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CRIMINAL AND CIVIL CONTEMPT: SOME SENSE OF A HODGEPODGE

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INTRODUCTION

In one way or another, the law of contempt permeates all law because force—not morality—is the ultimate sanction. Those who will not obey, or disrupt, are to be coerced and punished in the name of the law. In law school, contempt is a word used frequently but seldom defined beyond a few maxims, such as something about the key to one's own jail cell. After law school, contempt becomes a word secretly feared by those who threaten it—probably as much as those who are threatened with it. Contempt should be a required course in law school or at least 90% of any course in professional responsibility.

From a personal perspective as one who has read and studied contempt for close to thirty years, the latest erroneously-reasoned decision holds no awe because there is always an inventory of other erroneous decisions available to neutralize its pontifications about something being “well settled”—leaving the comparatively precious few classics, which have been soundly reasoned and correctly decided, free to fix the right. An intramural reassessment should take place on all levels, right up to the United States Supreme Court. With rare exception, appellate contempt law decisions are of extraordinarily poor quality. Bearing the marks of hurried carelessness and shockingly poor judgment, these decisions seem to mix and match truth with falsity and inaccurately cite or conveniently ignore precedent, re-

¹ Special thanks to Attorney General Dennis C. Vacco for his support and encouragement. All rights reserved by the author. Permission to republish will be granted per written request. This article is dedicated to the memory of a good person and a good trial judge—the Honorable Ruth Moskowitz, Justice of the Supreme Court, Kings County. Privately, routinely—and certainly out of her earshot but with respect and affection—she was referred to as “Ruthie” by those who always bore the burden of proof beyond a reasonable doubt in her courtroom. She is certainly missed.

sulting in a virtual jurisprudence by nomenclature.² This article is one man's effort to capture the essence of contempt law and pass it on to his brothers and sisters in comprehensible form—as far as that which is written will permit.

SECTION 1: CONTEMPT GENERALLY

Anglo-Saxon courts of justice are vested, by the very act of their creation, with the "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates," and to protect the integrity of their proceedings and their officers from disruption and corruption.³ Historically, English and American courts have possessed this inherent authority to punish parties for contempt as of the moment they were constituted.⁴ When the judiciary exercises its inherent contempt power, it vindicates its authority and therefore its existence as

² See *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994) (paralleling civil and criminal contempt crimes that aren't "serious" and distinguishing them from "serious" criminal contempt crimes); *United States v. Dixon*, 509 U.S. 688, 688-90 (1993); *McCormick v. Axelrod*, 453 N.E.2d 508 (N.Y. 1984) (per curiam) (holding the Commissioner of the New York State Department of Health, a nursing home, and its administrator in contempt for violating terms of a stay order precluding discharge of residents pending a hearing and the determination of appeal); *People v. Leone*, 376 N.E.2d 1287, 1288 (N.Y. 1978) (per curiam) (refusing to dismiss defendant's indictment of criminal contempt absent statutory authority despite the fact that he later complied with the court order that he had originally disobeyed); *People v. Johnson*, 649 N.Y.S.2d 502 (App. Div. 1996) (holding that since the defendant was charged with violating the Judiciary Law rather than the Penal Law, all that was required was a hearing and an opportunity to defend); *Kuriansky v. Ali*, 574 N.Y.S.2d 805, 807 (App. Div. 1991) (upholding a criminal contempt petition while acknowledging that the Attorney General should not have instituted a contempt proceeding until after moving to compel compliance); *Additional Jan. 1979 Grand Jury of Albany Sup. Ct. v. Doe*, 444 N.Y.S.2d 201, 202 (App. Div. 1981) (affirming conviction for contempt, but holding that by appealing and testifying before a grand jury after the contempt order was entered, the offender purged the contempt); *Ferrara v. Hynes*, 404 N.Y.S.2d 674, 675 (App. Div. 1978) (upholding conviction of witness for contempt, but allowing the witness to purge himself by undoing the acts that caused the contempt).

³ *Bagwell*, 512 U.S. at 831 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821)).

⁴ See 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, 186-87 (1995) (discussing the broad and long-enjoyed contempt power of English courts); see also *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 325-26 (1904); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (stating that the courts' inherent power to punish for contempt developed at the moment of their inception).

an institution of separated government.⁵ Ancillary to the exercise of this inherent contempt power is the punishment or modification of behavior for the benefit of either the public generally or private suitors individually.⁶ Contrary to some inaccurate statements made by a myriad of American courts ranging from the "milk stool" to America's highest, statutes regulating the judiciary's inherent contempt power are limitations on, not conferrals of, such power.⁷ While the judiciary's inherent contempt power is part of its definition as a political institution, its authority over penal law crimes of contempt is legislatively conferred.⁸ Crimes of contempt are entirely creatures of legislative enactment. They are conceptual cousins to those inherent powers wielded by courts to vindicate their own authority. The inherent judicial contempt power preserves both the court's authority and the rights of parties to a lawsuit. Under penal laws, courts punish contempt crimes just like any other crime, namely, by imposing a sentence for transgressions of the public's right to peace, security and good order.⁹

⁵ See *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 796 (1987) (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

⁶ Criminal ("public") contempt proceedings are utilized "to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders." *Bessette*, 194 U.S. at 328 (quoting *In re Nevitt*, 117 F. 448, 458 (8th Cir. 1902)). Civil ("private") contempt proceedings are "instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees." *Id.*; see also *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259, 260 (N.Y. 1886) (distinguishing between civil and criminal contempt in New York State courts).

⁷ See, e.g., *Degen v. United States*, 116 S. Ct. 1777, 1780-81 (1996) (noting that the inherent judiciary power may be limited by statute or rule to prevent the danger of overreaching); *Nye v. United States*, 313 U.S. 33, 50-51 (1941) (pointing out that Congress had statutorily imposed a limit on the power to punish for contempt and that federal courts improperly expanded such limitations); *Munsell*, 4 N.E. at 261-62 (recognizing that statutory language is all-inclusive for criminal contempts but civil contempts are not limited to the statutory enumeration); *Gabrelian v. Gabrelian*, 489 N.Y.S.2d 914, 917 (App. Div. 1985) (stating that "[t]he power to punish for criminal contempt is strictly circumscribed," but the power to punish for civil contempt is "much broader").

⁸ See *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 66 (1924). In New York State, statutory law limits the inherent contempt power of the courts to certain enumerated offenses, and to certain forms and degrees of punishment. See, e.g., N.Y. JUD. LAW § 750(A) (McKinney 1992) (imposing limitations on the criminal contempt power); *id.* § 753(A) (imposing limitations on the civil contempt power).

⁹ See, e.g., N.Y. PENAL LAW § 215.50 (McKinney 1988) (designating conduct that constitutes second degree criminal contempt); *id.* § 215.51 (defining criminal contempt in the first degree).

SECTION 2: LEGISLATIVE INHERENT CONTEMPT POWER

The bedrock case from the United States Supreme Court, *Anderson v. Dunn*, which recognized the existence of the legislative inherent contempt power, is replete with dicta recognizing the judiciary's inherent contempt power.¹⁰ It upheld a legislative contempt issuing out of the United States House of Representatives, with one of the protagonists being the great compromiser, Henry Clay.¹¹ The decision astutely recognized and confirmed the judiciary's inherent contempt power as the "older" Siamese twin of the inherent legislative contempt power and, consequently, it is cited repeatedly as confirmation of both. Besides the mutuality of benefit visited on both institutions of constitutional government, repeated citation of the Court's decision—as Blackstone might have said—lends it the quality of that which has been settled since "time whereof the memory of man runneth not to the contrary."¹² The decision is here synopsisized:

[The contempt power] must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the [C]onstitution. But what is the fact? There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeal to public approbation

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the

¹⁰ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821) (acknowledging that although courts receive the power to punish for contempt through statute, the absence of such a statute does not limit the court's power to punish).

¹¹ *See id.* at 234-35.

¹² JOHN BARTLETT, *FAMILIAR QUOTATIONS* 325 (Justin Kaplan ed., Little, Brown and Co. 16th ed. 1992).

powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of the particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him and yet it is no less certain, that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbour's rights.

That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety cannot be guarded. On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.¹³

New York's Legislature has inherent contempt powers upon which limitations are statutorily imposed.¹⁴ The legislature's

¹³ *Anderson*, 19 U.S. at 225-28.

¹⁴ See *Keeler v. McDonald*, 2 N.E. 615, 623-25 (N.Y. 1885) (discussing the inherent powers possessed by the New York State Legislature). Article 2 of New York's Legislative Law provides the following:

Each house may punish by imprisonment not extending beyond the same session ... as ... a contempt ... the following offenses only:

- (1) Arresting a member or officer of either house in violation of his privilege from arrest;
- (2) Disorderly conduct of its members, officers or others in the immediate view and presence of the house, tending to interrupt its proceedings;
- (3) The publication of a false and malicious report of its proceedings,

contempt power is reviewable by the courts but not dependent upon them.¹⁵

SECTION 3: NEW YORK JUDICIARY CONTEMPT POWER

A court lacking the power to coerce obedience to its orders, or to punish disobedience of them, is a contradiction in terms. Contempt power is what distinguishes a court from an administrative tribunal. A court without contempt power is not a court.¹⁶ Judicial contempt power, which is nondelegable¹⁷ and exercisable only in open court,¹⁸ has two facets—criminal or public, and civil

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

N.Y. LEGIS. LAW § 4 (McKinney 1991) (enumerating those contempt offenses for which either House may punish by imprisonment). It is important to note, however, that subsection (3) is, for most intents and purposes, unconstitutional. *See Groppi v. Leslie*, 404 U.S. 496, 502 (1972); *Bridges v. California*, 314 U.S. 252, 273 (1941).

¹⁵ *See, e.g., Groppi*, 404 U.S. at 496 (reviewing the contempt power of the Wisconsin State Assembly); *Jurney v. MacCracken*, 294 U.S. 125 (1935) (examining the contempt power of the Senate); *Marshall v. Gordon*, 243 U.S. 521 (1917) (distinguishing between Congress's impeachment power and its inherent power of contempt); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (reviewing the inherent contempt power of the House of Representatives); *Doyle v. Hofstader*, 177 N.E. 489, 490-91 (N.Y. 1931) (reviewing the legality of a contempt holding, by a joint committee of the New York State Senate and Assembly, of a witness for refusing to testify before that committee); *Keeler*, 2 N.E. at 615 (reviewing the legality of the Senate's imprisonment of a witness for refusing to testify before a public works committee).

¹⁶ The Japanese courts have no contempt powers and thus are actually administrative tribunals. *See, e.g., K. WOLFEREN, THE ENIGMA OF JAPANESE POWER* 225 (1989).

¹⁷ *See Goldberg v. Extraordinary Special Grand Juries Onondaga County*, 418 N.Y.S.2d 695, 698 (App. Div. 1979) (holding invalid a judicial order delegating contempt power to members of a special prosecutor's office); *People ex rel. Stearns v. Marr*, 84 N.Y.S. 965, 967 (App. Div. 1903), *aff'd in part*, 74 N.E. 431 (1905) (stating that it is for the court to determine whether a person is guilty of contempt).

¹⁸ *See, e.g., In re Oliver*, 333 U.S. 257, 264-65 (1948) (stating that a criminal contempt hearing held in secrecy is violative of the Fourteenth Amendment); *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982) (finding that a civil contempt hearing that could result in an order of confinement must be publicly held). *See generally Westchester Rockland Newspapers, Inc. v. Leggett*, 399 N.E.2d 518 (N.Y. 1979) (explaining that any public right of access to court proceedings must be balanced with the rights of the accused); *People v. Jones*, 391 N.E.2d 1335, 1338 (N.Y. 1979) (emphasizing a right to a public criminal trial).

or private.¹⁹ A criminal contempt of court violates the public's rights generally since the court serves as the public's instrument of justice. Judicial authority, in the form of criminal contempt power, is vindicated through punishment and fines.²⁰ Civil contempt, however, violates the rights of civil litigants in a purely private capacity. Here, coercive imprisonment, fines, or monetary indemnity serve to repair the private damage caused by disobedience to a court's order.²¹

A criminal contempt may occur within or without a court's immediate view and presence. Aside from directing colorful epithets toward the court while it is in open session, there are countless ways to commit an "immediate - view - and - presence -

¹⁹ See *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32 (1988) (reviewing the procedure for distinguishing between civil and criminal contempt); see also *Michaelson v. United States ex rel. Chicago St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42, 64-66 (1924) (distinguishing between the purposes of civil and criminal contempt); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 441 (1910) ("It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of [contempt] cases."); *McCormick v. Axelrod*, 453 N.E.2d 508, 512 (N.Y. 1983) (per curiam) (holding that the element which elevates a contempt from civil to criminal is the level of willfulness with which the conduct is undertaken); *Douglas v. Adel*, 199 N.E. 35, 37 (N.Y. 1935) (stating that a criminal contempt in the "immediate view and presence" of the judge may be punishable summarily); *In re Barnes*, 97 N.E. 508, 509-10 (N.Y. 1912) (holding valid a statute imposing power upon judges to imprison witnesses who fail to appear and testify); *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259, 261-62 (N.Y. 1886) (distinguishing between criminal contempt, civil contempt, and misdemeanors); *Gabrelian v. Gabrelian*, 489 N.Y.S.2d 914, 917 (App. Div. 1985) (noting that the inherent civil contempt power is significantly broader than the criminal contempt power).

²⁰ See *Department of Env'tl. Protection v. Department of Env'tl. Conservation*, 513 N.E.2d 706, 709 (N.Y. 1987) (per curiam) ("A criminal contempt ... involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates.") (citing *King v. Barnes*, 21 N.E. 182 (1889)); see also *Munsell*, 4 N.E. at 260 ("[Criminal contempt consists of] those whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant."); *County of Nassau v. Adjunct Faculty Ass'n of Nassau Community College*, 474 N.Y.S.2d 807, 808 (App. Div. 1984) (concluding that an injunction order, a violation of which is grounds for contempt, was valid only so long as the offense against which it guarded affected the issue being litigated), *aff'd*, 481 N.E.2d 254 (N.Y. 1985) (mem.).

²¹ *Munsell*, 4 N.E. at 259 ("[Civil contempt cases are] cases whose occasion is an injury or wrong done to a party who is a suitor before the court, and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit."); see also *Gompers*, 221 U.S. at 441-42 (considering that potential remedies include imposition of fines payable to the complainant and imprisonment of defendant).

contempt."²² Most criminal contempts, however, occur outside a court's presence. Common examples are outright disobedience to grand jury and trial subpoenas duces tecum and ad testificandum, or disobedience of sustained orders after legal challenge.²³ While New York's Legislature has limited criminal contempts addressing certain enumerated acts,²⁴ courts observe a common law catch-all for civil contempts.²⁵

The judiciary's inherent criminal contempt power, although limited but not conferred by statute, is necessary to a court's very existence. Its inherent civil contempt power, however, has no similar imperative. While the criminal contempt power may be invoked sua sponte or at the instance of the sovereign, a court may level civil contempt's coercive-remedial sanctions only at the instance of an aggrieved civil litigant, which occasionally may include the sovereign.²⁶ A court must be able to vindicate its

²² See *Douglas*, 199 N.E. at 37. Some examples include, failure of a non-privileged witness to testify in court, *United States v. Wilson*, 421 U.S. 309, 316-17 (1975); assaulting a court officer, *Ex Parte Terry*, 128 U.S. 289, 298 (1888); instructing a client to disregard a court order, *Davis v. Goodson*, 635 S.W.2d 226, 227 (Ark. 1982); refusing to testify, *O'Neil v. Kasler*, 385 N.Y.S.2d 684, 688-89 (App. Div. 1976); refusing to answer court's questions, *People v. Clinton*, 346 N.Y.S.2d 345 (App. Div. 1973); and making defiant hand gestures as part of a group courtroom disturbance, *Katz v. Murtagh*, 269 N.E.2d 816, 818-19 (N.Y. 1971).

²³ See, e.g., *Gold v. Menna*, 255 N.E.2d 235, 238-39 (N.Y. 1969) (holding that a witness may be held in contempt for refusing to testify after a grant of immunity); *Koota v. Columbo*, 216 N.E.2d 568, 569 (N.Y. 1966) (affirming contempt charges despite assertions that questions were irrelevant); *Spector v. Allen*, 22 N.E.2d 360, 362-63 (N.Y. 1939) (holding that where a witness intentionally disobeys an order of a grand jury to produce a specific document, in an action for contempt, the witness may be prohibited from purging the alleged contempt); *Kuriansky v. Ali*, 574 N.Y.S.2d 805, 806-07 (App. Div. 1991) (refusing to dismiss a contempt petition against an individual served with a grand jury subpoenas duces tecum and was personally named in the contempt petition and informed of the possible liability for the failure to comply).

²⁴ N.Y. JUD. LAW § 750(A) (McKinney 1992) provides that "[a] court of record has power to punish for criminal contempt a person guilty of any of the following acts, and no others." (emphasis added); see also *James v. Powell*, 274 N.Y.S.2d 192, 194-95 (App. Div.), *aff'd*, 223 N.E.2d 562 (N.Y. 1966) (limiting the power of criminal contempt to those offenses listed in Section 750).

²⁵ N.Y. JUD. LAW § 753(A)(8) (McKinney 1992) refers to "any other case, where an attachment or any other proceeding to punish for a contempt has been usually adopted and practiced in a court of record."; see also *People ex rel. Brewer v. Platzek*, 117 N.Y.S. 852, 853 (App. Div. 1909) (quoting *Munsell*, 4 N.E. at 259).

²⁶ Compare *United States v. Russotti*, 746 F.2d 945, 950 (2d Cir. 1984) (holding that civil contempt is not appropriate in criminal cases and that "[v]indication of the court's authority is normally accomplished by criminal contempt"), with *United States v. Williams*, 622 F.2d 830, 837-89 (5th Cir. 1980) (conceding that while the federal contempt statute grants only the court authority to punish for criminal con-

authority on behalf of public justice, but there is no such imperative for it to, *sua sponte*, take over a civil litigation by standing, without invitation, in the shoes of one of the privately interested litigants appearing before it.

SECTION 4: INHERENT AND LEGISLATIVELY CREATED CONTEMPT

Any legislature has the power to make criminal that which is already within a court's inherent criminal contempt power.²⁷ Such a statute does not actually confer additional contempt power on a court. After a conviction, however, under the usual criminal prosecution modalities, it is the court which retains the exclusive power to sentence—but only in accordance with the law creating the particular crime of criminal contempt. New York's Criminal Contempt in the Second Degree mirrors almost the entire Judiciary Law Criminal Contempt Statute.²⁸ Despite its similarity to Criminal Contempt in the Second Degree, Judiciary Law Criminal Contempt is not a crime. Judiciary Law Criminal Contempt proceedings are neither criminal nor civil, but rather are *sui generis* special proceedings to coerce obedience or punish disobedience.²⁹ United States Supreme Court decisions constru-

tempt, such contempt charges may be initiated by indictment without prior court action).

²⁷ See *Munsell*, 4 N.E. at 261 (noting that the revised statute attempted to codify and bring the court's inherent contempt power within definite and fixed rules).

²⁸ Compare N.Y. PENAL LAW § 215.50 (McKinney 1988), with N.Y. JUD. LAW § 750 (McKinney 1992) (listing, in both statutes, virtually identical conduct which may constitute criminal contempt).

²⁹ See *Nye v. United States*, 313 U.S. 33, 47-48 (1941); *Blackmer v. United States*, 284 U.S. 421, 440 (1932) (stating that although contempt is punishable, it is in a class by itself and not within the Sixth Amendment); *Myers v. United States*, 264 U.S. 95, 103, 105 (1924) (noting that the Clayton Act classifies disobedience of a judicial order as a non-criminal offense but such disobedience may be contempt and punishable at the discretion of the court); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440-41 (1911) (adhering to the trial judge's findings of fact, and limiting their inquiry to whether, as a matter of law, the disobedient conduct alleged constitutes contempt); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327-28 (1904) (classifying contempt proceedings in two groups—those that preserve the power of the courts and those that punish the disobedience of individuals); *Ex parte Terry*, 128 U.S. 289, 303 (1888) (noting the inherent power the courts have to punish for contempt and the necessity for it in the fair administration of justice); *Ex parte Wall*, 107 U.S. 265, 302-03 (1883) (Field, J., dissenting) (stating that since the power to punish for contempt was often abused, a congressional enactment limited the power of the courts to punish only to "insure order ... in their presence; faithfulness [by] their officers[;] ... and obedience to their ... orders"); *Gabrelian v. Gabrelian*, 489 N.Y.S.2d 914, 918-20 (App. Div. 1985) (stating that in order for the courts to properly exercise jurisdiction and administer justice, the power to punish for contempt is

ing and harmonizing the inherent judicial contempt power with double jeopardy, petty offense and modern day conceptions of due process of law under the Fifth and Fourteenth Amendments, despite their strained reasoning, have not metamorphosed them into prosecutions of crime.³⁰ "[P]rocedural protections which have gradually surrounded imposition of criminal contempt penalties [are merely] accretions of 'fundamental fairness' rather than application of ... the Bill of Rights to contempt prosecutions as 'crimes.'"³¹

SECTION 5: NEW YORK'S JUDICIARY LAW ARTICLE 19

Judiciary Law Article 19³² is a derivative of the Code of Civil Procedure of 1909 which preceded the Civil Practice Act and the present Civil Practice Law and Rules. Historically, the statute traces back to the Revised Statutes of the 19th Century and, be-

a necessity); *People ex rel. Frank v. McCann*, 237 N.Y.S. 85, 88 (App. Div. 1929) (stating that criminal contempt proceedings are not true criminal proceedings because their purpose is not to vindicate the criminal law), *aff'd*, 170 N.E. 898 (1930).

³⁰ See *Colombo v. New York*, 405 U.S. 9, 10-11 (1972) (vacating reversal of lower court's finding of criminal contempt for plaintiff's refusal to answer the grand jury's questions); *Bloom v. Illinois*, 391 U.S. 194, 197 (1968) (noting that the Supreme Court has held that even the potential for severe punishment for contempt does not, by itself, warrant a jury trial); *Green v. United States*, 356 U.S. 165, 183-87 (1958) (deciding that the Fifth Amendment does not require that contempts subject to prison terms of more than one year be based on a grand jury indictment); *Gompers v. United States*, 233 U.S. 604, 610 (1914) (holding that contempt convictions are crimes even though there are no constitutional protections such as a right to trial by jury).

³¹ *United States v. Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970); see *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 799-800 (1987) (holding that even though criminal contempt is now regarded as an ordinary crime, such characterization is intended only to rebut earlier sentiment that they are not deserving of normal criminal proceedings); *Blackmer*, 284 U.S. at 440 (holding that the requirement of due process in a criminal contempt proceeding can be satisfied by providing notice and an opportunity to be heard); accord *Sassower v. Sheriff of Westchester County*, 824 F.2d 184, 189 (2d Cir. 1987) (holding that there is a constitutional distinction between serious crimes and criminal contempt, and that providing notice and an opportunity to be heard satisfy due process requirements in contempt proceedings). See generally *Hanbury v. Benedict*, 146 N.Y.S. 44, 50-51 (App. Div. 1914) (holding that an order finding one guilty of contempt may be reversed by notice rather than a writ of certiorari).

³² N.Y. JUD. LAW art. 19 (McKinney 1992) (containing contempt laws); see *Eastern Concrete Steel Co. v. Bricklayers' & Mason Plasterers' Int'l Union, Local No. 45*, 193 N.Y.S. 368, 369-70 (App. Div. 1922) (explaining that criminal contempt provisions existing in the 1909 code were transferred to the Judiciary Law and became sections 750 and 753 of that law); *Hanbury*, 146 N.Y.S. at 49 (explaining that the 1909 provisions of the statute relating to criminal contempt were transferred from the Code of Civil Procedure to the Judicial Law).

fore that, to ad hoc local statutes.³³ Similar to other subjects of the law, Article 19 is a self contained unit.³⁴ Article 19's regulation of the judiciary's inherent contempt power—procedures, punishments and remedies—are all set forth therein. The statute draws on the civil modalities for both criminal and civil contempts by reference to its procedures and forms, seemingly to demonstrate an intention not to subject contempt proceedings to the letter of the law applicable to criminal prosecutions for crime generally.

SECTION 6: COURT ORDERS MUST BE CLEAR AND COMMUNICATED

One cannot be in contempt of a mere judgment.³⁵ A person may be contemptable, but may not be held in contempt for a mere admonition or observation of such conduct preceding a court's order.³⁶ A clear court order avoids any uncertainty in the minds of those to whom it is addressed and who are charged with obedience.³⁷ The order itself, however, need not explicitly warn of the consequences of disobedience.³⁸ Various terms have

³³ See *United States v. Barnett*, 376 U.S. 681, 715 (1964) (noting that in 1829 New York enacted a statute defining criminal contempt and designated punishment); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 406 (1882) (stating that the Civil Code preserved the distinction between criminal and civil contempt as established in the Revised Statutes).

³⁴ See, e.g., *People v. Valenza*, 457 N.E.2d 748, 751 (N.Y. 1983) (stating that prosecutorial discretion, when choosing between two statutes that punish the same conduct, is limited by legislative intent to make a specific statute the exclusive means to punish particular conduct).

³⁵ See *Pereira v. Pereira*, 319 N.E.2d 413, 418 (N.Y. 1974) (holding that a defendant's violation of a divorce judgment is not sufficient to hold the defendant in contempt).

³⁶ For example, in *United States v. Cutler*, 840 F. Supp. 959 (E.D.N.Y. 1994), *aff'd*, 58 F.3d 825 (2d Cir. 1995), the court noted that the use of the word "admonition," which means "warning," could be unclear, at least to a lay person. *Id.* at 964. Furthermore, the *Cutler* court concluded that the judge's admonition could be interpreted by a "literal legal mind" as something less than an order. *Id.* Similarly it has been noted that the court must determine whether the individual is capable of comprehending the warning. See *United States v. Turner*, 812 F.2d 1552, 1565 (11th Cir. 1987).

³⁷ See *Ketchum v. Edwards*, 47 N.E. 918, 920 (N.Y. 1897) (stating that because punishment for contempt may involve the loss of property or liberty, it is a reasonable requirement that the order be clearly expressed); *New York State Ass'n of Counties v. Axelrod*, 629 N.Y.S.2d 335, 338 (App. Div. 1995) (finding no evidence of contempt where the order allegedly disobeyed was ambiguous).

³⁸ See *Keator v. Keator*, 622 N.Y.S.2d 338, 339 (App. Div. 1995) (rejecting the respondent's assertion that because the court "order did contain any warning that its violation could result in incarceration, principles of due process and fundamental

been used to describe the requirement that a court order be clear, including "unequivocal," "explicit," "precise," and "reasonably specific."³⁹ Distilled to their essence, these terms express the fundamental postulate that if government is to command and later punish, it may not do so in language so vague and undefined that it does not afford fair notice and warning of what is required or forbidden.⁴⁰ Orders must have operative commands capable of enforcement, not merely expressions of abstract conclusions or principles of law.⁴¹ In determining whether an order is sufficiently clear to the audience to whom it is addressed, an inquiry into its terms and surrounding context⁴² is required.⁴³ The issue of a court order's clarity is a mixed question of law and fact, and there exists no particular verbal formula.⁴⁴ An issue of good faith arises when failure to comply with an order is asserted to be the result of its impreci-

fairness preclude the imposition of such a sanction").

