469 *Id.* at 323–24.

> islature, which is far better equipped to perform the task." In evaluating the seriousness of the offense, we place primary emphasis on the maximum prison term authorized. While penalties such as probation or a fine may infringe on a defendant's freedom, the deprivation of liberty imposed by imprisonment makes that penalty the best indicator of whether the legislature considered an offense to be "petty" or "serious."[470]
>
> An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious.[471]
>
> We face the question whether petitioner is nevertheless entitled to a jury trial, because he was tried in a single proceeding for two counts of the petty offense so that the potential aggregated penalty is 12 months' imprisonment.
>
> Petitioner argues that, where a defendant is charged with multiple petty offenses in a single prosecution, the Sixth Amendment requires that the aggregate potential penalty be the basis for determining whether a jury trial is required. Although each offense charged here was petty, petitioner faced a potential penalty of more than six months' imprisonment; and, of course, if any offense charged had authorized more than six months' imprisonment, he would have been entitled to a jury trial. The Court must look to the aggregate potential prison term to determine the existence of the jury-trial right, petitioner contends, not to the "petty" character of the offenses charged.
>
> We disagree. The Sixth Amendment reserves the jury trial right to defendants accused of serious crimes. As set forth above, we determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. Here, by setting the maximum authorized prison

470 *Id*. at 325–26 (citation omitted).

471 *Id*. at 326.

> term at six months, the Legislature categorized the offense of obstructing the mail as petty. The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply. We note that there is precedent at common law that a jury trial was not provided to a defendant charged with multiple petty offenses.[472]
>
> Petitioner nevertheless insists that a defendant is entitled to a jury trial whenever he faces a deprivation of liberty for a period exceeding six months, a proposition for which he cites our precedent establishing the six-months' prison sentence as the presumptive cut off for determining whether an offense is "petty" or "serious." To be sure, in the cases in which we sought to determine the line between "petty" and "serious" for Sixth Amendment purposes, we considered the severity of the authorized deprivation of liberty as an indicator of the legislature's appraisal of the offense. But it is now settled that a legislature's determination that an offense carries maximum prison terms of six months or less indicates its view that an offense is "petty." Where we have a judgment by the legislature that an *offense* is "petty," we do not look to the potential prison term faced by a *particular defendant* who is charged with more than one such petty offense. The maximum authorized penalty provides an "objective indicatio[n] of the seriousness with which society regards the offense," and it is that indication that is used to determine whether a jury trial is required, not the particularities of an individual case. Here, the penalty authorized by Congress manifests its judgment that the offense is petty, and the term of imprisonment faced by petitioner by virtue of the second count does not alter that fact.[473]
>
> Petitioner directs our attention to *Codispoti* for support for the assertion that the "aggregation of multiple petty offenses renders a prosecution serious for jury trial pur-

472 *Id.* at 326–27.

473 *Id.* at 327–28 (emphasis in original) (citation omitted).

> poses." *Codispoti* is inapposite. There, defendants were each convicted at a single, nonjury trial for several charges of criminal contempt. The Court was unable to determine the legislature's judgment of the character of that offense, however, because the legislature had not set a specific penalty for criminal contempt. In such a situation, where the legislature has not specified a maximum penalty, courts use the severity of the penalty actually imposed as the measure of the character of the particular offense.[474]
>
> Furthermore, *Codispoti* emphasized [the special concerns raised by the criminal contempt context]. Contempt "often strikes at the most vulnerable and human qualities of a judge's temperament. Even where the contempt is not a direct insult to the court . . . it frequently represents a rejection of judicial authority, or an interference with the judicial process . . ." In the face of courtroom disruption, a judge may have difficulty maintaining the detachment necessary for fair adjudication; at the same time, it is a judge who "determines which and how many acts of contempt the citation will cover," "determine[s] guilt or innocence absent a jury," and impose[s] the sentence. Therefore, *Codispoti* concluded that the concentration of power in the judge in the often heated contempt context presented the "very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate." The benefit of a jury trial, "as a protection against the arbitrary exercise of official power," was deemed particularly important in that context.[475]
>
> The absence of a legislative judgment about the offense's seriousness, coupled with the unique concerns presented in a criminal contempt case, persuaded us in *Codispoti* that, in those circumstances, the jury trial right should be determined by the aggregate penalties actually imposed. Codispoti was held to be entitled to a jury trial, because the sentence actually imposed on him for criminal contempt exceeded six months. By comparison, in *Taylor v.*

474 *Id*. at 328.

475 *Id*. at 328–29 (citation omitted).

> *Hayes*, which similarly involved a defendant convicted of criminal contempt in a jurisdiction where the legislature had not specified a penalty, we determined that the defendant was not entitled to a jury trial, because the sentence actually imposed for criminal contempt did not exceed six months. . . .
>
> Certainly the aggregate potential penalty faced by petitioner is of serious importance to him. But to determine whether an offense is serious for Sixth Amendment purposes, we look to the legislature's judgment, as evidenced by the maximum penalty authorized. Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply. As petitioner acknowledges, even if he were to prevail, the Government could properly circumvent the jury trial right by charging the counts in separate informations and trying them separately.
>
> The Constitution's guarantee of the right to a jury trial extends only to serious offenses, and petitioner was not charged with a serious offense. That he was tried for two counts of a petty offense, and therefore faced an aggregate potential term of imprisonment of more than six months, does not change the fact that the Legislature deemed this offense petty. Petitioner is not entitled to a jury trial.[476]

According to the concurrence,

> [t]his petitioner had no constitutional right to a jury trial because from the outset it was settled that he could be sentenced to no more than six months' imprisonment for his combined petty offenses. The particular outcome, however, should not obscure the greater consequence of today's unfortunate decision. The Court holds that a criminal defendant may be convicted of innumerable offenses in one proceeding and sentenced to any number of years' imprisonment, all without benefit of a jury trial, so long as no one of the offenses considered alone is pun-

476 *Id.* at 329–30.

> ishable by more than six months in prison. The holding both in its doctrinal formulation and in its practical effect is one of the most serious incursions on the right to jury trial in the Court's history, and it cannot be squared with our precedents. The Sixth Amendment guarantees a jury trial to a defendant charged with a serious crime.
>
> Serious crimes, for purposes of the Sixth Amendment, are defined to include any offense which carries a maximum penalty of more than six months in prison; the right to jury trial attaches to those crimes regardless of the sentence in fact imposed.
>
> This doctrine is not questioned here, but it does not define the outer limits of the right to trial by jury. Our cases establish a further proposition: The right to jury trial extends as well to a defendant who is sentenced in one proceeding to more than six months' imprisonment.
>
> To be more specific, a defendant is entitled to a jury if tried in a single proceeding for more than one petty offense when the combined sentences will exceed six months' imprisonment; taken together, the crimes then are considered serious for constitutional purposes, even if each is petty by itself.[477]
>
> The defendants in *Codispoti* and *Taylor* had been convicted of criminal contempt without juries in States where the legislatures had not set a maximum penalty for the crime. Taylor was convicted of nine separate contempts and sentenced to six months in prison. The Court held he was not entitled to a jury trial. Since the total sentence was only six months' imprisonment, the "eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required." Codispoti, by contrast, was convicted of seven contempts, and he was sentenced to six terms of six months' imprisonment and one term of three months' imprisonment, each to run consecutively—a total of 39

477 *Id*. at 330–31 (citation omitted) (Kennedy, J. & Breyer, J., concurring).

> months. We held he was entitled to a trial by jury because his aggregate sentence exceeded six months. In *Codispoti*, Pennsylvania made the same argument the United States makes today. It said no jury trial is required if the maximum punishment for each offense does not exceed six months in prison. We rejected the claim. . . .[478]
>
> The reasons the Court offers to distinguish these cases are not convincing. The Court first suggests *Codispoti's* holding turned on the absence of a statutory maximum sentence for criminal contempt. The absence of a statutory maximum sentence, however, has nothing whatever to do with whether a court must aggregate the penalties that are in fact imposed for each crime. Indeed, we know the open-ended penalty to which Codispoti was subject was not the reason he was entitled a jury trial because *Taylor*, decided the same day, held that a defendant who was subject to the same kind of open-ended sentencing was not entitled to trial by jury because the sentence he received did not in fact exceed six months. Taken together, *Codispoti* and *Taylor* stand for the proposition the Court now rejects: Sentences for petty offenses must be aggregated in determining whether a defendant is entitled to a jury trial.[479]
>
> The Court next suggests *Codispoti's* holding was based on "the special concerns raised by the criminal contempt context." The *Codispoti* Court was indeed cognizant of the need "to maintain order in the courtroom and the integrity of the trial process," and so approved summary conviction and sentencing for criminal contempt, "where the necessity of circumstances warrants." The Court made clear that under those circumstances, a judge may sentence a defendant to more than six months' imprisonment for more than one contempt without empanelling a jury. The Court went on to hold, however, that when the judge postpones the contempt trial until after the immediate proceedings have concluded, the "ordinary rudiments of due process" apply. The "ordinary" rule required

478 *Id.* at 331–32.

479 *Id.* at 332–33.

> aggregation of penalties, and because Codispoti's aggregated penalties exceeded six months' imprisonment, entitled him to a jury trial.
>
> In authorizing retroactive consideration of the punishment a defendant receives, the holdings of *Codispoti* and *Taylor* must not be confused with the line of cases entitling a defendant to a jury trial if he is charged with a crime punishable by more than six months' imprisonment, regardless of the sentence he in fact receives. The two lines of cases are consistent. Crimes punishable by sentences of more than six months are deemed by the community's social and ethical judgments to be serious.[480]
>
> As *Codispoti* recognizes, and as ought to be evident, the Sixth Amendment also serves the different and more practical purpose of preventing a court from effecting a most serious deprivation of liberty—ordering a defendant to prison for a substantial period of time—without the Government's persuading a jury that he belongs there. A deprivation of liberty so significant may be exacted if a defendant faces punishment for a series of crimes, each of which can be punished by no more than six months' imprisonment. The stakes for a defendant may then amount in the aggregate to many years in prison, in which case he must be entitled to interpose a jury between himself and the government. If the trial court rules at the outset that no more than six months' imprisonment will be imposed for the combined petty offenses, however, the liberty the jury serves to protect will not be endangered, and there is no corresponding right to jury trial.[481]
>
> Although *Codispoti* and *Taylor* are binding precedents, my conclusion rests also on a more fundamental point, one the Court refuses to confront: The [primary purpose of the jury in our legal system is to stand between the

480 *Id*. at 333–34.

481 *Id*. at 334–35.

> accused and the powers of the State].[482] The petitioner errs in the opposite direction. He argues a defendant is entitled to a jury trial whenever the penalties for the crimes charged combine to exceed six months' imprisonment, even if the trial judge rules that no more than six months' imprisonment will be imposed. We rejected this position in *Taylor*, however, and rightly so. A defendant charged with multiple petty offenses does not face the societal disapprobation attaching to conviction of a serious crime, and, so long as the trial judge rules at the outset that no more than six months' imprisonment will be imposed, the defendant does not face a serious deprivation of liberty. A judge who so rules is not withdrawing from a defendant a constitutional right to which he is entitled, as petitioner claims; the defendant is not entitled to the right to begin with if there is no potential for more than six months' imprisonment. The judge's statement has no independent force but only clarifies what would have been the law in its absence. *Codispoti* holds that a judge cannot impose a sentence exceeding six months' imprisonment for multiple petty offenses without conducting a jury trial, regardless of whether the judge announces that fact from bench.[483]

The two-Justice dissent stated that:

> [t]he majority attempts to distinguish *Codispoti* . . . by suggesting that the Court's decision in that case turned on the absence of any statutory measure of severity. That observation is certainly correct to a point: The contempt cases are special because the sentence actually imposed provides the only available yardstick by which to judge compliance with the command of the Sixth Amendment. But that unique aspect of the cases does not speak to the aggregation question. Having determined that the defendants in *Codispoti* were sentenced to no more than six months for any individual contempt, it would follow from the rule the Court announces today that a jury trial was unnecessary. Yet we reversed and remanded, holding that

482 *Id.* at 335.

483 *Id.* at 338.

> "each contemnor was tried for what was *equivalent* to a serious offense and was [therefore] entitled to a jury trial."[484]

> [The concurrence] reads a second contempt case, *Taylor v. Hayes*, as standing for the proposition that a judge may defeat the jury trial right by promising a short sentence. He is mistaken. The dispositive fact in *Taylor* was not that the prison term imposed was only six months but rather that the actual sentence, acting as a proxy for the legislative judgment, demonstrated that "the State itself has determined that the contempt is not so serious as to warrant more than a six-month sentence." In this case, by contrast, we have an explicit statutory expression of the legislative judgment that this prosecution is serious—the two offenses charged are punishable by a maximum prison sentence of 12 months.[485]

There is one commonality among the Justices in this latest foray into the "petty" versus "serious" offense area of criminal jurisprudence—a benign but generous distortion of the facts in *Codispoti* and *Taylor* coupled with a present certainty of their meaning when, at the time of their nativity, it was, as they say, "anyone's guess" as to what they meant.[486]

One detour around *Taylor* and *Codispoti* is as follows:

> Warn a contemnor at sidebar. Tell him that each courtroom contempt will result in an on-the-record "sanction" at sidebar and that the punishment imposed there and then is a day (or more) in jail. Thereafter, each contemptuous act is to be followed by a "sanctum" at sidebar, or even in front of the jury.[487]

484 *Id*. at 340–341 (Stevens, J. & Ginsburg, J., dissenting).

485 *Id*. at 341.

486 *Codispoti v. Pennsylvania*, 418 U.S. 506, 537–538 (1974) (Rehnquist, J., & Burger, C. J., dissenting).

487 *U.S. v. Cohen*, 510 F.3d 1114, 1121–1122 (9th Cir. 2007).

[1.29] XXX. SERIOUS CRIMINAL CONTEMPT FINES

Coal miner strikes make a lot of contempt law, as the U.S. Supreme Court case involving John L. Lewis and his United Mine Workers, decided in 1947, still illustrates.[488] They also make bad contempt law dressed up in constitutional language when the nine Justices, as has been urged in many contexts, entrust the nation's contempt jurisprudence to the knee-jerk "scholarship" of 24-year-old law clerks, that is, arrogant kids just out of law school.[489] In what was the swan song of Justice Harry Blackmun for a unanimous court, the Supreme Court decided, in another United Mine Workers case, that there was such a constitutional thing as a nonpenal law "*serious criminal contempt fine*," such that its imposition on the United Mine Workers would require a jury trial.[490] Pronouncing as it did 26 years before when it constitutionalized the jail-time limit for petty contempts at six months,[491] the court again declared that, "*criminal contempt is a crime in the ordinary sense*"[492]—a convenient cliché which never was and never will be analytically correct anymore than the Papacy's declaration that the Sun revolves around the Earth. Nevertheless, wrote the court, "*serious criminal contempt fines*" required a jury trial.

The court's reasoning was reasoning by default. The fines assessed against the United Mine Workers were "serious," said the Court, totaling $52 million. After noting in a footnote that it had previously held that a criminal contempt fine of $10,000 was petty,[493] Justice Blackmun stated that the court did not have to answer "the difficult question" as to where the line between petty and serious criminal contempt fines should be drawn since a $52 million fine was unquestionably a serious criminal contempt fine. Supreme Court opinions are supposed to provide answers, not create "difficult" but unanswered questions. With respect, courts are paid to answer questions, not create difficult ones. Emphatically, *any* appellate process worth its salt avoids raising a "difficult" question only to profess the lack of a need to answer it. *All* appellate courts should, as a matter of

488 *U.S. v. United Mine Workers*, 330 U.S. 258 (1947).

489 Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337, 415 (1998).

490 *Int'l Union–United Mine Workers v. Bagwell*, 512 U.S. 821 (1994).

491 *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

492 *Bagwell*, 512 U.S. at 826.

493 *Id.* at 837 n.5 (citing *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)).

sound policy, make a *bona fide* attempt to answer *any* and all questions that their opinions themselves create or crystalize—if for no other reason than to test the merits of their opinions. They should not confuse their need to answer a difficult question with what may well be their inability to answer it with analysis rather than ukase. Be this as it may, New York's Court of Appeals will eventually conform the state's jurisprudence to a new standard which is a complete mystery—a mystery because it is standardless and unmoored. It will have to overrule its own controlling precedent which is based upon what the Supreme Court held in 1968 (*infra*). In doing so it, and the rest of America, will thereafter have to struggle with a reality that the Supreme Court overlooked—one that it previously recognized: "*Imprisonment and fines are intrinsically different.*"[494] The Court of Appeals knew this truism. In 1968, Albert Shanker and his United Federation of Teachers were contemptuous of the courts. The court relied on the Supreme Court's first "criminal-contempts-are-crimes-in-the-ordinary-sense" decision for the proposition that a jury-trial requirement for a criminal contempt of court "turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence."[495]

Out of the blue, in 1989, the Second Circuit Court of Appeals decided, on its unsupported say-so, that a contempt fine of $100,000 on Twentieth Century Fox Film Corporation—box office receipts on the night of an earthquake in San Francisco—required a jury trial,[496] notwithstanding that it effectively said the opposite in 1974 with respect to IBM.[497] Unimpressed with the Second Circuit's *ipse dixit,* the Supreme Court ignored it in 1994 when it enunciated its serious-criminal-contempt fine doctrine. Without indication of exactly when, corporations and labor unions—which are economic conglomerates—were to have jury trials when they violated a court's order. It has been correctly assumed or implied that its doctrine must also apply to flesh and blood contemnors.[498] The Supreme Court's "say-so" was infallible because it was last but was no more principled than the Second Circuit's decision.

The line of demarcation between a "petty-*versus*-serious" criminal contempt fine is now assumedly somewhere between $10,000 and $52

494 *Muniz*, 422 U.S. at 477.

495 *Rankin v. Shanker*, 23 N.Y.2d 111, 119–20 (1968) (relying on *Bloom v. Illinois*, 391 U.S. 194 (1968)).

496 *U.S. v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 662, 665 (2d Cir. 1989).

497 *Int'l Bus. Machs. v. U.S.*, 493 F.2d 112 (2d Cir. 1974).

498 *Dep't of Hous. Pres. v. Deka Realty Corp.*, 208 A.D.2d 37, 46–49 (2d Dep't 1995).

million. Should the Supreme Court have put lawyers out of their suspense and merely picked a number—perhaps one gussied up with high-sounding phrases and statistical flapdoodle as it did—to an extent—33 years before when it drew the "jail line" separating petty from serious contempts at six months? The answer is negative. Unlike the Second Circuit, the Supreme Court was wise not to unwarrantedly jeopardize what credibility it has left in the area of contempt law generally[499] by picking a specific dollar amount out of thin air. Time and reflection may prove the better part of wisdom. Simply inventing a number might someday bring results making more of an ass of the law than even Dickens could tolerate. A criminal contempt fine of $10,000 is draconian to a man with a family and a mortgage. According to the Supreme Court, it is a petty fine. A fine of $100,000, which the Second Circuit declared to be serious, is picnic beer money to a multibillion dollar corporation or the teachers' unions.

Certain it is that the Supreme Court's serious-contempt-fine jurisprudence may be dangerous to the public health, safety and welfare—let alone the integrity of the law's process. Some reasons here follow. Criminal contempt by a labor union may cost the citizenry millions of dollars. It could cost some lives, innocent and otherwise, in the winter of a coal miner's strike when tempers get hot.

> Judiciary Law 751(2)(a), in part, provides that where an employee organization, as defined in . . . the civil service law, willfully disobeys a lawful mandate of a court of record, or willfully offers resistance to such lawful mandate, in a case involving or growing out of a strike in violation of . . . the civil service law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court.

This section of the law has been gutted by the Supreme Court's "petty-*versus*-serious-criminal contempt" jurisprudence. Courts will be well advised to fix their fines in the coercive mode rather than the punitive, that is, so many dollars per day that the strike continues or so many dollars per day until the strike stops. Perhaps casting the matter in coercive-remedial terms will take the matter out of the criminal and into the civil contempt

499 *See, e.g.*, *U.S. v. Dixon*, 509 U.S. 688 (1993). *Compare Sacher v. U.S.*, 343 U.S. 1 (1952), *with Taylor v. Hayes*, 418 U.S. 488 (1974), *and Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (as reinvented in *Lewis v. U.S.*, 518 U.S. 322 (1996). *Codispoti* does not explicitly overrule but rather ignores contradictory holdings from the Supreme Court in *U.S. v. Barnett*, 376 U.S. 681, 687, 692, 694–95, 697 (1964), *Green v. U.S.*, 356 U.S. 165, 183, 184–85, 187, 188 (1958) and *Eilenbecker v. Dist. Court of Plymouth Cnty.*, 134 U.S. 31, 36, 38, 39 (1890).

area despite the statute's use of the word "punishment."[500] Or suspend disbelief by dividing the serious fine by the union's membership thus fixing a petty fine on each member.[501]

Punishment in law deals with the past while simultaneously looking to the future. Necessarily, punishment that never really gets to punish—because of its procedural encumbrances—encourages that which it purports to punish. The law should expedite the criminal contempt fine process. It should save court and taxpayer resources by allowing for limited, controlled—but justly due—monetary punishments without a jury, such that enforcement of a judicial command affecting huge numbers of people does not choke on its own process or fall victim to juror nullification. Just as there are dangers posed by a judge acting alone, there are as many dangers presented by any group having the physical muscle and political clout to shut down a commuter railroad, or a subway system, or a city's school system safe in the knowledge that a jury-trial requirement will insulate it from real, certain and—most important—quick monetary punishment. No responsible person would argue the virtues of a jury dishonoring its oath by closing its eyes and ears to the law and the facts concerning the contemptuous conduct of a rogue labor union in the name of worker solidarity. Fact finder nullification of the law is neither exclusive nor unique. A judge on the other hand is neither labor nor management. History shows that nullification comes to the foreground repeatedly in theological-philosophical debates whose fora often include the streets. Witness the demagoguery and nullification often attending the abortion issue.[502]

Injunctions in labor disputes emanate from the equity side of the court. Anyone old enough to have struggled through a four-credit Equity course in law school knows that since the era of the English Chancellor's toe juries have found no abode on the equity side of a court. The Supreme Court has now compromised and confused the equitable process of enforcing injunctions. And the hard truth be known, the Supreme Court, until 1968, scoffed at the notion that a jury was in any way linked to nonpenal law criminal contempts of court. In the interests of the public's welfare, what the Supreme Court, as late as 1964, found good enough for bigoted and disobedient Jim Crow southern governors and traitorous Communists of Moscow's payroll should have remained good enough for

500 *N.Y.C. Transit Auth. v. Transit Union*, 35 A.D.3d 73 (2d Dep't 2006).

501 *Id.*

502 *See, e.g.*, *N.Y. State Org. for Women v. Terry*, 41 F.3d 794 (2d Cir. 1994).

lawless northern labor unions and megabuck capitalist corporations.[503] What the court found sufficient for Samuel Gompers[504] and Eugene V. Debs[505] should be constitutionally sufficient for Big Labor in the era of the Taft-Hartley Act. This in view, it will be interesting to learn whether the Supreme Court eventually decides to fix a number separating the petty from the serious fine or fashions a constitutional formula based on mathematical concepts of ratio and proportion. How much of a fine is serious punishment to an individual or entity for Sixth Amendment jury-trial purposes? When does a dollar amount go from a mere cost of doing business to a fine? Should the calculus differentiate between a pauper and a millionaire? *Does a fine become serious when it actually punishes?* A fine that does not sting is not punishment. It is a nuisance fee. Should a multibillion-dollar corporation disgorge more than just the illicit gain from its disobedience to a court mandate? Consider that even a bank charges interest. It is noted that corporations and labor unions, like peasants, must file tax and financial statements. With net worth as the calculus, a court could estimate how much of a fine would be serious to whom and thus determine whether a jury is required. This is a mere proposal. It is not an endorsement of continuing the fool's errand (*infra*) on which the Supreme Court has set labor-management relations in the nation—as now mediated through what was once a judiciary endowed by its very creation with meaningful contempt powers.[506]

"Criminal contempts are crimes in the ordinary sense?"[507] Criminal contempts of court are no more crimes in the ordinary sense than crimes are criminal contempts in the ordinary sense. "[C]ontempt proceedings are *sui generis* and should be treated as such in their practical incidence. They are not to be circumscribed by procedural formalities, or by the tra-

503 *See U.S. v. Barnett*, 376 U.S. 681, 687, 694–95, 697 (1964); *Green v. U.S.*, 356 U.S. 165, 183, 184–85, 187, 188 (1958), *cited with approval in Pounders v. Watson*, 521 U.S. 982 (1997); *Eilenbecker v. District Court of Plymouth Cnty.*, 134 U.S. 31, 36, 38, 39 (1890).

504 *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

505 *In re Debs*, 158 U.S. 564 (1895).

506 *N.Y.C. Transit Auth. v. Transit Union*, 35 A.D.3d 73, 89 (2d Dep't 2006) (violation of court order by large numbers of a union is attributable to union but total fine may be deemed spread among members *pro rata* to avoid serious-contempt-fine jury trial requirement) (citing *Pabst Brewing Co. v. Brewery Workers Local Union No. 77*, 555 F.2d 146, 152 (1977); *see also N.Y.C. Transit Auth. v. Transit Union*, 18 Misc. 3d 414 (Sup. Ct. New York Co. (2007) (affidavit of union president that merely parroted Taylor Law was insufficient to restore union's check-off privileges).

507 *Union–United Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)).

ditional limitations of what are *ordinarily called crimes*. . . .[508] "In brief, a court, enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land. . . ."[509] The number of cases from the Supreme Court, the federal circuits and New York's appellate courts which, for as much as 100 years prior to the day the Earl Warren Supreme Court plucked "crimes-in-the-ordinary-sense" from the sky, are legion.[510] Since that day in 1968, cases from the same courts have either explained away or ignored this cliché. The cliché is like the insane spouse in *Jane Eyre* to which the appellate courts are still married. Just one term before its serious-*versus*-petty contempt fine decision the Supreme Court resurrected this cliché for the first time in 25 years for affirmative action as the linchpin of a contempt opinion crafted to overrule its own "mistake"—as Justice Scalia termed it—in the form of a double jeopardy decision which was then only three years old.[511]

Crimes in the ordinary sense are passed by legislatures, not by courts. If nonpenal law criminal contempts of court were truly crimes in the ordinary sense legislatures could vote them out of existence and, by inescapable implication and consequence, the courts with them. A court without inherent criminal contempt power is not a court. It is advice wearing a black robe. That is why the moment a court is called into existence, whether by constitution or statute, it is inherently possessed of those powers necessary to its function and thus the preservation of its existence.[512] A court's existence is defined by its function, which is to adjudicate and order. It can do neither without inherent contempt powers. Those powers are criminal (punitive) and civil (coercive-remedial) contempt. As to the words, "ordinary sense" themselves—as in "crimes in the ordinary sense"—the Supreme Court has never defined them. Did and does the court now mean "ordinary sense" to be the common sense that is so ordinary that it constitutes nonsense? Up close, halitosis is a "crime in the ordinary sense." As the underpinning of its serious-*versus*-petty fine ratio-

508 *Penfield Co. of California v. SEC*, 330 U.S. 585, 609 (1947) (second emphasis added).

