

Why Contempt Is Different: Agency Costs and “Petty Crime” in Summary Contempt Proceedings

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A court without [the contempt] power would be at best a mere debating society, and not a court. . . . It is, and must be, a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government.¹

When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge [in a contempt proceeding,] he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause.²

INTRODUCTION

For as long as they have existed, contempt proceedings have been the source of significant controversy, their necessity and abuse hotly contested by the legal community, the legislature, and the judiciary. The raw, unchecked power of summary contempt—the ability of a judge to imprison an individual instantaneously without trial, hearing, or counsel—is arguably a discretionary authority of unparalleled magnitude.³ At the same time, such

1. State *ex rel.* Attorney Gen. v. Circuit Court, 72 N.W. 193, 194-95 (Wis. 1897).

2. Green v. United States, 356 U.S. 165, 199 (1958) (Black, J., dissenting) (footnote omitted).

3. For historical examples of such an exercise of power, see Taylor v. Hayes, 418 U.S. 488, 491 n.2 (1974); Illinois v. Allen, 397 U.S. 337, 353-55 (1970) (Douglas, J., concurring in the result); United States v. Seale, 461 F.2d 345, 375-89 (7th Cir. 1972); and Robert Allen Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U. L. REV. 34, 56-58 (1976).

In addition to the judiciary, Congress is also able to exercise the contempt power to maintain control over its proceedings. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 225-30 (1821) (upholding the contempt power as one essential to the functioning of the House of

authority has also been hailed as indispensable to the judiciary's function as an effective arbiter and administrator of the law.⁴ Given these polar traits of summary contempt, it is not surprising that the legitimacy and scope of the contempt power was once a topic of heated debate as well as intense academic and political scrutiny. In 1963, just five years before the Supreme Court handed down the last of a series of landmark contempt decisions in *Bloom v. Illinois*,⁵ one author described contempt as "a volatile, focal point of significant and timely political issues" that had been "the vehicle for deciding a variety of dramatic and significant social problems."⁶

But in the three and a half decades following *Bloom*—a decision that guaranteed a jury trial for any direct criminal contempt⁷ with a term of imprisonment greater than six months—the issue of contempt has gradually

Representatives); see also 2 U.S.C. §§ 192, 194 (2000) (authorizing a penalty of \$100 to \$1000 and one to twelve months' imprisonment, upon indictment by a grand jury, for failing to testify or produce evidence before Congress). However, given that the scope of congressional proceedings is limited to a far smaller pool of individuals than that of the courts, contempt of Congress—while theoretically a power equal in magnitude to contempt of court—is arguably a far less worrisome incarnation of the contempt power.

4. Such a view seems to have originated in an unpublished opinion of the British judge John Eardley Wilmot, which stated that contempt "is a necessary incident to every Court of Justice." JOHN EARDLEY WILMOT, NOTES OF OPINIONS AND JUDGEMENTS DELIVERED IN DIFFERENT COURTS 254 (London, Luke Hansard 1802). Blackstone appears to have been influenced by Wilmot's view when he wrote about the contempt power in his *Commentaries*. JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 21 (1927). For more on the necessity of summary contempt, see *infra* Part IV.

5. 391 U.S. 194 (1968).

6. RONALD L. GOLDFARB, THE CONTEMPT POWER 5 (1963).

7. The boundaries between different types of contempt of court have never been completely settled, and it is not within the scope of this Note to do so. For an excellent overview of what is acknowledged to be a "hodgepodge of case law, constitutional law, and statutory regulation [that] has yielded no unified structure," see Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 282 (1971).

For the purposes of this Note, the current definition of "direct criminal contempt" should suffice. "Direct" refers to geographical context. Direct (as opposed to indirect) contempt consists of "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." *Nye v. United States*, 313 U.S. 33, 52 (1941). In federal court, a contempt must be committed in the actual presence of the court and be seen by the presiding judge in order to merit summary adjudication. FED. R. CRIM. P. 42(a). The interpretation of what constitutes direct contempt, however, was not always as restrictive as this current definition. See *infra* notes 102-109 and accompanying text.

"Criminal" refers to the "character and purpose" for which the contempt sanction is imposed: Criminal (as opposed to civil) contempt is punitive, and is imposed "to vindicate the authority of the court." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). For background on the historical development of the criminal-civil distinction (as well as a short argument for the necessity of summary process for direct criminal contempt), see Joseph H. Beale, Jr., *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1908).

Although many of the arguments made throughout this Note might be applied to other categories of contempt, the differences are significant enough to merit the exclusion of those categories from this Note's discussion. For convenience, this Note will refer throughout to "contempt," but unless otherwise stated will mean only direct criminal contempt. More specifically, it will refer only to contempt that would serve as grounds for summary adjudication of guilt—in the federal system, only those occurring in court and in the sight of the presiding judge.

disappeared from judicial and academic discourse.⁸ This lack of modern-day discussion should not be taken as a sign that the contempt power is no longer exercised: It may rather evince a widespread acceptance that *Bloom* achieved the proper balance for contempt by placing it on the same footing as other crimes.

The true reach of summary contempt in today's court system is impossible to determine, in great part due to the very opacity of its procedures. Because summary contempt, by its very nature, does not involve a prosecutor, does not fall under the federal sentencing guidelines, and is adjudicated without any published ruling and often without the defendant ever leaving the courtroom,⁹ sources of judicial statistics that might otherwise be expected to provide data on criminal proceedings are unavailing in determining the extent of the judiciary's use of summary contempt.¹⁰ The single collected source of reporting on contempt—

8. A brief resurgence of interest in contempt scholarship occurred in the mid-1990s with the Supreme Court's decision in *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). See, e.g., Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407 (1998); Gino F. Ercolino, Comment, *United Mine Workers v. Bagwell: Further Clarification of Civil and Criminal Contempt?*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 291 (1996); Philip A. Hostak, Note, *International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181 (1995). But this scholarship focused mostly on the civil-criminal distinction in contempt and not on direct criminal contempt—the subject of this Note. This is the sole exception to what has otherwise been a sharp and steady decline in both judicial and academic attention to contempt over the past thirty years.

9. Federal judges, for example, are required to do nothing more than produce an order of contempt certifying the underlying facts and enter the contempt on the record. FED. R. CRIM. P. 42(a).

10. Such sources include the Administrative Office of the United States Courts, the Bureau of Justice Statistics, the Executive Office for the United States Attorneys, the Federal Bureau of Prisons, and the United States Sentencing Commission, all of which lack any data on summary contempt proceedings.

What may still be somewhat helpful for gauging the incidence of contempt are statistics on jury-tried criminal contempts. According to the Bureau of Justice Statistics—using data from the Executive Office for the United States Attorneys—151 defendants had criminal cases filed against them in U.S. district court for contempt under 18 U.S.C. § 401 in 2001. FED. JUSTICE STATISTICS PROGRAM, DEFENDANTS IN CRIMINAL CASES FILED IN U.S. DISTRICT COURT, FISCAL YEAR 2001, at http://fjsrc.urban.org/noframe/wqs/q_data_1.htm#2001 (under “2001: AOUSC in” hyperlink followed by “Offenses: FTSECMO” hyperlink). Similarly, 97 such cases were concluded in U.S. district court in 2001: 12 sets of charges were dismissed or declined by the prosecutor, 1 resulted in a mistrial, 63 defendants pled guilty, 17 pled nolo contendere, and 4 were convicted or found guilty or insane. FED. JUSTICE STATISTICS PROGRAM, DEFENDANTS IN CRIMINAL CASES TERMINATING IN U.S. DISTRICT COURT, FISCAL YEAR 2001, at http://fjsrc.urban.org/noframe/wqs/q_data_1.htm#2001 (under “2001: AOUSC out” hyperlink followed by “Offenses: TTSECMO” hyperlink). Given these numbers, and given also the fact that federal courts (from which these statistics are drawn) hear only 0.4% of all criminal prosecutions across the country, the number of jury-tried direct criminal contempts is certainly significant. Compare NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2001, at 138, at http://www.ncsconline.org/D_Research/csp/2001_Files/2001_SCCS.html (finding at least 14,532,895 criminal cases filed in state courts in 2000), with STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 65 (2001) (finding 62,585 criminal cases originated in U.S. district courts in the year ending March 31, 2001), available at <http://www.uscourts.gov/caseload2001/contents.html>.

appellate cases reviewing lower court contempt proceedings—may thus vastly understate the procedure's true prevalence in the judicial system. But even in the underrepresentative pool of appellate court decisions, it is clear that summary contempt is alive and well: Recent cases demonstrate that such simple provocations as an off-color remark,¹¹ a late request for a jury trial,¹² or merely staunch advocacy¹³ run the risk of costing an alleged contemnor a hefty fine or up to a half a year of his freedom. As these cases show, the exercise of the contempt power lives on, and with it questions of judicial bias and unchecked self-dealing—questions that *Bloom*, this Note argues, failed to address adequately.

This Note seeks to reopen the discussion and pick up where *Bloom* left off, by reconsidering the right to a jury trial in contempt-of-court proceedings. More specifically, the following pages address whether and in what instances the right to trial by jury is constitutionally guaranteed to those accused of direct criminal contempt. It is the thesis of this Note that the current doctrine, founded upon the Court's opinion in *Bloom*, provides insufficient constitutional safeguards for such contemnors. Contempt proceedings differ from ordinary crimes: They raise unique concerns of impartiality and separation of powers that the jury was designed to address. By analogizing contempt to other crimes, and by extending to contempt proceedings the "petty crimes" analysis that underlies the right to a jury trial in criminal cases, the current doctrine loses sight of the purpose behind

Whether the number of summary contempts is greater than that of contempt prosecutions is indeterminate. On the one hand, the specific circumstances required for contempt to be adjudicated summarily may suggest that the number of summary contempts is lower than those tried either by jury or judge. On the other hand, once such circumstances are satisfied, the distinction between tried and summary contempts turns primarily on the choice of the judge (by selecting whether the proposed sentence will be less than six months). As a result, given that there are greater administrative and judicial hurdles to tried contempt than to summary contempt, it is likely that judges more frequently choose the latter than the former. If so, it may be reasonable to use the number of contempt prosecutions as a rough—and perhaps even conservative—estimate of the prevalence of summarily adjudicated contempt.

11. *Commonwealth v. Williams*, 753 A.2d 856 (Pa. Super. Ct. 2000); *State v. Dubray*, 618 N.W.2d 728 (S.D. 2000). *Williams* is a particularly insightful example of the contempt power's potential for abuse in the hands of an angered and creative judge. *Williams* raised his middle finger in the court's direction and uttered the usual profanity to accompany such a gesture. The court held *Williams* in contempt for two separate acts—the finger-raising and the utterance—with a sentence of five months and twenty-nine days for each act, to be served consecutively. The resulting sentence of almost a full year's imprisonment was vacated by the superior court, and only one of the two contempt charges was remanded: The two acts were so inextricably intertwined, held the court, as to constitute only a single contumacious act. *Williams*, 753 A.2d at 864-65.

12. *Commonwealth v. Odom*, 764 A.2d 53 (Pa. Super. Ct. 2000) (reversing a district court finding of contempt—and a five-month, twenty-nine-day sentence—based on the defendant's request for a jury trial on the day of trial, prompted by his prior miscommunication and disagreement with appointed counsel).

