Journal of Law and Policy

Volume 3 | Issue 1 Article 2

1994

Judiciary and Penal Law Contempt in New York: A Critical Analysis

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JUDICIARY AND PENAL LAW CONTEMPT IN NEW YORK: A CRITICAL ANALYSIS

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Judiciary and Penal Law Contempt proceedings in New York have markedly increased in recent years.[1] However, courts have imprecisely expressed the nature of contempt,[2] inaccurately cited precedent,[3] reluctantly imposed contempt sanctions[4] and reflected improvident policy-making in their actions and opinions pertaining to contempt. As a result, contemnors who go unpunished appear to be above the law, and the public's confidence in justice suffers accordingly.

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Substantial portions of this article are based on concepts included in LAWRENCE N. GRAY, THE GRAND JURY IN NEW YORK (1994).

[1] Contempt proceedings arising out of grand jury investigations or trials of white-collar, official corruption, organized and civil rights crime, have steadily increased in New York from 1920 through the present. *See* LAWRENCE N. GRAY, CRIMINAL CONTEMPT HANDBOOK (1994).

[2] *See, e.g.*, People v. Colombo, 29 N.Y.2d 1, 4, 271 N.E.2d 694, 696, 323 N.Y.S.2d 161, 164 (1971) (Court of Appeals considered criminal contempt to be civil in nature), *vacated*, 405 U.S. 9 (1972); *cf.* McCormick v. Axelrod, 59 N.Y.2d 574, 583, 453 N.E.2d 508, 512, 466 N.Y.S.2d 279, 283, *amended*, 60 N.Y.2d 652, 454 N.E.2d 1314, 467 N.Y.S.2d 571 (1983); Goodman v. State, 31 N.Y.2d 381, 385, 292 N.E.2d 665, 667, 340 N.Y.S.2d 393, 395 (1972) (Court of Appeals considered criminal contempt to be punitive or criminal in nature).

[3] *See, e.g.*, People v. Stewart, 158 Misc.2d 776, 601 N.Y.S.2d 983 (Sup. Ct. 1993), *appeal filed*, No. 91-3150 (1st Dep't June 4, 1993); Kuriansky v. Azam, 151 Misc.2d 176, 573 N.Y.S.2d 369 (Sup. Ct. 1991).

[4] *See* Lawrence N. Gray, *Order in the Court: Where Has It Gone?*, N.Y.L.J., June 19, 1989, at 1.

INTRODUCTION

> [C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach of insults and pollution.[5]

Historically, English and American courts have had the inherent power to punish parties for contempt for as long as those courts have been in existence.[6] When the judiciary exercises its inherent contempt power, it vindicates and preserves its own authority and existence as an institution of our separated government. By exercising its inherent contempt power, the judiciary also gives effect to the law's purpose of punishing or modifying a contemnor's behavior, thus benefiting either the public generally or private suitors individually.[7]

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[5] United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812), *cited with approval in* International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552 (1994).

[6] *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512-13 (1873), *cited with approval in* International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552 (1994).

[7] International Union - United Mine Workers of Am., 114 S. Ct. 2552 (1994). Statutes regulating the exercise of the judiciary's inherent contempt power are limitations on, not conferrals of such power. *See, e.g.*, Nye v. United States, 313 U.S. 33 (1941); People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 4 N.E. 259 (1886); Gabrelian v. Gabrelian, 108 A.D.2d 445, 451, 489 N.Y.S.2d 914, 919-20 (2d Dep't), *appeal dismissed*, 66 N.Y.2d 741, 488 N.E.2d 111, 497 N.Y.S.2d 365 (1985). For purposes of this Article's analysis, the following New York statutes illustrate the regulation of the judiciary's inherent contempt powers. N.Y. JUD. LAW § 750 (McKinney 1993), in part, provides:

> Power of Courts to Punish for Criminal Contempts
>
> A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:
>
> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due its authority.

While the courts' power over Judiciary Law contempt is inherent, their power over Penal Law contempt is legislatively conferred. Penal Law crimes of contempt are distinct, yet conceptual cousins to the inherent contempt powers wielded by the courts. Although the enforcement of judiciary contempt law preserves a court's authority and the rights of the parties involved, under penal contempt law, courts generally impose sentences as punishment for transgressions of the public's rights.[8]

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3. Willful disobedience to its lawful mandate.
4. Resistance willfully offered to its lawful mandate.
5. Contumacious and unlawful refusal to be sworn as a witness; or after being sworn, to answer any legal and proper interrogatory.

N.Y. JUD. LAW § 753 (McKinney 1993), in part, provides:

Power of Courts to Punish for Civil Contempts

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

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

[8] While the courts' power over Judiciary Law contempt is inherent, their power over Penal Law contempt is legislatively conferred. N.Y. PENAL LAW § 215.51 (McKinney 1993) provides as follows:

Criminal Contempt in the First Degree

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

N.Y. PENAL LAW § 215.50 (McKinney 1993), in part, provides:

Criminal Contempt in the Second Degree

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct: (1) Disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate

To analyze judiciary and penal contempt law, this Article reviews and questions New York Court of Appeals decisions construing New York Judiciary Law sections 750, 751 and 753, as well as New York Penal Law sections 215.50 and 215.51. Section II of this Article reveals the judiciary's failure to clearly define New York contempt law and its components as pertain to grand jury witnesses. Section III and section IV discuss how this ambiguity causes an inconsistent interpretation and inadequate enforcement of contempt law in New York. Section V examines how decisions of the U.S. Supreme Court and New York's appellate courts affect the adjudication and punishment of contempts committed in the immediate view and presence of a court. Finally, this Article concludes that statutory revision and case law reformation are long overdue in New York to put the appropriate force behind a court's decision on the law and its order commanding the law's implementation.

I. NEW YORK JUDICIARY'S CONTEMPT POWER: INHERENT, BUT REGULATED BY STATUTE AND NECESSITY

A court lacking the power to coerce obedience of its orders or punish disobedience thereof is an oxymoron. In the United States, "the contempt power lies at the core of the administration of a state's judicial system."[9] A court without contempt power is not a court.[10]

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view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or (2) Breach of the peace, noise or other disturbance, directly tending to interrupt a court's proceedings; or (3) Intentional disobedience or resistance to the lawful process or other mandate of a court . . . ; or (4) Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory . . . .

[9] Juidice v. Vali, 430 U.S. 327, 335 (1977) (quoting with approval Ketchum v. Edwards, 153 N.Y. 534, 539, 47 N.E. 918, 920 (1897)); *see also* Eilenbecker v. District Court, 134 U.S. 31, 36 (1890).

[10] *See, e.g.*, K. Wolferen, THE ENIGMA OF JAPANESE POWER 225 (1989) (Japanese "courts," which have no contempt powers, are actually administrative tribunals).

Judicial contempt power, which is nondelegable[11] and exercisable only in open court,[12] has two facets—criminal, or public, contempt and civil, or private, contempt.[13] The division of judiciary contempt law into criminal contempt and civil contempt resulted, to a large extent, from the tension between the public's need for a judiciary capable of enforcing its own orders and the public's abhorrence of unchecked governmental power over personal liberty. A *criminal* contempt of court violates the public's rights generally, since the court is an instrument of public justice. Such a violation warrants punitive imprisonment or an imposed fine to vindicate the court.[14] In contrast, a *civil* contempt of court violates the rights of civil litigants or private parties. A civil contempt warrants the vindication of private rights through coercive imprisonment, fines, or monetary indemnity.[15]

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[11] Goldberg v. Extraordinary Special Grand Juries, 69 A.D.2d 1, 7, 418 N.Y.S.2d 695, 698 (4th Dep't), *appeal denied*, 48 N.Y.2d 608, 399 N.E.2d 1205, 424 N.Y.S.2d 1026 (1979); People *ex rel.* Stearns v. Marr, 88 A.D. 422, 424, 84 N.Y.S. 965, 966 (4th Dep't 1903), *aff'd in part*, 181 N.Y. 463, 74 N.E. 431 (1905).

[12] *See, e.g.*, *In re* Oliver, 333 U.S. 257, 264-65 (1948); *In re* Rosahn, 671 F.2d 690, 696-97 (2d Cir. 1982). *See generally* Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 438, 399 N.E.2d 518, 522, 423 N.Y.S.2d 630, 634-35 (1979); People v. Jones, 47 N.Y.2d 409, 391 N.E.2d 1335, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979); Poughkeepsie Newspapers, Inc. v. Rosenblatt, 92 A.D.2d 232, 459 N.Y.S.2d 857 (2d Dep't 1983).

[13] Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624 (1988); Michaelson v. United States *ex rel.* Chicago, St. P., M. & O. Ry., 266 U.S. 42 (1924); McCormick v. Axelrod, 59 N.Y.2d 574, 453 N.E.2d 508, 466 N.Y.S.2d 279, *amended*, 60 N.Y.2d 652, 454 N.E.2d 1314, 467 N.Y.S.2d 571 (1983); Douglas v. Adel, 269 N.Y. 144, 146, 199 N.E. 35, 36 (1935); *In re* Barnes, 204 N.Y. 108, 113-15, 97 N.E. 508, 509-10 (1912); People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 4 N.E. 259 (1886); Gabrelian v. Gabrelian, 108 A.D.2d 445, 451, 489 N.Y.S.2d 914, 920 (2d Dep't), *appeal dismissed*, 66 N.Y.2d 741, 488 N.E.2d 111, 497 N.Y.S.2d 365 (1985).

[14] Department of Envtl. Protection v. Department of Envtl. Conservation, 70 N.Y.2d 233, 513 N.E.2d 706, 519 N.Y.S.2d 539 (1987); County of Nassau v. Adjunct Faculty Ass'n, 65 N.Y.2d 672, 481 N.E.2d 254, 491 N.Y.S.2d 622 (1985); People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 4 N.E. 259 (1886).

[15] *Munsell*, 101 N.Y. at 247-49, 4 N.E. at 259-61; *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

A Judiciary Law criminal contempt of court may occur in the court's immediate view and presence as well as outside its presence. Aside from calling the sitting judge colorful epithets in the language of the street, other examples of "immediate-view-and-presence" criminal contempt include brawling with court officers while they are seeking to carry out the court's order,[16] refusing to answer questions as a witness (absent privilege) when ordered to do so,[17] advising a client, in the court's presence, to disobey an order which the court has just given to the client[18] and raising a fist of "defiant salute" as part of a group courtroom disturbance.[19] The usual case of Judiciary Law criminal contempt of court, however, involves disobedience occurring outside the court's presence. Common examples are disobedience of grand jury subpoenas *duces tecum* and *ad testificandum* outright, or disobedience of orders sustaining subpoenas against legal challenge.[20] Punishment for a New York Judiciary Law criminal contempt of court is up to thirty days in jail and a fine of up to one thousand dollars.[21]

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[16] *See, e.g., Ex parte* Terry, 128 U.S. 289 (1888).

[17] United States v. Wilson, 421 U.S. 309 (1975); *Ex parte* Hudgings, 249 U.S. 378, 382 (1919); O'Neil v Kasler, 53 A.D.2d 310, 385 N.Y.S.2d 684 (4th Dep't 1976); People v. Clinton, 42 A.D.2d 815, 346 N.Y.S.2d 345 (3d Dep't 1973).

[18] Davis v. Goodson, 635 S.W.2d 226 (Ark. 1982), *cert. denied*, 459 U.S. 1154 (1983).

[19] Katz v. Murtagh, 28 N.Y.2d 234, 269 N.E.2d 816, 321 N.Y.S.2d 104 (1971).

[20] *See, e.g.*, Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); Koota v. Colombo, 17 N.Y.2d 147, 216 N.E.2d 568, 269 N.Y.S.2d 393, *cert. denied*, 384 U.S. 1001 (1966); Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939); Kuriansky v. Ali, 176 A.D.2d 728, 574 N.Y.S.2d 805 (2d Dep't 1991), *appeal dismissed*, 79 N.Y.2d 848, 588 N.E.2d 93, 580 N.Y.S.2d 195 (1992); Ferrara v. Hynes, 63 A.D.2d 675, 404 N.Y.S.2d 674 (2d Dep't 1978); Manning v. Valente, 272 A.D. 358, 72 N.Y.S.2d 88 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947); People *ex rel.* Cirillo v. Warden of the City Prison, 14 A.D.2d 875 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 51, 181 N.E.2d 424, 226 N.Y.S.2d 398 (1962); Second Additional Grand Jury v. Cirillo, 16 A.D.2d 605, 230 N.Y.S.2d 303 (2d Dep't 1962), *aff'd*, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963).

[21] N.Y. JUD. LAW § 752 (McKinney 1993). The punishment for a Judiciary Law civil contempt includes imprisonment until the witness agrees to obey the

In New York, Judiciary Law criminal contempt is further distinguished from Judiciary Law civil contempt by the legislature's definition of each. The legislature limited criminal contempts of court to specifically enumerated acts.[22] For civil contempts of court, however, the legislature has preserved a common law catch-all.[23] This catch-all was deemed prudent and consistent with the fact that civil litigation affects only private interests where courts are under little or no temptation to abuse their power. In contrast, criminal contempt always poses the danger of abuse because the court in which the contempt is committed imposes the punishment, usually without intervention by a jury.[24] While New York courts may look to the full range of the common law for civil contempt, no statutorily undefined, common law criminal contempt power exists in New York. Therefore, an act which is not a civil contempt and which is not specifically enumerated among New York's statutorily defined criminal contempts is not a contempt at all.[25]

The criminal contempt power is necessary to a court's very existence, yet civil contempt is based on no such necessity. While the court may level criminal contempt against a contemnor *sua*

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court's order or payment of money to the party that is aggrieved by the witness's disobedience of the court's order.

[22] N.Y. JUD. LAW § 750(A) (McKinney 1993) 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* N.Y. JUD. LAW § 750(C) (McKinney 1993); James v. Powell, 26 A.D.2d 295, 296, 274 N.Y.S.2d 192, 194-95 (1st Dep't), *aff'd*, 18 N.Y.2d 931, 223 N.E.2d 562, 277 N.Y.S.2d 135 (1966).

[23] N.Y. JUD. LAW § 753(A)(8) (McKinney 1993) 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, 133 A.D. 25, 117 N.Y.S. 852 (1st Dep't 1909).

[24] International Union - United Mine Workers of Am., 114 S. Ct. 2552 (1994); Bloom v. Illinois, 391 U.S. 194 (1968); Green v. United States, 356 U.S. 165, 187 (1958); Rankin v. Shanker, 23 N.Y.2d 111, 119-20, 242 N.E.2d 802, 806-07, 295 N.Y.S.2d 625, 631-32 (1968).

[25] People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 247-54, 4 N.E. 259, 259-64 (1886); Gabrelian v. Gabrelian, 108 A.D.2d 445, 448-51, 489 N.Y.S.2d 914, 918-20 (2d Dep't), *appeal dismissed,* 66 N.Y.2d 741, 488 N.E.2d 111, 497 N.Y.S.2d 365 (1985); *see also* Nye v. United States, 313 U.S. 33, 45-48 (1941).

sponte, or on motion of the people as sovereign, it appears that a court may invoke civil contempt sanctions only at the insistence of an aggrieved civil litigant.[26] The reason for this distinction is that a court must be able to vindicate its authority on behalf of public justice generally, 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 civil litigants before it.