509 *In re Debs*, 158 U.S. at 596; *see also Justice v. Vail*, 430 U.S. 327, 335–36 (1977); *People ex rel. Sherwin v. Mead*, 92 N.Y. 415, 419–20 (1883).

510 *See, e.g.*, *supra* notes 13–16.

511 *See U.S. v. Dixon*, 509 U.S. 688 (1993), *overruling Grady v. Corbin*, 495 U.S. 508 (1990).

512 *U.S. v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812); *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204 (1821); *see also Bagwell*, 512 U.S. 821; *Chambers v. NASCO*, 501 U.S. 32, 42–46 (citing as authority *Hudson* and *Anderson*). *See generally Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337–47 (1998): Judiciary and Penal Law Contempt in New York: A Critical Analysis, Brook. J.L. & Pol'y 81, 82–90 (1994).

nale, the "crimes-in-the-ordinary-sense" cliché adds nothing to the Supreme Court's 1994 *United Mine Workers* decision.

For the egalitarians of this world, six months in jail visits equal justice upon both a rich man and a poor man. Picking a number for a serious fine, however, is as analytically different as it is problematic. Had the court's 1994 "serious-*versus*-petty" fine decision been decided in 1900, $100 today might require a jury trial—unless the court adjusted the number from time to time to keep pace with the rate of inflation. Should the court eventually be called upon to decide *the* dollar amount *per se* constituting a serious fine should it be offered the embarrassing suggestion that it tie the number to the Consumer Price Index? To pose this question is to answer it. If history is any indicator the Supreme Court will lock its "serious-crimes-in-the-ordinary-sense" cliché back in the attic whenever it threatens embarrassing results in future contempt cases.[513] It is only a matter of time before one or more of the justices jettisons the cliché as a basis of intelligible contempt jurisprudence.

The tragedy, when all is said and done, is that the nation's highest court need not have used a bad case to make bad law had it recognized a constitutional proposition that a second-year law student might have suggested. How so? The West Virginia trial court proceedings ultimately leading to the Supreme Court's serious-fine holding, as actually brought on initially and litigated thereafter, were *civil* and coercive, *not criminal and punitive.* Only *after* the parties had settled the strike did the trial court flip-flop and apparently decide that the state of West Virginia needed to recoup a lot of money spent on state troopers, and so forth. It then converted the *civil* into a *criminal* contempt proceeding in everything but name—as the Supreme Court *itself* carefully noted. Two indisputable elements of the Fifth and Fourteenth Amendments' due process clauses are notice and an opportunity to be heard at a time when it is meaningful to be heard. Richard Trumka's United Mine Workers suited up for one contest; the Mine Workers were scored on the basis of rules pertaining to another. There was no imperative for the court to go beyond its own "notice-and-opportunity-to-be-heard" jurisprudence. Equally, it had no overwhelming policy justification to ignore the common law of contempt which the United States Constitution subsumed "as is" under the Sixth Amendment. In Justice Felix Frankfurter's words, "[w]hatever the conflicting views of scholars in construing more or less dubious manuscripts of the Fourteenth Century, what is indisputable is that from the foundation of the United States the

513 *See, e.g.*, *Young v. U.S. ex rel. Vuitton*, 481 U.S. 787, 799–800 (1987).

constitutionality of the power to punish for contempt without the intervention of a jury has not been doubted."[514]

The Supreme Court may someday take another criminal-contempt-fine case and call its 1994 decision a mistake—maybe before the next coal miner, teacher, railroad or subway strike makes millions suffer while the law chokes on its own process. The court's last decision involving the United Mine Workers resulted in a decision which, it is urged, is a corporate-union marauder's dream and a potentially enduring public nightmare for 300 million Americans. Too much of a good thing is by definition a bad thing. This includes more jury process than is responsibly due to contemnors—especially in criminal contempt proceedings where none by history, constitution or Supreme Court precedent had been previously required. One court has already danced around the serious contempt fine jury trial requirement by claiming to spread a fine of $1,000,000 over a union's 33,000 members.[515]

[1.30] XXXI. A POSTSCRIPT ON CRIMINAL CONTEMPT AND JURY TRIALS

Recognizing their power but questioning their oath-restricted authority to do so, some U.S. Supreme Court Justices by bare majorities have—for the foreseeable future—succeeded in reinventing history by deliberately ignoring the Supreme Court's own prior decisions holding that nonpenal-law criminal contempts of court carrying incarcerational punishment for more than six months and/or fines which are "serious" (see below) do not require a jury trial. Three Supreme Court decisions are here excerpted because they put the fib to the modern-day creativeness which has made America's justice and its courtrooms what they are today. In 1890 the court stated:

> If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting

514 *Green v. U.S.*, 356 U.S. 165, 190 (1958) (Frankfurter, J., concurring).

515 *N.Y.C. Transit Auth. v. Transit Union*, 35 A.D.3d 73, 89 (2d Dep't 2006).

itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.[516]

[T]he opinions of this court show . . . conclusively what was the nature and extent of the power inherent in the courts of the states by virtue of their organization, and that the punishment which they were authorized to inflict for a disobedience to their writs and orders was ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the fourteenth amendment of the federal constitution was adopted; and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each state may have enacted for the government of its own courts.[517]

So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.[518]

Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding, and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitu-

516 *Eilenbecker v. District Court of Plymouth Cnty.*, 134 U.S. 31, 36 (1890).

517 *Id.* at 38.

518 *Id.* at 39.

> tion. We do not suppose that that provision of the constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.[519]

In 1958 the Supreme Court wrote that:

> The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right. . . . It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are "infamous crimes" under the Fifth Amendment although they are neither "crimes" nor "criminal prosecutions" for the purpose of jury trial within the meaning of Art. III, § 2, and the Sixth Amendment.[520]
>
> ***
>
> It is noteworthy that the Judiciary Act of 1789, first attempting a definition of the contempt power, was enacted by a Congress with a Judiciary Committee including members of the recent Constitutional Convention, who no doubt shared the prevailing views in the American Colonies of English law as expressed in Blackstone. Against this historical background, this Court has never deviated from the view that the constitutional guarantee of trial by jury for "crimes" and "criminal prosecutions" was not intended to reach to criminal contempts. And indeed beginning with the Judiciary Act of 1789, Congress has consistently preserved the summary nature of the contempt power in the Act of 1831 and its statutory successors, departing from this traditional notion only in

519 *Id.*

520 *Green v. U.S.*, 356 U.S. 165, 183, 184–85 (1958) (Harlon, J.) *cited in Pounders v. Watson*, 521 U.S. 982 (1997).

> specific instances where it has provided for jury trial for certain categories of contempt.[521]
>
> [C]riminal contempts have always differed from the usual statutory crime under federal law. As to trial by jury and indictment by grand jury, they possess a unique character under the Constitution.[522]
>
> ***
>
> The answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision, not in imposition of artificial limitations on the power.[523]

In 1964, the Supreme Court gave a history of the judicial contempt power along with a state-by-state appendix to prove its point against Arkansas Governor Ross Barnett.

> The First Congress in the Judiciary Act of 1789 conferred on federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ." 1 Stat. 83. It is undisputed that this Act gave federal courts the discretionary power to punish for contempt as that power was known to the common law. In 1831, after the unsuccessful impeachment proceedings against Judge Peck, the Congress restricted the power of federal courts to inflict summary punishment for contempt to misbehavior "in the presence of said court, or [misbehavior] so near thereto as to obstruct the administration of justice," misbehavior of court officers in official matters, and disobedience or resistance by any person to any lawful writ, process, order, rule, decree, or command of the courts.

521 *Id.* at 186–87 (citation omitted).

522 *Id.* at 187.

523 *Id.* at 188.

> Act of March 2, 1831. These provisions are now codified in 18 U.S.C. § 401 without material difference.[524]
>
> It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters. There were, of course, statutes enacted by some of the Colonies which provided trivial punishment in specific, but limited, instances.[525]
>
> But it cannot be said that these statutes set a standard permitting exercise of the summary contempt power only for offenses classified as trivial. Indeed, the short answer to this contention is the Judiciary Act of 1789 which provided that the courts of the United States shall have power to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." It will be remembered that this legislation was enacted by men familiar with the new Constitution.[526]
>
> ***
>
> Following [*United States v. Duane*, 25 Fed. Cas. 290] we have at least 50 cases of this Court that support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense. . . . It does appear true that since 1957 the penalties imposed in cases reaching this Court have increased appreciably. But those cases did not settle any constitutional questions as to the punishment imposed.[527]
>
> The jurisdiction to punish for a contempt is not denied as a general abstract proposition, as, of course, it could not be with success. . . ." The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and

524 *U.S. v. Barnett*, 376 U.S. 681, 687 (1964) (citation omitted) (footnote omitted).

525 *Id*. at 692–93.

526 *Id.* at 693.

527 *Id.* at 694–95.

> enforced, and their interest is not other than that they represent in every case.[528]

Regarding New York, the Supreme Court commented that New York's Charter of Liberties and Privileges (1683) guaranteed a jury trial. However, there was a specific exception from this jury requirement when the fault charged was a contempt.[529]

***

> Our research has uncovered no other statutory provision dealing with contempt in New York prior to the Constitution.[530]

The student of judicial contempt may wish to go back and compare these unequivocal pronouncements with those of the 1970s "squaring" this power with "due process." The law's supreme guardians held their inherent self-preserving power firm against the challenges of Jim Crow governors, but later became quite malleable in the hands of "Rambo lawyers" and those trendy "civil-rights," "political-prisoner" litigants of recent legend. Where the Supreme Court will go from here, is, as they say, "anybody's guess." If the concern lurking in the background was that "since 1957 the penalties imposed" for "immediate-view-and-presence" contempt "increased appreciably," that concern should have been one for the legislative branch. It is urged that the Supreme Court's *Mayberry*, *Taylor* and *Codisipoti* decisions were so driven.

[1.31] XXXII. JUDGE FRANK'S ANALYSIS OF THE SUMMARY CONTEMPT POWER

Whether the "immediate-view-and-presence-of-the-court" obstructionist contemnor be defendant, spectator, or, in particular, a lawyer, Judge Jerome Frank of the Second Circuit Court of Appeals, captured for all time not only the core logic of summary contempt but also how it may properly be used to keep a trial moving forward. All the high-sounding, content-empty and dubious phrases one can conjure up will not overcome the force of Judge Frank's logic arrayed against those who would contend

528 *Id.* at 697 (quoting *U.S. v. Shipp*, 203 U.S. 563, 574 (1906) (citation omitted)).

529 *Id.* at 714–15.

530 *Id.* at 715; *see also Dep't of Hous. Pres & Dev. v. Chance Equities, Inc.*, 135 Misc. 2d 375, 378–82 (Civ. Ct., N.Y. Co. 1987).

that summary punishment delayed is summary contempt power lost. Judge Frank is here quoted at length.

> This delay argument . . . takes several forms. Analysis is needed to expose its fallacies. It should first be noted that summary punishment necessarily has none but a future effect, for always that open-court obstruction or interruption of the court's business which justifies such punishment has, in the nature of things, already happened and cannot be prevented by any sort of punishment. No punishment, summary or otherwise, will undo the contempt, ever a thing of the past. Therefore, the exceptional power to punish summarily cannot be founded on the ability to forestall the punished behavior. Summary punishment, then, since its effect is wholly prospective, must be justified solely by the fact that it will tend to prevent future misconduct—either (1) in the future course of the same case or (2) in other future cases.[531]
>
> ***
>
> [O]n the mistaken assumption of fact that the case was closed when the judge summarily punished the lawyers, the following argument is advanced:
>
> Summary punishment is valid only if it will tend, by example, to stop future improper interruptions of the case then before the court—of the very same case in which the interruption happened. If, therefore, an in-court disturbance, no matter how shocking, is not immediately punished, and if, despite that disturbance, the case is not actually broken up but is able to reach its conclusion, summary punishment then imposed cannot serve its primary purpose—i.e., prevention (by example) of further interferences with that particular case—and is always forbidden. Never, it is contended, may the drastic summary method be used when its only possible value (aside from punishing the disturber) will be to deter, by example, similar interruptions of future cases.

531 *U.S. v. Sacher*, 182 F.2d 416, 456 (2d Cir. 1950) (Frank, J., concurring), *aff'd*, 343 U.S. 1 (1952).

> In blunt terms, that contention would have this surprising result: Suppose that, in a criminal case, the jury had brought in its verdict and had been discharged; that the trial judge had then at once heard and denied a motion for a new trial; and that he had then sentenced the defendant, thus ending the case. Suppose that, after the defendant and all participants in that case had departed, and while the judge was waiting, in open court, for another case to be called, someone in the courtroom, shouting that the judge was a tyrant, threw an inkbottle at him. According to this contention, the judge could not validly cite and punish the offender summarily, but would have to accord him a hearing, before another judge, with an opportunity to offer evidence. Why? Because the offense could not possibly disturb any case pending before the court, for there was none, and the summary punishment could do no more than to deter misconduct in other, later, cases.[532] A variant of the delay-argument runs as follows: Summary punishment must be instanter; it is invalid if postponed, even when the delay is not until the case's end. Thus, if the judge waits a day, or a week, or several weeks, he cannot punish summarily, although . . . the very same case is still in progress when he punishes.
>
> This argument puts a premium on hasty action. It means that the judge may act summarily only when he is least likely to be poised and temperate, that only then may he act without a hearing. Why such instant action is fairness or due process—adequately protective of the accused—and postponed action is not, remains unexplained by proponents of this contention. Curiously enough, those who (1) argue that such instant action is an indispensable condition of summary punishment also (2) counsel (and wisely) that the use of the summary power be narrowly circumscribed, for fear that the trial judge, in using it, may do so in haste, spurred to vindictiveness by the anger of the moment. I find it difficult to reconcile those two contentions: The first insists that summary punishment is not valid unless hasty. The second points to the potential danger of haste.

532 *Id.* at 456–57; *accord Pounders v. Watson*, 521 U.S. 982 (1997).

> There is such danger. Judges being human, may, on occasions, respond excessively to slight provocations, if they act impulsively. Where, as here, the judge waited and reflected before he acted, there is considerable assurance that impulsiveness could not have affected him.
>
> We are asked . . . to believe that the constitutional safeguards of judicial justice in the case of open-court contempts will be best preserved, and that "dictatorial authority" in the punishment of such contempts will be best avoided, if—what? If we instruct trial judges that summary punishment of such contempts must invariably be imposed at once, [this] means that trial judges may punish such contempts summarily when—and only when—they act in hot blood, i.e., in circumstances promoting, to the utmost, impatient, ill-considered judgment. We cannot accept that view. For it seems exactly upside-down.[533]

[1.32] XXXIII. CONTEMPTUOUS LAWYERS, DEFENDANTS, WITNESSES AND SPECTATORS

Contemptuous lawyers during jury trials, the courts have pointed out, present a special concern. The summary contempt power exists to control a courtroom. Its purpose is not to prejudice a defendant's right to a fair trial. But a judge is duty bound to keep a trial based on rules of evidence and civility moving forward. Consistent with case law and court rules, a judge need not wait until the end of trial to take action against the obstructive antics of counsel. If it must use its summary power it may do so by removing the jury from the courtroom, holding the contemptuous lawyer in contempt, imposing punishment and filling out a mandate to reflect the same. It can then stay its mandate until the end of the trial, return the jury to the courtroom and tell the chastened lawyer to proceed.[534] The same procedure may also be used in dealing with a contemptuous witness. So too, a defendant, with the added *advice* of Chief Justice Burger:

533 *Id*. at 459.

534 *Mangiatordi v. Hyman*, 106 A.D.2d 576 (2d Dep't 1984); *cf. Brodeur v. Levitt*, 285 A.D.2d 365 (1st Dep't 2001).

> The contempt power . . . is of limited utility in dealing with an incorrigible, a cunning psychopath, or an accused bent on frustrating the particular trial or undermining the processes of justice. For such as these, summary removal from the courtroom is the really effective remedy. Indeed it is one . . . where removal could well be a benefit to the accused in the sense that one episode of contemptuous conduct would be less likely to turn a jury against him than 11 episodes.[535]

Contemptuous courtroom spectators present none of the concerns attending lawyer, defendant or witness. Judge Breitel's words are most apposite.

> It is essential to the public trial that there be access to spectators, but any particular spectator is quite dispensable, as are all spectators if disorderly. What is essential is that spectators not be allowed or encouraged to inject themselves into the trial process, or to spawn time-consuming or distracting collateral proceedings to determine their responsibility for disorder in the courtroom.
>
> ***
>
> The court is not a public hall for the expression of views, nor is it a political arena or a street. It is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel. All others are absolutely silent non actors with the right only to use their eyes and ears. Any disorder in the courtroom, and specially that of spectators, can only be explained if the purpose is to destroy or impair the court's function. No society may tolerate such conduct so purposed unless it has lost both the will and the right to survive.[536]

What Judge Breitel essentially stated on the subject of disruptive courtroom spectators is that this class of contemnor, absolutely speaking and in

535 *Mayberry v. Pennsylvania*, 400 U.S. 455, 467 (1971) (Burger, C.J., concurring); *see also Taylor v. Illinois*, 484 U.S. 400, 413–14 (1988) ("The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years.").

536 *Katz v. Murtagh*, 28 N.Y.2d 234, 240 (1971) (emphasis added).

the nature of things, is ready fodder for the hoosegow. Caveat: Whether lawyer, witness, defendant or spectator, the Appellate Division Rules, First and Second Department, require that if a contempt in the immediate view and presence of the court is not punished as immediately as circumstances permit such contempt may then only be punished after notice and plenary hearing.[537]

[1.33] XXXIV. ATTORNEYS WHO DO NOT SHOW UP FOR COURT; THOSE WHO ARE ALWAYS LATE

An attorney's willful failure to appear in court or his persistent tardiness may be a contempt committed in the immediate view and presence of the court directly obstructing its business since, virtually without exception, no court can proceed with any matter without the attorneys for all parties being present. New York authority appears nonexistent, *albeit* New York attorneys are not particularly famous for their punctuality. Hence, resort is had to the facts and holdings of federal case law. May the truant or tardy attorney be punished for contempt summarily or must such punishment always be preceded by notice and hearing? *Ordinarily*, it must be on notice—but only as much as necessary to afford an appropriate hearing on the question of whether the attorney has a bona fide excuse for his absence.[538] The fact of absence or lateness coupled with the previously ordered appearance of counsel will be within the presence and personal knowledge of the offended court. But the underlying reasons, or lack thereof, will generally not be. *Mere* absence or lateness standing alone is not contempt. Absence or lateness may be the result of good cause or excusable neglect.[539] "Absence or tardiness alone is not contemptuous; the reasons for the failure to appear at the appointed time are of central importance.[540] Strict liability has no place here.[541] Some cases illustrate the point.

537 *Werlin v. Goldberg*, 129 A.D.2d 334, 336, 341–42 (2d Dep't 1987); *Zols v. Lakritz*, 74 Misc. 2d 322 (Sup. Ct., Queens Co. 1973) (Weinstein, J.).

538 *In re Karpf*, 88 Cal. Rptr. 895 (2d Dist. 1970); *Arthur v. Superior Court*, 42 Cal. Rptr. 441 (1965).

539 *Thyssen, Inc. v. S/S Chuen On*, 693 F.2d 1171 (5th Cir. 1982). *See generally U.S. v. Maynard*, 933 F.2d 918 (11th Cir. 1991); *In re Betts*, 927 F.2d 983 (7th Cir. 1991); *In re Allis*, 531 F.2d 1391 (9th Cir. 1976).

540 *In re Gates*, 600 F.3d 333, 339 (4th Cir. 2010).

541 *U.S. v. Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996).

Attorney Sykes was court-appointed counsel in a criminal case. At his request it was continued to a later date for commencement of trial. Relying on his memory rather than his notebook, he went to a different courthouse on the adjourned date to argue an appeal. He simply forgot the trial and was not reminded of it by his youthful secretary who forgot to tell him of a reminding phone call she had received from the trial court earlier that morning. In reversing the contempt citation, the appellate court held that while "the requisite intent may . . . be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty," Sykes's conduct was here neither intentional nor its reckless equivalent. "The specter of default because of forgetfulness or confusion haunts the dreams of every trial lawyer."[542] Faulty memory which escapes secretarial rescue—so long as it does not become a glaring habit—is not intentionally contemptuous conduct.[543] But the excuse has limits, especially when a lawyer has been warned "time and time again about being on time" for court. In a given case, the record may justify a conclusion of reckless or contemptuously willful disregard of a court's order to appear and to appear on time.[544] This is not to imply that the law favors judges (or their secretaries!) who are unreasonably exacting in their demands on lawyers who are simultaneously trying to competently represent all their clients and satisfy their responsibilities to other judges.[545]

Lawyer Baldwin refused to appear on the adjourned date of an ongoing trial for religious reasons and so advised the judge *beforehand*. His nonappearance on the adjourned date was a contempt committed in the immediate view and presence of the court permitting summary adjudication in his absence. He had already told the court *why* he would not be there.[546] Lawyer Agajanian's contempt in the court's presence consisted of his "failure to appear for trial without excuse and [his] incomplete and misleading statements to the court" in explanation thereof.[547] The antics of lawyer Farquhar prompted one jurist, in 1973, to lament:

542 *Sykes v. U.S.*, 444 F.2d 928, 930 (D.C. Cir. 1971).

543 *In re Adams*, 505 F.2d 949 (5th Cir. 1974).

544 *In re Niblack*, 476 F.2d 930 (D.C. Cir. 1973); *cf. In re Allis*, 531 F.2d 1391 (9th Cir. 1976).

545 *In re Monroe*, 532 F.2d 424 (5th Cir. 1976); *In re Gates*, 478 F.2d 998 (D.C. Cir. 1973); *In re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973); *In re Marshall*, 423 F.2d 1130 (5th Cir. 1970).

546 *U.S. v. Baldwin*, 770 F.2d 1550 (11th Cir. 1985), *cited in U.S. v. KS & W Offshore Eng'g, Inc.*, 932 F.2d 906, 909 (11th Cir. 1991).

547 *U.S. v. Agajanian*, 852 F.2d 56, 59 (2d Cir. 1988).

> Disrespect for our system of justice is rampant. One reason for this is the public's all too accurate knowledge of the laxity in the courts, laxity in decorum, laxity in the conduct of judges, laxity in the firm disposition of convicted criminals, laxity in the conduct of attorneys toward the court. The most fundamental primary principle would seem to be that a court's direct order to an attorney, an officer of the court [to appear on time], must be obeyed. If no degree of firmness is shown in enforcing this, what else can be enforced in the courtroom?[548]

Have matters become better or worse? That depends on one's point of view. And depending on one's point of view, Federal District Court Judge Kevin Duffy may have solidified old ground or broken new ground on the hide of a lawyer named Rojas who represented one of 15 defendants in a drug case. On June 6, 1994, Rojas appeared at a pretrial conference. Trial was ordered for June 27th but a conflict of interest disclosed later that day caused the court to schedule a hearing on the 23rd to ascertain whether Rojas could remain on the case. Numerous telephone and pager attempts to contact Rojas failed. An overnight letter was mailed to him. Rojas did not appear and the conflict-of-interest hearing was moved up to the 27th—the previously scheduled trial date. Rojas did not appear. July 5th was now the trial date. "Pursuant to the court's instructions, the government sent an overnight letter to Rojas advising him that a warrant would be issued for his arrest should he fail to appear . . . and Judge Duffy issued a warrant . . . for [his] arrest."[549] On July 11th the federal marshals found Rojas in the state courthouse and arrested him—a search of his person yielded his pocket diary with the original June 27th trial date clearly indicated.

At his contempt hearing, Rojas conceded that he had not been present for the scheduled court dates. Though advised by his wife-secretary that he had received mail, Rojas made no effort to determine its contents. He also claimed that he had misread his date book. Claiming to have been on trial in state court on the 27th, Rojas made no effort to contact Judge Duffy. He sought to shift blame to his wife-secretary.

> At the conclusion of the hearing, Judge Duffy found that Rojas had acted in reckless disregard of his responsibili-

548 *In re Farquhar*, 492 F.2d 561, 565 (D.C. Cir. 1973) (Wilkey, J., dissenting) (footnote omitted).

549 *Rojas v. U.S.*, 55 F.3d 61, 62 (2d Cir. 1995).

> ties as an attorney and in willful contempt of the court's scheduling order. After several delays caused by Rojas' failure to appear for interviews with the Probation Office, [Judge Duffy] sentenced Rojas to a three-month term of imprisonment."[550]

In affirming, the Second Circuit Court of Appeals held that willful (that is, intentional) disobedience of a court's scheduling order "may be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty."[551] Regardless of a valid time conflict, an attorney is obliged to seek an adjournment if he is unable to make his scheduled appearances in federal court. On appeal "great deference" must be given to a trial judge's credibility assessments.[552] Alas, points of view are irrelevant where the law is its own measure of right and wrong.

A U.S. Supreme Court decision concerning a lawyer named "Waco" is worthy of note.

> Waco alleged that, after he failed to appear for the initial call of Judge Mireles' morning calendar, the judge, "angered by the absence of attorneys from his courtroom," ordered the police officer defendants "to forcibly and with excessive force seize and bring plaintiff into his courtroom." The officers allegedly "by means of unreasonable force and violence seize[d] plaintiff and remove[d] him backwards" from another courtroom where he was waiting to appear, cursed him, and called him "vulgar and offensive names," then "without necessity, slammed" him through the doors and swinging gates into Judge Mireles' courtroom.[553]

In *dicta*, the court stated that a "judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge" and ordering excessive force would be an excess of authority otherwise possessed—but *not* one taken by a judge acting non-

550 *Id.* at 63.

551 *Id.* (quoting *In re Levine*, 27 F.3d 594, 596 (D.C. Cir. 1994)).

552 *Id.*; *see also U.S. v. Linney*, 134 F.3d 274 (4th Cir. 1998).

553 *Mireles v. Waco*, 502 U.S. 9, 10 (1991).

judicially or "in the complete absence of all jurisdiction" such as to expose him to suit or liability.[554]

It may be that things are going to change for New York lawyers who do not show up for court or are habitually late. Under court rule and appellate authority, they may be making forced contributions to the Client's Security Fund as a *sanction* against them even when their derelictions fall short of contempt.[555]

Finally, for those trial lawyers who posture and threaten to walk off a case if the presiding judge does not obey them and change his or her ruling, there are these words from the Appellate Division, First Department:

> We have no reason to doubt the sincerity of the appellant's declaration that his conduct in connection with the unfortunate incident, which has been the subject of examination on this appeal, was inspired by what he believed to be his duty to his client and that he had no intention to reflect upon the judge of the Court of Sessions, whose direction he disobeyed. His persistency in seeking to have the court reverse a ruling time and again made was, doubtless, prompted by zeal, but at the same time under a very mistaken apprehension of what his duty really required. Where, through an honest but erroneous conception of duty counsel transcends the proprieties of a trial, an ample apology and expression of regret would ordinarily be sufficient to condone the offense or to call forth only a reprimand, but here the repeated efforts of counsel to compel the court to do that which it had positively declined to do and the abrupt desertion of the case in the midst of the trial because he could not coerce the court into compliance with his request was something

554 *Id.* at 12.