13. *In re Marriage of Bartlett*, 711 N.E.2d 460 (Ill. App. Ct. 1999) (reversing the contempt conviction of an attorney who persisted in arguing a motion after the court insisted that the issue was closed and that the attorney step away).

the guarantees of jury trial found in Article III of the Constitution¹⁴ and the Sixth Amendment.¹⁵ Alluring though the “petty crimes” analysis for the right to a jury trial may be, *Bloom*’s application of that standard to contempt proceedings was erroneous, and the historical record of both the jury right and the contempt power support a more limited scope of summary adjudication than that standard provides. Accordingly, this Note strives to present a new framework within which to conceive of the right to jury trial in contempt proceedings—a framework that is more consistent with both the history of the contempt power and the theory behind the limits on jury trial for ordinary crimes.

To present and justify such a framework, this Note proceeds in four parts. Part I discusses the role of the jury, examining historical sources to demonstrate that one of the jury’s primary purposes was to act as a guard against consolidated power, corruption, and self-dealing. As the political discussion surrounding Article III and the Sixth Amendment demonstrates, a central function of the jury was to align incentives of the judiciary with those of the citizenry from which it derived its authority—to act as a solution to what is now commonly known as the “principal-agent problem.” By permitting the “principal” to make decisions when the stakes were high, the jury ensured that the judiciary was accountable to the people it purported to serve. For the same reason, juries were deemed unnecessary when the potential for judicial self-dealing and the stakes of adjudication were both low: There was no right to a jury trial when the offense was a “petty crime” that did not affect the judge and that carried a relatively minor punishment.

Part II considers why, given the functional role of the jury outlined in Part I, contempt is different from other crimes for the purposes of the right to a jury trial. Although the punishments for contempt and ordinary crimes may be analogous, the incentives for judges in both instances are not. Contempt provides a greater temptation for judges to deviate from the will of the citizenry, and accordingly generates greater agency costs than do other crimes.

Part III discusses why this difference matters from the perspective of the right to a jury trial. Combining the analysis in Parts I and II, it concludes that summary adjudication of contempt, if allowed at all, should be more limited in scope than the current doctrine requires. To supplement this critique, Part IV proposes a number of potential means by which the conclusions of Part III might be implemented. Although the appropriate balance between summary contempt and jury trials may be impossible to

14. U.S. CONST. art. III, § 2, cl. 3 (“The trial of all Crimes . . . shall be by Jury . . .”).

15. *Id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

determine, the summary contempt power as it currently stands is unjustifiable in its breadth. Accordingly, this final Part offers possible solutions to achieve a more appropriate standard for the adjudication of contempt and considers the costs of such solutions.

Part IV concludes with a discussion of the practical difficulties of implementing any possible solutions to the current, erroneous doctrine surrounding contempt. In so doing, it provides a final illustration of how the same judicial self-dealing that makes current contempt doctrine inappropriate has also historically acted to prevent its correction—whether attempted through legislative, executive, or judicial channels.

I. THE ROLE OF THE JURY: REVIVING THE “PRINCIPAL” IN THE JUDICIARY

A. *The Jury's Political Function*

There can be little doubt as to the high regard in which the Founders held the right to a jury trial. That the typical colonist placed significant value on this “grand bulwark of his liberties”¹⁶ is clear: Not only was the right to a jury trial cited among the causes for the American Revolution¹⁷ and among the constitutional guarantees of the fledgling nation that emerged thereafter,¹⁸ but it was also the moving force behind the Bill of

16. 4 WILLIAM BLACKSTONE, COMMENTARIES *342; see also 3 *id.* at *379-81. Blackstone's praise of the jury no doubt influenced the Founders' thoughts on its necessity and virtues. Invocation of Blackstone in the arguments over the nature and extent of the jury right abound. See, e.g., *Essay by a Farmer* (June 6, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST 212, 213-14 (Herbert J. Storing ed., 1981); *Letter from Centinel to the People of Pennsylvania* (1788), reprinted in 2 *id.* at 143, 149; *Letter from Richard Henry Lee to Governor Edmund Randolph* (Oct. 16, 1787), reprinted in 5 *id.* at 112, 114; *A Review of the Constitution Proposed by the Late Convention by a Federal Republican* (Oct. 28, 1787), reprinted in 3 *id.* at 65, 77.

17. See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). Even prior to the American colonies' decision to sever ties with Great Britain, the Continental Congress had invoked the right to trial by jury. In a 1774 letter to Quebec, the Congress cited trial by jury as one of the “invaluable rights” denied under British rule. Invoking the name of Montesquieu, the Congress urged Quebec to join the American colonies in opposition to Great Britain. *Letter to the Inhabitants of Quebec* (Oct. 26, 1774), reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS 105, 105-13 (Worthington Chauncey Ford ed., 1904). Although Quebec declined the offer, the letter's mention of jury trial as one of only five rights “without which a people cannot be free and happy,” *id.* at 107-08, further underscores the importance of the jury in the minds of the colonists.

18. U.S. CONST. art. III, § 2, cl. 3.

Rights¹⁹ and the source of a prodigious number of pamphlets, speeches, debates, and other writings during the Founding era.²⁰

What is somewhat less clear, however, is the precise reason—or reasons—why early America held the jury in such high regard. Explanations of the merits and necessity of jury trials abound,²¹ but of particular importance was the functional role of the jury as a way to assure that the judiciary remained accountable to, and aligned with, the interests of the citizenry it purported to serve.²² As witnessed by both writings of the Revolutionary era and the implementation of jury trials in the colonies and newly formed states, this function was particularly salient in the minds of those responsible for codifying the American right to trial by jury. For them, the jury was a simple solution to the classic problem of misaligned incentives between a principal and his agent—in this case, between the citizenry and the judiciary. The jury was a method of “reviving the principal” in judicial decisions that were either too important or too tempting for relatively unsupervised²³ agents—i.e., judges—to make.

19. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 83 (1998) (“[T]he entire debate at the Philadelphia convention over whether to add a Bill of Rights was triggered when George Mason picked up on a casual comment from another delegate that ‘no provision was yet made for juries in civil cases.’”).

20. For a collection of many of these writings, see *THE COMPLETE ANTI-FEDERALIST*, *supra* note 16; *THE DEBATE ON THE CONSTITUTION* (Bernard Bailyn ed., 1993); and *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1999).

21. For a detailed summary of arguments both for and against juries, see *Recording of Jury Deliberations: Hearings Before the Subcomm. To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 84th Cong. 63-81 (1955) (statement of Harry Kalven, Jr., Professor of Law, University of Chicago). Among the twenty arguments Professor Kalven put forth in favor of the jury, the first two were its effect against bias and self-dealing and its ability to integrate the values of the community into the judicial branch. *Id.* at 64-65. For additional sources in the years since Professor Kalven’s testimony, see Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 443-45 nn.2-5 (1997).

22. For a particularly rich description of this role of the jury—as well as its place in the Bill of Rights—see AMAR, *supra* note 19, at 81-118. See also Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994) (conceiving of the jury as both a structural protection against government and a democratic institution, but noting the declining effectiveness of the jury in the former role as it more strongly embraces the latter); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 733 (1993) (listing “protecting individual rights against an abusive government” as one of the goals of the jury); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964) (painting the jury as a fusion of democracy and structural protections against government); Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991) (citing the jury as a means to prevent legislative tyranny and to offset judicial bias toward governmental interests).

23. At least in theory, federal judges were always subject to the supervision and sanction of impeachment. Many critics of the Constitution, however, were skeptical of impeachment as an effective sanction of the judiciary. See, e.g., *Essay of Brutus* (Mar. 20, 1788), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 16, at 437, 440; *Letter from the Federal Farmer* (Jan. 14, 1788), reprinted in 2 *id.* at 301, 305. Others, by contrast, were concerned that impeachment would become a means of further corruption, by providing a tool for legislative control of the Executive. See, e.g., Samuel Spencer, Speech to the North Carolina Convention (July 28, 1788),

It is understandable why the Founders desired such a check upon their newly established courts. Recent oppression under the yoke of British law had made them wary of the judiciary, and particularly cognizant of the need to align judges' incentives with those of the citizens over whom they presided. The Stamp Act, for example, was enforced by the British admiralty courts—courts in which there was no right to jury trial. Colonists' experience with the Act made them inherently suspicious of adjudication severed from popular authority. Accordingly, when the colonists petitioned King George III for relief, they complained that they had been "subjected to the Determination of a single Judge" and requested that the "essential" right of trial by jury be reinstated to protect colonists from "Arbitrary Decisions of the executive Power."²⁴

British rule thus gave rise to a deep suspicion of the judicial branch. In Massachusetts, for example, one speaker empathized with a crowd's hostility toward the judiciary:

When you came to have leisure to consider, who was on this side, and who on that, of the important question [of whether to continue to obey the authority of Great Britain]; you unluckily found the greater number of those gentlemen, whom you had been wont to revere as makers of the law, the judges of law, the pleaders of law,

in 2 THE DEBATE ON THE CONSTITUTION, supra note 20, at 879, 881 (arguing that the mandate to try impeachments, when combined with other aspects of the Senate's authority, provides the Senate "at once with such an enormity of power, and with such an overbearing and uncontrollable influence, as is incompatible with every idea of safety to the liberties of a free country, and is calculated to swallow up all other powers, and to render that body a despotic aristocracy"); cf. George Mason, Objections to the Constitution, reprinted in 1 id. at 345, 346-47 (expressing concern that the trial of impeachments, when complemented by the rest of the Senate's powers, "will destroy any balance in the government, and enable [Senators] to accomplish what usurpations they please upon the rights and liberties of the people").

History has shown the skeptics of impeachment's effectiveness to be closer to the truth. Impeachment has generally been an empty threat to the judiciary, even for some of the most egregious abuses of judicial power. Circuit Justice Samuel Chase, acknowledged to be one of the worst offenders of the rule of judicial independence for his handling of criminal trials under the Sedition Acts of 1798, ch. 74, 1 Stat. 596, was impeached, but was acquitted on all eight articles of impeachment by the Senate, with votes ranging from unanimity on one charge to a 19-15 vote in favor of guilt on another. 8 ANNALS OF CONG. 665-69 (1805). The same is true of Judge James Peck, whose flagrant abuse of the contempt power led to an 1831 act of Congress, An Act Declaratory of the Law Concerning Contempts of Court, ch. 99, 4 Stat. 487 (1831), which was the first narrowing of the contempt power since its codification in the Judiciary Act of 1789, ch. 20, 1 Stat. 73. Like Chase, Peck was impeached, but the Senate would not vote to convict. Over the entire history of the judiciary, only twelve federal judges have been impeached by the House; only seven were subsequently convicted by the Senate. *Senate Trial History*, USA TODAY, Jan. 4, 1999, at <http://www.usatoday.com/news/index/clinton/clin893.htm>.