Besides defining and regulating the judiciary's inherent contempt power, the New York State Legislature enacted Penal Law criminal contempt in the first and second degree.[27] Any legislature has the power to make a crime out of that which would already be a criminal contempt of court as per the court's inherent powers.[28] Such penal statutes do not actually confer any "contempt power" on the courts, except that after conviction, a court has the sole authority to sentence. Criminal contempt in the second degree mirrors much of the Judiciary Law criminal contempt statute.[29] Criminal contempt in the second degree proscribes "disorderly, contemptuous or insolent behavior committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or impair the respect due its authority." It also prohibits "intentional disobedience or resistance to the lawful process or other mandate of a court" or "contumacious and unlawful refusal to be sworn as a witness in any court proceeding, or, after being sworn, to answer any legal and proper interrogatory."[30] Criminal contempt in the first degree

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[26] *Compare* United States v. Russotti, 746 F.2d 945, 949-50 (2d Cir. 1984) *with* United States v. Williams, 622 F.2d 402, 404 (2d Cir. 1977).

[27] N.Y. PENAL LAW §§ 215.50; 215.51 (McKinney 1993).

[28] *Munsell*, 101 N.Y. at 247-54, 4 N.E. at 259-64.

[29] *Compare* N.Y. JUD. LAW § 750 (McKinney 1993) *with* N.Y. PENAL LAW § 215.50.

[30] In New York, Penal Law criminal contempt in the second degree is invocable only by the prosecutor, though it is rarely invoked. *See, e.g.*, People v. Giglio, 74 A.D.2d 348, 428 N.Y.S.2d 27 (2d Dep't 1980) (defendant disobeyed court order issued in open court to provide voice exemplars in front of the jury during his trial for bribery); People v. Virag, 100 A.D.2d 984, 474 N.Y.S.2d 158 (2d Dep't), *leave denied,* 63 N.Y.2d 713, 469 N.E.2d 117, 480 N.Y.S.2d 1041 (1989) (defendant, husband and wife, convicted of disobeying

occurs when a witness appears before a grand jury and either refuses to be sworn or, after having been sworn, refuses to answer any legal and proper question.[31] Second degree criminal contempt carries up to a year in prison, while first degree criminal contempt allows for a sentence of up to four years.

Despite its similarity to criminal contempt in the second degree, Judiciary Law criminal contempt is not a crime. In fact, Judiciary Law criminal contempt proceedings are neither civil nor criminal.[32] They are *sui generis* special proceedings to coerce future obedience or punish past disobedience.[33] U.S. Supreme Court

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trial court's written order incorporating and implementing New York Court of Appeals decision in *Virag v. Hynes*, 54 N.Y.2d 437, 430 N.E.2d 117, 480 N.Y.S.2d 1041 (1981), which denied their motion to quash a grand jury subpoena *duces tecum*).

[31] *See generally* People v. Ianniello, 36 N.Y.2d 137, 325 N.E.2d 146, 365 N.Y.S.2d 821, *cert. denied,* 423 U.S. 831 (1975).

[32] The status of judicial criminal contempts has been the subject of ongoing debate. *See* Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 798-801 (1987); Blackmer v. United States, 284 U.S. 421, 440 (1932); Myers v. United States, 264 U.S. 95, 103, 104-05 (1924); Gompers v. United States, 233 U.S. 604, 610 (1914) (Justice Holmes claimed that judicial criminal contempts are crimes); *see also* Warring v. Huff, 122 F.2d 641 (D.C. Cir. 1941) (Chief Judge Vinson saw no purpose in rehashing the dispute "some of the procedural and substantive law applied to criminal contempts is as though they were crimes and some of it is not."). Justice Holmes' viewpoint, which courts, seeking a desired result, often seized upon unnecessarily or deliberately, is not supported by earlier or later Supreme Courts. *Cf.* United States v. Greene, 241 F.2d 631, 633 (2d Cir. 1957) (Judge Learned Hand labelled Justice Holmes' claim the product of confusion). *But see* United States v. Dixon, 113 S. Ct. 2849 (1993) (for double jeopardy purposes, judiciary criminal contempt is a crime "in the ordinary sense"; International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552 (1994) ("Serious criminal contempt fines [are] . . . crimes in the ordinary sense.").

[33] Nye v. United States, 313 U.S. 33, 47-48 (1941); *Blackmer,* 284 U.S. at 440; *Myers,* 264 U.S. at 103; Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); Bessette v. W.B. Conkey Co., 194 U.S. 324, 327 (1904); *Ex parte* Terry, 128 U.S. 289, 303, 307-09 (1888); *Ex parte* Wall, 107 U.S. 265, 302-03 (1883) (Field, J., dissenting); Gabrelian v. Gabrelian, 108 A.D.2d 445, 448-51, 489 N.Y.S.2d 914, 918-21 (2d Dep't), *appeal dismissed,* 66 N.Y.2d 741, 488 N.E.2d 111, 497 N.Y.S.2d 365 (1985); City Sch. Dist. v. Schenectady Fed'n of Teachers, 49 A.D.2d 395, 399, 375 N.Y.S.2d 179, 183-84 (3d Dep't 1975); People *ex rel.* Frank v. McCann, 227 A.D. 57, 58, 237 N.Y.S. 85, 87-88, *aff'd,*

decisions construing and harmonizing the judicial contempt power with double jeopardy, petty offense and modern day conceptions of due process have not metamorphosed it into a crime.[34] Moreover, the procedural protections which have come to surround the imposition of punishment for judicial criminal contempt are merely accretions of fundamental fairness rather than applications of the Bill of Rights to contempt prosecutions as crimes.[35]

II. CONTEMPT PROCEEDINGS AGAINST THE GRAND JURY WITNESS

When a grand jury witness refuses to answer questions or produce evidence by asserting a timely legal objection, a prosecutor *must* obtain a court order commanding the witness to do so prior to seeking sanctions under the Judiciary or Penal Laws. Flat refusal to answer, evasive nonanswer, or simple disobedience of the grand jury's subpoena entail no such requirement. In this situation, the prosecutor may either directly proceed under the Penal Law by indictment or seek a court order with a view toward sanctions under the Judiciary Law to command the witness's obedience. This extra optional step in the face of naked disobedience is often employed in long-term grand jury investigations. Judiciary Law sanctions are much quicker than criminal prosecution and may improve the attitude of a contemnor upon returning from jail to the grand jury, as well as that of others who may profit from the contemnor's example. Alternatively, the prosecutor could seek a more drastic measure by proceeding immediately under the Penal Law and asking the grand jury to return an indictment charging a witness with the Class E felony of criminal contempt in the first

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253 N.Y. 221, 224, 170 N.E. 898, 898 (1930).

[34] Colombo v. New York, 405 U.S. 9 (1972); Bloom v. Illinois, 391 U.S. 194 (1968); Green v. United States, 356 U.S. 165, 183-87 (1958); Gompers v. United States, 233 U.S. 604 (1914).

[35] Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 799-800 (1987); *Blackmer*, 284 U.S. at 440; United States v. Bukowski, 435 F.2d 1094, 1101 (7th Cir. 1970); *accord* Sassower v. Sheriff of Westchester County, 824 F.2d 184, 188-89 (2d Cir. 1987). *See generally* Hanbury v. Benedict, 160 A.D. 662, 146 N.Y.S.2d 44 (2d Dep't 1914).

degree[36] for refusal to answer or evasive nonanswer. The prosecutor could also seek an indictment for the Class A misdemeanor of criminal contempt in the second degree[37] for disobeying the grand jury process by simple failure to appear or produce documents before it.[38]

Whether a recalcitrant grand jury witness must or may be brought before the court,[39] the scope of the proceeding is quite limited. After determining the relevancy, legality and propriety of questions rebuffed or evaded, or physical evidence refused, a court will either order or excuse compliance.[40] Should recalcitrance

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[36] This statute was specifically drawn with those in mind who, appearing as a witness before a grand jury, "contumaciously and unlawfully refuse[] to be sworn as a witness . . . or . . . having been sworn as a witness . . . refuse[] to answer any legal and proper interrogatory." N.Y. PENAL LAW § 215.51.

[37] This statute was enacted with those in mind who, appearing as a witness before a grand jury, "intentionally disobey the lawful mandate of a court." N.Y. PENAL LAW § 215.50. A grand jury subpoena is a mandate of the court. *See infra* note 87 and accompanying text.

[38] To the extent that a grand jury subpoena seeks testimony, the litigation must wait until the witness actually hears and refuses a question. With a grand jury subpoena *duces tecum*, however, a different situation prevails. Purportedly privileged documents would have to be revealed before a court could intervene. Consequently, a subpoena *duces tecum* must be attacked by a motion to quash before the return date in order to force the matter into court. Beach v. Shanley, 62 N.Y.2d 241, 247-48, 465 N.E.2d 304, 306-07, 476 N.Y.S.2d 765, 767-68 (1984); *see also* People v. Desmond, 98 A.D.2d 728, 729, 469 N.Y.S.2d 141, 142 (2d Dep't 1983).

[39] It is a "must" situation if the witness asserts a privilege against answering, *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968), or if the prosecutor wants the court to impose contempt sanctions under the Judiciary Law, *People v. Leone*, 44 N.Y.2d 315, 376 N.E.2d 1287, 405 N.Y.S.2d 642 (1978); Koota v. Colombo, 17 N.Y.2d 147, 216 N.E.2d 568, 269 N.Y.S.2d 393, *cert. denied*, 384 U.S. 1001 (1966).

[40] *See generally* Additional Jan. 1979 Grand Jury v. Doe, 50 N.Y.2d 14, 405 N.E.2d 194, 427 N.Y.S.2d 950 (1980); Virag v. Hynes, 54 N.Y.2d 437, 430 N.E.2d 1249, 446 N.Y.S.2d 196 (1981); People v. Rappaport, 47 N.Y.2d 308, 391 N.E.2d 1284, 418 N.Y.S.2d 306 (1979); Keenan v. Gigante, 47 N.Y.2d 160, 390 N.E.2d 1151, 417 N.Y.S.2d 226 (1979); People v. Leone, 44 N.Y.2d 315, 318, 376 N.E.2d 1287, 1288, 405 N.Y.S.2d 642, 643 (1978); Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); *Koota* 17 N.Y.2d at 151, 216 N.E.2d at 569-70, 269 N.Y.S.2d at 395-96; Second Additional Grand Jury v. Cirillo, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963); People *ex*

persist, the witness has not only committed the crime of contempt but has also disobeyed a court mandate. Consequently, Penal or Judiciary Law sanctions may follow as appropriate to the circumstances. For Penal Law sanctions, the prosecution need only submit evidence of the contemnor's disobedience to a grand jury. For Judiciary Law sanctions, the prosecution may bring the matter on a simple order to show cause. A grand jury witness who asserts an objection or privilege must clearly and continuously maintain the same until vindicated or overruled by the court. By forcing the prosecutor to take the matter into open court, "the [grand jury] proceeding is expedited and the danger of stalling tactics reduced."[41] Flat refusals to answer or produce evidence, however, are exceedingly hazardous for the witness.[42] Legal grounds not raised before the grand jury are unavailable as later defenses to Judiciary or Penal Law criminal contempt. They are deemed waived.[43] Evasive nonanswers are likewise simply refusals to answer[44]—no prior court order is necessary for an indictment.

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rel. Cirillo v. Warden of the City Prison, 11 N.Y.2d 51, 181 N.E.2d 424, 226 N.Y.S.2d 398 (1962).

[41] *Ianniello,* 21 N.Y.2d at 425, 235 N.E.2d at 444, 288 N.Y.S.2d at 469.

[42] People v. Roseman, N.Y.L.J., July 7, 1978, p.7 col.6 (Sup. Ct.), *aff'd,* 78 A.D.2d 878, *leave denied,* 53 N.Y.2d 845, 422 N.E.2d 843, 440 N.Y.S.2d 1037 (1981); People v. Paperno, 98 Misc.2d 99, 104, 413 N.Y.S.2d 975, 980-81 (Sup. Ct. 1979), *rev'd on other grounds,* 77 A.D.2d 137, 432 N.Y.S.2d 499 (2d Dep't 1980), *rev'd,* 54 N.Y.2d 294, 445 N.Y.S.2d 119, 429 N.E.2d 797 (1981).

[43] People v. DeSalvo, 32 N.Y.2d 12, 14, 295 N.E.2d 750, 751, 343 N.Y.S.2d 65, 66-67 (1973); People v. Gentile, 47 A.D.2d 930, 367 N.Y.S.2d 69 (2d Dep't 1975), *aff'd,* 39 N.Y.2d 779, 350 N.E.2d 615, 385 N.Y.S.2d 284 (1976).

[44] People v. McGrath, 46 N.Y.2d 12, 29, 385 N.E.2d 541, 549, 412 N.Y.S.2d 801, 809-10 (1978); People v. Schenkman, 46 N.Y.2d 232, 237, 385 N.E.2d 1214, 1216, 413 N.Y.S.2d 284, 286-87 (1978); People v. Ianniello, 36 N.Y.2d 137, 142, 325 N.E.2d 146, 148, 365 N.Y.S.2d 821, 824 (1975); *DeSalvo,* 32 N.Y.2d at 16-17, 295 N.E.2d at 752-53, 343 N.Y.S.2d at 67-69; *Ianniello,* 21 N.Y.2d at 426, 235 N.E.2d at 444, 288 N.Y.S.2d at 469-70; People v. Lombardozzi, 73 A.D.2d 659, 423 N.Y.S.2d 225 (2d Dep't 1979); People v. McGrath, 86 Misc.2d 249, 257, 380 N.Y.S.2d 976, 984-85 (Sup. Ct. 1976), *rev'd,* 57 A.D.2d 405, 394 N.Y.S.2d 885 (1st Dep't 1977), *rev'd and conviction reinstated,* 46 N.Y.2d 12, 385 N.E.2d 541, 412 N.Y.S.2d 801 (1978).

The uncooperative witness has no legally cognizable expectation that the prosecutor will elect to proceed under the Judiciary Law rather than Penal Law.[45] If privilege or objection *is* timely asserted, then overruled, and followed by disobedience, the same alternate consequences may follow. But the witness's claim of privilege or objection will have been preserved. Should it be later sustained by pretrial motion or on appeal, such privilege or objection will constitute an absolute defense. A witness can establish a defense at a contempt proceeding or trial by way of confession and avoidance or the court can hold that questions refused by the witness are not legal and proper or have lost potency as contempt predicates.[46]

A. Mens Rea *of Testimonial Contempt*

Penal Law criminal contempt in the first and second degree and Judiciary Law criminal contempt[47] speak solely in terms of an intentional refusal to answer legal and proper questions. Yet, the judiciary has used language such as "willfulness" and "tending to

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[45] People v. Rappaport, 47 N.Y.2d 308, 314, 391 N.E.2d 1284, 1287-88, 418 N.Y.S.2d 306, 308-10 (1979); People v. Buonoraba, 27 N.Y.2d 604, 261 N.E.2d 411, 313 N.Y.S.2d 413 (1970); People v. Ruggiano, 39 A.D.2d 113, 113-14, 332 N.Y.S.2d 458, 459-60 (2d Dep't 1972); *Paperno*, 98 Misc.2d at 105, 413 N.Y.S.2d at 981-82.