555 22 N.Y.C.R.R. pt. 130; *Lapidus v. Vann*, 112 F.3d 91, 96–97 (2d Cir. 1997); *In re A. G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1 (1986); *People v. Rodriguez*, 180 A.D.2d 578 (1st Dep't 1992); *Marcus v. Bamberger*, 180 A.D.2d 533 (1st Dep't 1992); *Rosenman Colin Freund & Lewis v. Edelman*, 165 A.D.2d 533 (1st Dep't 1991); *Gabrelian v. Gabrelian*, 108 A.D.2d 445 (2d Dep't 1985); *Volkell v. Volkell*, 112 A.D.2d 293 (2d Dep't 1985); *LTown Ltd. P'ship v. Sire Plan, Inc.*, 108 A.D. 2d 435 (2d Dep't 1985), *aff'd as modified*, 69 N.Y.2d 670 (1986); *People v. McPherson (In re Gurwitch)*, 174 Misc. 2d 948 (App. Term 1997), *aff'd*, 256 A.D.2d 180 (1st Dep't 1998); *Valdez v. Cibulski*, 171 Misc. 2d 49 (Sup. Ct., Queens Co. 1996) (Lonschein, J.), *aff'd*, 248 A.D.2d 707 (2d Dep't 1998); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397 (1975).

> which demanded more than a simple reprimand. The attitude taken by counsel was such as must necessarily have impressed the jurors and others attending the court with the idea that the judge had deprived a prisoner on trial of a substantial right and had hence acted in an arbitrary manner. If the court were wrong in its ruling (and we are not called upon now to determine whether it was or not) an adequate remedy was afforded by the law.[556]

It has been said that there is "no reason to treat an attorney who fails to appear to ask questions more leniently than a witness who refuses to answer questions."[557]

[1.34] XXXV. CONTEMPT AND COURT JURISDICTION

Contempt is predicated on the violation of a legal duty, not a moral obligation.[558] If a court does not have subject matter jurisdiction, its order need not be obeyed.[559] This is a proposition as simple to state as it may be "chicken-and-the-egg" vexing to apply and live under. The distinction between subject matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests on the principle that courts have bounds to their authority, many of which are designed to protect the citizen against the abuse of judicial authority which is as pernicious as any today. The courts, like the political branches of our government—probably even more so because of tenure too long— must respect the limits of their authority.[560] A judge who knowingly and intentionally exceeds his powers or abjures his duty is acting in violation of his oath of office and should be impeached the same as any other official.

A court's order does not bind non-parties merely having knowledge of it. To be not so much bound as accountable in law, non-parties must be servants or agents of the parties, or, with knowledge of the order's terms,

556 *People ex rel. Chanler v. Newburger*, 98 A.D. 92, 92–93 (1st Dep't 1904); *see also In re Murphy*, 211 A.D.2d 228 (2d Dep't 1995) (lawyer who failed to return during jury trial requiring judge to declare a mistrial, suspended for one year).

557 *U.S. v. Baldwin*, 770 F.2d 1550, 1555 (11th Cir. 1985).

558 *In re Doyle*, 257 N.Y. 244, 265–266 (1931) (Cardozo, C.J.).

559 *People v. Sturtevant*, 9 N.Y. at 263, 265 (1853).

560 *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 77 (1988).

acting collusively with parties in disobedience to it.[561] But even a court ultimately held to have no subject matter jurisdiction has the power to issue a restraining order to preserve existing conditions pending a decision on its jurisdiction. When a court issues an order pending a determination of whether it has jurisdiction of a cause, it must provide for a determination either way. Until it determines its jurisdiction, it has authority generated by the necessity of the situation itself to issue such order or orders as are necessary to preserve the *status quo*. A party who, in the interim, makes a private determination of the law and disobeys such an interim order acts at his peril for contempt purposes.[562] If, ultimately, an order is confirmed to have been void on its face, transparently invalid, frivolous or some other semantic equivalent, the party who made his own private determination of the law is not punishable by contempt for he in retrospect, was never bound to obey in the first place.[563] If the decision goes against him, he will be punished for his contempt. Having called the law's shot wrong, he is held accountable for intentional disobedience even if his belief in the order's invalidity was the product of good-faith ignorance and a bad law school. Court orders for policy reasons are accorded a special status in American jurisprudence—only where a court lacks subject matter jurisdiction, or, its order is facially void, may a party disobey and later defend by challenging its underlying validity.[564]

Once a court issues an order to a party over whom it has *in personam jurisdiction,* in a matter in which it has subject matter jurisdiction, that order's command remains with the person no matter where he goes afterward.[565] As for contempt proceedings themselves, there is a presumption of subject matter jurisdiction over the contempt.[566]

[1.35] XXXVI. THE COLLATERAL BAR RULE

Said the Court of Appeals in 1873:

> The order . . . was in accordance with and in execution of the judgment under which the premises were sold, and

561 *State Univ. v. Denton,* 35 A.D.2d 176 (4th Dep't 1970).

562 *U.S. v. United Mine Workers*, 330 U.S. 258, 292, 293 (1947).

563 *Walker v. City of Birmingham*, 388 U.S. 308, 315 (1967); *State v. C.O.R.E.*, 92 A.D.2d 815, 817 (1st Dep't 1983).

564 *Valalis v. Shawmut Corp*., 925 F.2d 34, 36–37 (1st Cir. 1991).

565 *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 488, 251–252 (1932).

566 *Ex parte Cuddy*, 131 U.S. 280, 286 (1889).

> was within the jurisdiction of the court. If it was improvidently or erroneously granted, the remedy of the party aggrieved was by application to vacate it, or by appeal. It is not void, and it cannot be reviewed upon an application to punish for a disobedience of it. So long as it remains in force the duty of all parties is to obey it, and the merits of the order are not reviewable. Neither is it a defense in proceedings to punish for a contempt that an appeal has been taken from the order. If the proceedings have not been stayed, the party has a right to take every step for the enforcement of his civil remedy that he might if no appeal was taken.[567]

The collateral bar rule, which governs *criminal* contempts only, starts with the imperative that one must comply with a court's order, regardless of its correctness, unless it is stayed or reversed. From this imperative flows the rule: An appeal from, or collateral attack on, a *criminal* contempt may not be used for the first time to go behind a court's mandate in order to challenge its underlying validity. The rule has five exceptions. First, the court issuing the order must have personal and subject matter jurisdiction, or enough colorable jurisdiction to decide whether it has such jurisdiction. Second, the rule presupposes that adequate and orderly review procedures are in place to challenge the order—pre or post issuance. Third, the order must not require the irretrievable surrender of a constitutional right. Fourth, transparently frivolous or void orders need not be obeyed. Fifth, the order must not require, without an opportunity to contest it in advance, the surrender of privileged communications.[568] *Note* that, "[t]he line between a transparently invalid order and one that is merely invalid is . . . not always distinct. In order to protect the judiciary's power . . . we must indulge, in criminal contempt cases, a heavy presump-

567 *People ex rel. Day v. Bergen*, 53 N.Y. 404, 410 (1873); *see also Land v. Dollar*, 190 F.2d 366, 373, 379 (D.C. Cir. 1951).

568 *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 386 (1980); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439–40 (1976); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. City of Birmingham*, 388 U.S. 307, 320–21 (1967); *In re Green*, 369 U.S. 689 (1962); *U.S. v. United Mine Workers*, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922); *U.S. v. Shipp*, 203 U.S. 563 (1906); *Ketchum v. Edwards*, 153 N.Y. 534 (1897); *Daly v. Amberg*, 126 N.Y. 490 (1891); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 408–409 (1882); *Chase Manhattan Bank, N.A. v. Fed. Chandros, Inc.*, 148 A.D.2d 567 (2d Dep't 1989); *Seril v. Belnord Tenants Ass'n*, 139 A.D.2d 401 (1st Dep't 1988); *Kampf v. Worth*, 108 A.D.2d 841, 842 (2d Dep't 1985); *State v. C.O.R.E.*, 92 A.D.2d 815; *In re Cost*, 198 Misc. 782, 783 (Sup. Ct., Nassau Co.), *aff'd on opn below*, 277 A.D. 1049 (2d Dep't 1950), *aff'd*, 304 N.Y. 800 (1952).

tion in favor of the validity of every court order."[569] Plagiarizing from some of history's most respected jurists, the reasons for the *criminal* contempt collateral bar rule are: to discourage experimentation with disobedience, to vindicate the principles that no man may be the judge of his own cause and that ours is a government of laws not of men, and to deny protection to those who would ignore the procedures of the law and carry their battles into the streets. Respect for judicial process is a small price to pay for the civilizing hand of law. For those who unthinkingly react to the collateral bar rule as a mere procedural nicety, the simple but very lawyer-like reply is that, "[b]y definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases."[570] As enforced by the collateral bar rule, the law applauds the judicial process but abhors self-help.

In very sharp contrast, the collateral bar rule does not apply to civil contempt. The validity of the underlying order disobeyed is always a defense to a *civil* contempt. For instance, where a court lacks subject matter jurisdiction to grant a particular type of relief, as later ruled on appeal for the first time, it also lacks the authority to issue an order for the benefit of a private suitor upon which a civil contempt might be predicated.[571] "Though it may be seen at first that denying a defense in a criminal case and granting it in a civil one reverses our usual priorities, the distinction is sound, for it rests on the different purposes and necessities of the two types of orders."[572] "Given that civil contempt is designed to coerce compliance with the court's decree, it is logical that the order itself should fall with a showing that the court was without authority to enter the decree."[573]

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569 *In re Novak*, 932 F.2d 1397, 1403 (11th Cir. 1991) (internal quotation omitted) (citation omitted).

570 *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319 (1988).

571 *U.S. Catholic Conference v. Abortion Rights Mobilizations, Inc.*, 487 U.S. 72 (1988); *Tekkno Labs., Inc. v. Perales*, 933 F.2d 1093, 1099 (2d Cir. 1991); *In re Establishment Inspection of Hern Iron Works*, 881 F.2d 722, 726 n.11 (9th Cir. 1989); *Bachman v. Harrington*, 184 N.Y. 458, 462, 466–67 (1906).

572 *U.S. Catholic Conference*, 487 U.S. at 79 (Scalia, J., concurring).

573 *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992); *Brinkley v. Brinkley*, 47 N.Y. 40 (1871).

[1.36] XXXVII. ADVICE OF COUNSEL AND CRIMINAL CONTEMPT

One accused of criminal contempt may not offer the defense that his disobedience was the result of his reliance on the advice of counsel. The reasons for this proscription are as profound as they are fundamental.

> The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. . . . "A government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat governmental *or private power.* Every act of government may be challenged by an appeal to law, as finally pronounced by [the Supreme] Court. Even [the Supreme] Court has the last say only for a time.[574]

"No one, no matter how exalted his public office or how righteous his private motive, can be the judge of his own case. That is what courts are for."[575] One may not, without potentially punitive consequences, manifest the justice of his own cause by disobeying a court's order which he perceives to be unlawful, erroneous or not binding. Such disobedience, predicated on advice of counsel, stands on no holier ground. As applied to subpoenas, for instance, allowing an "advice of counsel" defense to disobedience thereof would nullify "the sound public policy that each individual, by himself, shoulder the responsibility for obeying the law."[576] "Advice of counsel" is not even relevant on the issue of intent because, at best, it merely supplies a reason—unacceptable in law—for intentional disobedience. If the rule were otherwise, "a nation of laws," as manifested through its judicial process, it would soon fall victim to evil doers mistakenly advised by lawyers that it is legal to rob banks. Similarly, "a nation of laws" would fall before the conscience of those basing their disobedi-

574 *U.S. v. United Mine Workers*, 330 U.S. 258, 307–308 (1947) (Frankfurter, J., concurring) (emphasis added).

575 *Id.* at 308–309; *see also Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967).

576 *Butterly & Green, Inc. v. Lomenzo*, 36 N.Y.2d 250, 256–57 (1975).

ence on the Divine counseling of sincerely held religious beliefs.[577] One is responsible for one's own disobedience no matter how inspired or induced.[578]

"Advice of counsel" is, under *all* circumstances, a defense *so perfect* that a civilized jurisprudence could not tolerate it for a moment. It is the first step towards the law of the street. It is noted that for an attorney's advice to be admissible on any issue the client must first personally testify that he relied on that advice.[579]

[1.37] XXXVIII. APPEALABILITY AND SCOPE OF REVIEW OF CRIMINAL CONTEMPT

Judiciary Law criminal contempt jurisprudence is a chameleon shaped by interpreters who sometimes chameleonize it to camouflage results desired as being in law required. Its only enduring imperative is necessity, "mingled and confused" as it is, "by the use of fixed but ambiguous nomenclature."[580] Regarding appealability and the scope of review, criminal contempt's nature, character, form and overtones as variously expressed in result-specific case law are only so much clay, available for molding and defending a desired conclusion. They provide nothing of stable analytical worth concerning appealability as some examples readily attest.

Judiciary Law civil contempt is "penal in nature"[581] for exclusionary rule purposes. Judiciary Law criminal contempt is sometimes called "civil in nature" with its punishment described as "remedial and coercive."[582] And, although criminal contempt "may be charged in a civil proceeding," it possesses, by nomenclatorial implication, "criminal over-

577 *Sinclair v. U.S.*, 279 U.S. 263, 299 (1929); *Standard Sanitary Mfg. Co. v. U.S.*, 226 U.S. 29, 49 (1912); *Armour Packing Co. v. U.S.*, 209 U.S. 56, 85 (1908); *U.S. v. Remini*, 967 F.2d 754 (2d Cir. 1992); *People v. Marcus*, 261 N.Y. 268, 294 (1933); *People v. Dercole*, 72 A.D.2d 318, 334 (2d Dep't 1980); *People v. Woodruff*, 26 A.D.2d 236 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848 9 (1968); *People v. D'Amato*, 12 A.D.2d 439, 443–44 (1st Dep't 1961), *cited with approval in Butterly & Green, Inc.*, 36 N.Y.2d 250; *see also Evans v. Int'l Ins. Co.*, 168 A.D.2d 374 (1st Dep't 1990) (breach of a legal duty is not excused by reliance on advice of counsel).

578 *People v. Van Guilder*, 29 A.D.3d 1226, 1228 (3d Dep't 2006).

579 *People v. Lurie*, 249 A.D.2d 119, 124 (1st Dep't 1998).

580 *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 247 (1886).

581 *Village of Laurel Hollow v. Laverne Originals, Inc.*, 17 N.Y.2d 900, 901 (1966).

582 *People v. Colombo*, 29 N.Y.2d 1, 4, *vacated*, 405 U.S. 9 (1971).

tones."[583] Yet again, criminal contempt is criminal "for purposes of the Double Jeopardy Clause."[584] But this characterization may no longer be conclusive under all circumstances implicating that clause.[585] For purposes of the petty-offense-jury-trial standard, criminal contempts were conveniently dubbed "crimes in the ordinary sense,"[586] with later judicial pronouncements, time and again, rejecting any notion that nonpenal law criminal contempts are in fact crimes, much less criminal prosecutions.[587]

The description of Judiciary Law criminal contempt, which does seem immutable and seems to argue for its civil appealability by both petitioner and respondent, is that it is *a sui generis special proceeding* (historically and now brought on the civil side of a court) *which is procedurally governed by the Civil Practice Law and Rules* (references to which are laced throughout Judiciary Law article 19) and the inherent power of the courts to formulate and promulgate rules of practice.[588] This definition for purposes of the civil appealability and scope of review relating to a Judiciary Law criminal contempt, has firmer commendation in statute and case law than the hodgepodge created by those result-oriented contempt cases stretching, bending, pounding and labeling criminal contempt as either civil or criminal with various tenors, tones and shadings thereof. This is mind, two not-yet-explicitly answered questions are posed: Where a Judiciary Law criminal contempt arises out of a grand jury (hence criminal) proceeding, is the appeal governed by the Civil Practice Law and Rules or

583 *Goodman v. State*, 31 N.Y.2d 381, 385 (1972).

584 *Colombo v. N.Y.*, 405 U.S. 9, 11 (1971).

585 *U.S. v. Broce*, 488 U.S. 563, 575–76 (1989); *U.S. v. Ryan*, 810 F.2d 650 (7th Cir. 1987); *U.S. v. Gracia*, 755 F.2d 984, 987, 989 (2d Cir. 1985); *U.S. v. Esposito*, 633 F. Supp. 544 (S.D.N.Y. 1986).

586 *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

587 *Young v. U.S. ex rel. Vuitton Et Fils, S.A.*, 481 U.S. 787, 799–800 (1987); *Blackmer v. U.S.*, 284 U.S. 421, 440 (1932); *see generally Dep't of Hous. Pres. & Dev. v. Chance Equities, Inc.*, 135 Misc. 2d 375, 377–382 (Civil Ct., N.Y. Co. 1987).

588 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991); *People ex rel. Frank v. McCann*, 227 A.D. 57, 58 (1st Dep't 1929), *aff'd*, 253 N.Y. 221, 224 (1930); *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 449 (2d Dep't 1985); *N.Y.C. Health & Hospital Corp. v. Local 2507*, 139 Misc. 2d 67, 69 (Sup. Ct., N.Y. Co. 1988). Decisions such as *Kuriansky v. Azam*, 151 Misc. 2d 176 (Sup. Ct., Kings Co. 1991) (Gerges, J.), are *simply wrong* since they ignore binding precedent and misconstrue the very precedents and statutes they purport to rely on. Starting with its confusion of Medicaid with Medicare, *Azam* is a decision based on a desired result in search of a legal basis. If a Judiciary Law criminal contempt proceeding was a "criminal proceeding" under the CPL such—for one thing—would *not* be appealable under the CPL. Hundreds of proceedings over the last century have been appealed as civil appeals. What's more, "criminal proceedings" are not commenced by orders to show cause. At its most generous, *Azam* is a clumsy attempt to make "is" out of what the jurist thinks "ought" to be.

the Criminal Procedure Law which, by its own terms, strictly limits appeals to those specified therein?[589] Where a Judiciary Law criminal contempt arises out of a civil lawsuit on which side of the procedural ladder does the appeal go up? This is "a good question" according to one jurist.[590]

The answer, one which has concrete case law examples strongly suggesting it, and one which New York's appellate courts would be forced to adopt explicitly to justify their actions in a number of cases, is, as suggested, that Judiciary Law criminal contempts are civilly appealable because they are *sui generis* special proceedings using the civil modes—all of this because a "criminal" contempt brought on the civil side of the court is more accurately called a "*public*" contempt and is just as much civil as a "civil" contempt, which is likewise brought on the civil side of the court but more accurately labeled a "*private*" contempt.[591] Looked at this way—that is, "public" and "private" rather than "criminal" and "civil"—civil appealability and scope of review for Judiciary Law criminal contempts are not held hostage to, nor obscured by, the "fixed but ambiguous nomenclature" which only "mingles and confuse[s] things."[592]

Cases from the Appellate Division illustrate the point. In them, contempt applications denied by lower courts have been granted; so too the equivalent of contempt summary judgment. Jail has been ordered where *nisi prius* has abused its discretion in not imposing incarceration. On occasion, the Appellate Divisions have taken on the role of trial courts by finding contempt and imposing punishment themselves. They have also engaged in other forms of *sui generis* tinkering when a contempt has come before them. Such instances have involved both ends of the con-

589 *People v. Laing*, 79 N.Y.2d 166, 170 (1992); *In re Abe A.*, 56 N.Y.2d 288, 293 (1982); *Alphonso C. v. Morgenthau*, 38 N.Y.2d 923, 925 (1976); *Santangello v. People*, 38 N.Y.2d 536 (1976); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 406–407 (1882).

590 *People v. Doe*, 38 A.D.2d 905, 906 (1st Dep't 1972) (Kupferman, J., dissenting); *see also Nye v. U.S.*, 313 U.S. 33, 41–44 (1941). *See generally Cunningham v. Nadjari*, 39 N.Y. 314 (1976).

591 *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 249–50 (1886); *Gabrelian*, 108 A.D.2d at 450–51.

592 *People ex rel. Munsell*, 101 N.Y. at 247.

tempt stick and no case has been found limiting appeals to adjudicated criminal contempt contemnors.[593]

Justified by their inherent rule-making powers over the *sui generis* necessities which are criminal contempts, and fortified by their historic civil modes as brought into Judiciary Law article 19 from the old Code of Civil Procedure in 1909, the appellate courts have found their own way to civil appealability and scope of review. That path is here traced at length in the language of two old chestnuts which struggled with the subject and invited legislation. First the Court of Appeals:

> The Revised Statutes distinguished, and the Civil Code preserves the distinction, between criminal contempts, and proceedings as for contempt in civil cases. As it respects disobedience to the orders of a court, the sole difference appears to be that a "willful" disobedience is a criminal contempt, while a mere disobedience by which the right of a party to an action is defeated or hindered is treated otherwise. The conviction here was for a criminal contempt, the disobedience adjudged willful, and the permitted punishment imposed. (Civil Code, §§ 8 and 9.) It is now said that from such a conviction there is no appeal, because it is not a civil but a criminal special proceeding. It cannot be the latter, for the Code of Criminal Procedure does not recognize or provide for it. That describes what are called "special proceedings of a criminal nature," but criminal contempts are not among them. (Crim. Code, part 6, titles 1 to 11.) They appear and are regulated in the Civil Code. When they originate in the violation of an order, made, not by a criminal court, but by a civil court in a civil action, it is difficult to see how they can be anything else than the special proceedings defined in the Civil Code as civil special proceedings. That the willful contempt is denominated "criminal" does not make the proceeding by a civil court, having before it a civil action, to

593 *In re Crescenzi*, 146 A.D.2d 86 (1st Dep't 1989); *In re Anonymous*, 121 A.D.2d 417, 418 (2d Dep't 1986); *In re Barr*, 121 A.D.2d 324, 325 (1st Dep't 1986); *In re Quinn v. Werner*, 96 A.D.2d 1079 (2d Dep't 1983); *January 1979 Grand Jury v. Doe*, 84 A.D.2d 588 (3d Dep't 1981); *Ferrara v. Hynes*, 63 A.D.2d 675 (2d Dep't 1978); *People v. Belge*, 59 A.D.2d 307, 309 (4th Dep't 1977); *Sobotka v. Myers*, 50 A.D.2d 550 (1st Dep't 1975); *Schreiber v. Garden*, 152 A.D. 817 (1st Dep't 1912); *Schmohl v. Phillips*, 138 A.D. 279 (1st Dep't 1910); *Typothete v. Typographical Union No. 6*, 138 A.D. 293 (1st Dep't 1910); *Brown v. Braunstein*, 86 A.D. 499 (2d Dep't 1903).

> protect its dignity and compel respect for its mandates, any the less a civil special proceeding. If it is in a court having only civil jurisdiction, or on the civil side of a court having criminal jurisdiction also, it must be deemed a special proceeding within the meaning of . . . the Code of Civil Procedure . . . which permit[s] an appeal. But where a criminal court makes an order in a criminal proceeding pending before it, which is disobeyed, the process by which it vindicates its authority must be held to be not . . . a special proceeding as defined in the Code of Civil Procedure. Possibly in this latter class of cases there is no appeal. If it is best that there should be, the attention of the legislature should be directed to the subject. We, therefore, deny the motion to dismiss the present appeal.[594]

Thirty-two years later the Appellate Division, Second Department again addressed the subject:

> The only question presented by this record is whether the order adjudging said Hanbury guilty of contempt may be reviewed by a writ of certiorari or by a notice of appeal.
>
> Some confusion seems to have arisen as to the proper practice arising either from *dicta* in opinions or because the point as to the proper method of review was not raised. In some instances it has been reviewed by appeal, in others by a writ of certiorari. It makes little practical difference which shall be held to be the proper method, provided only that the practice respecting the same is settled and that it stays settled.
>
> It may assist in arriving at a correct determination of this question if we clearly apprehend the nature of the proceeding terminating in the order sought to be reviewed. "A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others: *** Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory." Conduct of which

594 *People ex. rel. Negus v. Dwyer*, 90 N.Y. at 406–407.

Hanbury has been found guilty may constitute a crime to be prosecuted by indictment. But the remedies by indictment and the imposition of a fine and imprisonment in a special proceeding for a criminal contempt may coexist. The distinction is made in our statute law between contempt termed "criminal" and that designated as "civil." Some confusion might have been avoided if the former had been termed "public" and the latter "private," since the former has to do with vindicating the dignity of the court which has been defied, while the latter has to do in part with recompensing the person injured by the contumacious conduct complained of. While the offense is in the nature of a crime, since in its origin it is a violation of public law, and in its punishment ends in the vindication of public justice, the procedure resulting in punishment for a criminal contempt is not a criminal prosecution which will prevent subsequent indictment, and, after conviction, sentence in a criminal action, nor will such conviction and sentence bar a subsequent prosecution and punishment by a special proceeding as a criminal contempt, notwithstanding the constitutional provision that "No person shall be subject to be twice put in jeopardy for the same offense."

We think that the proceeding to determine whether a person has been guilty of a public or criminal contempt by reason of his conduct in connection with the prosecution of civil action or special proceeding, and which is instituted by a warrant of attachment or an order to show cause, is a civil special proceeding and not a criminal one. . . .

If such is the character of this proceeding, then "A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record" and "Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued in either of the following cases: *** Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer."

It is not claimed that there is any special statutory authority for review by writ of certiorari in the case that we are

now considering. Sections 2121 and 2122 of the Code of Civil Procedure appear in article 7 of title 2 of chapter 16 of said Code. This article concludes as follows: "This article is not applicable to a writ of certiorari, brought to review a determination made in any criminal matter, except a criminal contempt of court." If we should concede that every contempt of court which is "criminal" according to the nomenclature of the statute is a "criminal matter" as the words are here used, this article would apply, and would prevent the issuing of a writ of certiorari at least if the determination may be reviewed by appeal.

Let us now consider the statutory provisions relative to an appeal in a civil special proceeding.

"An appeal may be taken, to the Appellate Division of the Supreme Court, from an order, affecting a substantial right, made in a special proceeding, at a Special Term or a Trial Term of the Supreme Court; or made by a justice thereof, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him."

We think, therefore, that under the circumstances here disclosed the determination as to the conduct of appellant was a final order affecting a substantial right made in a civil special proceeding. It cannot be reviewed, therefore, by certiorari, but can and must be reviewed by appeal.

Criminal contempt may also arise in connection with a civil action or a civil special proceeding when the offense was committed in the immediate view and presence of the court, and where the offender is summarily punished. In such case it may be that as in the first instance the only record containing any facts showing the particular circumstances of the offense is comprised in the recitals necessarily contained in the order of commitment a proceeding in the nature of a writ of certiorari is proper which shall compel a return by the court or judge making the adjudication, and where the original return is defective, a further

return setting forth all the facts. Such proceeding may be brought to a hearing upon the writ and the return and the papers upon which the writ was granted. We will determine that question when it arises. Criminal contempt may also occur in connection with criminal as well as civil actions. If the objectionable conduct arose in connection with a criminal trial or a criminal special proceeding, and if the criminal court or judge vindicated its or his authority, and inflicted punishment for contempt, whether in such case the writ of certiorari may be employed as a writ of review we need not now determine. In 1909 the provisions of the existing statute relating to criminal contempts were transferred from the Code of Civil Procedure to the Judiciary Law (§§ 750–52). Its language is sufficiently broad to include every court of record, both civil and criminal. In view of the change, some of the decisions formerly made with respect to contempts occurring in criminal courts may be no longer applicable.