24. *Petition to the King (1765)*, reprinted in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766, at 63, 64-65 (Edmund S. Morgan ed., 1959); see also Declaration on Taking Arms (Thomas Jefferson's First Draft), in 2 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 17, at 128, 132-33 (decrying how Parliament has "extended the jurisdiction of the courts of admiralty beyond their antient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the decision arbitrary decision [sic] of a single and dependent judge").

and the executors of law, were, contrary to the law of nature, reason and humanity, taking party with the tyrant, and endeavoring to fix his hateful chains upon you. This circumstance, in addition to your former prejudice against law, excited an undue jealousy and hatred against all those men who have since been appointed to administer, or have attempted to introduce, law into the county.²⁵

This inherent distrust of the machinations of government—and particularly of a distant, federal government—led the drafters of the Constitution and the Bill of Rights to search for ways to incorporate popular checks into the structure of the Union. For the judiciary, the need was particularly acute: As opposed to legislators or the Executive, who served limited terms and were elected (directly or indirectly) by the people themselves, the courts were manned by political appointees whose offices were not jeopardized by deviance from the popular will.²⁶ The jury was thus a political tool for popular control of the judiciary—for making it an accountable (and thus legitimate) political body in the new republican government.²⁷ It provided the primary assurance that application of the laws would remain under the control of the people, rather than in the hands of the privileged and unassailable few.²⁸ When it was likely that the interests

25. William Whiting, *An Address to the Inhabitants of Berkshire County, Massachusetts* (1778), reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 461, 464 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

26. Madison himself acknowledged that the judiciary was particularly likely to be beyond the influences of the populace. Judges, he wrote, “by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions.” THE FEDERALIST NO. 49, at 284 (James Madison) (Clinton Rossiter ed., 1999); see also *Essay by a Farmer* (Mar. 21, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST, supra note 16, at 36, 38 (calling the jury “the democratic branch of judiciary power—more necessary than representatives in the legislature”).

The isolation of the judiciary from the everyday inspection and regulation of the populace was also problematic for another reason. Abuses of power were less likely to be discovered in the individual rulings of judges than in the more general edicts of legislatures or executives:

When the legislature makes a bad law, or the first executive magistrates usurp upon the rights of the people, they discover the evil much sooner, than the abuses of power in the judicial department; the proceedings of which are far more intricate, complex, and out of their immediate view. A bad law immediately excites a general alarm; a bad judicial determination, though not less pernicious in its consequences, is immediately felt, probably, by a single individual only

Letter from the Federal Farmer (Jan. 18, 1788), reprinted in 2 *id.* at 315, 316.

27. Alexis de Tocqueville, in his classic study of American society, commented on the jury’s political—and populist—function: To him, the jury was “above all a political institution” and “eminently republican.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 124 (Sanford Kessler ed. & Stephen D. Grant trans., 2000) (1835). He also explicitly compared the control mechanism of the jury to that of popular elections: “The system of the jury . . . appears to me to be a consequence of the dogma of the sovereignty of the people that is as direct and as extreme as universal suffrage. These are two equally powerful means of ensuring the predominance of the majority.” *Id.* at 125; see also *Essay by Hampden* (Jan. 26, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST, supra note 16, at 198, 200 (“[T]he inestimable right of a trial by jury . . . is the democratical balance in the Judiciary power . . .”).

28. As one commentator at the time of the Founding argued:

of the people and those of the courts would diverge, the right to a jury trial existed to ensure that the former would prevail: It was a way in which the “principal” could be revived in judicial decisionmaking, when the costs of entrusting “agents” were too great.²⁹

B. *The Jury's Historical Use*

This functional role of the jury as a means of judicial control is further supported by the history of jury trial in early America. Despite provisions in state constitutions that unequivocally guaranteed a universal right to trial by jury, colonial and state statutes around the time of the Founding provided no such right for so-called “petty crimes”—minor offenses that were sometimes punishable by up to six months’ imprisonment.³⁰ From

The trial by jury . . . is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. . . . The few, the well born, etc. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description.

Letter from the Federal Farmer (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 245, 249; see also *Essay of an Old Whig* (1787-1788), reprinted in 3 *id.* at 46, 49 (“Judges, unincumbered by juries, have been ever found much better friends to government than to the people.”).

29. For example, the people were protected from the caprices of judicial agents through the jury’s use of general verdicts, which by their very nature could not be questioned by judges on appeal:

[B]y holding the jury’s right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful control in the judicial department. If the conduct of judges shall be *severe* and *arbitrary*, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations

Letter from the Federal Farmer (Jan. 18, 1788), reprinted in 2 *id.* at 315, 320 (emphasis added); see also *Duncan v. Louisiana*, 391 U.S. 145, 155 & n.23 (1968) (supporting the jury as a right granted “in order to prevent oppression by the [g]overnment”); *id.* at 157 (“[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created . . .”).

30. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 934-65, 980-81 (1926). The proposal that “petty crimes” are not subject to a jury trial has not gone uncontested. See, e.g., George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959). Kaye argues that the state jury clauses on which Frankfurter and Corcoran rely are not comparable to Article III and the Sixth Amendment because some were not popularly ratified while others were limited to prosecutions by indictment and information. As a result, Kaye claims that these state clauses are inapposite to the federal Constitution’s universal guarantee of trial by jury. See also Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL’Y 7, 10 (1994) (arguing for a literal and liberal reading of the jury clauses, and for the “burden of persuasion” to lie on those who would read the clauses in a more restrictive fashion).

It is not within the scope of this Note to determine whether Frankfurter and Corcoran’s thesis is beyond reproach. It is sufficient that, be it correct or incorrect, the current Court’s petty crimes doctrine relies upon and parallels its analysis. Because this Note seeks to address contradictions of the law as it currently stands, it will leave the issue of the general appropriateness of the petty crimes doctrine for another day.

drunkenness to Sabbath-breaking, numerous criminal offenses were tried by judges, and not by juries.³¹

If the jury were an end unto itself, this practice would be incomprehensible. But when trial by jury is understood as an instrumental right—one that is only needed to make judicial agents accountable to their populist principals—its limited use makes perfect sense. If judges' incentives deviate from those of the populace at a constant rate across all crimes,³² and the only distinction between petty crimes and other offenses is that the former carry lesser punishments, it makes sense that jury trials might not be guaranteed for all legal infractions. Under such a system, in cases where the stakes (i.e., the potential punishments) are small, and thus the costs of judges' possible deviance are similarly low, the jury's watchful eye is unnecessary and perhaps more costly than it is worth.³³

This is not to say that fear of judicial deviance was the only justification for the jury's adoption and subsequent growth in American history. But this historical evidence does convey that the concern was certainly prominent in the Framers' minds when Article III and the Sixth Amendment were adopted, and—more importantly for the purposes of this Note—that this justification was the one that underlay the distinction between petty and serious crimes when it was first implemented during colonial times.

Certainly, there were (and still are) other benefits that have come to be associated with the jury: It has been forwarded as a forum in which to educate the citizenry, as a way to reinforce and reap the benefits of a pluralistic society, as a guard against the unresponsiveness of precedent, and even as a means of fostering attachment and obedience to the laws themselves. But while all of these benefits may also accompany the use of the jury in criminal trials, none can serve as a rational justification to treat crimes with lesser punishments in a distinct manner from those with greater ones. Both logically and historically, the jury's role as a check on judicial

31. Frankfurter & Corcoran, *supra* note 30.

32. *But see infra* Part II.

33. Let S be the stakes of a given decision (i.e., the length of potential imprisonment, or the magnitude of a potential fine), and let D be the probability that the "principal" (i.e., a jury) and the "agent" (i.e., a judge) will disagree and reach different conclusions between two alternatives (guilty or not guilty). The expected cost of assigning the decision to a judge rather than to a jury will be SD : the cost of an "error" (where the judge and jury disagree on the verdict) multiplied by the probability of such an error. If we assume D to be constant across all crimes, the expected costs of assigning a decision to a judge will vary only with the potential punishment (S) that a crime carries. If the costs are low enough, the populace may be willing to permit a judge to make decisions without the involvement of a jury; the instrumental value of the jury becomes de minimis. At the time of the Founding, it seems that when S was less than six months' imprisonment, the expected costs resulting from judges' deviance in ordinary crimes were not considered sufficient to merit a jury trial. *See Duncan*, 391 U.S. at 192 (Harlan, J., dissenting) ("The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages."). Harlan agreed with the Court on this point; he dissented for another reason—namely, because he believed the states should be doing the calculus, rather than the Court. *Id.* at 192-93.

deviance was the foundation for the distinct treatment of petty crimes, and that role has continued to underlie the distinction to this day. Accordingly, it is this same role that must be considered when determining the extent to which jury trial is appropriate for contempt proceedings as well.

The petty-serious distinction found its way into judicial doctrine in the late nineteenth century³⁴ and was applied to the states in 1968.³⁵ Implicit in these cases was the recognition that the jury's protections were needed only when the stakes of conviction were sufficiently high: For the Court's calculus, the only relevant difference among crimes was their gravity. Accordingly, on the day that the Court required states to try serious crimes by jury, it also decided in *Bloom v. Illinois*³⁶ that the same requirement would apply to "serious" contempt proceedings.

For both ordinary crimes and contempt, the Court set an identical threshold of six months for the petty-serious distinction. But the leap from crimes to contempt, although perhaps logical given the doctrinal perspective at the time, depended upon the assumption that a crime's statutory punishment was the only factor relevant to determining whether jury trial was necessary.³⁷ This assumption was a flawed one, and as a result the doctrinal limits on jury trials in contempt proceedings have been flawed as well.

II. WHY CONTEMPT IS DIFFERENT: INSTITUTIONAL BIAS AND SELF-DEALING

For almost a century prior to *Bloom*, the judiciary had dealt with questions of what constitutional rights, if any, were guaranteed in contempt proceedings.³⁸ To answer these questions, the Court had focused on what it deemed to be the central issue—whether contempt was a crime or simply an exercise of the inherent functions of the judiciary. In many contexts this focus was not unreasonable, and the vast majority of the constitutional guarantees that were extended to contempt hinged solely on such a

34. *Callan v. Wilson*, 127 U.S. 540, 557 (1888).

35. *Duncan*, 391 U.S. at 149.

36. 391 U.S. 194 (1968).

37. The justification for extending the jury right to criminal contempt was one of analogy, supported by the fact that potential criminal sanctions for contempt were similar to those for ordinary crimes:

Our experience teaches that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, are indistinguishable from those obtained under ordinary criminal laws. If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases.

Id. at 207-08 (citation omitted).

38. *See, e.g., City of New Orleans v. Steamship Co.*, 87 U.S. 387 (1874).

distinction.³⁹ But once it was settled that contempt was a crime, inquiry into the nature of contempt was treated as closed. Consequently, the Court lost sight of the fact that contempt is, in fact, fundamentally different from ordinary crimes in a way that is integral to the functional role of the jury: Contempt provides incentives and opportunities for judicial self-dealing that ordinary crimes do not.