³⁹ See, e.g., *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949) (Frankfurter, J., dissenting) (stating that in order to secure obedience of a court order, courts should be explicit and precise in their commands); *United States v. Turner*, 812 F.2d 1552, 1565 (11th Cir. 1987) ("To support a conviction for criminal contempt for violation of an order of a court, the order must be reasonably specific."); *United States v. Charmer Indus.*, 722 F.2d 1073, 1079 (2d Cir. 1983) (finding no contempt because the understanding of the order was not "clear and unequivocal"); *McCain v. Dinkins*, 639 N.E.2d 1132, 1138 (N.Y. 1994) ("To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed.").

⁴⁰ See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 438-39 (1976) (citing section 65(d) of the Federal Rules of Civil Procedure); *Raley v. Ohio*, 360 U.S. 423, 438 (1959) ("A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.").

⁴¹ See *International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) ("The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."); *United States v. International Brotherhood of Teamsters*, 899 F.2d 143, 146 (2d Cir. 1990) ("An unclear order provides insufficient notice to justify a sanction as harsh as contempt.").

⁴² See *United States v. Revie*, 834 F.2d 1198, 1201 (5th Cir. 1987) (noting that the specificity on an order depends on the context in which it was given (citing *Turner*, 812 F.2d at 1565)).

⁴³ See *In re Levine*, 27 F.3d 594, 596 (D.C. Cir. 1994) (noting that in determining the contempt of an order, the context in which it was raised and the audience to which it is addressed must be considered) (citing *In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993)).

⁴⁴ See *United States v. Cutler*, 815 F. Supp. 599, 607 (E.D.N.Y. 1993) (noting that the court must consider the relevant facts at the time the directive was issued to determine whether it is an "order" to which criminal contempt can attach).

sion.⁴⁵ For an order to be clear, however, it need not define its constituent terms which otherwise fall within the universe of common English usage.⁴⁶ Clarity is always subject to review regardless of whether an order has been appealed, stayed or disobeyed.⁴⁷ If the failure to comply is capable of a reasonable construction consistent with innocence, a contempt adjudication is not permissible.⁴⁸ A corollary to the reasonable construction analysis prohibits the imposition of punishment on conduct outside the ambit of an order's explicit command.⁴⁹

"Ordered" is not a term of art such that it must, for its own sake, be included in a court's command, as long as there is no doubt that a reasonable person would clearly understand that he is under compulsion.⁵⁰ An "order" includes the term "mandate" and both terms are used almost interchangeably in the language of the law. One is no less or more a command than the other, although "mandate," in some quarters, is viewed as synonymous with a written order. For the disobedient, it is a distinction without a legal difference.⁵¹ The content of an order need not be communicated in any special manner or form. In contrast, a court order commanding the appearance of one accused of diso-

⁴⁵ See *United States v. Ray*, 683 F.2d 1116, 1126 (7th Cir. 1982) ("[A] defense of good faith compliance arises when a defendant has not refused to comply ... but has failed to comply because of the indefiniteness of the order").

⁴⁶ See *United States v. Air Traffic Controllers*, 678 F.2d 1, 3 (1st Cir. 1982) (finding that an order need not list "the components of a term whose boundaries are understood by common parlance").

⁴⁷ See *Coan v. Coan*, 447 N.Y.S.2d 29, 31 (App. Div. 1982) ("The failure to perfect the appeal ... does not preclude [the court's] review of that order to determine whether it clearly expresses a mandate subject to contempt for its willful violation.").

⁴⁸ See *Department of Env'tl. Protection of New York v. Department of Env'tl. Conservation of New York*, 513 N.E.2d 706, 710 (N.Y. 1987) (per curiam); *Ketchum v. Edwards*, 47 N.E. 918, 920 (N.Y. 1897).

⁴⁹ See *Yagman v. Republic Ins.*, 987 F.2d 622, 629 (9th Cir. 1993) (stating that the plaintiff could not be punished for failure to produce documents requested by the order because such documents did not exist); *Holtzman v. Beatty*, 468 N.Y.S.2d 905, 908 (App. Div. 1983) (per curiam) (holding that failure to provide handwriting samples was not contempt because the order did not specify that such samples were to be furnished).

⁵⁰ See generally *O'Neil v. Kasler*, 385 N.Y.S.2d 684, 691 (App. Div. 1976) (noting that a witness did not have to be "ordered" to answer prosecutor's questions where it was obvious that the witness understood he would have to answer or be held in contempt).

⁵¹ See *People v. Giglio*, 428 N.Y.S.2d 27, 31 (App. Div. 1980) (stating, in dicta, that without authority to the contrary, one could be held in contempt for failure to obey an oral order of the court).

being a previously issued order may have its own special statutory or court rule. Except for this one subtlety, it suffices that a party to be charged with obedience be aware of the contents of an order.⁵² An oral direction in open court has as much binding authority on those who heard it as a written order signed and distributed.⁵³ Evidence of actual knowledge of the order's contents determines whether a person may be held punitively accountable for disobedience to an order, regardless of whether the order was formally, or even "informally" served;⁵⁴ notably, it is not sufficient to communicate the fact that an order has been issued without publishing its contents.⁵⁵ However, when individuals deliberately close their eyes and ears to the contents of an order, they are chargeable in law with the knowledge they otherwise would have obtained but for their own willful blindness.⁵⁶

⁵² See *McCormick v. Axelrod*, 453 N.E.2d 508, 513 (N.Y. 1983) (per curiam) (stating that a party to be held in contempt must have had knowledge of the order but actual service of the order upon that party is not required).

⁵³ See *In re Ithaca Journal News, Inc.*, 292 N.Y.S.2d 920, 927 (Ithaca City Ct. 1968).

⁵⁴ See *McCormick*, 453 N.E.2d at 513; *People ex rel. Davis v. Sturtevant*, 9 N.Y. 263, 277-78 (1853); *Power Auth. v. Moeller*, 395 N.Y.S.2d 497, 498 (App. Div. 1977) (noting that personal service of a court order is not required if actual knowledge is present) (citing *City Sch. Dist. of Schenectady v. Schenectady Fed'n of Teachers*, 375 N.Y.S.2d 179, 182 (App. Div. 1975)); *People ex rel. Illingworth v. Court of Oyer & Terminer*, 41 N.Y.S. 702, 704 (App. Div. 1896) (noting that not all orders by judges are reduced to writing).

⁵⁵ See *People v. McCowan*, 652 N.E.2d 909, 910 (N.Y. 1995) (dismissing charges against the defendant for violating an order of protection because the substance of the order was not conveyed); see also *Sturtevant*, 9 N.Y. at 271 (stating that the language of an order "must have a reasonable construction, with reference to the subject about which it is employed").

⁵⁶ See *In re Barbara*, 180 N.Y.S.2d 924, 928-29 (Sup. Ct. 1958); *Gallun v. Hibernia Bank & Trust Co.*, 195 N.W. 703, 704-05 (Wis. 1923) (holding that refusal to accept a subpoena and remain so contents could be read, did not relieve the defendant from obeying the contents of the order); see also *United States v. Joly*, 493 F.2d 672, 675 (2d Cir. 1974) (noting that one cannot intentionally remain ignorant of a fact material to one's conduct in order to avoid legal consequences); *In re Hildreth*, 284 N.Y.S.2d 755, 760 (App. Div. 1967) (holding that vague allegations of an inability to comply with a court order are not sufficient to mitigate a disobedience of the order); *Heller v. Levinson*, 152 N.Y.S. 35, 36-37 (App. Div. 1915) (finding sufficient service when papers were acknowledged by the defendant after being placed in the defendant's pocket because he was presumed to have ascertained the contents); *People v. Forsyth*, 439 N.Y.S.2d 808, 810 (Sup. Ct. 1981) (upholding a conviction for failure to appear pursuant to a subpoena based on the defendant's inability to show reasonable cause for the non-compliance). A person charged with blatant non-compliance, however, has an opportunity to prove otherwise. See *id.* Similarly, in *People v. Sugarman*, 215 N.Y.S. 56 (App. Div. 1926), the court held that "lack of knowledge re-

SECTION 7: SUBPOENAS AS MANDATES AND THEIR SERVICE

Judicial subpoenas are mandates of the court.⁵⁷ It is highly improbable "that there is any lawyer in the United States who does not know that a subpoena is a court order."⁵⁸ A grand jury subpoena *duces tecum*⁵⁹ issued by a prosecutor in good faith is a mandate of the court and disobedience of it is punishable as a contempt of court just like any other court order or mandate.⁶⁰ All subpoenas are self-limited by the terms of their written commands contained within their four corners. Attorneys have the authority to issue subpoenas on behalf of a court in accordance with the law.⁶¹ Thereafter, only the court may modify the terms unless attorney ministerial "modification" occurs in strict conformity with statute or special court authorization.⁶² When

sult[ing] from an avoidance of any endeavor to know what happened ... amounts in law to knowledge." *Id.* at 63; *see also* *Grant v. Greene Consol. Copper Co.*, 110 N.Y.S. 253, 256 (App. Div. 1908) (reversing a contempt charge because failure to comply with the order was not a willful refusal to comply). *But see* *McDonald v. Ames Supply Co.*, 238 N.E.2d 726, 728-29 (N.Y. 1968) (holding that although a person had knowledge of service and did not resist or avoid it, the order was nonetheless void because service was improper).

⁵⁷ In New York, for example, non-compliance of a judicial subpoena, as a mandate of the court, results in contempt with penalties thereunder. *See* N.Y. C.P.L.R. 2308(a) (McKinney 1991). The statute also provides, however, that a non-judicial subpoena is not a mandate of the court, and failure to comply allows the issuer to motion to compel performance. *See id.* at 2308(b). The New York Criminal Procedure Law states, in relevant part, "[a] 'subpoena' is a process of a court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court." N.Y. CRIM. PROC. LAW § 610.10(2) (McKinney 1995). Similarly, the Criminal Procedure Law uses the same distinction between a subpoena and a subpoena *duces tecum*, as does the Civil Practice Laws and Rules. *See id.* § 610.10(3); N.Y. C.P.L.R. 2301 (stating the purpose of both a subpoena and a subpoena *duces tecum*).

⁵⁸ *Waste Conversion v. Rollins Env'tl. Serv.*, 893 F.2d 605, 613 (3d Cir. 1990) (Scirica, J., dissenting).

⁵⁹ A subpoena *duces tecum* differs from a subpoena in that the former "requires production of books, papers and other things," whereas the latter "requires the attendance of a person to give testimony." N.Y. C.P.L.R. 2301; *see also* N.Y. CRIM. PROC. LAW § 610.10(3).

⁶⁰ *See* *People ex rel. Van Der Beek v. McClosky*, 238 N.Y.S.2d 676, 681 (App. Div. 1963) (upholding the validity of a subpoena issued by a district attorney commanding a police officer to appear as a witness); *Manning v. Valente*, 72 N.Y.S.2d 88, 94 (App. Div.), *aff'd*, 77 N.E.2d 3 (N.Y. 1947) (upholding criminal contempt conviction for failure to comply with a subpoena *duces tecum*).

⁶¹ *See* N.Y. C.P.L.R. 2302(a) (authorizing an attorney of record to issue subpoenas necessary to an action).

⁶² Section 2304 of the New York Civil Practice Laws and Rules allows for the modifications of an issued subpoena through subsequent motions to the court to so modify. Similarly, if one other than the court issued the subpoena, a request for

an attorney "adjourns" a subpoena or bargains its terms of compliance so as to vary it from its terms as originally written, the attorney is taking a calculated risk because this waives later judicial intervention should there be noncompliance with the subpoena. The attorney is not modifying the subpoena in law, which only a court has authority to do. Thus, if the attorney chooses to exercise the limited authority accorded by statute to "adjourn" the witness's appearance "from day to day upon reasonable notice," the attorney thereby waives potential penalty for non-compliance.⁶³ Such oral modification is not a subpoena and, therefore, a contempt proceeding so predicated will fail because disobedience here is not against a court mandate, but merely to an attorney's verbal command.⁶⁴ The terms of the original subpoena dictate the subpoenaed witness's duty. Such subpoena is the "only process under which [the witness may be] required to appear and testify" or produce documents.⁶⁵

Service of a subpoena is done in the same manner as a summons, but the requirement of its personal delivery has been said, without elucidation, to be "somewhat less stringent" than that required for a summons.⁶⁶ The purpose of service is to give

modification should first be addressed to the issuer and then a further motion to modify may be made to the court. *See* N.Y. C.P.L.R. 2304. Further, if a person served with a subpoena "is given reasonable notice of such [modification], no further process shall be required to compel his attendance." *Id.* at 2305(a). Moreover, the New York Criminal Procedure Law contains almost identical language. *See* N.Y. CRIM. PROC. LAW § 610.10(2).

⁶³ Whether the theory be waiver or estoppel, the attorney's oral modification precludes penalty.

⁶⁴ *See* N.Y. C.P.L.R. 2302, 2305(a) (providing for oral modification in a civil proceeding); N.Y. CRIM. PROC. LAW § 610.10(2) (providing for formal modification in a criminal proceeding); *see also In re Kaplan*, 168 N.E.2d 660, 662 (N.Y. 1960) (holding that an oral command by a grand jury foreman is not a mandate of the court and therefore failure to comply is not contempt); *Spector v. Allen*, 22 N.E.2d 360, 364-65 (N.Y. 1939) (holding that an oral direction from a district attorney is not a mandate of the court and therefore non-compliance is not contempt); *Maritime Fish Prods., Inc., v. World Wide Fish Prods., Inc.*, 474 N.Y.S.2d 281, 287 (App. Div. 1984) (stating that a written subpoena containing a provision to appear for any adjourned date can make a party answerable for contempt for failure to comply, if the party has reasonable notice of such date); *In re Mullen*, 31 N.Y.S.2d 710, 715 (Queens County Ct. 1941) (differentiating the power of the court from the district attorney and the foreman of the grand jury to issue lawful mandates).

⁶⁵ *Loubriel v. United States*, 9 F.2d 807, 809 (2d Cir. 1926). *See Spector*, 22 N.E.2d at 364-65 ("The subpoena must be in writing and only disobedience of the written command is subject to the drastic punishment meted out for a criminal contempt."); *Mullen*, 31 N.Y.S.2d at 715-16 (holding that contempt cannot result from failure to comply with an oral extension of a subpoena).

⁶⁶ *In re Barbara*, 183 N.Y.S.2d 147, 149 (App. Div. 1959). *But see* N.Y. C.P.L.R.

notice of what is commanded so that a party may resist compliance by lawful measures or simply comply—in either case because the party knows what is commanded.⁶⁷ “Courtesy service” on a witness’s attorney on behalf of the witness, however, does not provide sufficient service on the witness, and therefore even though apprised of its terms, the witness may not be punished for disobedience. Formality of service drives home the message of required obedience.⁶⁸ Properly served, a subpoena affords a witness no discretion as to obedience.⁶⁹ Its purpose would be frustrated if a witness were allowed to decide, absent good cause in law, whether obedience would be forthcoming. A subpoena is not “an invitation to a game of hare and hounds in which the witness must testify [or produce physical evidence] only if cornered”⁷⁰

SECTION 8: THE DUTY TO OBEY COURT ORDERS

As stated in *Ketchum v. Edwards*,⁷¹ an “order of a court having jurisdiction must be implicitly obeyed, however erroneous it may be, and ... it is no answer [to a charge of disobedience] ... that the order or judgment was broader than the facts war-

2303 (stating that “[a] subpoena shall be served in the same manner as a summons”).

⁶⁷ See *Barbara*, 183 N.Y.S.2d at 150 (citing *Hiller v. Burlington & Mo. River R.R. Co.*, 70 N.Y. 223, 227 (1877)).

⁶⁸ See *In re Depue*, 77 N.E. 798, 801 (N.Y. 1906) (recognizing that no authority allows jurisdiction to be conferred upon a client for contempt purposes by service upon the attorney); *Broman v. Stern*, 567 N.Y.S.2d 829, 830-31 (App. Div. 1991) (holding that an attorney not officially designated as an agent to accept service of process lacked authority to accept service of a subpoena and therefore the attorney’s client is not in contempt); *People v. Balt*, 312 N.Y.S.2d 587, 589 (App. Div. 1970) (per curiam) (stating that personal service of an order to show cause to answer contempt charges is mandatory); *Kanbar v. Quad Cinema Corp.*, 581 N.Y.S.2d 260, 261 (Sup. Ct. 1991), *aff’d as modified*, 600 N.Y.S.2d 702 (App. Div. 1993) (holding two individuals of a corporation were not in contempt for violation of a restraining notice because they were not personally served).

⁶⁹ See *People v. Balt*, 312 N.Y.S.2d 587, 589 (App. Div. 1970) (per curiam) (stating that personal service of an order to show cause to answer contempt charges is mandatory); *Kanbar*, 581 N.Y.S.2d at 261 (holding two individuals of a corporation were not in contempt for violation of a restraining notice because they were not personally served).

⁷⁰ *United States v. Bryan*, 339 U.S. 323, 331 (1950). Relying on *Bryan*, the court in *People v. D’Amato*, held that reliance on the advice of third parties, including attorneys, is not good cause in law for failure to comply, but the burden of proof is on the prosecution to show the party did not have good cause. See 211 N.Y.S.2d 877, 881-82 (App. Div. 1961).

⁷¹ 47 N.E. 918 (N.Y. 1897).

ranted, or gave relief beyond ..." that which was sought or justified under the circumstances.⁷² The court further stated that an "orderly jurisprudence" forbids litigants to nullify or set aside orders even if their improvidence, misapprehension and mistake are obvious.⁷³ This is why the law provides for stays and appeals. A "very clearly wrong" court order is not void and must be obeyed if its operation is not stayed through orderly process.⁷⁴ Only orders which are transparently invalid, void or frivolous need not be obeyed.⁷⁵ Whether an order fits one of these categories or is issued without jurisdiction is a question which ultimately has to be answered by the judiciary. Those who simply disobey an order and later assert one of these categories as a defense, assume the risk of punitive consequences should their position ultimately not prevail in the courts.⁷⁶

SECTION 9: CORPORATIONS AND CONTEMPT

As a creature of the state, a corporation receives its franchise subject to the laws of the state and the limitations of its charter.⁷⁷ In accordance with law, it is entirely proper for the state to investigate a corporation's activities and, to that end, examine its books and papers.⁷⁸ It has no Fifth Amendment privilege against self-incrimination.⁷⁹ At an earlier time, it was

⁷² *Id.* at 920.

⁷³ *Id.*

⁷⁴ *People ex rel. Davis v. Sturtevant*, 9 N.Y. 263, 270 (1853); *see also Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967) (requiring orderly judicial review of an injunction prior to disobeying the injunction); *In re Landau*, 243 N.Y.S. 732, 734 (App. Div. 1930) (*per curiam*) (stating that a party may not blatantly disregard an erroneous order, but must rather institute formal judicial proceedings to challenge it).

⁷⁵ *See Walker*, 388 U.S. at 315; *Schulz v. State*, 654 N.E.2d 1226, 1229 (N.Y. 1995) (stating that the order "was so manifestly lacking in validity that its disobedience cannot be punished as a contempt").

⁷⁶ *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947) (holding that parties may be held in contempt for violating a court order when the decision regarding the validity of the order was pending).

⁷⁷ *See Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) (discussing the relationship between the state and a corporation including the responsibilities a corporation has toward the state).

⁷⁸ *See id.* (holding that a corporation has no right to refuse the state access to its books and papers in a judicial proceeding).

⁷⁹ *See Wilson v. United States*, 221 U.S. 361, 382-83 (1911) (citing *Hale*, 201 U.S. at 74-75); *Grand Jury Subpoenas Duces Tecum (X&Y) v. Kuriansky*, 505 N.E.2d 925, 930 (N.Y. 1987) (stating that "a custodian of corporate records may not refuse to produce them even though they may incriminate him personally"); *Bleak-*

thought that corporations were immune from punishment for contempt due to their impersonal character and the fact that they could not be placed in handcuffs.⁸⁰ It is now the law that a corporation may be held in contempt.⁸¹ There are methods for coercing or punishing a corporation—fines being the most obvious. It would be anomalous to penalize agents and officers of a corporation but not to penalize the entity itself.⁸²

SECTION 10: CORPORATE OFFICERS AND CONTEMPT

A corporation as an entity obeys or disobeys legal process through its officers or agents served with or having knowledge of the law's writ. The case is different with respect to the officers or agents as individuals. While they obey in a representative capacity on behalf of the corporation, corporate officers disobey in a purely personal capacity.⁸³ "It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, and not the intangible being

ley v. Schlesinger, 62 N.E.2d 85, 86 (N.Y. 1945) (noting that a corporate officer cannot refuse to produce corporate records even if disclosure would incriminate the officer or the corporation); *In re Barnes*, 97 N.E. 508, 510 (N.Y. 1912) (recognizing that neither the corporation nor the custodian of its records may justify the refusal to submit the records on the grounds of self-incrimination).

⁸⁰ See *Continental Mortgage Guar. Co. v. Whitecourt Constr. Corp.*, 297 N.Y.S. 338, 339 (Sup. Ct. 1937) (reviewing prior case law on corporate immunity).

⁸¹ See *id.* at 340. In *Wilson*, the Court stated that a corporation is subject to legal proceedings as is an individual. *Wilson*, 221 U.S. at 374. The Court further noted that a subpoena issued on a corporation is analogous to one served on its agents, as a defendant corporation can act only through its agents. See *id.* at 377 (citing *Commissioners v. Sellev*, 99 U.S. 624, 627 (1878)).

⁸² See *Continental Mortgage Guar. Co.*, 297 N.Y.S. at 340.

⁸³ Compare *Braswell v. United States*, 487 U.S. 99, 117-18 (1988) (holding that while a person, as agent of a corporation, is not immune from Fifth Amendment privileges, any incriminating act so divulged against the individual acting in his individual capacity is deemed an act of the corporation if the agent was acting under that capacity); *United States v. White*, 322 U.S. 694, 700-01 (1944) (noting that evidence of wrongful acts by corporate officers is usually found in the corporation's business records); *Nelson v. United States*, 201 U.S. 92, 115 (1906) (stating that if individuals who have custody of the books were given immunity to court orders under guise of agents acting on behalf of a corporation, no corporate documents would ever be subject to review), and *Continental Mortgage Guar. Co.*, 297 N.Y.S. at 340 (stating that "[i]t would be an anomaly in the law if [it] were to be [held] that while the courts [have] the power to punish the officers and agents of a corporation, they do not have the power to punish the principal itself"), with *Wilson*, 221 U.S. at 378 (stating that an agent of a corporation is bound by a subpoena issued to a corporation unless he could prove the documents were personal).

they represent and act for, that the law directs its process⁸⁴ It is clear that "no individual may refuse to surrender existing [corporate] documents ... if they be within [the individual's] control."⁸⁵ A command to a corporation is a command to its officers and agents having knowledge of the command to take the necessary steps to insure compliance.⁸⁶ A corporate officer who, with notice of a court's order, impedes compliance, or, fails to take appropriate action within his power to effect compliance is, just like the corporation, punishable by contempt.⁸⁷ The converse, however, is not true. An officer or agent of a corporation who either has no knowledge of an order to the corporation or who does not participate in its disobedience is not guilty of contempt, and the corporation's contempt may not be imputed to such individual.⁸⁸

A corporate records custodian must produce records in response to legal process even if the records and their production will incriminate him.⁸⁹ Furthermore, an agent of a corporation

⁸⁴ *Nelson*, 201 U.S. at 115-16.

⁸⁵ *United States v. Patterson*, 219 F.2d 659, 660 (2d Cir. 1955).

⁸⁶ *See Wilson*, 221 U.S. at 376; *People ex rel. Davis v. Sturtevant*, 9 N.Y. 262, 271-72 (1853) (holding all members of a corporate body having knowledge of an injunction bound by its terms); *Citibank, N.A. v. Anthony Lincoln-Mercury, Inc.*, 447 N.Y.S.2d 262, 263 (App. Div. 1982) (upholding the court's power to punish corporate officers for contempt if personal service and knowledge requirements are met).

⁸⁷ *See Wilson*, 221 U.S. at 376; *see also United States v. Voss*, 82 F.3d 1521, 1526 (10th Cir.), *cert. denied*, 117 S. Ct. 226 (1996) (stating that the unequivocal direction by a subpoena to produce an organization's records requires persons with knowledge of the subpoena to comply or face contempt); *United States v. Fleischman*, 339 U.S. 349, 356-57 (1950) (requiring individuals in offices of joint responsibility to act within their power to comply with the order); *Geller v. Flamout Realty Corp.*, 183 N.E. 520, 521-22 (N.Y. 1932) (holding individual officers violating court orders liable for civil contempt).

⁸⁸ *See Continental Mortgage*, 297 N.Y.S. at 340 (stating that the lower court lacked authority to hold in contempt a corporate officer who was not a party to contemptuous conduct); *see also Ross v. Thousand Island Park Ass'n*, 196 N.Y.S. 811, 813 (App. Div. 1922) (holding a contempt conviction improper where the individual neither knew nor participated in any violations to the injunction). *See generally People v. Byrne*, 570 N.E.2d 1066, 1068 (N.Y. 1991) (holding that criminal liability of corporations will not be imputed to individuals playing no part in criminal acts).

⁸⁹ *See United States v. Rylander*, 460 U.S. 752, 758-61 (1983) (holding a claim of privilege is not a "substitute for relevant evidence"); *see also Braswell*, 487 U.S. at 117-19 (holding that a custodian of corporate records may not resist production under the self-incrimination privilege); *White*, 322 U.S. at 699-701 (holding custodians of corporate or union records may not withhold production to escape self-incrimination); *Wilson*, 221 U.S. at 384-86 (extending requirement of production to a corporate officer against whom indictments are pending); *Grand Jury Subpoenas (X&Y) v. Kuriansky*, 505 N.E.2d 925, 930 (N.Y. 1987) (holding Fifth Amendment

designated to produce documents must furnish all documents available to the corporation, not merely those of which he has personal knowledge.⁹⁰ Obviously, the law should not encourage corporations to designate the village idiot as its agent for compliance with court process as a means of thwarting or effectively preventing compliance.

SECTION 11: CONTEMPT AND COURT JURISDICTION

Contempt is predicated on the violation of a legal duty, not a moral obligation.⁹¹ If a court does not have subject matter jurisdiction its order need not be obeyed.⁹² This proposition, although simple to state, is nonetheless vexing to apply and live under. Admittedly, “[t]he distinction between subject matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics.”⁹³ In particular, the distinction rests on the notion that courts have limited authority, some of constitutional origin, which is designed to protect citizens against the abuse of judicial authority.⁹⁴ The courts, like “the political branches of the government, must respect the limits of their authority.”⁹⁵ A judge who knowingly and intentionally exceeds his powers or abjures his duty is acting in violation of his oath of office and should be impeached, just as any other official.