In conclusion, we may refer to some of the cases in which the question here involved has been considered, either directly or incidentally. In *People ex rel. Mitchell v. Sheriff of New York* there is a *dictum* to the effect that an order committing a party for contempt, arising in connection with the conduct of a civil action, may not be reviewed by certiorari. *** In *People ex rel. Munsell v. Court of Oyer & Terminer*, the offense was committed in the court of or in connection with a criminal trial, and the proceedings to inflict punishment therefor were reviewed by certiorari. . . . In *Lathrop v. Clapp* it is not entirely clear whether the proceedings were to punish for a civil or a criminal contempt. The order contained no recital that the rights of any one in the supplementary proceeding had been impeded, impaired, prejudiced or defeated by defendant's misconduct, as would seem to be necessary if it was a civil contempt. This determination was reviewed by appeal. In [five cases], each of which was a proceeding for a criminal contempt, the order determining the fact of such contempt and imposing punishment therefor was reviewed by appeal. In *Boon v. McGucken* . . . the review of such order was appeal and not by certiorari. In *People ex rel. New York Society P.C.C. v. Gilmore,* although the proceeding for criminal contempt

arose in connection with a charge of misdemeanor, and it was held to be so far criminal in character that an unsuccessful relator was not chargeable with costs, the review was by appeal. In *Matter of Teitelbaum* the Appellate Division of the First Department did say: "The practice to review a proceeding adjudging a party guilty of a criminal contempt is not by appeal, but by certiorari." . . . Under the circumstances of that case the statement may have been correct. Teitelbaum had been summarily adjudged guilty of contempt committed in the presence of the court, during the course of the trial. He then made a motion, based upon his own affidavit, to vacate this order, which was denied, and he then appealed from both orders. The court said: "The record as thus made is not certified, either by the justice presiding or by any other officer, that the affidavit [appellant's affidavit used on the motion to vacate] contains all of the proceedings which were had before the justice or of the orders entered thereon. *** No court would be authorized to review the proceedings unless a record was made up, properly authenticated, and thereby enable the reviewing court to see what the actual case was upon which the court acted in adjudging the defendant guilty of contempt." If the language of the court as to the method of review is to be construed as applicable to every case of criminal contempt, no matter how or where it arises, we should not be inclined to follow it. *People ex rel. Palmieri v. Marean* was also a case of summary commitment for an offense committed in the presence of the court, and was reviewed by certiorari. In *People ex rel. Kuhne v. Burr* the offense was committed in connection with proceedings in a criminal court, to wit, the County Court of Kings County, although the hearing was had and the punishment imposed upon the civil side of the Supreme Court, the writ of habeas corpus which was disobeyed having been issued by a justice of that court. The accused both appealed and sued out a writ of certiorari, and the cases came on for hearing together. No stress was laid on the form of the procedure, and the decision was handed down in the certiorari proceeding. *People ex rel. Drake v. Andrews* was also a case where the alleged contempt arose in connection with a criminal proceeding. The Appellate Division reversed the order for commitment upon a writ of certiorari, upon the ground that the conceded facts did not

> constitute a criminal contempt. The decision in that case was reviewed in the Court of Appeals upon the merits, the order of the Appellate Division reversed and the relator remanded to custody. The question of the form of the procedure in which a hearing was had at the Appellate Division seems not to have been raised in that court. If certiorari was not the proper remedy the Court of Appeals would have been obliged to reverse the order of the court below. Instead of reversing upon any technical ground, it reversed upon the merits. [Eight other cases] were each of them a case of a civil and not a criminal contempt. Our attention has been called to no well-considered case, nor have we been able to discover any by our own industry, in which a criminal contempt was committed in connection with a civil action or a civil special proceeding and where the adjudication was not summary in character in which such adjudication has been reviewed in any other manner than by appeal. The general policy of the law as expressed in our statutes is to make this the only method of review when it is applicable.[595]

All that seems to be needed, it is one man's opinion, is one appellate court or the legislature stating that *all* nonpenal law criminal contempts, save those committed in the immediate view and presence of the court (article 78—certiorari), are civilly appealable—and thus by either side where appropriate, with the same scope of review. For example, if the facts show beyond a reasonable doubt in conformity with applicable law that a criminal contempt has been committed, it is an abuse of judicial power for a court not to hold a contemnor in contempt. Under the above postulate, there would be review and remedy on appeal for the People, or anyone else incidentally harmed.

[1.38] XXXIX. CIVIL CONTEMPT IS NOT AVAILABLE AGAINST A GRAND JURY WITNESS IN NEW YORK

Prosecutors in New York would love to have civil-coercive contempt as a weapon against recalcitrant grand jury witnesses. It is available in the federal system under 28 U.S.C. § 1826. At present, however, civil contempt in New York against a grand jury witness is not available either by statute or by any common-law evolution. What prosecutors semantically,

595 *Hanbury v. Benedict*, 160 A.D. 662, 664–70 (2d Dep't 1914) (citations omitted) (emphasis in original).

logically and otherwise argue "ought" to be is to no avail. Neither history, statute nor precedent is on their side. One jurist has written on this point. The reasoning, it is submitted, is as clear as the accuracy of its citations to authority. The opinion is here paraphrased with its citations footnoted.[596]

It is argued that disobedience of a grand jury subpoena and also disobedience of the order directing compliance therewith have "impaired, impeded," and "prejudiced" the grand jury investigation, [and] that the action on the motion to quash is a "special proceeding" and that a grand jury trying to conduct an investigation ought to have available to it the same remedies available to a party in a civil action or other special proceeding]. Whether or not such measures "ought" to be available is not the issue here. The issue here is whether the legislature has made them available. It has not made them available under Judiciary Law § 753. Pursuant to § 753(A) of the Judiciary Law, a court:

> has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
>
> ***
>
> 3. A party to the action or special proceeding for any disobedience to a lawful mandate of the court.
>
> ***
>
> 5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

Despite bewilderment that while criminal contempt is available, civil contempt, in this context, is not; recalcitrant grand jury witnesses would accept such a result in order to argue that if they cannot be held in civil contempt they cannot be held in criminal contempt because it has a higher standard of proof. Both stands miss the point. Although the same act may

596 *In re Grand Jury Subpoena–Morano's of Fifth Avenue, Inc.*, No. 9182/87, slip op. 1–5 (Sup. Ct., N.Y. Co. Mar. 1, 1988) (Soloff, J.), *rev'd on other grounds*, 144 A.D.2d 252 (1st Dep't), *motion for leave to appeal denied*, 73 N.Y.2d 1009 (1989).

be punishable as both a civil and a criminal contempt, not every contumacious act is punishable both civilly and criminally. And the distinction is not only in the standard of proof, but also in the nature of the wrong committed and the purpose of a holding of contempt.

> A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order. Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both. A criminal contempt, on the other hand, involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates. Unlike civil contempt, the aim in a criminal contempt proceeding is solely to punish the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory. In keeping with a civil contempt's distinct purpose, it must be established that the rights of a party to the litigation have been prejudiced. In a criminal contempt proceeding, no such showing is needed since the right of the private parties to the litigation is not the controlling factor.[597]

The first requirement, then, for a civil contempt, is that it must involve an individual, a private right. As explained by the Court of Appeals, the People may be an aggrieved party in a civil contempt context, but only when, like individuals, they are seeking a civil right or remedy which the misconduct complained of tends to defeat or impede; in other words, when they stand in the attitude of private suitors, seeking to enforce their private rights. Where, however, the rights of the People are the rights of public justice with a view to public safety and the offense is a public offense, the contempt is criminal in nature, not civil. Recognizing the requirements for a finding of civil contempt, prosecutors might attempt to place themselves, as a party to the action, in the position of an injured private party. They would argue that since a litigant to the most mundane and frivolous civil lawsuit has access to civil contempt as a remedy, they should also. However, such an allegation of injury goes only to the progress of the grand jury investigation. The prosecutor's office is not the equivalent of the grand jury which is an arm of the court. Nor is a prose-

597 *Dep't of Envtl. Prot. v. DEC*, 70 N.Y.2d 233 (1983).

cutor performing the same function as a private suitor, as the Office of the Attorney General sometimes does. The impairment of the functioning of the grand jury is a very serious offense, a public offense, not, however, the kind of misconduct that violates a private right or remedy owned by the prosecution office.

The next requirement for a civil contempt is that the right affected must belong to a party to a civil action or special proceeding. There is no dispute that a grand jury subpoena is issued in connection with a criminal proceeding. The argument is that a procedure to enforce compliance with the subpoena is a special proceeding, relying as it does, on a series of Court of Appeals cases having a peculiar analytical basis and asymmetrical support. These cases hold that an order denying a motion to quash a grand jury subpoena issued in the course of a criminal investigation and prior to the commencement of a criminal action is a final order arising out of a special proceeding on the civil side of the court and, thus, may be appealed. The cases almost overtly acknowledge that they are result-oriented and that their result is sanctioned by the passage of time and by the fact that the legislature, having had the opportunity, has declined to overrule them. Nothing in the rationale of those cases, then, provides support for an extension of their rule. As an aside, the prosecution may be interested in the coercive measures of CPLR 2308(a), a statute which, in all likelihood, does apply to a grand jury subpoena.[598]

[1.39] XL. THE INSTITUTION OF THE GRAND JURY AS RELEVANT TO CRIMINAL CONTEMPT

"Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided."[599] Judge Cardozo's admonition, generally stated, could not be more apposite when applied to the grand jury's function as affected by all manner of statutes, especially those pertaining to contempt, as they, in turn, are affected by the philosophies of those called upon to construe

598 The author finds no support for this last paragraph of dicta either in CPLR 2308(a) or *People v. Di Maria*, 126 Misc. 2d 1, 5 (Sup. Ct., N.Y. Co. 1984) to which the court refers. The court's other citations of authority are *Dep't of Envtl. Prot.*, 70 N.Y.2d at 239; *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245 (1886); *McCormick v. Axelrod*, 59 N.Y.2d 574, 582–83 (1983); *State v. Unique Ideas*, 44 N.Y.2d 345 (1978); *N.A. Dev. Co. v. Jones*, 99 A.D.2d 238, 240 (1st Dep't 1984); *Virag v. Hynes*, 54 N.Y.2d 437, 442 (1981); *People v. Santos*, 64 N.Y.2d 702 (1984); *Cunningham v. Nadjari*, 39 N.Y.2d 314, 317 (1976); *Santangello v. People*, 38 N.Y.2d 536 (1976).

599 *In re Rouss*, 221 N.Y. 81, 91 (1917) (Cardozo, J.).

them. Knowledge of the broad, essential features of the grand jury as the product of history, constitution and statute, as well as those of its legal advisor, is important to an understanding of one of this book's main subjects—contempts arising out of grand jury proceedings. Hence, this chapter.

The United States and New York Constitutions did not and could not create the grand jury. Both, by their very language, refer to the grand jury as an existing institution. So to speak, this existing institution was constitutionally enshrined as is.[600] Thus, its "essential character must be found by reference to the common law, from which it has been derived,"[601] that is, the general investigation of possible crime via compulsory process possibly followed by specific accusation against someone. When New York became part of the Union and adopted its own constitution it merely repeated what the Federal Constitution had done before. As a colony and then under the Articles of Confederation, New York used the grand jury as an existing common-law institution brought over from England. It is probably for this reason that New York's appellate courts have always cited and quoted all manner of federal cases relating to this essential common-law feature of the grand jury.[602] Grand juries in this country, unlike magistrates,[603]

> are clothed by the common law with inquisitorial powers and, of their own motion, may make full investigation to see whether a crime has been committed, and if so, who committed it. They may investigate on their own knowledge, or upon information of any kind derived from any source deemed reliable; may swear witnesses generally and may originate charges against those believed to have violated the criminal laws.[604]

600 U.S. Const. Amend. V; N.Y. Const. art. I, § 6.

601 *People v. Petrea*, 92 N.Y. 128, 143 (1883); *see also U.S. v. Williams*, 504 U.S. 36 (1992).

602 *See, e.g.*, *Keenan v. Gigante*, 47 N.Y.2d 160 (1979); *Virag v. Hynes*, 54 N.Y.2d 437 (1981); *Grand Jury Subpoenas (Weeks)*, 58 A.D.2d 1, 3–4 (1st Dep't 1977).

603 *People ex rel. Travis v. Knott*, 204 A.D. 379 (1st Dep't 1923); *In re Both*, 200 A.D. 423 (2d Dep't 1922).

604 *People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 391–92 (1906) (citing *Hale v. Henkel*, 201 U.S. 43, 65 (1906)).

"To the grand jury, and to it alone, is given the power of investigation [by compulsory process] without a definite charge."[605] The courts do not have this power. They must await the filing of a definite charge in an accusatory instrument against a named person. A prosecutor does not have this "office subpoena" power. He may subpoena witnesses to the grand jury but only on behalf of the grand jury (or to the court on behalf of the court in a criminal action against a named person specifically charged). Thus, a prosecutor may not transform grand jury (or court) process into a function of his office.[606] The reasons lie in that lesson of history which is the grand jury and the constitutional and statutory codifications thereof.

> The law in this State, as in other jurisdictions which boast of the great heritage of the English common law, protects accused persons not alone against ill-founded prosecutions threatening the loss of life or liberty, but against injuries to reputation which might result from making public the testimony given in preliminary criminal examinations. It has surrounded them with many safeguards. No man may be held to answer for a capital or infamous crime unless upon presentment of a grand jury. . . . No person shall be compelled in any criminal case to be a witness against himself. *** The members of the grand jury must take an oath that they will keep secret the counsel of the people, of their own and of their fellows. No person may be admitted to the presence of a grand jury except the district attorney of the county, his assistant, a witness and the stenographer who keeps the minutes. The secrets of the grand jury must be kept. It may not reveal the testimony of any witness except by order of the court to determine its consistency with testimony subsequently given by him, or to determine whether he committed perjury. "Grand jurors are sworn to secrecy, and, as a general rule, what takes place before them is privileged from disclosure. The clerk of the grand jury cannot be compelled to reveal the proceedings before them; nor can the county attorney." The proceedings before a grand jury constitute the only general criminal investigation known to the law. "No such power of inquisition is given to a magistrate. To

605 *Ward Baking Co. v. W. Union Tel. Co.*, 205 A.D. 723, 728 (3d Dep't 1923); *see also Williams*, 504 U.S. at 1742.

606 *See People v. Natal*, 75 N.Y.2d 379 (1990), and cases cited therein.

> the grand jury, and to it alone, is given the power of investigation without a definite charge. The secrecy of the grand jury prevents injury to reputations from roving investigations." The grand jury is the great bulwark of the innocent; it is designed to prevent criminal proceedings in cases where there is lack of probable cause, and this is to be determined *in secret* by responsible men chosen from the community at large, acting upon their oath and upon sworn testimony, and it is hardly to be supposed that the Legislature has intended to open the doors to irresponsible inquisitors who merely alleged generally that fictitious persons have been guilty of crime."[607]

When has a grand jury proceeding been commenced? At its barest minimum:

> When the [prosecutor], on his own initiative, issues and serves . . . a subpoena in good faith, a proceeding is instituted in the Grand Jury just as, in an analogous situation, a civil action is commenced by the service of a summons . . .
>
> [A]t the very instant there is a bona fide issuance and service of a subpoena by the [prosecutor] . . . for the appearance of a person before the Grand Jury in a John Doe investigation, there originates a pending proceeding before the Grand Jury . . .[608]

Is there some sort of a magic formula which must be followed in order for—to use a colloquial—a prosecutor to "open a case or investigation" before a grand jury? The answer is no. "Unless mandated by provision of statute there is no general principle of law which would require identification of subject matter as prerequisite to Grand Jury appearance. . . ."[609] As noted, a grand jury may investigate "without a definite charge." Courts, for their part, may not suspend or impair the functioning of the law's ancient investigatory body, whose action "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand

607 *Ward Baking Co.*, 205 A.D. at 727–28 (citation omitted); *see generally In re Aswad v. Hynes*, 80 A.D.2d 382 (3d Dep't 1981).

608 *People ex rel. Van Der Beek v. McCloskey*, 18 A.D.2d 205, 208, 209 (1st Dep't 1963) (citation omitted); *see also Kuriansky v. Seewald*, 148 A.D.2d 238 (1st Dep't), *appeal denied*, 74 N.Y.2d 616 (1989).

609 *People v. Rallo*, 39 N.Y.2d 217, 222 (1976).

jurors."[610] This is mainly because the grand jury is "a body of laymen, free from technical rules"[611] whose "examination of witnesses . . . need not be preceded by a formal charge against a particular individual."[612] It has jurisdiction to determine whether it has jurisdiction.[613] The leading authorities on the powers and functions of the grand jury were cogently synopsized by the Appellate Division, First Department:

> The power of the Grand Jury to investigate criminal activity and to compel persons to appear and testify is exceedingly broad. [T]he Grand Jury is characterized as "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." Further . . . "[t]he role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task." 'When the grand jury is performing its investigatory function into a general problem area *** society's interest is best served by a thorough and extensive investigation.' . . ." *** "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government. *** '[T]he longstanding principle that "the public" *** has a right to every man's evidence" *** is particularly applicable to grand jury proceedings.' . . .
>
> In [New York] State the Grand Jury derives its power from the Constitution and the acts of the Legislature *** It is not only 'sworn to inquire of crimes committed or triable in the county' *** but by statute it is given the power, and the duty is enjoined upon it to 'inquire into all crimes committed or triable in the county, and to present them to the court' ***. Traditionally, our courts have

610 *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).

611 *Id.*

612 *Blair v. U.S.*, 250 U.S. 273, 282 (1919).

613 *Id*. at 282–83.

> afforded the Grand Jury the widest possible latitude in the exercise of these powers and insisted that *in the absence of a clear constitutional or legislative expression they may not be curtailed . . .*[614]

It is the grand jury's constitutional and common-law investigative authority as an institution, encompassing, as it does, its right to everyman's evidence when particularly focused by its process directed to an individual, which accounts for the proposition that a grand jury proceeding is commenced when a prosecutor issues its subpoena in good faith.[615] And it is *good faith as commanded by an oath of office* which largely justifies the flexibility that prosecutors enjoy in harmonizing the jurisprudential theory underpinning the power of the grand jury *as an institution* with the realities of a world where one must be practical if one is to succeed at one's task.[616]

One illustration is the prosecutor's good-faith right to issue subpoenas *duces tecum* and *testificandum* for the production of documents or testimony before grand jury panel "A" on a given date, notwithstanding the fact that the documents or testimony may actually be presented to panel "Z" months or even years later. Documents may need to be analyzed or processed through the recollection of witnesses. Or, subpoena litigation into the Court of Appeals may render the grand jury panel existing at the time of a subpoena's issuance long courthouse history by the time documents are turned over or testimony is finally given.[617]

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614 *In re Grand Jury Subpoenas (Weeks)*, 58 A.D.2d 1, 3–4 (1st Dep't 1977) (emphasis added).

615 *See, e.g.*, *In re Barbara*, 7 A.D.2d 340, 343 (3d Dep't 1959) (citing *Gumperz v. Hofmann*, 245 A.D. 622, 624 (1st Dep't 1935), *aff'd*, 271 N.Y. 544 (1935)); *accord U.S. v. Simmons*, 591 F.2d 206, 208–210 (3d Cir. 1979); *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1976); *U.S. v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975).

616 *See, e.g., People v. Friedgood*, 58 N.Y.2d 467, 473 (1983); *Brunswick Hosp. Ctr., Inc. v. Hynes*, 52 N.Y.2d 333, 338 (1981); *McGinley v. Hynes*, 51 N.Y.2d 116 (1980); *Heisler v. Hynes*, 42 N.Y.2d 250, 254–55 (1977); *Kuriansky v. Seewald*, 148 A.D.2d 238 (1st Dep't), *appeal denied*, 74 N.Y.2d 616 (1989); *In re Grand Jury Subpoenas (Kronberg)*, 95 A.D.2d 714 (1st Dep't), *aff'd on opn below*, 62 N.Y.2d 853 (1984).

617 CPL § 610.25; *Brunswick Hosp. Ctr., Inc.*, 52 N.Y.2d 333 (citing with approval *U.S. v. Kleen Laundry & Cleaners, Inc.)*, 381 F. Supp. 519, 522–23 (E.D.N.Y. 1974); *accord U.S. v. Thompson*, 251 U.S. 407, 413 (1920); *First Nat'l Bank v. U.S. Dep't of Justice*, 865 F.2d 217, 220 (10th Cir. 1989); *U.S. v. Benjamin*, 852 F.2d 413, 423 (9th Cir. 1988); *In re Grand Jury Proceedings (Sutton)*, 658 F.2d 782, 783–84 (10th Cir. 1981); *U.S. v. Halper*, 470 F. Supp. 103, 105 (S.D.N.Y. 1979); *Robert Hawthorne Inc. v. Director of I.R.S.*, 406 F. Supp. 1098, 1105–06 (E.D. Pa. 1977); *In re Wood*, 430 F. Supp. 41, 48 (S.D.N.Y. 1977).

Valid issuance of a grand jury subpoena no more depends on a specific grand jury panel's contemporaneous existence than does a summons and complaint commencing a civil lawsuit depend on the contemporaneous existence of a specific term and part of the Supreme Court. Stated differently, the grand jury as an institution possessed of compulsory process is not to be confused with those 23 conscripted laypersons designated as a specific grand jury panel by month, year and court term for the purpose of administrative convenience. Other illustrations are a prosecutor's right to eliminate unnecessary or equivocal material so that grand jurors' time may be conserved;[618] a prosecutor's right to possess and retain subpoenaed evidence for the grand jury;[619] a grand jury prosecutor's right to work out mutually convenient *modus vivendi* with opposing counsel for the production of evidence;[620] and a prosecutor's right to take such other good faith actions as will avoid impaling a grand jury's investigative powers on the thorns of the realities with which it must deal.[621]

Contrary to what some miscellaneous courts might lead one to believe—notwithstanding constitution, statute, Court of Appeals and Appellate Division instructions preemptively opposite to their decisions—the law and reality are not supposed to be set at war with one another through thought-empty, semantic, syllogistically-expansive incantations of "fundamental fairness," "due process," "inherent power" and the like in order to dress up personal predilection as law. Grand juries, it has been noted, are but temporary bodies which should not be held hostage to off-the-merits, frivolous delays.[622] Absent legally cognizable right or privilege, every man and woman owes society their evidence.[623] At the grand jury stage, the law recognizes few grounds upon which one may rely in refusing to produce documents or testify. And these grounds—within a range—may be restricted or regulated depending upon whether it is a federal or New York State grand jury.

618 *Friedgood*, 58 N.Y.2d at 473.

619 *Brunswick Hosp. Ctr. Inc.*, 52 N.Y.2d at 338.

620 *Heisler*, 42 N.Y.2d at 254–55 (1977).

621 *See, e.g.*, *Grand Jury Subpoenas (Kronberg)*, 95 A.D.2d 714 (1st Dep't), *aff'd on opn below*, 62 N.Y.2d 853 (1984); *Dwyer v. Wilcox*, 92 A.D.2d 646, 647 (3d Dep't 1983).

622 *Virag v. Hynes*, 54 N.Y.2d 437 (1981).

623 *U.S. v. Mandujano*, 425 U.S. 564, 571–72 (1976); *Blackmer v. U.S.*, 284 U.S. 421, 438 (1932); *Keenan v. Gigante*, 47 N.Y.2d 160, 167–68 (1979).

Applicable permutations of the privilege against self-incrimination is one such ground.[624] Aspects of the Fourth Amendment—jurisdiction of the party issuing a subpoena, over breadth-burdensomeness, and relevancy—are other grounds.[625] Also, the physician-patient,[626] social worker[627] and psychologist-patient[628] privileges, followed by those privileges relating to the attorney-client,[629] spousal[630] and priest-penitent[631] relationships, may be raised at the grand jury stage. Finally, there are those confidentiality provisions (with their rights to refuse to answer or produce evidence) which are the result of modern statutes dealing with special areas of concern, such as wiretapping[632] and the confidentiality of certain government records.[633] Still other factors pertaining to the grand jury's function warrant exposition.

"Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual."[634] And that is "[b]ecause no person is a party as such to a grand jury proceeding."[635] A grand jury proceeding—some lower courts have occasion-

624 *Braswell v. U.S.*, 487 U.S. 99 (1988); *Shapiro v. U.S.*, 335 U.S. 1, 32–33 (1948); *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006); *Bleakley v. Schlesinger*, 294 N.Y. 312, 316–17 (1945); *Grand Jury Subpoena (X & Y) v. Kuriansky*, 69 N.Y.2d 232 (1987); *People v. Doe*, 59 N.Y.2d 655, 656–57 (1983); *Cunningham v. Nadjari*, 39 N.Y.2d 314 (1976). In New York, though only sporadically noted by litigants and courts alike, CPL § 190.40(1) provides: "Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him."

625 *U.S. v. R. Enters., Inc.*, 498 U.S. 292 (1991); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208–209 (1946); *In re Grand Jury Subpoenas*, 72 N.Y.2d 307 (1988); *Virag*, 54 N.Y.2d 437; *Mann Judd Landau v. Hynes*, 49 N.Y.2d 128 (1979); *Moe v. Kuriansky*, 120 A.D.2d 594 (2d Dep't 1986).

626 *Grand Jury Subpoena (X & Y)*, 69 N.Y.2d 232.

627 *People v. Tissois*, 72 N.Y.2d 75 (1988).

628 *People v. Wilkins*, 65 N.Y.2d 172 (1985).

629 *In re Grand Jury Subpoena (Bekins)*, 62 N.Y.2d 324 (1984).

630 *In re Vanderbilt*, 57 N.Y.2d 66 (1982).

631 *Keenan v. Gigante*, 47 N.Y.2d 160 (1979).

632 *Gelbard v. U.S.*, 408 U.S. 41, 60 (1972); *People v. McGrath*, 46 N.Y.2d 12 (1978); *People v. Einhorn*, 35 N.Y.2d 948 (1974).

633 *See*, *e.g.*, *Stern v. Morgenthau*, 62 N.Y.2d 331 (1984).

634 *Gelbard*, 408 U.S. at 60; *McGrath*, 46 N.Y.2d 26 (1978); *see also Beach v. Shanley*, 62 N.Y.2d 241, 247 (1984); *Manning v. Valente*, 272 A.D. 358, 363 (1st Dep't), *aff'd*, 297 N.Y. 681 (1947).

635 *McGrath*, 46 N.Y.2d 26.

ally been reminded—is *not* an adversarial proceeding.[636] For those entitled to actively test a grand jury process in the courts, there are strict procedural rules which effectuate important public interests.