A. *Contempt as an Extension of the Court*

Contempt is, by its very nature, an affront to the judiciary and its administration of justice: It is an attack upon the institution of which the judge is keeper and administrator.⁴⁰ Despite Justice Holmes's assertion that "[t]he court is not a party" in contempt actions,⁴¹ the institutional integrity and power of the judiciary is tied up in the exercise of the contempt power. Even if "[t]here is nothing that affects the judges in their own persons" when contempt is committed before the court,⁴² there is an inherent interest of the judge in the outcome of a contempt proceeding. Just as a mayor who gets a fee for a conviction⁴³—or even just funding for his village⁴⁴—has incentives to deviate from the will of the citizenry, so, too, does a judge whose decision affects the scope of judicial power and, by extension, the power he will wield in his office.⁴⁵ Because the limits of judicial power are

39. See, e.g., *In re Bradley*, 318 U.S. 50 (1943) (extending the prohibition against double jeopardy to criminal contempt); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (extending the privilege against self-incrimination, presumption of innocence, and standard of proof beyond a reasonable doubt to criminal contempt).

40. "Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court." *Bloom*, 391 U.S. at 202; see also 18 U.S.C. § 401 (2000).

41. *United States v. Shipp*, 203 U.S. 563, 574 (1906).

42. *Id.*

43. See *Tumey v. Ohio*, 273 U.S. 510 (1927). The argument for judicial neutrality in *Tumey* is found as far back as Lord Coke's decision in *Dr. Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1610). Although the case is probably best known for its principles of judicial review and the common law's supremacy over legislation, it also held that "quia aliquis non debet esse Judex in propria causa" (one ought not to be the judge in one's own cause). *Id.* at 652.

44. See *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972).

45. While a financial interest in the outcome of a case may be different from an institutional interest, the distinction is one of degree, not of kind. Cf. *Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., dissenting from denial of certiorari). Although the Court does not provide explanations for denials of certiorari, the dissent by Justice Breyer—itself somewhat of an anomaly—suggested that the Court refused to hear a case regarding judges' salaries because it would "face the serious embarrassment of deciding a matter that would directly affect [its] own pocketbooks." *Id.* at 919. The media coverage supported this interpretation of why the Court refused to hear the case. See, e.g., Linda Greenhouse, *Despite Complaining About Pay, Justices Won't Review a Ruling That Blocks Raises*, N.Y. TIMES, Mar. 5, 2002, at A21; Tony Mauro, *The Judicial Pay Issue Is Now in Congress' Court*, NAT'L L.J., Mar. 11, 2002, at A8. Note that Justice Breyer's reason for why the Court should take the case—that there was no one else to decide it if the Court could not—does not apply to the choice between summary contempt and a jury trial. *Williams*, 535 U.S. at 919.

outlined in part by the relative success with which a contempt proceeding can be brought, the incentives for a judge—an agent and administrator of the court—to find against the contemnor differ fundamentally from those of the citizenry.⁴⁶

This integral link between the judiciary and contempt has often been cited in support of the summary contempt power: It has been asserted that without such power, a court would be unable to carry out its adjudicative functions.⁴⁷ Certainly, some minimum ability to maintain order, be it through contempt or other means, is necessary for the functioning of a court or any other institution. But at the same time, the degree to which such a power is needed is by no means clear. By placing discretion solely in the hands of judges, summary contempt invites them to err on the side of expanding the power of the institution that grants them control, even at the expense of the rights of those appearing before the court.⁴⁸ The incentives of the people, who have no such vested interest in expansion of the judicial power, are thus divorced from those of judges in contempt proceedings. This divergence of motives between judges and citizens sets contempt apart from other types of crimes, in which such a divergence cannot be expected to exist.

46. Although it is certainly true that “the power [judges] exercise is but the authority of the people themselves, exercised through courts as their agents,” *United States v. Barnett*, 376 U.S. 681, 700 (1964) (quoting *Watson v. Williams*, 36 Miss. 331, 341 (1858)), this does not alter the fact that judges—when the institution that is the source of their power is threatened—may act as imperfect agents of the people, from whom they derive their authority.

Indeed, there have been arguments to eliminate the contempt power on the ground that it violates the Due Process Clause’s guarantee of impartial adjudication. *See, e.g., Sedler, supra* note 3 (arguing that the process for contempt is inherently biased, since judges cannot help but be affected by an assault upon the court). But this argument proves too much: If the very notion of summary contempt violates the requirements of due process, one must wonder why the Founders—at a time when distrust of the judiciary was arguably at its zenith—permitted the process at all. Potential deviance of judges’ motives is certainly a concern in contempt actions, but the history of contempt in America suggests a certain degree of tolerance for summary contempt proceedings. *See infra* Part III. The concern surrounding summary contempt was—and remains—a concern relative to other crimes, and one that can be seen most clearly through the jury requirement of Article III and the Sixth Amendment.

47. *See, e.g., supra* note 1 and accompanying text; *supra* note 4 and accompanying text.

48. This is not to imply that a majority—or even a substantial minority—of judges actually abuse the contempt power. Rather, the point is that such a power poses unique opportunities and temptations to judges. Even when such temptations are indulged, the decision to do so may not be conscious or intentional, but rather a result of the judge’s unique perspective that arises from the administration of a courtroom. But this insular perspective, insofar as it deviates from that of the people, is one that the jury was designed to eliminate when its costs were sufficiently high. Thus, the argument is not that judicial deviance in the context of contempt is high in absolute terms, or that it is intentional or malicious. Rather, it is simply that the potential for such deviance—however it arises—is relatively higher for contempt than for other crimes.

B. *Contempt as an Opportunity for Unchecked Judicial Expansion*

This deviation of judges' incentives is further implicated by the opportunity that contempt inherently provides for judicial self-dealing. Because the limits of appropriate circumstances for summary contempt proceedings are not defined by legislation, but instead by application and judicial practice, the more broadly the power is used, the greater judicial power becomes.⁴⁹ If, as is only rational for self-serving actors, "judges will be interested to extend the powers of the courts,"⁵⁰ contempt provides an opportune vehicle for such an extension. Because contempt actions are initiated and adjudicated by the judge alone, there is no representative from any other branch of government that can intervene: The process of contempt, from start to finish, is a power vested solely in the judiciary.⁵¹ Furthermore, as the judicial discretion of contempt is reviewable only by appellate courts, not only is the incentive for deviating from the popular will stronger, but the opportunity for unchecked self-dealing is stronger as well.⁵² And although the Court has attempted to quell fears of abuse by

49. Although there have been some legislative attempts to narrow the scope of contempt—usually after extreme abuse of the power in the hands of certain judges—these efforts have been thwarted by judicial interpretation, as well as by the apparent position of the Court that any significant restriction upon the contempt power would be unconstitutional. See *infra* Subsection IV.C.1.

50. *Essay of Brutus* (Jan. 31, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 417, 422.

51. The Court has recognized that the Executive may pardon contemnors. It is doubtful, however, whether the Court would continue to do so were the pardon power to be used in a broad or sweeping manner. See *infra* notes 116-119 and accompanying text.

52. The proposition that self-dealing extends all the way up the appellate ladder is perhaps best expressed by the Marquis of Lansdown's response to the assertion that the rights of appeal are the dearest of birthrights:

The marquis ridiculed the declaration . . . asserting that it was neither more nor less than the being turned over from one set of lawyers to another, and from that other to a third. In fact, it was to be turned over from the judge who tried the cause, to himself and three others, in a second place; and from them to themselves again, mixed with a few more judges, in a third place!

29 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 1419 (T.C. Hansard ed., AMS Press 1966) (1817). The deferential standard of review given to summary adjudications of contempt reinforces this suspicion that appellate courts will serve only to ratify mistaken judgments at the trial court level. See, e.g., *In re Grand Jury Proceedings*, 943 F.2d 132, 136 (1st Cir. 1991) (applying an "abuse of discretion" standard to the district court's finding of contempt, and citing other circuits' use of the same standard). Furthermore, even absent the complicity of appellate courts, the nature of the contempt process is such that the court record—essentially the only evidence for higher courts to consider on appeal—may be inadequate to convey the circumstances under which the contempt occurred. As a result, appeal may be an ineffective means of protection for an unjustly accused contemnor. See *In re Little*, 404 U.S. 553, 556 (1972) (Burger, C.J., concurring) ("Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record."). But see *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974) ("Summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review."); *United States v. Martin*, No. 99-4295, 2001 WL 22910 (4th Cir. Jan. 10, 2001) (overturning a

declaring contempt to be limited to “the least possible power adequate to the end proposed,”⁵³ the decisions that have followed from such a doctrine suggest otherwise.⁵⁴

In sum, contempt is different from ordinary crimes. It provides greater incentives for judges to deviate from the popular will, and also provides greater opportunity to do so, vis-à-vis the absence of legislative or executive checks on the contempt power. Thus, although contempt may be—and, according to both the Court’s jurisprudence and common sense, is—a crime, it is also substantially different from ordinary crimes. This difference is particularly relevant when considering how far to extend the right to a jury trial. As the next Part demonstrates, the Court’s current guidelines—which treat contempt identically to other crimes—are imperfect as a result.

III. WHY THE DIFFERENCE MATTERS: THE LOST HALF OF THE PETTY CRIMES DISTINCTION

A. *Combining Level of Punishment with a Greater Probability of Deviance*

According to current doctrine, “[c]riminal contempt is a crime in the ordinary sense.”⁵⁵ As such, a jury trial is required for contempt when it is “serious,” but not when it is “petty.” Throughout the evolution of the right to a jury trial, the Court has drawn this distinction by focusing solely on the question of stakes and potential consequences of conviction.⁵⁶ Under this standard, the right to a jury trial for contempt and for ordinary crimes is coextensive: Both are considered “serious” once the accused faces a

summary contempt conviction because there was no certification in the record, as required by Rule 42(a) of the Federal Rules of Criminal Procedure).

53. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

54. See, e.g., *Pounders v. Watson*, 521 U.S. 982, 991 (1997) (reinstating a summary contempt order that the Ninth Circuit had vacated on the ground that it “went beyond those necessities pertaining to the ordered administration of justice”); Ruth M. Braswell, Comment, *The Role of Due Process in Summary Contempt Proceedings*, 68 IOWA L. REV. 177 (1982). *But see* *Offutt v. United States*, 348 U.S. 11, 13 (1954) (emphasizing “the importance of [appellate courts] assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt”).

