Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy

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ADVOCA CY AND CONTEMPT—PART TWO:
CHARTING THE BOUNDARIES OF CONTEMPT: ENSURING ADEQUATE BREATHING ROOM FOR ADVOCACY

Louis S. Raveson*

Abstract: Professor Raveson previously argued that the Constitution limits the contempt power to the punishment of actual obstructions of the administration of justice. In this Article, he maintains that any standard for defining contempt that is less restrictive than actual obstruction or the imminent threat of obstruction would be unconstitutionally overbroad. In addition, Professor Raveson discusses the inevitable imprecision that inheres even in the actual obstruction standard for contempt. He explains that the appropriate division between permissible advocacy and contempt must reflect a balance between the frequently conflicting goals of a trial in order to maximize the value of these interests to the system of justice as a whole. Finally, Professor Raveson suggests a number of variables that can assist to define and balance these competing interests, as well as provide greater certainty to the bench and bar in determining whether particular conduct is contemptuous.

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I. INTRODUCTION

After two days of hotly debated pretrial motions in a serious criminal trial, the public defender against whom all the motions had been decided grimaced momentarily in frustration. The court, having warned the defender the day before to refrain from gestures showing disagreement with the judge's rulings, ended the trial by summarily holding the attorney in contempt, handcuffing, frisking, and jailing him. Although the jail sentence was reversed on appeal, the state's highest court affirmed the contempt conviction without expressing any doubt that the attorney's conduct was contemptuous.¹

Unfortunately, this case is but an example of the courts' virtually unrestrained power to punish attorneys for contempt, and the arbitrariness with which that power is too frequently wielded. The fear, threat, and actual use of contempt sanctions are prominent features of many trials. Indeed, the courts' contempt power to a large extent actually defines the boundaries of permissible advocacy. Because the contempt power at present remains terribly broad and undefined, it is utilized idiosyncratically by judges to enforce whatever subjective level of order, decorum, and respect they deem appropriate, all too often at the expense of the vigor necessary for proper advocacy. Perhaps more importantly, the omnipresent threat of a standardless contempt power has a powerful deterrent effect on the ardor with which attorneys represent their clients.

In a previously published companion Article, I demonstrated why the Constitution should limit the substantive scope of the judicial contempt power so that it may be employed only to punish actual obstructions of the administration of justice.² I suggested that because the goals of our system of justice are often at odds, the dividing line between appropriate advocacy and obstruction of the administration of justice can be drawn only by balancing the various aims of a trial. The proper balance, in turn, can only be accomplished by including within the calculus of contempt a recognition of the actual experiences

of attorneys and other participants in the trial process. I argued, finally, that appropriate consideration of the value of advocacy, not just to the interests of the litigants, but more fundamentally to the processes of justice, requires that we permit advocacy to interfere at times with other competing goals of a trial. Vigorous representation would necessarily be chilled if inevitable excesses of advocacy and lapses of decorum were treated as contemptuous. To prevent this, as well as to realize the full value of advocacy, it is critical to construct a buffer zone surrounding the kinds of advocacy we wish to encourage in order to protect it adequately from punishment.

The present Article addresses the fundamental questions posed by these concerns: First, how can the obstruction of justice standard be implemented so that a line ensuring sufficient breathing room for advocacy is drawn between protected advocacy and punishable misconduct? Second, how can obstruction be defined to provide adequate notice to attorneys who must conform their conduct to the standard, and to judges who hold the power of contempt in their hands? As we shall see, these questions cannot be answered categorically. The creation of a buffer zone around valued advocacy and the provision of greater precision in the definition of contempt can only be achieved through the identification and application of criteria that operate to expose and balance the competing goals of a trial. This would maximize the combined value of these goals in a particular case and in our entire system of justice.

II. DEFINING CONTEMPT

A. Overbreadth

The statutory standards for contempt are so broad that they are virtually meaningless. This is especially true where the conduct in question is either advocative or not actually disruptive. Definitions such as obstruction, disorderly or insolent behavior, "misbehavior," and "insulting language" do little to distinguish protected from punishable conduct. Many states make no effort to define contempt by statute; instead, they grant the power to the courts. Still, others actual

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ally attempt to define contempt in part by prohibiting contemptuous behavior.  

The failure of contempt statutes to define the scope of punishable conduct with sufficient specificity threatens the adequacy of the breathing room provided for advocacy by imposing a potentially vague or overbroad proscription. We need to be concerned about the problems of overbreadth and vagueness at two different levels. First, an overbroad or vague law may be susceptible to constitutional challenge on its face. Second, and more importantly, the potential for vagueness and overbreadth of the definition of contempt must be considered in differentiating protected advocacy from punishable interference with the administration of justice.

Pursuant to the overbreadth doctrine, courts invalidate laws that prohibit conduct protected by the first amendment. The problem with an overbroad statute, and a prerequisite to its invalidation for overbreadth, is that it is drawn so broadly as to make unlawful a substantial amount of constitutionally protected activity. One commentator argues that existing contempt statutes should be invalidated as unconstitutionally overbroad. Indeed, contempt statutes may pro-

§ 9-1-17 (1972). Statutes may, of course, rely upon common law definitions to define the scope of prohibited conduct. See, e.g., United States v. Turley, 352 U.S. 407, 411 (1957). But this is of little avail because the common law development of obstruction standards fails to articulate a clear definition.

8. See, e.g., DEL. CODE ANN. tit. 11, § 1271 (1979) ("A person is guilty of criminal contempt when he engages in . . . [d]isorderly, contemptuous or insolent behavior . . . ."); see also, ALA. CODE § 12-1-8 (1986); CAL. PENAL CODE § 166 (West 1970); IDAHO CODE § 7-6-1 (1979); MINN. STAT. ANN §§ 588.01-.03 (West 1947 & Supp. 1987).

9. Although the overbreadth doctrine is limited to first amendment freedoms, see infra note 32 and accompanying text, the rationale for invalidating overbroad laws—that they sweep so broadly as to proscribe and deter a substantial amount of constitutionally protected activity—should be applicable to the aspects of advocacy protected by the sixth amendment and the right to due process. Valuable courtroom expression should be protected from an unacceptable level of restraint and deterrence, whether the source of that protection is the first amendment or other constitutional guarantees. Indeed, in many ways the sixth amendment and the right to due process provide even more compelling bases for the safeguarding of zealous advocacy from chilling by an overbroad proscription than the right to speech itself.


11. See, e.g., Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 445 U.S. 489, 494 (1982). The Supreme Court increasingly has demanded that the amount of protected conduct affected be substantial before a law will be invalidated as overbroad. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (law regulating conduct rather than "pure speech" must reach substantial amount of protected behavior to be judged unconstitutionally overbroad).

12. See Brautigam, Constitution Challenges to the Contempt Power, 60 GEO. L.J. 1512, 1527–33 (1972). Brautigam also argues that present contempt statutes are unconstitutionally
scribe a substantial amount of constitutionally protected activity or advocacy. Appellate courts reverse many contempt convictions for conduct trial judges believe is punishable under the applicable statutes.\textsuperscript{13} Appellate courts, however, do not find the behavior at issue protected by the statutory definition of contempt. Nevertheless, the appellate courts find that the behavior is protected by the Constitution. Rather, these courts conclude that the conduct in question does not come within the statutory (or judicial) definition of contempt.\textsuperscript{14} Thus, there is often no disparity between what the contempt statutes define as punishable and what the appellate courts determine to be constitutionally unprotected. But this convergence of the line drawn by legislative enactments and judicial interpretations is no mere coincidence. It necessarily arises from the fact that many statutes, or the courts' construction of statutes, exclude constitutionally protected conduct by limiting the definition of contempt to "obstruction" of the administration of justice.\textsuperscript{15} If allegedly contemptuous conduct falls


\textsuperscript{14} See, e.g., In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230 (1962); In re Dellinger, 461 F.2d 389, 398-99 (7th Cir. 1972), aff'd on rehearing, 502 F.2d 813 (1974), cert. denied, 420 U.S. 990 (1975); United States v. Seale, 461 F.2d 345, 370 (7th Cir. 1972).

\textsuperscript{15} With respect to statutes employing the obstruction standard, see laws cited supra note 3. For cases construing broader statutory definitions of contempt to mean actual obstruction, see infra note 20.
within the statutory definition and is found to be obstructive, it is not protected by the Constitution.

Nevertheless, a significant number of state contempt statutes authorize punishment for conduct that does not rise to the level of actual obstruction or even imminent threat of obstruction. For example, statutes in Indiana, California, and New Jersey define contempt respectively as the "creation of] any noise or confusion" in the courtroom, "conduct tending to interrupt," and "misbehavior." Although some courts limit their state's statutory contempt power to actual or imminent threats of obstruction, others fail to restrict the contempt power to either of these standards. Absent an authoritative judicial construction excising a precise category of constitutionally protected conduct from the laws' reach, such statutes appear overbroad on

16. See Raveson, supra note 2, at 525–29 (concluding that the constitutional standard for contempt is satisfied by the actual obstruction standard). The text treats that standard and the "imminent threat of obstruction" standard as coextensive for purposes of its overbreadth analysis. However, courts might conclude that the "imminent threat of obstruction" standard sets a constitutional limit on the substantive definition of contempt less strict than the actual obstruction limitation. Id. at 528.

17. IND. CODE ANN. § 34-4-7-1 (Burns 1986).
20. See, e.g., Ex parte Stephenson, 89 Okla. Crim. 427, 209 P.2d 515, 520 (1949) (construing contempt statute prohibiting "disorderly or insolent behavior" to apply only to "conduct that is directed against the dignity and authority of the court or judge acting judiciously, obstructive of the administration of justice"); State v. Harper, 376 S.E.2d 272, 274 (S.C. 1989) (statute defining contempt as "undue disturbance of [judicial] proceedings" narrowed to actual obstruction standard).

21. See, e.g., Ex parte Krupps, 712 S.W.2d 144 (Tex. Ct. App. 1986), cert. denied, 479 U.S. 1102 (1987). In Krupps a plurality of the court held that the refusal of a pro se defendant and six spectators to rise when the trial judge entered the courtroom, after they had been warned of the consequences of failing to do so, was a proper ground for criminal contempt. The plurality explicitly stated that "criminal contempt is not restricted only to conduct that obstructs or tends to obstruct, the proper administration of justice," but includes the broader notion of disrespect as well. Id. at 149–50. However, the argument that the obstruction standard is constitutionally required was never discussed in the plurality opinion and does not seem to have been presented to the court. See also, Tarrant v. State, 537 So. 2d 150, 152 (Fla. Dist. Ct. App.) (contempt is "any act which is calculated to embarrass, hinder, or obstruct courts . . . or which is calculated to lessen its authority or dignity"), cert. denied, 544 So. 2d 201 (Fla. 1989); In re Daniels, 118 N.J. 51, 570 A.2d 416 (1990) (tendency to obstruct sufficient to comply with constitutional restrictions on contempt power); Snow v. Hawkes, 183 N.C. 365, 366, 111 S.E. 621, 622 (1922) (contempt defined in accordance with statute as conduct that tends to bring authority of court into disrespect).

22. See, e.g., Bridges v. California, 314 U.S. 252 (1941) (reversing contempt conviction for publication of newspaper editorial). In Bridges, the Supreme Court noted that the trial court's basis for punishing the publication in question was that it had an "inherent tendency" to interfere with the orderly administration of justice in a pending action, and that in upholding the contempt, the California Supreme Court found a "reasonable tendency" to cause such
interference. Id. at 272–73. However, the Supreme Court concluded that, “[i]n accordance with what we have said on the ‘clear and present danger’ cases, neither ‘inherent tendency’ nor ‘reasonable tendency’ is enough to justify a restriction of free expression.” Id. at 273. Similarly, in Grayned v. City of Rockford, 408 U.S. 104 (1972), the Court was faced with vagueness and overbreadth challenges to the validity of an anti-noise ordinance prohibiting persons near a school from making a noise that disturbs or tends to disturb the peace of the school session. Although the Court sustained the validity of the Illinois law, it did so expressly because it found that the courts of Illinois had previously limited the phrase “tending to disturb” in a breach of the peace ordinance to apply only where there was at least an “imminent threat of violence.” Id. at 111. Thus, the Supreme Court treated the “tending to disturb” standard in the anti-noise ordinance as corrected by authoritative judicial construction of the state’s highest court. Id. (as to vagueness); id. at 119 (with respect to overbreadth). See also, Baltimore Radio Show v. State, 67 A.2d 497, 505–06 (Md. 1949) (court rule making publication of any matter which may tend in any manner to interfere with administration of justice punishable by contempt, invalid as broader than clear and present danger standard), cert. denied, 338 U.S. 912 (1950).

More recently, in Houston v. Hill, 482 U.S. 451 (1987), a Houston ordinance that prohibited “willfully or intentionally interrupt[ing] a city policeman . . . by verbal challenge during an investigation,” id. at 454, was held to be facially invalid for overbreadth because it was not constitutionally acceptable to leave to the police “unfettered discretion to arrest individuals for words or conduct that annoy or offend them.” Id. at 465. Contempt statutes authorizing punishment for “misbehavior” or “conduct tending to disrupt” seem to grant trial judges that same kind of unfettered discretion that Hill held to be offensive to the Constitution. Indeed, some courts and commentators have suggested that the determination of what conduct is contemptuous can only be made by relying on the discretion of the trial judge. See, e.g., Brautigam, supra note 12, at 1524; Note, A Pragmatic Look at Criminal Contempt and the Trial Attorney, 12 U. BALI. L. REV. 100, 101 (1982).

See also, Hirschkop v. Sneed, 421 F. Supp. 1137 (E.D. Va. 1976), aff’d in part, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689 (1974), rev’d, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (reversing trial court's order prohibiting defendants and their attorneys from making any public comments on pending criminal case as constitutionally impermissible). In Bauer, the Seventh Circuit considered a challenge on the grounds of overbreadth and vagueness to local rules of a federal district court in Illinois that restricted lawyers' rights to comment publicly on pending litigation. The Seventh Circuit invalidated as overbroad several of the rules that prohibited public comment during the period between completion of trial and sentencing in criminal cases and in all civil matters, and limited a rule proscribing attorneys' statements during the investigative stages of a criminal trial to prosecuting attorneys. More importantly, the court found that the standard used in the rules, that lawyers' comments about litigation must be prohibited “if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice,” was overbroad. The court limited the remaining rules to only those comments that pose a “serious and imminent threat” of interference with the fair administration of justice; only these can be constitutionally proscribed. Bauer, 522 F.2d at 249.

Similarly, in Hirschkop, the Fourth Circuit invalidated several sections of an almost identical disciplinary rule adopted by the Supreme Court of Virginia. There too the court imposed a narrowing construction, subjecting each of the expressed prohibitions to a standard of reasonable likelihood of interference with a fair trial. 594 F.2d at 368–69. Both Hirschkop and Bauer also invalidated several of the rules on the ground of vagueness. See infra note 40 and accompanying text. Although Hirschkop undoubtedly was correct in limiting the standardless disciplinary rules of Virginia, its choice of the “reasonable likelihood” test, rather than the “serious and imminent
threat" standard imposed in Bauer, was probably erroneous. See the discussion of Bridges v. California supra.

Different standards of constitutional tolerance between disciplinary rules and contempt statutes may well be justified. Indeed, Hirschkop explicitly distinguished the rule at issue there from the court's contempt power, where the court of appeals recognized the appropriateness of the clear and present danger test. 594 F.2d at 369. However, a violation of the court rule challenged in Hirschkop presumably could be punished by the contempt power. See Bauer, 522 F.2d at 248. The constitutional standard applicable to court rules can be less demanding because the validity of court rules can be challenged by one prosecuted for violating them. See In re Oliver, 452 F.2d 111 (7th Cir. 1971). The validity of a court order, on the other hand, generally cannot be questioned in a contempt proceeding for violating the order. See infra note 110 and accompanying text. But not all contempt citations result from the violation of court orders. Additionally, whether the conduct alleged to constitute contempt is constitutionally immune from punishment or non-obstructive is always debatable in a contempt proceeding. Even if the availability of appellate review of the constitutionality of a disciplinary rule may reduce the chilling effect of a broad proscription on lawyers' extrajudicial speech, it does not provide sufficient justification for extending lesser protection to expression than that ordinarily applicable to speech—a clear and present danger or imminent threat of harm.

2. Unfortunately, such laws are not uncommon. See, e.g., In re Daniels, 118 N.J. 51, 570 A.2d 416 (1990) (affirming that state contempt statute, N.J. STAT. ANN. § 2A:10-1(a) (West 1987), permits punishment for any conduct having a tendency to obstruct justice); Snow v. Hawkes, 183 N.C. 363, 111 S.E. 621, 622 (1922). One argument that might be made against facial invalidation is that unlike other laws, which entrust enforcement to the police, a judge makes the initial determination of whether to charge someone with contempt. Presumably, this judge will not prosecute for constitutionally protected conduct. Unlike police officers, trial judges can be expected to draw the line between punishable and constitutionally immune behavior correctly. Therefore, vigorous advocacy should not be chilled, the argument runs, because attorneys can rely upon judges to charge them with contempt only when their conduct is not protected by the Constitution.

The trial court either will draw the line correctly and not levy contempt charges for constitutionally protected conduct, in which case we need not be concerned with overbreadth, or it will cite conduct as contemptuous that is in fact constitutionally protected. In the latter case, however, the trial court is not just deciding that the behavior in question comes within the applicable definition of contempt. It is also determining that the behavior is unprotected by the Constitution. Thus, at the trial level, a contempt statute cannot be overbroad because the line demarcating conduct unprotected by the Constitution will always be the same as the line drawn by the statute to define contemptuous behavior. However, the statute is overbroad if the appeals court affirms the trial court's determination that the conduct at issue is punishable under the statute, but concludes that the lower court utilized a constitutionally deficient standard or the conduct is nevertheless protected by the Constitution.

Even if trial judges were always correct when they imposed sanctions for contempt, attorneys still would not know before the citation that their conduct was properly punishable; that determination would continue to be made only in hindsight. Because neither the judges nor the attorneys have a very good idea of where the line is that divides obstructive conduct from constitutionally protected advocacy, judges frequently punish behavior that is subsequently found to be constitutionally immune. See, e.g., In re Little, 404 U.S. 553 (1972) (reversing contempt citation of pro se litigant for accusing court of prejudice in his closing argument to jury); Eaton v. City of Tulsa, 415 U.S. 697 (1964) (reversing contempt conviction of witness for using the term "chicken shit" to describe assailant); Weiss v. Burr, 484 F.2d 973, 980 & n.7 (9th Cir. 1973) (reversing contempt conviction of prosecutor for engaging in constitutionally protected advocacy), cert. denied, 414 U.S. 1161 (1974). Moreover, the high reversal rate of contempt convictions results not just from the imprecision of the definition of contempt, but also
B. Vagueness

As to statutes that are on their face limited to obstruction, or so limited by judicial construction, overbreadth would not pose any problems if the courts could define with specificity the category of behavior constituting an obstruction, or conversely, the category of protected conduct which does not.24 However, if determining whether certain conduct is obstructive can only be decided after the fact, on a case-by-case basis, because application of the standard is too fact-specific to permit precise categorical articulation,25 the specificity seemingly gained by reducing the statutes’ overbreadth is lost to the vagueness26 of the standard.27 If the Constitution does not provide a
sufficiently clear line informing attorneys whether their conduct is protected, and if attorneys' only guarantee of not being sanctioned for what they believe is protected courtroom conduct is the faith that the courts will subsequently sort out the punishable obstructions from the permissible conduct, advocacy that courts actually would protect is deterred. 28 Because courts have been unable to describe any bright line appropriately delineating the division between protected conduct and obstruction, 29 the contempt standard's vagueness is a critical issue. 30


When faced with a challenge to federal laws, the Supreme Court has expressed concern for the distinction between cosmetic surgery to save a statute, which it is willing to perform, and wholesale revision, which it is not. See, e.g., Scales v. United States, 367 U.S. 203, 211 (1961) ("Although [the] Supreme Court will often strain to construe legislation so as to save it against constitutional attack, it must not . . . carry this to the point of perverting the purpose of a statute."). Moreover, at least one member of the Court and two former Justices saw no problem even in upholding an overbroad law simply by construing it not to apply to constitutionally protected conduct. See Arnett v. Kennedy, 416 U.S. 134, 158-63 (1974) (plurality opinion of Rehnquist, J., joined by Burger, C.J., and Stewart, J.). In Colten v. Kentucky, 407 U.S. 104, 110-11 (1971), the Court sustained against vagueness and overbreadth challenges the validity of a statute making it an offense for a person with intent to cause public inconvenience, annoyance, or alarm, to congregate with others in a public place and refuse to comply with a lawful police order to disperse. There, the Court found that the law was not unconstitutionally broad largely because the Kentucky statute had been construed by the state courts to apply only where there was no bona fide intention to exercise a constitutional right, "in which event, by definition, the statute infringes no protected speech or conduct." Id. at 111.