[46] Keenan v. Gigante, 47 N.Y.2d 160, 390 N.E.2d 1151, 417 N.Y.S.2d 226 (1979); *McGrath*, 46 N.Y.2d at 29-30, 385 N.E.2d at 548-49, 412 N.Y.S.2d at 810; Santangello v. People, 38 N.Y.2d 536, 540, 344 N.E.2d 404, 406, 381 N.Y.S.2d 472, 472-74 (1976); *Ianniello*, 36 N.Y.2d at 140, 325 N.E.2d at 147, 365 N.Y.S.2d at 822-23; *DeSalvo*, 32 N.Y.2d at 16-17, 295 N.E.2d at 752-53, 343 N.Y.S.2d at 68-69; Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969); *Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462; Koota v. Colombo, 17 N.Y.2d 147, 216 N.E.2d 568, 269 N.Y.S.2d 393, *cert. denied*, 384 U.S. 1001 (1966); Grand Jury v. Cioffi, 8 N.Y.2d 220, 168 N.E.2d 663, 203 N.Y.S.2d 841 (1960); Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939); People v. De Martino, 71 A.D.2d 477, 483-84, 422 N.Y.S.2d 949, 954-55 (1st Dep't 1979).

[47] N.Y. PENAL LAW §§ 215.50(1), 215.51, 15.15(2) (McKinney 1992); N.Y. JUD. LAW § 750(A)(5) (McKinney 1992).

obstruct" to define testimonial criminal contempt's *mens rea*.[48] Therefore, "willfulness" and "tending to obstruct" are legal surplusage.[49] A "sincerely" contemptuous witness who stubbornly refuses to answer, flatly or on meritless and overruled legal grounds, may not have the slightest desire to willfully tend to obstruct a legal proceeding. Nevertheless, a witness's knowing intent to simply refuse to answer[50] is sufficient to prove guilt of contempt.[51]

Testimonial criminal contempt, of whatever statutory stripe, is simply an intentional refusal to answer legal and proper questions.[52] Advice of counsel is *no* defense. Fear for one's safety or that of one's child, not rising to the level of legal duress, is *no*

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[48] *See, e.g.*, People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y.2d 245, 248-49, 4 N.E. 259, 260 (1886); People v. Dercole, 72 A.D.2d 318, 334, 424 N.Y.S.2d 459, 469-70 (2d Dep't 1980); People v. Giglio, 74 A.D.2d 348, 353-54, 428 N.Y.S.2d 27, 30-31 (2d Dep't 1980); People v. Gorgone, 47 A.D.2d 347, 351, 366 N.Y.S.2d 647, 650-51 (1st Dep't 1975); People *ex rel.* Valenti v. McCloskey, 8 A.D.2d 74, 80, 185 N.Y.S.2d 952, 959 (1st Dep't), *rev'd*, 6 N.Y.2d 390, 160 N.E.2d 647, 189 N.Y.S.2d 898 (1959); Steingut v. Imrie, 270 A.D. 34, 48, 58 N.Y.S.2d 775, 778 (3d Dep't 1945); Finkel v. McCook, 247 A.D. 57, 63, 286 N.Y.S. 755, 761-62 (1st Dep't 1936); *Paperno*, 98 Misc.2d at 104, 413 N.Y.S.2d at 981.

[49] *See* People v. Schenkman, 46 N.Y.2d 232, 237, 385 N.E.2d 1214, 1216-17, 413 N.Y.S.2d 284, 286-87 (1978); People v. Martin, 42 N.Y.2d 882, 883, 367 N.E.2d 881, 881, 397 N.Y.S.2d 794, 794 (1977); People v. Tantleff, 40 N.Y.2d 862, 863, 356 N.E.2d 477, 477, 387 N.Y.S.2d 1005, 1005 (1976); People v. Martin, 47 A.D.2d 883, 884, 367 N.Y.S.2d 8, 9-10 (1st Dep't 1975); People v. Renaghan, 40 A.D.2d 150, 152, 338 N.Y.S.2d 125, 127-28 (1st Dep't 1972).

[50] Keenan v. Gigante, 47 N.Y.2d 160, 390 N.E.2d 1151, 417 N.Y.S.2d 226 (1979); People v. McGrath, 46 N.Y.2d 12, 29, 385 N.E.2d 541, 549, 412 N.Y.S.2d 801, 809-10 (1979); Second Additional Grand Jury v. Cioffi, 8 N.Y.2d 220, 168 N.E.2d 663, 203 N.Y.S.2d 841 (1960); DiBiasi v. Schweitzer, 22 A.D.2d 684, 253 N.Y.S.2d 425 (1st Dep't 1964).

[51] People v. Breindel, 73 Misc.2d 734, 737-38, 342 N.Y.S.2d 428, 431-33, (Sup. Ct. 1973), *aff'd*, 45 A.D.2d 691, 356 N.Y.S.2d 626 (1st Dep't 1974), *aff'd*, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974).

[52] People v. Ianniello, 36 N.Y.2d 137, 325 N.E.2d 146, 365 N.Y.S.2d 821 (1975); Ruskin v. Detken, 32 N.Y.2d 293, 297, 298 N.E.2d 101, 103-04, 344 N.Y.S.2d 933, 935-36 (1973); *see also* Zicarelli v. New Jersey, 406 U.S. 470, 476-77 (1972).

defense.[53] Sincere religious beliefs or the concern of one spouse for another do not negate an intentional refusal to answer.[54]

In contrast to Penal Law contempt, neither Judiciary Law section 750(A)(3), nor the cases construing it, define "willfulness." In *dicta*, the 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."[55] How can one be more or less willful than willful? As a rule-of-thumb expression, "level of willfulness" is uninformative. Viewed as a roughly stated burden of proof for Judiciary Law criminal contempt, it is superfluous to the required standard of "beyond a reasonable doubt."[56] Statements such as "[i]n the absence of a specification that the contempt was criminal and without a finding of willful disobedience, the alleged contempt must be considered . . . civil"[57] are similarly uninformative. Judiciary Law civil contempt requires "reasonable certainty."[58] A lower "level of willfulness" appears no more at home with "reasonable certainty" than with "beyond a reasonable doubt."

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[53] Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961); Simkin v. United States, 715 F.2d 34 (2d Cir. 1983); People v. Clinton, 42 A.D.2d 815, 815-16, 346 N.Y.S.2d 345, 346-47 (3d Dep't 1973); People v. Gumbs, 124 Misc.2d 564, 478 N.Y.S.2d 513 (Sup. Ct. 1984).

[54] Smilow v. United States, 465 F.2d 802 (2d Cir.), *vacated on other grounds*, 409 U.S. 944 (1972); *In re* Grand Jury Proceedings, 776 F.2d 1099, 1102-04 (2d Cir. 1985); People v. Woodruff, 26 A.D.2d 236, 272 N.Y.S.2d 786 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1968); *In re* Fuhrer, 100 Misc.2d 315, 419 N.Y.S.2d 426 (Sup. Ct.), *aff'd on opinion below*, 72 A.D.2d 813, 421 N.Y.S.2d 906 (2d Dep't 1979).

[55] McCormick v. Axelrod, 59 N.Y.2d 574, 583, 453 N.E.2d 508, 512, 466 N.Y.S.2d 279, 283, *amended*, 60 N.Y.2d 652, 454 N.E.2d 1314, 467 N.Y.S.2d 571 (1983).

[56] County of Rockland v. Civil Serv. Employees Ass'n, Inc., 62 N.Y.2d 11, 14, 464 N.E.2d 121, 122, 475 N.Y.S.2d 817, 818 (1984).

[57] Sentry Corp. v. New York City Off-Track Betting, 75 A.D.2d 344, 345, 429 N.Y.S.2d 902, 903 (1st Dep't 1980).

[58] *McCormick*, 59 N.Y.2d at 582, 453 N.E.2d at 512, 466 N.Y.S.2d at 283; N.A. Dev. Co., Ltd. v. Jones, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363, 366-67 (1st Dep't 1984).

"Willfulness" need mean no more than knowing and intentional as determined in federal cases.[59] Criminal contempt in the second degree,[60] *inter alia*, uses the words "intentional" and "knowingly" and mirrors the Judiciary Law's criminal contempt statute[61] in most other material respects. "Knowing" and "intentional," under contemporary standards of due process, seem to be as good a definition of "willfulness" as any. The phrase "level of willfulness" would best be laid to rest.

B. Testimonial Evasive Contempt

Criminal contempt by evasive testimony, no matter how sanctioned, has numerous judicial definitions which are distinct, similar and sometimes contradictory.[62] Capturing the cumulative essence of these definitions would merely add another definitional shade to the word "evasive." Essentially, definitions of evasive testimonial contempt describe a crime of the intellect to be apprehended only by other intellects. The trick is to give meaningful factual content to whatever definition the court selects in a given case.

The distinction between evasive testimonial contempt and perjury is sometimes obscured. Every falsehood is an evasion, and

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[59] United States v. Armstrong, 781 F.2d 700, 706 (9th Cir. 1985); *see also* United States v. Nightingale, 703 F.2d 17, 18-19 (1st Cir. 1983); Goldfine v. United States, 268 F.2d 941, 945 (1st Cir. 1959).

[60] N.Y. PENAL LAW § 215.50.

[61] N.Y. JUD. LAW § 750.

[62] People v. Gottfried, 61 N.Y.2d 617, 619, 459 N.E.2d 1281, 1281, 471 N.Y.S.2d 844, 844 (1983); People v. Arnette, 58 N.Y.2d 1104, 1106, 449 N.E.2d 711, 712, 462 N.Y.S.2d 817, 818 (1983); People v. Schenkman, 46 N.Y.2d 232, 237, 385 N.E.2d 1214, 1216-17, 413 N.Y.S.2d 284, 286-87 (1978); People v. Ianniello, 36 N.Y.2d 137, 142, 325 N.E.2d 146, 147, 365 N.Y.S.2d 821, 824 (1975); People v. Renaghan, 33 N.Y.2d 991, 992, 309 N.E.2d 425, 425, 453 N.Y.S.2d 962, 963 (1974) (Brietel, J., dissenting); People v. Saperstein, 2 N.Y.2d 210, 216-17, 140 N.E.2d 252, 255-56, 159 N.Y.S.2d 160, 164-66 (1957); *In re* Investigation by the Regular Grand Jury, 278 A.D. 206, 212-13, 104 N.Y.S. 414, 420-21 (2d Dep't 1951); Steingut v. Imrie, 270 A.D. 34, 48, 558 N.Y.S.2d 775, 779 (3d Dep't 1945); Finkel v. McCook, 247 A.D. 57, 62, 286 N.Y.S.2d 755, 759-60 (1st Dep't 1936).

every evasion, by necessity, amounts to some degree of falsehood.[63] Is there a type or degree of falsehood amounting to a refusal to answer? Are there types of evasive testimony which are also perjurious? An answer such as, "How now brown cow" is obviously a nonanswer. "I can't remember whether I've been married more than a week," by contrast, is evasive and, absent perpetual insobriety or insanity, perjurious.

In New York, an indictment charging perjury and contempt for the same answer is entirely proper. In addition, there are types of egregiously and conspicuously perjurious answers which may subject the witness to Judiciary Law contempt sanctions because these "answers" are no answers at all. They are deemed nonanswers if they suggest not the slightest possibility of truthfulness, present no credibility issue and *actually obstruct* the proceedings in which they are given.[64] If the law has any power at all, it has the power to deal summarily with a sham, untruthful answer intended to fob off inquiry.

C. Proof of Criminal Contempt by Evasive Testimony

Proof of criminal contempt "stands or fails on the basis of the record of testimony, without regard to collateral proof."[65] Sometimes the transcript must be redacted to exclude unwarrantedly

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[63] People *ex rel.* Valenti v. McCloskey, 8 A.D.2d 74, 78, 185 N.Y.S.2d 952, 956 *rev'd on other grounds*, 6 N.Y.2d 390, 160 N.E.2d 647, 189 N.Y.S.2d 898 (1959).

[64] Ruskin v. Detken, 32 N.Y.2d 293, 297, 298 N.E.2d 101, 103-04, 344 N.Y.S.2d 933, 935-36 (1973); *Valenti*, 8 A.D.2d at 74, 185 N.Y.S.2d at 952; *Finkel*, 247 A.D. at 62-63, 286 N.Y.S. at 762 ; *see also Ex parte* Hudgings, 249 U.S. 378, 383 (1919); Clark v. United States, 289 U.S. 1, 12 (1933); *In re* Michael, 326 U.S. 224, 228 (1945); United States v. McGovern, 60 F.2d 880, 889 (2d Cir. 1932); United States v. Appel, 211 F. 495, 496 (S.D.N.Y. 1913).

[65] People v. Roseman, N.Y.L.J., July 7, 1978, at 7 (Sup. Ct.), *aff'd*, 78 A.D.2d 878, 433 N.Y.S.2d 25 (1st Dep't 1980); People v. Hirsch, N.Y.L.J., Feb. 13, 1979, at 12 (Sup. Ct.); People v. Paperno, 98 Misc.2d 99, 103, 413 N.Y.S.2d 975, 981 (Sup. Ct. 1979), *rev'd on other grounds*, 77 A.D.2d 137, 432 N.Y.S.2d 499 (1st Dep't 1980), *rev'd*, 54 N.Y.2d 294, 429 N.E.2d 797, 445 N.Y.S.2d 119 (1981); People v. Knyper, N.Y.L.J., Oct. 5, 1978, at 5 (Sup. Ct.); People v. Marinaccio, 90 Misc.2d 128, 130, 393 N.Y.S.2d 904, 906 (Sup. Ct. 1977).

prejudicial matters. But where evasiveness takes the form of a feigned inability to recall, the entire transcript may be admissible (with prejudicial, but probative matters) to demonstrate an otherwise precise memory.[66]

New York Court of Appeals *dictum* has brought some confusion into the law about proving criminal contempt. In affirming a contempt conviction based on feigned lack of recollection, the court reaffirmed the principle that contempt "is not grounded . . . on the truth or falsity of the answer," but rather on the premise that the answer "is no answer at all and . . . thus tantamount to a refusal to answer."[67] This in mind, the court held it "unnecessary" to determine whether the event assumed by the inquiry actually did or did not occur. However, the court added a footnote: "We do not suggest that evidence that the event . . . did occur would be inadmissible if offered by the People, or that evidence that it did not occur would be inadmissible if offered on behalf of the defendant."[68]

The footnote seems ill-considered for several reasons. First, the footnote is logically inconsistent with the rule enunciated in its parent text. If contempt is not to be founded on the truth or falsity of an answer's content, but on whether the answer is an answer at all, proof of whether the underlying event in fact transpired is totally irrelevant. Second, the footnote obscures the fundamental distinction between perjury[69] and contempt.[70] Third, where an indictment charges contempt through feigned lack of recollection,

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[66] *See Gottfried*, 61 N.Y.2d at 620, 459 N.E.2d at 1282, 471 N.Y.S.2d at 845. *Compare* People v. McGrath, 57 A.D.2d 405, 413, 394 N.Y.S.2d 885, 890 (1st Dep't 1977), *rev'd on other grounds*, 46 N.Y.2d 12, 385 N.E.2d 541, 412 N.Y.S.2d 801 (1978) *with* People v. Saperstein, 2 N.Y.2d 210, 216-17, 140 N.E.2d 252, 255-56, 159 N.Y.S.2d 160, 164-65 (1957).