55. *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

56. See *Baldwin v. New York*, 399 U.S. 66, 74-76 (1970) (Black, J., concurring); *Frank v. United States*, 395 U.S. 147, 148-49 (1969); *Cheff v. Schnackenberg*, 384 U.S. 373, 393 (1966) (Douglas, J., dissenting); *United States v. Barnett*, 376 U.S. 681, 740 (1964) (Goldberg, J., dissenting); *Green v. United States*, 356 U.S. 165, 194 (1958) (Black, J., dissenting); *Sacher v. United States*, 343 U.S. 1, 20-21 (1952) (Black, J., dissenting). Although the Court has sometimes stated that the relevant consideration is the “nature of the offense,” it has made clear that the “nature” is only pertinent insofar as it reflects the consequences of conviction—such as stigma or punishment. See *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930).

potential punishment in excess of six months' imprisonment.⁵⁷ For lesser terms of punishment, a judge may adjudicate contempt summarily.⁵⁸

The extent of the right to a jury trial in contempt proceedings, like ordinary crimes, is thus dependent only upon the length of the potential sentence that the contemnor faces, according to current doctrine. In order to see why this standard is incorrect, it is necessary to recall the reasoning behind the Founders' insistence on jury trial. The jury right was instituted as a political tool to ensure that the judiciary, ordinarily entrusted to the hands of a few judges, would serve the interests of all. When the expected costs of judge-made decisions were too great, a jury was guaranteed to ensure that the "correct" decision—the one the people espoused—was made. These "agency costs" of judges' decisionmaking can arise in two ways. First, greater stakes would yield greater expected costs: In a case with grave consequences, even infrequent error might be intolerable. Second, a greater probability of "incorrect" decisions would also increase expected costs: The more likely a judge is to diverge from the populace, the greater the need for a jury.⁵⁹

The Court's petty crimes doctrine, however, ignores the second of these factors. By analogizing contempt to ordinary crimes, and making the jury right coextensive in both cases, the Court has made an important—and fundamental—error. It has proceeded on the assumption that all crimes have an equal probability that the judge and the people will have divergent views. But as Part II demonstrated, the likelihood that a judge will act in his own interests and deviate from the interests of the polity is increased in the context of contempt. The Court has ignored a fundamental difference between contempt and other crimes that is highly relevant to the right to a jury trial.

The petty-serious distinction recognizes that the stakes of the crime can be sufficiently large that a consideration of the potential error rate is irrelevant, and that a jury will be necessary in all such instances.⁶⁰ But at

57. *Codispoti*, 418 U.S. at 511-12; *Baldwin*, 399 U.S. at 74-76.

58. Summary contempt proceedings are essentially instantaneous rulings by the trial judge. The judge must enter into the record and issue a signed order of contempt relating the relevant facts. See, e.g., FED. R. CRIM. P. 42(a). Beyond this, however, summary contempt—at least in federal court—consists solely of the judge's declaration that the individual is being held in contempt of court.

59. Using the mathematical notation in note 33, *supra*, the first of these two factors is *S*, while the second is *D*. Since the expected costs of a judge-made decision are *SD*, increasing either of these two factors raises the expected costs of such a decision.

60. Under this scenario, whenever *S* is large enough (six months' imprisonment, according to current doctrine), a jury trial is always needed: *SD* is always significantly large, even for the smallest *D* (which would presumably be some baseline chance of deviation between a judge and a jury). Empirical studies have found the value of *D* in ordinary criminal and civil cases to be around twenty percent (compared with fifty percent if the judge and jury were both independently to flip a coin to decide). See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 58-63,

the same time it has ignored the fact that, even in punishments of lesser stakes, the decisionmaking process may be so fraught with potential for judicial deviance that a jury is necessary to ensure that the will of the people is administered in the courts.⁶¹ If contempts are fundamentally different from other crimes because judges are more likely to deviate from the citizenry in such cases, then an identical standard for jury trial in contempt and other crimes would be inappropriate.

Current doctrine states that "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved,"⁶² but it is not necessary to declare that all contempts require juries. All that one need recognize is that the risks of judicial self-dealing and bias are higher in contempts than in other crimes. As a result, a lesser punishment for contempt may still implicate a jury right, even if the same punishment would not do so for an ordinary crime. By considering both potential punishment and potential decision error, it becomes clear that having an identical jury requirement for crimes and contempts does not make sense: The maximum punishment for summary contempt must be less than the six-month standard for ordinary petty crimes.

Nor is it availing to argue that the current minimum standard is sufficiently low to capture not only the lower risk of deviance for ordinary crimes, but also the higher risk of deviance for contempt. Such an argument would maintain that the current doctrine's threshold of six months was designed to compensate not for an *average* amount of deviance—namely, that of ordinary crimes—but rather for the *maximum* amount of potential deviance—namely, the magnitude encountered in contempt proceedings.⁶³ But this argument runs directly against the doctrinal origins of the six-month standard, which the Court derived by setting the petty-serious threshold at the maximum *punishment* that colonial statutes permitted to be judge-adjudicated. Rather than looking to maintain as broad a jury right as

521-23 (spec. ed. 1993); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064-65 (1964).

61. In this scenario, the stakes of a given crime might be less than six months' imprisonment, but the rate of potential error would remain sufficiently high that a jury would still be needed to eliminate a high expected error. Thus, as D increases, only a lower S will yield a sufficiently low SD such that a jury trial would no longer be needed.

This approach seems to have been considered briefly in *Bloom v. Illinois*, 391 U.S. 194 (1968). Although the opinion stated that there was "no substantial difference between serious contempts and other serious crimes," it also followed immediately with the observation that "[i]n deed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power." *Id.* at 202. Unfortunately, it appears that this consideration fell by the wayside after *Bloom* was decided, perhaps because there was never a sufficient number of Justices willing to consider the concept more fully.

62. *Id.* at 211.

63. Phrased in the terms of note 33, *supra*, this argument claims that the value of S was set to account for the maximum value of D : S is set such that SD_{max} still does not yield an unacceptably high expected cost.

possible in order to limit the costs of those crimes most likely to evoke judicial deviance, the Court instead looked to historical practice to determine the narrowest jury right across all crimes, and set the petty-serious threshold at that level.⁶⁴

This approach made perfect sense under the Court's assumption that all crimes had the same expected level of deviance.⁶⁵ But, as Part II demonstrated, this assumption is erroneous when one extends the standard to contempt. Because the probability of deviance is greater in the contempt setting, the six-month threshold derived from the expected deviance for ordinary crimes is inappropriate. Indeed, not only does the theoretical foundation of Part II support such a conclusion, but the historical behavior of the legislatures around the time of the Founding does as well.

B. *The Historical Distinction Between Contempt and Other Petty Crimes*

The statutory history of contempt around the time of the Founding also supports the distinction that this Note has drawn between the punishment for ordinary crimes and for contempt—namely that the latter, because of its greater temptations for judicial deviance, requires a broader right to jury trial. During the late colonial period and through the end of the eighteenth century, contempt was a summary power in the colonies and states. At the same time, numerous “petty crimes” were prosecuted without the accused being afforded the right to a jury trial.⁶⁶ But the punishments that could be imposed upon contemnors were more strictly limited than those for petty crimes: Precisely because the denial of a jury right in contempt proceedings was a more serious hazard, lower stakes were required to offset the higher risk of self-dealing in such proceedings.

64. As an empirical matter, one could certainly claim that the six-month threshold, in modern times, is sufficiently high to address even the concerns of contempt. This could be the case if either: (1) the punitive sanction of six months' imprisonment were not as serious now as it was at the Founding (effectively decreasing the value of S that results from a six-month threshold), or (2) the level of expected deviance between judges and juries were, for some reason, lower than at the time of the Founding (i.e., D were lower now than in the late eighteenth century). Nonetheless, it is unclear precisely why one would suspect such changes in either D or S to have occurred between the Founding and today, and the difficulty in measuring (or even detecting) any such variations would certainly be significant, if not insurmountable, obstacles to any support for such an objection.

65. That is to say that if D is constant, as the Court assumed, setting S at the highest level permitted by the colonial legislature would make sense: That level would indicate the maximum expected cost that the legislature was willing to accept for all crimes. But if the level of D varies, then the maximum S for one crime may not be appropriate for others. If the legislature assigns a greater maximum value of S for one category of crimes (ordinary crimes) than for another (contempt), this may indicate that the legislature understood D to be greater for the latter category of crime than for the former.

66. For an in-depth description of the type and extent of nonjury adjudication of petty crimes in some of the states around the time of the Founding, see Frankfurter & Corcoran, *supra* note 30.

Prior to 1800, five states had statutory limits on summary punishment of contempt, as well as statutory limits on the punishments for petty crimes. In each state, the maximum punishment allowed for contempt was significantly lower than the range of punishments permitted for “petty crimes”—i.e., other crimes adjudicated without provision for a jury trial. Delaware ensured that any contempt punishment could not exceed a five-pound fine,⁶⁷ but at the same time required that petty crimes of up to twelve pounds be heard by a single justice,⁶⁸ and furthermore that cases of adultery and fornication—subject to a penalty of \$160—also be tried by a single justice.⁶⁹ Maryland permitted petty criminal punishments of up to £100 or three months’ commitment to a workhouse,⁷⁰ but limited contempt to a ten-pound fine.⁷¹ South Carolina also limited contempt fines to ten pounds in most instances,⁷² but had judges administer fines of up to £400 for other offenses.⁷³ Connecticut limited punishment of contempt to a five-dollar fine or two hours in the stocks,⁷⁴ but permitted “any matter of criminal nature”

67. An Act Against Drunkenness, Blasphemy; and To Prevent the Grievous Sins of Profane Cursing, Swearing, and Blasphemy, 1 Del. Laws 173, 174 (1721); An Act Against Speaking in Derogation of Courts, 1 Del. Laws 120 (1721). Both of the Acts remained in force at the time of the Founding. If the parties objected to being tried by a single justice, in some instances—but not all—they could ask that three freeholders join the justice in his judgment, at the cost of an additional six shillings.

68. An Act for the More Easy and Speedy Recovery of Small Debts, 1 Del. Laws 1041 (1792).

69. A Supplement to an Act, Intituled, An Act Against Adultery and Fornication, 1 Del. Laws 1304, 1304-05 (1796). Although a jury verdict could be sought on appeal, the right was only available to those who paid the fine up-front as a recognizance. The money was not returned until the accused was acquitted through the appellate process.

70. An Act for the Relief of the Poor in Talbot County, 1811 Md. Laws 547, 552 (authorizing commitment in a workhouse for up to three months for disorderly conduct, unless security were given for six months’ good behavior); An Act Appointing Wardens for the Port of Baltimoretown, in Baltimore County, 1811 Md. Laws 470, 472 (instituting a fine of £100 for building wharves jutting into the channel).

71. An Act for Enlarging the Power of the High Court of Chancery, 1811 Md. Laws 585, 595-96.

72. An Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries by Ballot in This Province, 1731 S.C. Acts 123. An exception was made for a violent act committed in the face of the court, in which case a fine “at the discretion of the said court” was permitted. But it is unclear whether such a punishment was intended for the violent crime itself, or merely for the contemptuous nature of the crime.

73. An Act for Licensing Hawkers, Pedlars, and Petty-Chapmen, and To Prevent Their Trading with Indented Servants, Overseers, Negroes and Other Slaves, 1737 S.C. Acts 152. A 1769 act also permitted single justices to impose a penalty of two months in jail. An Act for the Preservation of Deer, and To Prevent the Mischiefs Arising from Hunting at Unreasonable Times, 1769 S.C. Acts 275, 276. The Act was amended in 1785, however, to require four freeholders to join in the judgment (although the punishment was also increased to three months, again suggesting that guarantees of lesser agency deviance permitted greater accompanying penalties). An Act for Establishing County Courts and for Regulating the Proceedings Therein, 1785 S.C. Acts 366.