A court’s order does not bind non-parties merely because they have knowledge of its existence.⁹⁶ Non-parties may only be punished if they act as servants or agents of the parties, or, if

privilege inapplicable to corporations and that a corporate records custodian must produce records even though they may incriminate the custodian personally).

⁹⁰ See *Taylor v. Home Ins. Co.*, 646 F. Supp. 923, 929 (W.D.N.C. 1986) (“The agent of a corporation who is designated to produce documents must furnish all information available to the corporation. This responsibility is not limited by [the agent’s] own personal knowledge of the situation.”).

⁹¹ See *Doyle v. Hofstader*, 177 N.E. 489, 497 (N.Y. 1931) (“To uphold a finding that his conduct amounted to a contempt, it must appear that in refusing to answer he was violating a legal, and not merely a moral, obligation.”).

⁹² See *People ex rel. Davis v. Sturtevant*, 9 N.Y. 262, 266 (1853) (noting that orders and judgments of a court without jurisdiction are void).

⁹³ *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

⁹⁴ See *id.*

⁹⁵ *Id.*

⁹⁶ See *State Univ. of N.Y. v. Denton*, 316 N.Y.S.2d 297, 300 (App. Div. 1970) (stating knowledge is not sufficient to impose liability on non-parties for violating a court order); see also *Chase Nat’l Bank v. Norwalk*, 291 U.S. 431 (1934); *International Bd. of Teamsters v. Keystone Freight Lines, Inc.*, 123 F.2d 326 (10th Cir. 1941); *Briddon v. Briddon*, 128 N.E. 675 (N.Y. 1920).

with knowledge of the order's terms, they act collusively with parties in disobedience of the order.⁹⁷ However, even a court ultimately lacking subject matter jurisdiction has the power to issue orders to preserve existing conditions when a decision is pending regarding its jurisdiction.⁹⁸ Until a court's jurisdiction is determined, its authority is derived from the necessity to issue such orders as are necessary to preserve the status quo.⁹⁹ A party who makes a private determination of the law and of the court's jurisdiction and disobeys such an interim order acts at his peril for contempt purposes.¹⁰⁰ If, ultimately, an order is confirmed to have been void on its face, transparently invalid, frivolous, or some other semantic equivalent, the party who disobeys it is not punishable by contempt for he, in retrospect, was never bound to obey in the first place.¹⁰¹ If the decision is adverse to him he will be punished for his contempt.¹⁰² Having predicted the ruling incorrectly, he will be held accountable for intentional disobedience, even if his belief in the order's invalidity was the product of good faith ignorance or a bad law school. "Court orders, [for policy reasons,] are accorded a special status in American jurisprudence."¹⁰³ Only where a court lacks subject

⁹⁷ See *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) ("[T]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden ... but what it has power to forbid").

⁹⁸ See *Carter v. United States*, 135 F.2d 858, 861-62 (5th Cir. 1943) (stating that orders by the court are lawful and binding while the determination of the validity of jurisdiction is pending); see also *Locke v. United States*, 75 F.2d 157, 159 (5th Cir. 1935) ("Willful disobedience of an injunction, however erroneous, issued by a court having jurisdiction while such injunction is in force unreversed constitutes contempt of court.") (citing *Patton v. United States*, 288 F. 812, 815 (4th Cir. 1923)).

⁹⁹ See *United States v. Shipp*, 203 U.S. 563, 573 (1906); see also *National Maritime Union v. Aquaslide 'N' Dive Corp.*, 737 F.2d 1395, 1399-1400 (5th Cir. 1984) (upholding a court's power to issue injunctions in order to maintain the status quo while a jurisdictional question is pending).

¹⁰⁰ See *United States v. United Mine Workers of Am.*, 330 U.S. 258, 292 (1947); *Children's Village v. Greenburgh Eleven Teachers' Union Fed'n of Teachers Local 1532*, 648 N.Y.S.2d 616 (App. Div. 1996) (providing an example of defendants disobeying a temporary court order and being held in criminal contempt).

¹⁰¹ See *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (discussing the notion that an invalid or frivolous order is not binding); see also *State v. Congress of Racial Equality*, 460 N.Y.S.2d 58, 60 (App. Div. 1983) (holding that an order must be obeyed so long as a court has jurisdiction and the order is not void on its face).

¹⁰² See *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922) (discussing the proposition that an order must be obeyed by the parties until it is reversed by orderly and proper proceedings).

¹⁰³ *In re Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir. 1986).

matter jurisdiction, or where its order is facially void, may a party disobey and later, as a defense, challenge its underlying validity.¹⁰⁴

Additionally, once a court with subject matter jurisdiction issues an order to a party over whom it has in personam jurisdiction, the commands of that order remain with the person regardless of where he subsequently goes.¹⁰⁵ As for contempt proceedings themselves, there is a presumption of subject matter jurisdiction over the contempt.¹⁰⁶

SECTION 12: SERVICE OF COURT ORDERS

An oral order given from the bench in open court by the presiding judge is an order served upon all those assembled to whom it is directed.¹⁰⁷ A client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order.¹⁰⁸ Certification of a court's order prior to its service is certainly not necessary to give it binding force.¹⁰⁹ By definition, an order is "served" when the recipient has knowledge of its existence and its terms.¹¹⁰

¹⁰⁴ See *Vakalis v. Shawmut Corp.*, 925 F.2d 34, 36-37 (1st Cir. 1991) (per curiam) (requiring compliance with court orders even when suspected to be unlawful); *Providence Journal Co.*, 820 F.2d at 1346 (holding a party subject to a court order and bound to its terms even if there exists a belief that the order is unlawful); see also *United States v. Underwood*, 880 F.2d 612, 618 (1st Cir. 1989) (affirming mandatory compliance regardless of a good faith belief of its unlawfulness).

¹⁰⁵ See *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451-52 (1932) (holding a decree which ordered the recovery of a total of \$49,292.89 "binding upon the respondent, not simply within the District of Massachusetts, but throughout the United States").

¹⁰⁶ See *Ex parte Cuddy*, 131 U.S. 280, 284-86 (1889) (holding that where a judgment is under collateral attack, there is still a presumption of jurisdiction over the contempt proceedings).

¹⁰⁷ See *People ex rel. Illingworth v. Court of Oyer & Terminer*, 41 N.Y.S. 702, 704-05 (App. Div. 1896) (holding that a mandate given by the court, whether oral or written, binding on those in the courtroom).

¹⁰⁸ See *United States v. Revie*, 834 F.2d 1198, 1203 (5th Cir. 1987) (holding defendant had adequate notice of a show cause order because his attorney was on notice).

¹⁰⁹ See *United States v. Underwood*, 880 F.2d 612, 618 (1st Cir. 1989) (holding that defendant was "willfully" disobeying an order of the court even though "he relied in good faith upon his counsel's advice that the subpoena was unlawful and that he must refuse to testify in order to preserve the issue for appeal").

¹¹⁰ See *Campanella v. Campanella*, 548 N.Y.S.2d 279, 281 (App. Div. 1989) (holding that one with actual knowledge of a court mandate can be punished for contempt even though not personally served); see also *McCormick v. Axelrod*, 453

SECTION 13: THE COLLATERAL BAR RULE

An order issued by a court with jurisdiction and pleadings properly invoking its action and properly served upon parties must be obeyed however erroneous it may be. Even if the order is based upon the assumed validity of a void law going to the merits of the case, the parties must comply with it.¹¹¹ It is for the court, in the first instance, to determine the validity of a law and it must be respected until its order is reversed for error whether by orderly appellate process or sua sponte by the issuing court itself.¹¹² This imperative applies even if a party has eminently proper grounds to object to the order.¹¹³ This is also true without regard to the constitutionality of a law under which a court acts:¹¹⁴

As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the orders or decree¹¹⁵

N.E.2d 508, 513 (N.Y. 1983) (per curiam); *People ex rel. Stearns v. Marr*, 74 N.E. 431, 434 (N.Y. 1905) (illustrating the proposition that it is not necessary for the court order to be served to impose actual knowledge); *Shakun v. Shakun*, 204 N.Y.S.2d 694, 696 (App. Div. 1960).

¹¹¹ See *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922) (discussing the defendant's obligation to follow a court order regardless of its validity).

¹¹² See *id.* at 190; see also *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 450 (1911) (holding that a party is without power to judge the validity of court orders and set them aside by an act of disobedience); *Toy Toy v. Hopkins*, 212 U.S. 542, 548 (1909) (holding that a judgment is not necessarily void where jurisdiction is erroneous); *Seril v. Belnord Tenants Ass'n*, 526 N.Y.S.2d 462, 463-64 (App. Div. 1988) (finding that a prior jurisdictionally valid order must be maintained); *Garry v. Garry*, 467 N.Y.S.2d 175, 180 (Sup. Ct. 1983) (barring a party held in contempt from collaterally attacking the judgment itself where the judgment was entered by consent of the parties based upon their own voluntary agreement).

¹¹³ See *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (holding that an order must be obeyed until it is reversed regardless of whether those subject to the order have reasonable grounds to object to the order); *Howat*, 258 U.S. at 189-90 (mandating compliance with an injunction issued by a court, even if it is erroneous).

¹¹⁴ See *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947) (holding that a court order is binding notwithstanding the constitutionality of the Act under which the order is issued).

¹¹⁵ *Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967) (quoting *Fields v.*

An apparent but not actual exception is the successful plea that a court's order itself is unconstitutional. This " 'exception' to the general rule [is] derive[d] not from the unconstitutionality of the [court's] order [itself] but from the exercise of a specific constitutional right not to cooperate with judicial process" in certain instances.¹¹⁶ Only when a court is so clearly outside its authority as to be merely usurping judicial power, may a court's order be disregarded.¹¹⁷ In other words, if a court does not have subject matter jurisdiction and its process is not issued to determine whether it has jurisdiction, then its process itself is a nullity. The ability to disobey a court's order is subject to a caveat: the very existence of a court presupposes its power to entertain a controversy, if only to decide, after taking the matter under advisement, that it has no jurisdiction to entertain the controversy.¹¹⁸

The courts have phrased the collateral bar rule in various ways. Each formulation contributes something of its own. In particular, a subjective good faith belief, without more, that a court's order is erroneous does not relieve one from the duty of compliance absent the obtaining of still another order staying its enforcement until the original order is either vacated or reversed.¹¹⁹ Additionally, even orders which are issued under misapprehension or mistake of law or fact must nevertheless be

City of Fairfield, 143 So.2d 177, 180 (Ala. 1962)); cf. *United States v. Terry*, 17 F.3d 575, 579 (2d Cir. 1994) (determining that the appropriate method for challenging the validity of an order is to file a petition requesting that the order be vacated or amended).

¹¹⁶ *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 n.2 (9th Cir. 1979) (citing *Maness v. Myers*, 419 U.S. 449 (1975)).

¹¹⁷ See *United Mine Workers*, 330 U.S. at 309-10 (Frankfurter, J., concurring) (discussing the rare instance where a court order could be disobeyed and treated as though it were a letter to a newspaper).

¹¹⁸ See *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 934 (2d Cir. 1992) (retaining jurisdiction for the appellate court to consider a contempt issue prior to the trial court's determination of its own jurisdiction).

¹¹⁹ See *Balter v. Regan*, 468 N.E.2d 688, 689 (N.Y. 1984) (recognizing that a court order must be obeyed even if it appears to be "misguided and erroneous"). In *Kampf v. Worth*, 485 N.Y.S.2d 344 (App. Div. 1985), the court upheld a finding of contempt by a mother who violated a court order commanding visitation rights to the child's grandparents. See *id.* at 345. The court justified its decision, noting that "the mere act of disobedience, regardless of its motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party." *Id.* (quoting *Great Neck Pennysaver, Inc. v. Central Nassau Publications*, 409 N.Y.S.2d 544, 546 (App. Div. 1978)).

obeyed unless they are stayed, vacated or reversed.¹²⁰ Similarly, attorneys who may know an order is erroneous are not relieved of their duty to obey it. Rather, they must stay the order or comply with it, and then cite the order as reversible error on appeal.¹²¹ An attorney may not "test case" the law by defying a court order only to later avoid a contempt adjudication with a claim that he was a "Roe" plaintiff "test casing" the law for the benefit of others similarly situated.¹²² A litigant may not unilaterally disregard an order merely because he believes, in good faith, that the order is defective, misguided, or erroneous.¹²³ So long as the court has jurisdiction, and its order is not void on its face, the order must be obeyed no matter how erroneous it may be.¹²⁴

The validity of an order resulting from an adjudication of criminal contempt, which is designed to vindicate judicial authority through punishment, may not be challenged for the first time on appeal unless the order was void on its face, transparently invalid or frivolous; or it was issued by a tribunal lacking subject matter and in personam jurisdiction.¹²⁵ Moreover, if an order is disobeyed, the party in violation may still be held in contempt despite his later success in obtaining its reversal on

¹²⁰ See *State v. Congress of Racial Equality*, 460 N.Y.S.2d 58, 60-61 (App. Div. 1983) (holding that a civil contempt fine was unwarranted because a civil contempt is merely remedial in nature unlike criminal contempt which is imposed to preserve the power of the court and therefore must be obeyed, even if it is later found to be erroneous).

¹²¹ See *Chapman*, 613 F.2d at 197 (noting that an attorney's competence to practice law includes the "obligation to comply with a court order").

¹²² See *United States v. Cutler*, 840 F. Supp. 959, 965 (E.D.N.Y. 1994), *aff'd*, 58 F.3d 825 (1995) (holding that an attorney could not willfully disobey a judge's order and then assert that the judge was legally wrong in making the order).

¹²³ See *Sigmoil Resources N.V. v. Fabbri*, 644 N.Y.S.2d 503, 505 (App. Div. 1996) (stating that a party's good faith belief that an order is defective is an insufficient basis upon which they may then unilaterally disregard such an order).

¹²⁴ See *Sigmoil Resources N.V.*, 644 N.Y.S.2d at 505; see also *Department of Labor OSHA v. Hern Iron Works, Inc. (In re Establishment Inspection of Hern Iron Works Inc.)*, 881 F.2d 722, 725 (9th Cir. 1989) ("In brief, the collateral bar rule permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional.").

¹²⁵ See *St. Regis Mohawk Dev. Corp. v. Cook*, 581 N.Y.S.2d 877 (App. Div. 1992) (quoting *Bergin v. Peplowski*, 569 N.Y.S.2d 844 (App. Div. 1991)). In *Bergin*, the court held "[a]n appeal from a contempt order which is jurisdictionally valid does not bring up for review the prior order." *Id.* at 846; *City Sch. Dist. of Schenectady v. Schenectady Fed'n of Teachers*, 375 N.Y.S.2d 179, 182 (App. Div. 1975) (noting same).

appeal.¹²⁶ Furthermore, it is not a defense that the order was being appealed at the time it was disobeyed. If the order was not stayed during the pendency of the appeal, the requirement of obedience is the same as though no appeal was taken at all.¹²⁷

Reversal of an order does not, in any way, alter the fact that a criminal contempt has occurred. Otherwise, the "orderly administration of justice [would] be thrown into chaos."¹²⁸ On appeal from a contempt adjudication, a contemnor may not urge facts or arguments which might have previously led to an order's modification or its vacatur.¹²⁹ The contemnor may never allege as a defense that the court erred in its judgment.¹³⁰ Instead, he must prove, in point of law, that the order was void or delivered by a court lacking subject matter and in personam jurisdiction,¹³¹ and the order in question must be stayed, vacated or determined to be the subject of a direct appeal for review. It may not later be attacked collaterally.¹³² Occasionally, a contemnor does not appeal an order, but rather attempts to use his appeal from a contempt adjudication as a means to revive abandoned challenges to that order. He will not be successful, however, because his right to do so terminated with his failure to appeal.¹³³

There are several qualifications to the collateral bar rule

¹²⁶ See *Brown v. Ramsey (In re Ragar)*, 3 F.3d 1174, 1180 (8th Cir. 1993) (stating that a court's order must be obeyed even if later reversed, unless one can get a stay on the order).

¹²⁷ See *People ex rel. Day v. Bergen*, 53 N.Y. 404, 410 (1873) (noting that because the order was not void, "it [could not] be reviewed upon an application to punish for a disobedience of it").

¹²⁸ *In re Cost*, 100 N.Y.S.2d 993, 993 (Sup. Ct.), *aff'd*, 101 N.Y.S.2d 737 (App. Div. 1950), *aff'd* 109 N.E.2d 343 (N.Y. 1952); see also *Hern Iron Works Inc.*, 881 F.2d at 726 (noting that "the orderly functioning of the judicial system necessitate[s] prompt adherence" to a court order, without which would jeopardize the "smoothly [run] judicial process").

¹²⁹ See *Geller v. Flammont Realty Corp.*, 183 N.E. 520, 522 (N.Y. 1932) (stating that the court will not hear arguments which could have been raised earlier and apply them retroactively to reverse the order).

¹³⁰ See *People ex rel. Davis v. Sturtevant*, 9 N.Y. 263, 266 (1853) (discussing the point that a party cannot disobey a court order and allege that the court made an error in judgment).

¹³¹ See *id.* at 266-67.

¹³² See *id.* (noting that a court decision, whether right or wrong, may be questioned only upon a direct proceeding to review it, and may not be challenged collaterally).

¹³³ See *People ex rel. Sassower v. Cunningham*, 492 N.Y.S.2d 608, 608 (App. Div. 1985) (stating that the petitioner may not use a contempt order to revive an opportunity to appeal the underlying order after the time to do so has lapsed).

which courts have enunciated. First, orders issued without personal or subject matter jurisdiction may be violated without incurring contempt liability. This recognizes that an order issued by a court "without jurisdiction to entertain [an application for] and then grant a provisional remedy ... in connection with [a] cause of action" manifestly lacks validity and therefore precludes the imposition of punishable contempt for disobedience thereunder.¹³⁴ Second, a transparently invalid, void, or frivolous order may likewise be violated without risk.¹³⁵ This is founded upon the proposition that contempt power is not a vehicle for a court to exceed its authority. A court with jurisdiction is nevertheless prohibited from "reduc[ing] constitutional rights without a colorable basis in the law."¹³⁶ Third:

the collateral bar rule presupposes that adequate and effective remedies exist for [the] orderly review of the challenged ruling; in the absence of such an opportunity for review, [a contemnor] may challenge the validity of the disobeyed order on appeal from his criminal contempt conviction and escape punishment if [the] order is deemed [to be] invalid.¹³⁷

Fourth, an order must not require the "irretrievable surrender" of constitutional rights.¹³⁸ "In such a case, the only way to preserve a challenge to the validity of the order and repair the error is to violate the order and contest its validity on appeal" from a contempt adjudication.¹³⁹ Fifth, if an order "requires the surrender of rights or privileges not grounded in the Constitution that protect individuals from the revelation of privileged information, such as the attorney-client privilege, ... [and] 'disclosure would cause irreparable injury' ... noncompliance is justified" subject to

¹³⁴ *Schulz v. State*, 654 N.E.2d 1226, 1229 (N.Y. 1995) (holding a court lacking subject matter jurisdiction cannot hold a party in contempt for disobedience of its order).

¹³⁵ See *In re Novak*, 932 F.2d 1397, 1401-02 (11th Cir. 1991).

¹³⁶ *Hern Iron Works Inc.*, 881 F.2d at 727.

¹³⁷ *Novak*, 932 F.2d at 1401.

¹³⁸ *United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972)

[T]he rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling, and (iii) the order must require an irretrievable surrender of constitutional guarantees.

Id. (citations omitted).

¹³⁹ *Novak*, 932 F.2d at 1401-02.

possible vindication on appeal.¹⁴⁰ Sixth, at the trial level, where compelled testimony does not automatically result in testimonial immunity and the Fifth Amendment privilege is asserted in good faith upon reasonable grounds, disobedience of a direction to testify is subject to attack for the first time on appeal.¹⁴¹ This is not applicable, however, when the Fourth Amendment is involved and the contempt order, for the first time on appeal following disobedience, is traced to an invalid search warrant, or when the disobedience is to *ex parte* injunctions involving First Amendment speech rights. In the case of the Fifth Amendment and other legally privileged information, the person compelled is part of the process of the court's order and the "cat cannot be put back in the bag." In First and Fourth Amendment *ex parte* order situations, the party is not forced to give information and his rights may be vindicated through the law's ordinary process.¹⁴² Lastly, the collateral bar rule distinguishes between criminal and civil contempt based on the fundamental distinction between the two.¹⁴³ Except for void, frivolous or transparently invalid orders and those issued without in personam or subject matter jurisdiction, a civil contempt, unlike a criminal contempt which issues its binding orders pursuant to its inherent authority to do so, always depends upon the legality and authority of the court to issue the order in the first instance.¹⁴⁴ A party may be held in civil and criminal contempt for violation of an order. On appeal, the order may be reversed for any number of reasons other than voidness or jurisdiction, such that the civil contempt, but not the criminal contempt, will be vacated because there is nothing to

¹⁴⁰ *Id.* at 1401 n.7 (quoting *In re Grand Jury Proceedings*, 601 F.2d 162, 169 (5th Cir. 1979)).

¹⁴¹ See *Maness v. Meyers*, 419 U.S. 449, 458-68 (1975) (holding that an attorney is not subject to a contempt penalty for advising his client in good faith to assert the Fifth Amendment against an order to produce material demanded by a subpoena duces tecum).

¹⁴² See *Hern Iron Works Inc.*, 881 F.2d at 728 ("Although several commentators have argued for the application of the *Maness* exception to deliberate violations of *ex parte* injunctions restraining First Amendment speech rights, ... thus far, the exception has not been extended beyond the limited confines of self-incrimination.") (citations omitted).

¹⁴³ See *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 78-79 (1988) (noting that differential treatment between criminal and civil contempt is based upon the fact that the two types of orders serve different purposes and necessities).

¹⁴⁴ See *id.* at 76-79.

coerce anymore while there is plenty remaining to punish.¹⁴⁵

SECTION 14: ABILITY TO COMPLY WITH AN ORDER

A court order should not command persons to do something which is entirely beyond their power.¹⁴⁶ The ability to comply with a court's order is critical in determining whether it has been intentionally disobeyed, and when placed in issue, a party's inability to comply with an order must be thoroughly explored.¹⁴⁷ Such a defense is tested in contempt proceedings after non-compliance with an order, a subpoena duces tecum, or a turnover order in a bankruptcy proceeding.¹⁴⁸ The defense has permutations. For example, a good faith effort to comply with a court order negates an intention to disobey.¹⁴⁹ However, good faith does not equate with a privilege to second guess an order's propriety.

¹⁴⁵ See *id.* at 78-79 (distinguishing between civil and criminal contempt as having different purposes of coercion and punishment, respectively); Department of Envtl. Protection of New York v. Department of Envtl. Conservation of New York, 513 N.E.2d 706, 709 (N.Y. 1987) (stating that civil contempt is designed to compensate the injured party or to coerce a party to comply with a court order, while criminal contempt is used to protect the integrity of the judicial process and to compel respect to the court).

¹⁴⁶ See *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 533 (7th Cir. 1997) (noting that, despite the court's broad discretion, its power is not unlimited, and therefore the court cannot hold persons in contempt for violating decrees they are unable to comply with because the matter is beyond their control).

¹⁴⁷ See *Foley v. Foley*, 422 N.Y.S.2d 465, 466 (App. Div. 1979) (finding that a *de novo* hearing was necessary to establish whether contemptible conduct was willful); *Genuth v. Hynes*, 384 N.Y.S.2d 866, 867 (App. Div. 1976) (explaining that the argument for the inability to comply with a subpoena duces tecum could be considered on a motion to punish for contempt); *In re Wegman*, 57 N.Y.S. 987, 989 (App. Div. 1899) (holding that the issue of willful disobedience must be determined by taking into account the contemnor's power to comply with the court's order).

¹⁴⁸ See, e.g., *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948) (positing that precaution should be taken in issuing a turnover order against an estate's trustee by first determining the power of the coerced party to comply); *United States v. Patterson*, 219 F.2d 659, 660 (2d Cir. 1955) (holding that no individual may refuse to produce documents if they are in his control); *Robertson v. Berger (In re Arctic Leather Garment Co.)*, 89 F.2d 871, 872-73 (2d Cir. 1937) (finding that the order to surrender possession of certain books was supported adequately by a determination that the party could comply with the order); *Kuriansky v. Azam*, 575 N.Y.S.2d 679, 680-81 (App. Div. 1991) (reasoning that a presumption of control over the subpoenaed documents was sufficient to support criminal contempt of the compelled party); *Genuth*, 384 N.Y.S.2d at 867 (stating that a party's "claim that [they do] not possess the documents ... may be tested on a motion to punish for contempt").

¹⁴⁹ See *United States v. Bryan*, 339 U.S. 323, 331-32 (1950) (discussing that certain exceptions exist for failure to comply with a subpoena when there is a "very real interest" to be protected); *United States v. Ray*, 683 F.2d 1116, 1126 (7th Cir. 1982) (stating that a good faith effort "tends to negate willfulness").

"In most instances, a defense of good faith compliance arises when ... fail[ure] to comply [is due to] the indefiniteness of the order ..." or the existence of conditions beyond the individual's control.¹⁵⁰ Once a prima facie case of contempt is established, the burden shifts to the alleged contemnor who must then come forward, with more than mere assertion, with evidence of a present inability to comply.¹⁵¹ In some instances, the burden may be satisfied by the making of *all* reasonable efforts to comply.¹⁵² Substantial or diligent effort is not enough, even if performed in good faith. Only a showing that *every* reasonable effort was made will suffice. Otherwise, a lesser standard would dilute the order's command.¹⁵³ Self-induced inability to comply is never a defense.¹⁵⁴ Individuals who, after receipt of compulsory process, render compliance impossible are punishable for criminal contempt, but they may not be coerced with civil contempt sanctions.¹⁵⁵

¹⁵⁰ *Ray*, 683 F.2d at 1126; see also *United States v. Voss*, 82 F.3d 1521, 1526 (10th Cir. 1996) (explaining that if the inability to comply results from the failure to take action within the individual's power, then the individual may be held in contempt).

¹⁵¹ See *Piambino v. Bestline Prods., Inc.*, 645 F. Supp. 1210, 1213 (S.D. Fla. 1986) (stating that to establish a defense of inability to comply, the contemnor must proceed beyond a "bald assertion" of inability).

¹⁵² See *id.* (quoting *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 984 (11th Cir. 1986)).