[67] People v. Fischer, 53 N.Y.2d 178, 184, 423 N.E.2d 349, 351, 440 N.Y.S.2d 872, 874 (1981).

[68] *Fisher*, 53 N.Y.2d at 184 n.3, 423 N.E.2d at 352 n.3, 440 N.Y.S.2d at 875 n.3.

[69] Perjury is defined as a "false statement knowingly made . . . as to some matter material to the issue or point in question." BLACK'S LAW DICTIONARY 1139 (6th ed. 1990).

[70] Contempt is defined as a "willful disregard or disobedience of a public authority." BLACK'S LAW DICTIONARY 318 (6th ed. 1990).

evidence that the underlying event did or did not occur proves that the evasive nonanswer was a lie (perjury), a crime not charged in the indictment. Fourth, assuming that the underlying event did or did not in fact occur, the exclusive question still remains whether the lack of recollection of such event or nonevent was feigned (contempt) or genuine (innocence). Fifth, the court's footnote is contradictory of its parent text insofar as it posits that evidence regarding the underlying event is admissible but "unnecessary." In law, the "unnecessary" smacks of the irrelevant and immaterial. One federal court has held that a Sixth Amendment claim (right to summon witnesses) based on reasoning similar to that contained in the court's footnote to be "not only without substance *but [bordering] on the specious*."[71]

The court's footnote may be harmonized with logic and rules of evidence only if confined to indictments charging *both* contempt and perjury for the same answer. A witness who states, "I don't recall" when he or she does recall, is lying *and* is being evasively contemptuous. Proof concerning the occurrence of the event which is the subject of inquiry, one way or the other, would clearly be admissible on the perjury count, with neither policy nor logic proscribing a guilty verdict for either perjury or contempt or both.[72]

D. Admonishing an Evasively Contemptuous Grand Jury Witness

A prosecutor confronted by an evasive grand jury witness once faced a potentially "no win" situation. Warning the witness about contempt risked an accusation that the witness was unfairly prejudiced before the grand jury, which ultimately indicted him for contempt. Doing nothing invited a claim that the witness was

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[71] Stahl v. New York, 520 F. Supp. 221, 225 (S.D.N.Y. 1981) (emphasis added).

[72] People v. Gottfried, 61 N.Y.2d 617, 459 N.E.2d 1281, 471 N.Y.S.2d 844 (1983); People v. Schenkman, 46 N.Y.2d 232, 385 N.E.2d 1214, 413 N.Y.S.2d 284 (1978); People v. Hirsch, 83 A.D.2d 811, 441 N.Y.S.2d 811 (1st Dep't 1981).

wrongfully lulled into believing that his or her answers were responsive.[73]

This dilemma has been resolved. First, a prosecutor *must, plainly and correctly*, inform witnesses of the scope of their immunity from criminal prosecution.[74] Second, the prosecutor *should* also advise the witnesses that their immunity will not shield them from perjury or contempt.[75] Third, while not required to do so, a prosecutor, where appropriate, may repeat questions evaded. Fourth, the prosecutor may remind and admonish evasive witnesses about the perils of contempt (and perjury) in a good faith effort to encourage responsiveness. This final option, however, is not a license to prejudice a grand jury against a witness by registering disappointment with otherwise responsive answers under the guise of admonishment.[76]

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[73] *Compare* People v. Cutrone, 50 A.D.2d 838, 376 N.Y.S.2d 593 (2d Dep't 1975) *with* People v. Didio, 60 A.D.2d 978, 978-79, 401 N.Y.S.2d 640, 640-42 (4th Dep't 1978).

[74] People v. Masiello, 28 N.Y.2d 287, 270 N.E.2d 305, 321 N.Y.S.2d 577 (1971); *see, e.g.*, Stevens v. Marks, 383 U.S. 234, 246 (1966) (holding that a "witness has . . . a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him."); People v. Tramunti, 29 N.Y.2d 28, 29, 272 N.E.2d 66, 67, 323 N.Y.S.2d 687, 688 (1971) (stating that the prosecutor's immunity advice was almost unintelligible); *see also* People v. Mulligan, 29 N.Y.2d 20, 27 N.E.2d 62, 323 N.Y.S.2d 681 (1971); People v. Sparaco, 39 A.D.2d 753, 332 N.Y.S.2d 351 (2d Dep't 1972) (Shapiro, J., dissenting), *aff'd*, 32 N.Y.2d 652, 295 N.E.2d 653, 342 N.Y.S.2d 854 (1973).

[75] People v. Rappaport, 47 N.Y.2d 308, 313-14, 391 N.E.2d 1284, 1287-88, 418 N.Y.S.2d 306, 308-10 (1979).

[76] People v. Rappaport, 60 A.D.2d 565, 565-66, 400 N.Y.S.2d 351, 352 (1st Dep't 1977), *aff'd*, 47 N.Y.2d 308, 391 N.E.2d 1284, 418 N.Y.S.2d 306 (1979); People v. Roseman, N.Y.L.J., July 7, 1978, at 7 (Sup. Ct.), *aff'd*, 78 A.D.2d 878, 433 N.Y.S.2d 25 (1st Dep't 1980); People v. Hirsch, N.Y.L.J., Feb. 13, 1979, at 12 (Sup. Ct.); People v. Knyper, N.Y.L.J., Oct. 5, 1978, at 5 (Sup. Ct.); *see also* People v. Davis, 53 N.Y.2d 164, 423 N.E.2d 341, 440 N.Y.S.2d 864 (1981); People v. Pomerantz, 46 N.Y.2d 240, 385 N.E.2d 1218, 413 N.Y.S.2d 288 (1978); People v. Tyler, 46 N.Y.2d 251, 385 N.E.2d 1224, 413 N.Y.S.2d 295 (1978); *Schenkman*, 46 N.Y.2d at 232, 385 N.E.2d at 1214, 413 N.Y.S.2d at 284.

E. News Media as Grand Jury Witnesses

In New York, the news media and the grand jury present a special problem because the state legislature has granted unwarranted, special treatment to journalists. Be it ever so legislated, there is no privilege like a reporter's to snoop, scoop and "clam up." By either privilege or exemption, New York's Civil Rights Law has precluded the use of the contempt sanction against journalists who refuse to divulge their sources to grand and petit juries.[77] Does this "shield law" tread on the separation of powers doctrine in that it removes from the judiciary the power to enforce orders necessary to its conduct of grand and petit jury proceedings? Is a Court of Appeals decision holding that the shield law does not impair or suspend the state constitutional power of grand juries to investigate misconduct in public office the product of reasoned analysis or judicial *ipse dixit* impelled by hydraulic forces of the moment? May it at some point interfere with the governor's state constitutional duty to take care that the laws are faithfully executed?[78] Does the shield law become an intolerable luxury when a reporter withholds vital inculpatory or exculpatory evidence in a murder case? Regarding the crime of unlawful grand jury disclosure, does the shield law not only protect the corrupt reporter but also confer *de facto* immunity on a prosecutor turned divulging felon? In short, does the shield law place certain people aside if not

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[77] N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney 1993).

[78] N.Y. CONST. Art. I § 4; Art. IV § 3; Knight-Ridder Broadcasting, Inc. v. Greenberg, 70 N.Y.2d 151, 511 N.E.2d 116, 518 N.Y.S.2d 595 (1987); Beach v. Shanley, 62 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (1984); Oak Beach Inn v. Babylon Beacon, 62 N.Y.2d 158, 164-66, 464 N.E.2d 967, 969-70, 476 N.Y.S.2d 269, 271-72(1984); *see also* Stern v. Morgenthau, 62 N.Y.2d 331, 335, 465 N.E.2d 349, 350-51, 476 N.Y.S.2d 810, 811-12 (1984) (dicta); Sharon v. Time, Inc., 599 F. Supp. 538, 582-83 (S.D.N.Y. 1984). *See generally* O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988); *cf.* Branzburg v. Hayes, 408 U.S. 632 (1972) (*unanimously cited with approval in* University of Pa. v. E.E.O.C., 493 U.S. 182, 190-200 (1990)); United States v. Cutler, 6 F.3d 67 (2d Cir. 1993) (Supreme Court and Second Circuit largely rejected the rationales offered by the press and legislators in support of New York's Shield Law).

above the law and its right to everyone's evidence? The courts, legislature and the bar are still struggling with these questions. This author strongly believes that there are "babies in the bath water" of Civil Rights Law section 79-h(b), shrill arguments of the "First Amendment lobby" to the contrary notwithstanding. Time will tell.[79]

III. PUNISHING CONTEMPT

A clear, communicated court order is the indispensable predicate for virtually all Judiciary and Penal Law contempts. One cannot be held in contempt for disobeying an uncommunicated or vague court order (or grand or trial jury subpoena issued by a prosecutor, which is also considered a court mandate). However, court orders generally need not take any special physical form or mode of delivery.[80] Although formal service of a court order may emphasize expected obedience, knowledge of the order, however

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[79] Newly enacted Civil Rights Law §§ 79-h(c)-(g) also shields nonconfidential sources—a possible infringement of a defendant's Sixth Amendment rights. *See, e.g.*, LAWRENCE N. GRAY, THE GRAND JURY IN NEW YORK (1994):

> Consider the following wild hypothetical: A newspaper reporter is walking down Fifth Avenue and sees a Court of Appeals Judge's son—now a famous defense attorney—shot to death. He clearly saw the gunman and will not forget his face as long as he lives. Being eager for promotion, his 17-column *exclusive* story is on the network news and the newsstands within an hour. The murderer is so impressed that he begins to *confidentially* phone the reporter with the "whys" and "wherefores" of his nefarious deed, part of which was the victim's expected *alibi* testimony in a murder case presently on trial where *this* murderer, *not the defendant in the dock*, is the true culprit. Can the law make the reporter talk or has Civil Rights Law § 79 h(b)-(g) become misprision of felony?

[80] International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1976); Daly v. Amberg, 126 N.Y. 490, 494, 495-96, 27 N.E. 1038, 1039-40 (1891); Holtzman v. Beatty, 97 A.D.2d 79, 468 N.Y.S.2d 905 (2d Dep't 1983); *see also* Pereira v. Pereira, 35 N.Y.2d 301, 308, 319 N.E.2d 413, 417-18, 361 N.Y.S.2d 148, 153-54 (1974); *In re* Wilson, 98 A.D.2d 666, 469 N.Y.S.2d 735 (1st Dep't 1983); Puro v. Puro, 39 A.D.2d 873, 333 N.Y.S.2d 560 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 805, 305 N.E.2d 778, 350 N.Y.S.2d 658 (1973); Martin v. Raffin, 2 Misc. 588 (N.Y.C. Mun. Ct. 1893).

obtained, is dispositive.[81] Therefore, once a court order is communicated, the contemnor must either stay the order or obey it.

Four caveats about responding to court orders are appropriate here. First, if knowledge of a court's order is initially imparted to an intermediary, that person must either remain silent or counsel obedience, for one who aids or advises disobedience is as guilty as one who actually disobeys.[82] Second, a court's order endures through the appellate process, though its enforcement may be stayed.[83] Third, absent a stay pending appeal, all court orders not void on their face (e.g., "go kill someone") must be promptly obeyed, even if they are later ruled incorrect. Judgmental error in failing to obtain a stay or "good faith disobedience" is not a defense to a contempt citation or conviction.[84] Fourth, a motion relating to, or an appeal from, a contempt citation or conviction may not be used to revive a challenge to an order which was never stayed or challenged *ab initio*.[85]

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[81] Generally, this knowledge must be personal, not imputed. McCormick v. Axelrod, 59 N.Y.2d 574, 583, 453 N.E.2d 508, 513, 466 N.Y.S.2d 279, 283, *amended*, 60 N.Y.2d 652, 454 N.E.2d 1314, 467 N.Y.S.2d 571 (1983); *In re* Kaplan, 8 N.Y.2d 214, 219-20, 168 N.E.2d 660, 662, 203 N.Y.S.2d 836, 839-40 (1960); Spector v. Allen, 281 N.Y. 251, 258, 22 N.E.2d 360, 363-64 (1939); People *ex rel.* Drake v. Andrews, 197 N.Y. 53, 56, 90 N.E. 347, 348 (1909); People *ex rel.* Davis v. Sturtevant, 9 N.Y. 263, 277-78 (1853).

[82] *McCormick*, 59 N.Y.2d at 584, 453 N.E.2d at 513, 466 N.Y.S.2d at 284 (citing People *ex rel.* Drake v. Andrews, 197 N.Y. 53, 90 N.E. 347 (1909); People *ex rel.* Stearns v. Marr, 181 N.Y. 463, 74 N.E. 431 (1905)); *In re* Goodson, 635 S.W.2d 226 (Ark. 1982), *cert. denied*, 459 U.S. 1154 (1983); King v. Barnes, 113 N.Y. 476, 479-80, 21 N.E. 182, 182-83 (1889).

[83] People *ex rel.* Platt v. Rice, 144 N.Y. 249, 262, 39 N.E. 88, 92 (1894).

[84] Maness v. Meyers, 419 U.S. 449, 458 (1975); United States v. United Mine Workers, 330 U.S. 258, 290-93 (1947); Kleiner v. First Nat. Bank, 751 F.2d 1193, 1207-09 (11th Cir. 1985); Balter v. Regan, 63 N.Y.2d 630, 468 N.E.2d 688, 479 N.Y.S.2d 506 (1984); People *ex rel.* Negus v. Dwyer, 90 N.Y. 402, 408-09 (1882); Kampf v. Worth, 108 A.D.2d 841, 842, 485 N.Y.S.2d 344, 345 (2d Dep't 1985). *Compare* Walker v. City of Birmingham, 388 U.S. 307 (1969) *with* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); *In re* Green, 369 U.S. 689 (1962).

[85] *See* People *ex rel.* Sassower v. Cunningham, 112 A.D.2d 119, 492 N.Y.S.2d 608 (1st Dep't 1985); *see also* United States v. Nightingale, 703 F.2d 17, 18-19 (1st Cir. 1983) (applying Maggio v. Zeitz, 333 U.S. 56, 69 (1948)).

A grand jury subpoena may also predicate Penal and Judiciary Law criminal contempts. A valid subpoena, which must be in writing,[86] is a mandate of the court[87]—for contempt purposes, it is "jurisdictional and conclusive."[88] To the contrary, an oral direction from a prosecutor or the grand jury is not a court mandate. Registered letters and understandings between counsel are not considered court mandates either.[89]

Assuming sufficient service of a valid subpoena, the prosecution must prove a prima facie case beyond a reasonable doubt to establish Penal or Judiciary Law criminal contempt for nonappearance.[90] Regarding disobedience to a subpoena *ad testificandum*, a prima facie case consists of proof of the subpoena's service and a failure to appear. After the People have established a prima facie case, the contemnor bears the burden of coming forward,[91] but not the burden of proof. It is not incumbent on the People to prove a contemnor's lack of good cause for nonappearance. This rule is grounded in policy because the circumstances constituting good cause for nonappearance rest peculiarly and almost exclusively within the personal knowledge of the contemnor.[92]

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[86] Spector v. Allen, 281 N.Y. 251, 260, 22 N.E.2d 360, 364-65 (1939); *In re* Barbara, 7 A.D.2d 340, 343, 183 N.Y.S.2d 147 (3d Dep't 1959); People v. McIntosh, 199 A.D.2d 540, 606 N.Y.S.2d 248 (2d Dep't 1993); *In re* Mullen, 177 Misc. 734, 31 N.Y.S.2d 710 (Sup. Ct. 1941).