74. An Act Concerning Delinquents, 1808 Conn. Pub. Acts 230, 232. The Act was carried over from its inception in 1667. The Act also contained a proviso permitting the accused to be imprisoned or bound over to the next county court. Such pretrial imprisonment—a common

to be tried by a judge alone “where the penalty [did] not exceed the sum of seven dollars.”⁷⁵ Finally, New Jersey limited its contempt punishments to maximum fines of fifty dollars,⁷⁶ but permitted justices of the peace to impose three months of hard labor in other instances.⁷⁷

As these examples demonstrate, in early American history the maximum penalty that could be imposed for petty crimes exceeded the potential punishment for contempt by a significant margin. This reinforces the conclusion that contempt is different from ordinary crimes: The Founders who regulated its punishment recognized the temptations such a power provided, and limited it accordingly. The judiciary has effectively overruled this legislative distinction by using a uniform six-month standard to determine whether any crime is “petty” or “serious,” but this does not diminish the importance of the original colonists’ understanding that contempt should be treated in a different fashion from other crimes. Rather, it strongly reinforces what has already been noted in Section III.A: The doctrinal theory exporting the unaltered petty-serious distinction to contempt is seriously flawed.

The fact that current doctrine differs from the historical treatment of contempt by colonial legislatures certainly indicates that one of these approaches is incorrect in its theoretical treatment of contempt. But the error is the judiciary’s, not the legislatures’: Judicial fiat cannot remedy the analytically unsound assumption that contempt is indistinguishable from other crimes, particularly when that judicial fiat may be motivated precisely by the institutional bias and self-dealing that distinguishes contempt in the first place.⁷⁸ While the Founders did not extend the popular protections of the jury to all contempt actions—whether because of expedience or necessity—they nonetheless implicitly acknowledged that the dangers of denying such protections were greater for contempt than for other crimes, and more narrowly prescribed its punishment as a result. This realization, however, has become lost in the doctrine of the present day.

In choosing to extend the six-month jury threshold to contempt, the Court claimed that it was ensuring “the firm administration of the law through those institutionalized procedures which have been worked out

practice among the colonies—was not considered a punishment for conviction, but rather a means of ensuring the accused would stand trial.

75. *Id.* at 230 (emphasis added). As was the case for contempt in Connecticut, pretrial detention was permitted in these cases as well.

76. An Act Respecting the Court of Chancery, 1800 N.J. Laws 428, 434. The provision was designed “to enforce obedience to the process, rules, and orders of the court of chancery,” suggesting that its limitations may have applied both to civil and criminal contempt. *Id.*

77. An Act To Describe, Apprehend and Punish Disorderly Persons, 1800 N.J. Laws 410.

78. In fact, the history of the treatment of contempt evinces a frequent defiance of the legislature by the judiciary, in ways that consistently—and unsurprisingly—favor expansion of the judiciary’s own power. See *infra* Subsection IV.C.1.

over the centuries."⁷⁹ But what the Court failed to realize was that the very historical procedures upon which it was relying—namely, the use of juries and the petty-serious distinction for ordinary crimes—had been historically *different* for contempt. By ignoring both the theoretical distinction of contempt from ordinary crimes and the manifestation of that distinction in historical practice, the Court exported a doctrine that was appropriate for one criminal context to another in which it was inappropriate. The result was that, rather than tailoring the jury right to meet the distinct needs and concerns of contempt, the Court propagated a one-size-fits-all approach that does neither the jury nor contemnors justice.

IV. POTENTIAL SOLUTIONS, COSTS, AND THE UNLIKELIHOOD OF IMPLEMENTATION

Contempt thus differs in a substantial manner from other crimes, and the difference—a higher potential for deviance between judge and jury—counsels for a more expansive jury right in criminal contempt proceedings. The question, then, is what can be done to resolve this problem. This final Part puts forth proposals—some old, some new—and discusses the costs that might accompany their implementation, but ultimately arrives at a disheartening conclusion. Legislative or executive channels could theoretically provide solutions, but the history of previous attempts to alter the contempt power suggests that any serious attempt at change is unlikely to withstand judicial review. The best, and perhaps only, chances to correct the errors of the current contempt doctrine may lie in the judiciary itself or in constitutional amendment. Which is to say that, in all likelihood, the chances are very low indeed.

A. *Potential Solutions—Revisions of the Contempt Power*

As this Note has attempted to demonstrate, any appropriate alteration of the current contempt doctrine must recognize both the distinct nature of contempt and the implications that such a distinction has for the guarantee of a jury trial in contempt actions. It is clear that there must be some restriction of the current scope of summary contempt, *vis-à-vis* the punishments that can be inflicted at the hands of a single judge. The difficult question, however, is how far such a change should extend.

Any answer to such a question would depend upon at least one, and perhaps two, empirical questions: How much more likely is judicial deviance in cases of contempt than in other crimes, and what costs would

79. *Bloom v. Illinois*, 391 U.S. 194, 208 (1968).

changing the current doctrine entail?⁸⁰ To answer these questions, however, would require the measurement of factors that are indeterminate at best. As a result, this Section does not propose a definitive solution as to how—or how far—the judiciary’s current contempt powers should be curtailed. Rather, it strives to offer possibilities for practical solutions, and in doing so tries to articulate more clearly the theoretical inconsistencies that the rest of this Note has revealed in the current judicial treatment of contempt.

Some commentators have argued for a complete abolition of the summary contempt power,⁸¹ but such a restriction, while perhaps desirable from a theoretical perspective, is practically unfeasible. Summary contempt may not be necessary to the extent that it is currently permitted, but some degree of power must be granted to preserve order and to conduct court proceedings effectively. Whether the power is called “contempt” or given another name, some degree of summary control—be it through criminal contempt, civil contempt, or otherwise—must exist.

One potential solution to alleviate the incentives for self-dealing that distinguish contempt from other crimes would be to maintain the contempt power, but vest it in a different adjudicative body. Although some power must exist for the sake of maintaining courtroom order, it need not necessarily be vested in the trial judge. In fact, placing such control in the hands of another courtroom official, rather than the judge himself, may help to solve the difficulties discussed in Part II. The new repository for the contempt power might be a preexisting official, such as the bailiff or court marshal, or a newly created courtroom administrator whose sole duty would be to define and punish contumacious conduct.

At first glance, such a solution has significant appeal. The quick resolution of summary adjudication would be maintained, while the power would also be disaggregated from judges who would have an incentive to misuse it. But the practical costs and difficulties of creating a separate class of “contempt judges” to maintain courtroom order may make such a solution administratively unfeasible. Furthermore, one could argue that the concerns expressed in Part II would still exist under such a system. Certainly, the opportunity for self-dealing would persist—albeit perhaps to a lesser degree—in a set of officials whose power was coextensive with the limits of contempt: By exercising the contempt power, such officials would be maintaining and enhancing the scope of their authority. Contemptuous conduct might not be a direct attack on the authority of a “contempt judge”

80. As to whether the second of these questions is relevant in determining how far to extend the jury right in contempt proceedings, see *infra* Section IV.B.

81. *E.g.*, 1 EDWARD LIVINGSTON, THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 258-67 (1873); Sedler, *supra* note 3; see also GOLDFARB, *supra* note 6, at 302-08 (suggesting a replacement of the summary contempt power—in most instances—with prosecution for the crime of “misdemeanor to government,” to which the usual constitutional safeguards of criminal prosecution and trial would attach).

in the way that it is on the trial judge; but as a part of the judiciary, some degree of institutional bias would most likely be present in the new officials as well—although perhaps not to the same extent as under the current system.

As a result, although separate contempt officials might produce some improvement by reducing the chance of self-dealing and deviance from the popular will, it is also possible that the decrease would be small compared to the costs of implementation. A more appropriate and feasible solution may lie not in transferring the power of contempt to another official, but rather in making sure that the power is narrowly tailored to what is actually required to administer justice. In Justice Frankfurter's words, since necessity has created the summary contempt process, "[n]ecessity must bound its limits."⁸²

This second approach—permitting summary contempt to continue in its current form, but only within a narrow set of circumstances and punishments—has been suggested often. Many authors have proposed allowing judges to exclude contemnors from their courtroom or, in cases of extreme disruption, to imprison them for short periods of time pending a trial.⁸³ Along the same lines, the extent of the contempt power could be maintained, but limited to use in instances where the contemnor posed an immediate threat of endangering those present or disrupting the court's functions.⁸⁴ Further proposals have also been suggested for controlling defendants in court, while still permitting them to remain present for the proceedings against them; these include "conditional contempt" (imprisonment that ends when the defendant agrees to behave),⁸⁵ as well as gagging or shackling the defendant—remedies that the Court explicitly sanctioned in 1970.⁸⁶ Yet another, perhaps more extreme possibility would

82. *Sacher v. United States*, 343 U.S. 1, 36 (1952) (Frankfurter, J., dissenting).

83. *E.g.*, GOLDFARB, *supra* note 6, at 304-06 (proposing to limit summary contempt to a period of one day, or for the remainder of any trial disrupted by such a contempt); Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1513, 1534, 1536 (1972) (recommending a statutory codification of contempt that limits summary contempt to the power to exclude individuals from the courtroom for disruption of judicial proceedings); Braswell, *supra* note 54 (suggesting that courts limit contempt to "exceptional circumstances").

84. In theory, summary contempt is limited to those acts that "create[] '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' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.'" *In re Oliver*, 333 U.S. 257, 275 (1948) (quoting *Cooke v. United States*, 267 U.S. 517, 536 (1925)). But in practice, this standard—due perhaps to the inherently subjective nature of what sorts of acts would demoralize the court—has proved to be little more than an empty limit on the contempt power.

85. "Conditional contempt" might be characterized as a specific subset of civil contempt: The accused must agree to behave before he will be set free. For the distinction between criminal and civil contempt, see *supra* note 7.

86. *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970) ("[T]here are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."). For articles embracing the *Allen* standard as a

be to remove a disruptive defendant from the courtroom entirely, permitting him to view and participate in the trial only through closed-circuit television and consultations with his attorney.⁸⁷ These solutions, either alone or in tandem, may be a viable way to ensure that the courtroom does not become a “debating society,” while at the same time limiting contempt’s potential for abuse. Nevertheless, such proposals may also impose significant dignitary costs upon the contemnor or generate a risk of fundamentally hamstringing an effective defense at trial—perhaps even to the point of eliminating one constitutional violation at the expense of creating another.⁸⁸

One might also conceive of a compromise that stopped short of restricting the courts to such a narrow set of contempt powers, while still expanding the jury right beyond that of ordinary crimes. Such a solution would entail a reduction in the maximum punishment permitted under summary contempt. A change of this sort would not only address the concerns of judicial deviance and self-dealing surrounding the contempt power, but would also remain faithful to the historical focus of the Court’s petty crimes doctrine: Insofar as colonial legislatures were more restrictive in prescribing punishments for judge-adjudicated contempts than for other crimes, a new standard of less than six months would be consonant with the history that originally gave rise to the petty-serious distinction.⁸⁹ The degree of reduction could even vary across states, depending upon structural differences in judicial systems that might make judges more or less prone to self-dealing.⁹⁰

viable alternative to contempt for defendants, see Richard B. Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39 (1978); Sedler, *supra* note 3; and *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 90-100 (1970) (recommending a “hierarchy of remedies,” from which criminal contempt should be excluded). Other countries, however, have not been as fond of the method of binding and gagging defendants. One English treatise on contempt cites *Allen* as an “extreme (and colourful) example” of the use of physical restraints, and takes solace in the fact that “[o]ne trusts that in [England] the line will be drawn at handcuffing, and that any temptation to ‘shackle and gag’ will be firmly resisted.” C.J. MILLER, CONTEMPT OF COURT ¶ 4.127 (2000).