A motion to quash a grand jury subpoena *duces tecum* must be made promptly, generally *before the compliance date*, but *not after actual compliance.* To the extent that a subpoena seeks testimony (*ad testificandum*), the assertion that the contemplated testimony is subject to a privilege will not usually justify quashing the subpoena in advance of the witness's appearance. Usually—because a witness will not know what to complain about until a question is asked—litigation must wait. An interlocutory court ruling will be sought by the witness from which no appeal may be taken unless and until he or she persists in a refusal to answer, thus ripening the ruling into a contempt adjudication.[637] Finally, motions to *suppress* evidence do not exist at the grand jury stage of proceedings. The exclusionary rules, except for illegal wiretapping, have no place at the investigatory-accusatory phase.[638]

The grand jury stage has another dimension besides that of counseled, citizen-investigative accuser. It is the executive-investigative discretion of its counsel *per se*—the prosecutor appearing before it. Such discretion comes with the constitutional oath of office, and nothing more of an antecedent nature is required for its exercise other than good faith and the realization that election day rolls around every so often. For example, with respect to:

> frauds . . . and other cases where it is impracticable to ascertain in advance the names of persons implicated . . . [i]t is impossible to conceive that . . . the examination of witnesses must be stopped until a basis is laid by an

636 *U.S. v. Calandra*, 414 U.S. 338, 344 (1974); *People v. Brewster*, 63 N.Y.2d 419, 422 (1984); *see also People v. Darby*, 75 N.Y.2d 449 (1990); *People v. Lancaster,* 69 N.Y.2d 20 (1986).

637 CPLR § 2304; *In re Grand Jury Subpoenas*, 72 N.Y.2d 307, 311, 315 (1988); *Beach*, 62 N.Y.2d at 247–48; *Brunswick Hosp. Ctr., Inc. v. Hynes*, 52 N.Y.2d 333, 339 (1981); *Cunningham v. Nadjari*, 39 N.Y.2d 314 (1976); *Santangelo v. People*, 38 N.Y.2d 536, 539 (1976); *People v. Desmond*, 98 A.D.2d 728 (2d Dep't 1983).

638 *Calandra*, 414 U.S. at 345–46, 348–51; *U.S. v. Blue*, 384 U.S. 251, 255 n.3 (1966); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208–09 (1946); *In re Horowitz*, 482 F.2d 72, 75–79 (2d Cir. 1973) (Friendly, J.); *In re Eight Grand Jury Subpoenas Duces Tecum*, 701 F. Supp. 53, 55–56 (S.D.N.Y. 1988); *In re Grand Jury Subpoenas*, 72 N.Y.2d 307, 315–16 (1988); *People v. McGrath*, 46 N.Y.2d 12 (1978); *Hynes v. Moskowitz*, 44 N.Y.2d 383, 394–95 (1978); *In re Grand Jury Proceedings*, 89 A.D.2d 605 (2d Dep't 1982); *see also Darby*, 75 N.Y.2d 449; *People v. Oakley*, 28 N.Y.2d 309, 312–13 (1971).

> indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted.[639]

> Accordingly, since "criminal prosecutions are instituted by the State through an officer selected for that purpose, [that officer] is vested with a certain discretion with respect to the cases he will call to [a grand jury's] attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings."[640]

Indeed, in much earlier times, "indictment" meant a written, as opposed to an oral, accusation by the prosecutor placed in front of a grand jury before the introduction of any evidence.

> [T]he indictment [was] supposed to be prepared and taken before the grand jury by counsel prosecuting for the State; and the evidence [was] then given in respect to the offense charged in it. If the party accused appear[ed] to be guilty, the indictment [was] certified to be a true bill: otherwise it [was] thrown out.[641]

Such a practice today would probably impact upon the grand jury's province as "the exclusive judge of the facts" under CPL § 190.25(5) and the requirement that it hear and examine legally sufficient evidence before voting to indict under CPL § 190.60(1). "True Bill of Indictment" is now an artful expression presently surviving from a largely abandoned practice, although the prosecutorial discretion it historically informs still survives as much as ever. Research reveals no precedent in New York or elsewhere requiring a prosecutor to artificially "present" the subject matter of, much less expressly anticipate, the result of a grand jury's investigation as a jurisdictional prerequisite for the investigation's conduct in the first place.

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639 *Hale v. Henkel*, 201 U.S. 43, 65 (1906), *relied upon in People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 391–92.

640 *Hale*, 201 U.S. at 65; *People v. Batashure*, 75 N.Y.2d 306, 312 (1990) ("Finally, while we conclude that it is for the Grand Jury to scrutinize the prosecutor's evidence and match it against the elements of the crime, we note that it is of course proper for the District Attorney to evaluate a matter for legal sufficiency before commencing, or continuing a prosecution."); *see generally People v. Mitchell*, 82 N.Y.2d 509 (1993); *People v. Lancaster*, 69 N.Y.2d 20 (1986).

641 *People ex rel. Hackley v. Kelly*, 24 N.Y. 74, 79 (1861).

A contrary position was found to be intellectually unfathomable,[642] premised erroneously, as it was, on a legal theory which, had it been sustained, would have relegated nascent grand jury investigations to the pad and pencil and an embarrassing official subservience to the voluntary cooperation of those possessed of relevant evidence—evidence to which the law was already supposed to have a right. At the grand jury investigative stage, virtually the whole dynamic is worked out within the executive branch as informed and limited by the history and precedent that is the institution of the grand jury. In this vein, the Court of Appeals has rejected any backdoor method of interfering with a grand jury's legitimate right to hear evidence pertaining to all crimes and misconduct in public office within its venue by bringing prohibition against that body's prosecutorial eyes, ears and legal advisor.[643]

It is submitted that one not-so-apparent reason why prohibition is not available against a grand jury and its prosecutor, when they are mutually performing their investigative function, is that any judicial decision granting prohibition at this stage would likely have to be moored to the word "matter," which is a peculiarly slippery term that is mostly used in decisions where a more precise term is unavailable for the task—a telltale sign of a shaky jurisprudential rationale. "Matter"—particularly that matter which is the raw stuff of a grand jury investigation—potentially encompasses everything but precisely defines nothing. Hence prohibition should wait, and is only very limitedly appropriate, until after there has been an indictment against a named person for specific criminal charges.[644]

Nor should a court, it would seem, "backdoor" its unauthorized interference with a grand jury's subpoena *duces tecum* powers—and hence the conduct of its investigation—by purportedly fixing the "terms and conditions" of subpoenaed document possession without proper and timely application, and, cognizable grounds from an aggrieved party with legal

642 *See, e.g.*, *Kuriansky v. Patel*, 144 Misc. 2d 59 (Sup. Ct., Bronx Co. 1989) (Seewald, J.), *writ of prohibition granted sub. nom. Kuriansky v. Seewald*, 148 A.D.2d 238 (1st Dep't), *appeal denied*, 74 N.Y.2d 616 (1989); *cf. People ex rel. Van Der Beek v. McCloskey*, 18 A.D.2d 205, 208, 209 (1st Dep't 1963).

643 *McGinley v. Hynes*, 51 N.Y.2d 116, 124, 125 (1980). While the prosecutor is the legal advisor to the grand jury as per CPL § 190.25(6), he is not a mere sage but passive onlooker. On behalf of public justice, he and his resources "belong" to the grand jury, both as an institution of the law and as a body of 23 conscripted laymen having no investigative resources of their own. The independent authority of a prosecutor to issue grand jury process cannot be more clear than his right to submit "any" available evidence of crime to it. CPL § 190.55(2)(c).

644 *People v. Ohrenstein*, 77 N.Y.2d 38 (1990); *Steingut v. Gold*, 42 N.Y.2d 311 (1977); *Dondi v. Jones*, 40 N.Y.2d 8 (1976).

standing under CPL § 610.25. That section authorizes the People's possession of documents subpoenaed on behalf of a grand jury. A court's authority to fix the possession's "terms and conditions" is limited to such "as may reasonably be required for the action or proceeding."[645] Nowhere, of course, does the statute appear to confer a roving commission on the judiciary—standardless and unmoored to constitution, statute or precedent—to prohibit or compromise the utilization of documentary evidence in a grand jury investigation.[646] The legislative history behind the lightning speed supersession of *Heisler v. Hynes*,[647] *via* the enactment of CPL § 610.25—at the instance of the State's Medicaid Fraud Control Unit charged with policing a $20 billion plus Medicaid Program—strongly compels the opposite conclusion.[648]

As for a court's supervisory powers over the grand jury, the most recent U.S. Supreme Court case on the subject states the following: (a) "the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this court and by Congress to ensure the integrity of the grand jury's functions'"; (b) the supervisory power may *not* be used "as a means of prescribing those standards of prosecutorial conduct in the first instance—just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves"; (c) "as a general matter at least, no such 'supervisory' judicial authority exists"; (d) "judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office"; (e) "the grand jury requires no authorization from its constituting court to initiate an investigation, nor does the prosecutor require leave of court to seek a grand jury indictment"; (f) "and in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge"; (g) "true, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution or even testimonial privileges recognized by the common law";

645 CPL § 610.25(2).

646 *Brunswick Hosp. Ctr., Inc. v. Hynes*, 52 N.Y.2d 333, 338–39 (1981); *Hynes v. Moskowitz*, 44 N.Y.2d 383, 395–96 (1978).

647 42 N.Y.2d 250 (1977).

648 *See generally* Preiser, McKinney's Practice Commentary, CPL § 610.25 (1995).

(h) "given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure"; (i) supervisory power "certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself"; and (j) "[c]ourts have no authority to prescribe . . . [duties on grand jury prosecutors] pursuant to their inherent supervisory authority over their own proceedings."[649] These are the broad-based principles of the grand jury, its prosecutor and its courts.

[1.40] XLI. THOUGHTS FOR A JUDGE PRESIDING OVER A CONTEMPT PROCEEDING

It is only human to want to be sure when deciding another's fate. It is also true that a desire for transcendental certainty induced, perhaps, by a quest for Jesuitical perfection, or a free-floating squeamishness, is not of this world. When we all get to that other shore we shall find out who was lying and who had the subpoenaed records. A judge presiding at a criminal contempt proceeding must work with less. The condensed and paraphrased words of Justice Peter McQuillan strike a balance which is nice, clear and true: (1) a reasonable explanation is an explanation that a reasonably prudent person would find credible and acceptable. It is a question of whether common human experience would lead a reasonable person to reject or accept the explanation as reasonable; (2) in litigation, civil or criminal, the fact-finder can never hope to ascertain the true, transcendental, mind-of-God facts, i.e., absolute certainty in the field of fact-finding is impossible. A fact-finder can only conclude what probably has happened (preponderance of the evidence), what is highly probable to have happened (clear and convincing evidence), and what almost certainly has happened (proof beyond a reasonable doubt); (3) an inference, similar to an expectation, is a function of experience and involves probabilities. In life, in our day-to-day dealings, both personal and business, we arrive at certitude, or some degree of certainty, through accumulated probabilities. When a sole proprietor operates and effectively controls a multi-million dollar, closely regulated nursing home business, we expect that he will have effective control of all, or substantially all, of the business books and records for two relatively recent calendar years, and we expect that all

649 *U.S. v. Williams*, 504 U.S. 36, 46–50, 55 (1992). New York Court of Appeals and Appellate Division cases as cited in this section are in agreement. Miscellaneous cases to the contrary simply ignore authority. *See People v. Stepteau*, 81 N.Y.2d 799 (1993,) *aff'g*, 178 A.D.2d 376 (1st Dep't 1991).

of those books and records owned by such sole proprietor will not mysteriously disappear when he is ordered to comply with a subpoena *duces tecum*; (4) this expectation is based on our common sense: it fulfills our expectation of the probabilities. Voluminous business books and records are unlike the few ill-starred vessels sailing the Bermuda Triangle: they do not mysteriously vanish en masse; (5) the difficulty with the expectations of the reasonable person who sits as a fact-finder is that his personal expectations may color his perceptions, i.e., the expectations we each have are functions of our perceptions. We sometimes perceive what we expect to perceive. Nevertheless, each day, in every courthouse, everywhere, it is on such "as if" hypotheses that severe sanctions are imposed in criminal cases and substantial judgments entered in civil actions; (6) in weighing and evaluating testimony, a fact-finder is not required to credit a particular fact testified to by one or even ten witnesses; (7) the inherent probability or improbability of such fact is to be tested by the totality of circumstances surrounding the occurrence as well as by the ordinary laws that govern human conduct; (8) believable testimony must have the ring and flavor of credibility; (9) some testimony is simply too weak and too incredible to accept; (10) sometimes, testimony can be disproved by uncontradicted documentary evidence; (11) but the doctrine of inherent incredibility does not require such positive proof—this doctrine may be invoked by the fact-finder when a party's proof seems highly unbelievable in the light of common experience.[650] For instance, subpoenaed document disappearance due to sudden floods, lightening-induced fires, plagues of locusts, midnight burglaries as well as car-trunk break-ins and thefts seem to follow what Judge Learned Hand called "a well-known pattern" which "no sane person would believe."[651] According to the legendary jurist, "if courts allowed themselves to be fobbed off with such silly tales, there would be an end to the administration of justice."[652]

650 *Hynes v. Sigety*, No. 4161676, at 4, 5, 6 (Sup. Ct., N.Y. Co. Aug. 4, 1977) (McQuillan, J.), *aff'd*, 60 A.D.2d 808 (1st Dep't), *appeal dismissed*, 43 N.Y.2d 947 (1978), *writ of habeas corpus granted sub. nom. Sigety v. Abrams*, 492 F. Supp. 1123 (S.D.N.Y.), *rev'd*, 632 F.2d 969 (2d Cir. 1980) remanded with instructions to dismiss the writ.

651 *Seligson v. Goldsmith*, 128 F.2d 977, 978 (2d Cir. 1942) (Hand, J.).

652 *Id.*

[1.41] XLII. CRIMINAL CONTEMPT PROCEEDINGS MUST BE TRIED IN OPEN COURT

Contempt proceedings must be open. Closed proceedings—with rare exception—are void proceedings. Section four of the Judiciary Law, as here relevant, provides: "The sittings of every court within this state shall be public, and every citizen may freely attend the same. . . ." In construing this section the courts have repeatedly stressed that the discretion permitted a court to close its proceedings to the public is limited to exceptional circumstances. "[T]he settled rule [is] that court proceedings, with a few necessary exceptions, are to be conducted not in secrecy but in the open. . . ."[653] It is unlawful except when necessary to meet a serious and imminent threat to the integrity of a trial.[654]

"Exceptional circumstances" may be found where closure is necessary to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses and, generally, to further the administration of justice.[655]

Judiciary Law § 4 is:

> clear and unmistakable, unambiguous and unclouded. It can only mean precisely what it says, and may not be confused with section 8 of the [then] Code of Criminal Procedure, nor section 12 of the Civil Rights Law. The latter statutes guarantee *to a defendant* in a criminal case a "public trial." That is *his* right. Section 4 of the Judiciary Law, by an entirely different arrangement of words, grants a wholly separate and independent right, namely, a *public* right.[656]

A defendant simply cannot waive or abrogate the rights of the public:

> The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under

653 *People v. Prior*, 294 N.Y. 405, 423 (1945) (dissenting opinion) (citation omitted).

654 *Oliver v. Postel*, 30 N.Y.2d 171, 181 (1972); *People v. Hinton*, 31 N.Y.2d 71, 73 (1972); *see also Hearst Corp. v. Cholakis*, 54 A.D.2d 592 (3d Dep't 1976).

655 *People v. Jelke*, 308 N.Y. 56, 63 (1954); *see also Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 377 (1977), *aff'd*, 443 U.S. 368 (1979); *Danco Lab., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1 (1st Dep't 2000); *Times–Union v. Harris*, 71 A.D.2d 333 (3d Dep't 1979).

656 *United Press Ass'n v. Valente*, 308 N.Y. 71, 88 (1954) (dissenting).

> some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a secret trial. . . .[657]

The clear distinction between secret grand jury proceedings and public trials of contempt charges arising therefrom was clearly enunciated by the Supreme Court.

> Many reasons have been advanced to support grand jury secrecy. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. . . . Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witness guilty of contempt in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court.[658]

Any court that closes a contempt proceeding is—almost certainly—conducting a void proceeding. No harmless error analysis is available. In the context of a criminal prosecution the Court of Appeals stated:

> [S]ince the concept of a secret trial is anathema to the social and political philosophy which motivates our society, the discretion to limit the public nature of judicial proceedings is to be "sparingly exercised and then, only when unusual circumstances necessitate it." *** This caution recognizes that the fundamental and constitutional nature of the right does not permit the making of an unchartered, ungrounded or unjustified exception.[659]

> Our conclusion that defendant's trial was improvidently closed to the public brings us to the question whether such error is reversible. In contending that it is not, the People rely on the harmless error rule. And it is true that defendant points neither to discrepancies in the testimony . . . nor to any exculpatory evidence or other benefit that

657 *Singer v. U.S.*, 380 U.S. 24, 34–35 (1965) (citation omitted).

658 *In re Oliver*, 333 U.S. 257, 264–65 (1948) (citation omitted) (footnote omitted).

659 *People v. Jones*, 47 N.Y.2d 409, 413 (1979).

> might have come to him had the entire trial been public. But, in our view, prejudice need not be demonstrated.[660]
>
> [P]ublic confidence in the administration of justice is enhanced when its doors are open to all, litigants and nonlitigants alike, and wide understanding of its methods moves in the same direction. The harmless error rule is in no way to gauge the great, though intangible, societal loss that flows from frustration of such a goal.[661]

Again, the contempt may occur in or about a secret grand jury proceeding but the trial of the contempt proceeding to follow must be a public one.[662]

[1.42] XLIII. NOTICE OF CONTEMPT PROCEEDINGS

"The exact form of the procedure in . . . contempts is not important" so long as there is notice and an opportunity to be heard.[663]

"An application to punish for a contempt punishable civilly may be commenced by notice of motion . . . or by an order . . . to show cause . . ."[664] It must contain an eight-point bold type warning concerning arrest and imprisonment,[665] which is waivable if the lack thereof is not asserted in a timely manner, or, the contemnor contests on the merits.[666] Judiciary Law § 761 states that, "[a]n application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge."[667] The question of when an attorney is the attorney for a civil contemnor has been the subject of case law. Service of an order to show cause or motion may be made upon the attorney who currently represents the contemnor in an action which is still

660 *Id*. at 415.

661 *Id*. at 416 (citation omitted).

662 *In re Rosahn*, 671 F.2d 690, 696–97 (2d Cir. 1982). *See generally Westchester–Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 438 (1979).

663 *Cooke v. U.S.*, 267 U.S. 517, 536 (1925).

664 Jud. Law § 756; *see also Nelson v. Nationwide Measuring Serv.*, 59 A.D.2d 717 (2d Dep't 1977).

665 Jud. Law § 756; *Nelson*, 59 A.D.2d 717.

666 *In re Estate of Rappaport*, 58 N.Y.2d 725 (1982).

667 *Ballek v. First Media Mktg.*, 24 Misc. 3d 532, 534 (Sup. Ct., New York Co. 2009).

pending.[668] "Attorney" as referred to in Judiciary Law § 761 means the attorney of record for the accused, not his counsel or any other attorney who has not formally appeared for him in the action.[669] An attorney's general appearance on appeal is not an appearance for the purpose of legally effective service of an order to show cause on him in a civil contempt proceeding.[670] An attorney's representation for purposes of service generally terminates with the judgment. But it is certain that the proposition has qualifications. The authority of the attorney as agent for service in an action continues with the presumed assent of the client until some affirmative step is taken by the client indicating otherwise, or some other legal event intervenes.[671] Where a civil contempt involves a non-party witness, the order to show cause must be personally served upon him.[672]

Judiciary Law § 751(1) provides that when a person has committed a criminal contempt outside the immediate view and presence of the court "the party charged must be notified of the accusation, and have a reasonable time to make a defense." There is *no* mention of an order to show cause or a written motion. (In the federal courts notice of the accusation may be given orally in open court by the judge in the presence of the alleged contemnor or by an order to show cause or an order of arrest.[673]) Judiciary Law criminal contempts, by express statutory language, are not punished in the same way as Judiciary Law civil contempts.[674] Without explanation, the case law states that, "[g]enerally, to charge a party with a violation of an order or mandate as a basis for criminal contempt, an order to show cause must be made or a warrant of attachment issued" and "[a] copy of the order to show cause must be personally served"—such requirements being jurisdictional and nonwaivable.[675] Case law also states that, "[i]t is well established that a criminal contempt mandate can only be rendered in a special proceeding, which requires personal service with equal dignity to that required of a summons" and that "[f]ailure to person-

668 *Rosenthal v. Rosenthal*, 201 A.D. 27 (1st Dep't 1922); *Isaacs v. Calder*, 42 A.D. 152 (1st Dep't 1899).

669 *Patillo v. Patillo*, 12 Misc. 2d 645, 649 (Sup. Ct., Bronx Co. 1958).

670 *Vingut v. Sire*, 163 A.D. 529, 530 (1st Dep't 1914).

671 *Commercial Bank v. Foltz*, 13 A.D. 603, 607 (4th Dep't 1897).

672 *John Sexton & Co. v. Law Foods, Inc.*, 108 A.D.2d 785, 786 (2d Dep't 1985); *Hampton v. Annal Mgmt. Co.*, 168 Misc. 2d 138 (App. Term, 1st Dep't 1996).

673 Fed. Rule Crim. Procedure 42(a).

674 Jud. Law § 754.

675 *People v. Balt*, 34 A.D.2d 932, 933 (1st Dep't 1970).

ally serve the alleged contemnor is a jurisdictional defect requiring reversal."[676] These cases do not indicate the basis of their jurisdictionally exacting pronouncements but appear to less than completely rely on an earlier case where the criminal contemnor "was not served with the order to show cause and affidavits *and did not voluntarily appear*"[677] and:

> it [was] seen that while plaintiff's conduct in part could have been construed as a violation of the order directing him to answer certain questions at an examination before trial and to that extent could have been punished, as a civil contempt, in fact, *without due notice*, plaintiff was condemned for acts other than mere disobedience to an order in the action. He was punished, for deliberate and insulting contumacity.[678]

The case concluded by stating that:

> nothing in this opinion is to be taken as a holding that the mere disobedience of an order may not also be a criminal contempt as well as a civil one. But to the extent that any violation of any mandate of the court is to be punished as a criminal contempt, it must be *on notice*."[679]

Nowhere does the opinion indicate that "notice" was or was not meant to be synonymous with an order to show cause personally served. Yet today, without analysis,

> the rule oft stated in this State is that service of the order to show cause to commence a criminal contempt proceeding must be personally served on the accused. This rule exists despite the statutory requirement as to service. Judiciary Law § 751(1) provides merely that "the party

676 *In re Grand Jury Subpoena Duces Tecum (Morano's of Fifth Ave.)*, 144 A.D.2d 252, 255–56 (1st Dep't 1988); *see also Clinton Corner H.D.F.C. v. Lavergne*, 279 A.D.2d 339, 341 (1st Dep't 2001).

677 *Billingsley v. Better Business Bureau*, 232 A.D. 227, 227 (1st Dep't 1931) (emphasis added).

678 *Id.* at 228 (emphasis added).

679 *Id.* (emphasis added).

> charged must be notified of the accusation, and have a reasonable time to make a defense."[680]

A later case qualifies this statement.

> There is no appellate case expressly holding that personal delivery of the order to show cause is the only permissible means of commencing a criminal contempt proceeding, or holding that statutory alternatives to in-hand delivery are jurisdictionally infirm. Many of the cases in which service has not been upheld involved situations where service was made only upon the contemnor's attorney or others unconnected with the contemnor . . . — and—[I]t is frequently the case that those who have flagrantly violated the court's order are not disposed to make themselves readily available for personal delivery of [service].[681]

Here follows some history which may serve as some sort of explanation, or at least an historical frame of reference.

In 1867, the Court of Appeals opined that:

> [I]f we keep in mind the distinction between proceedings to punish criminal contempts, and proceedings as for contempts, to enforce civil remedies, we shall see the reason why personal notification of the accusation is . . . indispensable in the one case while it may not be in the other. Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding is, in effect, but an execution of the judgment or order against him.[682]

680 *Dep't of Hous. Pres. & Dev. v. Arick*, 131 Misc. 2d 950, 953 (Sup. Ct., N.Y. Co. 1986).

681 *Dep't of Hous. Pres. & Dev. v. 24 W. 132 Equities*, 137 Misc. 2d 459, 461–62 (App. Term. 1987), *aff'd*, 150 A.D.2d 181 (1st Dep't 1989).

682 *Pitt v. Davison*, 37 N.Y. 235, 239 (1867); *Town of Coeymans v. Malphrus*, 252 A.D.2d 874 (3d Dep't 1998).

This holding was later brought into the Code of Civil Procedure and today is Judiciary Law § 761.[683]

A later opinion from the court, involving subpoena service and contempt for disobedience thereof, declared that:

> it is assumed without color of reason or authority that a witness, not a party, may appear by attorney and that any order subsequently served on the attorney in contempt proceedings to punish the witness *for not appearing* may be served on the attorney and this service is sufficient to confer jurisdiction to punish the witness for contempt. It is perfectly safe to say that no principle or authority can be found to support such a proposition, and yet, it is one of the fundamental assumptions in this case since it is based upon the notion that a subpoena or an order to testify may be served, not upon the witness, but on someone claiming to represent him, and then, in case there is no appearance the witness can be punished for contempt.[684]

The Revised Statutes that preceded the Code of Civil Procedure required personal service for criminal contempt (§ 12), but exempted civil contempt from such a requirement (§ 14) because the order to show cause was held to be "but a notice of Motion" which "may ordinarily be served upon the attorney of the adverse party."[685] However, a proceeding to punish for criminal contempt arising out of a civil action is considered separate from that action and must be commenced by personal service upon the contemnor.[686]

[1.43] XLIV. CONTEMPTS AND EXECUTIVE PARDONS

The United States Constitution confers on the president the power to grant pardons for committing federal offenses.[687] Even at common law,

683 *Jewelers' Mercantile Agency v. Rothschild*, 155 N.Y. 255 (1898); *Davidowitz v. Hamroff*, 196 Misc. 209, 211 (Sup. Ct., Kings Co. 1949).

684 *In re Depue*, 185 N.Y. 60, 69–70 (1906) (emphasis in original).

685 *Pitt*, 37 N.Y. at 240–241.

686 *Lu v. Betancourt*, 116 A.D.2d 492, 494 (1st Dep't 1986); *John Sexton & Co. v. Law Foods, Inc.*, 108 A.D.2d 785, 785–86, (2d Dep't 1985).

687 U.S. Const. art. II, § 2, cl. 1.

however, the effect of a pardon was necessarily limited to the punishment imposed for a criminal conviction and had no effect as to the remedial portion of a court's order, because the remediation is necessary to secure the private rights of a private suitor.[688] A pardon, by the necessity of logic, may only be granted for a completed criminal contempt. A pardon cannot interfere with private rights or measures taken by the judiciary to enforce them, such as coercive civil contempt. A pardon cannot obliterate the consequences of an act where civil justice is concerned. A president or governor cannot pardon a husband who has been held in civil contempt for failing to pay child support—or, a tenant for neglecting to pay his rent, or unrestrain one from a restraining order already violated. A pardon is only capable of relieving one from the pains and punishments which the sovereign would otherwise inflict for the punishment of crime—or acts against public justice generally such as a criminal contempt of court.[689]

Acceptance of a pardon is a formal admission of guilt.[690] The executive has no power to set aside a criminal judgment, only to pardon.[691] As with immunity from criminal prosecution, the executive's pardoning power may not reach further than the sovereign as sovereign—and as a creature of constitution in America—may grant or withhold.[692] Under federal law, a presidential pardon may be granted before conviction of crime. Under New York's Constitution, a governor's pardon may only follow conviction for crime.[693] In sum, a criminal contempt of court may be pardoned. Civil contempt is beyond the pardoning authority.