In light of these cases, and the difficulty that one would expect to encounter in asking the judiciary to curtail their own prerogatives by striking a contempt statute limited to obstruction as facially overbroad, there is probably little chance of winning an overbreadth or vagueness challenge. Furthermore, as the remainder of this Article suggests, there are means available by which the courts can effectively address the difficulties resulting from the lack of specificity that inheres in the obstruction standard.

28. See, e.g., Dombrowski, 380 U.S. at 487 (noting that the chilling effect of an overly broad enactment on constitutionally protected conduct is not effectively remedied if "the contours of regulation would have to be hammered out case-by-case and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation").

29. There is nearly universal agreement that the courts have failed to define with any specificity the line that separates protected courtroom conduct from contemptuous misbehavior. See, e.g., Brautigam, supra note 12, at 1526, 1529; Note, Criminal Law-Contempt-Conduct of Attorney During Course of Trial, 1971 Wisc. L. REV. 329, 343.

30. Remember that judicial authority to punish for contempt derives not only from statutory grant but from the inherent power of the judiciary as well. See Raveson, supra note 2, at 485-86.

Query whether the standards governing contempt articulated pursuant to the courts' common law power are also subject to vagueness and overbreadth challenge. Certainly, all the vices of a vague law can exist with respect to a judicially created proscription. One commentator has suggested that "the void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender, than as a practical
The constitutional infirmities of vagueness and overbreadth reflect concern with a regulation's failure to adequately distinguish punish-

instrument mediating between . . . all the organs of public coercion of a state and . . . the institution of federal protection of the individual's private interests." Note, The Void-For-


The United States Supreme Court has recognized in an analogous context that a court's failure to clarify the circumstances under which an individual might be held in criminal contempt required reversal of his conviction. In Scull v. Commonwealth of Virginia, 359 U.S. 344 (1959), the Supreme Court reversed a contempt citation against Scull for failure to comply with a court order to answer questions put to him by a state legislative committee. The Court concluded that the purposes of the committee's inquiry, as announced by its chairman, were so unclear as to prevent any opportunity of understanding the basis for the questions or any justifications on the part of the committee for seeking the information Scull refused to give. Because the trial court also failed to clarify these matters when it ordered Scull to answer the questions, the Supreme Court held that he could not know with reasonable certainty he was committing a crime. Id. at 352-53; see also, Watkins v. United States, 354 U.S. 178 (1957) (failure of Un-American Activities Committee to provide sufficient basis for determining pertinency of questions required reversal of conviction for contempt of Congress resulting from defendant's refusal to answer, on grounds of vagueness).

Moreover, numerous cases have reversed contempt convictions where the court failed to provide adequate notice or warning to the contemnor that her conduct was deemed violative of the court's order or contemptuous. See, e.g., Local 191, Int'I Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967) (party may not be held in contempt for violation of vague order). If a court announces a definition of contempt, pursuant to its inherent authority, that gives insufficient notice to participants in the trial process as to what conduct is protected versus that which is punishable, or grants too much discretion to the courts to determine what constitutes contempt on an ad hoc basis, the void-for-vagueness doctrine would appear to require facial invalidation of the proscription. Courts have had little difficulty, in invalidating court rules imposing disciplinary sanctions where the proscriptions contained therein were not clear enough to provide sufficient notice. See, e.g., Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). For a discussion of the aspects of these cases related to vagueness, see infra note 40 and accompanying text.

To be sure, there is a real difference in the review of actions taken by a court in its legislative role as opposed to those taken in its adjudicative role. See In re Oliver, 452 F.2d 111 (7th Cir. 1971). But, where courts essentially can legislate in the criminal arena through the process of common law contempt adjudication, it is not out of the question to suggest that a court could facially invalidate another court's pronouncement under the contempt power. See, e.g., In re Callan, 126 N.J. Super. 103 (rejecting attorneys' challenge that "the substantive common law standard for the offense of contempt is vague and indefinite"), rev'd on other grounds, 66 N.J. 401, 331 A.2d 612 (1975). The modern doctrines of vagueness and overbreadth have had little chance to interact with the judiciary's creation of common law crimes, of which contempt is the last existing example in our law, since the prohibition of common law crimes by the Supreme Court. See Viereck v. United States, 318 U.S. 236, 245 (1943); United States v. Reese, 92 U.S. 214, 216 (1875); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (abolishing common-law crimes in federal system). In any event, the vagueness of any judicial definition of contempt, as applied, surely presents a cognizable claim, and one to which courts are more likely to respond.

Application of overbreadth doctrine to the courts' inherent power to punish for contempt is similarly uncertain. Ordinarily, overbreadth measures the overlap between what a legislative proscription punishes and what the courts determine is protected conduct under the Constitution. Here, there is no legislative proscription: the court defines both what is punishable
able and protected conduct.\textsuperscript{31} However, vagueness and overbreadth are not conceptually equivalent doctrines. A law that is perfectly clear and precise may nevertheless be overbroad if its proscription reaches a substantial amount of conduct protected by the first amendment.\textsuperscript{32} The vagueness doctrine on the other hand, responds only to a lack of clarity or precision,\textsuperscript{33} and is not limited to first amendment freedoms.

Laws that are so vague or indefinite that they do not give fair warning of what conduct is proscribed implicate three constitutional considerations, all applicable to contempt. First, a law which is so indefinite as to require people "of common intelligence [to] necessarily

under its inherent power and what is protected by the Constitution. See supra note 23. As with vagueness, where a court is acting legislatively, through the promulgation of rules, its proscriptions can be facially invalidated as unconstitutionally overbroad. See, e.g., Hirschkop, 594 F.2d 356; Bauer, 522 F.2d 242. With respect to case-by-case adjudication, however, the reviewing court is likely to focus on the constitutional standard employed in the particular case under review, whether the conduct at issue therein comes within the court's prohibition, and whether the conduct is constitutionally protected. Where the reviewing court finds the conduct in question to be proscribed by the lower court's standards for contempt, but nevertheless protected by the Constitution (or a state's own constitution), the reviewing court will find the lower court's standards to be overbroad, and reverse the conviction. Where the conviction is based on an overbroad contempt statute, and a lower court's limitations fail to exclude unconstitutional applications of the statute, or do so by rendering the statute too vague, see supra notes 25-28 and accompanying text, the appellate court's imposition of a new standard relates back to the statute. The statute incorporating this new standard can still be facially invalidated.

In a prosecution pursuant to the court's inherent contempt power, an appellate court would generally be faced with both an individual conviction for specific conduct and some kind of statute-like pronouncement of the jurisdiction's definition of contempt. The appellate court obviously could reverse the conviction without addressing the broader contempt standard. To the extent the decision clearly applies to similar cases, the court could limit the reach of its inherent power. Finally, if able, the court could and probably would choose to carve out a precise category of protected conduct from the judicial proscription of contempt.

But where an appellate court is unable to precisely define a category of constitutionally immune expression, and any effort to limit the statute would only replace overbreadth with vagueness, facial invalidation of the standard would have little meaning. Presented with this problem, the courts would continue to possess the inherent power to punish for contempt, but could apply it in the absence of any specific standard. This practice would cause the same or worse problem with respect to a lack of notice. Given the dearth of enviable options, courts inclined to address the issue at all are likely to limit the construction of any judicial standard to some variant of the "obstruction" or "imminent threat of obstruction" standard and sustain the validity of that rule. In this case, the vagueness problems of those standards could be alleviated by the recommendations suggested in the remainder of this Article.

\textsuperscript{31} See, e.g., Note, supra note 30 (characterizing the two doctrines as an "infinitely parallel contrariety"); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (invalidating law prohibiting demonstrations as "unconstitutionally vague in its overly broad scope").


\textsuperscript{33} See, e.g., cases cited supra note 32. As with overbreadth, a law is not unconstitutionally vague unless it may reach a substantial amount of constitutionally protected activity. See, e.g., City of Houston, 482 U.S. at 458.
guess at its meaning and differ as to its application," violates due process because it does not sufficiently notify individuals whether their conduct is punishable. Second, the lack of specificity in a vague prescription can deter protected activity because if an individual cannot discern between immune and punishable conduct, the only safe course is to avoid any behavior that the law could conceivably reach. The risk of deterring protected conduct has moved the Supreme Court to demand a greater precision and clarity of laws potentially chilling speech than of laws in other areas. Third, vague standards delegate an unacceptable level of discretion to those responsible for enforcing the law, often resulting in arbitrary and discriminatory application. This also constitutes a denial of due process, and can deter protected expression.

Even if a finding of obstruction required some showing of disruption or demonstrable harm, the line separating protected from punishable conduct would not be particularly bright. Questions would still remain. For example, at what point might the delay caused by repetitive arguing fairly be considered disruptive, or what level of interference with the authority of the court is demonstrably damaging to the administration of justice? But exercise of the contempt power does not require such a showing because obstruction encompasses less tangible harms than disruption or demonstrable harm. And where con-

36. See, e.g., Grayned, 408 U.S. at 109; Baggett v. Bullitt, 377 U.S. 360, 372 (1964) ("Those . . . sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.").
37. See, e.g., Smith, 415 U.S. at 573–74.
39. Although "actual obstruction of justice" is an imprecise standard, the vagueness would be magnified if the standard were expanded to include less injurious conduct under the imminent threat of obstruction test. See Raveson, supra note 2, at 523–24 nn.177–79. Because "obstruction" includes within its reach non-demonstrable harm, extending the scope of prohibition to the imminence of such harm magnifies the vagueness of the category. Those standards grounded on even less of a showing, such as a tendency to interfere with justice, are more imprecise still. Moreover, to the extent these less restrictive standards are precise enough to give fair notice of what conduct is proscribed, they would most likely be unconstitutionally
duct is measured against a standard that need not be triggered by demonstrable damage, the imprecision of the line is even greater. Indeed, some courts have themselves explicitly recognized the inherent vagueness of the "clear and present danger of obstruction" standard as utilized in the law of contempt. As the Supreme Court of overbroad. See City of Houston v. Hill, 482 U.S. 451, 462 (1987) (ordinance prohibiting speech that "in any manner . . . interrupt[s]" a police officer held not vague but struck as overbroad).

40. See, e.g., Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). Both Hirschkop and Bauer invalidated as unconstitutionally vague a number of disciplinary rules adopted by state and federal courts that, as part of a larger scheme of prohibiting attorneys' extrajudicial comments at various stages of a trial, might interfere with the administration of justice, and proscribed public comment on any "other matter reasonably likely to interfere with a fair trial of the action." Bauer, which subjected the provision to the more demanding standard of a "serious and imminent threat" of interference, held that it was still too uncertain to stand, concluding that "[i]ts chilling effect is obvious." 522 F.2d at 259. Hirschkop also determined that the rule did not provide adequate notice and suggested that it delegated an unacceptable level of discretion to those responsible for enforcing the law. 594 F.2d at 371.

Moreover, both courts questioned the sufficiency of the notice provided by the clear and present danger of obstruction test in contempt cases. In Hirschkop, the court stated that in several of the Supreme Court's contempt rulings, Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941), "the contempt power of the court had been invoked and punishment imposed on the basis of vague and general standards." 594 F.2d at 369. Furthermore, Hirschkop declined to construe the disciplinary rules at issue as limited to a clear and present danger or serious and immediate harm test because to do so would inject too much uncertainty into the rules as to whether particular conduct is punishable. Id. at 368. Unfortunately, the court failed to realize that the reasonable likelihood standard poses the same problems with respect to vagueness as the more stringent tests it rejected. This failure derives largely from Hirschkop's focus upon the degree of likelihood of interference with the administration of justice rather than the meaning of interference itself. To the extent that the reasonable likelihood test reduces the uncertainty of the standard, it does so only at the expense of increasing the scope of the proscription to the point of overbreadth.

The court in Bauer also understands the inherent vagueness of the imminent threat of interference test, concluding that standard is not constitutionally sufficient by itself:

While the application of the [imminent threat of interference] standard to these rules can eliminate overbreadth, the specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a "serious and imminent threat" of interference with the fair administration of justice. 522 F.2d at 249-50. Hirschkop too relies on the "rules which are quite explicit in informing [lawyers] what they may and may not say for publication," to provide the clarity necessary to withstand constitutional attack. 594 F.2d at 369.

These cases echo the Supreme Court's own earlier intimations that the clear and present danger of obstruction standard in contempt cases is itself unavoidably uncertain. For example, in Bridges v. California, 314 U.S. 252, 261-63 (1941), the Court noted that although the clear and present danger formula provides a "working principle," it "does not comprehend the whole problem." Questions still remain, the Court continued, with respect to determining when a danger shall be deemed clear and how remote the danger may be and yet be deemed present. Id. at 261. These concerns are particularly poignant where the danger—obstruction of the administration of justice—is identifiable only after the rigorous balancing of competing interests. As the Court acknowledged in Pennekamp v. Florida, 328 U.S. 331 (1946), in response to the question: "What is meant by clear and present danger to a fair administration of justice? No definition could give an answer." Id. at 348. Rather, the standard is given meaning by weighing "the right
the United States conceded in *Bridges v. California*, the contempt power is "based on a common law concept of the most general and undefined nature." Even the standard of actual obstruction has been acknowledged by some courts to be unclear. Less stringent standards employed in many contempt statutes, such as "misbehavior" and "conduct tending to disrupt," only exacerbate all three infirmities of a vague proscription. Absent an authoritative judicial construction limiting such prohibitions at least to the "imminent threat of obstruction" test, these less stringent standards are probably unconstitutionally vague.

of free speech ... against the danger [to the courts] from the particular conduct in question. *Id.* at 346.

These cases all strongly support the point that under the actual obstruction standard or the clear and present danger formulation, whether specific conduct interferes enough with the administration of justice to justify contempt sanctions can only be properly determined through the application of appropriate variables.

41. 314 U.S. 252, 260 (1941).

42. See, e.g., *United States v. Seale*, 461 F.2d 345, 369 (7th Cir. 1972) (obstruction of the judicial process is "an elusive concept which does not lend itself to general statements").

43. As the scope of a criminal statute broadens, the vagueness of the proscription is often reduced. To the extent the language of an expansive prohibition is plain and unambiguous, it may provide adequate notice of what conduct is punishable. Of course, the problem with expanding the range of prohibited behavior is that the conduct clearly proscribed under the statute is more likely to be protected by the Constitution; therefore, vagueness concerns are replaced with the threat of overbreadth. See, e.g., *City of Houston v. Hill*, 482 U.S. 451 (1987) (city ordinance making it illegal to, in any manner, oppose, molest, abuse, or interrupt a police officer unconstitutionally overbroad but not vague). This is the converse of the relationship between overbreadth and vagueness previously discussed. See *supra* notes 25–28 and accompanying text.

Nevertheless, the evils of overbreadth and vagueness sometimes share one common element that, contrary to the problem above, tends to synchronize increases in the breadth of a law with a higher degree of vagueness. The Supreme Court has invalidated laws that grant officials unfettered discretion to arrest or charge individuals for words or conduct that annoy or offend them on both overbreadth and vagueness grounds. See, e.g., *Hill*, 482 U.S. at 451 (overbreadth); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (striking for vagueness a state law making it criminal to publicly treat the United States flag contemptuously; such state law is "of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections . . . [thereby] entrusting law making ‘to the moment-to-moment judgment of the policeman on his beat’"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971) (statute prohibiting "annoying" conduct contains an obvious invitation to discriminatory enforcement, and is both unconstitutionally vague and overbroad). Additionally, the constitutional vices flowing from the virtually unfettered discretion accorded trial judges to levy contempt charges based on subjective standards and personal sensibilities is compounded greatly by the abbreviated procedural protection used in summary contempt proceedings. In such proceedings, the judge is at once the enforcement official, the prosecutor, and the court, and often the victim of perceived misconduct as well. Cf. *United States v. Wilson*, 421 U.S. 309 (1975) (authorizing use of summary proceedings in criminal contempt case).

44. See *Grayned v. City of Rockford*, 408 U.S. 104, 110–12 (1971) (upholding ordinance proscribing noise tending to disturb peace of school session against vagueness challenge because imprecision of language corrected by state judicial limitation of standard to imminent
This is not to say that the obstruction standard does not apply clearly to a core of unprotected conduct. When individuals attempt to subvert judicial processes by illegal acts or acts wholly outside the established rules of procedure, the line demarcating obstruction is quite bright. For example, where an individual tampers with a jury, bribes a witness, or insults a judge, there is little question that the administration of justice has been obstructed. Similarly, where a defendant hurls an object at the prosecutor, or a number of attorneys in a multi-defendant case exit the courtroom en masse delaying the trial for several hours, it can hardly be argued that they did not have fair notice that their conduct was punishable. Judicial constructions of the obstruction standard unanimously proscribe such behavior.

At the risk of asking an overly simple question, why is it that we do not have much difficulty in identifying these actions as obstructive? Is obstruction of the administration of justice like Justice Stewart’s view of obscenity—we know it when we see it; or are there identifiable characteristics that inform us such conduct is clearly obstructive? A number of factors probably operate on an almost unconscious level to evoke a consensus that these kinds of behavior are properly punishable.

45. Actual obstruction, like imminent threat of obstruction, may also include attempts to block the judicial process or to prejudice the fairness of a proceeding. Such conduct need not have an actual effect on the outcome of a trial in order to be actually obstructive. Thus, for example, the attempt to bribe a juror has properly been found to constitute an actual obstruction of justice. See, e.g., cases cited infra note 46.


47. See, e.g., Ex parte Savin, 131 U.S. 267 (1889).


51. As to these individuals whose conduct falls squarely within the meaning of the statute, standing would not exist to challenge the constitutionality of the contempt statute as vague on its face or as it is applied to others. See Parker v. Levy, 417 U.S. 733, 753–58 (1974). However, as to those individuals for whom fair notice is in fact lacking—the ensnared innocent—the prohibition can be challenged as applied to them.

52. See Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define [hard-core pornography] . . . . But I know it when I see it . . . . ").
as contempt.\textsuperscript{53} First, whatever one's view of the trial process, everyone would most likely agree that it is difficult for the other participants in the proceeding to do their jobs while dodging flying objects. Moreover, where conduct actually halts the trial for a substantial period, justice is literally disrupted. Second, these kinds of misbehavior can in no way be interpreted as the inevitable lapses of vigorous advocacy. Rather, they represent gross departures from the ordinary range of courtroom conduct, far beyond the bounds of what any judge would find acceptable. Indeed, where the conduct is independently punishable as a crime, the actor is obviously on specific notice that his behavior is obstructive. Third, determining the harm caused by the misbehavior is not complicated by having to balance some countervailing value of the conduct to the administration of justice. Such behavior is so far beyond any permissible process of presenting one's case as to fail to be even arguably advocative. Finally, however we choose to define the requisite intent necessary to make an obstruction punishable as contempt,\textsuperscript{54} it seems appropriate to infer it from these actions.

Obstruction of the administration of justice, however, can be such an amorphous harm that there is a broad area, short of the kinds of conduct just noted, where any positioning of a line demarcating the innermost reach of the contempt power would be arbitrary. Our system requires attorneys to practice at the boundary of permissible advocacy and to struggle with the trial court over the location of that boundary. When courts find it necessary to punish excessive or repetitive argumentation, disrespect, or improper argument or questioning of a witness, it becomes easy to lose one's way with respect to what conduct is punishable.\textsuperscript{55} The only bright line that can be drawn where the value of the conduct at issue to the administration of justice conflicts with the competing needs of order and respect for the court is to require immediate obedience to every ruling and order of the court. Even that line, however, would not account for all circumstances in which the contempt power might apply. For example, making an

\textsuperscript{53} Although we are speaking here about notice, these are also some of the factors that should be considered in determining whether an attorney's conduct should be punishable as contempt. Naturally, there is an inexorable connection between them. To the extent that the variables governing the substantive determination of whether conduct is obstructive are clear and precise, and can be applied prospectively to guide conduct, individuals can be fairly warned of the range of conduct that is proscribed.

\textsuperscript{54} See infra Section V.