[87] *Spector*, 281 N.Y. at 259, 22 N.E.2d at 364; Manning v. Valente, 272 A.D. 358, 361,72 N.Y.S.2d 88, 91-92 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947); *see also* People *ex rel.* Van Der Beek v. McCloskey, 18 A.D.2d 205, 209, 238 N.Y.S.2d 676 (1st Dep't 1963).

[88] *In re* Kaplan, 8 N.Y.2d 214, 219-20, 168 N.E.2d 660, 662, 203 N.Y.S.2d 836, 839-40 (1960).

[89] *Spector*, 281 N.Y. at 259, 260, 22 N.E.2d at 364-65; *Mullen*, 177 Misc. at 737, 31 N.Y.S.2d at 714. *See generally* Holtzman v. Beatty, 97 A.D.2d 79, 82-83 (2d Dep't 1983).

[90] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); County of Rockland v. Civil Serv. Employees Ass'n, 62 N.Y.2d 11, 14, 464 N.E.2d 121, 122, 475 N.Y.S.2d 817, 818 (1984); People v. D'Amato, 12 A.D.2d 439, 445, 211 N.Y.S.2d 877, 882 (1st Dep't 1961).

[91] *D'Amato*, 12 A.D.2d at 444-45, 211 N.Y.S.2d at 881-82; *accord* United States v. Fleischman, 339 U.S. 349, 362-64 (1950); Morrison v. California, 291 U.S. 82, 88-89 (1934); Rossi v. United States, 299 U.S. 89, 91-92 (1933).

[92] *D'Amato*, 12 A.D.2d at 445, 211 N.Y.S.2d at 882.

Proof of disobedience to a subpoena *duces tecum* has an added twist. In addition to proof of service and nonproduction, the prosecution must show some evidence that the subpoenaed documents exist and that the contemnor has actual or constructive control over them. Speculation, surmise or mere logical deduction, standing alone, are not legally sufficient substitutes for such proof.[93] However, once the prosecution proves existence and control, the burden of production, *not proof*, shifts to the contemnor. A contemnor may give a reasonable, good cause explanation in lieu of production or remain mute, and possibly go to jail.[94] It is certainly true that a document custodian may assert his Fifth Amendment privilege rather than come forward with a plausible explanation. But the custodian's privilege is not a substitute for proof of good cause noncompliance. Therefore, the court may not jail contemnors for refusing to testify about unproduced, subpoenaed documents,[95] but it may jail contemnors for their nonproduction if the documents are found to exist and the contemnors are found to have custody or control over them.[96]

In proving whether subpoenaed documents exist and whether a contemnor has custody or control of them, the law recognizes a doctrine called "the presumption of continued existence and possession."[97] This "presumption" is actually a permissible

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[93] People v. Shapolsky, 8 A.D.2d 122, 127, 185 N.Y.S.2d 639, 643-44 (1st Dep't 1959); *In re* Wegman's Sons, 40 A.D. 632, 633 (1st Dep't 1899); *see also* United States v. Bryan, 339 U.S. 323, 330, 331 (1950); United States v. Patterson, 219 F.2d 659 (2d Cir. 1955).

[94] Bleakley v. Schlesinger, 294 N.Y. 312, 62 N.E.2d 85 (1945); *Shapolsky*, 8 A.D.2d at 127, 128, 185 N.Y.S.2d at 643-45; *see also* Sigety v. Abrams, 632 F.2d 969 (2d Cir. 1980).

[95] Curcio v. United States, 354 U.S. 18 (1957); United States v. Edgerton, 734 F.2d 913, 920, 921 (2d Cir. 1984); Triangle Publications, Inc. v. Ferrare, 4 A.D.2d 591, 168 N.Y.S.2d 128 (3d Dep't 1957); Bradley v. O'Hare, 2 A.D.2d 436, 156 N.Y.S.2d 533 (1st Dep't 1956).

[96] United States v. Rylander, 460 U.S. 752 (1983); *Bleakley*, 294 N.Y. at 316-17, 62 N.E.2d at 86-87; Kuriansky v. Azam, 176 A.D.2d 943, 944, 575 N.Y.S.2d 679, 680 (2d Dep't 1991); American Cyanamid v. Fox, 36 Misc.2d 1070, 234 N.Y.S.2d 364 (Sup. Ct. 1962). *See generally* Kirtley v. Abrams, 184 F. Supp. 65 (E.D.N.Y. 1960).

[97] "Possession," of course, may be physical, constructive, or authoritative. For example, a warehouse manager for IBM would have physical possession of

inference or, even more precisely, a common sense reasoning process. Existence and present possession or control, depending on the nature of the documents themselves and surrounding circumstances, may be inferred from proof of their prior existence and possession by a contemnor.[98] For example, books and records do not self-destruct. They are not perishable fruit sold by street corner peddlers. Their value is almost exclusive to their owner. They are not articles of commerce flowing in and out of the marketplace. Generally, businesses have a substantial interest in maintaining their records. Based on these commonplace understandings, the law gives prosecution-petitioners "the presumption of continued existence and possession" as an aid to establishing a prima facie case of disobedience to a subpoena *duces tecum.*

Although it is designed to aid the establishment of a prima facie case, the presumption of continued existence and possession is not a substitute for good judgment. The presumption is intended to aid reason, not override it. Contempt proceedings concerning subpoenaed documents are not intended to be experiments in coercion. Credibility assessments are critically important. By parity of reasoning, these considerations apply equally to the good cause explanations offered by contemnors in lieu of production. Although metaphysical certainty that documents exist and are in the control of the contemnor is not required, good cause explanations must be believable and believed.[99]

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documents and records while on the premises. At home with the keys to the warehouse, the manager would have constructive possession. IBM's chief executive officer, who need only lift up the phone and order the manager to produce the documents and records, would have authoritative possession and control.

[98] Maggio v. Zeitz, 333 U.S. 56, 65-66 (1948); People v. Shapolsky, 8 A.D.2d 122, 127, 128, 185 N.Y.S.2d 639, 643-45 (1st Dep't 1959); *see also* United States v. Patterson, 219 F.2d 659 (2d Cir. 1955); Brune v. Fraidin, 149 F.2d 325 (4th Cir. 1945); *In re* Arctic Garment Co., 99 F.2d 871 (2d Cir. 1937).

[99] Nilva v. United States, 352 U.S. 285, 295 (1957); *Maggio*, 333 U.S. at 66; Combs v. Ryan's Coal Co., 785 F.2d 970, 983 (11th Cir. 1986); Sigety v. Abrams, 632 F.2d 969, 977 (2d Cir. 1980); United States v. Johnson, 247 F.2d 5, 8 (2d Cir. 1957); Lopiparo v. United States, 216 F.2d 87, 91 (8th Cir. 1954); United States v. Goldstein, 105 F.2d 150, 152 (4th Cir. 1939).

Even after a contemptuous act has been committed, the court may not punish a witness for refusing to testify or produce evidence "unless the court is shown that the evidence demanded may be relevant and proper."[100] This judicially created proviso has been grafted onto the Judiciary Law criminal contempt statute[101] regarding contemptuous grand and trial jury witnesses. Neither the source nor the rationale for this proviso, however, is entirely clear. It may be that, because courts in Judiciary Law criminal contempt proceedings are exercising their inherent powers (restricted, but not conferred by statute), they have the concomitant inherent power to require a pre-punishment materiality showing as both a shield against oppression and a sword vindicating a witness's right to refuse to provide irrelevant evidence.[102]

Prior to imposing punishment for contempt, the court must form an "intelligent estimate of the evidence's relevancy," commonly referred to as "materiality." A contemnor, however, is not entitled to a hearing on this issue.[103] "Materiality" does not have a rigid calculus and is not a matter of degree. For grand jury purposes it is "necessarily a term of broader import than when applied to evidence at trial."[104] Materiality is not a matter on which a court may substitute its judgment for that of a grand or petit jury by speculating about the probable importance of evidence.[105]

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[100] Virag v. Hynes, 54 N.Y.2d 437, 445, 430 N.E.2d 1249, 1253, 446 N.Y.S.2d 196, 200 (1981); Spector v. Allen, 281 N.Y. 251, 257, 22 N.E.2d 360, 363 (1939); Manning v. Valente, 272 A.D. 358, 362, 72 N.Y.S.2d 88, 92-93 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947).

[101] N.Y. JUD. LAW § 750.

[102] Additional Jan. 1979 Grand Jury v. Doe, 50 N.Y.2d 14, 21, 405 N.E.2d 194, 199, 427 N.Y.S.2d 950, 955 (1980); People v. Ianniello, 21 N.Y.2d 418, 425, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 468 (1968).

[103] Gold v. Menna, 25 N.Y.2d 475, 482, 255 N.E.2d 235, 238-39, 307 N.Y.S.2d 33, 38-39 (1969); Koota v. Colombo, 17 N.Y.2d 147, 150, 216 N.E.2d 568, 568, 269 N.Y.S.2d 393, 394, *cert. denied*, 384 U.S. 1001 (1966); *Spector*, 281 N.Y. at 258, 22 N.E.2d at 363-64; *Manning*, 272 A.D. at 362, 72 N.Y.S.2d at 92-93.

[104] *Virag*, 54 N.Y.2d at 444, 430 N.E.2d at 1253, 446 N.Y.S.2d at 200; *cf.* People v. Scarola, 71 N.Y.2d 769, 777 (1988).

[105] Manning v. Valente, 272 A.D. 358, 362, 72 N.Y.S.2d 88, 92-93 (1st Dep't), *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947); Vanderbilt v. Hickey, 87 A.D.2d 528, 529, 448 N.Y.S.2d 3, 5-6 (1st Dep't), *rev'd on other grounds*, 57

Penal Law criminal contempt does not require the same materiality showing as Judiciary Law criminal contempt. Regarding mere physical evidence, Penal Law criminal contempt in the second degree,[106] practically the mirror image of Judiciary Law criminal contempt,[107] does *not* require a materiality showing, let alone proof thereof. Regarding a refusal to testify, Penal Law criminal contempt in the second degree uses the elements "legal and proper," as does Judiciary criminal contempt, rather than materiality.[108] Conviction of criminal contempt in the second degree may be based on the same evidence that would underpin an adjudication of Judiciary Law criminal contempt. Penal Law criminal contempt in the first degree,[109] only for testimony refused before a grand jury, also diverges from the materiality requirement of Judiciary Law criminal contempt. The prosecution cannot convict on first degree criminal contempt without "proving" the legality and propriety of *testimony* demanded of a *grand jury witness*. A "legal" demand for testimony is one that violates no right or privilege of a witness and is material to the proceedings.[110] A "proper" demand is one that is "fit, suitable or appropriate."[111] In all instances, whether demanded testimony is legal and proper is a question of law.[112] Thus, on a trial for first degree criminal contempt, once a trial court determines legality and propriety, it should charge the jury on these elements as it would on any other question of law.[113] Criminal contempt in the first

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N.Y.2d 66, 439 N.E.2d 378, 453 N.Y.S.2d 662 (1982); *In re* Greenleaf, 176 Misc. 566, 570 (Gen. Sess. N.Y. Cty. 1941).

[106] N.Y. PENAL LAW § 215.50(3).

[107] N.Y. JUD. LAW § 750(A)(3), (4).

[108] These elements are questions of law for the court, not the jury, which will decide the other factual elements of the crime. This issue is discussed in greater detail *infra* pp. 109-110.

[109] N.Y. PENAL LAW § 215.51.

[110] *In re* Barnes, 204 N.Y. 108, 125, 97 N.E. 508, 513 (1912) (Werner, J., concurring).

[111] People v. McAdoo, 45 Misc.2d 664, 257 N.Y.S.2d 763 (Crim. Ct. N.Y. Cty. 1965).

[112] People v. Ianniello, 36 N.Y.2d 137, 140, 145, 325 N.E.2d 146, 147, 149-50, 365 N.Y.S.2d 821, 822, 826-27 (1975).

[113] *Ianniello*, 36 N.Y.2d at 145-46, 325 N.E.2d at 149-50, 365 N.Y.S.2d at

and second degree for testimonial contempt are the only crimes where specific elements of a crime are taken away from a jury and then charged to it as a matter of law.

Regarding grand jury witnesses, the Judiciary Law's materiality proviso, coupled with the legality-propriety elements of Penal Law criminal contempt in the first, but not second degree (and only in regard to documentary evidence), creates something of an anomaly. Criminal contempt in the first degree requires publication of the purpose of a grand jury's investigation to prove the legality and propriety of demanded testimony. First degree criminal contempt carries a penalty of up to four years imprisonment. Criminal contempt in the second degree, as applied to a grand jury witness who defies a court mandate to produce documents,[114] contains no legality-propriety element or materiality proviso, and thus requires no disclosure of the nature of a grand jury's investigation. Conviction for second degree criminal contempt may bring one year in jail. In contrast, Judiciary Law criminal contempt, utilized to punish the same types of conduct, carries a penalty of up to thirty days in jail and a $1,000 fine—enough to make a martyr, but not severely punish. Nevertheless, Judiciary Law criminal contempt, according to the New York Court of Appeals, requires a showing of materiality and, therefore, publication of the grand jury's investigation.[115]

The judiciary should reconsider requiring the prosecution to make an open court showing of materiality in a Judiciary Law criminal contempt proceeding. Because Judiciary Law criminal contempt's judicially created proviso only requires that an intelligently estimating court be satisfied of materiality, and without a hearing thereon,[116] the nature of a grand jury's investigation need not be publicly disclosed in such a punishment-limited proceeding. An *in camera* materiality showing after public proof of disobedience to a court's mandate should suffice. Thirty days seems like little flesh to trade for compromising the secrecy of a grand jury's

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826-27.

[114] N.Y. PENAL LAW § 215.50 (3).

[115] Additional Jan. 1979 Grad Jury v. Doe, 50 N.Y.2d 14, 21, 405 N.E.2d 194, 200, 427 N.Y.S.2d 950, 956 (1980).

[116] *See supra* note 91.

investigation and the ever-present opportunity for witness tampering, harassment, or harm.[117]

IV. SUMMARY CONTEMPT: IMMEDIATE VIEW AND PRESENCE

"Upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it."[118] Courts have the inherent power "to impose silence, respect and decorum in their presence and submission to their lawful mandates, and . . . to preserve themselves and their officers from the approach of insults and pollution."[119] Examples of "immediate view-and-presence" contempt include refusing to leave the courtroom;[120] returning to the courtroom after being ordered to leave;[121] deliberately bringing witnesses back into the courtroom in defiance of an order previously excluding them;[122] and perjury on the witness stand during trial, *but only under* the "exceptional circumstance" where the witness obstructs the court in the performance of its duty.[123] The court can also enforce its summary contempt power against a grand jury witness who refuses, in the presence of the court, to answer questions before a grand jury.[124] In contrast, an accusation of bias or unfairness offered with a civil tongue is not contempt. Mere strenuous, even vociferous, advocacy is not considered contempt either.[125] But it must always be remembered that much

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[117] This argument has not as yet been offered to the courts for their imprimatur or condemnation.