¹⁵³ For example, the court held in *Powers v. Powers*, 653 N.E.2d 1154 (N.Y. 1995), that the respondent, who alleged that he was unable to meet his child support obligation, did not satisfy the burden necessary to establish his inability to pay merely by claiming that he had exhausted his funds and by offering "no credible evidence indicating the necessity for placing his alleged expenses ahead of support payments." *Id.* at 1158; see also *United States v. Ryan*, 402 U.S. 530, 534 (1971) (stating that the subpoena served on the respondent placed on him "a duty to make in good faith all reasonable efforts to comply with it"); *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995) (stating that "if [one] 'offers no evidence as to his inability to comply ... or stands mute,' [one] has not met [the] burden") (quoting *Maggio v. Zeitz*, 333 U.S. 56, 75-76 (1948)); *Combs*, 785 F.2d at 984 (ruling that the phrase "in good faith all reasonable efforts to comply" is to be strictly construed) (quoting *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976)).

¹⁵⁴ See, e.g., *Bryan*, 339 U.S. at 330-31 (explaining that responsibility for the failure to comply is not a defense to a charge of contempt); *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980) (stating an exception exists to the defense of inability to comply when "the person charged is responsible for the inability to comply"); *People ex rel. Day v. Bergen*, 53 N.Y. 404, 410-11 (1873) (holding that a contemnor cannot use the inability defense against disobedience of the court's order if it was a result of his own actions).

¹⁵⁵ See *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 251 (1972) ("Civil contempt is coercive in nature, and consequently there is no justification for confining

SECTION 15: ORDERS AND THIRD-PARTY ADVICE

The law does not allow the instigator of contemptuous conduct to absolve himself of contempt liability by leaving the physical performance of the forbidden conduct to others. "[T]hose who have knowledge of a valid court order [and then counsel, advise or] abet others in violating it are subject to" punishment for contempt.¹⁵⁶ "Incitement and execution are touched with equal guilt."¹⁵⁷ One who aids, procures or advises the disobedience of a subpoena after it has been served, or has knowledge that it is about to be served on a person, is equally guilty with the one who actually disobeys it.¹⁵⁸

Attorneys present a subtlety. An attorney may advise a client towards a course of action that seems to be consistent with the language in a court's order by interpreting the order's meaning and validity. Even if the advice is erroneous, the attorney may not be held in contempt unless, rather than merely advising the client of the order's meaning and validity, the attorney exceeds his limitation and counsels the client to disregard or disobey the order.¹⁵⁹ Ordinarily, if the attorney acts in good faith and with the honest belief that the advice is well founded and in the legally cognizable interests of the client, the attorney's advice

on a civil contempt theory a person who lacks the present ability to comply."); *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 935 (2d Cir. 1992) (finding that an attorney, who no longer represents a client in a case where the attorney was held liable for noncompliance with a discovery order, cannot be held liable for civil contempt since civil contempt is essentially a coercive sanction and the attorney no longer has the ability to comply with the order).

¹⁵⁶ *Roe v. Operation Rescue*, 919 F.2d 857, 871 (3d Cir. 1990); see also *King v. Barnes*, 21 N.E. 182, 182-83 (N.Y. 1889) (finding defendant in contempt for aiding in the company officers' disobedience of the lower court's judgment).

¹⁵⁷ *People v. Emieleta*, 144 N.E. 487, 489 (N.Y. 1924). See *United States v. Terry*, 815 F. Supp. 728, 737 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 575 (2d Cir. 1994) (explaining that one who aids another with the necessary intent is liable for the act of the other).

¹⁵⁸ See *People ex rel. Drake v. Andrews*, 90 N.E. 347, 348 (N.Y. 1909) ("[O]ne who aids, procures, or advises the disobedience of a lawful mandate of the court is equally guilty with him who actually disobeys it.") (citing *King v. Barnes*, 21 N.E. 182 (N.Y. 1889)).

¹⁵⁹ See *In re Landau*, 243 N.Y.S. 732, 735-36 (App. Div. 1930) (finding appellant attorney not in contempt for the advice he rendered to his client with regard to a court order prohibiting the issuance of certain bonds because he refrained from advising his client to disobey the order); see also *Waste Conversion Inc. v. Rollins Env'tl. Serv. (NJ), Inc.*, 893 F.2d 605, 612-13 (3d Cir. 1990) (Higginbotham, J., concurring) (reasoning that judges must be "scrupulously careful" to protect the alleged contemnor's procedural and substantive rights, and that giving bad legal advice is not the equivalent of contemptuous conduct).

is not the fodder of contempt. "The preservation of the independence of the bar is too vital to the due administration of justice to allow ... the application of any other general rule."¹⁶⁰ In the courtroom, the general rule is that once a court has ruled, its order must be obeyed even though an objection may be made. That is why appellate courts exist.¹⁶¹ However, a lawyer who in good faith advises clients to assert the Fifth Amendment in opposition to a trial subpoena duces tecum, where immunity would not by operation of law attend production, is not subject to contempt.¹⁶² The Fifth Amendment privilege against self-incrimination would be meaningless if an attorney in good faith could not advise clients to assert it. The right to counsel includes the right to counsel's advice.¹⁶³ But the role of counsel is limited to that of good faith advisor. If the attorney uses his or her license to advise with the intent to further a criminal enterprise, obstruct justice or obstruct an ongoing trial, the attorney may face disciplinary sanctions, contempt of court, or imprisonment.¹⁶⁴ Additionally, an attorney whose intentional conduct or willful neglect of an order is the cause of a client's disobedience may be held in contempt.¹⁶⁵

¹⁶⁰ *In re Watts & Sachs*, 190 U.S. 1, 29 (1903); *see also* *Davis v. Goodson*, 635 S.W.2d 226, 227 (Ark. 1982) (holding an attorney in contempt for specifically advising his client to disregard a court order during open court).

¹⁶¹ *See* *Maness v. Myers*, 419 U.S. 449, 459-60 (1975) (discussing the necessity of orderly process to the workings of the adversarial system and the general reparability of injury caused by judicial error).

¹⁶² *See id.* at 458, 464-65.

¹⁶³ *See id.* at 471-72 (Stewart, J., concurring).

¹⁶⁴ *See id.* at 459-60; *see also* *United States v. Cintolo*, 818 F.2d 980, 995 (1st Cir. 1987) (holding an attorney in contempt for influencing, obstructing and impeding the administration of justice by befouling a federal grand jury investigation); *United States v. Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir. 1974) (holding the defendant in contempt for influencing a witness in a grand jury proceeding by threats and intimidation); *Cole v. United States*, 329 F.2d 437, 443 (9th Cir. 1964) (finding coercion or corruptive advisement of a witness to claim his constitutional privilege against self-incrimination is an obstruction of the due administration of justice); *People ex rel. Vogelstein v. Warden*, 270 N.Y.S. 362, 371 (Sup. Ct. 1934) (holding an attorney in contempt for his refusal, on privilege grounds, to testify as to the name of the person who employed him to represent the defendants in a grand jury proceeding), *aff'd*, 271 N.Y.S. 1059 (App. Div. 1934).

¹⁶⁵ *See* *Kanbar v. Quad Cinema Corp.*, 600 N.Y.S.2d 702, 704 (App. Div. 1993) (noting that an attorney may be held in contempt for willful neglect or refusal to follow an order, which resulted in the client's disobedience of such order, while finding that the defendant attorney was not willfully neglectful since his failure to inform his clients of the notice was not deliberate).

SECTION 16: INTENT, ADVICE OF COUNSEL AND CONTEMPT

In establishing intent, it is sufficient to find that a refusal to obey was the product of rational choice. The fact that the rational choice is predicated on the advice of counsel is irrelevant.¹⁶⁶ The same result occurs even when disobedience is based upon one's religious beliefs.¹⁶⁷ The invocation of First Amendment protection as a defense to intentional contempt is intolerable in a civilized society. In relying on this defense, one assumes the risk of an adverse decision in a contempt proceeding.

The fact that a contemnor subjectively intended no harm or disrespect is irrelevant to the question of the contemnor's intent. The due administration of justice in a society under law demands this.¹⁶⁸ To allow such a "white heart" defense would destroy the power of courts to compel obedience and punish disobedience.¹⁶⁹ While cooperation with one's lawyer is important and should be encouraged, an "attorney may not exculpate his client of contempt by advising him to disobey an order of the

¹⁶⁶ See *People v. Marcus*, 185 N.E. 97, 104-05 (N.Y. 1933) (finding defendant's reliance on his attorney's advice, regarding an illegal application of funds and a resultant loss, constitutes an insufficient defense to charges of misappropriation of funds); *People v. Dercole*, 424 N.Y.S.2d 459, 469-70 (App. Div. 1980) (stating the general rule that reliance on advice of counsel is not a sufficient defense to a criminal contempt charge nor is it relevant to the issue of intent); *In re Grand Jury (Cioffi)*, 202 N.Y.S.2d 26, 39 (App. Div.) (finding appellants in contempt for willfully refusing to testify during grand jury proceedings, irrespective of their claimed reliance on counsel's advice), *aff'd*, 168 N.E.2d 663 (N.Y. 1960); *People v. Breindel*, 342 N.Y.S.2d 428, 433 (Sup. Ct. 1973) (finding intent on the part of defendant to commit contempt, irrespective of defendant's reliance on the advice of his attorney to so act), *aff'd*, 356 N.Y.S.2d 626 (App. Div.), *aff'd*, 324 N.E.2d 545 (N.Y. 1974).

¹⁶⁷ See *People v. Woodruff*, 272 N.Y.S.2d 786, 789-90 (App. Div. 1966) (finding appellant's religious beliefs must yield to the dominant state interest of maintaining order and peace and, therefore, appellant, who refused to testify claiming that to do so would violate her religious beliefs, was in contempt), *aff'd*, 236 N.E.2d 159 (N.Y. 1968); *In re Fuhrer*, 419 N.Y.S.2d 426, 429-30 (Sup. Ct. 1979) (directing a Rabbi to testify although he claimed that to do so would subject him to possible excommunication), *aff'd sub nom. Fuhrer v. Hynes*, 421 N.Y.S.2d 906 (App. Div. 1979).

¹⁶⁸ See *United States v. Armstrong*, 781 F.2d 700, 707 n.4 (9th Cir. 1986) ("Contempt is a knowing and willing violation of a valid court order If everyone was free to disobey lawful court orders until they were ratified by some other tribunal, the result would be anarchy and disorder."); *People ex rel. Springs v. Reid*, 124 N.Y.S. 205, 209 (App. Div. 1910) (finding punishment of defendant for contempt just, regardless of his claim of innocent reliance on alleged advice of counsel and his proclaimed lack of intent to willfully disregard court process).

¹⁶⁹ See *Department of Envtl. Protection of New York v. Department of Envtl. Conservation of New York*, 513 N.E.2d 706, 711 (N.Y. 1987) (finding that, if contemptuous actions taken on reliance of legal advice went unpunished, judicial orders would be evaded too easily and disobeyed).

court because the judge is 'wrong.'¹⁷⁰ The responsibility of complying or not complying with a court order rests solely with the person commanded.¹⁷¹ Viewed cynically, a defense to contempt based on advice of counsel is an invitation to every sophisticated scoundrel to seek an attorney who will give advice that he or she need not obey the order and thus be safe in the expectation that there will be immunity from the consequences of the disobedience.¹⁷² While "advice of counsel ... may be considered in mitigation of punishment," the law of contempt is not "so complex ... as to set it apart from the rest of criminal law to which 'ignorance ... is no defense.'¹⁷³ As a matter of policy, society abhors placing a premium on ignorance or experimentation with disobedience and, thus, counsel's mistaken view of the law is no defense.¹⁷⁴ One cannot be allowed to excuse derelictions by asserting reliance on the advice of others.¹⁷⁵ Otherwise, a defen-

¹⁷⁰ *United States v. Monteleone*, 804 F.2d 1004, 1011 (7th Cir. 1986).

¹⁷¹ See *People v. D'Amato*, 211 N.Y.S.2d 877, 880-81 (App. Div. 1961) (explaining the well-settled principle that responsibility for obedience to an order of the court rests with the person charged and the authority so charging); *People v. Forsyth*, 439 N.Y.S.2d 808, 810 (Sup. Ct. 1981) (stating that the impossibility defense is not available to a defendant who is responsible for his inability to comply).

¹⁷² See *People v. Einhorn*, 356 N.Y.S.2d 620, 625 (App. Div.) (Steuer, J., dissenting) (noting the possible result of allowing a contemnor to escape contempt liability based on his reliance on counsel's advice to act contemptuously), *rev'd on other grounds*, 324 N.E.2d 551 (N.Y. 1974).

¹⁷³ *United States v. Remini*, 967 F.2d 754, 757, 758 (2d Cir. 1992) (quoting *United States v. Goldfarb*, 167 F.2d 735, 735 (2d Cir. 1948) (per curiam)).

¹⁷⁴ See *id.* at 757; *Sinclair v. United States*, 279 U.S. 263, 299 (1929), *overruled by United States v. Guadin*, 515 U.S. 506 (1995); see also *Maness v. Myers*, 419 U.S. 449, 459-460 (1975) (noting that a lawyer who advises his client against complying with an order of the trial court subjects his client to punishment for contempt and exposes himself or herself to sanctions for trial obstructions); *SEC v. Musella*, 818 F. Supp. 600, 606 (S.D.N.Y. 1993) (stating that the contemnor may not rely on his own inadvertence, misunderstanding or advice from counsel as a defense to contempt). *But see Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (holding this inquiry necessary to evaluate whether a criminal defendant may be punished for the errors of an attorney under the rule established by the Supreme Court in *Taylor v. Illinois*, 484 U.S. 400 (1988)—"[a]lthough the Supreme Court held that certain willful misconduct by an attorney may permissibly be imputed to the attorney's client, such may not be the case when the attorney's error is the product of mere inadvertence or even gross negligence.") (citations omitted).

¹⁷⁵ See *Butterly v. Lomenzo*, 326 N.E.2d 799, 803 (N.Y. 1975) (noting that reliance on advice of counsel is not an excuse for disobeying a subpoena because public policy supports holding individuals responsible for obeying laws); *Reid*, 124 N.Y.S. at 209. There may be occasions where a lawyer may actually testify that he did not advise his client of a court's order as a means of exoneration. The courts, in such a curious instance, might view such testimony generously on behalf of its proponent. *But see United States v. Revie*, 834 F.2d 1198, 1202-03 (5th Cir. 1987) (noting that

dant would be entitled to assert a defense that could arguably be called "the public official defense."

SECTION 17: DURESS

In some circumstances, duress may serve as an equitable defense to contempt. In these instances, the duress must consist of "palpable imminent danger."¹⁷⁶ Fear alone does not suffice as a legal justification for disobeying a court order.¹⁷⁷ With regard to an immunized prisoner, fear of reprisal gives him "no more dispensation from testifying than it does any innocent bystander without a record" an excuse not to testify.¹⁷⁸ The courts have thus far failed to express the rationale of this principle. Ultimately, it is a matter of sound policy. If the law has a right to "every man's evidence,"¹⁷⁹ it is the court, and not some nameless thug, who must be the final arbiter of the duty to testify.

SECTION 18: WILLFULNESS

The words "willful" and "willfully," wherever they appear in any criminal contempt statute or opinion, should be changed to "intentional" or "intentionally." Criminal contempt is premised on intentional disobedience, not disobedience with an attitude. "Willful" and "willfully" in addition to sparking a constant battle over how many "l's" should appear in their respective spellings, subliminally import moral disapprobation into criminal contempt's mens rea. This phenomenon is the antithesis of objectivity. It invites both the uncertainty and excuse of subjectivity. In the mind's eye of some, a willful child is merely a high-spirited

to do so would create the ability to avoid contempt charges simply based on the attorney's assertion that no advice was given to the client).

¹⁷⁶ *In re Grand Jury Proceedings of December, 1989*, 903 F.2d 1167, 1170 (7th Cir. 1990) (noting that for a witness to be excused from testifying due to duress, he "must demonstrate that due to this overwhelming sense of immediate danger, he 'is unable to act freely, to testify, and thus to purge himself of his contempt'" (quoting *In re Grand Jury Proceedings Empanelled May 1988* (Freligh), 894 F.2d 881, 884 (7th Cir. 1989)).

¹⁷⁷ See *Dupuy v. United States*, 518 F.2d 1295, 1295 (9th Cir. 1975).

¹⁷⁸ *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961); see also *United States v. Doe*, 125 F.3d 1249, 1254, 1257 (9th Cir. 1997) (holding that "[a] witness who has been granted immunity and has been ordered to testify must do so or risk punishment for criminal contempt"), *cert. denied*, 118 S. Ct. 1100 (1998); *United States v. Winter*, 70 F.3d 655, 665-66 (1st Cir. 1995) (discussing that fear of reprisal as a basis for refusing to testify, at best, may be potentially relevant in mitigating the contemnor's sentence).

¹⁷⁹ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citation omitted).

child, while in the perception of others, he is a little bastard. Case law generally equates "willful" with "intentional" although, in dicta, the New York Court of Appeals has stated that "the element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out."¹⁸⁰ This is conceptual nonsense worthy of a philosophy class dropout. How can one be more or less willful than willful? Historically, in New York, willfulness was equated with intentional conduct for contempt purposes.¹⁸¹

SECTION 19: REFUSAL TO BE SWORN AS CRIMINAL CONTEMPT

A refusal to be sworn may take various forms. In law and theory, a refusal to be sworn may occur anywhere depending on circumstances. For instance, a refusal to be sworn may occur "in" the grand jury room, while the act of voicing the refusal actually occurs in front of the judge who just ordered the witness to go back in the grand jury room to be sworn and testify.¹⁸² As more fully discussed above, it matters not in which room of the courthouse a contemnor takes his stand for purposes of felony as opposed to misdemeanor contempt liability.¹⁸³ Some who refuse to be sworn are more brashly circuitous than they are successful. A grand jury witness who, in order to consult his attorney, repeatedly refuses to be sworn and states that he will not testify with the prosecutor in the room is subject to prosecution for con-

¹⁸⁰ *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983) (per curiam).

¹⁸¹ See *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259, 260 (N.Y. 1886) (discussing willfulness or evil intention as a necessary element of criminal contempt); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 406 (1882) (discussing willful disobedience as the element of criminal contempt that distinguishes it from civil contempt).

¹⁸² See *Branzburg*, 408 U.S. at 688 (noting the grand jury's power to subpoena a witness is fundamental to fulfilling its obligation expressed through "the longstanding principle that 'the public ... has a right to enjoy every man's evidence' except for those persons protected by a constitutional, common law or statutory privilege") (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

¹⁸³ Compare *People v. Ruggiano*, 401 N.Y.S.2d 729, 731-32 (Sup. Ct. 1978) (finding defendant guilty of felony contempt for his refusal to appear before the grand jury even though violation would normally impose only misdemeanor liability, since the purpose of defendant's actions was to avoid the felony charges that would have been imposed for his refusal to be sworn as a witness once physically before the grand jury), with *People v. DiMaria*, 481 N.Y.S.2d 244, 249-50 (Sup. Ct. 1984) (stating that defendant's contemptuous conduct was elevated to a felony by refusing to be sworn as a witness once physically appearing before the grand jury).

tempt.¹⁸⁴ While a proclaimed refusal clearly indicates intent, it would be equally clear if a witness walked out of a legal proceeding before being sworn.¹⁸⁵

Under New York Penal Law, a subpoenaed witness who disobeys a subpoena by simply staying home on the subpoena's return date is properly and only chargeable with contempt as a misdemeanor.¹⁸⁶ On the other hand, if he appears before the grand jury and refuses to be sworn he incurs felony contempt liability.¹⁸⁷ While at first blush it may seem harsh to impose felony liability for the failure to appear before a grand jury, this concern may encompass too much. Those who ignore the grand jury's subpoena suffer less penal consequences than those who appear. The potential consequences posed by either a nonappearance or an appearance with a refusal to be sworn, places counsel in a difficult position. Counsel is bound to move to quash the subpoena or advise obedience thereunder. Whatever may be said of equitable arguments, it appears certain that New York's present statutory scheme perversely "rewards" nonappearance and punishes appearance in response to grand jury subpoenas. This quirk in the law has not escaped the notice of wily contemnors who occasionally assert a "geographic defense" to felony contempt by refusing to be sworn in a place other than

¹⁸⁴ See *Levine v. De Cesare*, 312 N.Y.S.2d 39, 39 (3d Dep't 1970) (affirming decision to hold defendant in contempt for refusal to be sworn before the grand jury and finding that he was not entitled to have his attorney present in the grand jury room nor was he entitled to an adjournment because he had ample time to consult with his attorney prior to the proceeding).

¹⁸⁵ See *Bryan*, 339 U.S. at 329-30 (stating that it is the refusal to comply with the order and not the manner in which it was done that constitutes contempt); see also *Branzburg*, 408 U.S. at 689-92 (refusing to grant a special exception for newsgatherers and their anonymous sources in grand jury proceedings involving questions relevant to a criminal investigation); *United States v. Allen*, 73 F.3d 64, 68 (6th Cir. 1995) (holding that defendant's intentional efforts to avoid service of a subpoena constituted a willful disobedience of a specific order, and hence criminal contempt); *People ex rel. Keeler v. McDonald*, 2 N.E. 615, 625-26 (N.Y. 1885) (finding a realtor in contempt because he was called to testify before a state senate committee and he answered some questions but refused to answer others, then refused further examination and left the committee room).

¹⁸⁶ See N.Y. PENAL LAW § 215.50(3) (McKinney 1988) ("A person is guilty of criminal contempt in the second degree when he engages in ... [i]ntentional disobedience or resistance to the lawful process or other mandate of a court").

¹⁸⁷ See N.Y. PENAL LAW § 215.51(a) ("A person is guilty of criminal contempt in the first degree when ... he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or, when after having been sworn as a witness before a grand jury, he refuses to answer any legal and proper interrogatory").

the physical presence of the grand jury. Likewise, prosecutors will counter such tactics with court orders authorizing bodily seizure to transport such an individual into the grand jury room in order to subject the witness to felony liability should he persist in refusing to be sworn.¹⁸⁸

The same type of disparity is present when comparing the felony contempt liability that attaches to a refusal to be sworn and testify before a grand jury, with the misdemeanor contempt liability that attaches to the same conduct during a trial.¹⁸⁹ Specifically, the grand jury utilizes a reasonable cause standard of proof in its proceedings, which are merely accusatory in nature. However, at the adjudicatory phase before a petit jury the standard applied is "beyond a reasonable doubt."¹⁹⁰ Consequently, one might argue that New York's Penal Law has its punitive priorities reversed.

SECTION 20: THE MENS REA OF TESTIMONIAL CONTEMPT

Generally, the mens rea of testimonial criminal contempt exhibits itself in a refusal to testify before a grand jury or public commission. The issue is much less likely to arise at trial where the parties, for the most part, know and control the witnesses whom they are calling to the witness stand. Despite the fact that the Penal and Judiciary Laws pertaining to testimonial contempt's mens rea are cast solely in terms of an intentional refusal to answer, phrases such as "willfulness" and "tending to obstruct" have been used to define it. The process is done blindly without question or examination. To the extent "willfulness" is synonymous with "knowing and intentional," it adds nothing of

¹⁸⁸ See *DiMaria*, 481 N.Y.S.2d at 248-50 (upholding a custodial order by the court to bring the defendant before the grand jury, when the defendant appeared for a bench warrant and refused to be brought before the grand jury). In rejecting the defendant's claim that the procedures were orchestrated by the prosecution in order to elevate the level of charges, the court stated that "[t]he defendant 'elevated' his contemptuous conduct to a felony, when having bodily appeared before the Grand Jury ... he refused to be sworn." *Id.* at 249.

¹⁸⁹ Compare N.Y. PENAL LAW § 215.51 with N.Y. PENAL LAW § 215.50(4) (defining criminal contempt in the second degree as "unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory").

¹⁹⁰ See *People v. Calbud, Inc.*, 402 N.E.2d 1140, 1143 (N.Y. 1980) (discussing the requirement for the higher burden of proof that resides with the petit jury, because the petit jury determines ultimate guilt or innocence, whereas the grand jury merely serves as an accusatory instrument).

intelligible substance to an intentional refusal to answer. "Tendency to obstruct," and like phrases, too often are used imprecisely and needlessly. Obviously, testimonial contempt necessarily and foreseeably obstructs inquiry, but obstruction is the effect, and not the mens rea, of what is intended. The distinction between testimonial contempt by evasive answer and flat refusal to answer illustrates the point.

Evidence concerning intent and state of mind at the time of interrogation is relevant to the issue of whether an answer is evasive.¹⁹¹ Evidence of state of mind relates to intent, and not to obstruction, which has nevertheless occurred. A defendant on trial for criminal contempt is not entitled to a jury charge that the prosecution must establish an intent to obstruct.¹⁹² However, it is erroneous to exclude proof concerning his state of mind.¹⁹³ Evasive contempt is a method of refusing to answer, but to hold that the evasive witness simultaneously harbors an intent to obstruct inquiry does not justify a conclusion that obstruction is part of evasive contempt's mens rea.

A flat refusal to answer, or a refusal to answer on legal grounds previously declared meritless, is an intentional refusal to answer.¹⁹⁴ The contemptuous witness may be well coached or sincerely misguided as to issues pending on appeal at the time he refuses to testify and may not harbor the slightest intention to obstruct. Nevertheless, he is guilty of contempt.¹⁹⁵

¹⁹¹ See *People v. Martin*, 367 N.Y.S.2d 8, 10 (App. Div. 1975), *aff'd*, 366 N.E.2d 881 (N.Y. 1977) (ordering a new trial because the trial court erroneously refused to consider evidence concerning the "defendant's intent and state of mind when he testified before the Grand Jury"); *People v. Renaghan*, 338 N.Y.S.2d 125, 128 (1st Dep't 1972) (reversing a contempt conviction because intent to obstruct justice was not shown), *aff'd*, 309 N.E.2d 425 (N.Y. 1974).

¹⁹² See *People v. Tantleff*, 356 N.E.2d 477, 477 (1976).

¹⁹³ See *Martin*, 367 N.Y.S.2d at 10.

¹⁹⁴ See *Keenan v. Gigante*, 390 N.E.2d 1151, 1155-56 (N.Y. 1979) (holding a priest in contempt for refusing to answer questions based on a priest-penitent privilege that the court held did not apply); *People v. McGrath*, 385 N.E.2d 541, 549 (N.Y. 1978) (finding that a defendant was precluded from raising the illegality of the wiretap as a defense to a contempt charge where he had previously answered questions falsely or evasively); *In re Grand Jury (Cioffi)*, 168 N.E.2d 663, 665 (N.Y. 1960) (holding a witness, who had been granted immunity, in contempt for appearing before the grand jury but refusing to answer questions regarding his employment); *DiBiasi v. Schweitzer*, 253 N.Y.S.2d 425, 435 (App. Div. 1964) (finding witness in contempt, despite grant of immunity, for refusing to testify).

¹⁹⁵ See *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) (noting that the fear of retaliation is not sufficient to defend against a charge of contempt for remaining silent where a witness has been granted immunity); *United States v.*

SECTION 21: EVASIVE CRIMINAL CONTEMPT, WHAT IS IT?

Criminal contempt by evasive answer, whether prosecuted under the Judiciary or Penal Law, has always been the subject of semantic formulations. The proverbial last word from the Court of Appeals and other courts will never be anymore or less proverbial, given the wisdom and world perspective of the law clerk—with three years of law school behind her or him—who prepares the court's bench memorandum. This, and other areas of bedrock law, produce a strong argument for the hiring of law clerks, at suitable compensation, who have been practicing for a minimum of ten years.