\textsuperscript{55} Justice Black characterized criminal contempt as the offense "with the most ill-defined and elastic contours in our law." Green v. United States, 356 U.S. 165, 200 (1958) (Black, J., dissenting).
argument to the jury grounded on racial prejudice, or insulting the judge, could justify a contempt citation even though the conduct does not violate a court directive.\footnote{One could posit an affirmative obligation of attorneys to consult with the court and allow it to rule before making any argument or asking a question of a witness that the lawyer can fairly anticipate might be objectionable, and reveal or suggest highly prejudicial information to the jury. Lawyers, in fact, do have some such obligation. See infra notes 197–99 and accompanying text. There are problems, however, to this solution. First, it still does not address the issue of disrespectful remarks to the judge. Second, it places attorneys in a dilemma of having to warn opposing counsel to object to questions or arguments to which opposing counsel might not otherwise object. Often, attorneys are far more aware of the objectionability of their own actions than opposing counsel might be.}

More fundamentally, although mandating strict obedience to the court would provide a precise standard, it would also be overly broad, drawing the line between advocacy and obstruction in the wrong place.\footnote{See Raveson, supra note 2, at 566–79.}

Those courts properly rejecting the “obey the court” standard draw lines between clearly protected advocacy and violently disruptive behavior all over the spectrum. Appellate courts, for example, have affirmed contempt convictions for continuing to stand after one or two orders to be seated.\footnote{See, e.g., State ex rel. Smith v. District Court, 677 P.2d 589 (Mont. 1984).} Conversely, courts have reversed convictions for excessive argumentation after numerous orders to stop, including several warnings that the attorney would be held in contempt.\footnote{See In re Natale, No. A-1549–84T5, (N.J. Super. Ct. App. Div. June 27, 1986) (on file with the Washington Law Review).} Similarly, courts have both upheld and overturned contempt convictions for an attorney’s threats to refuse to obey a trial judge’s order.\footnote{Compare United States v. Baldwin, 770 F.2d 1550, 1556 (11th Cir. 1985) (attorney’s statements that he would not appear and represent his clients on religious holidays despite court order to contrary constitutes contempt), cert. denied, 475 U.S. 1120 (1986) with In re McConnell, 370 U.S. 230 (1962) (threats of attorney to violate direct court order to cease a line of questioning, “until some bailiff stops us,” not an obstruction of justice). Although the attorney in Baldwin ultimately fulfilled his threat to not appear while the lawyer in McConnell eventually acceded to the court’s command, Baldwin is clear that the threats themselves were independently contumacious. Moreover, the attorney’s challenge to the court’s authority in McConnell was far more confrontational and disrespectful than in Baldwin.}

Although, as a whole, appellate decisions defining the substantive scope of the contempt power demonstrate a fair degree of sensitivity to the value of vigorous advocacy and its vulnerability to deterrence by
the power of contempt, these and many other examples illustrate that the courts have not protected advocacy with any precision.

The Supreme Court has been no exception. In the handful of cases considering the contempt power's reach to punish courtroom conduct, the Court has reversed the convictions and has been extremely supportive of the advocate's duty to vigorously represent the client. The Court has also recognized the inevitability both of minor excesses of advocacy on the part of attorneys and of occasional confusion between personal offense and obstruction of justice on the part of judges. However, the Court's decisions are devoid of any analysis of the variables that should be used to distinguish legitimate advocacy or innocuous conduct from obstructive misbehavior. Therefore, the

61. See, e.g., In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230 (1962); In re Dellinger, 461 F.2d 389 (7th Cir. 1972), aff'd, 502 F.2d 813 (1974), cert. denied, 420 U.S. 990 (1975); United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

62. Compare United States ex rel. Robson v. Malone, 412 F.2d 848 (7th Cir. 1969) (upholding contempt citations imposed on spectators who refused to comply with order to rise) and In re Chase, 468 F.2d 128 (7th Cir. 1972) (same as to defendant in criminal case) with United States v. Snider, 502 F.2d 645 (4th Cir. 1974) (failure to rise cannot constitute obstruction because act of rising not essential to proceedings).

63. Some of the disparity in the courts' application of the contempt power must naturally be attributable to the development of different standards in different jurisdictions. Given the elastic nature of the obstruction standard, it is to some extent unavoidable, and perhaps to some extent appropriate that individual jurisdictions express differences in determining when conduct becomes contemptuous. There are likely to be geographical gradations of tolerance and impatience for such behavior, especially where disrespect plays some role in the finding of obstruction.

Moreover, the disparate treatment of similar conduct from jurisdiction to jurisdiction rarely reflects any variation in the courts' analyses of contempt cases. Rather, it merely parallels the kind of haphazard and arbitrary line drawing that goes on within the individual jurisdictions. Because the different lines marking contemptuous behavior are based on ad hoc feelings for the specific facts of each individual case, rather than on any principled analysis or balancing of the conflicting values involved, there is little clarity or precision even within a single jurisdiction.

Indeed, within the same jurisdiction courts frequently treat seemingly similar cases quite differently. Compare State v. Gonzales, 134 N.J. Super. 472, 341 A.2d 694 (App. Div.) (criminal defendant held in contempt after directing "vulgarities" at court), aff'd, 69 N.J. 397, 354 A.2d 325 (1975) with State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (Essex County Ct. 1969) (defendant's utterance of a vulgarity in open court held to have created no disorder). In addition, numerous state and federal court contempt convictions appear to conflict with United States Supreme Court precedents. Compare, e.g., State ex rel. Smith v. District Court, 677 P.2d 589 (Mont. 1984) (attorney held in contempt after failing to sit down after several warnings to do so) with In re McConnell, 370 U.S. 230 (1962) (reversing contempt conviction for attorney's refusal to stop arguing despite several orders to cease and for threat to court that attorney would continue to question witness until "some bailiff stops us," in contradiction of court order for silence).

64. See, e.g., In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230 (1962).

65. See, e.g., In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230 (1962); cf. Offutt v. United States, 348 U.S. 11, 14 (1954) ("The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance.")
Court fails to provide the kind of warning necessary either to guide the lower courts or to remedy the chilling effect of an imprecise proscription.\textsuperscript{66}

Partially as a result of appellate court confusion over the application of the obstruction standard, trial courts have been even more arbitrary in drawing the line between protected conduct and contempt.\textsuperscript{67} For example, trial courts have held an attorney in contempt for refusing to use her husband's surname in court,\textsuperscript{68} and others for appearing in attire that offended the judge,\textsuperscript{69} smirking,\textsuperscript{70} and refusing to begin a criminal trial when the attorney was at home and seriously ill with a high fever.\textsuperscript{71} Threats of contempt are regularly made in response to any conduct the judge might find annoying. In my own experience, I have seen judges threaten contempt against attorneys for absentmindedly tapping a pen on counsel table, making a joke when no jury was present, and using an innocuous expression that the judge did not like.\textsuperscript{72} And, of course, threats of contempt and actual citations are

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\textsuperscript{66} To the extent that the case-by-case development of standards and knowledge of the courtroom customs provide some notice of what conduct is protected and what is punishable, attorneys are more likely than other participants in the trial process to know the scope of the proscription. Cf. Eaton v. City of Tulsa, 415 U.S. 697, 700 (1974) (Powell, J., concurring) (in view of contemporary standards of use of profane language, witness may have had no reason to believe that use of phrase "chicken shit" would be disruptive of proper courtroom decorum).

\textsuperscript{67} Even if appellate courts were very precise in identifying the variables that distinguish protected from punishable courtroom conduct, trial judges' perceptions of personal offense, and their individual sensibilities as to etiquette and decorum may trigger citations for and threats of contempt in response to conduct that is clearly unobstructive.

\textsuperscript{68} See N.Y. Times, July 14, 1988, § A, at 23, col. 2.

\textsuperscript{69} See, e.g., In re De Carlo, 141 N.J. Super. 42, 357 A.2d 273 (App. Div. 1976); Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183, 201–02 n.70 (1971). One commentator, however, has strongly suggested that fundamental normative values may be furthered by the rituals of dress. See W. ALLEN, GETTING EVEN 25 (1966) ("Eternal nothingness is o.k. if you're dressed for it."). In all seriousness, the appropriateness of attorney dress is a good example of how vague the unwritten rules of courtroom decorum are. At some point, perhaps only after a warning, the manner in which an attorney dresses arguably can interfere with the administration of justice. Short of such obviously inappropriate clothing, how can the effect of casual dress on the processes of justice be measured, so that the proper line may be drawn? Other standards of etiquette and decorum, which govern an attorney's tone of voice, facial expressions, and degree of contentiousness towards the judge, are similarly incapable of distinguishing between protected and punishable behavior except in the most extreme cases.

\textsuperscript{70} See In re Daniels, 118 N.J. 51, 570 A.2d 416 (1990); Parmelee Transp. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961) (reversing trial contempt citation for "sneering").


\textsuperscript{72} An assignment judge held in contempt a lawyer who answered a trial call for another member of her firm by stating that the other attorney was "on his feet" in the court of another county. The judge made it clear that the threat of contempt was not for the failure to appear but for the expression, which, for some strange reason, he found to be "vulgar."
\end{quotation}
Advocacy and Contempt

employed with as much arbitrariness to curtail advocacy that the judges find overzealous, confrontational, or merely disagreeable.\textsuperscript{73}

At the same time, trial courts are extremely varied in the degree of tolerance shown to misconduct in certain categories. In such cases, they frequently are more hesitant to issue a citation than appellate decisions would seem to indicate is appropriate.\textsuperscript{74} For example, the antics of well-known attorneys, which have been punished when engaged in by less experienced counsel, are often viewed by judges with a begrudging admiration—an acceptance of a battle of wills and wits.\textsuperscript{75} In addition, trial courts appear to be overly permissive with attorneys', and particularly prosecutors', improper arguments and questioning of witnesses.\textsuperscript{76} For the most part, permitting a broader range of advocacy and courtroom conduct is beneficial, except when an attorney's behavior prejudices the deliberative process against the opposing litigant. Whether beneficial or not, however, attorneys often have little idea whether their conduct will be treated as protected or obstructive by either the trial or appellate court.

Furthermore, every day trial courts refrain from citing for contempt the very same conduct that is sometimes found to be obstructive. This uneven treatment not only adds to contempt's imprecision, but also raises questions about the courts' need to exercise the contempt power to deal with such conduct. If courts are sometimes capable of conducting their business without resort to the contempt power in response to particular behavior, they may not be justified in exercising that power to punish the same behavior at other times.\textsuperscript{77}

\textsuperscript{73} See, e.g., cases cited supra note 61.

\textsuperscript{74} That trial courts threaten and cite for contempt much more than appellate courts are willing to condone is obvious from the large number of decisions reversing contempt convictions. That trial courts are also more tolerant of some categories of behavior is far less obvious because few opinions ever result from such circumstances.

\textsuperscript{75} See, e.g., Gill, The Oral Tradition of Gerry Spence in Pring v. Penthouse, 17 Sw. U.L. Rev. 693 (1988). As Professor Gill notes, during a trial against Penthouse magazine for libel, Gerry Spence, one of the most famous and well-regarded trial attorneys in the country, wholly ignored repeated court rulings to desist from referring to Penthouse as smut, sewage, filthy, degrading, degenerate, and vile. Yet, rather than holding Spence in contempt for such continual and potentially prejudicial violations of the Court’s order, or even threatening him with a contempt citation, the court seemed content merely to glorify such misconduct by characterizing it as “Spencarian”[sic]. \textit{Id.} at 704.

\textsuperscript{76} See infra Section IV.E.

\textsuperscript{77} That many courts find it unnecessary to exercise the contempt power in response to particular conduct is an indication that the judiciary can safeguard the administration of justice by less drastic means. A court that responds to misbehavior with an admonishment or recess has chosen a less restrictive alternative. Even if a court does nothing at all in the face of arguably obstructive conduct, it is also using less restrictive alternatives to the contempt power: alternatives that the court believes will further the goals of justice more than contempt.
The trial courts' tolerance of arguably obstructive conduct may go beyond obscuring the fair warning necessary to notify attorneys of what is contumacious conduct; it may also affect the actual standards for defining an obstruction.\textsuperscript{78} If obstruction of justice were always an

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\textsuperscript{78} In speaking of the courts' tolerance of some categories of behavior, it is necessary to consider the distinction between a court's failure to impose contempt sanctions after warning the actor that the conduct is obstructive, and failure to give any warning at all. The analysis set forth in the text is obviously applicable where the court neither warns the actor nor cites the conduct as contempt. The real question is whether that analysis applies when a court does warn an attorney that her conduct is obstructive, but does not charge her with contempt.

Warnings will provide fair notice if the court directs them to the same conduct ultimately cited as contempt. If a court fails to follow through with its threat to hold an individual in contempt after repeating the conduct, however, the clarity of the notice is again obscured. This sort of mixed message, which is not uncommon in trial practice, can be very confusing and lead to a somewhat justifiable understanding that the original warnings may have been exaggerated as a device for stifling opposition to the court's wishes.

As to the effect of warnings on the actual standards for determining whether conduct is obstructive, where a judge warns an attorney that her behavior is contumacious, that conduct can hardly be considered a permissible custom of courtroom practice. On the other hand, the utilization of warnings rather than contempt charges may be an effective and less restrictive alternative to contempt. Similarly, the use of warnings, as opposed to the imposition of contempt charges, may indicate that the custom of trial practice is to caution against continuation of the behavior, without exercising the contempt power. Thus, as with the question of notice, the warning may reasonably be thought of as an exaggeration. These different interpretations of the courts' restraint appropriately reflect an ambivalence toward conduct that we would like to discourage but, absent special circumstances, would not like to punish as contumacious. \textit{See infra} notes 126-27 and accompanying text.

To some degree, a special circumstance that would give rise to contempt can be the warning itself. A warning may sometimes have the effect of elevating otherwise unobstructive behavior to the level of contempt if it is repeated, because the refusal to obey the court may itself constitute an obstruction. To the extent, then, that the prior warning does make a future violation obstructive, the court's failure to use the contempt power after a repetition of the offensive conduct is as if the court had never issued a warning at all. In other words, if particular behavior is obstructive only after, and in part because of, a court's admonition that the conduct is contumacious, the warning itself does not indicate that the conduct is obstructive; only a violation of the warning \textit{after} it is given would have such an effect. Therefore, the failure to utilize the contempt power after a warning is similar to not issuing a contempt citation for arguably obstructive behavior where no warning had been given in the first instance.

Nevertheless, we should not assume that conduct merely warned against is permissible conduct simply because the court warns that conduct is contumacious, without actually citing it as such. The court's restraint should not be treated as immunizing the conduct from the contempt power. In the long run, encouraging the use of warnings and judicial restraint rather than the leveling of contempt charges will likely further the independence of the bar and the vitality of advocacy. If the courts' use of warnings rather than contempt sanctions is treated as legitimizing the behavior, however, courts will be forced to utilize the power of contempt in circumstances where an admonition might otherwise have sufficed. Indeed, if warnings can be ignored by the participants in a trial, they will not constitute a less restrictive alternative to contempt proceedings, because they will not effectively achieve the courts' objectives. Thus, we should give effect to warnings by the court in setting the limits on the scope of permissible courtroom behavior.

This is not to say, however, that the violation of any court warning is necessarily obstructive. On the contrary, a prior caution that certain conduct is contumacious is but one of many factors
\end{footnotesize}
unambiguous and demonstrable phenomenon, tolerance of obstructive behavior would not affect the scope of contempt. But, because the contours of the zone of contemptious conduct are often diffuse, a judge's indulgence of questionable behavior, and even more so, her participation in or provocation of confrontational debate, can be fairly interpreted as indicating that the behavior is not obstructive. In addition to the adequate warning problem, the court's prior tolerance of behavior presently sought to be punished as contempt raises serious questions whether the contemnor acted with the requisite wrongful intent.79

When these dynamics are viewed in the unique light shed by the law of contempt, one can see that the use or non-use of the contempt power may change the character of what we classify as an obstruction. Obstruction has a self-defining quality: to the extent that disobedience and challenge to the court's authority are considered to be obstructive, anything we call obstructive tends to be self-fulfilling, because attorneys who continue to engage in that conduct after being warned that it is deemed obstructive are violating the court's command.80 Conversely, when a judge permits certain behavior in the courtroom, the combination of the vagueness of the obstruction standard, the judge's omnipresence in observing the conduct, and her presumed ability to distinguish between protected and obstructive behavior, should influence the definition of obstruction. That is, we must partially look to the customs and norms of courtroom practice to help define and apply the obstruction standard. In contrast, when dealing with a precise proscription, such as a speed limit, the failure to prosecute every violation obviously does not affect the meaning of the proscription or provide a defense to those who are cited. Even where a prohibition is less specific, such as a law against disorderly conduct, behavior that arguably comes within the prohibition may not be prosecuted simply because it goes undetected, or because the police devote their efforts to higher priorities. Furthermore, a police officer's determination not to issue a summons, even if it is based on a decision that the law is not being violated, does not carry the kind of authoritative presumption of correctness that a court's decision carries. But a trial judge witnesses

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79. See infra Section IV.D.

80. Conduct should not, however, be considered obstructive merely because a trial court deems it so. Obstruction must be measured objectively rather than subjectively. See Raveson, supra note 2, at 562-65 nn.295-302 and accompanying text.
all conduct in the courtroom and is always in the position of determining whether conduct is obstructive. And there is little reason for a judge to refrain from using the contempt power where she feels it is necessary to protect the fairness and continuity of the proceedings. Therefore, permitting particular kinds of behavior, allowing a certain level of aggressiveness in advocacy, and tolerating minor excesses of vigorous representation, serve to incorporate such behavior as protected courtroom conduct. This is especially so where the nature of the harm is disrespect or disobedience, as opposed to interference with the deliberative process. The court is likely to be sensitive, if not oversensitive, to disorder, disrespect and disobedience. If the court does not feel the need to wield its contempt power to maintain order or vindicate its authority, its restraint indicates that such behavior is an accepted (if unwelcome) aspect of courtroom practice. Thus, the

81. Courts are, or at least should be, concerned about not exercising the contempt power in front of the jury, so as not to prejudice the attorney's cause. In addition, courts certainly want to avoid having to delay the proceedings to deal with the contempt citation itself, or to hold a summary hearing, and they have an interest grounded on judicial economy in avoiding a plenary contempt trial before another judge. Hopefully, courts also want to protect the independence of the bar and prevent any chilling of vigorous advocacy. But where a court believes use of the contempt power is truly necessary to protect the proceedings and to deter future misconduct, these potential downsides to the exercise of the contempt power can be minimized and are not likely to dissuade a judge from exercising the contempt power.

82. With respect to an attorney's improper interference with the deliberative processes of a trial, this Article argues that the courts should exercise the contempt power more freely in some circumstances than they have in the past. See infra Section IV.E. However, the prior reluctance of the courts generally to consider such conduct contemptuous arguably insulates the behavior from the contempt power until it is treated by them more clearly and consistently as obstructive. Nevertheless, a judge's tolerance of conduct that might be deemed disrespectful or defiant should to some extent be reflected in the obstruction standards because, almost by definition, what a court does not perceive as offensive is not obstructive. On the other hand, in determining whether deliberative processes are obstructed, the judge's feelings and restraint are not so clearly a factor in measuring the harm to the administration of justice.

83. Nevertheless, the circumstances of various trials differ enough that identical conduct, which causes no obstruction in one proceeding, can be obstructive in another. For example, a prejudicial remark to the jury about a criminal defendant is ordinarily more likely to be obstructive than the same comment concerning a civil litigant. Similarly, in a trial where the judge has had difficulty maintaining order, an attorney's disobedience or disrespectful remarks can be more threatening to the administration of justice than in a perfectly peaceful proceeding. Conversely, a capital case might require a broader latitude of advocacy for defense counsel than a minor civil matter.

These kinds of differences may add to the appearance of inconsistent application of the contempt power. This is especially true where, as is almost always the case, courts fail to articulate these differences as bases for their decisions. However, the introduction of these considerations as further variables in the obstruction determination probably also increases the actual unevenness of how the contempt power is exercised. Once the nature and character of the trial are at issue in the balancing process, trial judges are likely to feel that they have unfettered discretion to cite conduct as contemptuous since every proceeding arguably presents unique circumstances calling for exercise or restraint of the power. Moreover, when trial judges
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courts' tolerance of forensic behavior operates both to assist in identifying the boundary between obstructive and protected expression and to provide an objective measure of obstruction. Stated simply, the

consider the individual circumstances of particular proceedings in determining the propriety of contempt sanctions, they are likely to receive greater deference from appellate courts because trial judges are ostensibly in a better position to objectively assess the character of their own proceedings.

Although individualized attributes of trials should be considered when deciding whether particular conduct is obstructive, most of these differences can be generalized into broad categories. See infra Section IV. To the extent this is not possible, it is perhaps incumbent upon the trial judge to warn attorneys in advance that the unusual circumstances of the case require a curtailment of the ordinary range of permissible expression. In any event, when the text speaks of the similarity between courtroom conduct in different trials (or even at different times in the same proceeding), the similarities must be measured against the considerations relevant to determining whether the contempt power may be exercised appropriately. See infra Section III.