[118] United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812).

[119] Anderson v. Dunn, 19 U.S. (6 Wheat) 204 (1821).

[120] Rodriguez v. Feinberg, 48 A.D.2d 971, 369 N.Y.S.2d 825 (3d Dep't 1975), *rev'd*, 40 N.Y.2d 994, 359 N.E.2d 665, 391 N.Y.S.2d 69 (1976).

[121] Gumbs v. Martinis, 40 A.D.2d 194, 338 N.Y.S.2d 817 (1st Dep't 1972).

[122] LaDuca v. Bergin, 86 A.D.2d 983, 448 N.Y.S.2d 318 (4th Dep't 1982).

[123] *In re* Michael, 326 U.S. 224, 228 (1945); *Ex parte* Hudgings, 249 U.S. 378, 383 (1919). *See generally* Clark v. United States, 289 U.S. 2 (1933).

[124] *In re* Epstein, 43 Misc.2d 987, 252 N.Y.S.2d 771 (Sup. Ct. 1964); *cf.* Harris v. United States, 382 U.S. 162 (1965).

[125] Eaton v. City of Tulsa, 415 U.S. 697 (1974); *In re* Little, 404 U.S. 553 (1972); Holt v. Virginia, 381 U.S. 131 (1965); *In re* McConnell, 370 U.S. 230 (1962); Marino v. Burstein, 72 A.D.2d 814, 421 N.Y.S.2d 904 (2d Dep't 1979).

depends on the speaker's tone of voice, facial expression and physical gesture.[126]

Contemptuous lawyers, defendants, or witnesses during jury trials present special concerns. The summary contempt power exists to control a courtroom, not to prejudice a defendant's right to a fair trial. But a judge is duty-bound to keep a trial based on rules of evidence and civility moving forward. Under case law and court rules, a judge need not wait until the end of trial to take actions against a lawyer's obstructive antics. If a court must use its summary power, it may do so by (1) removing the jury from the courtroom; (2) holding the contemptuous lawyer in contempt; (3) imposing punishment; (4) filling out a mandate of commitment to reflect the same; (5) staying execution of its mandate until the end of trial; (6) returning the jury to the courtroom; and (7) telling a chastened lawyer to proceed. The same procedure may be used in dealing with a contemptuous witness or defendant. However, the summary contempt power "is of limited utility in dealing with an incorrigible, a cunning psychopath, or an accused bent on frustrating the . . . trial or undermining the processes of justice,"[127] thus leaving binding, gagging, or summary removal from the courtroom as the truly effective remedies for these individuals.[128]

Contemptuous courtroom spectators present none of the aforementioned concerns about lawyers, defendants, or witnesses. As noted by Chief Judge Breitel, "Any particular spectator is quite dispensable as are all spectators if disorderly." They are "absolutely silent nonactors with the right only to use their eyes and ears."[129] Essentially, a disruptive courtroom spectator, absolutely stated and in the nature of things, should be readily subject to contempt punishment without any of the complications that apply to the trial's participants.

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[126] *Little*, 404 U.S. at 556 (Burger, C.J. & Rehnquist, J., concurring).

[127] Mayberry v. Pennsylvania, 400 U.S. 455, 467 (1971) (Burger, C.J. concurring).

[128] Illinois v. Allen, 397 U.S. 337 (1970); People v. Palermo, 32 N.Y.2d 222, 298 N.E.2d 61, 344 N.Y.S.2d 874 (1973).

[129] Katz v. Murtagh, 28 N.Y.2d 234, 240, 269 N.E.2d 816, 820, 321 N.Y.S.2d 104, 109 (1971).

Misbehavior in the immediate view and presence of the court, standing alone, does not wake the summary contempt power. The misbehavior must be, or threaten to be, an actual obstruction to the court's proceedings or authority. For example, one Cooke sent a nasty letter to a court, asking it to recuse itself on the ground of bias. The U.S. Supreme Court set aside his contempt citation. Cooke's conduct was not "an open threat to the orderly procedure of the Court and such a flagrant defiance of the person and presence of the judge before the public," which if not "instantly suppressed and punished demoralization of the court's authority would follow."[130]

Contempt may occur in a court's "presence" but not necessarily in its "immediate view." There is a difference between assaulting a court officer in the courtroom and "fixing" a petit juror in the cloakroom. Both actions are in the court's presence, but only the assault was in the court's immediate view, thus authorizing summary punishment without advance notice.[131] The former is a direct and immediate threat to the court's authority, the latter is not.[132] New York is bound by and agrees with the U.S. Supreme Court in its distinction between mere "presence," as opposed to "presence" plus "immediate view" contempts.[133]

New York courts may impose punishment for contemptuous behavior committed in their immediate view and presence within the parameters set by the Judiciary Law.[134] To say the least, Judiciary Law contempt statutes are specific and strictly construed.[135] In fact, the First and Second Departments of the

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[130] Cooke v. United States, 267 U.S. 517, 536 (1925).

[131] *Compare In re* Terry, 128 U.S. 289, 307-08 (1888) *with Ex parte* Savin, 131 U.S. 267, 277 (1889).

[132] Cooke v. United States, 267 U.S. 517, 536 (1925). *See generally* Young v. United States *ex rel.* Vuitton, 481 U.S. 787 (1987).

[133] *Katz*, 28 N.Y.2d at 237-39, 269 N.E.2d at 817-19, 321 N.Y.S.2d at 106-07; Douglas v. Adel, 269 N.Y. 144, 146-47, 199 N.E. 35, 36-37 (1935).

[134] *See* N.Y. JUD. LAW §§ 750(A)(1), (2), (3); 751 (1); 752 and 755. N.Y. PENAL LAW § 215.50(1) punishes "immediate-view-and-presence" contempt as a misdemeanor, though § 215.50(1) case law is nonexistent except for *People v. Giglio*, 74 A.D.2d 348, 428 N.Y.S.2d 27 (2d Dep't 1980).

[135] The federal counterparts are 18 U.S.C. § 401 and FED. R. CIV. P. 42 (a). This of course, is not to say that, on occasion, law clerks for the Supreme Court

New York Appellate Divisions have promulgated rules regulating the summary contempt power. Largely reflective of case law, the rules essentially provide that a court shall only impose summary contempt in exceptionally necessitous circumstances. For a New York court to exercise its summary contempt power, the offending conduct must actually disrupt or threaten to disrupt the proceedings and any alternative remedies must be insufficient.

Wherever practical, according to the New York Appellate Division rules, punishment for immediate-view-and-presence contempt should be determined and imposed at the time of the adjudication of contempt. Appellate Division rules in the First and Second Departments require that if a contempt in the immediate view and presence of the court is not punished as immediately as circumstances permit, the contempt may then be punished only after notice and plenary hearing.[136] But where advisable, adjudication of contempt may first occur with punishment *briefly* deferred. The contemnor must have a reasonable opportunity to make a statement in defense or extenuation prior to summary adjudication. Except for the most flagrant behavior requiring immediate action to preserve order, a contemnor should be warned and given an opportunity to desist. Where adjudication occurs immediately, but the contemnor desists from further misbehavior, the court may consider whether execution of punishment is necessary. In all other cases, the contempt shall be adjudicated at a plenary hearing with notice, written charges, assistance of counsel, compulsory process and the right of confrontation.[137]

In *Sacher v. United States*,[138] the U.S. Supreme Court emphasized the importance of timely and fair adjudications for summary

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and Courts of Appeals will not dig up "contempts of court are crimes in the ordinary sense" when they need this falsehood for a desired result. *See, e.g.*, United States v. Dixon, 113 S. Ct. 2849 (1993); International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552 (1994). *See generally* United States v. Barnett, 376 U.S. 681, 692-700 (1964).

[136] Werlin v. Goldberg, 129 A.D.2d 334, 336, 341-42, 917 N.Y.S.2d 745, 746, 749-50 (2d Dep't 1987); Zols v. Lakritz, 74 Misc.2d 322, 344 N.Y.S.2d 626 (Sup. Ct. 1973).

[137] 22 N.Y. COMP. CODES R. & REGS. tit. 22, §§ 604.2, 701.2, 701.3, 701.4 (1993).

[138] 343 U.S. 1, 5, 7, (1952).

contempt. Following a jury's verdict in a lengthy and extraordinarily contentious trial, one Sacher and other lawyers were summarily imprisoned for outrageously contemptuous conduct in the immediate view and presence of the court during trial. It was contended that the trial court's summary contempt power expired with the jury's verdict and, therefore, any contempt adjudication had to be on notice with an opportunity to defend.[139] In affirming the contempt, the U.S. Supreme Court held that "summary" does not refer to the timing of the summary contempt power's exercise but rather "to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process."[140] The purpose of process is only to inform a court of events not occurring within its personal knowledge. "Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise."[141] A contrary holding "would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment."[142] The Court said that summary contempt could be immediately imposed if delay would prejudice the trial.[143] On the other hand, if trial exigencies required, deferred action was also permissible.[144] The force of this logic notwithstanding, later Supreme Court decisions imported those difficulties inherent in either measuring or mitigating the effects of the summary contempt power—a power whose very existence depends on its purpose, which is instant punishment to maintain order in a courtroom.[145]

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[139] *Id.*

[140] *Id.* at 9.

[141] *Id.* at 9-10.

[142] *Id.* at 11.

[143] *Id.*

[144] *Id.*

[145] An "activist-seeking-combat" judge, according to the record, became personally embroiled with a contemptuous lawyer, did not act instantly, but instead held him in contempt after trial. In reversing, the Supreme Court stated that the pith of the summary contempt power is "that the necessities of the administration of justice require such dealing with obstruction to it." Offutt v. United States, 348 U.S. 11, 14 (1954). It is wholly unrelated to the judge's individual sensibilities, be they tender or rugged. "But judges also are human,

Summary punishment for contempt is a power peculiar to a unique evil, the relationship between which, courts, from early on, have characterized as "the least possible power adequate to the end proposed."[146] This characterization has been understood, misunderstood, deliberately applied and misapplied to achieve a desired result. Analytical, orderly, practical and comprehensible case law have commensurately suffered. The U.S. Supreme Court has obscured summary contempt's essence, which is a power derived from the implication of necessity, but extending no further than such implied necessity justifies.[147] "The least possible power adequate to the end proposed" is an adjectival phrase modifying the *essence* of a functioning judiciary's self-preserving power, born of and implied by the very evil which would destroy it. A tug of war has resulted between decisions emphasizing summary contempt's practical essence and those echoing its theoretical characterization.

A historical analysis of the constitutionally mandated procedures circumscribing immediate-view-and-presence summary contempt is the least likely to mislead because recent Supreme Court decisions

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and may in a human way, quite unwittingly identify offense to self with obstruction to law." *Id.* Without sanctioning any notion that a judge may be run out of a case by simply stoking the fire of personal abuse, the Court held that at least where adjudication and punishment is delayed, neutral justice must satisfy the appearance of neutral justice. This goal could only be effectuated, under deferred punishment circumstances, by a trial judge not sitting in judgment where the contempt is entangled with the judge's personal feelings. "These are subtle matters." *Id.*

[146] Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

[147] Marshall v. Gordon, 243 U.S. 521, 541-42 (1917). The Supreme Court unanimously stated in *International Union - United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552 (1994), that:

> our jurisprudence in the contempt area has attempted to balance the competing concern of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play. The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court.

simply defy satisfactory synthesis.[148] *In re Terry*,[149] one of the earliest Supreme Court decisions regarding summary contempt power, involved a California federal judge ordering a defendant's wife to be removed from the courtroom. The defendant, who fled after assaulting the marshall, contended that his contempt citation was void because it was made in his absence. The Court disagreed with the defendant, holding that jurisdiction of the person attaches at the instant of the contemptuous act.[150] Recent Supreme Court decisions vacillate on how a court can properly adjudicate immediate-view-and-presence contempt. In *Mayberry v. Pennsylvania*,[151] for example, the Court was concerned about judges' impartiality in presiding over contempt proceedings when they have been the object of personal contemptuous attacks during trial, which later formed the very basis of those proceedings. The Court, while acknowledging that a judge could not be driven off a case simply because counsel increased the level of personal abuse against that judge, essentially stated that "by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor."[152] The Supreme Court's rule in *Mayberry* seemed clear until it encountered *Taylor v. Hayes*.[153]

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[148] *Compare* Mayberry v. Pennsylvania, 400 U.S. 455, 463-64 (1971) *and* Johnson v. Mississippi, 403 U.S. 212, 214 (1971) *with* Codispoti v. Pennsylvania, 418 U.S. 506, 524 (1974) (Rehnquist, J. & Berger, C.J., dissenting).

[149] *Ex parte* Terry, 128 U.S. 289, 310-12 (1888).

[150] The question of whether the trial court would have retained authority to summarily punish Terry on a later date without notice and hearing was specifically left open by the Court. *Id.* at 314. Absent sufficient averment to the contrary there is a presumption in favor of a court's summary contempt jurisdiction. *Ex parte* Cuddy, 131 U.S. 280, 186 (1889).

A year later, the Court acknowledged that contemptuously disruptive misbehavior could occur in a court's immediate view and presence without the judge being personally and simultaneously cognizant of it. *Ex parte* Savin, 131 U.S. 267, 278 (1889).

[151] 400 U.S. 455 (1971).

[152] *Id.* at 466 (emphasis added).

[153] Taylor v. Hayes, 418 U.S. 488 (1974). On nine occasions during the trial, Taylor was told "that he was in contempt of court." At the trial's end, the Court made a statement regarding Taylor's trial conduct, but refused his request to respond. Stating "'I have you' on nine counts, [the judge] proceeded to impose

In *Taylor*, the Court was "convinced that [a contemnor] . . . should not be tried by [the same trial judge] since contemptuous conduct, *though short of personal attack*, may still provoke a trial judge and so embroil him . . . that he cannot hold the balance nice, clear and true."[154] According to the *Taylor* majority, the inquiry was no longer whether there was actual bias, but whether there was the likelihood or appearance of bias.[155] Alternatively, the Supreme Court held in *Codispoti* that this particular contemnor was entitled to a jury at his contempt proceeding.[156] The Court reasoned that

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a jail term on each count totalling almost four and one-half years." Persuaded by Taylor's contention that he was entitled to more of a hearing and notice than he received "prior to final conviction and sentence," the Court reversed. *Id.* at 496.

The Court seemed to play with semantics in reasoning that no sentence was imposed during trial and that it did not appear that a final contempt adjudication was entered until after the jury's verdict. Contradicting its own statement of the facts, the Court stated that "[i]t was [only] then that the court proceeded to describe and characterize [Taylor's] various acts during trial as contemptuous, to find him guilty of . . . contempt, and to sentence him immediately." *Id.* at 496-97. Notwithstanding its "decisions establish[ing] that summary punishment need not always be imposed during trial if it is to be permitted at all," the Court ruled that the procedure employed against Taylor "[did] not square with the Due Process Clause." *Id.* at 497-98 (emphasis added). An earlier case, said the Court, involving contempt of a legislature, *Groppie v. Leslie*, 404 U.S. 496 (1972), but with no factual similarity to Taylor's courtroom conduct, somehow "counsel[ed] that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and an opportunity to be heard in his own behalf." *Taylor*, 418 U.S. at 498-99.