87. See, e.g., *United States v. Washington*, 705 F.2d 489, 497 n.4 (D.C. Cir. 1983) (“When security is a problem or a dangerous defendant or a group of defendants is involved, the right to be present can be satisfied by use of closed circuit television and the opportunity to consult with counsel, if such procedure is considered necessary by the trial court.”); cf. *Maryland v. Craig*, 497 U.S. 836 (1990) (holding that testimony of a child witness in a child abuse case, administered via one-way closed circuit television, did not violate the Confrontation Clause when supported by a case-specific finding of necessity).

88. See, e.g., *Craig*, 497 U.S. at 860-70 (Scalia, J., dissenting).

89. See *supra* Section III.B.

90. Such structural differences might include whether the judiciary was appointed or elected, the length of judges’ terms of office, and the degree of impeachment power vested in the state legislature. The difficulty in quantifying the effect of such differences might make this more ambitious, state-tailored remedy impractical or impossible, however.

A proposal for such a state-by-state scheme is similar—at least in result—to what Justice Harlan suggested in his dissent in *Duncan v. Louisiana*, 391 U.S. 145, 192-93 (1968). Harlan, however, based his argument for interstate variation upon states’ differential costs in

A final potential solution would be to attempt to counteract the bias and incentives for self-dealing that the contempt power creates, by authorizing civil or even criminal liability for "malicious contempts."⁹¹ Such a solution would function in a manner similar to a malicious prosecution claim: The goal would be to attempt to quantify the harms that a judge inflicts when improperly using his summary contempt powers, and to internalize them by holding the judge liable to the extent of the harm that his conduct causes. This solution might be considered radical, insofar as it infringes on the realm of immunity to which judges have typically been entitled for actions in their judicial capacities. It might also turn out to be an empty solution if judges proved unwilling to entertain suits or prosecutions against fellow members of the judiciary. However, if one wishes to keep the contempt power at its current strength while still remedying its inconsistency with the petty crimes doctrine, the abrogation of judicial immunity for "malicious contempts" might provide a way to counteract contempt's potential for self-dealing and bias, and to decrease judicial deviance to the level of all other crimes—thus making a narrower contempt power unnecessary.

B. *Considering the Costs of a New Contempt Standard*

Regardless of which of the above solutions is chosen, it is clear that there will be costs that accompany any change in the current standard of contempt. These may include the administrative costs of conducting more jury trials, the potential error costs that accompany the heuristic biases of jury deliberation, or possible underenforcement costs that derive from judges' decreased willingness to use the contempt power when a jury trial will result. But while the consideration of these costs may be a useful exercise, the Court has indicated on numerous occasions that the right to a jury trial (and, more pointedly, the interest in avoiding the improper imprisonment that the jury was designed to protect) is incommensurable

administering jury trials, rather than on varying state policies that affected probabilities of judicial deviance. Such a cost-based justification, however, is arguably an unconstitutional ground for permitting states to limit the jury right as Harlan proposed. *See infra* notes 92-98 and accompanying text.

91. The suggestion of criminal prosecution for improper contempts seems to have been considered as far back as the late eighteenth century. *See* *Lining v. Bentham*, 2 S.C.L. (2 Bay) 1, 6 (1796). The criminal prosecution proposed in that case, however, would have been under the more general category of "corruption or oppression," making it unclear whether any improper contempt would be sufficient to provide grounds for prosecution, or only those contempts that could be shown to have arisen from provable and improper motive.

Regardless, current doctrine does not seem particularly amenable to judicial liability—civil or criminal—for improper use of the contempt power. *See, e.g.,* *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (expressing concern that an abrogation of the common-law rule of judicial immunity from suit would inhibit judicial decisionmaking); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) (sustaining judicial immunity from a civil suit arising from a holding of contempt, regardless of whether the contempt exceeded the judge's jurisdiction or was malicious or corrupt).

with such costs. Indeed, if one were to consider these costs in determining how far to extend the jury right, each crime would require a separate standard. Accordingly, although these cost concerns certainly are relevant when choosing *how* to vindicate the jury right in contempt proceedings—i.e., which solution to select—they cannot determine *whether* that right ought to be vindicated in the first place.

There is reason to suspect that the additional administrative costs of changing the current contempt standard will be significant. Depending on the solution chosen, these could include the costs of creating a new department of “contempt judges,” the costs of undertaking a greater number of jury trials, or the costs of limiting a disruptive defendant from exercising the full panoply of his trial rights. Furthermore, if judges substitute toward “serious contempts” once their summary contempt powers are undermined, there might be additional burdens on the jury system—even if the jury’s role is not explicitly expanded by the solution implemented.

Along similar lines, if an alternative decisionmaker—be it another official or a jury—assumes some of the powers of contempt previously vested in the trial judge, potential difficulties of bias may arise. While judges may suffer from institutional bias or incentives to self-deal, the bias concerns raised by a new decisionmaker would be heuristic in nature, arising from the fact that such a decisionmaker may be an objectively less-qualified adjudicator of contempt than the trial judge would be. At the very least, jurors—as nonprofessional, group decisionmakers—are prone to heuristic biases that judges are not. But the facts underlying an allegation of contempt tend to be simple and straightforward, and the trial transcript itself often provides a verbatim description of the conduct in question. As a result, it seems doubtful that a jury or any other entity is likely to suffer such biases to any great degree in the context of contempt. Furthermore, as Part II made clear, judges suffer an inherent distortion of self-interest in contempt proceedings. It is quite possible that even though liabilities in judgment do exist for alternative decisionmakers, they are dwarfed by the greater distortion that faces the judge attempting to adjudicate a cause that, directly or indirectly, affects him personally.

Finally, some of the solutions proposed above—particularly those that narrow the range of scenarios in which the summary contempt power may be utilized without providing a new alternative—raise the potential cost of underutilization of the contempt power after they are implemented. It is possible that, by restricting the range of permissible instances of contempt, one might overdeter its use and permit contumacy to go unpunished, possibly resulting in a general disrespect for the law, as well as a greater risk of physical harm to those in the courtroom. But the risk of such “costs” of underutilization inherently depends on one’s judgments of whether the current scope of the contempt doctrine is actually necessary to vindicate the

power of the courts. If this is not the case, then the specter of these costs disappears: The narrowing of the contempt power, rather than letting the guilty go free, actually permits the innocent to remain unfettered by the unconstitutional bonds imposed by an overzealous judiciary.

Regardless of their respective measures, it is only logical that these various costs—and their potential magnitudes—should be considered in selecting a solution to the contempt quandary. They need not, however, provide a justification for permitting the current, erroneous contempt doctrine to persist. The constitutional right to a jury trial, guaranteed as a safeguard against government oppression, must be considered anew when the potential for oppression is particularly acute, as in the case of contempt. But it cannot be abridged or curtailed by considerations unrelated to its purpose, even if those considerations include something as practical as cost. Indeed, even the judiciary itself has consistently held, in both contempt and other contexts, that the protections the jury was designed to provide may not be undermined by considerations of cost.⁹²

In the context of contempt in particular, the Court has acknowledged and supported the proposition that the costs of jury trial are incommensurable with its benefits. When it first expanded the right of jury trial to “serious contempts” in *Bloom*, the Court explicitly rejected the argument that efficiency or costs were proper to consider against the constitutional requirements of jury trials.⁹³ This sentiment has carried all the way through to the most recent of the Court’s major contempt decisions in *International Union*.⁹⁴

92. It is important to recognize that this is not an argument that jury trials should be granted in all instances, or that society will never be willing to endure any risk of wrongful punishment. Clearly, the petty crimes distinction itself disputes this view. Rather, the argument is that the threshold level of potential wrongful punishment is a fixed amount, independent of the costs of administration. Expressed in terms of this Note’s formal model, *see supra* note 33, this argument would declare that $SD < K$, where K is some fixed threshold quantity of expected wrongful punishment. While the source of K is somewhat unclear, the Court’s reliance on historical practice and legislation in *Duncan* and *Baldwin* suggests that its value may strive to approximate a society-wide consensus about what magnitude of injustice is intolerable in a free society. That citizens are willing to endure some degree of injustice in exchange for cheaper judicial administration (thus producing a positive, nonzero value for K) does not contradict such an argument. Rather, it merely demonstrates that society is willing to exchange risk for benefits, but only up to a certain point: Once the risk becomes too great, it also becomes one that is categorically unacceptable.

Put another way, the petty crimes doctrine does consider administrative costs in some circumstances—namely, for those offenses where expected error costs are sufficiently low. It is because of these very administrative costs that the jury right does not extend to such trials. Once the expected costs of punishment exceed some predetermined amount (K), however, the decision is no longer a cost-benefit analysis, and the right to jury trial becomes absolute. The petty-serious distinction is a proxy for determining at what point this paradigm shift occurs.

93. *Bloom v. Illinois*, 391 U.S. 194, 208-09 (1968).

94. *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 839 (1994). One might argue that the Court’s reasoning in both *International Union* and *Bloom* relied in part upon its (mistaken) belief in the propriety of wholly exporting the petty-serious distinction to the context of contempt. The more fundamental recognition of both opinions, however, is that when the need

In a noncontempt setting, the Court's recent rulings in *Apprendi v. New Jersey*⁹⁵ and *Ring v. Arizona*⁹⁶ have similarly demonstrated that implementation costs may not be grounds on which to obviate the constitutional right to a jury trial. Both decisions invalidated statutory regimes in which the determinations of the jury were replaced by that of a "more efficient" decisionmaker—namely, a judge. The Court ruled the practices unconstitutional, despite significant—perhaps staggering—costs that were predicted to and did arise as a result.⁹⁷ Accordingly, the costs surrounding the vindication of the jury trial in contempt proceedings, while relevant to the method by which it should be achieved, should not be an objection to implementing the changes needed. In Justice Scalia's words, the jury trial "has never been efficient; but it has always been free."⁹⁸

C. *Difficulties Remain—Methods of Implementation*

Given the complexity of determining the relative costs that different corrective measures would entail, it may be difficult to arrive at a consensus as to which policy should be implemented to solve the theoretical flaws of current contempt doctrine. But even if a solution were unambiguously preferable, considerable difficulties would remain in implementing it. It is unlikely that the judiciary would be sympathetic to such a proposal: Generally, courts—or any institutions—are loath to take any action that might jeopardize their power or influence. In such a scenario, either the executive or legislative branch might attempt to introduce change. But given prior case history in the realm of contempt, it is unlikely that such a sweeping change to the current doctrine would survive in the face of judicial review.

Historically, the judiciary has interpreted the contempt power to be quite broad, while it has also interpreted the other branches' abilities to limit that power to be quite narrow. Legislative attempts to alter or eliminate summary contempt have met with two varieties of judicial resistance: Some restrictions have been struck down as per se invalid encroachments on the courts, in violation of separation of powers, while others have met with judicial interpretations that thwarted their original intent. Similarly, although the executive pardon power has been permitted

for a jury trial does exist—whether gauged properly by the petty-crime analysis or a modification thereof—the consideration of costs is not appropriate.