Evasive contempt's judicial formulations are distinct, similar, overlapping, and conceptually contradictory. May the

Remini, 967 F.2d 754, 758-59 (2d Cir. 1992) (holding that following advice of counsel to remain silent is not a legitimate defense against a charge of contempt); *In re Grand Jury Investigation (Detroit Police Special Cash Fund)*, 922 F.2d 1266, 1272-73 (6th Cir. 1991) (deciding that fear for one's own safety or the safety of others is not sufficient to avoid testifying). The court in *Detroit Police Special Cash Fund* also held "the informer's privilege ... inapplicable to state or local governments seeking to withhold information from federal grand juries." *Id.* at 1272; see also *Grand Jury Witness v. United States (In re Grand Jury Proceedings)*, 776 F.2d 1099, 1102-04 (2d Cir. 1985) (deciding that the First Amendment does not protect members of an organization which is the focus of a legitimate investigation from having to testify regarding its organizational activities); *Dupuy v. United States*, 518 F.2d 1295, 1295 (9th Cir. 1975) (holding that fear of threats made by fellow prisoners for testifying does not relieve a witness from testifying, and the Fifth Amendment privilege against self-incrimination cannot be raised as a defense once immunity has been granted); *Smilow v. United States*, 465 F.2d 802, 804-05 (2d Cir. 1972) (stating fear of "Divine punishment" for being labeled an "informer" within the Jewish community was not sufficient grounds for refusal to testify before a grand jury), *vacated on other grounds* 409 U.S. 944 (1972) (mem.); *United States v. Chase Manhattan Bank*, 590 F. Supp. 1160, 1163 (S.D.N.Y. 1984) (holding that an order by a foreign court not to produce records is not a defense to a charge of contempt for failing to produce the records in accordance with a United States district court order); *People v. Garlock*, 202 N.E.2d 905, 905 (N.Y. 1964) (holding that wife could be held in contempt for refusing to testify against her husband); *People v. Clinton*, 346 N.Y.S.2d 345, 346 (App. Div. 1973) (holding witness's fear for her own life and her child's life was not sufficient grounds for refusing to testify); *People v. Woodruff*, 272 N.Y.S.2d 786, 789 (App. Div. 1966) (holding that fear of violating a religious tenet forbidding injuring others did not absolve a witness from being required to testify), *aff'd*, 236 N.E.2d 159 (N.Y. 1968); *People v. Gumbs*, 478 N.Y.S.2d 513, 517-18 (Sup. Ct. 1984) (holding that a witness who had not been called to testify because of his own criminal activity, who had refused police protection, and who had not actually been threatened, could not raise fear for his own and his family's safety as a defense for refusing to testify); *In re Fuhrer*, 419 N.Y.S.2d 426, 431-32 (Sup. Ct.) (holding that a rabbi could not raise the possibility of excommunication or loss of his ministry as a defense for refusing to testify when he had been accused of participation in the illegal activities), *aff'd*, 421 N.Y.S.2d 906 (App. Div. 1979).

"witness... reasonably be said to have made a bona fide effort to answer[?]"¹⁹⁶ The technique of evasion is the attempt to answer questions in terms of probability or possibility, while never asserting certainty or reasonable assurance.¹⁹⁷ Did the witness respond to questions with answers unequivocal enough to allow for a perjury indictment?¹⁹⁸ Are answers " 'false and evasive profession[s] of an inability to recall' and hopelessly contradictory responses repeatedly changed or altered[?]"¹⁹⁹ Can the answers be proven false by extrinsic evidence or are they so improbable, inconsistent, evasive, contradictory or obviously untruthful as to constitute contempt?²⁰⁰ Are they self-evident falsehoods?²⁰¹ Are they " 'so [inherently] false ... as to be equivalent to no answer at all[?]' "²⁰² Is an answer perjurious on its face without resort to extrinsic evidence and patently calculated to obstruct?²⁰³ Does the answer go "beyond ... raising ... an issue of credibility ...[?]"²⁰⁴ Are answers "persistent equivocations ... despite earlier formal, unqualified denials" such that they constitute "sophisticated evasion[s?]"²⁰⁵ Is the response a "false and evasive profession of

¹⁹⁶ *People v. Roseman*, N.Y. L.J., July 7, 1978, at 7 (Sup. Ct. July 6, 1978) (noting court decision which held that a defendant had not made a valid attempt to answer multiple questions regarding transactions with which he admitted he was familiar) (citing *United States v. Appel*, 211 F. 495 (S.D.N.Y. 1913)).

¹⁹⁷ See *People v. Paperno*, 413 N.Y.S.2d 975, 980 (Sup. Ct. 1979), *rev'd*, 432 N.Y.S.2d 499 (App. Div. 1980) (noting that the test to establish evasiveness is whether the witness made a bona fide effort to answer).

¹⁹⁸ See *People v. Stahl*, N.Y. L.J. Mar. 13, 1979, at 2, (Sup. Ct. Mar. 12, 1979) (citing *People ex rel. Valenti v. McCloskey*, 160 N.E.2d 647, 654 (1959)), *aff'd*, 427 N.Y.S.2d 895 (App. Div. 1980) (mem.), *aff'd*, 425 N.E.2d 876 (N.Y. 1981).

¹⁹⁹ *People v. Schenkman*, 385 N.E.2d 1214, 1216 (N.Y. 1978) (quoting *People v. Ianniello*, 325 N.E.2d 146, 148 (N.Y. 1975)).

²⁰⁰ See *People v. Tilotta*, 375 N.Y.S.2d 965, 969 (Sup. Ct. 1975) (holding that the witness's testimony was so unbelievable and false on its face that the record alone was sufficient proof for a finding of criminal contempt).

²⁰¹ See *Finkel v. McCook*, 286 N.Y.S. 755, 760-62 (App. Div.) (discussing the effects of obviously untruthful statements and cases determining that obstruction is an additional element), *aff'd*, 3 N.E. 460 (N.Y. 1936). *But see* *Steingut v. Imrie*, 58 N.Y.S.2d 775, 779 (App. Div. 1945) (annulling a contempt conviction after finding that the witness's responses were truthful and responsive).

²⁰² *In re Epstein*, 252 N.Y.S.2d 771, 774 (Sup. Ct. 1964) (quoting *People ex rel. Valenti v. McCloskey*, 160 N.E. 2d 647, 651 (N.Y. 1959)).

²⁰³ See *In re Kamell*, 11 N.Y.S.2d 479, 485 (Ct. Gen. Sess.) (finding that a witness's contradictory and evasive answers were attempts to block inquiry regarding racketeering activities, *aff'd mem. sub nom. Kamell v. Koenig*, 15 N.Y.S.2d 141 (App. Div. 1939)).

²⁰⁴ *People ex rel. Valenti v. McCloskey*, 185 N.Y.S.2d 952, 957 (App. Div.), *rev'd on other grounds*, 160 N.E.2d 647 (N.Y. 1959).

²⁰⁵ *People v. Renaghan*, 309 N.E.2d 425, 426 (N.Y. 1974) (Breitel, J., dissenting).

an inability to recall . . . [?]"²⁰⁶ Other formulations involve patently improbable answers, indefinite answers, or answers which in relation to others are so absurd, deceptive and prevaricated that they amount to no answer at all, as well as answers which are patently frivolous (e.g., reciting nursery rhymes as answers) or "plainly inconsistent, manifestly contradictory and conspicuously unbelievable."²⁰⁷ For example, a witness who claims that he cannot remember if he has been married more than a week fits this description.²⁰⁸

Convenient amnesia is another means of evasive contempt.²⁰⁹ One definition from the Court of Appeals states that "the false and evasive profession of an inability to recall events or details which were significant and therefore memorable is ... [a] criminal contempt" as is "[a] general denial followed by professions of an inability to recall particular events which would have left an impression ... had they occurred ..."²¹⁰ This type of evasion brings to mind Sunday's "Meet the Press" or a Presidential news conference.

SECTION 22: PERJURY AND CONTEMPT UNDER PENAL AND JUDICIARY LAW

"Every falsehood is an evasion, and every evasion, of necessity, amounts to some degree of falsehood."²¹¹ Although false swearing and a refusal to answer are defined by conceptually dif-

²⁰⁶ *People v. Ianniello*, 325 N.E.2d 146, 148 (N.Y. 1975).

²⁰⁷ *In re Finkel*, 286 N.Y.S. at 761.

²⁰⁸ *See United States v. Appel*, 211 F. 495, 496 (S.D.N.Y. 1913).

²⁰⁹ *See O'Connell v. United States*, 40 F.2d 201, 203-04 (2d Cir. 1930) (holding that the "constant repetition of 'I can't remember' in respect to matters of which the witness must in all likelihood have recollection" was grounds for contempt); *Appel*, 211 F. at 496 (likening failure to remember with a transparent sham); *People v. Saperstein*, 140 N.E.2d 252, 255-56 (N.Y. 1957) (finding defendant in contempt because his vivid recollection of business details and transactions caught on a wiretap precluded him from professing lack of recollection as to recorded conversations in which he was involved); *In re Reardon*, 104 N.Y.S.2d 414, 421 (App. Div. 1951) (holding that the court was not required to believe defendant when he testified that he could not remember due to intoxication).

²¹⁰ *People v. Arnette*, 449 N.E.2d 711, 712 (N.Y. 1983); *see also People v. Gottfried*, 459 N.E.2d 1281, 1282 (N.Y. 1983) (holding that repeated responses of "I don't remember," and similar responses, combined with evasive answers, were sufficient to find the defendant in contempt).

²¹¹ *People ex rel. Valenti v. McCloskey*, 185 N.Y.S.2d 952, 956 (App. Div.), *aff'd*, 160 N.E.2d 647 (N.Y. 1959).

ferent statutes,²¹² there is a degree of falsity which amounts to a refusal to answer. Similarly, there are, at least conceptually, evasive answers which are also perjurious. When a criminal indictment charges both contempt and perjury for the same answer or answers, a properly charged jury may convict on both counts²¹³ and the testimony complained of will determine whether the verdict is contempt and/or perjury. Under the Judiciary Law, a witness who gives a contemptuously incredible explanation is subject to prosecution for perjury or contempt, but not summary contempt.²¹⁴ However, answers which are "so false as to offer not the slightest probability of truthfulness" may have the summary sanction "applied on the ground that although the witness has uttered words he, in fact, has given no answers."²¹⁵ It is the court that determines whether any issue of credibility has been raised with respect to the answers provided and, if so, the Judiciary Law summary contempt power may not be used.²¹⁶ The court must "determine whether the answers ... create an issue of credibility or whether they are so false and preposterous as to preclude the raising of any issue of fact."²¹⁷ The problem faced by courts, however, is distinguishing between a false answer and an answer that is so evasive that it amounts to no answer at all.²¹⁸ As difficult as it may seem, the Court of Appeals has done exactly that.²¹⁹

²¹² In New York, false swearing (perjury) is covered under N.Y. PENL LW Sections 210.00-50 (McKinney 1988) and refusal to answer (contempt) is covered by N.Y. PENL LW sections 215.50-51.

²¹³ See *Finkel v. McCook*, 286 N.Y.S. 755 (App. Div.), *aff'd*, 3 N.E.2d 460 (N.Y. 1936)).

²¹⁴ See *Valenti*, 185 N.Y.S.2d at 961 (citing decisions which determined that summary contempt was not a proper sanction).

²¹⁵ *Id.* (citing *Finkel*, 286 N.Y.S. 755).

²¹⁶ See *id.* at 962-63 (citing *Clark v. United States*, 289 U.S. 1 (1933) and *Ex parte Hudgings*, 249 U.S. 378 (1919)).

²¹⁷ *Id.* at 963.

²¹⁸ See *People ex rel. Valenti v. McCloskey*, 160 N.E.2d 647, 651 (N.Y. 1959) (considering cases which distinguished clearly untruthful statements from those that were so contradictory that they were as "useless as a complete refusal to answer") (citing *Ex parte Hudgings*, 249 U.S. 378, 382 (1919); *People v. De Feo*, 131 N.Y.S.2d 806, 809-10 (App. Div. 1954)).

²¹⁹ See *Ruskin v. Detken*, 298 N.E.2d 101, 103 (N.Y. 1973) ("[T]he only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.") (quoting *United States v. Appel*, 211 F. 495, 495-96 (S.D.N.Y. 1913)). In doing so, the court avoided the nebulous standards that were previously used, such as: "palpably false and evasive of the obligation to answer", 'so false as to offer not the slightest probability of truthfulness'.

SECTION 23: LEGAL AND PROPER QUESTIONS

The imposition of a criminal contempt in New York for refusing to answer is dependent upon the legality of the interrogatories.²²⁰ An interrogatory which does not violate a witness's legal rights and is pertinent to the purpose of the proceeding is a legal interrogatory, and is required or permitted by law.²²¹ A question seeking to compel an answer which would violate a witness's rights is not a legal one.²²² A complex example of an improper interrogatory is one where a question's source is traceable to official illegal conduct which directly violates a witness's rights.²²³ However, this is not an absolute. An interrogatory which does not violate a witness's legal rights does not extend traditional exclusionary rules such that constitutional "askability" means legality.²²⁴ A proper question is one that is fit, suitable or appropriate, and depends on the issues involved or likely to become involved in a proceeding.²²⁵ By definition, whether an interrogatory is legal and proper is a question of law.²²⁶ "[T]he statutory use of the word 'legal' [in the conjunctive

ness', 'so false and preposterous as to preclude the raising of any issue of fact', and 'so patently obstructive and evasive as to raise no issue of fact.' " *Valenti*, 160 N.E.2d at 654 (discussing standards previously used by the Appellate Division); see also *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (citing, with approval, the *Appel* standard relied upon in *Detken*).

²²⁰ See N.Y. PENL L.W. §§ 215.50(4), 215.51 (McKinney 1997) (criminalizing the refusal to answer a "legal and proper interrogatory").

²²¹ See *In re Barnes*, 97 N.E. 508, 513 (N.Y. 1912) (Werner, J., concurring).

²²² See *id.*

²²³ See *Gelbard v. United States*, 408 U.S. 41, 49-61 (1972) (stating that a grand jury witness should not have been found guilty of contempt for the refusal to disclose information barred from evidence because of the government's illegal wiretap); *People v. McGrath*, 385 N.E.2d 541, 549 (N.Y. 1978) (noting that contempt power may not be used to compel a witness to answer a grand jury's questions based on information obtained from an illegal wiretap); *People v. Einhorn*, 324 N.E.2d 551, 552 (N.Y. 1974) (per curiam) (noting that the defendant's "claim of illegal wiretapping, if sustained, constitutes a defense" to contempt).

²²⁴ See *United States v. Calandra*, 414 U.S. 338, 353-54 (1974) (finding that a witness may not refuse to answer questions posed by a grand jury regarding illegally obtained evidence because the exclusionary rule's objective is to deter police misconduct, and extending the rule to insulate a witness from grand jury investigation would not further this objective).

²²⁵ See *Barnes*, 97 N.E. at 513 (Werner, J., concurring) (defining a "pertinent" question as one that is "relevant and material ... to the purpose of the proceeding or investigation").

²²⁶ See *id.* (stating that a challenge to the pertinence of an inquiry "presents a question of law for the courts to decide"); *People v. Ianniello*, 325 N.E.2d 146, 149 (N.Y. 1975) (stating that the reliance by courts on perjury analysis is misplaced and deciding that the propriety of questions asked of a witness is clearly for the court to

with the word "proper"] makes particularly incongruous and self-contradictory a treatment of the standard as one of fact.²²⁷ Once a court determines that a question is legal and proper, it must charge the jury as it would on "any other question of law."²²⁸ It is unnecessary that the definitions of these crimes expressly state what constitutes a legal and proper interrogatory, just as it is inappropriate for witnesses to make such a determination for themselves. Trial court screening and post conviction review of a question's legality and propriety is sufficient protection for the contemnor.²²⁹

SECTION 24: MATERIALITY (RELEVANCY)

Unlike legality and propriety (see Section 23, *supra*), materiality, which is often used interchangeably with relevancy, is a question of fact.²³⁰ To be material, evidence must have "a natural tendency to influence or [be] capable of influencing" the outcome of a legal proceeding.²³¹ It "need not prove directly the fact in issue."²³² Materiality exists even when evidence circumstantially supports a witness's credibility with respect to a fact in issue, or a matter under consideration.²³³ Stated another way, evidence is material if it has a natural effect or "tendency to impede or ... dissuade."²³⁴ Evidence is also said to be material if it has "any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence."²³⁵

SECTION 25: ORDERING A CRIMINAL TRIAL WITNESS TO TESTIFY

The possibility always exists that a witness in a criminal

decide).

²²⁷ *Id.*

²²⁸ *Id.* at 150.

²²⁹ See *People v. Cianciola*, 383 N.Y.S.2d 159, 161 (Sup. Ct. 1976) (denying motion to dismiss and rejecting the defendant's due process claims).

²³⁰ See *United States v. Gaudin*, 515 U.S. 506, 518-19 (1995) (discussing the historical division of authority on the subject and holding that materiality, as an element of contempt, must be decided by the fact-finder); *People v. Davis*, 423 N.E.2d 341, 345 (N.Y. 1981).

²³¹ *Gaudin*, 515 U.S. at 509 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)).

²³² *Davis*, 423 N.E.2d at 345.

²³³ See *id.*

²³⁴ *Id.*

²³⁵ *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting FED. R. EVID. 401).

trial may refuse to testify on Fifth Amendment or evidentiary privilege grounds. If a trial judge overrules an assertion of an evidentiary privilege, only the potential protection of the Fifth Amendment remains. To compel a witness to testify, the prosecution must request that the court confer immunity on the witness. This request, and only this request, renders the court competent authority to confer immunity.²³⁶ The court may then order the witness to answer the questions and advise the witness that, upon answering truthfully and responsively, he will receive immunity. The court should briefly advise the witness as to what immunity means and warn him against perjury and contempt. Should the witness subsequently refuse to testify in the immediate view and presence of the court after being accorded an opportunity to speak on his own behalf by way of defense, explanation, or mitigation, he may summarily be held in contempt.²³⁷ Conversely, in a civil trial, no party has authority to confer immunity on a witness and cannot compel him to testify.²³⁸ However, the court may impose serious adverse consequences, other than incarceration, upon one who asserts the Fifth Amendment in a civil proceeding.²³⁹ The ultimate question

²³⁶ See *Kastigar v. United States*, 406 U.S. 441, 442, 444 (1972) (stating that the most important exemption from a witness's testimonial duty is the Fifth Amendment privilege against self-incrimination); see also N.Y. C.I. . POC . LW § 50.10 (McKinney 1992).

²³⁷ See N.Y. C.I. . POC . LW §§ 50.10, 50.20, 50.30 (McKinney 1992); see also *Kastigar*, 406 U.S. 441; *Zicarelli v. New Jersey*, 406 U.S. 472 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *People v. Rappaport*, 391 N.E.2d 1284 (N.Y. 1979); *O'Neil v. Kasler*, 385 N.Y.S.2d 684 (App. Div. 1976); *People v. Clinton*, 346 N.Y.S.2d 345 (App. Div. 1973).

²³⁸ See *Maness v. Meyers*, 419 U.S. 449, 472-76 (1975) (White, J., concurring). See generally *In re Rouss*, 116 N.E. 782, 784 (N.Y. 1917) (affirming order of disbarment and discussing immunity as a protection from criminal rather than civil sanctions).

²³⁹ See *Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976) (upholding prison disciplinary measure requiring inmates to serve 30 days in punitive confinement); *United States v. Parcels of Land*, 903 F.2d 36, 42-46 (1st Cir. 1990) (rejecting defendant's Fifth Amendment privilege and affirming court-ordered forfeiture of real property); *Brinks, Inc. v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983) (stating that "there is generally no constitutional interest underlying a particular claim of privilege" in a civil matter, and allowing an employee's claim of privilege to be used as evidence of the employer's negligence in determining punitive damages); *Kuriansky v. Bed-Stuy Health Care Corp.*, 525 N.Y.S.2d 225, 235-37 (App. Div. 1988) (rejecting defendant's claim of Fifth Amendment privilege, and affirming an order compelling the defendants to disclose financial information regarding forfeiture of property gleaned from possible acts of Medicaid fraud); *Commissioner of Soc. Servs. ex rel. Jason C. v. Eliminia E.*, 521 N.Y.S.2d 283, 285-86 (App. Div. 1987)

for contempt purposes is whether the witness's answers or his production of evidence will incriminate him:

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears to the court that he is mistaken." However, if the witness, upon interposing his claim, were to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."²⁴⁰

New York has long adhered to this formulation.²⁴¹ The privilege against self-incrimination presupposes a real and substantial danger of incrimination.²⁴²

SECTION 26: ORDERING A GRAND JURY WITNESS TO TESTIFY

A witness who testifies before a New York grand jury may

(finding that the Family Court could properly deny adjournment of civil child protective proceeding despite the mother's assertions that her rights against self-incrimination would be jeopardized in light of criminal charges pending against her for child abuse).

²⁴⁰ *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (citations omitted).

²⁴¹ See *People v. Priori*, 58 N.E. 668, 670 (N.Y. 1900) (noting that the witness's invocation of privilege was properly subjected to the review and discretion of the trial court).

²⁴² See *Rogers v. United States*, 340 U.S. 367, 372-73 (1951) (finding that by not answering all grand jury questions regarding his Communist Party activities, the petitioner effected a waiver of the privilege, and could not invoke it to avoid further incrimination); see also *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972) (acknowledging the appellant's exposure to foreign prosecution, but deciding that the use immunity offered to the appellant was sufficient; thus the appellant was compelled to testify before a state commission investigating racketeering activities); *Mason v. United States*, 244 U.S. 362, 365-66 (1917) (determining that a judge "is ... bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril" and "not a danger of an imaginary and unsubstantial character") (quoting *Queen v. Boyes*, 121 E.R. 730, 730 (Q.B. 1861)).

receive immunity from criminal prosecution and punishment.²⁴³ Therefore, absent other legally cognizable objection, the witness must answer truthfully and responsively. If the witness raises an objection or a claim of legal privilege, the prosecutor must obtain a court order commanding the witness to testify before administering the sanctions available for contempt under the Judiciary and Penal Laws.²⁴⁴ If the witness flatly refuses to answer without claim of legal privilege or objection, or avoids answering by evading the question, the prosecutor can proceed under the Judiciary Law with a view towards having the court hold the witness in criminal contempt. This would be accomplished by placing the witness before the court and having the court order the witness to testify. If the witness remains recalcitrant, he or she may be held in criminal contempt for disobeying the court's order, or may be indicted for criminal contempt in the first degree.²⁴⁵ In order to assert a *testimonial* (only) privilege, a grand jury witness must continuously assert the privilege until the court either upholds the privilege or orders the witness to answer. By forcing the prosecutor to take the matter into open court, the "proceeding is expedited and the danger of stalling tactics [is] reduced."²⁴⁶ In addition to the risk of an indictment for criminal contempt in the first degree, without the prosecution's prior recourse to the Judiciary Law, refusal or evasion by a witness also waives all privileges or objections he might have raised.²⁴⁷ Unvarnished refusal to answer a question in a grand jury proceeding—on nonverbalized grounds—is simply a refusal to answer.²⁴⁸ In such a situation, there is no legal requirement

²⁴³ See *Stevens v. Marks*, 383 U.S. 234, 242 (1966) (stating that New York grants immunity only when the immunity statute is strictly complied with); see also *People v. Laino*, 176 N.E.2d 571, 579 (N.Y. 1961); *Doyle v. Hofstader*, 177 N.E. 489, 493-97 (N.Y. 1931).

²⁴⁴ See *In re Halleran*, 31 N.Y.S.2d 710, 715 (Queens County Ct. 1941) (finding that a witness fully complied with a subpoena by appearing and testifying on dates specified and that neither the jury foreman nor the district attorney could impose sanctions for failure to testify beyond the express terms of the subpoena).

²⁴⁵ See N.Y. JUD. LAW § 750(A)(3), (4) (McKinney 1992); N.Y. PENAL LAW § 215.51 (McKinney 1988).

²⁴⁶ *People v. Ianniello*, 235 N.E.2d 439, 444 (N.Y. 1968).

²⁴⁷ See *People v. Tantleff*, 356 N.E.2d 477, 477 (N.Y. 1976); *People v. DeSalvo*, 295 N.E.2d 750, 753 (N.Y. 1973); *People v. Gentile*, 367 N.Y.S.2d 69, 71 (App. Div. 1975), *aff'd*, 350 N.E.2d 615 (N.Y. 1976); *People v. Breindel*, 356 N.Y.S.2d 626, 627 (App. Div.), *aff'd mem.*, 324 N.E.2d 545 (N.Y. 1974).

²⁴⁸ See *People v. Schenkman*, 385 N.E.2d 1214, 1216 (N.Y. 1978); *People v. McGrath*, 385 N.E.2d 541, 549 (N.Y. 1978); *People v. Ianniello*, 325 N.E.2d 146, 148

that the witness receive the court's direction to answer prior to indictment. If, on the other hand, the witness refuses to answer and claims a legal privilege or objection, then only after those assertions are overruled by the court must the witness answer or face punishment for contempt under the Penal Law or Judiciary Law. Under these circumstances, however, the witness will have protected his or her rights to further review via pretrial motion to dismiss or reversal on appeal.²⁴⁹

SECTION 27: PERJURY AS CONTEMPT

"It would be a strained construction"²⁵⁰ of a contempt statute to fail to distinguish perjury from a refusal to testify. "Generally speaking, false swearing does not constitute civil contempt."²⁵¹ But when it plainly appears that a denial of knowledge or recollection of facts which are well within the witness's knowledge and recollection is a transparent ruse to evade answering questions, "the court may refuse to aid in a mere subterfuge and may compel an answer."²⁵² This power may not be used to punish perjury or to compel answers which conform to expectation.²⁵³ However a finding of perjury does not absolutely preclude a sanction for contempt. Such a perverse immunity has no support in reason or law. Where there has been a formal answer, but it is apparent that the truth is being withheld for the purpose of obstructing a proceeding from moving forward, punishment for contempt, as well as perjury, may be imposed.²⁵⁴ It is

(N.Y. 1975); *People v. Lombardozzi*, 423 N.Y.S.2d 225, 226 (App. Div. 1979); *People v. McGrath*, 380 N.Y.S.2d 976, 985 (Sup. Ct. 1976).