[154] *Id.* at 501 (emphasis added).

[155] *Id.* The *Taylor* dissenters pointed out that the wisdom of the Court's majority was at odds with the very precedents its opinion purported to reaffirm. *Id.* (Rehnquist, J. & Burger, C.J., dissenting).

[156] Codispoti v. Pennsylvania, 418 U.S. 506 (1974). This case also involved a lawyer, Codispoti, who in the course of his contemptuous trial conduct accused the judge of railroading the defendant, of being crazy, a Caesar and being in a criminal conspiracy. *Id.* at 507 n.1. Following the Supreme Court's instructions, attending reversal of Codispoti's client's contempt adjudication, that another judge preside over the client's de novo contempt hearing, Codispoti was tried before a different judge. The state rested on the trial transcript; Codispoti offered no evidence. He was found guilty of six separate contempts and sentenced to five consecutive terms of six months imprisonment. Should Codispoti have been afforded a jury trial? Generally "no" but in this instance "yes." A contemnor, according to the Court, is not entitled to a jury trial simply because a strong

"in the context of the post-verdict adjudication of various acts of contempt, it appears to us that there is posed the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate."[157] According to the Court, since the contemnor in *Codispoti* was tried *seriatim* in one proceeding, with separate consecutive sentences for each contempt aggregating more than six months, he was tried for the *equivalent* of a serious offense for which a jury trial was required.[158]

Stripped of all obscuring verbiage, a trial court's summary contempt power is raw power. It forcefully decides that the judge,

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possibility of substantial punishment exists regardless of the punishment actually imposed. *Id.* Moreover, a trial judge does not exhaust his or her power to punish for contempt once the aggregate punishment for separate contemptuous acts exceeds six months. *Id.* at 514. Nevertheless, the Supreme Court reversed.

The present Supreme Court, in *dicta* from its unanimous opinion in *International Union - United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552 (1994), has now put further confusion into the mix of *Sacher*, *Mayberry*, *Taylor* and *Codispoti* by stating that:

> If a court delays punishing a[n] . . . [immediate-view-and-presence] contempt until the completion of trial, for example, due process requires that the contemnor's right to notice and a hearing be respected. There "it is much more difficult to argue that action [i.e., contempt imposed after completion of trial] without notice of hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business, . . . [particularly] in view of the heightened potential for abuse posed by the contempt power."

International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552 (1994) (citing with approval *Taylor*, 418 U.S. at 495).

[157] *Taylor*, 418 U.S. at 515-16.

[158] *Id.* at 516, 517. *Codispoti's* four-justice dissent was "at a loss" to see what legitimate role a jury could play for direct, in court, trial-obstructive contempts. "The perceived need to remove the case from the contemned judge is fully served by assigning the case to a different judge" and "since the new judge, not the jury, will impose the sentence, there is nothing the jury can do by way of mitigating an excessive punishment." *Id.* at 523 (Blackmun, J., dissenting).

In *Codispoti* and other decisions, the Supreme Court has consistently used the word "sentence" when it desired a given result. Contemnors are adjudicated, not sentenced. The Court demonstrates its latest use of penal law terms to describe a court's inherent contempt power in *United States v. Dixon*, 113 S. Ct. 2849 (1993) (*inter alia*, the Court's order to show cause consisted of "counts").

not the contemnor, runs a courtroom. While cool reflection, if practical under given circumstances, is preferable to heat and haste, such reflection presupposes delay which in turn draws into question whether summary contempt was necessary in the first place.[159] If not necessary in the first place, then the summary contempt power never had necessity to give it birth.[160] The syllogism is reversed if heat and haste prevail.[161]

V. COMPLICATIONS IN PUNISHING CONTEMPT

A. Double Jeopardy Considerations Affecting Penal and Judiciary Law Contempts by Grand Jury Witnesses

While an unlawfully recalcitrant grand jury witness may be convicted under Penal Law or punished under Judiciary Law, the

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[159] *See, e.g.*, Breitbart v. Galligan, 135 A.D.2d 323, 525 N.Y.S.2d 219 (1st Dep't 1988).

[160] United States v. Sacher, 182 F.2d 416, 456-57 (2d Cir. 1950) (Frank, J., concurring), *aff'd*, 343 U.S. 1 (1952).

[161] All the high-sounding, content-empty, ambiguous phraseology one can conjure up will not improve upon, much less equal, the force of Second Circuit Court of Appeals Judge Jerome Frank's logic arrayed against those who would contend that summary punishment delayed is summary contempt power lost or diluted. His reasoning is drastically paraphrased here. Summary punishment has only a future effect, for the contemptuous obstruction of a court's business has, in the nature of things, already occurred and cannot be prevented. No punishment will undo an "immediate-view-and-presence"contempt, ever a thing of the past. Therefore, the summary contempt power cannot be founded on an ability to prevent the punished behavior. Its effect is wholly prospective. Hence, it must be justified by the fact that it will deter future misconduct during the same litigation or *in future cases*. *Sacher*, 182 F.2d at 456. The argument that summary contempt punishment must be instanter (invalid if postponed) means that a judge may act summarily only when, without a hearing, he is least likely to be poised and temperate. Why such action would constitute fairness and due process, while calmer postponed action would not defy reason. "If we instruct trial judges that summary punishment of such contempts must invariably be imposed at once, [this] means that trial judges may punish only when they act in hot blood, i.e., in circumstances promoting, to the utmost, impatient, ill-considered judgment." *Id.* The present state of the law from Supreme Court decisions would probably seem to Judge Frank "exactly upside-down." *Id.*

federal Constitution's double jeopardy clause precludes the imposition of both sanctions for the same transaction. For example, in *Colombo v. New York*,[162] the defendant was punished for Judiciary Law criminal contempt when he disobeyed a court order that commanded his return to a grand jury before which he had previously remained mute. After serving thirty days in jail, he was then indicted for Penal Law contempt.[163] After the appellate court dismissed Colombo's indictment,[164] the Court of Appeals reinstated it,[165] but the U.S. Supreme Court vacated and remanded for reconsideration.[166] The Court of Appeals adhered to its original determination, viewing Judiciary and Penal Law contempt as serving the distinct purposes of coercion *versus* punishment for crime.[167] Again, the Supreme Court remanded "for further consideration in view of the . . . Court of Appeals' misconception of the nature of the contempt judgment [under the Judiciary Law] . . . for purposes of the Double Jeopardy Clause . . . ."[168]

Little guidance, let alone unanimity, can be gleaned from Colombo's appeals, which were never set down for full argument before the U.S. Supreme Court. On the second remand, the Court of Appeals reversed its earlier decisions, but implicitly approved the sequential imposition of punishment under the Judiciary and Penal Laws for *distinct*, though transactionally-related, acts of disobedience.[169] According to this reasoning, a grand jury

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[162] People v. Colombo, 32 A.D.2d 812, 302 N.Y.S.2d 488 (2d Dep't), *aff'd*, 25 N.Y.2d 641, 254 N.E.2d 340, 306 N.Y.S.2d 258 (1969).

[163] Koota v. Colombo, 17 N.Y.2d 147, 216 N.E.2d 568, 269 N.Y.S.2d 393, *cert. denied*, 384 U.S. 1001 (1966); People v. Colombo, 32 A.D.2d 812, 302 N.Y.S.2d 488 (2d Dep't), *aff'd*, 25 N.Y.2d 641, 254 N.E.2d 340, 306 N.Y.S.2d 258 (1969).

[164] People v. Colombo, 32 A.D.2d 812, 302 N.Y.S.2d 488 (2d Dep't), *aff'd*, 25 N.Y.2d 641, 254 N.E.2d 340, 306 N.Y.S.2d 258 (1969).

[165] People v. Colombo, 29 N.Y.2d 1, 271 N.E.2d 694, 323 N.Y.S.2d 161 (1971).

[166] Colombo v. New York, 400 U.S. 16 (1970).

[167] People v. Colombo, 29 N.Y.2d 1, 271 N.E.2d 694, 323 N.Y.S.2d 161 (1971).

[168] Colombo v. New York, 405 U.S. 9, 11 (1972).

[169] People v. Colombo, 31 N.Y.2d 947, 239 N.E.2d 247, 341 N.Y.S.2d 97

witness's naked refusal to testify or produce evidence is a Penal Law contempt when it occurs and disobedience to *subsequent* court order can be punished separately, because it occurs only *after* the order's issuance.

The U.S. Supreme Court ultimately rejected the Court of Appeals' rationale that a grand jury witness can be punished separately for penal contempt and judicial contempt because the acts of contempt do not occur simultaneously.[170] In *Menna v. New York*,[171] the defendant flatly refused to testify before a grand jury and subsequently disobeyed a court order commanding him to do so. *Menna*'s Judiciary Law contempt for disobeying the court's "return" order was upheld,[172] but his subsequent Penal Law conviction for the criminal contempt—a guilty plea based solely on his distinct initial recalcitrance before the grand jury—was vacated by a philosophically splintered Supreme Court.[173] The Court of Appeals' memorandum on remand without discussion concluded, with the prosecutor's concurrence, that the double jeopardy clause barred *Menna*'s Penal Law prosecution.[174] Since the *Colombo* and *Menna* cases were decided, the membership of both courts has almost totally changed. The proverbial "last word" may still await prosecutor and grand jury contemnor.[175] That last word may be *United States v. Dixon*.[176] In *Dixon*, another badly splintered Supreme 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

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(1972); Capio v. Justices of Supreme Court, 41 A.D.2d 235, 342 N.Y.S.2d 100 (2d Dep't 1973).

[170] Menna v. New York, 423 U.S. 61 (1975).

[171] People v. Menna, 38 N.Y.2d 850, 345 N.E.2d 599, 382 N.Y.S.2d 56 (1976).

[172] Gold v. Menna, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969).

[173] Menna v. New York, 423 U.S. 61 (1975).

[174] People v. Menna, 38 N.Y.2d 850, 345 N.E.2d 599, 382 N.Y.S.2d 56 (1976); *see also* People v. Prescott, 66 N.Y.2d 216, 218, 220-21, 486 N.E.2d 813, 813-14, 495 N.Y.S.2d 955, 956 (1985).

[175] *See, e.g.*, United States v. Garcia, 755 F.2d 984, 987, 989 (2d Cir. 1985); United States v. Esposito, 633 F. Supp. 544 (S.D.N.Y. 1986).

[176] 113 S. Ct. 2849 (1993).

involve double jeopardy. The opinion, however, is as confusing as it is lengthy.

B. Multiplicity: Penal and Judiciary Law Contempts

Penal Law contempt indictments are multiplicitous when separate contempts are charged based on repeated refusals to answer either the same questions or questions relating to one subject area.[177] There are two tests for determining whether a Penal Law contempt indictment is multiplicitous. The first test requires identifying the distinct subject areas of inquiry. The second test, objectively assessed and recognizable in advance, involves determining the scope of a witness's refusal to answer. Under either test, the remedy for multiplicity is not dismissal, but rather a limitation of punishment.[178]

Questions relating to the same subject matter, met by evasion or outright refusals to answer, present a comparatively uncomplicated issue for pretrial motion. Difficulty arises in situations where different subject areas of inquiry are met with refusals or evasions which, in their nature, preclude advance, objective assessment. Should the witness who refuses to answer some questions under various guises be worse off than one who remains stone silent?[179] Surprisingly, the policy of the law seems to have settled on the encouragement of testimony by treating a witness willing to testify in most areas of inquiry, save one or more, no worse than one unwilling to give *any* testimony.[180] As for Judiciary Law contempt punishment arising out of grand jury proceedings, multiplicity does not arise when questioning occurs during different

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[177] People v. Riela, 7 N.Y.2d 571, 578, 166 N.E.2d 840, 843, 200 N.Y.S.2d 43, 47 (1960).

[178] People v. Mulligan, 29 N.Y.2d 20, 24, 272 N.E.2d 62, 64, 323 N.Y.S.2d 681, 683 (1971).

[179] People v. Cianciola, 86 Misc.2d 976, 981, 383 N.Y.S.2d 159, 163-64 (Sup. Ct. 1976), *rev'd on other grounds sub nom.* People v. Dercole, 72 A.D.2d 318, 424 N.Y.S.2d 459 (2d Dep't 1980), *appeal dismissed*, 52 N.Y.2d 956, 419 N.E.2d 869, 437 N.Y.S.2d 966 (1981).

[180] United States v. Coachman, 752 F.2d 685, 691-92 (D.C. Cir. 1985) (quoting Yates v. United States, 355 U.S. 66, 73 (1957)).

sessions of the same grand jury or before different grand juries. Thirty days in jail does not confer *de facto* immunity from later questioning of the same witness on the same subject matter.[181]

C. *The Contempt Trap: A Legalism In Search of a Factual Home*

The function of a grand jury investigation is to seek evidence of antecedent crime, not to create crime during the course of its proceedings by 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."[182] A prosecutor, the court holds, "may not . . . attempt to trap the witness into giving confusing or evasive replies."[183] Whether a contempt trap has been improperly sprung is ordinarily a factual question unless one is found to exist as a matter of law.[184]

In essence, the "contempt trap" is an unnecessary legalism in search of a factual home because it is a conceptual contradiction. By recognizing the existence of a "contempt trap," the court acknowledges that a witness can commit excusable contempt. However, none of the court's decisions regarding contempt suggest that there is such a thing as excusable contempt before a grand jury. There are many ways for grand jury witnesses to vindicate their rights. Being contemptuous is not one of them. "No witness

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[181] People *ex rel.* Cirillo v. Warden of the City Prison, 14 A.D.2d 875 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 51, 181 N.E.2d 424, 226 N.Y.S.2d 398 (1962); Second Additional Grand Jury v. Cirillo, 16 A.D.2d 605, 230 N.Y.S.2d 303, *aff'd*, 12 N.Y.2d 206, 188 N.E.2d 138, 237 N.Y.S.2d 709 (1963); Second Additional Grand Jury v. Cirillo, 19 A.D.2d 555, 241 N.Y.S.2d 8 (2d Dep't 1963).

[182] People v. Fischer, 53 N.Y.2d 178, 183 n.1, 423 N.E.2d 349, 351 n.1, 440 N.Y.S.2d 872, 874 n.1 (1981).

[183] People v. Rappaport, 47 N.Y.2d 308, 314, 391 N.E.2d 1284, 1288, 418 N.Y.S.2d 306, 309-10 (emphasis added).

[184] *Fischer*, 53 N.Y.2d at 183 n.1, 423 N.E.2d at 351 n.1, 440 N.Y.S.2d at 874 n.1; People v. Tyler, 46 N.Y.2d 251, 258-59, 389 N.E.2d 1224, 1228-29, 413 N.Y.S.2d 295, 299-300 (1978).

has a license to testify evasively or falsely before the grand jury."[185] Moreover, "[a] witness may not disregard his oath to tell the truth in the first instance."[186] The theoretical justification of the contempt-trap doctrine is the integrity of the prosecutorial, grand jury and judicial process. But the integrity of all three institutions can be preserved without free-floating, amorphous metaphors. The question of whether a "contempt trap" was set and sprung, in terms familiar, if not prosaic, will always be one of evidentiary sufficiency. An ordinary pretrial motion to inspect and dismiss is sufficient to determine whether as a matter of law there is a question of fact for a jury. If not dismissed on the motion, counsel's summation and the common sense of the fact-finder are the only remaining means to determine whether a contempt trap was actually effected.