However, the exercise of the contempt power is not necessarily an objective measure that the conduct is contemptuous. An attorney's aggressive advocacy, including heated debate with the court and minor excesses of advocacy, such as mildly disrespectful remarks and continued argument after orders to cease, may often trigger a contempt citation where there was no obstruction of justice. The history of abuse of the contempt power makes that starkly clear. Therefore, despite the use of the contempt power by many trial judges in similar circumstances, such exercises of the power may reflect only a fulfillment of the expectation that many trial judges will mistakenly cite conduct for contempt that is not actually interfering with the administration of justice (other than by dint of the judges' subjective overreactions to the behavior).

Indeed, there is a significant category of conduct that is contemptuous, if at all, only because the courts say it is. With respect to behavior such as an attorney's failure to acquiesce immediately to a court's order to cease arguing, the level of emotionality displayed in advocacy, or the abrasiveness of the language used in argument, the harm to the administration of justice is so amorphous that such conduct tends to be obstructive simply because it violates customs of practice and the courts' insistence that such conduct is considered by them to be obstructive. See Raveson, supra note 2, at 564 n.300 and accompanying text. A broad range of qualities of advocacy are either beneficial or detrimental to the administration of justice. The courts' encouragement or disfavor of these attributes change from time to time and from place to place. In this sense, notice that particular conduct is obstructive is inseparable from the conduct's obstructiveness: the normative standard merges with the notice. It is important, therefore, for courts to refrain from categorizing conduct as obstructive unless it truly interferes with the ability of the court to provide a fair and relatively efficient proceeding, independent of classification.
kinds of conduct that courts permit every day are unlikely to be obstructive.

The disparity and standardlessness with which judges apply the contempt power can vary depending on the circumstances of the case. To the extent that the proper application of the obstruction standard is extremely fact specific, trial courts can, as a practical matter, virtually ignore appellate opinions. However, that reaction to fact-specificity cuts both ways. Appellate courts can ignore the actual practices in trial courts if they may rely on factors so specific as to distinguish any other case or custom. If determining whether particular behavior is obstructive depends on such individualized circumstances as the lilt of one's voice or one's facial expression, then each case is essentially a sui generis decision, and there is little hope of providing fair notice. In those circumstances, the substantive reach of the contempt power is expanded or limited only by the discretion of the individual judges exercising it. Therefore, the chilling effect on attorneys can be enormous, and effective appellate review of a contempt conviction can be almost impossible.

86. We have seen the courts' tolerance of various categories of forensic behavior objectifies the standards for measuring obstructiveness. Another objective measure of the propriety of courtroom conduct is the practice of attorneys themselves. Attorneys will generally be disinclined to engage in obstructive behavior, such as repeatedly refusing to accede to the court's command to cease argument with the judge or refrain from arguing a particular issue to the jury, if it truly interferes with the fairness or continuity of a proceeding. The disincentives created by the risks of alienating the judge or jury, of causing a mistrial or reversible prejudice, and of incurring contempt charges, will almost always outweigh whatever benefits that kind of reckless advocacy may bring. Thus, the bar's balance of the competing interests of the administration of justice also helps delineate the proper boundary between advocacy and contempt.

87. One caveat to this observation, however, is that the courts probably underestimate the obstructiveness of some categories of misconduct that may improperly influence the deliberative processes of a trial. See infra notes 236-38 and accompanying text.

88. Naturally, if an appellate court affirms a contempt conviction for particular misconduct, the tolerance of such behavior in the future by trial courts in the same jurisdiction does not indicate that the conduct is not obstructive. Rather, it indicates that the trial judge merely is restraining herself from punishing obstructive conduct. On the other hand, after some period of time, widespread tolerance by trial courts of conduct found to be obstructive by an appellate court may fairly reflect the development of an evolving standard of the propriety of forensic behavior, at least so long as there is no intervening appellate opinion reiterating its condemnation of the conduct.

89. Indeed, contempt cases appear to place remarkably little reliance upon prior judicial determinations with respect to conduct similar to that at issue. Rather, decisions most often cite merely to the generic standards articulated in previous decisions, and independently analyze the specific facts of their own cases with reference to those standards as if no court had ever considered whether equivalent conduct was contemptuous.

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Many courts and commentators have suggested that contempt determinations do indeed depend on such fact-specific findings. It is certainly true that a sensitive balance of the individual facts of each case is frequently necessary for a proper determination of whether contempt was committed. Nevertheless, we should be very reluctant to permit the fact-specificity of contempt decisions to serve as a scapegoat for the arbitrariness that has always characterized this area of the law and for the profession's failure to articulate more general principles adequately guiding attorneys' conduct in the courtroom. To some degree, our perception of the fact-specificity of contempt findings may emanate from the inconsistency of the courts' decisions rather than vice versa.

In fact, that inconsistency likely results from several other dynamics wholly apart from whatever effect fact-specificity might have: the failure to develop an appropriate calculus for balancing the competing interests involved; the near omnipotence of the trial judge who initiates contempt proceedings, serves as the witness, trier, and is often the victim of the contumacious conduct as well; the lack of other procedural safeguards in summary contempt proceedings; and the absence of effective mechanisms to control trial judges' discretion prior to the issuance of a citation and during appellate review of contempt convictions. Whatever the causes of the disparity, and however fact-sensitive contempt determinations must be, it is necessary to more precisely guide trial judges and attorneys regarding contempt and thereby reduce the haphazard use of the contempt power with its inevitable inhibition of vigorous advocacy.

The difficulty in defining obstruction and providing fair warning of what conduct is contemptuous derives not from imprecise diction, but from the failure to analyze properly (or in many instances, even to recognize) the tensions between the competing goals and dynamics of a trial. It is unlikely that contempt statutes or their judicial interpretations, or generic pronouncements by the courts of the common-law

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90. See, e.g., In re Little, 404 U.S. 553, 557 (1972) (Burger, C.J., concurring) (contempt holding depends on such elusive factors as tone of voice, facial expressions, and physical gestures of contemnor); In re Daniels, 118 N.J. 51, 570 A.2d 416 (1990) (same); see also, United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972) ("The tendency has been for courts to treat each [contempt] case on its individual facts and there are, therefore, few decisions which aid in the determination of the proper standards [governing contempt] . . . in this case.").

91. Compare In re Buckley, 10 Cal. 3d 237, 514 P.2d 1201, 1204, 110 Cal. Rptr. 121 (1973) (affirming contempt conviction of attorney for stating to judge: "This Court obviously doesn't want to apply the law."); cert. denied, Buckley v. California, 418 U.S. 910 (1974) with United States v. Seale, 461 F.2d 345 (7th Cir. 1972) (reversing contempt conviction of pro se defendant for calling judge a "blatant racist" and accusing the court of railroading him).
definition of contempt, could be worded more precisely than the "obstruction" standard. This means, for one thing, that there is little chance a contempt statute will be found unconstitutionally vague on its face. It also means that it is really the case-by-case development of the law of contempt that gives the obstruction standard true meaning.

If we look at the use of "obstruction" in several other contexts, it is readily apparent that in those areas the standard is accepted primarily because the conflicting interests involved can be balanced with greater ease. For example, courts have upheld, against facial attacks for vagueness and overbreadth, numerous statutes that criminalize obstruction of justice, picketing in a manner that obstructs the administration of justice, and obstruction of a police officer. Applying the obstruction standard to specific conduct is more difficult in some areas than in others. Bribing a juror or inciting fraudulent litigation are themselves crimes in many jurisdictions. Prosecuting these actions as obstruction of justice usually does not require much interest balanc-

92. At least one court has considered and rejected a challenge on the grounds of vagueness to the facial validity of a state contempt statute that prohibits "willful behavior . . . tending to interrupt the court", or "impair" its ability to function, and "willful disobedience of, resistance of, or interference with" the court's command. See In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, 485 (1976) (construing N.C. GEN. STAT. §§ 5A-11, 5A-15), cert. denied, 289 N.C. 614, 223 S.E.2d 767 (1976). To the extent a legislature drafts a contempt statute with meticulous specificity, it risks circumventing the legislative will by distinguishing the proscription from the conduct in question. On the other hand, if a proscription is framed too generally, individuals will be prosecuted for behavior outside the purpose of the legislation. Courts have reacted to this tension by demonstrating a reluctance to invalidate laws where the statutes' proscriptions cannot be articulated with greater precision. See, e.g., Colten v. Kentucky, 407 U.S. 104 (1972):

The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. Id. at 110; see also. United States v. Petrillo, 332 U.S. 1, 7-8 (1947). However, in the first amendment area, the vice of vagueness does not flow merely from a lack of adequate notice. Because the imprecision of a statute also can result in the substantial self-censorship or chilling of protected expression, the lack of specificity may also provide notice that is overly influential. It is almost inconceivable, however, that the courts would invalidate contempt statutes as unconstitutionally vague, thereby substantially limiting their own powers.

93. See, e.g., Cameron v. Johnson, 390 U.S. 611, 612 n.1 (1968) (law prohibiting "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any [county] . . . courthouses" clear and precise and not overly broad); Cox v. Louisiana, 379 U.S. 536 (1965) (statute making it a crime to picket near a state court with the intent of interfering with or obstructing the administration of justice not vague or overbroad); State v. Snodgrass, 117 Ariz. 107, 570 P.2d 1280 (Ct. App. 1977) (offense of "obstructing public officer" not unconstitutionally vague or overbroad); State v. Torline, 215 Kan. 539, 527 P.2d 994 (1974) (statute proscribing obstruction of due administration of justice neither vague nor overbroad); State v. Nielsen, 19 Utah 2d 66, 426 P.2d 13 (1967) (statute punishing criminal conspiracy to pervert or obstruct justice not unconstitutionally vague).
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Determing whether an individual's verbal challenge to a police officer obstructs the performance of her duties, on the other hand, is somewhat more difficult. Such speech is protected to some extent by the Constitution, and may be immune from punishment absent the presence of some physical act or exertion against the officer. In this circumstance, we must be far more concerned with the dangers of overbreadth, vagueness, and deterrence of protected conduct. But as thorny as those concerns are in that context, they are quite blunt in comparison to the more tangled conflict created by these concerns in the area of contempt. As to contempt, the methods employed to address these dangers in other contexts are either inapplicable or have not been utilized. Even more importantly, the tensions at work in the law of contempt are in many ways substantially different from those that govern the balancing of competing concerns in other areas that prohibit obstructive conduct.

First, it is extremely difficult to determine whether particular expression, especially advocacy, obstructs or even harms the goals of a

94. In many instances, the conduct that violates a statute providing a penalty for obstruction of justice will also constitute contempt. Often, where that is so, as with destroying records that have been subpoenaed by a grand jury, see United States v. Walasek, 527 F.2d 676, 680 (3d Cir. 1975), vagueness is rarely if ever an issue and courts need have little concern for inappropriately punishing or deterring constitutionally protected behavior. In some circumstances however, applying the obstruction of justice standard to specific conduct under both an independent statute punishing such obstructions and the contempt law is extremely uncertain. For example, cases have repeatedly held that perjury by itself is insufficient to amount to contempt, see, e.g., In re Michael, 326 U.S. 224 (1945); Nye v. United States, 313 U.S. 33 (1941); United States v. Essex, 407 F.2d 214, 218 (6th Cir. 1969). Yet many appellate courts have in fact sustained contempt convictions for perjury, finding special circumstances that amount to an obstruction in what appears to be nothing more than the garden variety of false swearing. See, e.g., Handler v. Gordon, 140 P.2d 622 (Colo. 1943) (false answers of judgment debtor in proceeding to discover his assets held to be obstruction because perjury was "manifest" and obstructed ability to locate property). At first blush, it appears that there should not be any outcry of legitimate concern for chilling this kind of behavior. However any witness who has testified on behalf of the losing party may not have been believed by the fact-finder and would theoretically be subject to perjury charges. Given our adversarial system of justice, equating perjury with obstruction may be putting too high a premium on credibility as opposed to truthfulness.

95. See generally, Note, Types of Activities Encompassed By The Offense Of Obstructing A Public Officer, 108 U. PA. L. REV. 388, 406-07 (1960):

[Conduct involving only verbal challenge of an officer's authority or criticism of his actions... operates, of course, to impair the working efficiency of government agents. ... Yet the countervailing danger that would lie in the stifling of all individual power to resist—the danger of an omnipotent, unquestionable, officialdom—demands some sacrifice of efficiency to the... forces of private opposition. ... The strongest case for allowing challenge is simply the imponderable risk of abuse.

96. See, e.g., State v. Snodgrass, 117 Ariz. 107, 570 P.2d 1280, 1287 (Ct. App. 1977) (state statute proscribing resisting, delaying, coercing, or obstructing public officer not unconstitutionally vague or overbroad if limited to require some physical act other than mere speech).
trial or the administration of justice. The value of advocacy to the ends of justice necessitates a delicate and acrobatic process of balancing the simultaneously positive and negative effects that specific advocative expression has on the interests protected by the contempt power. Unlike obstruction of a police officer, the constitutional values of expression do not merely oppose competing governmental interests, they also directly further those same interests. Indeed, to maximize the ultimate goal of justice, advocative expression must at times be permitted to interfere with other component values of justice, and must frequently border on interfering with the administration of justice itself. Moreover, in other contexts where obstruction is criminalized, there usually are much more objective indicia of interference with important state interests, including a showing of some demonstrable harm.

Second, unlike individuals choosing to picket or to confront a police officer, an attorney engaging in advocacy does so not purely out of predilection, but out of a professional duty to argue to the very limits allowed by law. Attorneys are ethically obliged to argue with the court, to challenge its actions, and to attempt to change its mind. All of these duties will inevitably create tremendous conflict and tension between the court and counsel. Moreover, attorneys are duty-bound to protect the constitutional interests of their individual clients. Our legal system explicitly relies on attorneys to ensure the proper development and vindication of constitutional rights. Thus, when a court considers punishing advocative expression, not only are first amendment freedoms implicated, but rights under the fifth, sixth, and fourteenth amendments, and the proper functioning of the judicial branch are at issue as well.

Third, the universe of obstructive conduct in other areas is smaller than that which constitutes contempt of court. Put another way, courtroom proceedings can be more sensitive to interference from participants in the trial process than from picketers, and more vulnera-

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97. The Supreme Court has often noted that the greater vulnerability of institutions such as courts and schools, to obstruction even from picketers or noisy individuals outside the buildings, justifies harsher restrictions on the time and place for that kind of expression. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 120 (1972) ("Expressive conduct may be constitutionally protected at other places or times, but next to a school, while classes are in session, it may be prohibited."); Cox v. Louisiana, 379 U.S. 559, 562–64 (1965) (because of special nature of place, persons can be constitutionally prohibited from picketing "in or near" a courthouse, with the intent of obstructing justice).

The problem with advocacy in a courtroom is that, unlike many other kinds of speech and conduct that are subject to constitutional limitation, there simply is no other time or place for such expression. The availability of other ways to convey one's message to the same listeners,
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able to obstruction than are police officers from the same kinds of expression. For example, the Supreme Court in *City of Houston v. Hill*\(^9\) concluded that pure speech may not constitutionally be punished when it in any manner opposes or interrupts a police officer in the execution of her duty, unless, at a minimum, it rises to the level of "fighting words."\(^9\) In spite of this holding, it is clear that speech which does not consist of "fighting words" may obstruct the administration of justice and be punished as contempt. With a judge, unlike a police officer, the power to regulate conduct encompasses prevention of dignitary harm, or interference with ritual, and maintenance of a deliberative atmosphere as well. Thus, harm to the administration of justice serious enough to warrant punishment can be far less egregious and palpable.

The Supreme Court seems willing to permit punishment of one who physically obstructs an officer by conduct that is largely expressive. However, the Court has demanded that any such prohibition be more narrowly tailored and provide greater substantive safeguards than the blanket proscription of obstruction, which is the *narrowest* standard utilized in contempt statutes. For example, the Court stated in *Hill* that an individual who stands near an officer and persistently attempts to engage the officer in conversation while the officer is directing traffic at a busy intersection can be punished under a properly tailored statute, "such as a disorderly conduct statute that makes it unlawful to

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*See e.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566-67 & n.12 (1972) (leafleting of anti-war literature in privately owned shopping mall is not immunized from regulation by first amendment, in part because leafleters had adequate alternative channels to disseminate message). Although these factors are far less important where the government regulates expression in a public forum, such as the streets outside a courthouse or school building, *see e.g.*, *Schneider v. State*, 308 U.S. 147, 163 (1939), the need to protect valuable advocacy in a courtroom from unnecessary abridgement and deterrence is another quantum leap from that.


99. *Id.* at 463 n.12 (striking down as overbroad an ordinance prohibiting speech that "in any manner . . . interrupt[s]" an officer; "[t]he freedom verbally to challenge police action is not without limits, of course; we have recognized that fighting words which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' are not constitutionally protected. *Chaplinsky* v. New Hampshire, 315 U.S. 568, 572 ([1942])"); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (invalidating ordinance prohibiting use of obscene or opprobrious language toward police officer in performance of duty as overbroad because it punished only spoken words and was not limited in scope to fighting words). Moreover, it has been suggested that even the "fighting words" exception articulated in *Chaplinsky* might require a narrower application in cases involving speech addressed to a police officer, because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.' " *Id.* at 135 (Powell, J., concurring) (citation omitted). This caution is applicable to judges as well.

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fail to disperse in response to a valid police order or to create a traffic hazard."\textsuperscript{100} Similarly, \textit{Hill} noted that the government can criminalize the conduct of a person who runs beside and rails at an officer who is pursuing a felon in a public street by prohibiting the physical obstruction of the officer's investigation.\textsuperscript{101} In these circumstances, it is the greater specificity of the proscription, combined with the narrowing of the category of punishable behavior, that provides the requisite certainty and safeguard against punishing and chilling protected expression. The constitutional necessity of narrow tailoring has been

\textsuperscript{100} 482 U.S. at 462 n.11. One factor the Supreme Court, in several cases, considered to be quite important in determining whether a proscription reaches constitutionally protected conduct is whether the provision proscribes free speech alone, or proscribes expression mixed with particular conduct. \textit{See}, e.g., \textit{id.} at 458-67 (striking ordinance making it a crime to oppose, molest, abuse, or interrupt a police officer in execution of duty overbroad on its face, in part, because enforceable part of ordinance deals not with core criminal conduct, but with speech); \textit{Cox v. Louisiana}, 379 U.S. 559, 564 (1965) (holding anti-picketing statute "on its face ... a valid law dealing with conduct subject to regulation ... and the fact that free speech is intermingled with such conduct does not bring with it constitutional protection"); \textit{State v. Snodgrass}, 117 Ariz. 107, 570 P.2d 1280, 1286 (Ct. App. 1977) (if terms "result" or "obstruct" in statute proscribing resistance or obstruction of police officer interpreted not to require some physical act other than mere speech, law is unconstitutionally overbroad). This factor cuts against a liberal interpretation of the obstruction standard in contempt, and in favor of greater protection for in-court expression. Courtroom expression, other than an occasional physical outburst, such as hurling a book at the judge, is mostly comprised of pure speech. Moreover, the Supreme Court has also demonstrated greater tolerance toward proscriptions that are not triggered by the content of expression. \textit{Compare} \textit{Grayned v. City of Rockford}, 408 U.S. 104 (1972) (upholding anti-noise ordinance in part because does not license to punish anyone because of what she is saying) \textit{with} \textit{Scoville v. Board of Educ.}, 425 F.2d 10 (7th Cir.), \textit{cert. denied}, 400 U.S. 826 (1970) (expulsion of high school students for writing material critical of school policies and authorities infringed students' freedom of expression). Obviously, in a judicial proceeding, however, an attorney is frequently punished precisely because of the content of her speech, as, for example, where an attorney is disrespectful to the judge.

On the other hand, speech in a courtroom often is offensive not because of its content, but because of its disruptive characteristics and because of the potentially obstructive effect on the administration of justice of a refusal to obey the repeated directions of the court. Thus, courtroom expression frequently is akin to the hypothetical posed by the Supreme Court in \textit{Hill}, of an individual persistently attempting to engage a busy officer in conversation. \textit{See infra} note 101 and accompanying text. The qualification of requiring a valid police order as a prerequisite to punishment highlights the critical importance of warnings in the context of contempt, but is not wholly transferable to that area of the law. \textit{See infra} notes 107-10 and accompanying text. The Court's suggestion, in \textit{Hill}, of proscribing a traffic hazard also loses much of its force as an analogy to contempt because the potential harm is often far less ascertainable.