[1.44] XLV. CORPORATIONS AND CONTEMPT

As a creature of the state, a corporation receives its franchise subject to the laws of the state and the limitations of its charter. In accordance with law, it is entirely proper for the state to investigate its activities and, to that end, examine its books and papers. It has no Fifth Amendment Privilege

688 *Ex parte Grossman*, 267 U.S. 87 (1925). *See generally Brown v. Walker*, 161 U.S. 591, 599 (1896); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866); *U.S. v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833).

689 *In re An Attorney*, 86 N.Y. 563, 568–73 (1881); *People ex. rel. Prisament v. Brophy*, 287 N.Y. 132, 135, 136, 137–40 (1941).

690 *Burdick v. U.S.*, 236 U.S. 79, 94, 95 (1915); *In re Nixon*, 53 A.D.2d 178 (1st Dep't 1976).

691 *People ex rel. Prisament*, 287 N.Y. at 138–140.

692 *In re Rouss*, 221 N.Y. 81 (1917) (Cardozo, J.).

693 *Doyle v. Hofstader*, 257 N.Y. 244, 258, 266 (1931) (Cardozo, J.).

against self-incrimination.[694] At an earlier time, it was thought that corporations were immune from punishment for contempt due to their impersonal character and the fact that they could not have handcuffs put on them. It is the law that a corporation may be held in contempt. There are methods for coercing or punishing a corporation—fines being the most obvious. It would be worthy of M'Cawber's assessment of the law to lay by the heels agents and officers of a corporation but not penalize the entity itself.[695]

[1.45] XLVI. CORPORATE OFFICERS AND CONTEMPT

A corporation *as a corporation* obeys or disobeys legal process through its officers or agents served with or having knowledge of the law's writ. The case is different with respect to the officers or agents themselves. While they obey in a representative capacity on behalf of the corporation, corporate officers disobey in a purely personal capacity.[696] "It is as useless as attempting to demonstrate that twice two make four to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them—not the intangible being they represent—that the law directs its process. . . ."[697] No individual may refuse to surrender existing corporate documents if they are within his control.[698] A command to a corporation is a command to its officers and agents having knowledge of the command to take the necessary steps to insure compliance.[699] A corporate officer who, apprised of a court's order, prevents or impedes compliance, or, fails to take appropriate action within his power to effect compliance is, just like the corporation, punishable by contempt.[700] The converse is not true. An officer or agent

694 *Wilson v. U.S.*, 221 U.S. 361 (1911); *Grand Jury Subpoenas Duces Tecum (X&Y) v. Kuriansky*, 69 N.Y.2d 232 (1987); *Bleakley v. Schlesinger*, 294 N.Y. 312, 316–17 (1945); *In re Barnes,* 204 N.Y. 108, 116 (1912).

695 *Cont'l Mtg. Guar. Co. v. Whitecourt Constr. Co*., 164 Misc. 56, 56–57 (Sup. Ct. N.Y. Co. 1937).

696 *Compare Nelson v. U.S.*, 201 U.S. 92 (1906); *Cont'l Mtg. Guar. Co.,* 164 Misc. at 57; *Braswell v. U.S.*, 487 U.S. 99 (1988); *U.S. v. White*, 322 U.S. 694, 700–701 (1944) *with Wilson*, 221 U.S. 361.

697 *Nelson*, 201 U.S. 92.

698 *U.S. v. Patterson,* 219 F.2d 659 (2d Cir. 1955).

699 *Wilson*, 221 U.S. 361; *People v. Sturtevant*, 9 N.Y. 263, 278 (1853); *Citibank, N.A. v. Anthony Lincoln-Mercury, Inc.*, 86 A.D.2d 828 (1st Dep't 1982).

700 *U.S. v. Fleischman*, 339 U.S. 349, 360–61 (1950); *U.S. v. Voss*, 82 F.3d 1521, 1526 (10th Cir. 1996); *Geller v. Flamount Realty Corp.*, 260 N.Y. 346 (1932).

of a corporation who either has no knowledge of an order to the corporation or who does not participate or suffer its disobedience is not guilty of contempt, and the corporation's contempt may not be imputed to him.[701]

A corporate records custodian must produce its records in response to legal process even if the records and his act of producing them will incriminate him.[702]What is more, an agent of a corporation who is designated to produce documents must furnish all documents available to the corporation, not merely those he has personal knowledge of.[703] Obviously, the law should not encourage corporations to designate the village idiot as its agent for compliance with court process as a means of thwarting or effectively preventing compliance. Finally, it is an improvident exercise of discretion to hold a corporation in contempt but not the officers subpoenaed for its records.[704]

[1.46] XLVII. CONTEMPT BY PUBLICATION

Contempt by publication is legal subtlety. It is free speech versus a fair trial based on evidence adduced in court. Early on, the test was whether out-of-court statements had a reasonable tendency to interfere with the orderly administration of justice, not whether they would actually influence a judge. Justice Holmes insisted that there must be actual interference.[705] The reasonable tendency standard was later put to the side.[706] Comment on pending cases must present a clear and present danger to the administration of justice. Borderline statements receive First Amendment protection from being the fodder of contempt by publication. There must be no doubt that a statement about a pending case poses a serious and imminent threat. An appellate court must make an independent assessment of the facts. It is not sufficient for an appellate court to find that a trial court the correct principle.[707] The substantive evil of an out-of-court

701 *Cont'l Mtg. Guar. Co.*, 164 Misc. at 57 (citing *Ross v. Thousand Island Park Assoc.*, 203 App. Div. 499, 501 (4th Dep't 1922); *see generally People v. Byrne*, 77 N.Y.2d 460 (1991).

702 *U.S. v. Rylander*, 460 U.S. 752, 759–760 (1983); *Braswell v. U.S.*; 487 U.S. 99 (1988); *U.S. v. White*, 322 U.S. 694 (1944); *Wilson*, 221 U.S. 361; *Grand Jury Subpoenas (X&Y) v. Kuriansky*, 69 N.Y.2d 232 (1987).

703 *Taylor v. Home Ins. Co.*, 646 F. Supp. 923, 929 (W.D.N.C. 1986).

704 *Cadlerock Joint Venture v. Greenberg & Sons*, 94 A.D.3d 580 (1st Dep't 2012).

705 *Toledo Newspaper Co. v. U.S.*, 247 U.S. 402 (1918).

706 *Nye v. U.S.*, 313 U.S. 33 (1941) (citing *Ex parte Poulson*, 19 F. Cas. 1205 (E.D. Pa. 1835)).

707 *Craig v. Harney*, 331 U.S. 367 (1941); *Lauer v. 1056 Lex Corp. (In re Jesse Brinn)*, 305 N.Y. 887–888 (1953).

statement about a pending case must be extremely serious and the degree of imminence extremely high before the utterance may be punished as a contempt. Probability is not the standard. The words "clear and present danger" need not be used. "Substantial likelihood of material prejudice" is the linguistic equivalent of "clear and present danger."[708] It is difficult to apply even the correct standard when the utterance is a defense against charges publicly leveled. And different factors are involved on the eve of jury selection.[709] It is submitted that the standard applicable to contempt by publication is easy enough to state. It is difficult to give meaningful factual content to it. Taste and good manners aside, judges have no contempt power to punish speech outside the courtroom that they find personally offensive, such as calling them bums, dopes, crooks, hacks, bribe-takers, drunkards, envelope-lickers, ass-kissers or the whores who became madams.[710]

Criminal contempt's collateral bar rule lurks behind every judicial gag order. One may not simply ignore it without protesting it on stated grounds and seeking its rescission or modification beforehand, and thus preserving it as defense to a later contempt charge. Except where the gag order is transparently invalid or issued without subject matter jurisdiction—determined *post facto*—one simply cannot disobey it and then challenge it as a defense to contempt.[711]

When a case is over, a court is subject to public criticism or rebuke the same as any other person.[712]

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708 *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

709 *Wood v. Georgia*, 370 U.S. 375 (1962).

710 *Justices of the Appellate Division, First Department v. Erdman*, 33 N.Y.2d 559 (1973); Martin Erdman (later Judge) said in a magazine article:

> There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams. I would like to [be a judge] just to see if I could be the kind of judge I think a judge ought to be. But the only way you can get it is to be in politics or buy it—and I don't even know the going price.

711 *U.S. v. Cutler*, 815 F. Supp. 599 (E.D.N.Y. 1993); *U.S. v. Cutler*, 840 F. Supp. 959 (E.D.N.Y. 1994), *aff'd*, 58 F.3d 825 (1995).

712 *Patterson v. Colorado*, 205 U.S. 454 (1907); *People ex rel. Supreme Court of New York v. Albertson*, 242 A.D. 450 (4th Dep't 1934).

[1.47] XLVIII. CONCLUSIONS AND SUGGESTIONS

The law respecting the rights and responsibilities of grand jury witnesses enjoys a common sense coherence fostered by a prudent judicial regard for the orderly and expeditious fixation of the same. Legitimate privileges, timely asserted, are promptly recognized, while certain "defenses" involving disputed facts must await full vindication at a contempt trial. As for the varied definitions of evasive testimonial contempt, the same provide intellectual constructs against which the testimony of an alleged contemnor may be assessed. Regarding the double jeopardy considerations affecting the *in tandem* use of Penal and Judiciary Law contempt, one must wait to see if the last word has been written—or is ever written. The most recent U.S. Supreme Court and Federal Circuit cases seem to suggest that the same defiance *may* now be bifurcated into two acts of contempt—one of the grand jury and one of the court—for purposes of *in tandem*, successive conviction and adjudication or *vice-versa*.[713] Where the New York Court of Appeals will finally stand on this issue is an open question. If it goes back to what it held prior to *Colombo-Menna*, its position will match that of the Supreme Court. Happily, the so-called "contempt trap" has undergone little or no accretion since its birth by Court of Appeals *dictum* and footnote.

The Judiciary Law sections defining and regulating criminal and civil contempt are long overdue for legislative review and revision. The notion that a Judiciary Law *criminal* contempt arising out of a grand jury proceeding may be purged is but one glaring end product of a jurisprudence, which has too often mixed and matched the totally distinct concepts of compulsion and punishment with results as predictable as the weather. Such product is not harmonious with Court of Appeals' complaint that "as a practical matter . . . a Grand Jury is but a temporary body" and the "delays occasioned by the refusals of recalcitrant witnesses to comply with Grand Jury subpoenas are a very real concern."[714] It is at war with the fundamental proposition that all court mandates, unless stayed, must be promptly obeyed. It invites experimentation with disobedience—at

713 *See U.S. v. Dixon*, 509 U.S. 688 (1993); *U.S. v. Ryan*, 810 F.2d 650 (7th Cir. 1987); *U.S. v. Garcia*, 755 F.2d 984, 987, 989 (2d Cir. 1985) (Imprisonment for civil contempt for refusal to obey court's order to testify under 28 U.S.C. § 1826(a) followed by indictment and conviction for contempt under 18 U.S.C. § 401; double jeopardy claim found without merit with no citation of *Colombo* and *Menna*); *U.S. v. Esposito*, 633 F. Supp. 544 (S.D.N.Y. 1986).

714 *Virag v. Hynes*, 54 N.Y.2d 437, 443 (1981). Apparently unimpressed, the Virags themselves were convicted of criminal contempt in the second degree for disobeying the very subpoena the Court of Appeals sustained. *People v. Virag*, 100 A.D.2d 984 (2d Dep't), *appeal denied*, 63 N.Y.2d 713 (1984).

least gamesmanship—and is insensitive to statutes of limitation which are not tolled by the "[c]onstant delays occasioned by unmeritorious motions to quash followed by routine appeals,"[715] nor the contempt proceedings following thereafter.

> The question is . . . whether courts must put up with shifts and subterfuges . . . and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance.[716]

The notion that a Judiciary Law criminal contempt arising out of a grand jury proceeding is purgable exalts judicial indecisiveness over the public's interest in the vitality of one of its oldest institutions. Authorities cited by the Court of Appeals in support of its purge *dictum* indicate that purgation should be the exception, not a rule which would only encourage nonpurgable contempt indictments[717] with all their harsher consequences.

As for the punishment authorized under Judiciary Law § 750—the same should be reassessed in light of the "petty-serious-offense" standard and contemporary economic reality.[718] Greater flexibility should attend the question of how much punishment is appropriate for an individual contemnor—and, in the context of an ongoing grand jury investigation, how much incarcerational sting will drive a message home to others. The presently permissible fine, $1,000, raised in 1988 from the $250 first specified almost 100 years ago, is still a nuisance fee of piddling proportions.[719] It may properly be increased by the legislature.[720] History bears this out.

> Our research has uncovered no other statutory provision dealing with contempt in New York prior to the Constitu-

715 *Virag*, 54 N.Y.2d at 443.

716 *Loubriel v. U.S.*, 9 F.2d 807, 808 (2d Cir. 1926) (Hand, J.).

717 *People v. Leone*, 44 N.Y.2d 315, 317–18 (1978).

718 *Int'l Union–United Mine Workers v. Bagwell*, 512 U.S. 821 (1994) (applying and extending *Bloom v. Illinois*, 391 U.S. 194 (1968) and effectively overruling *Rankin ex rel. Bd of Educ. v. Shanker*, 23 N.Y.2d 111 (1968) on the question of a jury–trial requirement for "serious" criminal contempt fines for contempt of court).

719 *E. Concrete Steel Co. v. Bricklayers & M. P. Int'l Union*, 200 A.D. 714 (4th Dep't 1922).

720 *Rankin ex rel. Bd. of Educ.*, 23 N.Y.2d at 119–20; *see also Bagwell*, 512 U.S. 821.

> tion. An 1801 law provided that any person swearing in the presence or hearing of a justice of the peace, mayor, recorder or alderman could be placed, in a summary manner, in the stocks for one hour. N.Y. Laws, 1801 (1887 ed.) [ch. 34] at 54. Then, in 1829, a fairly comprehensive statute was enacted designating what actions constituted criminal contempts and limiting punishments to $250 fine [a draconian sum in 1829] and 30 days in jail. 52 N.Y. Rev. State., 1828–1835 (1836 ed.), at 207.[721]

Some final observations are in order. When the judiciary exercises its inherent contempt powers, it does so to vindicate and preserve its own authority and existence as an institution of separated government. It is always the primary beneficiary of its contempt power, incidental and secondary beneficiaries are the public and private suitors generally.[722] From the benefits flowing to its incidental and secondary beneficiaries springs Judiciary Law criminal contempt's functional definitions. They have been labeled "criminal" and "civil." Because of the all-too-often tendency to unthinkingly spin a jurisprudence off these labels, New York contempt jurisprudence has become "mingled and confused by the use of fixed but ambiguous nomenclature"[723] at the expense of reasoned analysis. Far too many decisions—some with a lamentably obvious impetus to a desired result—alternately mix and match contempt's functional definitions with those merely convenient labels historically affixed to them. As noted, the results have been like the weather.

This is not the place to work out a theory in detail, nor to answer many obvious doubts and questions suggested by this handbook. Suffice it to say that the accumulated wisdom of the case law—*sans* its barnacles—together with the contemporary experience of private and public litigants should be appropriately honed and codified. New Judiciary Law contempt statutes are clearly called for. Those already contained in the United States Code present a worthy model.[724] A *proposed* new Judiciary Law contempt statute was submitted to the New York State Law Revision

721 *U.S. v. Barnett*, 376 U.S. 681, 715 (1964).

722 *See, e.g.*, *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 518 (9th Cir. 1992); *Dep't of Hous. Pres. & Dev. v. Chance Equities, Inc.*, 135 Misc. 2d 375, 376 (Civil Ct., N.Y. Co. 1987).

723 *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 247 (1886).

724 *See* 18 U.S.C. § 401; 28 U.S.C. § 1826.

Commission and the New York State Bar Association in 1995 (see Appendix A).

As to the case law relating to the judiciary's summary contempt power for disruptive behavior in its immediate view and presence, this portion of the handbook may be legitimately perceived as decidedly critical. One cannot make steak out of hash. The appellate courts should return to basics. They should recognize the summary contempt power (through its history and logic) for what it is—the necessary solution to a very practical problem. They should strip away so much of the ethereal "due process" incantation that has rendered recent case law exceedingly difficult to comprehend, let alone apply. Those who have committed no wrong should not be erroneously held in summary contempt.[725] But those guilty of disruptive behavior should, just as urgently, be correctly held in contempt with appropriate dispatch. What is "correct" and what is "erroneous" should be simplified and clarified—"bright lines" and appellate court restraint would be helpful. How can either *or both* sides of a litigation obtain justice if courts cannot *or will not* control *both* sides *and spectators* through their summary contempt powers? Unwarranted judicial timidity or ineptitude is here just as unseemly as overreaction.[726]

The U.S. Supreme Court has spoken seriously about both unseemly extremes: "If imposed in passion or pettiness" the immediate-view-and-presence contempt power "brings discredit to a court as certainly as the conduct it penalizes."[727] "That power [however] has been vested in the

725 *See*, *e.g., Brostoff v. Berkman*, 170 A.D.2d 364, 366 (1st Dep't 1991) (Sullivan, J., dissenting), *aff'd*, 79 N.Y.2d 938 (1992).

726 For a *glaring* example of Monday morning quarterbacking regarding a trial court's use of summary contempt—based on clear misconstruction of precedent, including the philosophically, legally and historically erroneous notion that summary contempt "is inherently violative of fundamental notions of due process"—*see Werlin v. Goldberg*, 129 A.D.2d 334, 343–47 (2d Dep't 1987) (Brown, J., dissenting); *see also Breitbart v. Galligan*, 135 A.D.2d 323 (1st Dep't 1988). Only two of many U.S. Supreme Court cases need be quoted to put the fib to this "of–the–moment" jurisprudential falsehood:

> Historically and rationally the inherent power of the courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. *Such summary conviction and punishment accords due process of law.*

Fisher v. Pace, 336 U.S. 155, 159–60 (1949) (emphasis added) (footnote omitted); *Cooke v. U.S.*, 267 U.S. 517, 534 (1925) ("It has *always* been so in the courts of the common law *and the punishment imposed is due process of law.*") (emphasis added); *see also In re Katz*, 62 Misc. 2d 342, 344–45 (Sup. Ct., N.Y. Co. 1970).

727 *Sacher v. U.S.*, 343 U.S.1, 8 (1952) (Jackson, J.).

judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise that call for its exercise."[728] "The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great [a] leniency."[729]

The American courtroom is not a back alley or a meeting hall. Yelling and screaming reinforced by idle threats (so typical of trial jurists) are no answer to immediate-view-and-presence contempt, especially by spectators who are supposed to be silent non-actors. Trial courts must deal with the rough and tumble of the courtroom. But appellate decisions appear on the verge of construing or obfuscating the immediate-view-and-presence contempt power out of existence while simultaneously emphasizing the need for order in the courtroom. This jurisprudential phenomenon calls to mind the old saw about the man who sought to prove that he could keep a horse alive by starving it. When he proved his point the horse died. Lawyers and judges seem to agree that the growing problem of courtroom indecorum is a judicially self-inflicted wound.[730]

New York's Shield Law,[731] until its 1990 amendment, only protected "news persons" from contempt charges for failing to disclose (confidential) information or its sources that were obtained during the news gathering process.[732] A 1981 attempt to expand it so as to include nonconfidential sources fell short of the necessary votes in the State Senate.[733] The 1990 change warrants comment.

There is no Federal Constitutional requirement that members of the news media be a privileged class exempt from the law's right to everyman's evidence.[734] But in a 1988 decision, involving *civil* discovery, our Court of Appeals—ignoring one of its own prior cases—found a qualified journalist's privilege for nonconfidential news sources in article I, section

728 *In re Terry*, 128 U.S. 289, 308 (1888) (Harlan, J.).

729 *Cooke*, 267 U.S. at 539 (Taft, J.).

730 *Lack of Dignity in Court? Blame the Judges*, N.Y.L.J., May 12, 1989, p. 2, col. 3; *Order in the Court! Where Has It Gone*?, N.Y.L.J., June 19, 1989, p. 1, col. 1.

731 *See supra* IX. Contempt and the Media—New York's Shield Law; N.Y. Civil Rights Law § 79-h.

732 *Knight–Ridder Broad. Co. v. Greenberg*, 70 N.Y.2d 151, 155 (1987).

733 *Id*. at 155–56.

734 *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291 (1936).

8 of the New York State Constitution.[735] Its decision, as it said, was "based on an adequate and independent ground under our State Constitution," thus rendering what it "believe[d]" about the First Amendment of the United States Constitution pure *dicta*.[736] It did not involve New York's Shield Law, and, being a civil case, the court did not "*consider the different factors present in criminal cases*."[737]All of this notwithstanding, the 1990 law passed by the legislature "codifies the Shield Law, the three part test adopted [by the Court of Appeals in the above-described civil case] and makes clear that the same test applies to criminal proceedings."[738] Most respectfully, this author has some nagging questions about this rank special interest legislation.

Does the expanded Shield Law tread on the separation of powers doctrine in that it removes from the judiciary its inherent power to enforce orders which may be necessary to its conduct and supervision of grand and petit jury proceedings?[739] Is a 1984 Court of Appeals decision holding that the absolute, confidential-source privilege of the Shield Law does not impair or suspend the State Constitutional power of grand juries to investigate misconduct in public office[740]—ironically in a case involving unlawful grand jury disclosure by a corrupt prosecutor to a corrupt news reporter—the product of reasoned analysis or a craven judicial *ipse dixit* impelled by hydraulic forces of the moment? May this new absolute and qualified privilege at some point interfere with the Governor's State Con-

735 Article I, § 8's language has been in the New York Constitution since 1821. In 1936 a unanimous Court of Appeals affirmed the denial of a writ of habeas corpus sought by a jailed reporter who refused to divulge the *confidential* source of his news articles to a grand jury. While the court was not called upon to construe Article I, § 8, it did state:

> On reason and authority, it seems clear that *this court should not* now depart from the general rule in force in many of the States and in England and create a privilege in favor of an additional class. If that is to be done, it should be done by the legislature which has thus far refused to enact such legislation.

People ex. rel. Mooney, 269 N.Y. at 295 (emphasis added).

736 This technique for avoiding U.S. Supreme Court review of federal questions has been sharply criticized. McCraw, *Doubts about Our Processes: Richard D. Simons and the Jurisprudence of Restraint in State Constitutional Analysis*, 13 Touro L. Rev. 626 (1997).

737 *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528 n.2 (1988).

738 Memorandum of State Exec. Dep't, 1990 N.Y. Laws ch. 33, amending Civil Rights Law § 79-h.

739 *People v. Zagarino*, 97 Misc. 2d 181, 191 (Sup. Ct., Kings Co. 1978).

740 N.Y. Const. art. I, § 6.

stitutional duty to take care that the laws are faithfully executed?[741] Will the new expanded Shield Law become an intolerable luxury when a reporter withholds vital *non-confidential*, inculpatory or *exculpatory evidence* in a murder case? Regarding the crime of Unlawful Grand Jury Disclosure,[742] does the Shield Law not only protect the corrupt reporter but also confer *de facto* immunity on prosecutors turned divulging felons? Lastly, there is the Sixth Amendment of the U.S. Constitution under which a defendant has the right to call witnesses in his own behalf. On this score does the Shield Law require a defendant to go through a procedural and appellate cement mixer before he can vindicate his Sixth Amendment right to call witnesses? The U.S. Supreme Court, not New York's Court of Appeals, its legislature or Constitution, will here be the final arbiter.[743] It is one man's opinion that the legislature, by adopting a substantive and procedural expansion of the Shield Law applicable to civil and criminal cases based on a Court of Appeals ruling in a purely civil case[744]—a decision obviously without the possible persuasion of prosecution and defense *amicus* briefs—may have jumped the State Constitutional gun, as well as that belonging to the Sixth Amendment of the United States Constitution.[745] At least on the State Constitutional level, there has been no chance for the Court of Appeals to "*consider the different factors present in criminal cases*."[746] Requiring a criminal defendant to make a "clear and specific showing" that something he has not seen—like evidence which would free him—is "highly material and relevant" and "critical and necessary" to his defense but "not obtainable from any

741 N.Y. Const. art. IV, § 3; *Knight–Ridder v. Greenberg*, 70 N.Y.2d 151 (1987); *Beach v. Shanley*, 62 N.Y.2d 241 (1984); *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 164–66 (1984); *see also Stern v. Morgenthau*, 62 N.Y.2d 331, 335 (1984) (dictum); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 582–83 (S.D.N.Y. 1984).

742 Penal Law § 215.70.

743 *People v. Troiano*, 127 Misc. 2d 738, 742–44 (City. Ct., Suffolk Co. 1985).

744 *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521 (1988).

745 *Holmes v. South Carolina*, 547 U.S. 319 (2006):

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. (internal quotation marks and citations omitted).

746 *Id.* at 528 n.2.

alternative source" seems, at least to this author, to take a heavy toll on the Sixth Amendment. "It is the rare case in which a litigant, in advance of looking at items sought by a subpoena, can actually establish that such items contain the very evidence the litigant needs."[747] Can rational judges find evidence "highly material and relevant" but not "critical and necessary?"[748] Can they do so with a straight face? The Second Circuit Court of Appeals appears to have done so. Construing New York's Shield Law in a diversity action the court stated:

> We think that critical or necessary as used in the statute must mean something more than useful, particularly since the first statutory factor requires that the material sought must be shown to be highly material and relevant in any event. Several courts have held that in order to find unpublished news to be critical or necessary within the meaning of . . . 79-h, there must be a finding that the claim for which the information is to be used virtually rises or falls with the admission or exclusion of the proffered evidence.[749]

How can "highly material and relevant" evidence not be "critical or necessary" such that one's claim will not "virtually rise or fall" without it? Does the Second Circuit mean that, so long as one can make out a *prima facie* case, "highly material and relevant" evidence is not "critical or necessary" such that his claim would "virtually rise or fall" without it? Has any member of the Second Circuit ever been a trial lawyer (include the court's clerks) and had the experiences of trying a "bare bones" as opposed to a strong, winnable case? The Second Circuit, applying what the United States Supreme Court has actually said on the subject, finds no privileged status for nonconfidential news sources and only a qualified privilege for confidential ones in *civil* cases only.[750]

In the case of important inculpatory evidence, the prosecution does not have a Sixth Amendment shoulder to cry on. How high a price the public will ultimately pay to subsidize, as it were, the suspension of its own dis-

747 *In re Grand Jury Subpoenas Served on NBC*, 178 Misc. 2d 1052, 1058 (Sup. Ct., N.Y. Co. 1998).