95. 530 U.S. 466 (2000).

96. 536 U.S. 584 (2002).

97. See *id.* at 2449-50 (O'Connor, J., dissenting) (citing *Apprendi* as responsible for 1802 additional criminal appeals in federal court, a 77% increase in second or successive federal habeas petitions, and 18% of all certiorari claims, as well as predicting further and similar "harm" from the Court's decision in *Ring*).

98. *Ring*, 530 U.S. at 498 (Scalia, J., concurring).

for contempts, it is possible that if the power were exercised too broadly (or with an eye toward effectively eliminating summary contempt), judicial tolerance would wane. Furthermore, history suggests that it would be highly unlikely for an executive to pardon contemnors en masse.

1. *Reform Through the Legislature*

Current doctrine has defined contempt as a power that “cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others,”⁹⁹ and one that is “not immediately derived from statute.”¹⁰⁰ As a result, legislative attempts to limit or eliminate contempt have met with resistance from the judiciary. Insofar as restricting contempt would affect the power of the courts, the doctrine has generally developed so that legislatures may regulate contempt, but only to the extent that such regulation does not materially affect or infringe upon the contempt power. “The courts of several states have realized that self-preservation demands the resistance of every legislative encroachment upon the historical judicial prerogative of inflicting penalties for contempt,”¹⁰¹ and the federal courts appear to have done the same.

The Court has occasionally upheld legislation regarding contempt,¹⁰² although in so doing has made explicit the fact that such legislation is only acceptable if it “does not interfere with the power to deal summarily with contempts committed in the presence of the court.”¹⁰³ But even when the judiciary has upheld such legislation, it has also used its interpretative authority to limit—and occasionally to undermine—the effects of such legislation. This tendency is perhaps best demonstrated by the judicial response to the Judiciary Act of 1831.¹⁰⁴

The Act, prompted by an infamous and well-publicized case of indirect contempt that eventually led to the impeachment of the presiding judge,¹⁰⁵ limited summary contempts to cases of “misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct

99. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

100. *Id.* But see *In re McConnell*, 370 U.S. 230, 236 (1962) (referring to “the limited powers of summary contempt which Congress has granted to the federal courts” (emphasis added)).

101. Wilbur Laremore, *Constitutional Regulation of Contempt of Court*, 13 HARV. L. REV. 615, 616 (1900). This article provides an excellent general summary of early state decisions limiting legislative encroachments upon the contempt power.

102. For federal limits on the use of summary contempt, see 18 U.S.C. § 401 (2000); and FED. R. CRIM. P. 42(a). Other limitations on indirect contempts include 18 U.S.C. §§ 3691-3692.

103. *Michaelson v. United States*, 266 U.S. 42, 66 (1924).

104. An Act Declaratory of the Law Concerning Contempts of Court, ch. 99, 4 Stat. 487 (1831) (current version at 18 U.S.C. § 401).

105. See *supra* note 23. For more on the case, the subsequent impeachment of Judge Peck, and the resulting Act of Congress, see CROMWELL HOLMES THOMAS, PROBLEMS OF CONTEMPT OF COURT 25-27 (1934).

the administration of justice.”¹⁰⁶ The intent was primarily to stop summary punishment of certain indirect contempts—particularly contempts by publication, which allowed judges to punish any published criticisms of the judiciary, or particular judges, as they saw fit.

For the next century, however, courts staunchly ignored the Act’s purpose and interpreted “so near thereto” to be a causal restriction on the summary contempt power, rather than a geographic one.¹⁰⁷ As a result, the judiciary held that any contempt—including one by publication—that the judge determined to be sufficiently obstructive could be summarily punished, effectively nullifying the 1831 Act. Indeed, the Court expressly stated that the Act “conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed.”¹⁰⁸

It was only in 1941—110 years after the Act was passed—that the Court switched its interpretation to one of geographic proximity, removing contempt by publication from the scope of summary adjudication and vindicating the original purpose of the statute.¹⁰⁹ The extremely long lag between Congress’s solution to the overbreadth of the contempt power and its recognition by the courts demonstrates the hesitancy with which the judiciary will restrict its own power at the behest of other branches, especially in the context of contempt.

This hesitancy becomes particularly suspect when one recognizes that Congress has a legitimate constitutional power to limit contempts, at least in the lower federal courts.¹¹⁰ Precisely because the ability and discretion to create those courts rests solely in the hands of Congress,¹¹¹ it logically follows that Congress can condition the existence of those courts on a more restricted contempt power, so long as such a restriction does not limit them

106. § 1, 4 Stat. at 488. The Act also covered contempts committed by officers of the court in their official capacities, as well as resistance to the court’s “lawful writ, process, order, rule, decree, or command.” *Id.*

107. *See, e.g.,* Sinclair v. United States, 279 U.S. 749 (1929); Craig v. Hecht, 263 U.S. 255 (1923); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918); *In re Cuddy*, 131 U.S. 280 (1889); *In re Savin*, 131 U.S. 267 (1889); Kirk v. United States, 192 F. 273 (9th Cir. 1911); United States v. Anonymous, 21 F. 761 (W.D. Tenn. 1884).

108. *Toledo Newspaper Co.*, 247 U.S. at 418.

109. *Nye v. United States*, 313 U.S. 33 (1941).

110. There is some question as to whether Congress has the power to limit contempts for all federal courts, or just for the lower courts, the existence of which is not mandated by the Constitution. *See Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

111. *See* U.S. CONST. art. I, § 8, cl. 9 (“[Congress shall have the power to] constitute Tribunals inferior to the supreme Court.”); *id.* art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

to such an extent that they become something other than courts.¹¹² The Supreme Court itself has recognized this fact, holding that because the district and circuit courts are products of congressional legislation, “[t]heir powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.”¹¹³

As a result of this constitutional entitlement, any attempts by the judiciary to check federal regulation of contempts (such as the Act of 1831) should be viewed not only with skepticism, but perhaps also as further indication of the vested interest with which the judiciary operates in the realm of contempt. As with no other judicial power, contempt exists in large part separate from both the legislative and executive branches, making the potential and opportunity for judicial self-dealing particularly acute.¹¹⁴ Certainly, these further efforts to isolate the court’s power from the scrutiny or checks of the other branches—particularly in contravention of the Constitution’s command—is a serious suggestion that greater oversight, not less, is needed. Nonetheless, it is unlikely that the legislature possesses the ability to meet such a need. Whether or not the judiciary’s effort to thwart legislative restrictions is a conscious one, history indicates that between judicial review and judicial interpretation, it is unlikely that the legislative branch will be able to remedy the problems of the current contempt doctrine effectively.¹¹⁵

2. *Reform Through the Executive*

The executive pardon power, while initially more promising, is also unlikely to provide a panacea. Although the Court has acknowledged that contempt, as a crime, can be pardoned by the Executive,¹¹⁶ it is also likely that the Court would consider extensive use of the pardon power in such a context to be unconstitutional. In the same case in which it ruled that the

112. For a more elaborate and historically supported version of this argument, see Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—a Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

113. *Robinson*, 86 U.S. (19 Wall.) at 511. The “power” in question when the Court elaborated such a view was none other than the contempt power.

114. Judges may exercise judicial restraint in part because of their concern over legislative intervention or reversal by higher courts. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 19.7 (5th ed. 1998) (arguing that the main constraint on judges is their sensitivity to reversal or the potential for legislative intervention). But insofar as contempt is not subject to legislative regulation without judicial approval, and the judiciary as a whole is likely to approve of decisions expanding the contempt power (thus yielding a low probability of reversal), such incentive checks on the judiciary may be substantially smaller in the context of contempt than for other judicial decisions.

115. One must also keep in mind that the Act of 1831 dealt with indirect contempts only. If the statute had significantly infringed upon the power of the courts in direct contempts, it is even more likely that the judiciary—intentionally or not—would have undermined or rejected it.

116. See *Ex parte Grossman*, 267 U.S. 87 (1925).

Executive could pardon contempts, the Court also stated that “[t]o exercise [the pardon power] to the extent of destroying the deterrent effect of judicial punishment would be to pervert it Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.”¹¹⁷ Although the opinion does not explicitly state what the consequence of nullifying the contempt power through systematic pardons would be, it suggests that such a use would not be looked upon favorably by the Court, and might even result in judicial intervention.¹¹⁸ Certainly, the current case law does not preclude such a possibility.¹¹⁹

Furthermore, past practice suggests that the President—or any executive official—would be unlikely to use the pardon power in such a sweeping manner. In the first 125 years of the republic, only eighteen contempt violations were pardoned by the Executive.¹²⁰ In addition, fewer than half of those pardons dealt with direct contempts: The majority were for acts committed outside of the courtroom.¹²¹ Unless there is substantial and significant popular support for doing so, we can expect that executive pardon will not be an effective method for remedying the current doctrinal errors surrounding contempt. The administrative and reputational costs that the Executive would bear as a result of doing so would likely be too great—and the rewards too few—to justify such an action, especially for an office that is so visible and scrutinized as that of the Executive.

3. *Reform Through Unlikely Channels*

Change, it seems, must therefore come from within the judiciary itself, or through constitutional amendment. But the latter is extraordinarily unlikely, given that contempt is an issue of which few lawyers (let alone ordinary citizens) are fully aware. And the chance of change occurring through the courts, although possible, is also extremely low.

117. *Id.* at 121.

118. Although issues of the separation of powers might be implicated by executive pardons of contempt—or by the judiciary’s exemption of contempt from executive pardon—the issue has not been squarely addressed in the doctrine to date. Nor has it been considered for contempt of Congress, which raises similar concerns. The two cases that come closest to addressing the issue, however, both hold that contempt is to be construed as an “offense against the United States” within the meaning of Article II and thus pardonable by the President. In this regard, the authority of the Executive is seen as coextensive with that of the King of England, who could pardon both contempt of court and contempt of Parliament. *Grossman*, 267 U.S. 87; *In re Mullee*, 17 F. Cas. 968 (C.C.S.D.N.Y. 1869) (No. 9911).

119. For an argument that the Executive should have no pardon power at all in the context of contempt, see Larremore, *supra* note 101, at 620-23. Larremore argues that “[t]he recognition of the power of pardon . . . tends to make the courts creatures of executive will or caprice, and, in like manner as the concession of the authority of the legislature to regulate contempt, to disturb the theoretical adjustment of the American governmental tripod.” *Id.* at 623.

120. THOMAS, *supra* note 105, at 97.

121. *Id.*

As much of this Note has shown, judicial influence and power are inextricably linked to contempt: For the judiciary to undermine that power by restricting contempt's summary process would be as unlikely as it would be uncharacteristic of courts' previous behavior. It is true that, for a brief moment in 1963, the Court seemed willing to put its own interests aside and to modify the doctrine of contempt to conform to the guarantees of the Constitution. But unfortunately, the turn that it chose to take—while certainly a vast improvement—was still erroneous. As a result, contempt continues to lack the full extent of jury protection that it merits. And, barring an unprecedented shift in judicial disposition, such a deficiency is likely to persist—despite the constitutional guarantees to the contrary.