\textsuperscript{101} 482 U.S. 451, 462 n.11.
recognized in virtually all prohibitions of obstructive expression except contempt.\(^{102}\)

Of course, the case-by-case development of contempt law can narrow the construction of contempt statutes and thereby reduce their breadth and uncertainty.\(^ {105}\) But, with few exceptions, the courts' meager efforts to limit and clarify the scope of contempt have been haphazard and unsuccessful, largely because the courts have failed to identify appropriate variables to facilitate the accurate identification and balancing of competing interests. As one of the best reasoned contempt cases, United States v. Seale, acknowledges, "The Supreme Court has touched upon the issue in very general terms, . . . [but]"

102. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding against vagueness and overbreadth challenges anti-noise ordinance prohibiting a person near a school in session from willfully making "noise" or "diversion" that disturbs or tends to disturb the peace or good order of the school session). The Grayned Court said:

The vagueness of [the terms utilized in the ordinance—"noises" and "diversions"], by themselves, is dispelled by the ordinance's requirements that (1) the "noise" or "diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be "willfully" done. Id. at 112-14.

Similarly, in Cox v. Louisiana, 379 U.S. 559 (1965), the Court sustained the validity of a statute prohibiting picketing in or near a courthouse with the intent of obstructing the administration of justice. The Court explicitly distinguished the "undefined nature" of the contempt power from the anti-picketing law in question, which was "narrowly drawn to punish specific conduct." 379 U.S. at 564; see also Cameron v. Johnson, 390 U.S. 611 (1968) (upholding a statute making it a crime to picket "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses" as a specific ban on particular conduct restricted at a certain time and place); State v. Snodgrass, 117 Ariz. 107, 570 P.2d 1280 (Ct. App. 1977) (upholding an obstruction of justice statute against vagueness and overbreadth challenges by limiting construction to require some physical act other than mere speech); supra note 40.

103. Indeed, some contempt decisions themselves recognize that the standards used to define an obstruction in that context are too general. See, e.g., Bridges v. California, 314 U.S. 252, 260-61 (1941) (applying the imminent likelihood of serious obstruction standard to a contempt statute directed at out-of-court publications because the state legislature "ha[d] not . . . found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance" (footnote omitted)); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972) ("Obstruction [of the judicial process] is an elusive concept which does not lend itself to general statements.")

104. Legislatures, too, could attempt to enact more precise rules of conduct to govern some aspects of the contempt power, and narrow by statute the courts' power to impose sanctions. Legislation is not likely to add appreciably to the certainty of those circumstances that require a case-by-case application of normative values to specific facts, but legislation could define limits for certain behaviors that arise often with little variation, ranging from the failure to rise when a judge enters the court to perjury.

105. As discussed previously, attorneys are very likely to be aware of the sweeping scope and imprecision of the standards governing the contempt power, as well as the potential sanctions for any violation. Thus, if courts are able to narrow meaningfully the construction of contempt laws, it is likely to have an unusually high remedial effect on the chilling of courtroom fervor.

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[b]eyond this, courts have assiduously avoided enunciating a standard."106

Many of the techniques used to narrow and clarify the obstruction standard in other contexts are either unsatisfactory or underutilized in contempt cases. For example, in order to limit the scope and enhance the certainty of laws prohibiting obstruction of an officer (or disorderly conduct), courts have required that an officer warn an individual that the conduct is obstructive and order her to stop.107 To require a judge to warn an attorney that conduct is obstructive, or borders on contempt, could greatly reduce the imprecision of an otherwise vague standard. However, attorneys, unlike individuals arguing with an officer, are professionally obligated to test the court's resolve and to attempt to change the court's mind. Thus, even when a judge warns an attorney, the attorney may require some latitude to challenge the parameters of the ruling or the ruling itself. The pressures of trial practice may also require that when attorneys so challenge the court, they be excused for the excesses such pressures inevitably produce. As many contempt cases reflect, the line dividing protected and punishable courtroom conduct cannot be clearly drawn by a judge's warning.108

Moreover, there is an additional layer of protection for the rights of individuals who choose to challenge an officer's order to disperse: the order must be lawful.109 In contrast, the invalidity of a judge's order is not generally a defense to charges of criminal contempt for violating the order.110 Therefore, we might expect to see a higher level of acqui-

106. 461 F.2d 345, 369 (7th Cir. 1972).
107. See, e.g., supra note 100 and accompanying text; see also Colten v. Kentucky, 407 U.S. 104 (1972) (upholding against vagueness and overbreadth challenges a statute making it an offense for a person with intent to cause public inconvenience, annoyance, or alarm; to congregate with others in a public place; and refuse to comply with a lawful police dispersal order).
108. See, e.g., cases cited supra notes 58–60.
109. See, e.g., Wright v. Georgia, 373 U.S. 284 (1963) (reversing convictions of six black persons for breach of the peace for peacefully playing basketball in a public park customarily used only by whites and not dispersing when ordered to do so by the police, on the grounds that the police officer's command violated the defendants' right to equal protection because it was intended to enforce racial discrimination in the park); State v. Snodgrass, 117 Ariz. 107, 570 P.2d 1280, 1288 (Ct. App. 1977) (statute criminalizing obstruction of officer in performance of his duty implicitly limited to officer's lawful performance of duty); People v. Curtis, 70 Cal. 2d 347, 450 P.2d 33, 38, 74 Cal. Rptr. 713 (1969) (same). But see, e.g., ARIZ. REV. STAT. ANN. §§ 13-404B(2), 13–2508 (1977) (abrogating the common law right to forcibly resist an unlawful arrest).

In certain cases, however, courts have concluded that orders to an attorney to cease arguing and sit down were not lawful and held that the attorneys who refused to obey the orders were not
escence and self-censorship by attorneys, under circumstances in which vigorous advocacy would be far more likely to maximize the mix of conflicting values in a trial.

The fourth reason the obstruction standard is so much more imprecise in the context of contempt is that the deterrent effect of broad and imprecise contempt laws is greatly enhanced by the common practice of trying contempts summarily, and by the deferential standards of review applied by many appellate courts in contempt cases. The expansive discretion of trial judges to determine what constitutes contempt and then to try the charge themselves is substantively similar to the grant of standardless discretion to other public officials to enforce their own personal preferences. Such grants of standardless discretion to other public officials have repeatedly been struck down by the Supreme Court. Yet, the discretion of trial judges is even less restrained as the contempt process fails to interpose a neutral judge to guard against the abuse or mistaken use of that discretion. Moreover, the contempt process denies the right to counsel and most other fundamental due process rights. Any relief from a trial judge’s erroneous exercise of the contempt power must await an appellate process of limited availability, which often cannot be counted upon to remedy improper contempt convictions.

 guilty of criminal contempt. See, e.g., Cooper v. Superior Court, 55 Cal. 2d 291, 359 P.2d 274, 280–82, 10 Cal. Rptr. 842 (1961) (trial judge’s order to an attorney to refrain from objecting in the presence of the jury to the judge’s voicing of opinions about the credibility of various witnesses was not a lawful order); State v. Pokini, 55 Haw. 430, 521 P.2d 668, 674 (1974) (the court’s power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy can be afforded); People v. Kurz, 35 Mich. App. 643, 192 N.W.2d 594, 599–600 (1971) (trial judge’s order that “no objection to any question shall be made after the answer has been given” was beyond the power of trial court); see also infra notes 207–19 and accompanying text.

Also, Johnson v. Virginia, 373 U.S. 61 (1963), and George v. Clemmons, 373 U.S. 241 (1963), both overturned contempt convictions for refusal to comply with a court order requiring segregated seating in a courtroom.

111. See, e.g., Coates v. Cincinnati, 402 U.S. 611 (1971) (ordinance punishing sidewalk assembly of three or more persons who “conduct themselves in a manner annoying to persons passing by” held impermissibly vague because enforcement depended on the completely subjective standard of “annoyance”); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (breach of peace ordinance construed by state courts to mean “to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet” invalidated for granting too much discretion to police).

112. See, e.g., Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974) (California law provides no direct appeal of contempt conviction; contemnor must proceed by writ of habeas corpus or petition for certiorari), cert. denied, 420 U.S. 962 (1975); In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965); Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Brizendine v. State, 103 Tenn. 677, 54 S.W. 982 (1899) (if contempt is in the presence of the court, the only appellate remedy is by habeas corpus or petition for certiorari); Wagner v. Warnasch, 156 Tex. 334, 295 S.W.2d 890 (1956) (a contempt conviction may only be challenged by writ of habeas corpus); Ex parte
Finally, many laws criminalizing obstruction of justice or a police officer require that the intent to obstruct also be proved as an essential element of the crime. The Supreme Court explicitly recognizes that intent requirements help narrow the scope and dispel the vagueness of such laws. Courts have almost universally read an intent requirement into contempt statutes. Yet, such statutes usually do not include an intent requirement. As will be discussed in greater depth, an intent requirement usually provides far less protection in contempt cases than in other crimes, because in contempt the requisite intent most often can be inferred only from the conduct in question. This is yet another dynamic that may well result in the heightening of actual and perceived risk of punishment to attorneys for conduct that they may reasonably consider perfectly appropriate and professionally required.

III. DEFINING OBSTRUCTION TO PROPERLY BALANCE THE COMPETING INTERESTS INVOLVED AND REMEDY THE VICES OF VAGUENESS AND OVERBREADTH

Not every excess of advocacy or each instance of disobedience to a court's order should be considered obstructive of the administration of justice. On the contrary, sometimes an attorney's conduct that goes beyond what is generally considered appropriate and commendable or that challenges the immediate wishes of the judge may actually benefit the goals of justice. Other times, a lawyer's forensic behavior may itself have little or no value as advocacy, but punishing it would be destructive of the goals of trials by dampening vigorous advocacy.

Dancer, 171 Tex. Crim. 381, 350 S.W.2d 544 (1961) (if punishment consists only of a fine, there is no restraint on contemnor's liberty and habeas corpus relief is unavailable).

113. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 113-114 (1972) (imprecision of terms "noises" and "diversions" remedied in part by ordinance's requirement that act be "willfully" done); Colten v. Kentucky, 407 U.S. 104, 108-11 (1971) (disorderly conduct statute making it an offense for person with intent to cause public inconvenience, annoyance, or alarm to congregate with others in public and refuse to comply with police dispersal order narrowed to constitutional dimensions in part by intent requirement).

114. See infra notes 294-95 and accompanying text.


116. See infra Section V. In contrast, intent to obstruct justice in another context, such as picketing of a courthouse, may be easier to establish without placing sole reliance on the conduct itself. See, e.g., Cox v. Louisiana, 379 U.S. 559, 566-67 (1964) (Court looked to the testimony of picketers as to the purpose of the demonstration rather than to the conduct of the picketers).

117. See infra Section IV.

118. Id.
When determining what behavior by attorneys is generally condon-
able, courts must leave sufficient space for lawyers to fight with the
judge and to be aggressive.\textsuperscript{119} Courts must insist that any proscrip-
tions, including their own, on obstructive or contemptuous conduct
must be narrow and precise enough that they neither punish nor
appear to punish constitutionally protected conduct, that they give
adequate notice of what expression is properly punishable, and that
they do not inhibit the exercise of the most vigorous level of advocacy
tolerable within our system of justice.

As to the first imperative, drawing the line correctly between pun-
ishable conduct and protected advocacy, the interests involved—advo-
cacy, order, respect, due process—are too important, open-ended, and
ill-defined, simply to balance against each other with any accuracy.\textsuperscript{120}
The only possibility of finding the optimal balance between all the
competing interests is to identify appropriate variables that will illumi-
nate and gauge the tensions resulting from the conflict between the
various goals of a trial and the rights of litigants and their attorneys as
they interact with each other in particular circumstances. These vari-
ables will assist in deciding both whether specific advocative expres-
sion is more beneficial to the ultimate goals of a judicial proceeding
than destructive, and the point at which such expression can be pro-
hibited at pain of penal sanction, where the harm to the trial may
outweigh the benefits.

Courts have two means of addressing the latter two imperatives:
increasing the clarity and properly restricting the scope of contempt
law to prevent self-censoring of valued advocacy. Courts can with-
draw any grant of standardless discretion to trial judges to determine
what conduct is contemptuous, and attempt to define the line between
protected and punishable conduct with sufficient precision that attor-
neys will know with greater certainty how far they can go. In addi-
tion, courts can create a buffer zone around protected advocacy,

\textsuperscript{119} It is important to understand that here we are talking about the degree of constitutional
protection that courts actually extend to courtroom expression, not merely whether statutory or
judicial enunciations of contempt proscriptions are vague, or overbroad in relation to the
constitutional immunity afforded such conduct.

\textsuperscript{120} Nevertheless, courts on a regular basis do engage in the balancing of just such interests
in determining whether expression is protected by the Constitution. \textit{See, e.g.}, \textsuperscript{11} \textit{Colten v.
Kentucky, 407 U.S. 104, 111 (1971)} (disorderly conduct statute not overbroad because it comes
into operation only when the individual's interest in expression is insignificant in comparison to
the public interests in preventing that expression or conduct at that time and place).
narrowing the range of expression that can be proscribed by the contempt power.\textsuperscript{121}

These two techniques for reducing the chilling effect of potentially vague and overbroad laws have a dynamic relationship. If courts are capable of defining contempt standards with sufficient precision to give adequate notice of what is punishable, there is correspondingly less need for the maintenance of an insulating zone around the protected conduct. Conversely, so long as the buffer zone is broad, valuable advocacy is less subject to inhibition, even where contempt standards are unclear. As an attorney's expression moves toward the end of the zone where conduct may properly be punished, we can be less concerned with the risk of deterring valuable conduct because the conduct will diminish in value just as the resulting harm increases. As an attorney's conduct begins to approach the limits of that zone, the line beyond which she may be punished becomes implicitly clearer. Furthermore, as the notice to attorneys that particular conduct is deemed to be obstructive becomes clearer, the inference that the obstruction was intentional becomes more supportable. We may still not know exactly where that line is located, but at least we will know with greater certainty where it is drawn, and why. Even where contempt prohibitions are quite precise it is nevertheless necessary to have some insulating zone surrounding the kinds of advocacy we wish to promote. If the minor lapses and excesses that inevitably result from zealous representation were punishable, attorneys could only protect themselves from contempt charges by tempering the ardor of their lawyering.\textsuperscript{122}

The enunciation of variables to facilitate the structuring of an accurate balance of opposing interests is also indispensable to increasing the clarity of and setting appropriate parameters to the line between advocacy and contempt.

Accurate balancing of interests also narrows the area of prohibited conduct and defines the contours of the protected zone. Through a case-by-case application to recurring fact patterns, a system of balancing can be achieved that will provide a calculus with which, and a

\textsuperscript{121}. Cf. Note, \textit{Void-For-Vagueness}, supra note 30, at 75 (primary thesis advanced by author is that doctrines of vagueness and overbreadth "ha[ve] been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms").

\textsuperscript{122}. See Raveson, supra note 2, at 553–57.
context within which a furious power, presently subject only to murky limits, can be constrained to serve its salutary function.\footnote{\textsuperscript{123}}

Our ability to fulfill these prospects is limited, however, because the variables involved are so numerous that significant uncertainty will at times infect the process. Furthermore, because the concept of obstruction of justice is so amorphous, and the need for vigorous advocacy in different circumstances so varied, there is an unavoidable arbitrariness to individual decisions in close cases.

The value of developing particular balancing factors to increase the precision of judicial decision-making and to guide the discretion of trial judges is undermined by the fact that contempt decisions are usually made in the heat of the moment. Of course, in plenary contempt proceedings and in appeals of contempt convictions variables can be applied after-the-fact in a deliberate way. But for attorneys trying to decide how far they can go with the vigor of their argument, and for judges deciding whether to cite an attorney for contempt, these variables will not always lend themselves to split-second assessments.

None of this is to say that the use of carefully defined variables will not give better notice of what conduct is prohibited and permissible under the contempt power. Moreover, not all factors will be applicable to a given situation; sometimes a very few will be sufficient to determine with relative ease if an obstruction has occurred. But these factors will often fail to guide judges precisely or warn attorneys adequately, especially in the heat of courtroom drama. Furthermore, an attorney cannot practice at the limits of laudable advocacy without occasionally stepping over the line. Consequently, the development of balancing factors is not sufficient to prevent the deterrence of what should be protected advocacy. We must also narrow the range of the conduct that contempt can be wielded to punish.

This clear need for an insulating buffer zone around valued advocacy has been recognized in numerous cases.\footnote{\textsuperscript{124}} Nevertheless, many courts and commentators have urged that often only a fine line separates the limits of commendable advocacy from the innermost reaches of contempt.\footnote{\textsuperscript{123}} Thus, the variables act much as detailed rules and regulations do to provide a context that increases the clarity of otherwise vague proscriptions. For example, in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), a general proscription against attorneys’ extrajudicial remarks about pending trials was made subject to specific provisions relating to various stages of the trial process, such as investigation, trial, and sentencing, as well as particular categories of comment, such as communications concerning character, reputation, or prior criminal record. The court held that the inherent vagueness of the “serious and imminent threat of interference with the fair administration of justice” standard withstood constitutional challenge only because it was clarified sufficiently by the specific rules.\footnote{\textsuperscript{124}} See, e.g., cases cited infra note 139.
of the contempt power. The practice of some courts, of finding an obstruction whenever an attorney continues to argue in the face of an order to cease, illustrates this fine line. This approach permits the trial judge to set what are frequently subjective limits on permissible advocacy and to punish as an obstruction any crossing of the line.

To the extent particular advocacy, balanced against the harm it might cause, is beneficial to the administration of justice, it should be immune from the contempt power. We must, however, protect more than clearly beneficial advocacy. While we must allow the definition of obstruction to impose a limit on the expression of advocacy, it would be inappropriate to view the boundaries of condonable advocacy as characterizing the border of obstruction. That asymmetry provides the breathing space for advocacy. Without this space, as soon as advocacy becomes excessive, it becomes obstructive. And the punishment of inevitable excesses of advocacy would deter attorneys from fulfilling their ethical—and perhaps constitutional—duty to practice at the outermost limits of proper representation. Such punishment would also too narrowly restrict the leeway needed to argue with the court.

Thus, it is critical to distinguish between courtroom conduct that we merely do not want to encourage as the norm of trial practice, and that which obstructs the proceeding. Indeed, some advocacy actually may be impermissible, in the sense that it can be grounds for

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125. See, e.g., People v. Ravitz, 26 Mich. App. 263, 182 N.W.2d 75, 76 (1971) (contempt of attorney concerns the very fine line that separates the right of the trial judge to supervise all aspects of any proceeding before him and to enforce this supervision by statutorily prescribed punishment, and the right of an attorney to pursue with vigor and thoroughness the defense of a client charged with a very serious offense).

126. See, e.g., In re Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988) (attorney’s “loud voice and hand slamming during the heat of a long and hard fought trial, although annoying and not condoned by this court, do not constitute the type of ‘exceptional circumstances’ that pose an immediate threat to the judicial process”); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) (angry gesture of attorney in flinging papers on counsel table and breaking a water pitcher and confrontational remarks of co-counsel to judge not condoned, but when considered in factual setting, did not warrant contempt citation), rev’d in part, 446 U.S. 754 (1980); United States v. Sophor, 347 F.2d 415, 418 (7th Cir. 1965) (reversing the contempt conviction of a defense attorney, who, in a criminal trial made misstatements of material fact to the jury because “[o]n the record before us it is not clearly shown that [the attorney’s] conduct although unjustifiable, actually obstructed the district judge in the performance of judicial duty”).

Conversely, even perfectly appropriate or somewhat questionable attorney behavior may “cause” an actual “obstruction” or physical disruption of a trial if a witness, the judge, or spectators react to it in some way that interferes with the trial. But, even where those kinds of reactions can reasonably be anticipated by an attorney, unless her own actions are far enough outside the accepted norms of practice to be judged misconduct, they should not be considered, and under existing law probably are not considered, contemptuous. The incredibly powerful emotions that frequently are evoked in a trial, sometimes causing the proceeding itself to falter,
reversible error, and yet not be obstructive. Where an attorney is not violating an explicit warning or order of the court to refrain from particular expression, such as a specific line of questioning to a witness or argument to the jury, and the conduct is not clearly violative of the rules of evidence or trial practice, the conduct might not be an obstruction justifying contempt sanctions even if it may require reversal of the case. On the other hand, limitations on the scope of proper advocacy, which are imposed by notions of fair play and substantive justice, play a very important role in defining obstruction. They assist in setting parameters to define what types of advocative expression are beneficial, neutral, and detrimental to these aspects of our system of justice. To the extent the regulation of advocacy through means other than the contempt power is clarified (and there is a great need for that in its own right), it will increase our understanding of how to balance the value of advocacy against competing goals of justice and of the distinction between condonable advocacy and punishable obstruction.127

Distinguishing between condonable advocacy and punishable obstruction imposes a buffer zone within which attorneys are properly guided by considerations of what is likely to help or hurt the administration of justice without fear of being held in contempt. For example, when an attorney's argument with the judge is mildly discourteous, we are the foreseeable consequences of exactly the kind of advocacy we want to encourage. As one court noted:

It is not enough that the questions [asked by an attorney] were provocative or inflammatory. If lawyers were barred from asking provocative and penetrating questions at trial merely because they may provoke or inflame, then an essential goal of every fact finding process—the discovery of the truth—would indeed be thwarted. In any trial where emotions run high, we think it inevitable that some questions will provoke witnesses or spectators or inflame their passions.