The contempt trap doctrine imports confusion into the law. If a court on pretrial motion decides that a grand jury witness was not trapped, then what is the permissible scope of defense counsel's argument thereon to a jury? Mere prosecutorial anticipation of contempt counts for nothing.[187] *What about the witness's intellect and free will?* True, the questioner controls the questions, but it is the witness who controls the answers alleged to constitute "confusing or evasive replies." The Court of Appeals could alleviate any confusion about "entrapping" grand jury witnesses by setting aside the misconceived notion of a contempt trap once and for all.

D. Purgation of Penal and Judiciary Law Contempts

An indictment for criminal contempt before a grand jury may never be purged.[188] Nevertheless, addressing an issue which was

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[185] People v. McGrath, 46 N.Y.2d 12, 29, 385 N.E.2d 541, 549, 412 N.Y.S.2d 801, 810 (1978); People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968).

[186] People v. Ezaugi, 2 N.Y.2d 439, 443, 141 N.E.2d 580, 583, 161 N.Y.S.2d 75, 78 (1957).

[187] *Tyler*, 46 N.Y.2d at 262, 385 N.E.2d at 1230-31, 413 N.Y.S.2d at 300-01; *accord* United States v. Apfelbaum, 445 U.S. 115 (1980); United States v. Bryan, 339 U.S. 323, 340-41 (1950).

[188] People v. Leone, 44 N.Y.2d 315, 317-18, 376 N.E.2d 1287, 1288, 405

"unnecessary to reach," the Court of Appeals stated that "probably incorrect, is the conclusion that under no circumstances may a 'criminal' [Judiciary Law] summary contempt be purged."[189] This pronouncement ignores the fundamental distinction between civil and criminal contempt as well as prior opinions from the U.S. Supreme Court and the New York Court of Appeals.[190] This aside, the *dictum* lacks practical policy justification for its obfuscation of the distinct goals served by coercion for future private benefit and punishment for past public wrong.

The Court of Appeals' *dictum* conflicts with its earlier statements, which, for example, assert that "taking the witness before the court may reduce stalling tactics."[191] On the contrary, proving a grand jury or trial contemnor guilty of Judiciary Law criminal contempt beyond a reasonable doubt only to allow purgation as of right does anything but expedite matters. Purgation—by the contemnor's doing what he or she was ordered to do in the first place—should be the *very rare* exception, not the rule. In fact, the court's negatively-phrased *dictum* concedes as much if stated positively.

In regard to purgation, prosecutors are duty-bound not to waste their time on efforts reasonably perceived as futile. If a Judiciary Law criminal contempt is—without predictably strict, intelligible limit—subject to a right of purgation, it is not an expeditious response to contemptuous conduct before grand and petit juries. For a time, the court's free grant of purgation was the clearly unwise pattern—a pattern which invited "indictment-or-nothing." A middle ground—Judiciary Law criminal contempt—was considered viable until a trend of decisions indiscriminately applied the Court of Appeals' "purge" *dictum*.[192] Fortunately, the trend may now be

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N.Y.S.2d 642, 642-43 (1978).

[189] *Leone*, 44 N.Y.2d at 318, 376 N.E.2d at 1288, 405 N.Y.S.2d at 643.

[190] *See, e.g.*, People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 247-49, 4 N.E. 259, 259-61 (1886); *see also* Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911).

[191] People v. Rappaport, 47 N.Y.2d 308, 314, 391 N.E.2d 1284, 1288, 418 N.Y.S.2d 306, 309 (1979).

[192] Additional Jan. 1979 Grand Jury v. Doe, 84 A.D.2d 588, 444 N.Y.S.2d 201 (3d Dep't 1981); Ferrara v. Hynes, 63 A.D.2d 675, 404 N.Y.S.2d 674 (2d

moving in a more responsible direction.[193] Hollow sanctions or those reasonably perceived as hollow are appropriate to neither child rearing nor a court system. Judiciary Law criminal contempt sanctions should deter disobedience, not encourage more contempt proceedings.

CONCLUSION

The Judiciary Law sections and case law defining and regulating criminal and civil contempt are long overdue for reassessment and revision. Although this may not be the place to work out a detailed legislative revision, the New York State Legislature would be wise to hone and codify the practical wisdom of case law together with the contemporary experience of the bench and bar to redraft contempt law.[194] In fact, the United States Code presents a worthy model for simplifying contempt law.[195] The Code unequivocally states that:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury . . . refuses without just cause shown to comply with an order of the court to testify or provide other information including any . . . document, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily [without a jury] order his confinement . . . until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of (1) the court proceeding, or (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Dep't 1978); People v. Belge, 59 A.D.2d 307, 309, 399 N.Y.S.2d 539, 540-41 (4th Dep't 1977).

[193] Department of Envtl. Protection v. Department of Envtl. Conservation, 70 N.Y.2d 233, 513 N.E.2d 706, 519 N.Y.S.2d 539 (1987); People v. Williamson, 136 A.D.2d 497, 523 N.Y.S.2d 817 (1st Dep't 1988).

[194] In fact, the New York State Law Revision Commission discussed revising several aspects of New York contempt law when it convened in April 1994.

[195] *See* 18 U.S.C. § 401 (1988); 28 U.S.C. § 1826 (1988).

New York contempt law, in its present state, is exceedingly difficult to comprehend, let alone apply. Those who have committed no wrong should not be erroneously held in contempt. Alternatively, those guilty of contemptuous behavior should, just as urgently, be correctly held in contempt with appropriate dispatch. What is "correct" and what is "erroneous" should be simplified and clarified—"bright lines" and appellate court restraint are far from a call to heresy.

Regrettably, New York Judiciary Law contempt jurisprudence has become "mingled and confused by the use of fixed but ambiguous nomenclature"[196] at the expense of reasoned analysis. The courts, for example, continue to mislabel judiciary contempts as "criminal" or "civil." Innumerable decisions—some with a sterile and lamentably obvious impetus to effect a desired result—misapply the Judiciary Law's misleading "criminal" and "civil" labels. In regulating the judiciary's inherent contempt powers, the legislature probably uncritically attached "criminal" and "civil" labels to the judiciary's functional definitions of its contempt powers. "Many have observed . . . that the categories, 'civil' and 'criminal' contempt, are unstable in theory and problematic in practice."[197] A revised contempt statute should refer to "criminal" contempts as punitive and "civil" contempts as coercive.

Beyond erroneously applying and confusing the nomenclature, functional definitions and purposes of contempt law, New York courts have failed to adequately exercise their contempt power because they also misinterpret many of its basic concepts. For example, the Court of Appeals has sometimes stated that a criminal contempt requires proof of a higher level of willfulness than civil contempt.[198] By qualitatively confounding criminal contempt's

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[196] People *ex rel.* Munsell v. Court of Oyer & Terminer, 101 N.Y. 245, 247, 4 N.E. 259, 259 (1886).

[197] International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552, 2566 (1994) (Ginsburg, J. & Rehnquist, C.J., concurring).

[198] *See, e.g.*, Department of Envtl. Protection v. Department of Envtl. Conservation, 70 N.Y.2d 233, 240, 513 N.E.2d 706, 709, 519 N.Y.S.2d 539, 542 (1987); McCormick v. Axelrod, 59 N.Y.2d 574, 583, 453 N.E.2d 508, 512, 466 N.Y.S.2d 279, 283, *amended*, 60 N.Y.2d 652, 454 N.E.2d 1314, 467 N.Y.S.2d 571 (1983). *But cf.* County of Rockland v. Civil Service Employees Ass'n, Inc.,

mens rea of willfulness,[199] New York's courts have introduced confusion into the law and encouraged the arbitrary imposition or withholding of contempt sanctions. The courts' inconsistent definition of "evasive testimonial contempt" has also detracted from the effective use of their contempt power. These definitions have gone beyond logical necessity to the point of almost poetic permutation,[200] thus preventing the courts from making a reasonably uniform assessment of whether a witness has offered evasive testimony.

New York trial courts are also subject to the vague, confusing and contradictory instruction of higher courts. For example, the last word is yet to be written about double jeopardy considerations circumscribing the *in tandem* use of Penal and Judiciary Law contempt for separate but transactionally-related grand jury misconduct. As the law now stands, a flat refusal to answer or produce evidence may or may not be bifurcated into two contempts—one of the grand jury and one of the court—for the purpose of successive prosecution and punishment.[201]

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62 N.Y.2d 11, 16, 464 N.E.2d 121, 123, 475 N.Y.S.2d 817, 819 (1984) ("[P]roof to establish criminal contempt is proof beyond a reasonabale doubt . . . . In criminal contempt cases . . . it is required that the evidence establish the willful violation of the court order beyond a reasonable doubt.").

[199] In New York, willfulness historically meant intentional. *See, e.g.*, People *ex rel.* Negus v. Dwyer, 90 N.Y. 402, 406 (1882) ("The revised statutes distinguished, and the Civil Code preserves the distinction, between criminal contempts, and proceedings as for contempt in civil cases. As it respects disobedience to the orders of a court, the sole difference appears to be that a willful' disobedience [intentional] is a criminal contempt while a mere disobedience [i.e., without intent to disobey] by which the right of a party to an action is defeated or hindered is treated otherwise"); *Munsell*, 101 N.Y. at 248-49, 4 N.E. at 260 ("As described in the statute, an element of willfulness, or of evil intention enters into and characterizes them.")

[200] *See supra* note 62.

[201] United States v. Dixon, 113 S. Ct. 2849 (1993); *see* United States v. Ryan, 810 F.2d 650 (7th Cir. 1987); United States v. Garcia, 755 F.2d 984, 987, 989 (2d Cir. 1985); United States v. Esposito, 633 F. Supp. 544 (S.D.N.Y. 1986) (Imprisonment for civil contempt for refusal to obey court's order to testify under 28 U.S.C. §1826(a) followed by indictment and conviction for contempt under 18 U.S.C. § 401; double jeopardy claim found without merit with no citation of *Colombo* and *Menna* cases, *see supra* notes 22-29).

An example of a contradictory instruction from the Court of Appeals is the notion that a Judiciary Law criminal contempt arising out of a grand jury proceeding may be freely purged. This notion often produces anomalous and counterproductive applications of the law. Purgation certainly conflicts with the Court of Appeals' complaints that "as a practical matter . . . a Grand Jury is but a temporary body" and "the delays occasioned by the refusals of recalcitrant witnesses to comply with Grand Jury subpoenas are a very real concern."[202] It also invites experimentation with disobedience and is insensitive to statutes of limitation for crimes that are not tolled by the delays occasioned by meritless motions to quash followed by contempt proceedings thereafter. Indeed, purgation should be the rare exception, not the rule. Undoubtedly, it should be limited to mitigation of punishment.[203]

In addition to facilitating and expediting grand jury investigations and trial proceedings, New York contempt law should uphold the decorum of the courtroom. After all, the American courtroom is not a back alley or a meeting hall. The law should return to basics and practicality concerning contempts committed in the immediate view and presence of the court. The law should recognize the summary contempt power through its history and logic for what it is—the necessary solution to a very practical problem. Unwarranted judicial timidity or ineptitude, self-inflicted or otherwise, is as unseemly as overreaction.[204] Trial courts must

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[202] Virag v. Hynes, 54 N.Y.2d 437, 443, 430 N.E.2d 1249, 1252, 446 N.Y.S.2d 196, 199 (1981) (emphasis added). Apparently unimpressed, the Virags themselves were convicted of criminal contempt in the second degree for disobeying the very subpoena the Court of Appeals sustained. People v. Virag, 100 A.D.2d 984, 474 N.Y.S.2d 158 (2d Dep't), *leave denied*, 63 N.Y.2d 713, 469 N.E.2d 117, 480 N.Y.S.2d 817 (1984).

[203] *See, e.g.*, People v. Williamson, 136 A.D.2d 497, 523 N.Y.S.2d 817 (1st Dep't 1988).

[204] For a glaring example of Monday-morning quarterbacking regarding a trial court's use of summary contempt—based on a clear misconstruction of precedent, including the philosophically, legally and historically erroneous notion that summary contempt "is inherently violative of fundamental notions of due process . . . ."—*see* Werlin v. Goldberg, 129 A.D.2d 334, 343-47, 917 N.Y.S.2d 745, 750-52 (2d Dep't 1987) (dissenting opinion); *see also* Breitbart v. Galligan, 135 A.D.2d 323, 525 N.Y.S.2d 219 (1st Dep't 1988).

deal with the rough and tumble of the courtroom. Appellate decisions, however, are on the verge of construing or obfuscating the immediate-view-and-presence contempt powers of trial courts out of existence, while simultaneously emphasizing the need for order in the courtroom. This jurisprudential phenomenon calls to mind the old saw about the man who sought to prove that he could keep a horse alive by starving it. When he proved his point, the horse died.

One method of preserving the dignity of the New York courtroom and respect for the rule of law as the only bulwark against the law of the street would be for the legislature to increase the punishment presently authorized by New York Judiciary Law section 751. In light of the "petty offense" standard and contemporary economic reality,[205] the courts should enjoy greater flexibility in determining appropriate punishment for an individual contemnor and, in the context of an ongoing grand jury investigation, for deterring similar conduct by others. The former permissible fine of $250 was first specified many years ago. A large amount of money then, time made it a nuisance fee of piddling proportions.[206] Eventually, the New York State Legislature increased it slightly to $1,000.[207] Expanding the limit on

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[205] Bloom v. Illinois, 391 U.S. 194 (1968); Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968).

[206] Eastern Concrete Steel Co. v. Bricklayers' and Mason Plasterers' Int'l Union, 200 A.D. 714, 193 N.Y.S.2d 368 (4th Dep't 1922); Code Civ. Procedure art. 2, § 9 (1877).

[207] *Rankin*, 23 N.Y.2d at 119-20, 242 N.E.2d 802, 295 N.Y.S.2d 625; N.Y. JUD. LAW §751(1). *International Union - United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552, 2562 n.5 (1994), has recently complicated, but certainly not prevented, an additional increase of the present $1,000 fine. In *Bagwell*, the Court held that a "serious criminal contempt fine" is also subject to the jury trial requirement set forth in *Bloom v. Illinois*, 391 U.S. 194 (1968). However, in *Bagwell*, the Court refused to specifically designate what amount constitutes a "serious criminal contempt fine." It only estimated that it was somewhere between $10,000 and $52,000,000. Consequently, New York can pick a number in between and take its chances or it could adopt a means test for determining when a criminal contempt fine is "serious" and warrants a jury trial.

imprisonment for contempt from thirty days to six months and raising the fine to at least a maximum of $10,000 is as constitutional as it is overdue.[208]

[208] International Union - United Mine Workers of Am. v. Bagwell, 114 S. Ct. 2552 (1994); Bloom v. Illinois, 391 U.S. 194 (1968).