²⁴⁹ See, e.g., *Keenan v. Gigante*, 390 N.E.2d 1151, 1152 (N.Y. 1979) (discussing a priest's refusal to answer a grand jury's questions based the priest-penitent privilege and his First Amendment rights); *People v. McGrath*, 385 N.E.2d 541, 549 (N.Y. 1978) (finding that after grant of immunity, witnesses before a grand jury must testify truthfully); *Santangelo v. People*, 344 N.E.2d 404, 406 (N.Y. 1976) (stating that the refusal to answer improper questions implicated appellate review); *People v. Einhorn*, 324 N.E.2d 551, 552 (N.Y. 1974) (per curiam) (attesting to the discretion of the court to review whether grand jury questioning was based upon illegally obtained evidence); *In re Second Additional Grand Jury (Cioffi)*, 168 N.E.2d 663, 664-65 (N.Y. 1960) (determining that the defendant's failure to answer despite an offer of immunity was dispositive of the defendant's guilt for contempt).

²⁵⁰ *Foster v. Hastings*, 189 N.E. 229, 230 (N.Y. 1934).

²⁵¹ *Id.* at 230.

²⁵² *Id.* at 231.

²⁵³ See *id.*

²⁵⁴ See *O'Connell v. United States*, 40 F.2d 201, 205 (2d Cir. 1930) (recognizing that the appellant's conduct was "clearly obstructive and contemptuous of judicial authority").

well settled that in order to punish perjury as a contempt in the immediate view and presence of the court, obstruction of the court, proceedings must be shown in addition to the elements of perjury under the general law.²⁵⁵ There is a distinction between the untruthful statement which does not clearly appear to be such from the face of the record, and testimony which is so inconsistent or unbelievable as to make it apparent from the record itself that the witness has deliberately concealed the truth and has given answers in form only. The fact that a witness gives some response to a legal and pertinent question is not dispositive of the issue of whether he has refused to answer.²⁵⁶ Simply put, perjury as a means of refusing to answer is not beyond the contempt power.²⁵⁷

SECTION 28: TALESMAN CONTEMPT

“Concealment or [deliberate] misstatement by a [prospective] juror upon a voir dire examination is punishable as a contempt if its tendency [is] to obstruct the process of justice.”²⁵⁸ A juror is not punished for concealment per se or perjury. Rather, the contempt is based on the juror’s obstruction of the court’s proceedings by making use of his concealment or false statements to gain acceptance as a juror.²⁵⁹ The talesman is to be distinguished from the witness. A talesman, when accepted as a juror, becomes a part of the court since voir dire is part of the process of organizing the court for purposes of trial.²⁶⁰ The talesman who lies or conceals his way onto a jury is a “juror in name only.”²⁶¹ Contempt proceedings are not instituted against him because of his vote in the jury room. It has been theorized that the talesman’s obstruction of the proceedings by lying and concealing, at a minimum, deprives one or both sides of an opportunity at trial to challenge the juror for cause, “thus denying

²⁵⁵ See *Ex parte Hudgings*, 249 U.S. 378, 383 (1919).

²⁵⁶ See *Finkel v. McCook*, 286 N.Y.S. 755, 760 (App. Div.), *aff’d*, 3 N.E.2d 460 (N.Y. 1936).

²⁵⁷ See *id.* In order for perjury to amount to an act of contempt, there must be a further element of obstruction. See *In re Michael*, 326 U.S. 224, 228-29 (1945); *Clark v. United States*, 289 U.S. 1, 12 (1933); *United States v. McGovern*, 60 F.2d 880, 889 (2d Cir. 1932).

²⁵⁸ *Clark v. United States*, 289 U.S. 1, 10 (1933).

²⁵⁹ See *id.* at 11.

²⁶⁰ See *id.*

²⁶¹ *Id.*

both the right to a trial before a fair and impartial jury."²⁶²

SECTION 29: FALSE PLEADING AND CONTEMPT

A false pleading has been held not to be a contempt of court.²⁶³ A pleading is not "a proceeding of the court,"²⁶⁴ and, therefore, is not a court mandate.²⁶⁵ Rather, it is the proceeding of a party in court, and thus a false pleading is not a deceit upon the court.²⁶⁶ The courts receive pleadings as part of the litigation process. If perjury occurs in a verified pleading, a court's recourse is to the criminal law.²⁶⁷

SECTION 30: CONTEMPT, BAIL AND ABSCONDING DEFENDANTS

The reasons why early English courts proceeded against ab-

²⁶² See *In re Mossie*, 589 F. Supp. 1397, 1410 (W.D. Mo. 1984), *rev'd on other grounds*, 768 F.2d 985 (8th Cir. 1985).

²⁶³ See *Wolff v. Hubbard*, 78 N.Y.S.2d 671, 672 (New Rochelle City Ct. 1948); *Gernhardt v. Boland*, 211 N.Y.S. 877, 879 (Yonkers City Ct. 1925). *But see* *Moffat v. Herman*, 22 N.E. 287, 287 (N.Y. 1889) (holding that a false pleading may amount to civil contempt and declining to decide whether it constitutes criminal contempt).

²⁶⁴ *Fromme v. Gray*, 43 N.E. 215, 216 (N.Y. 1896). *But see* *Martin Cantine Co. v. Warshauer*, 28 N.Y.S. 139, 139-40 (Sup. Ct. 1894) (holding that a false answer is a "proceeding of the court").

²⁶⁵ See *Fromme*, 43 N.E. at 216.

²⁶⁶ See *id.* ("[I]t is absurd to say that a false answer ... deceives the court. The court is not misled by it, nor regards it otherwise than as a defense").

²⁶⁷ See *id.*; see also *Wolff*, 78 N.Y.S.2d at 673 (explaining that the alternative would be a possible "parallel civil contempt proceeding" in every case of perjury punishable under criminal statutes); *Gernhardt*, 211 N.Y.S. at 880 (holding that the petitioner's false pleading did not constitute civil contempt and left the question of perjury for criminal court). In federal proceedings, note that in 1994, 18 U.S.C. § 1001 provided that,

[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully ... makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 1001 (1994). This section was construed to include false statements made in the judicial branch. See *United States v. Bramblett*, 348 U.S. 503, 509 (1955), *overruled by* *Hubbard v. United States*, 514 U.S. 695 (1995). *Hubbard* was then superseded by a 1996 amendment to section 1001 which limited the application of section 1001 in the judicial branch. See *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997). Currently, section 1001 does not apply to "a party to a judicial proceeding, or that party's counsel." 18 U.S.C. § 1001(b) (1996).

In New York, the C.P.L.R. requires that many pleadings be verified by affidavit of the party. See N.Y. C.P.L.R. 3020 (McKinney 1991). *But see* N.Y. C.P.L.R. 3020 cmt. C3020:1 (McKinney 1991) (questioning the effectiveness of verification when district attorneys will not prosecute for a perjury in a civil pleading).

scending defendants through outlawry—by proclamation summoning the absconder to five successive terms of court and then forfeiting his property—are not clear.²⁶⁸ It is clear, however, that English courts had the power to treat failure to appear pursuant to their orders as contempts.²⁶⁹

Outlawry was never known to the American federal law.²⁷⁰ Issuing a bench warrant and forfeiting bail following flight are not necessarily effective deterrents to other defendants.²⁷¹ There is no substantial justification to allow an absconding defendant to risk only monetary forfeiture, recapture and indictment for bail jumping when he intentionally disobeys a direct court order to appear in court.²⁷² It appears, however, that punishment by the court for a criminal contempt of its bail order would bar criminal prosecution for the crime of bail jumping.²⁷³

SECTION 31: CONTEMPT AND BIAS RECUSAL MOTIONS

“The right to be heard” embodies the “right to file [relevant] motions and pleadings essential to present claims and raise relevant issues.”²⁷⁴ Since a fair trial before an impartial tribunal is a basic ingredient of the right to be heard under due process of law, it thus follows that motions to escape a biased judge raise constitutional issues.²⁷⁵ Allegations in a motion for a judge to recuse himself on the ground of bias must, of their very nature, be insulting.²⁷⁶ Asserting in a good faith recusal motion, in a re-

²⁶⁸ See *Green v. United States*, 356 U.S. 165, 170 (1958) (proposing that English courts considered absconding to be such a serious crime to justify imposing outlaw status rather than contempt), *overruled in part by* *Bloom v. Illinois*, 391 U.S. 194 (1968) (overruling *Green* to the extent it held courts may punish any criminal contempt without a jury trial).

²⁶⁹ See *Green*, 356 U.S. at 170-71.

²⁷⁰ See *id.* (citing *United States v. Hall*, 198 F.2d 726, 727-28 (2d Cir. 1952)); see also Bruce A. Green, “Hare and Hounds”: *The Fugitive Defendant’s Constitutional Right to be Pursued*, 56 BROOK. L. REV. 439, 453 (1990) (discussing the development of American jurisprudence regarding fugitive defendants).

²⁷¹ See *Green*, 356 U.S. at 173 (“[T]he issuance of a bench warrant and the forfeiture of bail following flight have generally proved inadequate to dissuade defendants from defying court orders.”).

²⁷² See *id.*

²⁷³ See *United States v. Dixon*, 509 U.S. 688, 694-97 (1993) (holding that the test for double jeopardy established in *Blockburger v. United States*, 284 U.S. 299 (1932), bars subsequent prosecution if neither offense contains an element not contained in the other).

²⁷⁴ *Holt v. Virginia*, 381 U.S. 131, 136 (1965).

²⁷⁵ See *id.*

²⁷⁶ See *id.* at 137 (“But if the charges [of bias] were ‘insulting’ it was inherent in

spectful, firm, but civil manner, that a court is biased, is not a contempt committed within or without the immediate view and presence of the court.²⁷⁷ This does not mean that a bias motion or allegation is a license to beat a presiding judge around the ears in open court—especially with a jury or the public present—such that his ability and authority to preside will be obstructed or impaired.²⁷⁸ Depending on degree and circumstance, a lawyer's deliberately false accusation of bias may be the subject of disciplinary action and possible contempt proceedings.²⁷⁹ But

the issue of bias raised"); *In re Rotwein*, 51 N.E.2d 669, 672 (N.Y. 1943) ("Doubtless a judge conscious of his rectitude and convinced of his judicial fairness would deeply resent such statements of counsel").

²⁷⁷ See *Rotwein*, 51 N.E.2d at 673. Contempts committed in open court are treated differently from contempts committed outside the presence of the court. Courts may immediately punish individuals who commit acts of contempt in open court without further proof or trial. See *Ex parte Terry*, 128 U.S. 289, 314 (1888) ("[I]t is a settled doctrine in the jurisprudence both of England and of this country ... that for direct contempts committed in the face of the court ... the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial ... and without other proof"); *Cooke v. United States*, 267 U.S. 517, 534 (1925) ("To preserve order in the court room ... the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence ... before punishment, because the court has seen the offense."). On the other hand, individuals who commit contempts not within the immediate view of the court are entitled to notice and fair hearing. See *id.* at 537 ("Due process of law ... in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.").

²⁷⁸ See *Mangiatordi v. Hyman*, 483 N.Y.S.2d 82, 82-83 (App. Div. 1984) (confirming finding of contempt where petitioner's conduct and statements suggesting bias by the court were disruptive and abusive toward the judge during trial); cf. *Breitbart v. Galligan*, 525 N.Y.S.2d 219 (App. Div. 1988) (holding summary contempt adjudication was improper where defense counsel asserted in open court but outside the hearing of the jury that the judge was improperly holding ex parte conferences which he prosecutor).

²⁷⁹ See *Werlin v. Goldberg*, 517 N.Y.S.2d 745, 746 (App. Div. 1987) (finding defense counsel guilty of criminal contempt for challenging repeatedly in open court the trial judge's ability to conduct a fair and impartial trial). For example, in *In re Mordkofsky*, 649 N.Y.S.2d 71 (App. Div. 1996), according to the Referee's report, Mordkofsky, an attorney, questioned a judge's ruling and accused the judge of not considering all relevant documentation. The judge held the attorney in contempt and noted for the record that the attorney had threatened him at a sidebar. The attorney had, in another proceeding, filed a motion stating that the judge had fixed the case, and subsequently accused the judge of being a crook. Mordkofsky was suspended from the practice of law for six months. The court noted the Referee's conclusion that the respondent "casts aside ethical considerations in the name of zealous representation" and "is a serious danger to both courts and litigants alike" and "[b]y a combination of irresponsibility, malice and unadulterated speculation ... [Mordkofsky] ... sees wrongdoing by judges and lawyers alike where there is none,

what is really a contempt proceeding may not be paraded as a disciplinary proceeding.²⁸⁰

SECTION 32: NOTICE OF CONTEMPT PROCEEDINGS

"The exact form of the procedure in the prosecution of ... contempts is not important" so long as there is notice and an opportunity to be heard.²⁸¹ "An application to punish for a contempt punishable civilly may be commenced by notice of motion ... or by an order ... to show cause"²⁸² It must contain an eight-point bold type warning concerning arrest and imprisonment²⁸³ which is waivable if the lack thereof is not asserted in a timely manner, or if the contemnor contests on the merits.²⁸⁴

Judiciary Law section 761 states that "[a]n application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge."²⁸⁵ The question of when an attorney continues to represent a civil contemnor has been the subject of case law. Service of an order to show cause or motion may be made upon the attorney who currently represents the contemnor in an action which is still pending.²⁸⁶ "Attorney,"

and manufactures accusations with total recklessness." *Id.* at 73.

²⁸⁰ See *In re Jafree*, 741 F.2d 133, 136 (7th Cir. 1984) (finding district court Executive Committee had no authority to try contempt proceeding). In *Jafree*, the court held that appellee's conduct constituted contempt and that the exclusive remedy was a contempt proceeding prescribed by statute. Thus the court held that the district court Executive Committee had no authority to try the contempt in a disciplinary proceeding and subsequently vacated the Committee's order holding the appellant in contempt. See *id.* at 136, 138.

²⁸¹ *Cooke*, 267 U.S. at 536.

²⁸² N.Y. JUD. LAW § 756 (McKinney 1992). Thus, the New York State Legislature has taken the view that one can commence a contempt proceeding by notice of motion without prejudice. See *Nelson v. Nationwide Measuring Serv., Inc.*, 398 N.Y.S.2d 443, 444 (App. Div. 1977).

²⁸³ See N.Y. JUD. LAW § 756 (McKinney 1992).

²⁸⁴ See *In re Rappaport*, 444 N.E.2d 1330, 1330 (N.Y. 1982).

²⁸⁵ N.Y. JUD. LAW § 761 (McKinney 1992).

²⁸⁶ See *Rosenthal v. Rosenthal*, 193 N.Y.S. 702, 703 (App. Div. 1922) (citing *Welch v. Welch*, 110 N.Y.S. 201 (Sup. Ct. 1908) and *Carr v. Carr*, 118 N.Y.S. 625 (Sup. Ct. 1909)); see also *Circharo v. Circharo*, 51 N.Y.S.2d 15, 15 (Sup. Ct. 1943) (holding that service of an order to show cause on defendant's attorney was sufficient where defendant failed to pay alimony as ordered). But where final judgment has been entered, service made upon the attorney who represented the contemnor in the action is not sufficient to acquire jurisdiction. See *Keller v. Keller*, 91 N.Y.S. 528, 532 (App. Div.), *aff'd*, 93 N.Y.S. 1136 (App. Div. 1905); see also *Wulff v. Wulff*, 133 N.Y.S. 807, 807 (Sup. Ct. 1911), *aff'd*, 135 N.Y.S. 289 (App. Div. 1912) (finding service of order to show cause could not be made on the contemnor's attorney where

as stated in the New York Judiciary Law, has been interpreted to refer to the "attorney of record for the 'accused,' not his counsel or any other attorney who has not formally appeared for him in the action."²⁸⁷ An attorney's appearance on appeal is not a general appearance for the purpose of legally effective service of an order to show cause in a civil contempt proceeding.²⁸⁸ An attorney's representation for purposes of service generally terminates with the judgment, but this proposition has many qualifications.²⁸⁹ The authority of the attorney as agent for service in an action continues with the presumed assent of the client until the client takes some affirmative step indicating otherwise, or some other legal event intervenes.²⁹⁰ Where a civil contempt involves a nonparty witness, the order to show cause must be served personally upon that witness.²⁹¹

Judiciary Law section 751(1) provides that when a person has committed a criminal contempt outside the immediate view and presence of the court "the party charged must be notified of the accusation, and have a reasonable time to make a defense."²⁹² No mention is made of an order to show cause or a written motion.²⁹³ Criminal contempts, by express statutory language, are not punished in the same way as civil contempts.²⁹⁴ Without ex-

final judgment was entered and thus contempt proceedings could not be instituted).

²⁸⁷ *Patillo v. Patillo*, 178 N.Y.S.2d 154, 159 (Sup. Ct. 1958).

²⁸⁸ *See Vingut v. Sire*, 148 N.Y.S. 533, 534 (App. Div. 1914) (holding that the defendant was not in contempt of court for failing to appear when the order to show cause was served upon the attorney who only signed the defendant's notice of appeal).

²⁸⁹ *See Commercial Bank v. Foltz*, 43 N.Y.S. 985, 987 (App. Div. 1897) (stating "the authority of the attorney terminates with the judgment ... but ... this statement ... needs many qualifications").

²⁹⁰ *See id.* at 988.

²⁹¹ *See* N.Y. JUD. LAW § 761 (McKinney 1992); *Long Island Trust Co. v. Rosenberg*, 442 N.Y.S.2d 563, 566 (App. Div. 1981). A nonparty contemnor is in essence viewed as a new party to the proceeding, and is therefore "entitled to the same level of notice required to institute any special proceeding against any new party." *Id.* at 567; *see, e.g., John Sexton & Co. v. Law Foods, Inc.*, 485 N.Y.S.2d 115, 117 (App. Div. 1985) (finding no jurisdiction over a nonparty in an underlying action where motion of contempt was not personally served); *Hampton v. Annal Management Co.*, 646 N.Y.S.2d 227, 228 (App. Term 1996) (holding mail service to corporation's employee ineffective to confer jurisdiction over the nonparty corporation for contempt judgment).

²⁹² N.Y. JUD. LAW § 751(1).

²⁹³ In the federal courts, notice of the accusation may be given orally in open court by the judge in the presence of the alleged contemnor, or by an order to show cause, or an order of arrest. *See* FED. R. CRIM. P. 42(b).

²⁹⁴ *Compare* N.Y. JUD. LAW § 751 (describing the punishment for criminal con-

planation, however, the case law has required that a party charged with "a violation of an order or [a] mandate as a basis for criminal contempt" be served personally with an order to show cause why the alleged contemnor should not be so held,²⁹⁵ reasoning that such requirements are jurisdictional and thus unwaivable.²⁹⁶ Case law has further provided that "[i]t is well established that a criminal contempt mandate can only be rendered in a special proceeding, which requires personal service with equal dignity to that required of a summons."²⁹⁷ In addition, "[f]ailure to personally serve the alleged contemnor is a jurisdictional defect requiring reversal."²⁹⁸ These cases do not indicate the basis of their jurisdictionally exacting pronouncements but appear to rely less than completely on *Billingsly v. Better Business Bureau of N.Y. City*,²⁹⁹ which was an earlier case where the criminal contemnor "was not served with the order to show cause and affidavits and did not voluntarily appear."³⁰⁰ In *Billingsly*, the court stated,

it is seen that, while plaintiff's conduct in part could have been construed as a violation of the order directing him to answer

tempt), with N.Y. JUD. LAW § 754 (describing the proceeding to punish for civil contempt).

²⁹⁵ *People v. Balt*, 312 N.Y.S.2d 587, 590 (App. Div. 1970); see *Pitt v. Davison*, 37 N.Y. 235, 238-39 (1867) (establishing personal service for punishing criminal contempt); see also *In re Minter*, 518 N.Y.S.2d 181, 183 (App. Div. 1987) (holding that there was no personal service in a criminal contempt proceeding where order to show cause was sent by regular mail); *In re Murray*, 469 N.Y.S.2d 747, 751 (App. Div. 1983) (finding service inadequate where the order to show cause for criminal contempt proceedings were left at court and picked up by a member of alleged contemnor's staff). Such requirement is based on "the well settled principle of the common law, that no person shall be condemned unheard." *Billingsley v. Better Bus. Bureau of N.Y. City, Inc.*, 249 N.Y.S. 584, 585 (App. Div. 1931) (quoting *Pitt*, 37 N.Y. at 238).

²⁹⁶ See *Balt*, 312 N.Y.S.2d at 589-90; see also *Howard T.P. v. Maria B.*, 654 N.Y.S.2d 419, 419 (App. Div. 1997) (finding that the lack of personal service of an order to show cause was a jurisdictional defect); *Lu v. Betancourt*, 496 N.Y.S.2d 754, 756 (App. Div. 1986) (holding that an appearance in response to an order to show cause and contesting it on the merits does not amount to a waiver in a criminal contempt proceeding).

²⁹⁷ *In re Grand Jury Subpoena Duces Tecum (Morano's of Fifth Avenue, Inc.)*, 533 N.Y.S.2d 869, 872 (App. Div. 1988) See *Murray*, 469 N.Y.S.2d at 751 ("A proceeding to punish for a criminal contempt of court which arises out of a civil action is a special proceeding separate and distinct from the original underlying action.").

²⁹⁸ *Morano's of Fifth Ave., Inc.*, 533 N.Y.S.2d at 872; see, e.g., *Lu*, 496 N.Y.S.2d at 756 (vacating contemnor's conviction and commitment for criminal contempt for improper service).

²⁹⁹ 249 N.Y.S. 584 (App. Div. 1931).

³⁰⁰ *Id.* at 585 (emphasis added).

certain questions at an examination before trial and to that extent could have been punished, as a civil contempt, in fact, *without due notice*, plaintiff was condemned for acts other than mere disobedience to an order in the action. He was punished for deliberate and insulting contumacy. Such a judgment cannot be rendered without personal service of process.³⁰¹

The opinion concluded by stating that:

[n]othing in this opinion is to be taken as a holding that the mere disobedience of an order may not also be a criminal contempt as well as a civil one. But, to the extent that any violation of any mandate of the court is to be punished as a criminal contempt, it must be *on notice*.³⁰²

The opinion does not expressly indicate whether "notice" was meant to be synonymous with a personally served order to show cause, but it impliedly treats the terms as such.³⁰³ Yet today's view, without analysis, is that

[t]he rule oft stated in [New York] is that service of the order to show cause to commence a criminal contempt proceeding must be personally served on the accused. This rule exists despite the statutory requirement as to service. Judiciary Law § 751(1) provides merely that "the party charged must be notified of the accusation, and have a reasonable time to make a defense."³⁰⁴

A later case, *Department of Housing Preservation and Development v. 24 West 132 Equities, Inc.*,³⁰⁵ qualifies this statement:

[T]here is no appellate case expressly holding that personal delivery of the order to show cause is the only permissible means of commencing a criminal contempt proceeding, or holding that statutory alternatives to in-hand delivery are jurisdictionally infirm. Many of the cases in which service has not been upheld involved situations where service was made only upon the contemnor's attorney or others unconnected with the contemnor.³⁰⁶

The court also stated, "it is frequently the case that those who have flagrantly violated the court's orders are not disposed

³⁰¹ *Id.* at 585-86 (emphasis added).

³⁰² *Id.* at 586 (emphasis added).

³⁰³ *See id.* at 568 (stating that criminal contempt judgment must be preceded by personal service of process).

³⁰⁴ *Department of Hous. Preserv. & Dev. v. Arick*, 503 N.Y.S.2d 489, 491 (Civ. Ct. 1986), *rev'd sub nom. on other grounds* *Department of Hous. Preserv. & Dev. v. Chaney*, 526 N.Y.S.2d 51 (App. Term 1988).

³⁰⁵ 524 N.Y.S.2d 324 (App. Term 1987).

³⁰⁶ *Id.* at 326. (citations omitted).

to make themselves readily available for personal delivery of notice³⁰⁷ Here follows some history which may serve as some explanation, or, at least an historical frame of reference.

In 1867, the New York Court of Appeals opined that

[i]f we keep in mind the distinction between proceedings to punish criminal contempts, and proceedings as for contempts to enforce civil remedies, we shall see the reason why personal notification of the accusation is ... indispensable in the one case, while it may not be in the other. Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding is, in effect, but an execution of the judgment or order against him.³⁰⁸

This holding was later brought into the Code of Civil Procedure and today is Judiciary Law section 761.³⁰⁹

A later opinion from the same court, involving subpoena service and contempt for disobedience thereof, declared that

[i]t is assumed without color of reason or authority that a witness, not a party, may appear by attorney and that any order subsequently served on the attorney in contempt proceedings to punish the witness for not appearing, may be served on the attorney, and this service is sufficient to confer jurisdiction to punish the witness for contempt. It is perfectly safe to say that no principle or authority can be found to support such a proposition, and yet it is one of the fundamental assumptions in this case, since it is based upon the notion that a subpoena or an order to testify may be served, not upon the witness, but on some one [sic] claiming to represent him, and then in case there is no appearance the witness can be punished for contempt.³¹⁰

The Revised Statutes, which preceded the Code of Civil Procedure, required personal service for criminal contempt (section 12), but exempted civil contempt from such a requirement

³⁰⁷ *Id.* at 327.

³⁰⁸ *Pitt v. Davison*, 37 N.Y. 235, 238-39 (1867).

³⁰⁹ See N.Y. JUD. LAW § 761 (McKinney 1992) (providing that in a civil contempt proceeding, service can be on the accused, or on the attorney of the accused, if ordered by the court); see also *Jeweler's Mercantile Agency Ltd. v. Rothschild*, 49 N.E. 871, 872 (N.Y. 1898) (discussing the incorporation of the holding in *Pitt* into the Code of Civil Procedure); *Davidowitz v. Hamroff*, 90 N.Y.S.2d 38, 39-40 (Sup. Ct. 1949) (tracing the development of the holding in *Pitt* to the Code of Civil Procedure, and finally to section 761 of the Judiciary Law).

³¹⁰ *In re Depue*, 77 N.E. 798, 801 (N.Y. 1906).

(Section 14) because the order to show cause was held to be "but a notice of motion ... [which]... may ordinarily be served upon the attorney of the adverse party."³¹¹ However, "[a] proceeding to punish for criminal contempt arising out of a civil action is considered separate from that action and must be commenced by personal service upon the alleged contemnor."³¹²

SECTION 33: SUFFICIENCY OF CONTEMPT ORDER TO SHOW CAUSE

The courts in their discretion may adopt such modes of adjudicating contempts committed without their presence as they deem proper, "provided due regard [is] had to the essential rules that obtain in the trial of matters of contempt."³¹³ The only requirements are notice and an opportunity for explanation and defense. "[S]ufficiency of the notice depends upon the particular circumstances of each case"³¹⁴ "The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."³¹⁵ At the least, sufficient time must be given for an accused contemnor to weigh the merits of the charge and evaluate possible defenses as well as to gather evidence and secure an attorney.³¹⁶ Sufficient time is reasonable time.³¹⁷ Put simply, the order to show cause, which initiates a contempt proceeding, should competently state those facts necessary to put the contemnor on notice as to what conduct constituted the contempt, and to allow him a reasonable period of time to meet the charge with a counseled defense in open court.³¹⁸ If the contemnor appears and defends on the merits, such actions constitute a waiver of any defects in the pre-

³¹¹ *Pitt*, 37 N.Y. at 241.

³¹² *Lu v. Betancourt*, 496 N.Y.S.2d 754, 756 (App. Div. 1986).