United States ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972) (reversing contempt conviction of attorney because arguably improper questions asked of a witness did not "rise to level of misbehavior necessary to support a contempt citation"); accord, Offutt v. United States, 232 F.2d 69, 72, cert. denied, 351 U.S. 988, reh'g denied, 352 U.S. 860 (1956). Indeed, some contempt statutes, themselves, contain this qualification. See, e.g., 18 U.S.C. § 401(1) (1988) (granting federal district judges the power to summarily punish "[m]isbehavior of any person . . . [that] obstruct[s] the administration of justice") (emphasis added).

127. Additional sets of guidelines against which to measure the propriety or obstructiveness of various courses of advocacy are provided by the codes of disciplinary rules and ethical standards governing attorneys’ conduct. See, e.g., In re Ungar, 160 N.J. Super. 322, 389 A.2d 995 (App. Div. 1978) (“[I]n putting questions to witnesses it is improper and unprofessional for an attorney to allude to prejudicial irrelevancies and matters which he has no reason to believe will be supported by admissible evidence.” (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(1) (1978))). However, as with other standards controlling the permissible scope of trial practice, violation of a disciplinary rule or ethical standards should not be deemed a per se obstruction.
do not want to suggest that it is a good thing, but neither do we want to punish it.\textsuperscript{128} Similarly, when an attorney continues to argue after being ordered to cease, the conduct may sometimes be more valuable than obstructive, sometimes not; however, sanctioning attorneys at the point where the balance just tips toward obstruction can do more damage to the goals of justice by stifling advocacy than if courts disapprovingly tolerate some minimal level of interference with those goals. It is crucial that any finding of contempt reflect a leap from the region of valued and necessarily shielded behavior over an insulating chasm to the region of unquestionably obstructive misconduct.

The insistence of some courts that the harm to the administration of justice must be material or substantial before protected expression can be punished by the contempt power,\textsuperscript{129} is, in effect, an attempt to construct a buffer zone around such conduct. Likewise, some courts require that interference with the court's business be "clearly shown" to constitute contempt.\textsuperscript{130} Finally, courts have also made efforts to compensate for a fine line approach by noting that where the line between vigorous representation and contemptuous behavior is close, "doubts should be resolved in favor of vigorous advocacy."\textsuperscript{131} These qualifications of the standard for contempt are helpful because they correctly communicate the sense that vigorous advocacy should be protected—that minor excesses of advocacy and reasonable conflict with the court are not contemptuous. To some degree these standards also recognize the positive value of advocacy as against minor interference with other values of justice.\textsuperscript{132} These standards, however, fail to

\textsuperscript{128} See supra text accompanying note 122; Raveson, supra note 2, at 553–57.

\textsuperscript{129} See, e.g., Bridges v. California, 314 U.S. 190, 193–94 (1941) ("What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972) ("[T]he standard to be applied [in contempt cases] is one of material disruption or obstruction.").

\textsuperscript{130} See, e.g., Ex parte Hudgings, 249 U.S. 378, 383 (1919).

\textsuperscript{131} See United States ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972) (reversing contempt convictions for improper cross-examination and remarks criticizing the court made during closing argument to the jury); see also United States v. Thoreen, 653 F.2d 1332, 1339 (9th Cir. 1981); Commonwealth of Pa. v. Local Union 542, Int'l Union of Operating Eng'rs, 552 F.2d 498 (3d Cir.), cert. denied, 434 U.S. 822 (1977).

\textsuperscript{132} See, e.g., In re Dellinger, 461 F.2d 389, 397–401 (7th Cir. 1972) ("[W]here, as here, the conduct complained of is that of an attorney engaged in the representation of a litigant, the search for [the elements of contempt] must be made with full appreciation of the role of trial counsel and his duty of zealous representation of his client's interests."). The Court underscored the importance of the "extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process," reasoning that "mere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the 'heat of courtroom debate' may prompt statements which are ill-considered and might later be regretted." Id. at 400.
address the more fundamental issue of what an obstruction is, and even seem to use the qualifications in part to avoid grappling with that very difficult question. Indeed, the admonition that doubts should be resolved in favor of vigorous advocacy carries with it the explicit assumption that the division between such advocacy and contempt can be a thin one, and therefore is virtually self-defeating as an effort to secure sufficient breathing room. Thus the boundaries of the buffer zone around protected advocacy must be laid by the same variables that clarify obstruction's meaning.

Some of the factors discussed in the next section have also been suggested by a few courts and commentators as appropriate considerations for measuring the obstructiveness of conduct in the courtroom. For example, professors Dorsen and Friedman suggest that the manner in which a trial judge reacts to a problem should depend in part on whether the disorder occurs frequently or over a period of time, whether the incident occurs before a jury, the stage of the proceeding when misconduct occurs, and whether there are mitigating circumstances, such as possible provocation by the prosecutor or judge. In In re Gustafson, the Ninth Circuit noted that the relevant factors in determining the issue of “material obstruction” in contempt adjudications include the reasonably expected reactions of those in the courtroom, the manner in which the remarks are delivered, any delay in the proceeding caused by a disrespectful outburst, and the failure to heed explicit directives of the court. Although these factors do have some bearing on the obstructiveness of misconduct, they are for the most part subsumed by larger policy considerations reflected in the variables suggested here.

IV. VARIABLES IN DEFINING THE ZONE BETWEEN ADVOCACY AND CONTEMPT

This section identifies ten factors that should assist in making the determination whether an attorney's behavior is contemptuous. These variables derive from the analysis presented throughout this Article; some of the factors have already been identified explicitly, others have been implied. Together, they provide a calculus for resolving the issues we have been discussing: determining the value of an attorney's expression as against other interests of the administration of justice.

134. 619 F.2d 1354, 1359 (9th Cir. 1980), rev'd on other grounds, 650 F.2d 1017 (9th Cir. 1981) (en banc).
135. Id. at 1369.
measuring the harm to justice, ascertaining the degree of breathing room and the dimensions of the buffer zone necessary to protect vigorous advocacy, and deciding whether an attorney acted with the requisite wrongful intent.

Each of the variables examined below embodies several of these overlapping concerns; and conversely, each of the concerns is reflected in many of the variables. For example, whether the misconduct constitutes a pattern or is only a single incident affects the determination of all four issues. Assessing whether an attorney acted with wrongful intent can involve the application of numerous variables, such as: whether the attorney was warned, engaged in a pattern of misconduct, or was persistent in her refusal to obey the court; and whether her conduct constituted a gross deviation from the norms of trial practice or affected the deliberative processes of the trial. The factors set forth below are ordered in a very rough approximation of their importance and the frequency with which they are likely to be applicable.

A. Is the Conduct in Question Advocacy?

I have previously suggested that advocative expression in the courtroom should be granted the broadest possible latitude, even where it may interfere to some extent with other values of our system of justice. Conversely, where neither advocacy nor the inevitable minor excesses of advocacy are involved, in-court expression is deserving of less protection, and here, attorneys should be held to an even higher standard than non-lawyers. Thus, for example, conduct disrespectful to the court generally should be better tolerated where it has some advocative content than where it does not. Expression that is wholly proper advocacy within the rules and necessity of trial practice is immunized altogether from the contempt power, regardless of its effect on the proceeding.

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136. See, e.g., Raveson, supra note 2, at 549–58 nn.264–80. As will be discussed shortly, an important exception to this, or more accurately a clarification of what is meant by advocacy, is where an attorney’s conduct unfairly prejudices another party to the proceeding. See infra Subsection IV.E.

137. Cf. In re Dellinger, 461 F.2d 389, 401 (7th Cir. 1972) ("[L]itigants not even making a pretense of self-representation are not to be afforded the same latitude of speech and action as an attorney."); TRIAL DISRUPTION STANDARDS at 13 (1970) ("[A] layman ... cannot be held to the same standard of decorum ... expected of a member of the bar.").

138. See Holt v. Virginia, 434 U.S. 842, 381 U.S. 131 (1965) (neither attorney charged with contempt nor his counsel could, consistently with due process, be convicted for contempt for filing motions for change of venue and disqualification of judge because of alleged bias, where words used in motions were in no way offensive in themselves, and were wholly appropriate to charge bias of presiding judge).
The concept that advocative expression has a value that helps to shield it from the contempt power has found its clearest way into the law of contempt through the principle of good faith, enunciated by the Supreme Court in *In re McConnell*. There, the Court reversed the contempt conviction of an attorney who, in contravention of the judge’s repeated orders to stop arguing and not to ask certain questions of a witness, threatened to continue to ask the questions “unless some bailiff stop[ped him],” and concluded that it was “essential to a fair administration of justice that lawyers be able to make honest, good-faith efforts to present their clients’ cases.”

This “good faith” standard correctly reflects the recognition of advocacy’s worth as it conflicts with order, respect, and obedience to the court, and thereby narrows the range of conduct punishable by contempt. Furthermore, it helps to draw an appropriate distinction between an attorney’s threat to disobey a court order controlling the revelation of information to the jury, which is within the furthest limits of permissible, albeit emphatic and contentious, attempts to persuade the judge, and actual disobedience, which simply exceeds those limits. In the latter case, the attorney is usurping one of the judge’s most vital roles, to prevent the introduction of prejudice into the fact-finding process that may irreparably subvert justice.

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139. 370 U.S. 230 (1962); see also, United States v. Sopher, 347 F.2d 415 (7th Cir. 1965); Parmalee Transp. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961); Sprinkle v. Davis, 111 F.2d 925 (4th Cir. 1940).

140. 370 U.S. at 236.

141. The good faith standard also implies a rather broad definition of what should be deemed advocative for purposes of balancing against competing interests.

142. Here, I distinguish between a court order regarding the cessation of argument with the court and one that affects what the jury will hear. As to the former, a violation by continuing to argue with the judge is in essence synonymous with the threat to continue; both contravene the command to accept the court’s ruling, remain silent and allow the trial to proceed. With respect to the latter, there is a clear distinction between the threat and the actual disobedience.

143. McConnell, itself, understands that crucial difference. As the Court noted, “the bailiff never had to interrupt the trial by arresting [the attorney], for the simple reason that after [his threats to do so, the attorney] never did ask any more questions along the line which the judge had forbidden.” 370 U.S. at 236.

The distinction has also played a role, for the most part implicitly, in other contempt decisions where attorneys have threatened but not consummated disobedience or disruption. The case that probably carries it furthest is *In re Logan*, 52 N.J. 475, 246 A.2d 441 (1968), in which a criminal defense attorney overreacted when the trial judge sustained an objection during his opening argument to the jury. The defense attorney vehemently challenged the court’s ruling, moved for a mistrial, and threatened not to continue as counsel in the case. After a recess until the next morning, the trial court declared a mistrial and adjudged the attorney guilty of contempt. In reversing the conviction, the New Jersey Supreme Court stated that although an unwarranted refusal to continue with a trial would constitute an obstruction and, therefore, could support a finding of contempt, the attorney first should have been permitted to retreat from his position.
In the former circumstances, however, where an attorney in an overemotional moment threatens to engage in behavior that could obstruct a proceeding, she should be given an opportunity to withdraw from that threat prior to being charged with contempt. So long as such threats are not part of a continuous pattern of behavior, they should not be considered contemptuous unless the threats are carried out. These threats usually are nothing more than momentary lapses, or demonstrations of emphasis, provoked by the heat of courtroom debate, and are not themselves obstructive of justice.\textsuperscript{144} The most appropriate way for a court to deal with overemotional behavior in the courtroom that is not truly obstructive is to call a recess to allow a cooling-off period\textsuperscript{145} rather than resorting to contempt sanctions. The delay necessitated by a recess should not itself be deemed an obstruction. Recesses are an integral part of trial practice, and the need for occasional breaks from the tensions of trials is an unquestionably foreseeable aspect of that practice—not a deviation from or an obstruction of the normal processes of justice.

But the “good faith” standard, which has been regarded by many courts and commentators as providing sufficient (if not excessive) limitation on the substantive scope of the contempt power,\textsuperscript{146} is not adequate by itself to fulfill that function. For one thing, it fails to create a buffer zone broad enough to protect conduct that cannot fairly be said to comprise a good faith effort to advocate, but should nevertheless be shielded from punishment because the conduct is an unavoidable byproduct of zealous lawyering. The good faith test may even suggest the opposite, that attorneys’ in-court behavior which does not constitute good faith representation, such as mildly disrespectful remarks to the judge, is actually obstructive. Such conduct, however, should not be treated as obstructive or intentional merely because it is not consid-

\textsuperscript{144} Other variables also come into play in reaching the conclusion that such conduct is not obstructive. See infra note 170 and accompanying text.
\textsuperscript{145} See, e.g., In re Logan, 52 N.J. 475, 246 A.2d 441 (1968).
\textsuperscript{146} See, e.g., United States v. Sopher, 347 F.2d 415 (7th Cir. 1965); Parmelee Transp. Co. v. Keech 292 F.2d 806 (7th Cir. 1961); Note, Criminal Law-Contempt-Conduct of Attorney During Course of Trial, 1971 Wisc. L. REV. 329, 336 (supporting use of good faith standard).
ered a good faith effort to advocate;\footnote{See, e.g., Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) (reversing contempt conviction of attorney for slamming papers down on counsel table and breaking water pitcher in fit of anger over adverse ruling); In re Dellinger, 461 F.2d 389 (7th Cir. 1972) (reversing contempt convictions for multiple insults to the trial judge). But see In re Dellinger, 502 F.2d 813 (1974) (affirming contempt convictions following full trial), cert. denied, Dellinger v. United States, 420 U.S. 990 (1975).} and doing so improperly confuses the limits of condonable advocacy with contempt.\footnote{See, e.g., United States v. Sopher, 347 F.2d 415 (7th Cir. 1965) (court reversed contempt conviction of attorney for making misstatements of material fact and improper inferences to the jury, despite court's willingness to concede that counsel's beliefs as to statements and inferences were not reasonable, because there was insufficient evidence of wrongful intent).}

An even larger shortcoming perhaps is that we really do not know what good faith representation is. Thus, whatever protection the standard presently affords is lost to its inherent vagueness;\footnote{The Supreme Court's brief discussion in McConnell makes it extremely difficult to apply the good faith standard with any precision in other cases; its articulation of the standard is somewhat tautological: The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. 370 U.S. 230, 236 (1962). The federal courts' disparate application of the good faith standard bears this out. Compare Fisher v. Pace, 336 U.S. 155 (1949) (rephrasing remark to jury in nearly same manner after objection to remark sustained upheld as contempt) with Steinberg v. United States, 162 F.2d 120 (5th Cir. 1947) (conviction of attorney for attempting to rephrase questions to witness to which objections sustained reversed), cert. denied, 332 U.S. 808 (1947) and Caldwell v. United States, 28 F.2d 684 (9th Cir. 1928); Phelan v. Territory of Guam, 394 F.2d 293 (9th Cir. 1968) (attorney's repeated exceptions to court's ruling curtailing scope of cross-examination and comment held not contemptuous) with United States v. Landes, 97 F.2d 378 (2d Cir. 1938) (repeated exceptions to court's demand that attorney refrain from similar valid objections contemptuous). Surely, many, if not most, of the contempt convictions of attorneys for continuing to argue with a judge after being ordered to cease were well within the meaning of good faith representation.} the test needs the same clarification through the identification of appropriate variables and the case-by-case application of these variables as the courts' proscription against obstruction. Indeed, many of the variables delineating the boundaries of both are the same.
Any serious attempt to analyze the precise limits of proper or condonable advocacy, or to identify the characteristics that distinguish advocacy from non-advocacy is beyond the scope of this Article. Suffice it to say that given the enormous value of the most vigorous advocacy to our system of justice, the guidelines should be generous in permitting the broadest latitude, except where it reasonably might prejudice another party. Although the ends of the spectrum between yelling at the judge to drop dead and arguing an evidentiary issue are clear, the area in the middle can appear murky. Recently, for example, the attorney representing Oliver North yelled at Judge Gerhard Gesell after being admonished by the court to be quiet at the counsel table. As noted by Judge Gesell, the court understood the need for North's counsel to create a record of judicial bias for a subsequent appeal. Most likely, the conduct was not contemptuous, but was it perfectly proper advocacy? Similarly, is it condonable advocacy for an attorney purposely to exhibit disapproval, disagreement, or frustration with the court after an adverse ruling in the hope of influencing the judge's later decisions?

Ultimately, the question regarding these examples and countless others like them, is whether the conduct is obstructive and therefore punishable. But, the answer to that question depends in part on how we measure the proper advocative value of the behavior, and whether the conduct exceeds the bounds of its worth.

B. Is Contempt the Least Restrictive Alternative?

The *sine qua non* of the contempt power is the courts' need to protect themselves from serious and immediate interference with their business. It is only this compelling need that justifies the regulation of expression through the contempt power and the imposition of summary procedures to try contempts. The Supreme Court has correspondingly interpreted the federal contempt statute "to safeguard

150. N.Y. Times, July 15, 1988, § A, at 10, col. 5. This incident also exemplifies the proper understanding and reserve of a trial judge in not escalating tensions into the kind of confrontation between court and counsel that often leads to contempt.


152. See, e.g., In re Mattera, 34 N.J. 259, 168 A.2d 38, 45 (1961), where the court stated: "The summary contempt power is indeed awesome. Its nature is harsh, for despite such antidotes as may be invented, the court is at once the complainant, prosecutor, judge and executioner. It is a power which can be justified by necessity alone."
Advocacy and Contempt

constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed." Some state courts also have recognized this limitation on the contempt power. The federal courts, and the state courts that have so restricted contempt, have done so with respect to both the substantive reach of the power and the procedures utilized in contempt proceedings.

It is not entirely clear whether the basis for the state courts' adoption of the "least possible power" restriction is statutorily or constitutionally based. Nevertheless, the "least possible power" limitation should be recognized and applied in all courts as a reformulation of the "least restrictive alternative" approach that courts have long used in balancing the extent to which expression is prohibited or deterred against the competing state interests furthered by enforcement of the inhibition. Indeed, the Supreme Court's utilization of the concept of less restrictive alternatives seems to have begun with the Court's limitation of the congressional contempt power, as noted above.

The Court has progressively expanded its practice of seeking less dras-

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156. See, e.g., Harris v. United States, 382 U.S. 162 (1965); In re Yengo, 84 N.J. 111, 417 A.2d 533, 539 (1980) (dictum), cert. denied, 447 U.S. 1124 (1981). The argument for doing so has been quite cogently made by Professor Sedler. See Sedler, The Summary Contempt Power and the Constitution: The View from Without and Within, 51 N.Y.U. L. Rev. 34, 87-90 (1976) (arguing that the less-drastic-means test requires that if summary procedures are not clearly necessary to prevent courtroom disruption, their use "should be held violative of due process of law, or at least prohibited as a matter of policy").

157. See, e.g., Yengo, 417 A.2d at 539 (1980) ("least possible power" limitation based on potential for abuse in summary contempt proceedings).


[Whenever it can be demonstrated that the result of the government's rule or policy is to limit in some significant degree the ease or effectiveness with which a speaker can reach a specific audience with a particular message, the government should lose the case unless it can establish that an important public objective unrelated to the message would be sacrificed by any less restrictive alternative.

Spece, The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-focused Review in Due Process and Equal Protection, 33 VILL. L. REV. 111, 135 (1988);


tic means to facilitate the balancing of constitutional rights and governmental interests in a large variety of areas. \(^{160}\)

In essence, the "least possible power" limitation embodies the concept that if the processes of a trial have sufficient flexibility to absorb or counteract the interference with various goals of justice from advective expression without resort to contempt sanctions, contempt is inappropriate. \(^{161}\) If a court does not use less restrictive means at its disposal to protect the court's business from interference, it essentially will have failed to provide sufficient breathing space for advocacy. \(^{162}\)

There are a number of ways judges can reduce the possibility that lawyers will engage in excessive conduct, and prevent excessive behavior that does occur from obstructing justice, diminishing the need for contempt sanctions. A central purpose of the balancing process in contempt cases should be to maximize the overall value of the competing goals of justice. The balancing process that determines whether particular conduct is obstructive must therefore consider the availability of an alternative to the exercise of the contempt power that would achieve the same benefits with less inhibition of advocacy.