748 *In re Subpoena Duces Tecumto to Ayala*, 162 Misc. 2d 108 (Sup. Ct., Queens Co. 1994); *In re Grand Jury Subpoena to McGuire*, 161 Misc. 2d 960 (Westchester Co. Ct. 1994); *cf. Scott v. Cooper*, 227 A.D.2d 463, 465 (2d Dep't 1996).

749 *Krase v. Graco Children's Prods., In re NBC*, 79 F.3d 346, 351 (2d Cir. 1996), *cited in In re CBS (Vacco)*, 232 A.D.2d 291 (1st Dep't 1996).

750 *Gonzales v. NBC*, 155 F.3d 618 (2d Cir. 1998).

belief, which is the actual underpinning of "an unfettered news gathering process," remains to be seen.[751] Perhaps the media ought to develop industry-wide guidelines for the voluntary waiver of the Shield Law's privileges where a needless travesty of justice might occur, bearing in mind that those who give may also take or construe away.

751 The Shield Law Amendment's sponsor, Senator Goodman, said: "This bill will recognize that the press, particularly in criminal cases, should not be made into an investigative arm of government." Senator Gold said: "There's no difference between a reporter who, in the course of what he or she is doing, finds out something that may be useful in a case, and any private citizen who may develop information." Senator Galiber stated that: "This is a horrible, horrible piece of legislation. How much more are we going to cave in to pressure from the press out of fear?" *See "State's Pols O.K. 'Shield Law,'"* New York Post, Mar. 22, 1990, p. 18. Contrary to the sponsor's bald assumption, it may be criminal defendants, not the government, who were in the bath water thrown out by New York's Shield Law.

APPENDIX A

SUGGESTIONS FOR A NEW CONTEMPT STATUTE FOLLOWED BY SUGGESTED STATUTE WITH ANNOTATIONS

INTRODUCTORY SECTION FOR SUGGESTED STATUTE TO PRECEDE PRESENT JUDICIARY LAW SECTION 750

1. Subject to constitutional requirements, proceedings under this article are civil proceedings which, unless the contrary is specified, are governed by the Civil Practice Law and Rules. Such proceedings are not criminal proceedings for the prosecution of crime.

NOTE: Case law shows that, despite the familiar but erroneous catchphrase "criminal contempts are crimes in the ordinary sense," non-penal law criminal contempts are *sui generis* special proceedings using the modes of civil procedure. Yet, to achieve a given result, courts will alternate between calling them crimes and criminal prosecutions and denying that they are crimes and criminal prosecutions. The net result is error, contradiction and confusion. The above subdivision (1) will put an end to this constant stream of contradiction and bring about uniformity and consistency of result in the law.

NOTE: Subject to limitations otherwise provided by constitution or existing case law, appeal must lie for an aggrieved petitioner under Judiciary Law §§ 750 and 753, but not obviously under 28 U.S.C. § 1826 (re-written as § 753-a *infra*)—only the "recalcitrant-witness-respondent" may appeal an order of commitment under this new "1826" proposed section which, except for its subdivision (c) is taken from 28 U.S.C. § 1826.

2. Except as otherwise specified therein, an application to punish for a contempt of court under § 750 may be made by notice of motion, order to show cause, or orally by the judge in open court in the presence of the contemnor. Such notice shall state the time and place of hearing and allow a reasonable time for the preparation of a defense and shall state the essential facts constituting the contempt charged and describe it as such.

NOTE: *All* of the above methods of notice satisfy due process of law, that is, notice and opportunity to be heard at a time when it is meaningful to be heard. This proposed subsection (2) is derived from the Federal Rules of Criminal Procedure, specifically Rule 42(a). The contempt power of the court is an inherent one which is first, last and foremost circumscribed, controlled and defined by the Federal Constitution. The notice of motion and order to show cause methods of commencing a contempt proceeding are creatures of statute, *not* constitution. A careful reading of Judiciary Law §§ 750(A)(1)–(6) and 751(1) shows that, "the party charged must be notified of the accusation, and have a reasonable time to make a defense," nothing more (though custom and usage is with the notice of motion and

the order to show cause). *Cooke v. United States*, 267 U.S. 517, 536 (1925), notes that, "*[t]he exact form of the procedure of such contempts is not important*" so long as there is notice and an opportunity to be heard.

> Allowing oral notice consistent with "notice-and-opportunity-to-be-heard" due process requirements *is very important* to lower criminal courts charged with giving and enforcing orders of protection for abused women, etc.

3. An application to punish for a contempt of court under § 753 must be made by notice of motion or order to show cause personally served on the respondent, or, his attorney in a pending civil action or proceeding.

NOTE: Present Judiciary Law §§ 756 and 761 are classic cases of micro management. The bold-faced notice is unnecessarily redundant to what the civil contempt papers state themselves. This subsection complies with Appellate Division case law.

NOTE: The bold-faced type requirement of § 756 is nothing more than "gotcha"—"feel good" legislation which causes a needless waste of court, lawyer and litigant time and money. Contemnors, represented by counsel, appear in the civil contempt proceeding and successfully have it thrown out because they didn't get bold-faced notice that it was a contempt proceeding with jail in the offing.

> If the bold-faced notice is so important, then why is it waivable if one proceeds to contest the merits? *See In re Estate of Rappaport*, 58 N.Y.2d 725 (1982); *Nelson v. Nationwide Measuring Serv.,* 59 A.D.2d 717, 718 (2d Dep't 1977), *appeal dismissed*, 43 N.Y.2d 649. [To this author it seems that the § 756 notice serves to scare unrepresented poor people into "paying up."].

4. Definitions

A. Punitive Contempt

A punitive contempt under § 750 is a contempt of court whose cause and result are a violation of the rights of the public as represented by their courts of record as established by law and which result in punishment in the interest of public justice.

B. Coercive—Remedial Contempt

A coercive remedial contempt under § 753 is a contempt of court whose cause and result are a violation of the rights of a private party who is a litigant before a court and for whom a monetary indemnity or compulsory act or omission is ordered for his benefit.

NOTE: These definitions are lifted out of *People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245 (1886). It is from *Munsell*—one suspects—that the New York Legislature cemented in the words "civil" and "criminal" in the Code of Civil Procedure of 1909.

> The benefits of defining these contempts accurately—based on the foremost Court of Appeals pronouncement—should, one hopes, be obvious to all.

C. [Definitions of contempt terms should be defined as far down as possible—on the style and order of the definitions at the beginning of the Criminal Procedure Law.]

[Suggested definitions should include: "adjudged in contempt," "punishment," "petitioner," "respondent," "motion to hold in contempt," "order to show cause to hold in contempt."]

NOTE: A certain amount of "dumbing down" definitions, as may be derived from case law, custom and Supreme Court clerks, will help eliminate the constant tide of nomenclature which renders most contempt proceedings adventures in confusion. (Witness the fact that Criminal Procedure Law § 710.60(4)'s last sentence states: "Upon [a hearing on a motion to suppress physical evidence], hearsay evidence is admissible to establish any material fact." This "dumbing down" was considered necessary because the principle of hearsay which inheres in 4th Amendment probable cause was reputed to be having difficulty penetrating some thick juristic skulls. The "hearsay" on such a hearing is, in law, actually *not* hearsay.)

5. Burdens of Proof

A. A punitive contempt under § 750(A)(3)–(7) must be proven beyond a reasonable doubt. *See Cnty. of Rockland v. Civil Serv. Employees Ass'n.*, 62 N.Y.2d 11, 14 (1984).

B. A coercive-medial contempt under § 753 must be proven with reasonable certainty. *See McCormick v. Axelrod*, 59 N.Y.2d 574, 582 (1983); *N.A. Dev., Ltd. v. Jones*, 99 A.D.2d 238, 242 (1st Dep't 1984).

C. The burden of proof in a proceeding to confine a recalcitrant witness under § 753-a [28 U.S.C. § 1826] is clear and convincing evidence.

Add these new paragraphs in subsection:

6. Except for a court order which is void on its face, the validity of a court order may not be inquired into a punitive contempt proceeding pursuant to § 750(A).

In a coercive remedial contempt proceeding pursuant to § 753(A) the validity of a court order may be inquired into.

NOTE: This is the collateral bar rule for these two types of contempt. Most trial courts out of ignorance or agenda—to one degree or another—have difficulty reconciling themselves to this fundamental tenet of a civilized jurisprudence. Too much effort is wasted—oftentimes futile—in educating a court on this matter as a needless preliminary contest to the actual contempt proceeding.

Add a new paragraph in subsection:

7. In any proceeding under §§ 750(A), 753(A) and 753-a of this article for disobedience to a court order, or other contemptuous conduct, reliance upon advice of another person is not a defense, justification or mitigating circumstance for such disobedience or contemptuous behavior.

NOTE: To this day, despite volumes of case law, reliance upon the advice of counsel or others—even God—is used as a "defense" or mitigating circumstance. A statute codifying the principle that advice of others is no defense will emphasize the point to all concerned.

[§ 750] Amend §§ 750(A) & (C) to substitute the word "intentional" for "willful" and substitute "punitive" for "criminal."

NOTE: The word "willfulness" in § 750 is derived from some old Court of Appeals cases where it is crystal clear that the court used "willfully" to mean "intentionally." Where "level of willfulness" came from and how this "philosophy-class-dropout" conceptual impossibility leaked its way into Court of Appeals opinions is anyone's guess. "Punitive" for "criminal" contempt will remove a word which never was intended to bring about its mischievous results. I know of no lawyer, judge or commentator who would not like to be rid of it. The U.S. Supreme Court itself seems to have become punch-drunk on account of it. *Munsell* explains best how the word "criminal" sneaked into what has *always been* a civil statute.

[§ 750(6)] Rewrite this subdivision as indicated below:

6(a). Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

6(b). Publication of a report of a court's proceedings which refers to a matter under judicial consideration and is calculated to, and actually does, interfere with its proceedings or presents an imminent, clear and present danger of interfering with its proceedings.

6(c). An extrajudicial statement, by a litigant or his attorney in an action or proceeding, made in violation of a prior court order which a reasonable person would expect to be disseminated by means of public communication which the litigant or his attorney knows, or reasonably may be deemed to know, will have a substantial likelihood of materially prejudicing the proceeding. Such communication must be calculated to and actually interfere with the proceeding, or, present an imminent, clear and present danger to the conduct of the court's proceedings.

NOTE: There is *no* power of "contempt by publication" in the federal courts. It was taken away by an 1831 statute. The states retain this power under a "clear and present danger" standard or a constitutionally acceptable linguistic permutation thereof. *Obviously*, to prove "contempt by publication," *as here set forth*, beyond a reasonable doubt, will be no small feat. As a matter of civilized jurisprudence, the subsection is necessary to set a tone and standard for extreme situations.

NEW 2§ 750(D)

Add a new subdivision D to § 750 to read:

"Punishment imposed for a punitive contempt under subsections (3) or (4) of this section which arises out of and relates to a grand jury proceeding may not be purged without the consent of the People."

NOTE: Public resources, court time and public justice and safety have become a mockery under the chancellor's-toe "purgation" doctrine which lower courts have either: (1) abused in shirking their duty once guilt has been proven beyond a reasonable doubt (and even after appellate affirmance); or (2) rendered as predictable as the weather. The contemnor is here being punished for obstructing justice; if he is to be let off the hook it

should be because he has cooperated with lawful authority and has helped make right his wrong.

JUDICIARY LAW § 751(1)

Section § 751(1) should be amended to increase its jail-time and monetary-fine punishments. Its original 30 days and $250 fine were first specified in 1829! (A few years ago the fine was raised to $1,000.)

NOTE: The jail-time punishment (under *Bloom v. Illinois* from the Supreme Court and *Rankin v. Shanker* from the Court of Appeals) may be (constitutionally) increased to 6 months *without* requiring a jury trial. The fine should be increased to $10,000 which, under the latest Supreme Court decision in *Bagwell*, is still a petty fine which will not require a jury trial.

A new "flexible-fine-amount" provision taking into account the gravity of the harm caused by the criminally-contemptuous disobedience under § 750 should be added so as to allow a fine greater then $10,000 *if*, based on principles of ratio and proportionality, the amount of the fine *vis-à-vis* the contemnor's wealth (and other factors) would still be a "petty" fine *not* requiring a jury trial. If, applying these factors, the fine was deemed "serious" then a jury trial would be required. (One supposes that it could be a six-person jury.)

NOTE: A new § 751 should have a clear subdivision specifying that, in assessing a contemnor's ability to pay, for jury trial purposes, the burden of production and proof *is on the contemnor* not the petitioner. Ability to pay is *not* an "element" of the contempt, and, the knowledge and documents necessary to prove lack of an ability to pay are peculiarly and almost exclusively within the knowledge of the contemnor. *See Dep't of Hous. Pres. & Dev. v. Deka Realty Corp.*, 208 A.D.2d 37, 49 (2d Dep't 1995).

NOTE: The Supreme Court of the United States has many times stated (in a criminal contempt jail situation) that whether a jury trial was required did *not* depend on the amount of jail time facing the contemnor but the amount of jail time actually imposed. This methodology—despite its curious logic—is Constitutional law. A new "serious fine" statute could use an "*amount-of-the-fine-actually imposed*" rather than an "*amount-of-the-fine-imposable-and-risked*" method. At the end of the *non-jury* "serious fine[?]" contempt hearing, a court could require a contemnor to show evidence of his net worth and then, based thereon, divine an amount of

money which will "petty" punish, or, do the whole thing over if it desires to impose a "seriously" punishing fine. *Lewis v. United States*, 518 U.S. 322 (1996), *Codispoti v. Pennsylvania*, 418 U.S. 506, 507–512 (1974), and other cases have used this "*post hoc, nunc pro tunc*" method of determining whether a jury trial is (or was) necessary for "serious-vs.-petty-offense" jail-time calculations.

This method could be written into a new § 751.

§ 753

Change "civil" to "coercive-remedial" contempt as it presently appears in the caption to § 753 and its subdivision B.

NEW § 753-a

Add a new § 753-a, which will be a pure lifting of 28 U.S.C. § 1826(a), (b). (Present § 753-a should be renumbered § 753.) The new section will read as follows:

Recalcitrant Witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the State of New York refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) A recalcitrant witness as described in this section may, notwithstanding, be indicted and prosecuted for the same offense, if it is an indictable offense but a court, before which he is convicted, must, in forming its sentence, take into account any previous incarceration.

NOTE: The burden of proof is *clear and convincing evidence* with any final adjudication to occur in open court.

Case law: *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983); *In re Bongiorno*, 694 F.2d 917 (2d Cir. 1982); *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982); *In re Battaglia*, 653 F.2d 419 (9th Cir. 1981).

NOTE: The statute does not use the word "contempt." The cases, however, use the expression "civil contempt" meaning "coercive-remedial contempt." It covers the grand jury process, as well as civil and criminal trials and hearings.

NEW § 753-b

Add a new § 753-b to be captioned:

Sanctions for Abusive or Frivolous Litigation Practices

This section should be modeled on Federal Rule of Civil Procedure Rule 11 and 22 N.Y.C.R.R. pt. 130, together with those specific and general categories of abusive and frivolous litigation practices which may be gleaned from the case law.

A second paragraph in this section should state: "Sanctions imposed pursuant to this section are not to be construed as proceedings under §§ 750A, 753(A) and 753-a."

REPEAL § 776

This section merely provides that a person may also be subject to indictment for the same misconduct as obtains in §§ 750 and 753. It is now incorporated as paragraph (c) in the proposed new § 753-a (28 U.S.C. § 1826).

First, the section is unnecessary insofar as it states what the federal and state case laws have recognized and fought over in a double jeopardy context. The present state of the law is confusion. However, it appears that the Supreme Court may have now, unwittingly, put the law back at what the Court of Appeals said it was in 1971. *See People v. Colombo*, 29 N.Y.2d 1,

4, *vacated sub nom. Colombo v. New York*, 405 U.S. 9 (1971). Will the Court of Appeals itself go back to it?

Second, case law and history show that there will be no double jeopardy problem if the core of § 776 is made into subsection (c) of new § 753-a. There has been no dispute by anyone on the Supreme Court that double jeopardy is not implicated when a recalcitrant witness has the opportunity to "purge his recalcitrance."

MISCELLANEOUS

1. Go through all New York statutes for references to "contempt" and there amend them to state: "may be punishable as a contempt as otherwise provided in Article 19 of the Judiciary Law."

2. Leave the Mandate of Commitment section of Article 19 alone.

3. Leave the "immediate-view-and-presence" provisions of Article 19 alone.

4. Conform the rest of Article 19's sections to the use of "punitive contempt" and "coercive-remedial contempt."

5. "Coercive-remedial contempt" is a more accurate, tested, trouble-free nomenclature than "coercive" or "remedial" standing alone. Both words require interpolation to encompass the other. This is to be avoided. "Remedial" depends on one's perspective—as does "coercive."

The hyphenated term "coercive-remedial" is a "failsafe" against jurisprudence by nomenclature.

6. Leave the rest of Article 19 alone. It is the haphazard accretion of teacher, policeman, hospital worker, and labor union lobbies. There is no sense fighting lobbies when it is the core of contempt which is the problem.

AMEND CPLR 2308

An amendment would be as follows:

(1) CPLR 2308(a) uses the words "shall be punishable as a contempt of court" as the *last part* of its first sentence. Amend it by adding the words: "as provided in Article 19 of the Judiciary Law."

(2) CPLR 2308(b) should be subsumed into Article 19 of the Judiciary Law, of which § 774 already has provisions for the periodic review of the imprisonment of one who refuses to perform an act, *or*

REPEAL IT

It would be better to repeal it and rely on the enactment of a new § 753-a [28 U.S.C. § 1826] as part of a new Article 19 of the Judiciary Law.

Section 753-a covers everything that CPLR 2308 does. It is a much clearer statute. It does not need periodic review because incarceration is limited by the length of the proceeding in which a witness was recalcitrant.

NOTE: The portion of CPLR 2308 regarding the striking of a party's pleadings can be tacked on to an earlier CPLR rule.

APPENDIX B
SAMPLE ORDERS TO SHOW CAUSE

(SAMPLES 1 THROUGH 5)

SAMPLE ORDER TO SHOW CAUSE #1

At a Criminal Term, Motion Part, of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 24th day of June, 1986.

PRESENT: Hon. Ruth Moskowitz, Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

_____X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL, FOR AN ORDER ADJUDGING MICHAEL UNGER AND SOPHIE'S CHOICE FAMILY SHOES, INC., IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3) AND 751 OF THE JUDICIARY LAW FOR THEIR WILLFUL DISOBEDIENCE TO THE LAWFUL MANDATE OF THE COURT, AND COMMITTING MICHAEL UNGER TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY DAYS, AND/OR FINING MICHAEL UNGER AND SOPHIE'S CHOICE FAMILY SHOES, INC., EACH A SUM OF MONEY NOT TO EXCEED $1,000,

ORDER TO SHOW CAUSE

INDEX NO. 16299/86

Petitioner,

-against-

MICHAEL UNGER AND
SOPHIE'S CHOICE FAMILY SHOES, INC.,

Respondents.

_____X

Upon reading the supporting affirmation of LAWRENCE N. GRAY, Special Assistant Attorney General for Medicaid Fraud Control, State of New York, and the exhibits annexed thereto,

AND, it appearing that MICHAEL UNGER and SOPHIE'S CHOICE FAMILY SHOES, INC., have disobeyed the lawful mandates of this Court by willfully and deliberately failing to appear and produce, before the Grand Jury, the documents commanded by two subpoenas *duces tecum* dated May 23, 1986, and by deliberately failing to comply with my June 6, 1986, order to produce the subpoenaed documents before the Grand Jury on June 19, 1986,

IT IS HEREBY ORDERED that MICHAEL UNGER and SOPHIE'S CHOICE FAMILY SHOES, INC., appear before me at a criminal term of the Supreme Court of Kings County to be held at the Courthouse located at 360 Adams Street, Brooklyn, New York, Part 37, on the 27th day of June, 1986, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and show cause why an order should not be entered adjudging MICHAEL UNGER and SOPHIE'S CHOICE FAMILY SHOES, INC., guilty of criminal contempt, and committing MICHAEL UNGER to jail for a period not to exceed thirty (30) days and/or fining him and SOPHIE'S CHOICE FAMILY SHOES, INC., each a sum of money not to exceed $1,000.

Sufficient reason appearing therefor, personal service of a copy of this Order, together with the affirmation and exhibits on which it is based, upon MICHAEL UNGER on or before 5:00 p.m. on the 25th day of June, 1986, shall be deemed good and sufficient service.

Dated: Brooklyn, New York
June 24, 1986

ENTERED

June 24, 1986

Anthony N. Durso

ENTER:

/s/
Ruth Moskowitz, J.S.C.
Justice of the Supreme Court
Kings County

SAMPLE ORDER TO SHOW CAUSE #2

At a Criminal Term, Motion Part, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse located at 100 Centre Street, New York, New York, on the 6th day of February, 1986.

PRESENT: Hon. Harold J. Rothwax, Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

_____X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL, FOR AN ORDER ADJUDGING UZI WEINBERG, M.D., IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3) AND 751 OF THE JUDICIARY LAW FOR HIS WILLFUL DISOBEDIENCE TO THE LAWFUL ORDER TO MANDATE OF THE COURT FOR A PERIOD NOT TO EXCEED THIRTY DAYS, AND/OR FINING UZI WEINBERG, M.D., A SUM OF MONEY NOT TO EXCEED $250,	ORDER TO SHOW CAUSE INDEX NO. 40258/86

Petitioner,

-against-

UZI WEINBERG, M.D.,

Respondent.

_____X

Upon reading the supporting affirmation of LAWRENCE N. GRAY, Special Assistant Attorney General for Medicaid Fraud Control, State of New York, and the exhibits annexed thereto.

AND, it appearing that UZI WEINBERG, M.D., has willfully disobeyed the lawful mandate of this Court by willfully and deliberately failing to appear and produce *in toto* before the Grand Jury, as ordered by me on January 24, 1986, the documents commanded by a subpoena *duces tecum* dated November 6, 1985,

IT IS HEREBY ORDERED that UZI WEINBERG, M.D., appear before me at a criminal term of the Supreme Court of New York County to be held at the Courthouse located at 100 Centre Street, New York, New York, Part 50, on the 13th day of February 1986, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and show cause why an order should not be entered adjudging UZI WEINBERG, M.D., guilty of criminal contempt and committing UZI WEINBERG, M.D., to jail for a period not to exceed thirty (30) days and/or fining him a sum of money not to exceed $250.

Sufficient reason appearing therefor, personal service of a copy of this Order, together with the affirmation and exhibits on which it is based, upon UZI WEINBERG, M.D., on or before the 10th day of February, 1985, shall be deemed good and sufficient service.

Dated: New York, New York
Feb. 6, 1986

ENTER

/s/
Harold J. Rothwax
Justice of the Supreme Court
Feb. 6, 1986

SAMPLE ORDER TO SHOW CAUSE #3

At a Term of the Supreme Court of the State of New York, New York County, held in Supreme Court, Part 35, 100 Centre Street, New York, New York, on the day of August, 1993.

PRESENT: Hon. Rose L. Rubin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

_____X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL, FOR AN ORDER ADJUDGING MARTIN PAUL SOLOMON, ESQ., AND GIOVANNI DEL GIZZO IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3) AND 751 OF THE JUDICIARY LAW FOR THEIR DISOBEDIENCE TO THE LAWFUL MANDATE OF THE COURT AND COMMITTING MARTIN PAUL SOLOMON, ESQ., AND GIOVANNI DEL GIZZO TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY (30) DAYS AND FINING MARTIN PAUL SOLOMON, ESQ., AND GIOVANNI DEL GIZZO EACH A SUM OF MONEY NOT TO EXCEED ONE THOUSAND DOLLARS ($1,000),	ORDER TO SHOW CAUSE INDEX NO.
Petitioner,	
-against-	
MARTIN PAUL SOLOMON, ESQ., and GIOVANNI DEL GIZZO,	
Respondents.	

_____X

UPON a reading of the attached affirmation of LAWRENCE N. GRAY, Special Assistant Attorney General, State of New York, and the exhibits incorporated therein,

AND, it appearing that MARTIN PAUL SOLOMON, ESQ., and GIOVANNI DEL GIZZO have willfully disobeyed the lawful mandate of the Court, in that:

On January 13, 1993, the Supreme Court, New York County (Rubin, J.) ordered that $10,000 bail money posted by correspondent, GIOVANNI DEL GIZZO (the defendant in the criminal action entitled *People v. Del Gizzo*, Indictment No. 3707/91), *not* be returned or given to him, but instead be returned and given to his attorney, MARTIN PAUL SOLOMON, ESQ., correspondent herein, to be deposited and placed by said MARTIN PAUL SOLOMON, ESQ., in his attorney escrow account until further order of said Supreme Court or the Appellate Division (First Department thereof), and whereas:

On January 13, 1993, correspondent Del Gizzo was remanded to commence execution of sentence upon his conviction in the above criminal action whereupon, by operation of law, said $10,000 bail, held in trust by the court, was returnable or returned to correspondent Del Gizzo subject to the aforesaid court order directing otherwise. Thereafter and to the present, corespondents, singly and acting in concert with one another, willfully and deliberately failed and refused to deposit and place said $10,000 in MARTIN PAUL SOLOMON, ESQ.,'s attorney escrow account, thus converting it to their own use and possession, and it is hereby

ORDERED that MARTIN PAUL SOLOMON, ESQ., and GIOVANNI DEL GIZZO appear before me at a term of the Supreme Court to be held at the Courthouse, Part 35, Criminal Term, 100 Centre Street, New York, New York, on the _____ day of August, 1993, at _____ o'clock in the noon, and show cause why an Order should not be entered pursuant to Sections 750(A)(3) and 751 of the Judiciary Law adjudging MARTIN PAUL SOLOMON, ESQ., and GIOVANNI DEL GIZZO guilty of Criminal Contempt and committing them to jail for a period not to exceed thirty (30) days and fining them each a sum of money not to exceed one thousand dollars ($1,000).

Sufficient reason appearing, personal service of a copy of this Order upon MARTIN PAUL SOLOMON, ESQ., and GIOVANNI DEL GIZZO together with the aforesaid affirmations and exhibits upon which it is

based, on or before the _____ day of August, 1993, shall be deemed good and sufficient service.

Dated: New York, New York
August , 1993

ENTER

_____/s/
Rose L. Rubin
Justice of the Supreme Court

P893:26

SAMPLE ORDER TO SHOW CAUSE #4

At a Criminal Term of the Supreme Court, of the State of New York, New York County, held in Supreme Court, Part 49, 111 Centre Street, New York, New York, on the 1st day of April, 1985.

PRESENT: Hon. John A. K. Bradley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

_____X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL, FOR AN ORDER ADJUDGING EDWARD COHEN, ESQ., IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3), (4) AND 751 OF THE JUDICIARY LAW FOR HIS WILLFUL DISOBEDIENCE TO THE LAWFUL MANDATE OF THE COURT AND COMMITTING EDWARD COHEN, ESQ., TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY (30) DAYS AND FINING EDWARD COHEN, ESQ., A SUM OF MONEY NOT TO EXCEED TWO HUNDRED FIFTY DOLLARS ($250),

ORDER TO SHOW CAUSE

INDEX NO. 40762/85

Petitioner,

-against-

EDWARD COHEN, ESQ.,

Respondent.