³¹³ *Ex parte Savin*, 131 U.S. 267, 278 (1889).

³¹⁴ *See City Sch. Dist. v. Federation of Teachers*, 375 N.Y.S.2d 179, 183 (App. Div. 1975) (citing *Spector v. Allen*, 22 N.E.2d 360 (N.Y. 1939)); *see also Sassower v. Sheriff of Westchester County*, 824 F.2d 184, 189 (2d Cir. 1987) (listing factors used in determining whether due process has been satisfied).

³¹⁵ *Ex parte Savin*, 131 U.S. at 279 (quoting *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 540 (1868)); *see also Blackmer v. United States*, 284 U.S. 421, 440 (1932) (explaining that due process is satisfied by "suitable notice and adequate opportunity to be heard").

³¹⁶ *See In re Weeks*, 570 F.2d 244, 247 (8th Cir. 1978).

³¹⁷ *See id.* at 246-47.

³¹⁸ *See In re Oliver*, 333 U.S. 257, 275 (1948); *O'Connell v. United States*, 40 F.2d 201, 203 (2d Cir. 1930).

liminary process.³¹⁹

SECTION 34: BURDENS OF PROOF FOR CONTEMPT

Criminal contempt under the Judiciary Law must be proven beyond a reasonable doubt.³²⁰ No case found has ever explicated why it must be proven beyond a reasonable doubt.³²¹ One court stated that criminal contempt of court under the Judiciary Law is criminal in character and it was therefore "elementary" that guilt must be proven beyond a reasonable doubt.³²² This is an example of jurisprudential oversimplification by the use of jargon. The issue is more complex because the criminal contempt proceeding, while civil in nature, has vindication as its objective, not remediation.³²³ Since the same offense may be punished in both civil and criminal contempt, a court may invoke criminal contempt to achieve its desired objective.³²⁴

Civil contempt has been said to require reasonable certainty.³²⁵ Then again, it has also been posited by the Court of

³¹⁹ See *In re Nunns*, 176 N.Y.S. 858, 871 (App. Div. 1919).

³²⁰ See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987) (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911)); *Michaelson v. United States*, 266 U.S. 42, 66 (1924) (same); *County of Rockland v. Civil Serv. Employees Ass'n*, 464 N.E.2d 121, 123 (N.Y. 1984) (addressing criminal contempt in the context of a labor injunction); *Kuriansky v. Feldman*, 533 N.Y.S.2d 679, 680 (Sup. Ct. 1988) (stating the burden of proof for criminal contempt is guilt beyond a reasonable doubt).

³²¹ See *N.A. Dev. Co. v. Jones*, 472 N.Y.S.2d 363, 367-68 (App. Div. 1984) (Sandler, J., dissenting) (discussing the different standards of proof for criminal and civil contempt and asserting that a single standard—proof beyond a reasonable doubt—be required whenever incarceration is contemplated).

³²² See *In re Shapolsky*, 185 N.Y.S.2d 639, 642 (App. Div. 1959).

³²³ See *People v. Colombo*, 271 N.E.2d 694, 696 (N.Y. 1971), *vacated on other grounds*, 405 U.S. 9 (1972); see also *Goodman v. State*, 292 N.E.2d 665, 667 (N.Y. 1972) ("[T]hese contempts in their origin and punishment partake of the nature of crimes, which are violations of the public law, and end in the vindication of public justice.") (quoting *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259, 260 (N.Y. 1886)); *Incorporated Village of Laurel Hollow v. Laverne Originals, Inc.*, 218 N.E.2d 703, 704 (N.Y. 1966) (finding that although contempt involves a civil proceeding, punishment is penal in nature). In civil contempt proceedings, incarceration is not viewed as a punishment, but rather as a tool to force the defendant to comply. See *Gompers*, 221 U.S. at 442. In contrast, criminal contempt is a punishment designed to protect the judicial system and involves vindication of an offense against public justice. See *McCormick v. Axelrod*, 453 N.E.2d 508, 512, *modified*, 459 N.E.2d 1314 (N.Y. 1983).

³²⁴ See *McCormick*, 453 N.E.2d at 512.

³²⁵ See *id.* at 513; *N.A. Dev. Co.*, 472 N.Y.S.2d at 366; *Hynes v. Hartman*, 406 N.Y.S.2d 818, 819 (App. Div. 1978).

Appeals that the burden of proof in civil contempt where willful violations result in coercive incarceration is "clear and convincing evidence (an issue this court has yet to determine)."³²⁶

The function of a standard of proof ... is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication' ... [a] standard [which] serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.³²⁷

SECTION 35: THE MANDATE OF COMMITMENT FOR CONTEMPT

Judiciary Law contempt proceedings are *stricti juris*.³²⁸ Failure to adhere to the statutory requirements vitiates the contempt.³²⁹ The order or mandate of commitment for punishment of contempt must state with reasonable clarity the particular facts and circumstances of the offense.³³⁰ "[F]ailure to comply with this statutory requirement renders the commitment totally defective."³³¹ The mandate, however, need not state the particular statutes upon which the commitment is based.³³² No appellate review of a contempt adjudication and punishment is possible unless it has been reduced to writing.³³³ The particular facts and circumstances of a contempt, which must be specified in the

³²⁶ *Powers v. Powers*, 653 N.E.2d 1154, 1157 (N.Y. 1995). The presently constituted Court of Appeals has always been liberal with unpresented-question answering dicta when it suited its purpose. This makes one wonder why the bashfulness in this case.

³²⁷ *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

³²⁸ See *Berkon v. Mahoney*, 180 Misc. 659, 661 (1943), *rev'd on other grounds*, 49 N.Y.S.2d 551 (App. Div. 1944), *aff'd*, 62 N.E.2d 388 (1945).

³²⁹ See *Rutherford v. Holmes*, 66 N.Y. 368, 372 (1876).

³³⁰ See *In re Rotwein*, 51 N.E.2d 669, 671 (N.Y. 1943); *Paine, Webber, Jackson & Curtis, Inc. v. Pioneer Warehouse Corp.*, 402 N.Y.S.2d 5, 5 (App. Div. 1978); *Tri-State Investors' Corp. v. Kitching*, 246 N.Y.S. 240, 244 (App. Div. 1930), *aff'd*, 178 N.E. 800 (1931); *Roncoroni v. Gross*, 86 N.Y.S. 1113, 1114 (App. Div. 1904).

³³¹ *In re Law Firm of Daniel P. Foster, P.C.*, 495 N.Y.S.2d 403, 404 (App. Div. 1985) (citing *Douglas v. Adel*, 199 N.E. 35, 37 (N.Y. 1935)).

³³² See *Berkon v. Mahoney*, 49 N.Y.S.2d 551, 551 (App. Div. 1944), *aff'd*, 62 N.E.2d 388 (N.Y. 1945) (per curiam) (mem.).

³³³ See *Solano v. Martin*, 389 N.Y.S.2d 413, 413 (App. Div. 1976) (dismissing an attorney's appeal regarding an act of contempt committed in the immediate view and presence of the court where the contempt citation was not in writing); *Lynch v. Derounian*, 341 N.Y.S.2d 145, 146 (App. Div. 1973) (stating that review of contempt is predicated on a written order but determining that finding of contempt was "unwarranted").

mandate of commitment, must be more than mere conclusory allegations.³³⁴ In fact, the Judiciary Law contempt statutes themselves are defined by the use of adjectives.³³⁵ Hence their use in a mandate of commitment to characterize specified acts and their effect does not cause facts to “degenerate into ... conclusion[s].”³³⁶ The recitals in a mandate of commitment for criminal contempt differ from those in a final order (mandate) of civil contempt.³³⁷ The mandate for criminal contempt must state all the facts constituting the elements of the contempt, including that the disobedience was willful.³³⁸ The mandate for civil contempt, while not requiring a showing of willfulness, must have the additional phrase that the contempt “defeated, impaired, impeded, or prejudiced” a right of a party to an action or special proceeding.³³⁹

SECTION 36: REVIEW OF CONTEMPT ADJUDICATIONS

Appellate review of contempt adjudications is either by direct appeal or a C.P.L.R. Article 78 proceeding in the nature of certiorari.³⁴⁰ When committed in the immediate view and presence of the court, a summary punishment for criminal contempt is reviewable through an Article 78 proceeding, and on occasion by writ of certiorari.³⁴¹ Article 78 is almost exclusively the vehi-

³³⁴ See *Waldman v. Churchill*, 186 N.E. 690, 691-92 (N.Y. 1933) (affirming a finding of criminal contempt where defendant's behavior was characterized as “rash,” “heedless,” “rude,” and “offensive”).

³³⁵ See N.Y. JUD. LAW § 750 (A)(1) (McKinney 1992) (listing disorderly, contemptuous and insolent behavior as punishable by the court of record).

³³⁶ *Waldman*, 186 N.E. at 692.

³³⁷ See *Eastern Concrete Steel Co. v. Brick Layers' & Mason Plasterers' Int'l Union*, 193 N.Y.S. 368, 369 (App. Div. 1922). A final order for criminal contempt should include language that the contempt was “willful”; a final order in a civil contempt proceeding need not refer to the willfulness of the offender. See *id.* at 370.

³³⁸ Judiciary Law section 752 states the requisites for criminal contempts generally, whereas Judiciary Law section 755 specifically states punishment may be summarily imposed when the offense is committed in the immediate view and presence of the court. See N.Y. JUD. LAW §§ 752, 755 (McKinney 1992).

³³⁹ *Id.* §§ 754, 770; see also *Oppenheimer v. Oscar Shoes, Inc.*, 488 N.Y.S.2d 693, 695 (App. Div. 1985); *Eastern Concrete Steel Co.*, 193 N.Y.S. at 370.

³⁴⁰ See N.Y. C.P.L.R. 7801(2) (McKinney 1994).

³⁴¹ See *id.*; see also N.Y. JUD. LAW § 752 (McKinney 1992); *Douglas v. Adel*, 199 N.E. 35, 36 (N.Y. 1935) (determining that acts within the immediate view of the court are reviewable by an order of certiorari); *People v. Sanders*, 395 N.Y.S.2d 190, 191 (App. Div. 1977) (noting that while normal review of summary contempt is by an Article 78 proceeding or order of certiorari, an adequate record existed for review by direct appeal).

cle for appellate review because it is the judge who, as witness to the offense, exercises discretion and orders summary punishment based on his own observation and knowledge.³⁴² The mandate of contempt creates the record for review, and the judge's personal observation, and its effect on him, constitutes the formal proof.³⁴³ Here, the mandate of commitment is a crucial starting point irrespective of all else that follows by way of record development. If the mandate of commitment fails to establish specific acts of contempt which occurred in the immediate view and presence of the court, review is dependent on appeal rather than certiorari.³⁴⁴ If an adequate stenographic record exists, appeal should also lie.³⁴⁵ As to criminal or civil contempts committed outside the immediate view and presence of the court, the proceeding is commenced by order to show cause or motion and the adjudication of contempt takes place only after an adversary hearing,³⁴⁶ thus creating a record for appeal.³⁴⁷

SECTION 37: PURGATION OF CRIMINAL CONTEMPTS

An indictment for the crime of criminal contempt may not be purged by doing or refraining from that which was commanded or forbidden in the first place, and a purge order may be ineffec-

³⁴² See *Douglas*, 199 N.E. at 37; *Sanders*, 395 N.Y.S.2d at 191.

³⁴³ See *Douglas*, 199 N.E. at 37; *In re Barnes*, 97 N.E. 508, 512 (N.Y. 1912) (Werner, J., concurring); *People ex rel. Clark v. Truesdell*, 79 N.Y.S.2d 413, 416 (1948).

³⁴⁴ See *Douglas*, 199 N.E. at 37 (determining that acts within the immediate view and presence of the court may be reviewed by an order of certiorari); *In re Law Firm of Daniel P. Foster, P.C.*, 495 N.Y.S.2d 403, 404 (App. Div. 1985) (finding mandate of commitment invalid for court's failure to specify particular in-court acts necessary to support criminal contempt).

³⁴⁵ See *Douglas*, 199 N.E. at 37 (stating that acts of contempt occurring outside the presence of the court must be recorded and reviewed on appeal); see also *People v. Clinton*, 346 N.Y.S.2d 345, 345-346 (App. Div. 1972) (holding review by appeal appropriate where an adequate record exists); *People v. Zweig*, 300 N.Y.S.2d 651, 653-54 (App. Div. 1969) (finding that in-court acts of contempt may also be properly appealable where the record is adequate for appellate review).

³⁴⁶ See N.Y. JUD. LAW § 756 (McKinney 1992).

³⁴⁷ See *Barnes*, 97 N.E. 508, 512 (1912) (alternative holding) (Werner, J., concurring) (considering due process provisions regarding notice and hearing for acts of contempt occurring outside the presence of the court, positing that proof "should be held to embrace the evidence which the accused may furnish"); see also *Silver v. Hannah*, 326 N.Y.S.2d 225, 226 (App. Div. 1971) (per curiam) (determining that appeal, rather than an article 78 proceeding, was proper where a finding of contempt resulted from a formal hearing and full record for review).

tual on the indictment.³⁴⁸

More than one hundred years ago, in affirming a criminal contempt, the Court of Appeals held that a contemnor could not supplement the record on appeal by including an affidavit stating that the contemnor had, as of the time of the appeal, done the act commanded.³⁴⁹ The court stated, "[i]f this were so, and the defendant had any claim, founded upon such action, to be absolved from the contempt, he should have applied for relief to the court. He cannot have the benefit of such action upon an appeal from the order punishing him for contempt." Rather, the disposal must be done before the court below.³⁵⁰

In today's era, the court has posited the following dictum:

Unnecessary to reach, and probably incorrect, is the conclusion that under no circumstances may a "criminal" summary contempt be purged. In fact, this court has concluded, in some circumstances at least, that one summarily adjudged in criminal contempt pursuant to section 750 of the Judiciary Law "holds the key to his freedom." Arguably, implicit in such a conclusion is the ability to purge some criminal contempts as distinguished from crimes of contempt.³⁵¹

Some clarity, at least in logic, may be achieved if this dictum is restated in positive terms: probably correct is the conclusion that, under rare circumstances, a criminal contempt may be purged.³⁵² Beyond this conclusion, there exists no certainty. In this regard, appellate division cases now fall into two categories. First are those which state that, in essence, purgation is actually only a stay or modification of the punishment and such a stay or modification is strictly within the province of the court that originally adjudged the contempt.³⁵³ Second are those which, for

³⁴⁸ See *People v. Leone*, 376 N.E.2d 1287, 1288 (N.Y. 1978) (per curiam) ("[O]nce a contempt goes to indictment and prosecution, forgiveness by an individual Judge or court may not be permitted to frustrate the power to punish for the affront to public justice.").

³⁴⁹ See *People ex rel. Day v. Bergen*, 53 N.Y. 404, 411 (1873).

³⁵⁰ *Id.*

³⁵¹ *Leone*, 376 N.E. 1288-89 (citations omitted).

³⁵² See *id.* at 1289.

³⁵³ See *People v. Belge*, 399 N.Y.S.2d 539, 540 (App. Div. 1977) (finding that the defendant's subsequent oral statement did not warrant the reversal of a contempt order and remanding the matter to the trial court); *Typothetae of New York v. Typographical Union No. 6*, 122 N.Y.S. 975, 977 (App. Div. 1910) (characterizing a purge of a contempt order as a stay and solely within the discretion of the court that imposed the original mandate).

the first time on appeal, go beyond the record and import purgation into the decision-making process—in apparent contravention of what the Court of Appeals held impermissible at the appellate stage.³⁵⁴ While not completely contradictory, this second line of appellate division authority does not appear consistent with the bedrock proposition that criminal contempts may not be settled by the parties to a litigation.³⁵⁵

SECTION 38: PURGATION OF CIVIL CONTEMPTS

If a contemnor “should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be [imprisoned] until he complied with the order.”³⁵⁶ Because the order of imprisonment seeks to coerce the defendant to engage in the conduct commanded, the defendant holds the key to his own jail cell.³⁵⁷ One who is fined, pursuant to an order of civil contempt, has it in his power to avoid the penalty unless the day for performance set by the court has passed.³⁵⁸ With coercion as its objective, civil contempt, by inescapable inference, is inappropriate where obedience is reasonably perceived not to be within the capability of the contemnor.³⁵⁹ Civil contempt incorporates the factually impossible defense.³⁶⁰ Besides coerced ac-

³⁵⁴ See *Kuriansky v. Ali*, 574 N.Y.S.2d 805, 806 (App. Div. 1991) (modifying, “in the exercise of discretion,” by eliminating the fine imposed and purging the contempt); see also *People v. Williamson*, 523 N.Y.S.2d 817, 818 (App. Div. 1988) (rejecting contention that a right to a “purge order” exists, but importing appellate discretion in modifying punishment); *In re Additional 1979 Grand Jury of the Albany Sup. Ct. v. Jane Doe*, 444 N.Y.S.2d 201, 202 (App. Div. 1981) (permitting a criminal contemnor to purge the contempt by testifying before the grand jury); *Ferrara v. Hynes*, 404 N.Y.S.2d 674, 675 (App. Div. 1978) (permitting a contemnor to purge criminal contempt by belatedly complying with a validly issued subpoena to testify before the grand jury).

³⁵⁵ See *Department of Env'tl. Protection v. Department of Env'tl. Conserv.*, 513 N.E.2d 706, 709-10 (N.Y. 1987) (per curiam) (rejecting parties' settlement proposing withdrawal of a criminal contempt charge due to the serious nature of willful disobedience and “weighty public and institutional concerns regarding the integrity of and respect for judicial orders”).

³⁵⁶ *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911).

³⁵⁷ See *id.*

³⁵⁸ See *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947).

³⁵⁹ See *Maggio v. Zeitz*, 333 U.S. 56, 67-69 (1948); *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 935 (2d Cir. 1992); *Badgley v. Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986), *rev'd on other grounds*, 853 F.2d 50 (2d Cir. 1988).

³⁶⁰ See *United States v. Rylander*, 460 U.S. 752, 757 (1983) (stating that a defendant, in a civil contempt proceeding, may assert the defense that it is presently

tion or inaction, civil contempt also serves functions such as indemnity or remedial reparation.³⁶¹ "Where a party is able to show that he or she has suffered an actual loss or injury as a result of a civil contempt, a fine may be imposed in an amount sufficient to indemnify the aggrieved party."³⁶² The contemnor also may be required to repair whatever damage he has caused. A civil contempt fine need only be predicated upon a reasonable basis of computation.³⁶³ Distilled to the essence of its conceptual distinction from criminal contempt, which is only supposed to punish past disobedience, civil contempt is concerned only with coercion and remediation or remedial reparation.³⁶⁴ Thus, a civil contempt is purged by doing the act commanded or refraining from the act forbidden, paying money or taking other steps to make an aggrieved litigant whole.

SECTION 39: CONTEMPTS AND EXECUTIVE PARDONS

The United States Constitution confers upon the President the power to grant pardons for committing federal offenses.³⁶⁵ Even at common law, however, the effect of a pardon was necessarily limited to the punishment imposed for a criminal conviction and had no effect as to the remedial portion of a court's order, because the remediation is necessary to secure the private rights of a private suitor.³⁶⁶ A pardon may, by logical necessity,

impossible to comply with the order).

³⁶¹ See N.Y. JUD. LAW §§ 753(A)(B), 773 (McKinney 1992).

³⁶² *Wynard v. Beiny* (*In re Beiny*), 562 N.Y.S.2d 58, 60 (App. Div. 1990), amended by 576 N.Y.S.2d 501 (App. Div. 1991) (mem.).

³⁶³ See *id.*

³⁶⁴ See *IBM, Corp. v. United States*, 493 F.2d 112, 115 (2d Cir. 1973); see also *McCain v. Dinkins*, 639 N.E.2d 1132, 1134 (N.Y. 1994) (upholding the imposition of remedial fines against New York City to compensate homeless families for whom the city failed to find proper shelter when ordered to do so by the court); *Department of Hous. Preserv. & Dev. v. Deka Realty Corp.*, 620 N.Y.S.2d 837, 839 (App. Div. 1995) (assessing civil contempt fines against a landlord in favor of his tenants who had suffered actual damages due to housing code violations); *First Nat'l Bank of Glens Falls v. Reoux*, 194 N.Y.S.2d 546, 548 (App. Div. 1959) (imposing a civil contempt fine in the full amount of the judgment when the judgment debtor secreted funds causing an actual loss to the judgment creditor's administrator). *But see* 4504 New Utrecht Ave. Corp. v. Pita Parlor, Inc., 531 N.Y.S.2d 622, 623 (App. Div. 1988) (dismissing civil contempt fine because it was improperly invoked for the nonpayment of a sum of money); *N.A. Dev. Co. Ltd. v. Jones*, 472 N.Y.S.2d 363, 366 (App. Div. 1984) (recognizing the possibility of imprisonment for a civil contempt so as to coerce the party to perform the requisite act or duty and pay the fine).

³⁶⁵ See U.S. CONST. art. II, § 2, cl. 1.

³⁶⁶ See *Ex parte Grossman*, 267 U.S. 87, 111 (1925).

only be granted for a completed criminal contempt.³⁶⁷ It may not interfere with private rights or measures taken by the courts to enforce those rights, such as coercive civil contempt.³⁶⁸ Power to pardon cannot take away the consequences of an act where private civil injustice is concerned. The President or Governor cannot pardon a husband/father who has been held in civil contempt for failing to pay child support, or a tenant who has been held in contempt for failure to pay his rent, or release an individual from the provisions of a restraining order already violated. The pardon only obviates the conviction and the punishment for the offense; it does not erase the fact of its existence.³⁶⁹ Acceptance of a pardon may imply a formal admission of guilt.³⁷⁰ A pardon based on an executive finding of innocence does not wipe out guilt. The executive has no power to set aside a finding of guilt, only to pardon.³⁷¹ As with immunity from criminal prosecution, the executive's pardoning power may not reach further than that which the sovereign as sovereign—and as creature of constitution—may grant or withhold.³⁷² Under federal law, a presidential pardon may be granted before conviction for crime.³⁷³ Under

³⁶⁷ See *id.* at 121.

³⁶⁸ See *id.* See generally *Schick v. Reed*, 419 U.S. 256, 258-59 (1974) (upholding President's power to grant pardons conditionally); *Brown v. Walker*, 161 U.S. 591, 599 (1896) (stating, in dicta, that a witness may not invoke constitutional privilege to avoid testifying before a grand jury when he has already received a pardon for the offense); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866) (stating that it is beyond the power of Congress to impose punishment after an offender has been pardoned); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833) (rejecting defendant's contention that a presidential pardon for one conviction may be effective against another indictment).

³⁶⁹ See *In re _____*, an Attorney, 86 N.Y. 563, 568-73 (1881) (upholding disbarment of an attorney for a felony conviction, despite the fact that he had been pardoned); see also *Barsky v. Board of Regents*, 111 N.E.2d 222, 224-26 (N.Y. 1953), *aff'd*, 347 U.S. 442 (1954) (upholding suspensions of doctors' licenses due to convictions of criminal contempt for refusing to produce documents subpoenaed by congressional committee); *People ex rel. Prisament v. Brophy*, 38 N.E.2d 468 (N.Y. 1941) (upholding the sentence of a defendant as a "second offender" regardless of a presidential pardon of the first offense). *But see State v. Bergman*, 558 N.E.2d 1111, 1113 (Ind. Ct. App. 1990) (ordering defendant's criminal record expunged after gubernatorial pardon); *Commonwealth v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987) (same).

³⁷⁰ See *Prisament*, 38 N.E.2d at 470 (citing *Burdick v. United States*, 236 U.S. 79, 90 (1915)).

³⁷¹ See *Prisament*, 38 N.E.2d at 470-71. *But see Bergman*, 58 N.E.2d at 1113.

³⁷² See generally *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917) (holding that a grant of immunity to a testifying witness does not preclude private sanctions such as disbarment).

³⁷³ See *In re Doyle*, 177 N.E. 489, 497 (N.Y. 1931).

New York's Constitution, a governor's pardon may only follow conviction for crime.³⁷⁴ Criminal contempt of court may be pardoned. Civil contempts of court are beyond the pardoning authority.

SECTION 40: SERIOUS AND PETTY CONTEMPTS

In determining entitlement to a jury trial, a serious nonpenal law criminal contempt is one which is *punished* with more than six months in jail,³⁷⁵ and not merely one which is *punishable* by more than six months in jail. It is the punishment actually imposed which is nunc pro tunc determinative.³⁷⁶ Quantitatively speaking, a serious nonpenal law criminal contempt fine may, depending on the criminal contemnor, be somewhere between \$10,000 and \$52,000,000.³⁷⁷ A line has not yet been and may never be drawn. A criminal contempt fine of \$10,000 may be draconian to a homeowner with a family. A \$1,000,000 fine is picnic beer money to a multinational corporation. One suggestion might be an invitation requirement to a contemnor to submit his, her or its income tax return before the commencement of a contempt proceeding in order to apply a principle of proportionality and assess whether a fine of a certain amount is serious or petty.³⁷⁸

³⁷⁴ See *id.* at 494.

³⁷⁵ See *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (stating that criminal contempt is a petty offense unless punished as a serious one); see also *Lewis v. United States*, 116 S. Ct. 2163, 2168 (1996) (acknowledging the uniqueness of criminal contempt charges as a valid exception to the no aggregate rule for petty crime potential sentences, and for looking to actual instead of potential sentences); *Bloom v. Illinois*, 391 U.S. 194, 198 (1968) (granting the right to jury trial in a criminal contempt case imposing a 24 month sentence); *People v. Foy*, 673 N.E.2d 589, 590 (N.Y. 1996) (holding that a potential aggregate sentence for petty crimes exceeding six months does not in and of itself demand defendant be granted a jury trial); *Morgenthau v. Erlbaum*, 451 N.E.2d 150, 156 (N.Y. 1983) (holding that despite "seriousness" of prostitution charge, since it only carries a three month possible sentence a jury trial cannot be granted); *Rankin ex rel. Board of Educ. v. Shanker*, 242 N.E.2d 802, 807 (N.Y. 1968) (relying on *Bloom* and stating that contempt punishment of 30 days in jail and \$250 fine was not "serious" enough to warrant a jury trial). *But see State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573 (Mo. 1994) (expressly declining to follow *Bloom*).

³⁷⁶ See *Lewis*, 116 S. Ct. at 2167-68 (citing *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974)); *Foy*, 673 N.E.2d at 589.

³⁷⁷ See *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 837 n.5 (1994) (citing *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)).