On the other hand, courts must be extremely careful not to assume that whenever a judge sustains an objection, or strikes statements from

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160. See Spece, Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study, 21 Ariz. L. Rev. 1049, 1053 (1979) (search for less drastic means is "a part of the Court's analysis in virtually every field of constitutional adjudication").

161. See, e.g., United States v. Oliver, 470 F.2d 10, 13–14 (7th Cir. 1972). The court in Oliver reversed several contempt convictions of an attorney for asking an allegedly improper question of a witness and making inappropriate remarks in closing argument to the jury. The Seventh Circuit stated, "even if it was evidentially improper, we see no reason why the trial judge could not—by use of the least power necessary—have stricken it from the record with an appropriate instruction to the jury to disregard the question." Id. at 13; cf. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (examination of Nixon's documents at historical archives upheld as least drastic means of accommodating public need for information therein); Haig v. Agee, 453 U.S. 280 (1981) (revocation of passport of former CIA agent unconstitutional because less restrictive alternatives available to serve governmental interests).

162. For example, many of the confrontations leading to contempt citations seem avoidable if judges ensure adequate opportunities for attorneys to argue fully and forcefully. Similarly, it is important for judges to inform attorneys fully of the bases for rulings. Trial courts also can establish ground rules before trial to put attorneys on notice as to the judges' expectations of their conduct and her own; hold conferences with counsel to anticipate substantive, evidentiary, and procedural problems in the case, and to discuss and alleviate existing tensions; set a fair trial schedule permitting time for preparation and unexpected circumstances; use recesses to reduce courtroom stresses; encourage more frequent briefing on critical issues and use of motions in limine to clarify the course of the proceeding; assign a second judge in complex or controversial cases to consult with the primary judge on difficult rulings and on questions of orderliness, decorum, and the like, and to serve as a check on the primary judge's own emotional involvement in the matter; and impose the court's moral authority through examples of competence, intellectual honesty, and composure.
the record, or instructs the jury to disregard something it has heard or seen, these actions can effectively remedy the introduction of prejudice into the decision-making process. Not only are such remedial actions often unsuccessful, they may even emphasize the improper remarks for the jury and make them more memorable. Thus, such measures should not be applied automatically as less drastic alternatives to the contempt power. If the prejudice from improper revelations of argument or information to the jury is minimal, however, and actions by the court are likely to prevent the decision-making process from being tainted, the use of the contempt power probably is not appropriate. But, where the attorney’s improper disclosure flagrantly violates the rules of evidence or trial practice, and is sufficiently prejudicial that the court’s subsequent actions cannot reasonably guarantee that the outcome of the trial will not be adversely affected, contempt is an appropriate sanction. Indeed, in these circumstances, the contempt power should be utilized more readily than it generally is at present.

One question that remains is how effective must the less drastic alternative be for the court to be required to use it instead of the contempt power? Although the answer must eventually evolve from a case-by-case consideration of contempt citations in varied circumstances, the effectiveness of an alternative measure depends in large part upon how we characterize the governmental interest to be protected. Consider, for example, a proscription against disseminating literature door to door. If a court defines the purpose of the law as ensuring that individuals in their homes should be spared any unwanted intrusion, it could not be fulfilled by a less drastic alternative. If, on the other hand, the aim of the regulation is the prevention of unreasonable or clearly unwanted intrusion, the purpose can be adequately achieved by punishing individuals who call at home in defiance of the previously expressed will of the occupant.163

Applying this analysis to the law of contempt, if we characterize the government’s interest as protecting the court’s dignity, or maintaining

163. See, e.g., Martin v. Struthers, 319 U.S. 141, 148 (1943), from which this hypothetical comes. There, the Court invalidated such an ordinance as applied to the dissemination of religious circulars, by defining the ordinance’s purpose narrowly. Part of the Court’s analysis was an assessment of the importance of the interest asserted by the government. Thus, in the instant example, the Court necessarily concluded that any interest of the state in preventing all unwanted intrusions was not weighty enough to justify the extent of the prohibition in question; see also Schneider v. State, 308 U.S. 147, 164 (1939) (invalidating anti-leafletting ordinances as applied to religious and political literature). “If it is said that [the less drastic means of punishing litterers and trespassers] are less efficient and convenient [than the law at issue], the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.” Id.
absolute control over a trial, few less drastic alternatives will be found sufficiently effective to replace the contempt power. If the interest sought to be protected is justice, with all its component parts, including advocacy, a wider selection of less restrictive alternatives will be available and will militate against use of the contempt power. Even if the government's interest is characterized as total control over a trial, however, the judge's ability to use ethical suasion and the authority of her office, as well as other means less drastic than contempt, often will alleviate the need for the contempt power. In fact, because the unnecessary use of contempt sanctions is as likely to engender disrespect as respect for the court, less restrictive alternatives may at times more effectively control a trial than the use of the contempt power. If the governmental interest is characterized as the whole of the administration of justice, less drastic means frequently will achieve that purpose in response to conduct that threatens the court's interests in respect, obedience, and order far more effectively than a contempt citation.

C. Gross Deviation from the Norms of Trial Practice

One measure of what is appropriate, excessive, or obstructive in a courtroom is the general experience of trial practitioners. Just as the level of practice of a profession is an indication of the minimal standard of adequate representation in malpractice cases, and claims of ineffective assistance of counsel, so too should the norms of trial

164. For example, many of the confrontations leading to contempt citations seem avoidable if judges ensure adequate opportunities for attorneys to argue fully and forcefully. Similarly, it is important for judges to inform attorneys fully of the bases for rulings. Trial courts can also establish ground rules before trial to put attorneys on notice regarding the judge's expectations of attorney conduct, hold conferences with counsel to anticipate substantive evidentiary and procedural problems, and to discuss and alleviate tensions. Trial courts can also establish fair trial schedules permitting time for preparation and unexpected circumstances, use recesses to reduce courtroom stress, provide for more frequent briefing on critical issues, and use in limine motions to clarify the course of proceedings. It is also possible for courts to assign a second judge in complex and controversial cases. This would serve as a check on the primary judge's emotional involvement and impose the court's moral authority through the example of competence, intellectual honesty, and composure.

165. Some courts mistakenly define the purpose behind the contempt power as the inhibition of any conduct a judge deems destructive to justice. Under this characterization of the government's interest, no less drastic means could be remotely as effective, for it is precisely because of the harshness and arbitrariness of the power that contempt is such a powerful deterrent. That is at the heart of what is wrong with the power. Thus, that purpose must be deemed insufficiently important or legitimate to justify such an expansive view of the contempt power. See supra note 163.


practice be considered in determining the outer limits of permissible and vigorous advocacy. Presumably, attorneys for the most part do not often intentionally obstruct the administration of justice. Indeed, there usually is little incentive for an attorney or any other participant in a judicial proceeding to be obstructive. The risk of antagonizing a judge or alienating a jury combined with the risk of contempt sanctions usually provides a deterrent so that intentionally obstructive conduct is rare. In many trials, and in virtually all serious and lengthy proceedings, however, there are confrontations between the court and counsel, repetitive or excessive argument after orders to cease arguing, and lapses of composure that breach decorum and sometimes suggest disrespect for the court. If these excesses of emotion or inevitable lapses are features of every-day trial practice they ought not be considered the kind of conduct that constitutes contempt. The contempt

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168. Professors Dorsen and Friedman concluded after a comprehensive survey that there was "no serious quantitative problem of disruption in American courts." N. DORSEN & L. FRIEDMAN, supra note 133, at 6. Attorneys presumably make an effort to comply with ethical obligations not to obstruct judicial proceedings. See, e.g., Cooper v. Superior Court, 55 Cal. 2d 291, 359 P.2d 274, 10 Cal. Rptr. 842 (1961), where the court stated:

The very fact that each of opposing counsel is dedicated, within the high obligations of his profession, to protect the interests of his client and at the same time to "maintain the respect due to the courts of justice and judicial officers" should provide the questing judge with a ready source of help in his difficult problems.

359 P.2d at 281 (citation omitted) (citing Cal. Bus. & Prof. Code § 6068 (West 1990)).

169. See, e.g., Dixon v. Maritime Overseas Corp., 490 F. Supp. 1191, 1198 (S.D.N.Y.), aff'd mem., 646 F.2d 560 (2d Cir. 1980), cert. denied, 446 U.S. 754 (1980); George v. Toal, 6 Ill. App. 3d 329, 286 N.E.2d 41 (1972) (reversing contempt of attorney for shouting at opposing counsel: "May I complete my GOD DAMN statement"). These inevitable by-products of courtroom tensions and aggressive advocacy usually should not be seen as contemptuous, for some combination of the variables suggested in this Article: advocacy is often involved in such incidents; they are single occurrences rather than repeated patterns; they do not adversely affect the deliberative processes of a trial; they tend to be inadvertent or reflexive rather than deliberate and intentional; they are not gross departures from the norms of trial practice because such incidents occur occasionally in most trials and are committed from time to time by most attorneys; they frequently involve some provocation by the judge or opposing counsel; and less restrictive and equally effective alternatives to contempt are almost always available to remedy any harm caused by the excesses. Even where such a lapse cannot reasonably be viewed as advovative, these other factors most often mitigate against considering it contemptuous. These lapses are rarely anything more than minor ventings of pent-up emotions or frustration, directed, at times, as much at the attorney herself as at the court or opposing counsel. See, e.g., George, 286 N.E.2d at 42 (reversing contempt of attorney for single vulgarity in course of hotly contested trial outside of hearing of jury).
power should be reserved for obstructions resulting from gross deviations from the standards of ordinary trial practice.\textsuperscript{171}

Four important policy considerations would be served by the application of a gross deviation standard. First, measuring the conduct of potential contemnors against the norm of common practice provides a more objective measure of whether the conduct is obstructive. If the behavior in question is common to most trials, surely it is a more tenable conclusion that punishing such conduct is not necessary to the courts' self-preservation than that most trials are being obstructed. Moreover, if the rules or norms governing attorneys' behavior are not well settled, unless conduct breaks the rules egregiously, it seems inappropriate to deem the conduct obstructive.\textsuperscript{172}

Second, comparing the conduct of contemnors to the norms of general trial practice would also build into the calculus of contempt sensitivity to evolving standards and techniques of advocacy. As with analogous comparisons in professional malpractice cases,\textsuperscript{173} a relevant standard of reference may be practice in a geographical community or within a subset of trial practice, such as criminal practice generally (or, more specifically, capital cases\textsuperscript{174}). Similarly, some allowance should be made for inexperienced attorneys when measured against the practice of more seasoned trial practitioners. It takes considerable time and effort to find one's voice as a trial lawyer to the point where

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Unless a lawyer's conduct manifestly transgresses that which is permissible it may not be the subject of charges of contempt. Any other rule would have a chilling effect on the constitutional right to effective representation and advocacy. In any case of doubt the doubt should be resolved in the client's favor so that there will be adequate breathing room for courageous, vigorous, zealous advocacy.

These standards obviously should be applied independently with respect to the various roles of all the different participants in the trial process. See, e.g., United States v. Seale, 461 F.2d 345, 366-67 (7th Cir. 1972) ("misbehavior" that will support contempt conviction is conduct inappropriate to the "particular role of the actor, be he judge, juror, party, witness, counsel, or spectator").

As noted earlier, codes of ethics and disciplinary rules also properly provide a standard of reference for an attorney's courtroom conduct. See supra note 127. Only a gross departure from the rules of ethics should trigger the use of contempt sanctions. See, e.g., In re Hinds, 90 N.J. 604, 449 A.2d 483, 498 (1982) (disciplinary rule sanctioning attorney conduct "prejudicial to the administration of justice" applied only in situations involving conduct flagrantly violative of accepted professional norms).

172. This may be particularly true where contempt sanctions are imposed for prejudicial conduct that does not result in a mistrial or reversal of the verdict, because the harm to justice in such circumstances is less clear.


174. In these latter categories of cases, we might expect to find a more vigorous level of practice generally on the part of the defense bar, and a greater number of minor excesses and lapses due to the emotionally charged nature of the proceedings.

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one is able to balance successfully in a serious case vigorous representation with an attorney's obligation not to exceed the limits of the law.\textsuperscript{175}

Third, reference to the general practices of courtroom behavior will ensure that the contemnor has reasonable prior notice that her behavior is obstructive.\textsuperscript{176} Moreover, an attorney's wrongful intent can be fairly presumed only from patent misconduct. Attorneys have no ready gauge that tells them precisely when they are committing contempt. Rather, they must look for guidance not only to the cases in which contempts have been upheld, but also to the countless trials in which aggressive and even excessive advocacy has not been cited as contempt. A court's decision not to press contempt charges for aggressive advocacy may be interpreted as an indication that the behavior is not contemptuous; otherwise the court would have found it necessary to punish the conduct to ensure order. Given the great difficulty in defining contempt, judicial determinations not to cite for contempt may create reasonable expectations that similar behavior is not contemptuous.\textsuperscript{177}

Indeed, there is a great deal of lore concerning some of our most respected trial attorneys that demonstrates an admiration for aggressive and excessive advocacy.\textsuperscript{178} Although some of the conduct

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\item[175.] Similarly, an attorney's experience plays a significant role with respect to her understanding of what conduct is expected of her.

\item[176.] This kind of notice is different from the notice given when the judge warns an individual that her behavior is considered obstructive. Even where a judge issues such a warning, it may still be proper not to accede immediately to the judge's command, and failure to heed the warning may be excusable, and not contemptuous. See infra Section IV.D. A judge's warning, unlike the notice that is provided by the norms of practice, does not have the same indicia of objectivity to guide attorneys' conduct.

\item[177.] One also might view the warnings given in other cases as setting limits on the scope of permissible advocacy, but with the understanding that it may be necessary to establish the limits and give notice of them before holding an individual in contempt for transgressing them. See, e.g., State v. Ramseur, 106 N.J. 123, 524 A.2d. 188, 290 (1987) (putting prosecutors "on notice that in the future" violations of special ethical rules in capital cases will be referred by state supreme court for disciplinary action).

\item[178.] Earl Rogers, a well known American defense attorney of the early part of this century, was quite adept at using his face to achieve desired effects. According to one writer, Rogers's scornful stare at a state's witness was sufficiently disconcerting to draw from the witness exactly the kind of defensive response he sought. A. COHN & J. CHISOLM, TAKE THE WITNESS! 77–78 (1934).

Likewise, Clarence Darrow, perhaps the most revered trial lawyer in American history, utilized trial tactics that undoubtedly would lead to contempt citations against mortal lawyers. Among his ploys was a habit of talking (apparently spontaneously) to the jury from counsel table while a state's witness was testifying. For example, while Harry Orchard testified for the state during the murder trial of "Big" Bill Haywood, Darrow suddenly cried out from counsel table, "Sometimes I think I am dreaming in this case." I. STONE, CLARENCE DARROW FOR THE
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described in these accounts has been considered contemptuous, much of it is revered as the work of master practitioners.\textsuperscript{179} When such conduct is emulated by others, a court should be reluctant to view it as obstructive and contemptuous.\textsuperscript{180}

There is a fourth policy consideration furthered by application of a gross deviation standard. So long as contempt is limited to the flagrant transgressions of accepted trial practice rules, we need be far less concerned with chilling valuable advocative expression.

There is a danger, however, in looking to the general practice to define contempt. If the normal level of practice falls short of the limits that define the most aggressive permissible advocacy because, for example, of the deterrent effect of the contempt power, an attorney practicing at the appropriate limits might be viewed as being obstructive and contemptuous.\textsuperscript{181} Thus, while a gross deviation from the normal standards of trial practice should generally be considered a prerequisite to a finding of contempt, that does not mean that every large deviation from those standards is obstructive. To the contrary, such deviations may sometimes extend aggressive advocacy to new limits without being obstructive, and even more often may be excusable under the circumstances of the particular proceeding. Indeed, an attorney’s flagrant departure from the norms of practice may at times be required by her obligations as counsel, in circumstances where the gross excesses of other participants in the trial process, including the judge, threaten the integrity of the trial.\textsuperscript{182}

\textsuperscript{DEFENSE 318–19 (1941).} Neither Rogers nor Darrow were cited for contempt for these incidences.

\textsuperscript{179.} See, e.g., Gill, supra note 75.

\textsuperscript{180.} The suggestion was offered earlier that allowances should be made for less experienced attorneys. In practice, however, more experienced attorneys, and particularly the best reputed, are often excused for conduct that less well-known attorneys could not dare without serious risk of sanction. Probably, this is due in part to the fact that older attorneys have ongoing and longer-standing professional, if not personal, relationships with the judges before whom they appear, and in part because the profession (including judges) looks to the most experienced attorneys to set the standard for permissible advocacy. Thus, courts should consider that when these attorneys are not cited for contempt, it affects what is considered contemptuous and the quality of notice to the bar of what is considered non-punishable.

\textsuperscript{181.} The converse possibility—that if the general level of practice is obstructive, courts would not be able to punish obstructive conduct as contempt—should not be a problem. Courts can reset the limits of advocacy by giving notice that obstructive conduct that had not previously been treated as contempt will in the future be punishable.

\textsuperscript{182.} See, e.g., Cooper v. Superior Court, 55 Cal. 2d 291, 359 P.2d 274, 280, 10 Cal. Rptr. 842 (1961):

It may be that . . . [i]t is unheard of . . . for counsel to interrupt the judge when the jury is being instructed. But it is also well nigh unheard of for the trial judge, after the jury have deliberated for three weeks in a capital (or any other) case, to recall them and express to them his opinion that the defendants testified falsely and prosecution witnesses told the
Finally, an additional aspect of the issue whether an attorney's behavior is flagrantly excessive is whether the behavior is verbal or non-verbal. The vast majority of contempt citations are issued in response to verbal behavior. However, a significant percentage of contempt convictions do punish non-verbal actions. When an attorney is physically violent or a defendant throws an object at the judge, the obstructiveness and contemptuous intent of the actions generally are quite clear. Similarly, where non-verbal gestures are used as a substitute for language, such as sticking out one's tongue at the judge, they are no different from disrespectful remarks with the same meaning. On the other hand, some non-verbal actions may be obstructive but not contemptuous when an adequate explanation justifies the conduct. For example, when an attorney fails to appear during a trial, whether the failure to appear is contemptuous or not depends on whether the absence is excusable.

The difficult issue with regard to non-verbal conduct is when tone of voice, physical gestures, or facial expressions, which are not clear substitutes for speech, are interpreted as disrespectful and therefore deemed obstructive and contemptuous themselves, or are considered contemptuous in combination with other conduct, such as argument or remarks to the court.

One of the most obvious problems with finding non-verbal expressions contemptuous is their ambiguity. What is meant by a "smirk," or the screwing up of one's face, or body language? This ambiguity makes the determination of contempt almost entirely dependent upon the trial judge's subjective perceptions of disrespect; physical gestures...

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and vocal inflections simply are not reviewable by an appellate court because they do not appear with any accuracy on the record. Mild disrespect is a tenuous enough basis for contempt charges when it is unequivocal. Where the disrespect must itself be gleaned from momentary physical gestures, that difficulty and the potential for misinterpretation due to personalization by the judge are greatly increased.

Facial expressions and physical gestures may often be unwitting and inadvertent as well, raising serious questions about whether the attorney intended to obstruct justice. More importantly, the degree of control required not to speak is far less than that necessary to remain physically impassive throughout a trial. That kind of exquisite control may be possible only at the price of stifling emotional ardor and chilling vigorous advocacy.

Moreover, it may be entirely proper for attorneys to react physically and demonstrate emotion during a trial as an aspect of their advocacy, as long as the gestures or expressions are not overtly disrespectful of the court, disruptive, or prejudicial to a party. Too ready a resort to the contempt power therefore could chill not only the necessary emotion of attorneys but deprive them of an accepted means of advocative expression as well.

Although attorneys should be free to demonstrate some disagreement with the court through physical expressions and even to react non-verbally to the testimony of witnesses and the argument of opposing counsel, physical gestures, facial expressions, and tone of voice should not be completely insulated from the contempt power. Momentary signs of frustration in reaction to a court’s rulings perhaps should never be considered contemptuous, but clear patterns of audible laughter, finger pointing, and smirking, especially after warnings to cease, at some point can become sufficiently disruptive or disrespectful.

188. Indeed, it is commonplace for judges to make facial grimaces and other physical gestures, and even verbal remarks, indicating their agreement or disagreement with, or approval or disapproval of, statements by witnesses and attorneys. These reactions can add the authority of the court to one side or the other in a trial, and have a profound impact on the jury’s determination of a case. The fact that judges exhibit this kind of behavior as often as they do is another indication of how difficult it is to exercise total control over one’s every reaction in the tumult of trial practice.