_____X

UPON a reading of the attached affirmation of LAWRENCE N. GRAY, Special Assistant Attorney General, State of New York, and the supporting affidavits of Special Assistant Attorney General MICHAEL R. BER-

LOWITZ, and Special Investigator JEAN REILLY and exhibit incorporated therein,

AND, it appearing that EDWARD COHEN, Esq., having willfully disobeyed and resisted the lawful mandate of the Court, to wit: subpoena *duces tecum* issued during the trial of *People v. Fazal Ahmad*, Indictment Number 2772/84, by resisting and willfully and deliberately refusing to appear before the New York County Supreme Court on March 25, 1985, as a witness in the trial of the aforesaid indictment, it is hereby

ORDERED that EDWARD COHEN, Esq., appear before me at a term of the Supreme Court to be held at the Courthouse, Part 49, Criminal Term, 111 Centre Street, New York, New York, on the 1st day of May, 1985, at 9:30 o'clock in the forenoon, and show cause why an Order should not be entered pursuant to Sections 750(A)(3), (4) and 751 of the Judiciary Law adjudging EDWARD COHEN, Esq., guilty of Criminal Contempt and committing him to jail for a period not to exceed thirty (30) days and fining him a sum of money not to exceed two hundred fifty dollars ($250).

Sufficient reason appearing, personal service of a copy of this Order upon EDWARD COHEN, Esq., together with the aforesaid affirmation, affidavits and exhibit upon which it is based, on or before the 19th day of April, 1985, shall be deemed good and sufficient service.

Dated: New York, New York
April 1, 1985

E N T E R

/s/
John A. K. Bradley
Justice of the Supreme Court

SAMPLE ORDER TO SHOW CAUSE #5

At a Term of the Supreme Court of New York County, held in Supreme Court, Part 40, 100 Centre Street, New York City, New York, on ____ day of November, 1984.

PRESENT: Hon. Herbert I. Altman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

_____X

IN THE MATTER OF THE APPLICATION OF SPECIAL ASSISTANT ATTORNEY GENERAL LAWRENCE N.GRAY, FOR AN ORDER ADJUDGING FAZAL AHMAD IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3), (4) AND 751 OF THE JUDICIARY LAW FOR HIS WILLFUL DISOBEDIENCE TO THE LAWFUL MANDATE OF THE COURT AND COMMITTING FAZAL AHMAD TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY (30) DAYS AND FINING FAZALAHMAD A SUM OF MONEY NOT TO EXCEED TWO HUNDRED FIFTY DOLLARS ($250),

ORDER TO SHOW CAUSE

INDEX NO. 44120/84

Petitioner,

-against-

FAZAL AHMAD,

Respondent.

_____X

UPON a reading of the annexed affirmation of LAWRENCE N. GRAY, Special Assistant Attorney General, State of New York, and the exhibits incorporated therein, and the affidavits of CELESTE CEDENO and BRENA STEWART;

AND, it appearing that FAZAL AHMAD having willfully disobeyed and resisted the lawful mandate of the Court, to wit: a trial subpoena

duces tecum, by willfully and deliberately refusing to produce before the New York County Supreme Court documents demanded by said subpoena *duces tecum* served and dated October 15, 1984.

IT IS HEREBY ORDERED THAT FAZAL AHMAD appear before me at a term of the Supreme Court to be held at the Courthouse, Part 40, Criminal Term, 100 Centre Street, New York, New York, on the 27th day of November, 1984, at 10 o'clock in the forenoon and show cause why an Order should not be entered pursuant to Sections 750(A)(3), (4) and 751 of the Judiciary Law adjudging FAZAL AHMAD guilty of Criminal Contempt and committing him to jail for a period not to exceed thirty (30) days and fining him a sum of money not to exceed two hundred fifty dollars ($250).

Sufficient reason appearing, personal service of a copy of this order upon FAZAL AHMAD, together with the affirmation and exhibits upon which it is based, on or before the 15th day of November, 1984, shall be deemed good and sufficient service.

Dated: New York, New York
November 13, 1984

E N T E R.

/s/
Herbert I. Altman
Justice of the Supreme Court

APPENDIX C

SAMPLE MANDATES OF COMMITMENT

SAMPLE MANDATE OF COMMITMENT #1
(Subpoena *Duces Tecum*)

At the Additional Term of the Supreme Court of Albany County at the Courthouse, Columbia and Eagle Streets, Albany, New York, on the ____ of _____, 1980.

PRESENT: Hon. Norman L. Harvey
Justice of the Supreme Court

_____X

IN THE MATTER OF THE APPLICATION OF THE ADDITIONAL JANUARY 1979 GRAND JURY OF THE ALBANY SUPREME: COURT FOR AN ORDER ADJUDGING LOUIS J. FIORE IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3) AND 751 OF THE JUDICIARY LAW FOR HIS WILLFUL DISOBEDIENCE TO THE LAWFUL MANDATE OF THE COURT AND COMMITTING LOUIS J. FIORE TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY (30) DAYS AND/OR FINING LOUIS J. FIORE A SUM OF MONEY NOT TO EXCEED $250,	: MANDATE OF COMMITMENT FOR CRIMINAL CONTEMPT INDEX NUMBER 449/79
Petitioner,	:
-against-	:
LOUIS J. FIORE,	:
Respondent.	:

_____X

PETITIONER, The Additional January 1979 Grand Jury of the Albany Supreme Court, having moved by order to show cause dated April 3,

1980, for an order pursuant to Sections 750(A)(3) and 751 of the Judiciary Law, adjudging the respondent, LOUIS J. FIORE, guilty of Criminal Contempt for his willful disobedience to the lawful mandate of the court and committing LOUIS J. FIORE to jail for a period not to exceed thirty (30) days and/or fining LOUIS J. FIORE a sum of money not to exceed $1,000.

NOW, upon reading and filing the order to show cause dated April 3, 1980, and the supporting affirmation of LAWRENCE N. GRAY, Special Assistant Attorney General, and exhibits annexed thereto, and the affidavit in opposition of LOUIS J. FIORE dated April 17, 1980, and, having conducted a hearing on April 17, 1980, and having heard LAWRENCE N. GRAY, Special Assistant Attorney General for the petitioner and RICHARD PRUNE, ESQ., for the respondent, it is

ORDERED AND ADJUDGED, that said respondent, LOUIS J. FIORE, be and hereby is found guilty of Criminal Contempt of this Court as a result of this willful disobedience to the lawful mandate of this Court, to wit: respondent's willful disobedience to, and refusal to comply with, the subpoena *duces tecum* of The Additional January 1979 Grand Jury of Albany Supreme Court (attached hereto) commanding him on March 27, 1980, to bring and produce before said Grand Jury: **"All powers of attorney, general, limited and otherwise, executed by LOUIS J. FIORE to Republican State Senator Joseph R. Pisani for the years 1970 up to and including January 1, 1980."**

AND IT IS ORDERED AND ADJUDGED, that said respondent, LOUIS J. FIORE, as punishment for the said Criminal Contempt of this Court, be imprisoned in the Albany County Jail for a period of ____ days and fined the sum of $ ___.

ENTER:

_____
Norman L. Harvey
Justice of the Supreme Court

SAMPLE MANDATE OF COMMITMENT #2
(Subpoena *Duces Tecum*)

State of New York, Supreme Court, Bronx County, 215 East 161st Street, Bronx, New York, on the 9th day of September, 1987.

PRESENT: Hon. Robert G. Seewald
Justice of the Supreme Court

_____X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL FOR AN ORDER ADJUDGING SHANTI JAIN AND GYAN JAIN AND H.S. GROUP, INC., IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3) AND 751 OF THE JUDICIARY LAW FORTHEIR WILLFUL DISOBEDIENCE AND WILLFUL RESISTANCE TO THE LAWFUL MANDATES OF THE COURT, AND COMMITTING SHANTI JAIN AND GYAN JAIN TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY DAYS, AND/OR FINING SHANTI JAIN AND GYAN JAIN AND H.S. GROUP, INC., D/B/A CENTROMEDICAL CENTER INC., EACH A SUM OF MONEY NOT TO EXCEED $1,000,	:	MANDATE OF COMMITMENT FOR CRIMINAL CONTEMPT
	:	INDEX NUMBER 1248/87

Petitioner,

-against-

SHANTI JAIN AND GYAN JAIN AND H.S. GROUP, INC. D/B/A CENTRO MEDICAL CENTER, INC.,

Respondent.

_____X

PETITIONER, Special Assistant Attorney General LAWRENCE N. GRAY, having moved by orders to show cause dated June 25 and July 17, 1987, for an order pursuant to Sections 750(A)(3), (4) and 751 of the Judiciary Law, adjudging respondents, SHANTI JAIN, GYAN JAIN and H.S. GROUP, INC., D/B/A CENTRO MEDICAL CENTER, INC., guilty of Criminal Contempt for their willful disobedience to, and resistance willfully offered to, the lawful mandates of the court and committing respondents to jail for a period not to exceed thirty (30) days and/or fining respondents each a sum of money not to exceed one thousand dollars ($1,000),

NOW, upon reading and filing the orders to show cause dated June 25 and July 17, 1987, and the supporting affirmations of Special Assistant Attorney General LAWRENCE N. GRAY attached thereto, the affirmations of BARRY TELLER, ESQ., and MELVIN LEBETKIN, ESQ., dated July 1, 1987, the order to show cause (Enten, J.) and supporting affidavit of SHANTI JAIN dated June 24, 1987, and

HAVING conducted hearings on July 9, August 17, September 1, and September 8, 1987, and having heard the Special Assistant Attorney General for petitioner and MELVIN LEBETKIN, ESQ., and BARRY TELLER, ESQ., for respondents, it is

ORDERED AND ADJUDGED that respondent GYAN JAIN and respondent H.S. GROUP, INC., D/B/A CENTRO MEDICAL CENTER, INC., be and hereby are found guilty of Criminal Contempt pursuant to Sections 750(A)(3), (4) and 751 of the Judiciary Law for their willful disobedience to, and resistance willfully offered to, the lawful mandates of the court, to wit: (1) a Bronx County Grand Jury Subpoena *Duces Tecum* dated June 17, 1987 (attached hereto and incorporated by reference), commanding them on June 22, 1987, to bring, produce and leave before said Grand Jury "All Documents Listed in Attached Schedule 'A,'" corporate and required to be kept by law for the period September 1, 1983 to present; and (2) an order of the Supreme Court, Bronx County (Seewald, J.) dated July 10, 1987 (attached hereto and incorporated by reference), commanding them forthwith to provide said Grand Jury with all the subpoenaed material commanded by said subpoena *duces tecum* of said Grand Jury dated June 17, 1987. Having been duly and properly served with the above court mandates respondents, GYAN JAIN and H.S. GROUP, INC., D/B/A CENTRO MEDICAL CENTER, INC., willfully disobeyed said mandates and willfully offered resistance to said mandates by knowingly, intentionally, willfully and deliberately refusing to bring, produce, provide and leave the aforesaid documents, production of which

was commanded by said Grand Jury subpoena *duces tecum* and forthwith court order dated June 17 and July 10, 1987, respectively, AND IT IS

ORDERED AND ADJUDGED that respondents, GYAN JAIN and H.S. GROUP, INC., D/B/A CENTRO MEDICAL CENTER, INC., are found guilty of Criminal Contempt pursuant to §§ 750(A)(3), (4) and 751 of the Judiciary Law, AND IT IS THEREFORE

ORDERED AND ADJUDGED that respondent, GYAN JAIN, as punishment for said Criminal Contempt be imprisoned by the New York City Department of Correction for a period of thirty (30) days and fined the sum of one thousand ($1,000) dollars, AND IT IS

ORDERED AND ADJUDGED that respondent, H.S. GROUP, INC., D/B/A CENTRO MEDICAL CENTER, INC., as punishment for said Criminal Contempt be fined the sum of one thousand ($1,000) dollars, AND IT IS

ORDERED that the Mandate of Commitment is stayed until 9:30 am, Tuesday, September 15, 1987, at which time said stay will automatically expire and respondent GYAN JAIN shall appear before this court for the purpose of surrender and commencement of punishment.

September 9, 1987

E N T E R:

_____

Robert G. Seewald
Justice of the Supreme Court

SAMPLE MANDATE OF COMMITMENT #3
(Immediate-View-and-Presence Contempt)

Mandate of Commitment[752]

The Mandate of Commitment's CAPTION should read: *IN RE* THE CRIMINAL CONTEMPT OF COURT OF (name or description of "John Doe" contemnor)[753] COMMITTED IN THE IMMEDIATE-VIEW-AND-PRESENCE OF THE COURT (JUDICIARY LAW § 750), WHICH OBSTRUCTED AND IMMEDIATELY THREATENED TO OBSTRUCT THE PROCEEDINGS AND IMPAIRED THE COURT'S AUTHORITY TO PRESIDE OVER THE PROCEEDINGS ENTITLED: (Write in the name of the criminal or civil action or proceeding with the indictment or index number) [adapted from *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 500 (1911)].

The **HEADING** next to the caption box should state: MANDATE OF COMMITMENT FOR CRIMINAL CONTEMPT COMMITTED IN THE IMMEDIATE VIEW AND PRESENCE OF THE COURT.[754]

The **first paragraph** of the Mandate should state: AT A (special, trial, etc.) TERM OF THE _____ COURT IN THE _____ JUDICIAL DEPARTMENT, HELD IN AND FOR THE COUNTY OF _____, ON THE _____ DAY OF (month), (year), AT THE COURTHOUSE AT (number and street), COUNTY OF _____, THERE WAS REGULARLY BEFORE THE COURT A (trial, hearing, motion, etc.) ACTUALLY IN PROGRESS IN THE ABOVE-CAPTIONED ACTION AND PROCEEDING.

The **second paragraph** of the Mandate should also state: WHEREUPON (name of contemnor) WHO WAS (Attorney for, Client, Witness, Spectator) ENGAGED IN THE FOLLOWING CONDUCT IN THE IMMEDIATE VIEW AND PRESENCE OF THE COURT: [*legibly write out what the contemnor did or refused to do in clear, everyday, non-con-*

752 § 752 Requisites of Commitment for Criminal Contempt; Review of Certain Mandates. Where a person is committed for contempt, as prescribed in § 751 [up to $1,000 fine and/or up to 30 days in jail], the particular circumstances of his offense must be set forth in the mandate of commitment. Such mandate, punishing a person summarily for a contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under article 78 of the CPLR.

753 Some spectator contemnors refuse to identify themselves. This is not an obstacle since the court is punishing the contemnor, not his or her name. Like a "John Doe" indictment, the contemnor's name—as purely a police–corrections matter—can be substituted for "John Doe."

754 Neither statute nor case law requires the court to specify which subdivision of § 750 is involved. "It was proper for the magistrate to interpolate his version of the occurrences in conjunction with the stenographer's minutes." *Berkon v. Mahoney*, 268 A.D. 825 (2d Dep't 1944), *aff'd*, 294 N.Y. 828 (1945).

clusory, non-editorializing English. Be expansively truthful and err on the side of being overly detailed in how the contemnor's conduct obstructed or immediately threatened to obstruct the proceedings or impaired the authority of the court over the proceedings. Incorporate the stenographic minutes by reference.]. THE CONDUCT OF (name of contemnor), AS ABOVE SET FORTH, OBSTRUCTED, IMMEDIATELY THREATENED TO OBSTRUCT AND IMPAIRED THE COURT'S AUTHORITY TO PRESIDE OVER SAID (trial, hearing, motion, etc.) IN THE ABOVE-CAPTIONED ACTION AND PROCEEDING.

The **third paragraph** of the Mandate should state: IT IS THEREFORE ORDERED AND ADJUDGED THAT (contemnor's name) IS GUILTY OF CRIMINAL CONTEMPT OF COURT, COMMITTED IN THE IMMEDIATE VIEW AND PRESENCE OF THE COURT.

The **fourth paragraph** of the Mandate should state: AND IT IS FURTHER ORDERED AND ADJUDGED THAT AS PUNISHMENT FOR SAID CRIMINAL CONTEMPT OF COURT (name of contemnor) IS TO BE COMMITTED TO AND IMPRISONED IN THE JAIL OF THIS COUNTY FOR A PERIOD OF _____ DAYS [*not to exceed thirty*] AND IS FINED THE SUM OF _____ DOLLARS [*not to exceed $1,000*] AND IT IS SO ORDERED.

_____

NAME AND TITLE OF JUDGE

DATED: _____

_____, NEW YORK[755]

755 This Mandate of Commitment is adapted from that which was reproduced in *Waldman v. Churchill*, 262 N.Y. 247 (1933). It complies with Judiciary Law §§ 752, 755 and case law distillation. "Jurisdiction of the person . . . attache[s] instantly upon the contempt being committed in the presence of the court." *In re Terry*, 128 U.S. 289, 311 (1888). Absent sufficient averment to the contrary there is a presumption in favor of a court's summary contempt jurisdiction. *In re Cuddy*, 131 U.S. 280, 286 (1889). But a court filling out a Mandate of Commitment will be well served by bearing in mind that, "[i]t is difficult . . . in a written statement, to convey to the mind of the reader a photographic impression of what occurred at the time of an alleged contempt . . ." *People ex rel. Palmieri v. Marean*, 86 A.D. 278, 279 (2d Dep't 1903). An "immediate–view–and–presence" contempt is one which is seen or heard by the judge presiding so that he can assert the facts based on his own knowledge. "[N]o proof need be given. The knowledge of the judge takes the place of proof and his recital in the mandate of commitment of the facts . . . is sufficient." *Douglas v. Adel*, 269 N.Y. 144, 147 (1935). "Where [an Article 78 proceeding in the nature of *certiorari*] is directed to a judge . . . he is obliged to make and file a return which shall set forth the facts within his knowledge upon which he acted. . . . The return thus made is conclusive."*Douglas*, 269 N.Y. at 147–48. An appellate court can only look to the facts recited in the Mandate of Commitment in deciding whether there was an "immediate–view–and–presence" contempt. A contempt citation is void without a written Mandate of Commitment which is *stricti juris*. *In re Rotwein*, 291 N.Y. 116 (1943); *People ex rel. Barnes v. Court of Sessions*, 147 N.Y. 290 (1895); *Rutherford v. Holmes*, 66 N.Y. 368 (1876); *Paine, Webber, Jackson & Curtis, Inc. v. Pioneer Warehouse Corp*., 61 A.D.2d 756, 757 (1st Dep't 1978); *Sickmen v. Goldstein*, 59 A.D.2d 731 (2d Dep't 1977); *Solano v. Martin*, 55 A.D.2d 620 (2d Dep't 1976); *In re Petition of Boasberg*, 286 A.D. 951, 952 (4th Dep't 1955); *Steingut v. Imrie*, 270 A.D. 34, 44 (3d Dep't 1945).

APPENDIX D

SAMPLE ARREST ORDERS FOR FAILURE TO OBEY ORDER TO TO SHOW CAUSE COMMANDING APPEARANCE FOR CONTEMPT PROCEEDING

SAMPLE ARREST WARRANT #1

_____

WARRANT OF ARREST

[Use Caption] PURSUANT TO JUDICIARY LAW § 2-b(3)

_____

TO ANY PEACE OFFICER OF THE STATE OF NEW YORK:

GREETINGS:

An order to show cause having been personally served on (*name of contemnor*) commanding his/her appearance before the court on the ___ day of _____, 19__, and said person having failed to appear,

YOU ARE HEREBY COMMANDED to arrest said person and bring said person directly before (*name of judge*), a Justice/Judge of the _____ Court, Part _____ thereof, held at the Courthouse located at _____, New York, on the __ day of _____, 19__, at ___ o'clock in the ___ noon, to answer for his/her disobedience to the order to show cause, and also the charges contained therein, issued by (*name of judge*) and duly served on said person on the ___ day of _____, 19__, and pursuant to Judiciary Law § 2-b(3) you have this warrant, and it is

So Ordered

_____
Justice/Judge of the _____ Court

Dated this _____ day of _____, 19___

SAMPLE ARREST WARRANT #2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

——————————————————————————X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL, FOR AN ORDER ADJUDGING EDWARD CREEP, ESQ., IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3), (4) AND 751 OF THE JUDICIARY LAW FOR HIS WILLFUL DIS-OBEDIENCE TO THE LAWFUL MANDATE OF THE COURTAND COMMITTING EDWARD CREEP, ESQ., TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY (30) DAYS AND FINING EDWARD CREEP, ESQ., A SUM OF MONEY NOT TO EXCEED $1,000,	WARRANT OF ARREST INDEX NO. 40762/85

Petitioner,

-against-

EDWARD CREEP, ESQ.,

Respondent.

——————————————————————————-X

TO: ANY POLICE OFFICER OF THE STATE OF NEW YORK AND SPECIFICALLY SPECIAL INVESTIGATORS OF THE OFFICE OF THE DEPUTY ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL:

GREETINGS:

YOU ARE HEREBY COMMANDED to apprehend EDWARD CREEP, ESQ., of 93 Marion Avenue, Merrick, New York, and bring him before a Justice of the Supreme Court at a Trial Term, Part 49 thereof, held at the Courthouse at 111 Centre Street, New York, forthwith, to

answer for his disobedience to a subpoena and order to show cause issued by said court and duly served on the said EDWARD CREEP, ESQ., on the 25th day of March, and pursuant to Judiciary Law § 2-b(3), you have this warrant.

Dated: _____, 1985

_____

Justice of the Supreme Court

SAMPLE ARREST WARRANT #3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM

——————————————————————————X

IN THE MATTER OF THE APPLICATION OF
SPECIAL ASSISTANT ATTORNEY GENERAL
LAWRENCE N. GRAY, FOR AN ORDER ADJUDG-
ING FRANKLIN LEE IN CONTEMPT OF COURT
PURSUANT TO SECTIONS 750(A)(3) AND 751
OF THE JUDICIARY LAW — WARRANT OF
FOR HIS WILLFUL DISOBEDIENCE — ARREST
TO THE LAWFUL MANDATE OF THE COURT
AND COMMITTING FRANKLIN LEE TO JAIL
FOR A PERIOD NOT TO EXCEED THIRTY — INDEX NO.
(3O) DAYS AND FINING FRANKLIN LEE A
SUM OF MONEY NOT TO EXCEED $1,000,

Petitioner,

-against-

FRANKLIN LEE,

Respondent.

——————————————————————————-X

TO: ANY POLICE OFFICER OF THE STATE OF NEW YORK AND SPECIFICALLY SPECIAL INVESTIGATORS OF THE OFFICE OF THE DEPUTY ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL:

GREETINGS:

YOU ARE HEREBY COMMANDED to apprehend FRANKLIN LEE, of 913 East Tremont Avenue, Bronx, New York, and bring him before a Justice of the Supreme Court at a Trial Term, Part 25 thereof, held at the Courthouse at 215 E.161st Street, Bronx, New York, forthwith, to answer for his disobedience to a subpoena, two orders to show cause issued by said court and duly served on the said FRANKLIN LEE, on the 26th day of January, 1988, and the 18th day of February, 1999, respec-

tively, and an order of said court issued on March 9, 1988, and pursuant to Judiciary Law § 2-b(3), you have this warrant.

Dated: _____

_____

Justice of the Supreme Court

SAMPLE ARREST WARRANT #4

At a Criminal Term of the Supreme Court of the State of New York, Part 17 held in and for the County of Kings, 360 Adams Street, Brooklyn, New York, on the ___ day of October, 1991.

PRESENT: Hon. Abraham Gerges
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

————————————————————————————X

IN THE MATTER OF THE APPLICATION OF LAWRENCE N. GRAY, SPECIAL ASSISTANT ATTORNEY GENERAL, FOR AN ORDER ADJUDGING CHOWDHURY AZAM AND CHURCH AVENUE PHARMACY, CORP., INC., IN CONTEMPT OF COURT PURSUANT TO SECTIONS 750(A)(3) AND 751 OF THE JUDICIARY LAW FOR THEIR WILLFUL DISOBEDIENCE TO THE MANDATE OF THE COURT, AND COMMITTING CHOWDHURY AZAM TO JAIL FOR A PERIOD NOT TO EXCEED THIRTY DAYS, AND/OR FINING CHOWDHURY AZAM AND CHURCH AVENUE PHARMACY CORP., INC., EACH A SUM OF MONEY NOT TO EXCEED $1,000,

WARRANT OF ARREST

INDEX NO.

Petitioner,

-against-

CHOWDHURY AZAM AND CHURCH AVENUE PHARMACY CORP., INC.,

Respondents.

————————————————————————————--X

TO: ANY POLICE OFFICER OF THE STATE OF NEW YORK AND SPECIFICALLY SPECIAL INVESTIGATORS OF THE OFFICE OF THE DEPUTY ATTORNEY GENERAL FOR MEDICAID FRAUD CONTROL:

GREETINGS:

YOU ARE HEREBY COMMANDED to apprehend CHOWDHURY AZAM, of 85-17 165th Street, Jamaica, New York, and bring him before Abraham Gerges, a Justice of the Supreme Court at a Trial Term, Part 17 thereof, held at the Courthouse at 360 Adams Street, Brooklyn, New York, in response to CHOWDHURY AZAM having been adjudged guilty of Criminal Contempt of Court pursuant to Sections 750(A)(3) and 751 of the Judiciary Law by decision of the Supreme Court, Kings County (Gerges, J.) dated June 20, 1991. You have this warrant pursuant to Judiciary Law § 2-b(3).

Dated: New York, New York
_____, 1991

_____

Justice of the Supreme Court

TABLE OF AUTHORITIES

CASES

STATUTES, RULES & REGULATIONS

FEDERAL STATUTES

United States Code

Federal Rules of Civil Procedure

Federal Rules of Criminal Procedure

NEW YORK STATUTES

Civil Practice Law & Rules

Civil Rights Law

Criminal Procedure Law

Education Law

Judiciary Law

Legislative Law

N.Y. Comp. Code, Rules & Regs.

Penal Law

INDEX

D

E

F

G

I

J

K

L

M

N

O

P

R

S

T

W

LAWRENCE N. GRAY, ESQ.

Lawrence N. Gray is a former Special Assistant Attorney General in the appellate section of the Attorney General's Medicaid Fraud Control Unit. He was previously a Special Assistant Attorney General in the Office of the Special State Prosecutor for the Investigation of the New York City Criminal Justice System; prior to that he was an Assistant Attorney General in the Bureau of Real Estate, Securities Fraud and Theatrical Syndications. He began his career as an Assistant District Attorney in Bronx County. Mr. Gray is a 1969 graduate of St. John's University School of Law, where he was an associate editor of the *St. John's Law Review.* His other publications include *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's Law Review 337 (1998); *Judiciary and Penal Law Contempt in New York: A Critical Analysis*, Brooklyn Law School Journal of Law and Policy, Vol. III, No. 1 (1994); *The Criminal Contempt Handbook*, New York State Criminal Justice Services (2000); *Criminal Contempt Under New York's Penal and Judiciary Laws* (1992); *Direct Examination* (1983); *The Role of Counsel at the Grand Jury* (NYSBA, 1987); *Extradition* (1991); and he is Editor-in-Chief of NYSBA's *New York Criminal Practice Handbook* Supplements.