³⁷⁸ See *Department of Hous. Preserv. & Dev. v. Deka Realty*, 620 N.Y.S.2d 837, 843-46 (App. Div. 1995) (suggesting that appellant could have introduced financial

SECTION 41: THE CRIMINAL CONTEMPT "TRAP" DOCTRINE

A grand jury investigation seeks evidence of antecedent crime,³⁷⁹ not the artificial creation of new crime during the course of its proceedings—such as manipulating witnesses into committing contempt. In dicta, the Court of Appeals has coined the phrase "contempt trap" to describe "an argument grounded, by analogy, on the concept of a perjury trap."³⁸⁰ The court has also held that a prosecutor "may not ... attempt to trap the witness into giving confusing or evasive replies."³⁸¹ Whether a questioner has improperly sprung such a "contempt trap" on a witness ordinarily constitutes a factual question unless one is found to exist as a matter of law.³⁸²

No one has a right to testify evasively or falsely.³⁸³ The Second Circuit has discussed but not adopted a perjury "trap" doctrine.³⁸⁴ Although a questioner controls the question, it is the witness who controls the answer. What about a witness's intellect and free will?

SECTION 42: MULTIPLICITY AND CRIMINAL CONTEMPT

Indictment counts of criminal contempt are multiplicitous when separate contempts are charged based on repeated refusals to answer either the same questions or questions relating to one

records into evidence to support an argument that contempt fines imposed were "serious").

³⁷⁹ See generally 38 AM. JUR. 2D *Grand Jury* § 28 (1968).

³⁸⁰ *People v. Fischer*, 423 N.E.2d 349, 351 n.1 (N.Y. 1981) (citing *People v. Tyler*, 385 N.E.2d 1224 (N.Y. 1978)).

³⁸¹ *People v. Rappaport*, 391 N.E.2d 1284, 1288 (N.Y. 1979) (citing *Tyler*, 385 N.E.2d at 1224).

³⁸² See *Fischer*, 423 N.E.2d at 351 n.1.

³⁸³ See *United States v. Mandujano*, 425 U.S. 564, 568-70 (1976) (holding that the failure to give *Miranda* warnings to a witness before the witness testifies is no excuse for perjury); *People v. McGrath*, 385 N.E.2d 541, 548 (N.Y. 1978) (holding that a defendant was not permitted to answer grand jury questions evasively); *People v. Ianniello*, 235 N.E.2d 439, 442 (N.Y. 1968) (stating that even though a witness has "immunity," he may still be prosecuted for testifying evasively); *People v. Ezaugi*, 141 N.E.2d 580, 582 (N.Y. 1957) (holding recantation was not a defense where the witness waited several days after testifying, and the witness was given several opportunities to recant while still on the stand); see also *United States v. Apfelbaum*, 445 U.S. 115, 132 (1980) (Brennan, J., concurring) (stating that the Fifth Amendment gives witnesses the right to refuse to answer, but not the right to testify falsely).

³⁸⁴ See *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997) (citing *Wheel v. Robinson*, 34 F.3d 60, 67-68 (2d Cir. 1994)).

subject area.³⁸⁵ Are there distinct subject areas of inquiry? Is there, objectively assessed and recognizable in advance, a scope to the witness's refusal to answer?³⁸⁶ As for Judiciary Law criminal contempt punishment arising out of grand jury proceedings, multiplicity does not arise when questioning occurs during different sessions of the same grand jury or before different grand juries.³⁸⁷ Judiciary Law punishment—far less punitive than that imposed under a contempt indictment—does not confer de facto immunity from later questioning of the same witness on the same subject matter.³⁸⁸

SECTION 43: CRIMINAL CONTEMPT AND DOUBLE JEOPARDY

While recalcitrant grand jury witnesses may be convicted under the Penal Law or punished under the Judiciary Law, the Federal Constitution's Double Jeopardy Clause precludes the imposition of both sanctions for the same criminal transaction.³⁸⁹ This does not appear to be the proverbial "last word." In *United States v. Dixon*, the latest Supreme Court decision on the issue, a

³⁸⁵ See *Yates v. United States*, 355 U.S. 66, 73 (1957) (stating that only one contempt charge would result when a witness fails to answer numerous questions concerning the same subject matter); see also *Baker v. Eisenstadt*, 456 F.2d 382, 393 (1st Cir. 1972) (defining the scope of a witness' refusal to testify as within the same subject matter and thereby subject only to one contempt charge).

³⁸⁶ See *People v. Riela*, 166 N.E.2d 840, 843-44 (N.Y. 1960) (finding that the pattern of refusal was predictable); cf. *People v. Saperstein*, 140 N.E.2d 252, 257 (N.Y. 1957) (holding that poor memory as to one telephone conversation did not show that the witness' memory would be equally poor as to the other separate conversations, therefore the witness could not be held in contempt each time he failed to answer questions of five separate telephone conversations).

³⁸⁷ See *People v. Dercole*, 424 N.Y.S.2d 459, 469-70 (App. Div. 1980) (stating that a defendant committed only one contempt when he refused to answer factually similar questions which were asked within a short amount of time at a single session of a grand jury); see also *Riela*, 166 N.E.2d at 844 (same).

³⁸⁸ See *People ex rel. Cirillo v. Warden of the City Prison, Brooklyn*, 181 N.E.2d 424 (N.Y. 1962); *Second Additional Grand Jury v. Cirillo*, 241 N.Y.S.2d 8, 9 (App. Div. 1963); *Second Additional Grand Jury v. Cirillo*, 230 N.Y.S.2d 303, 305 (App. Div. 1962), *aff'd*, 188 N.E.2d 138 (N.Y. 1963).

³⁸⁹ See *Colombo v. New York*, 405 U.S. 9, 11 (1972); *Colombo v. New York*, 400 U.S. 16 (1970); *People v. Colombo*, 293 N.E.2d 247 (N.Y. 1972); *People v. Colombo*, 271 N.E.2d 694 (N.Y. 1971); *People v. Colombo*, 302 N.Y.S.2d 488 (App. Div.), *aff'd*, 254 N.E.2d 340 (N.Y. 1969); *Koota v. Colombo*, 216 N.E.2d 568 (N.Y. 1966). Compare *Menna v. New York*, 423 U.S. 61, 62 (1975) (holding contemnor did not waive double jeopardy protection), with *Williams v. State*, 775 S.W.2d 812, 816 (Tex. 1989) (holding that double jeopardy did not bar an indictment for attempted capital murder when defendant had earlier been held in contempt and punished for the same offense).

badly splintered Court hardly achieved a coherent conclusion. Specifically, the Court held that where a criminal contempt of court does not have the "same elements" as a legislatively-enacted crime, a contempt proceeding followed by a criminal prosecution does not implicate double jeopardy.³⁹⁰

SECTION 44: IMMEDIATE VIEW AND PRESENCE CONTEMPT

Disorderly and insolently disruptive behavior which tends to interrupt the court's proceedings or impair the respect due its authority may occur in its presence but not in its immediate view.³⁹¹ It is the difference between assaulting a court officer carrying out a court's directive and attempting to influence a juror in the cloakroom. Both are in the court's presence, but only the former is in the court's immediate view and presence, and permits summary punishment without advance notice; the latter while in its presence is not in its immediate view. Such summary punishment derives less from the fact that the judge personally saw and heard the obstruction, but from the danger that if immediate action is not taken, demoralization of the court's authority and its capacity to conduct its proceedings will follow.³⁹² It is no surprise the Supreme Court has held that "[s]uch summary conviction and punishment accords due process of law."³⁹³ A court's power to punish contempt "is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citi-

³⁹⁰ See *United States v. Dixon*, 509 U.S. 688, 696 (1993). ("The same elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense [has any shared elements]; if [so], they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.") (quoting U.S. CONST. amend. V). *But see* *ShIPLEY v. State*, 620 N.E.2d 710, 717 n.2 (Ind. 1993) (holding that in accordance with Indiana Supreme Court decisions, the "Blockburger" test must be coupled with "the manner in which the offenses are charged and not merely the statutory definitions of the offenses").

³⁹¹ See *Ex parte Savin*, 131 U.S. 267, 277 (1889).

³⁹² See *Cooke v. United States*, 267 U.S. 517, 536 (1925); *Ex parte Terry*, 128 U.S. 289, 307-08 (1888). See generally *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-800 (1987) (discussing the distinction between in-court and out-of-court contempts, emphasizing that punishment of in-court contempt "serve[s] the limited purpose of vindicating the authority of the court").

³⁹³ *Fisher v. Pace*, 336 U.S. 155, 159-60 (1949) ("[F]or direct contempts committed in the face of the court ... the offender may, in [the court's] discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred.") (citing *Ex parte Terry*, 128 U.S. at 313)).

zen.³⁹⁴ New York's Appellate Division—First and Second Departments only—have rules governing immediate-view-and-presence summary contempt;³⁹⁵ however, these rules are not models of clarity because they mindlessly track the “hodgepodge” of United States Supreme Court case law.³⁹⁶ The jurist would be better served with Part C of the latest edition of *The Benchbook for Trial Judges*.³⁹⁷

SECTION 45: EXAMPLES OF IMMEDIATE-VIEW-AND-PRESENCE CONTEMPT

Calling a trial judge colorful epithets in the language of the street in open court is an obvious form of immediate-view-and-presence contempt tending to obstruct proceedings and undermine the court's authority to preside over them.³⁹⁸ Brawling with a court officer trying to carry out a court's directive is another clear example.³⁹⁹ Unzipping one's trousers and urinating in front of the judge and jury during the final phase of the prosecutor's summation is yet another example which quintessentially combines disrespect with obstruction.⁴⁰⁰ Other examples include refusal by a trial witness, absent privilege, to answer questions when ordered to do so;⁴⁰¹ advising a client in the presence of the

³⁹⁴ *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); see also *Cooke*, 267 U.S. at 534 (stating that due process has not been violated when contempt in open court is summarily punished despite lack of evidence or assistance of counsel before such punishment); *Katz v. Murtagh*, 269 N.E.2d 816, 818-19 (N.Y. 1971) (citing the long-standing acceptance of judicial summary control over courtroom disorder).

³⁹⁵ See N.Y. COMP. CODES R. & REGS. tit. 22, §§ 604.2, 701.2 (1998).

³⁹⁶ *Codispoti v. Pennsylvania*, 418 U.S. 506, 524 (1974) (Rehnquist, J., dissenting).

³⁹⁷ See COMMITTEE ON PUBLICATIONS ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., *BENCH BOOK FOR TRIAL JUDGES—NEW YORK*, at C-1 to C-18. Part C governs conduct in the courtroom, including disruptive conduct, contempt, as well as sanctions. See *id.*

³⁹⁸ See *United States v. Barnett*, 376 U.S. 681, 710 (1964) (citing the Massachusetts Bay Charter, which provides fines for cursing in the presence of the judge).

³⁹⁹ See *Ex parte Terry*, 128 U.S. at 289, 298 (judging summarily the petitioner guilty of contempt for assaulting a U.S. Marshall during court proceedings).

⁴⁰⁰ See *United States v. Perry*, 116 F.3d 952, 957 (1st Cir. 1997) (“Perry urinated on the carpet in open court and in plain view of [the judge].”).

⁴⁰¹ See *United States v. Wilson*, 421 U.S. 309, 314-15 (1975); *In re Boyden*, 675 F.2d 643, 644 (5th Cir. 1982). The refusal to testify can involve many situations. Under no circumstances is the refusal to testify justified. See *id.* For example, contempt has been found for failing to recall the subject matter of the question, when the failure to recall was perjury. See *In re Sinadinos*, 760 F.2d 167, 171 (7th Cir. 1985) (discussing the three-part analysis of a witness's asserted memory loss); see

court to disobey an order just issued to the client by the court;⁴⁰² refusing to leave the courtroom;⁴⁰³ returning to the courtroom after being ejected for misbehavior;⁴⁰⁴ advancing towards a testifying witness and yelling "[y]ou are a damned liar";⁴⁰⁵ deliberately bringing witnesses back into the courtroom in defiance of an order excluding them;⁴⁰⁶ and a defiant salute as part of a courtroom demonstration.⁴⁰⁷

SECTION 46: IMMEDIATE-VIEW-AND-PRESENCE CONTEMNORS IN CONTEMPT

The decisions of the United States Supreme Court—distilled to some coherence—presently require that a court, during a jury trial, adhere to the following exact steps in order to adjudicate and punish an immediate-view-and-presence contemnor, and have the adjudication sustained on appeal without prejudicing

also In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 454-55 (6th Cir. 1983) (refusing to testify by asserting the attorney-client privilege); *People v. Pickett*, 654 N.Y.S.2d 1, 2 (App. Div. 1997) (holding that the court appropriately held a prosecution witness in contempt for feigning a lack of recall); *O'Neil v. Kasler*, 385 N.Y.S.2d 684, 691 (App. Div. 1976) (upholding criminal contempt charges for refusal to testify after having been granted immunity); *People v. Clinton*, 346 N.Y.S.2d 345, 346 (App. Div. 1973) (holding that being in fear of one's own or one's child's life is not sufficient reason for refusing to testify); *People v. Woodruff*, 272 N.Y.S.2d 786, 789-90 (App. Div. 1966) (upholding finding of contempt for refusing to testify on First Amendment grounds of the free exercise of religion), *aff'd*, 236 N.E.2d 159 (N.Y. 1968) (mem.).

⁴⁰² See *Davis v. Goodson*, 635 S.W.2d 226, 227 (Ark. 1982) ("Although an attorney has a duty to represent his client zealously, he should not engage in conduct which offends the dignity of the court. An attorney may make a proper objection to a ruling of the court but then should abide by the ruling so long as it remains in effect."). *But see id.* at 228 (Purtle, J., dissenting) ("If an attorney advises a client in good faith even though that advice may be incorrect, he should not be held in criminal contempt of the court for doing what he feels is proper under the circumstances."); *accord In re Watts and Sachs*, 190 U.S. 1, 29 (1903); *In re Landau*, 243 N.Y.S. 732, 735-36 (App. Div. 1930).

⁴⁰³ See *Rodriguez v. Feinberg*, 369 N.Y.S.2d 825, 826 (App. Div. 1975), *rev'd on other grounds*, 40 N.Y.2d 994, 995 (1976) (adjudging petitioners as guilty of criminal contempt after their refusal to leave when the judge ordered them out of the courtroom).

⁴⁰⁴ See *Gumbs v. Martinis*, 338 N.Y.S.2d 817, 822 (App. Div. 1972) (sustaining contempt charge for violating the judge's order to stay out of the courtroom).

⁴⁰⁵ *Gridley v. United States*, 44 F.2d 716, 742, 734 (6th Cir. 1930).

⁴⁰⁶ See *La Duca v. Bergin*, 448 N.Y.S.2d 318, 319 (App. Div. 1982) (holding a lawyer in contempt for his "vindictiveness" in violating the judge's order to exclude certain witnesses from the courtroom).

⁴⁰⁷ See *Katz v. Murtagh*, 269 N.E.2d 816, 817-18 (N.Y. 1971) ("It is enough that by rising and raising his arm he joined the others in an unequivocal demonstration of disrespect").

the jury, and without violating the due process rights of the contemnor.

The court must direct the bailiff to "take the jury out" of the courtroom and order the attorney, client, witness or spectator to the bench. In direct language, the judge must tell the contemnor that he or she is about to be held in contempt for obstructing or immediately threatening to obstruct the court's proceeding or impairing its authority over the proceeding. The judge is to ask the contemnor if he or she has anything to say by way of explanation, defense, extenuation or mitigation. After hearing the contemnor, the court may state that it finds the contemnor in contempt, in its immediate view and presence, for engaging in conduct that has obstructed or threatened to obstruct its proceedings or impaired its authority to preside over the proceedings. A brief statement of the facts, as seen and heard, are to be written into the mandate of commitment, with punishment of imprisonment and fine imposed immediately. When the mandate of commitment is filled out, execution of punishment is stayed until the verdict or a declaration of mistrial. A stay is not warranted for a disruptive spectator who was supposed to be a completely silent non-actor in the courtroom in the first place.⁴⁰⁸

SECTION 47: JUDGE JEROME FRANK'S ANALYSIS

Summary punishment for courtroom contempt has "none but a future effect."⁴⁰⁹ The disruption has already occurred and punishment can only stop it and deter future disruption. Those who argue against a trial judge acting in hot blood simultaneously argue that if the judge awaits a cooler second thought, the

⁴⁰⁸ See *Katz v. Murtagh*, 269 N.E.2d 816, 817-18 (N.Y. 1971) (holding that court proceedings were not so disrupted as to warrant a stay when a spectator was summarily adjudged in contempt). With respect to non-silent, active courtroom participants, see generally *Taylor v. Hayes*, 418 U.S. 488 (1974), *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), *Offutt v. United States*, 348 U.S. 11 (1954), and *Sacher v. United States*, 343 U.S. 1 (1952). But see *Lewis v. United States*, 116 S. Ct. 2163, 2167 (1996) (holding that a petty offense does not entitle a defendant to a jury trial, and distinguishing criminal contempt from petty offenses on the basis that petty offenses are described in statute while contempt is not, and contempt is a unique exercise of judicial authority over its own proceedings); see also *People v. Foy*, 673 N.E.2d 589, 593 (N.Y. 1996) (holding that the petty offense itself and not the accumulation of petty offenses determines the constitutional entitlement to a grand jury).

⁴⁰⁹ *United States v. Sacher*, 182 F.2d 416, 456 (2d Cir. 1950) (Frank, J., concurring), *aff'd*, 343 U.S. 1 (1952).

power to punish is extinguished because he or she no longer has the necessity to justify it.⁴¹⁰ However, Judge Frank's analysis correctly points out that summary punishment is a legitimate judicial necessity, and when a judge waits for a "chance to cool off" before exercising the authority, he or she is better able to pass summary judgment.⁴¹¹

SECTION 48: APPEALABILITY OF JUDICIARY LAW CONTEMPTS

Judiciary Law criminal contempt jurisprudence is a chameleon which has been shaped by decisions tailored to achieve desired results, and camouflaged as being required by law. Contempt's only enduring imperative seems to be necessity—a mingled and confused jurisprudence by nomenclature. Regarding appealability and the scope of review, criminal contempt's nature, character, form and overtones as variously expressed in result-specific case law are only so much clay, available for molding and defending a desired conclusion. They provide nothing of stable analytical substance concerning appealability.⁴¹² Twice, the New York State Legislature has been asked by the courts to clarify whether Judiciary Law criminal contempts are civilly appealable in the same fashion as Judiciary Law civil contempts.⁴¹³ Somehow, appeals under either label get to the state Court of Appeals. There has been no legislative response.

SECTION 49: JUDICIARY LAW CONTEMPTS ARE NOT CRIMES

Before our state and federal constitutions were adopted, the courts possessed contempt power. It was a by-product of being a political institution which had the inherent power to preserve its own existence without reliance on other political institutions. Judiciary Law criminal contempts are neither civil nor crimi-

⁴¹⁰ See *id.* at 456-59.

⁴¹¹ *Id.* at 460.

⁴¹² See, e.g., *Colombo v. New York*, 405 U.S. 9, 11 (1972); *Blackmer v. United States*, 284 U.S. 421, 440-41 (1932); *Incorporated Village of Laurel Hollow v. Laverne Originals, Inc.*, 218 N.E.2d 703, 704 (N.Y. 1965). See generally *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 799-800 (1987); *Housing Dep't v. Chance Equities*, 515 N.Y.S.2d 709, 710-13 (N.Y. City Civ. Ct. 1987) (denying respondent's demand for jury trial on contempt charge).

⁴¹³ See *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 406-07 (N.Y. 1882) ("[I]f it is best that there should be [appeals for criminal contempts] the attention of the legislature should be directed to the subject."); *Hanbury v. Benedict*, 146 N.Y.S. 44, 47-48 (App. Div. 1914) (same).

nal—as those terms are used in the language of the law. They are sui generis special proceedings brought before the civil side of a court possessed of civil and criminal jurisdiction, or, using the civil forms, brought before courts possessed of only criminal jurisdiction.⁴¹⁴ “In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land.”⁴¹⁵ Although the United States Supreme Court has stated that non-penal law criminal contempts are crimes “in the ordinary sense,”⁴¹⁶ this is not so and never will be so—no more than Rome can say that the sun revolves around the earth. Crimes “in the ordinary sense” are passed by legislatures. When it desires a result, the Court will intone or seemingly disown this catch phrase.⁴¹⁷

SECTION 50: PRESIDING OVER A CONTEMPT PROCEEDING

Everyone wants perfect certainty. Jesuitical perfection is a state of mind. Free-floating squeamishness is part of everyone when called upon to pass judgment. A jurist presiding over a criminal contempt proceeding under the Judiciary Law must work with less than perfect certainty. A reasonable explanation is an explanation that a reasonably prudent person would find credible and acceptable. It is a question of whether common human experience would lead a reasonable person to reject or accept an explanation as reasonable. In litigation, civil or criminal, the fact-finder can never hope to ascertain the true, tran-

⁴¹⁴ See *United States v. Barnett*, 376 U.S. 681, 692-700 (1964); *Green v. United States*, 356 U.S. 165, 183-87 (1958); *Nye v. United States*, 313 U.S. 33, 47-48 (1941); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 440-52 (1911); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327-30 (1904); *McCormick v. Axelrod*, 453 N.E.2d 508, 512 (N.Y. 1983); *People v. Rappaport*, 391 N.E.2d 1284, 1287-88 (N.Y. 1979); *People v. Leone*, 376 N.E.2d 1287, 1288-89 (N.Y. 1978); *Gabrelian v. Gabrelian*, 489 N.Y.S.2d 914, 918-23 (App. Div. 1985); *People ex rel. Frank v. McCann*, 237 N.Y.S. 85, 88 (App. Div. 1929), *aff'd*, 170 N.E. 898, 899 (N.Y. 1930).

⁴¹⁵ *In re Debs*, 158 U.S. 564, 596 (1895); see also *Judice v. Vail*, 430 U.S. 327, 335-36 (1977) (noting that the judiciary has a paramount interest in exercising its contempt power free from state interference).

⁴¹⁶ *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

⁴¹⁷ See *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994) (determining that contempt is criminal in nature when it takes the form of violating a court order by engaging in violence); cf. *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 799-800 (1987) (noting that the Court's “insistence on the criminal character of contempt prosecutions has been intended to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings”).

scidental, absolute certainty. In the field of human fact-finding, such is impossible. A fact-finder can only conclude what *probably* has happened (preponderance of the evidence), what *highly probably* has happened (clear and convincing evidence), and what *almost certainly has happened* (proof beyond a reasonable doubt).⁴¹⁸ For instance, document disappearance due to sudden floods, lightning-induced fires, midnight burglaries and car-trunk "break-ins" seem to follow what Judge Learned Hand called "a well-known pattern" which "no sane person would believe."⁴¹⁹ According to the legendary jurist, "if courts allowed themselves to be fobbed off with such silly tales, there would be an end to the administration of justice."⁴²⁰

CONCLUSION

The New York contempt statutes are long overdue for review and revision. By and large, they are of Thomas Jefferson vintage.⁴²¹ The State's contempt jurisprudence is jurisprudence by nomenclature. Case law of the United States Supreme Court and the New York courts, particularly that of the state's appellate divisions, is often poorly crafted, poorly reasoned and simply not thought through, with results as unpredictable as the weather, and, unfortunately embarrassingly equally unjust. Very often all of these tribunals ignore their own precedents rather than overruling, explaining or distinguishing them.

The wisdom of correctly decided case law should be codified by New York's Legislature into a new, brief, intelligible and comprehensive statute with admonitions to the judiciary that its

⁴¹⁸ See generally 17 AM. JUR. 2D *Contempt* § 207 (1990) (discussing burdens of proof in court proceedings); CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 526.1 (1997) (discussing burdens of proof regarding federal sentencing guidelines).

⁴¹⁹ *Seligson v. Goldsmith*, 128 F.2d 977, 978 (2d Cir. 1942) (Hand, J.).

⁴²⁰ *Id.*

⁴²¹ See *United States v. Barnett*, 376 U.S. 681, 715 (1964) (stating that New York's contempt law was enacted in 1829). New York's contempt law has caused judicial confusion for over a decade. See, e.g., *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259 (N.Y. 1886) (distinguishing between classes of contempts have become "somewhat mingled and confused"); *People ex rel. Negus v. Dwyer*, 90 N.Y. 402, 406 (N.Y. 1882) (urging legislative attention to clarify the appealability of criminal contempt convictions); *Eastern Concrete Steel Co. v. Bricklayers' & Mason Plasterers' Int'l Union, Local No. 45*, 193 N.Y.S. 368, 369 (App. Div. 1922) (acknowledging the "great confusion" surrounding contempt proceedings); *Hanbury v. Benedict*, 146 N.Y.S. 44, 47 (App. Div. 1914) (concluding that the distinction between civil and criminal contempt has caused confusion).

role is to apply the law, not reinvent it through amorphous interpretations. For their parts, New York's and the nation's judiciary must learn and then practice restraint by refraining from importing their own notions of the good, the true and the beautiful into the law of contempt. This has been the hallmark of prior decision-making which has made contempt law a mass of contradictions and anomalies. At least one justice of the United States Supreme Court has referred to one facet of the Court's contempt law jurisprudence as a "hodgepodge."⁴²² The high Court's latest forays into contempt jurisprudence are assaults on the human reasoning process.⁴²³ Mindless appellate "judicial activism"—a euphemism for violating the judicial oath and engaging in official lawlessness—is decidedly unbecoming and counterproductive in the one area of law central to a civilized and efficient justice system. Some common sense, together with something other than knee-jerk "scholarship" from law clerks—recently referred to as "arrogant kids just out of law school"⁴²⁴—would work to the ultimate benefit of all—including the same appellate judiciary which constantly complains that it is as much overloaded as it is disrespected for dispensing "junk justice." Just this past term, the Court properly reversed the Ninth Circuit Court of Appeals for holding that, in the context of an immediate-view-and-presence contempt, a lawyer's conduct was not "so disruptive as to justify the use of summary contempt procedure."⁴²⁵ This contemptibly ignorant ruling by the Ninth Circuit would have introduced uncertainty into what should be a routine practice in the conduct of a trial. So it has been, at least, since "the memory of man runneth not to the contrary."⁴²⁶

⁴²² *Codispoti v. Pennsylvania*, 418 U.S. 506, 524 (1974) (Rehnquist, J., dissenting).

⁴²³ See *Lewis v. United States*, 116 S. Ct. 2163, 2165-66 (1996) (reinventing *Codispoti*, 418 U.S. 506); see also *International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994).

⁴²⁴ Michael W. McConnell, *Supreme Humility*, WALL ST. J., July 2, 1997, at A14; see also Tony Mauro, *Justices Give Pivotal Role to Novice Lawyers*, U.S.A. TODAY, Mar. 13, 1998, at 1A (noting that tremendous power is placed in the hands of Supreme Court clerks "who lack self-assurance and experience" causing some decisions to be "written in hairsplitting, tentative prose that leaves key issues unresolved").

⁴²⁵ *Pounders v. Watson*, 117 S. Ct. 2359 (1997) (*rev'g Watson v. Block*, 102 F.3d 433 (9th Cir. 1996)).

⁴²⁶ *Putnam Resources v. Pateman*, 958 F.2d 448, 457 n.6 (1st Cir. 1992) (quoting *Western Fire Ins. Co. v. Word*, 131 F.2d 541, 543-44 (5th Cir. 1942)).

ABOUT THE AUTHOR

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