189. Sir Thomas Erskine, an eighteenth century English barrister who defended Thomas Paine, argued for the propriety of emotionality in advocacy:

If an advocate entertains sentiments injurious to the defence he is engaged in, he is not only justified, but bound in duty, to conceal them; so, on the other hand, if his own genuine sentiments or any thing connected with his character or situation, can add strength to his professional assistance, he is bound to throw them into the scale.

N. DORSSEN & L. FRIEDMAN, supra note 133, at 136.
to obstruct the proceeding.\textsuperscript{190} Given the greater ambiguity and lesser volition and intent usually associated with non-verbal gestures and expressions, however, courts should show more restraint when evaluating whether such conduct is contemptuous than when evaluating verbal expressions of presumably similar content.

\subsection*{D. Notice and Warnings}

Because the limits of condonable advocacy and the standards for defining contempt are at best uncertain, whether an attorney is on notice that conduct is within the prohibition of contempt laws is critical. When an attorney is on notice that her conduct exceeds the outermost bounds of tolerable expression, either because the violation of the norms of trial practice is clear or because of a warning by the judge, not only is the problem of fairness under the doctrine of vagueness ameliorated, but an inference of wrongful intent can more readily be drawn. Furthermore, where a court actually warns an attorney not to continue engaging in specific conduct,\textsuperscript{191} the refusal to comply brings into play an additional element of potentially obstructive behavior—disobedience to the court’s command.\textsuperscript{192}

Where a contempt charge is leveled for violation of a court’s ruling or order, the court’s command must be clear and clearly breached for the conduct to be contemptuous.\textsuperscript{193} Although many court orders are unambiguous, others may leave room for interpretation or even become inapplicable at later points in a trial. For example, evidence that presently is irrelevant and excluded by the court might later become relevant upon the introduction of other evidence or because an adversary opens the door to its admission. It is also not uncommon

\begin{itemize}
  \item \textsuperscript{190} See, e.g., In re Stanley, 102 N.J. 244, 507 A.2d 1168 (1986) (continuous repetition of all of these forms of conduct along with sarcastic comments to the court found contemptuous and deserving of disciplinary action).
  \item \textsuperscript{191} I draw no principled distinction here between a “warning” by the court as opposed to an “order,” nor do I think such a distinction is appropriate. Where the warning is clear, it expresses the court’s command with all the authority of an order. In both instances, however, whether the court explicitly threatens contempt sanctions may be important. See infra note 209 and accompanying text.
  \item \textsuperscript{192} In addition, where a court issues an “order” adjudicating the substantive rights of a party, the failure of a litigant to comply with the order triggers another set of issues concerning contempt as a tool to enforce litigant’s rights and the court’s power, which is beyond the scope of this Article.
  \item \textsuperscript{193} The same might be said of patent violations of clear rules of trial practice, whether set by a trial judge or by the appellate courts. See infra notes 238–39 and accompanying text.
  \item \textsuperscript{193} See, e.g., State ex rel. City of Pacific v. Buford, 534 S.W.2d 819 (Mo. Ct. App. 1976) (to support charge of contempt for disobedience of a court order, the order will not be expanded by implication, but must be so specific and definite as to leave no reasonable basis for doubt as to its meaning).
\end{itemize}
for judges to make inconsistent rulings.\textsuperscript{194} In circumstances such as these, aggressive advocacy may demand that attorneys make efforts artfully to avoid strict compliance with an order harmful to their clients' cases. That does not mean, of course, that attorneys are free to ignore rulings of the court. It does suggest, however, that room for reasonable doubt with regard to a ruling should be resolved by further subjecting it to the adversarial process, not by making this behavior punishable by contempt and thus encouraging self-censorship.\textsuperscript{195}

On the other hand, where it is clear that a prior court ruling might realistically be violated by the revelation of potentially prejudicial information to the jury, attorneys probably do have an ethical obligation to inform the court and allow the judge to determine the admissibility prior to the revelation.\textsuperscript{196} For example, an attorney should discuss ahead of time with the judge her intention to make a certain closing argument that might be excluded by a prior ruling. Similarly, questions which themselves reveal potentially inadmissible and prejudicial information to the jury should be asked first out of the presence of the jury to give the judge a chance to rule on the admissibility of the answer, and thus on the propriety of the question. However, an attorney probably has no duty to clear questions with the court that do not reveal information to the jury where a prior ruling does not unambiguously disallow them; and attorneys certainly should not be subject to the contempt power for doing so.\textsuperscript{197} The imposition of such a duty would improperly shift the role of an attorney from an advocate to that of a neutral officer of the court.\textsuperscript{198}

There are more difficult questions. When should a warning be a prerequisite to a contempt citation, and when is the violation of a clear warning or order in itself obstructive? As to the first question, given the difficulty of defining with any precision the reaches of the con-

\textsuperscript{194} Nor is it unusual for a court, or, after a question to a witness was found to be objectionable because it would elicit an inadmissible response, to allow the question to be reworded notwithstanding the fact that the same response was called for.

\textsuperscript{195} The degree of clarity of an order often depends on the stage of the trial. Some orders that may have originally seemed ambiguous or unclear in scope are likely to become clearer as the trial progresses, as the parties and the court become more familiar with the facts and legal issues involved in a particular case, and after many of the evidentiary questions framed by the issues in the trial are resolved by the court.

\textsuperscript{196} See Raveson, supra note 2, at 251 n.275.


\textsuperscript{198} Indeed, often attorneys see the problems in their own cases far more clearly than either opposing counsel or the court. Thus, it would be unfair to require revelation of those problems unless the failure to do so could cause prejudice.
tempt power, warnings give specific notice to potential contemnors that, in the judge's opinion, the conduct in question is improper. If no warning or ruling is issued by the court to set specific limits on an attorney's conduct, the court should be less willing to consider the behavior contemptuous.

This is not to say that a contempt citation always is improper in the absence of a prior warning. Some kinds of misbehavior, such as a gross insult to the court, or the revelation of clearly inadmissible and highly prejudicial evidence to the jury, are so egregious as not to require a warning;199 attorneys are on notice that such conduct is contemptuous by their knowledge that, under any standard, this behavior is obstructive of a trial.200

Where the transgression of a norm of trial procedure or the obstructiveness of an attorney's expression is less clear, however, warnings may provide the requisite degree of certainty lacking in the law of contempt.201

199. See, e.g., United States v. Schiffer, 351 F.2d 91, 95 (6th Cir. 1965) (affirming contempt conviction of attorney for grossly disrespectful statements to the court, despite the fact that no explicit warning was given: "[w]hile warnings have been given by Courts in some of the cases, and we deem this practice generally desirable, we do not believe warnings were essential where, as here, the conduct was clearly contemptuous"), cert. denied, 384 U.S. 1003 (1966); see also MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951), cert. denied, 342 U.S. 953 (1952); Tarrant v. State, 537 So. 2d 150 (Fla. Dist. Ct. App. 1989) (although a trial judge is generally required to caution an attorney that her actions can result in a contempt citation, repeated attacks against the personal integrity and credibility of opposing counsel are contemptuous on their face and a warning is not required), review denied, 544 So. 2d 201 (Fla. 1989) (en banc).

200. See, e.g., United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981) (upholding contempt conviction of an attorney for substituting, without the court's knowledge, another person in place of the defendant at the counsel table; the court rejected the attorney's argument that he could not be held in contempt for violating the custom and practice of which he lacked notice because lack of awareness too improbable), cert. denied, 455 U.S. 938 (1982); Gordon v. United States, 592 F.2d 1215 (1st Cir.) (where criminal defendant stated he did not recognize totally corrupt, flimflam kangaroo court proceedings and accused the court of engaging in flagrant, outrageous, criminal misuse of judicial process, the conduct was self-noticing and no warning was necessary as a prerequisite to a contempt citation), cert. denied, 441 U.S. 912 (1979); United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965) (affirming contempt conviction of an attorney who had charged that the trial court was conducting a drumhead court-martial, and a star chamber proceeding, and that the trial judge's rulings smacked of Stalinism and Hitlerism, the Sixth Circuit noted that although warnings are generally desirable, they are not essential where conduct is clearly contemptuous), cert. denied, 384 U.S. 1003 (1966).

201. See, e.g., Eaton v. City of Tulsa, 415 U.S. 697 (1973) (reversing contempt conviction of witness for using phrase "chicken shit" as characterization of person he believed had assaulted him). In Eaton, in a concurring opinion, Justice Powell stated: [B]efore there is resort to the summary remedy of criminal contempt, the court at least owes the party concerned some sort of notice or warning. No doubt there are circumstances in which a courtroom outburst is so egregious as to justify a summary response by the judge without specific warning, but this is surely not such a case. Id. at 701.
Some courts, therefore, have properly required that where an attorney might otherwise not have adequate notice of her conduct's obstructiveness, the court must give a warning prior to any exercise of the contempt power.\textsuperscript{202} Some courts have gone a step further by suggesting that, where an individual's behavior is not such a flagrant transgression of the rules of trial practice as to be self-evident, a court warning is a prerequisite to contempt.\textsuperscript{203} Such warnings state the trial judge's view of the limits of courtroom conduct more emphatically than orders simply to refrain from specific behavior.

Absent one or both of these types of warnings, it is difficult to establish beyond a reasonable doubt that an attorney acted with wrongful intent except with respect to the most flagrant obstructions. Thus, a warning that particular behavior is considered contemptuous, accompanied by a reasonable opportunity to cease the behavior,\textsuperscript{204} would advance the interests of justice in response to all but the most egregious misconduct. In the absence of a clear pattern of misbehavior, moreover, such warnings would appear to be appropriate after each individual incident prior to issuing a contempt citation. On the other hand, where a pattern of obstructive conduct is involved, a sufficiently strong inference of wrongful intent may fairly be drawn if a warning was given at some point; failure to warn on the actual occasion for

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\textsuperscript{202} See, e.g., United States v. Powers, 629 F.2d 619, 624 (9th Cir. 1980) (dictum) (although language of Rule 42(a) of Federal Rules of Criminal Procedure does not require that warning be given before court exercises its summary contempt power, courts have recognized that such warnings are preferable); In re Hallinan, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (1969) (reversing attorney's contempt convictions for addressing remarks in sarcastic voice, accompanied by disrespectful gestures, to judge and a witness). The Hallinan court said:

It appears appropriate to once more emphasize . . . that "[t]he heat of courtroom debate, particularly where liberty is concerned, often gives rise to persistence on the part of counsel. If the words used by counsel are respectful and pertinent to the matter before the court, it is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceeding. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; and these penalties could be rendered unassailable . . . by . . . recitals in the orders of contempt respecting the demeanor of the contemnor."

459 P.2d at 299.
\end{quote}

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\textsuperscript{203} See, e.g., In re Chaplain, 621 F.2d 1272, 1276 (4th Cir.) (where contemnor engages in repeated pattern of misconduct, in which each isolated instance is insufficient by itself to constitute contempt, trial court must provide fair warning that a contempt conviction may ultimately result from a "last-straw" repetition of identified conduct), cert. denied, 449 U.S. 834 (1980); United States v. Brannon, 546 F.2d 1242, 1249 (5th Cir. 1977) (trial judge should have explicitly warned the contemnor that refusal to answer a question could be found contemptuous in a summary proceeding); United States v. Seale, 461 F.2d 345, 366 (7th Cir. 1972) (failure of court to warn contemnor that borderline conduct is considered contemptuous could be fatal to conviction when behavior could not reasonably be believed by contemnor to be improper).
\end{quote}

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\textsuperscript{204} See infra Subsection G.
\end{quote}
Advocacy and Contempt

which a contempt charge is leveled should not be a prerequisite to conviction.\textsuperscript{205} Warnings are especially necessary where the behavior complained of consists of tone of voice, physical gestures, or facial expressions, which may be entirely inadvertent.\textsuperscript{206} Requiring a warning and a chance to refrain from engaging in the offensive conduct would ensure that only behavior which is intentionally defiant of the court's authority is treated as obstructive.

One important exception, however, is that an unambiguous warning not to disclose potentially prejudicial information or argument to a jury should not have to include a specific threat of contempt.\textsuperscript{207} The importance of protecting the deliberative processes of a trial justifies imputing notice, at least to seasoned trial attorneys, of the obstructive effect of such misconduct. Indeed, the vulnerability and the critical significance of the integrity of a jury's decision-making put attorneys on notice that a deliberate attempt to place improper information before the jury, in violation of a clear order, is obstructive.

Finally, the most difficult issue with respect to court warnings is whether an individual's failure to comply with one is itself contemptuous, or whether the violation of a warning or order elevates the obstructiveness of otherwise borderline conduct to the level of contempt. Courts have held that even where an attorney's behavior is not itself obstructive, failure to comply with a court's warning to cease the behavior does constitute contempt. For example, in \textit{State ex rel. Smith v. District Court},\textsuperscript{208} an attorney stood up and interrupted opposing counsel in the course of arguing a motion to the trial court. Despite being ordered several times by the court to be seated, the attorney remained standing and was summarily convicted of contempt.\textsuperscript{209}

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\textsuperscript{205} See, e.g., \textit{In re Chaplain}, 621 F.2d 1272 (4th Cir.) (because contemnor was explicitly told after extensive pattern of misbehavior that further interruptions of the judge or unwarranted remarks to witness would result in confinement, contemnor need not have been specifically warned about the last incident, which may be used by court to charge the entire course of like antecedent conduct), \textit{cert. denied}, 449 U.S. 834 (1980).


\textsuperscript{207} See, e.g., \textit{United States v. Renfroe}, 634 F. Supp. 1536 (W.D. Pa.) (experienced attorney need not be specifically warned that behavior was contemptuous when he has been advised by court on several occasions that argument made in closing to jury was improper), \textit{aff'd mem.}, 806 F.2d 255 (3d Cir. 1986).

\textsuperscript{208} 210 Mont. 344, 677 P.2d 589 (1984).

\textsuperscript{209} The Supreme Court of Montana upheld the conviction, noting that:

\begin{quote}
It should be emphasized that Mr. Smith is not being punished for exercising his right as an attorney to stand up, represent his client's interests and object to testimony. This conduct in and of itself is not contemptible. However, the further refusal to sit down when so ordered by the court clearly can constitute contempt.
\end{quote}
On the other hand, courts also have reversed contempt convictions where attorneys and pro se litigants had been cited for failing to stop arguing despite repeated orders to do so.\textsuperscript{210} The conflict between these lines of authority reflects the very essence of the tension between advocacy and contempt. Does the trial court's word state the absolute limit of advocacy, beyond which an attorney is acting contemptuously, and if not, what does? Although conduct such as arguing with the court would never constitute contempt if the judge did not order the conduct to stop, such conduct does become obstructive in contravention of the court's repeated orders to cease. Similarly, when a single incident of misconduct, such as laughing at the judge or slamming papers down on counsel table, is insufficient to constitute contempt, but a repeated pattern of such behavior would obstruct the proceeding, should a single warning to desist from the conduct be adequate to charge contempt for the next occurrence?

The answers to these questions lie in understanding that although warnings often are necessary to provide notice to attorneys in order to prevent vagueness, warnings do not resolve the constitutional infirmity of vesting virtually unchecked discretion in the hands of the officials enforcing contempt laws. Nor, more importantly, does determinative reliance on warnings, or more precisely on the limits drawn in individual cases by trial judges, maximize the aims of justice in the mix of competing values at a trial. To be sure, the limits a trial court places on expression in the court are an important and proper factor in determining whether conduct is obstructive. But there also must be other objective measures of the propriety or obstructiveness of counsel's actions besides the trial judge's own personal standards.\textsuperscript{211} Nor is it

\textit{Id.} at 591; see also People v. Boynton, 154 Mich. App. 245, 397 N.W.2d 191 (affirming contempt conviction of attorney for continuing to argue with the trial court over the scope of a ruling after court warned that further discussion would result in contempt citation), appeal denied, 426 Mich. 878 (1986).


\textsuperscript{211} See, \textit{e.g.}, \textit{Dellinger}, 461 F.2d at 399 (reversing numerous contempt convictions of attorneys for persisting in continuing argument on motions and rulings after express orders by the trial judge to cease). The \textit{Dellinger} court said:

While \textit{McConnell} cannot be read as an immunization for all conduct undertaken by an attorney in good faith representation of his client, it does require that attorneys be given great latitude in the area of vigorous advocacy. Appellate courts must ensure that trial judges . . . are not left free to manipulate the balance between vigorous advocacy and obstructions so as to chill effective advocacy when deciding lawyer contempt.

\textit{Id.} at 398; see also People v. Ravitz, 26 Mich. App. 263, 182 N.W.2d 75 (1970). In \textit{Ravitz}, the trial judge held in contempt an attorney who, during an extremely vigorous cross-examination of
appropriate for a court to prohibit—through the threat of contempt—any excess of emotion by a participant in the trial process. The milieu of trial practice is too emotionally laden, and some outbursts too inadvertent, inevitable and unobstructive, to permit such warnings themselves to define the reach of the contempt power.\footnote{212} The very purpose of using objective criteria to determine the reach of the contempt power would be soundly defeated if the requisite quantum of objective obstructiveness could be derived solely from an attorney’s failure to obey the court’s warning.

As noted earlier, a number of courts have approached this issue by attempting to draw an absolute, mechanical distinction between a “lawful” order of the court, the disobedience of which constitutes contempt, and an order that exceeds the court’s powers, which can be disobeyed with impunity.\footnote{213} In these cases, contempt convictions for continuing to argue with the trial court after being told by the court to cease were reversed. Although the courts’ instincts were correct, the particular device chosen to implement them is somewhat misguided. Obviously, these cases do not mean that all orders which would be reversed by an appellate court, or even those which are unquestionably incorrect, are “unlawful.”\footnote{214} If attorneys had no enforceable obliga-

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an elderly witness in an effort to discredit her identification of his client, rephrased questions previously asked despite several cautions from the court to refrain from doing so. The subjectivity of the trial court’s standards as to the proper scope of cross-examination and the determination of contempt is revealed and magnified in a statement by the judge that reflected the tension between the court and this particular attorney: “Just a minute witness—we have had trouble with you before, Mr. Ravitz, in this Court and you complained to the University of Michigan and other places about the way I conduct examinations.” \textit{Id.} at 77–78.

Thus, it was easier than it often is for the appellate court, in reversing the contempt convictions, to conclude that the trial judge did not “exercise the degree of restraint which is imposed upon . . . the judiciary with its attendant summary power to punish for contempt.” \textit{Id.} at 78. Unfortunately, even this level of subjectivization of the standards for contempt, based on prior relationships and resentments, is not unusual given the ill-defined and virtually unchecked nature of the courts’ power.

\footnote{212} See, e.g., \textit{United States v. Seale}, 461 F.2d 345, 371 (7th Cir. 1972) (reversing contempt convictions for continuing to argue with the court after orders to cease). The \textit{Seale} court stated, “[w]e do not say that automaton-like reflexive obedience to the court’s orders is necessary to avoid a contempt citation. The law does not expect inhuman responsiveness. A certain amount of leeway must be allowed.” \textit{Id.}

\footnote{213} See cases cited \textit{supra} note 110; see also \textit{Platnauer v. Superior Court}, 32 Cal. App. 463, 163 P. 237 (1917) (order refusing to allow attorney active participation in the trial was unlawful and failure to comply does not constitute contempt).

\footnote{214} In other contexts, courts have held that certain judicial orders are unlawful because the court lacks jurisdiction to enter them, and therefore a violation of the order is not punishable as contempt. See, e.g., \textit{Schlesinger v. Musmanno}, 367 Pa. 476, 81 A.2d 316, 318 (1951) (attorney could not be held in contempt for refusing to answer trial court’s question of whether attorney was a member of the Communist Party because court lacked jurisdiction to ask question). For example, orders to compel testimony that violate a witness’ fifth amendment privilege against
tion to obey those kinds of orders, trial judges would lose the degree of control they should appropriately have over a trial. Rather, when the cases refer to unlawful or invalid orders, they must mean a court's wholesale negation of the valid role of attorneys to advocate.\footnote{215}

A trial court's denial of an attorney's role and obligations is most glaring where the judge does not permit an attorney to argue at all. Such an order or warning by the court, however, is not technically "unlawful," as if the court lacked jurisdiction to make it or because it is unconstitutional. But such an order should not be enforceable by the contempt power because it wholly interferes with the attorney's obligations and proper function in our system of trial practice. An attorney who violates this order is only doing exactly what we demand in representing her client and protecting the administration of justice.\footnote{216}

\footnote{self-incrimination have been held to be "unlawful" in that sense. See, e.g., Maffie v. United States, 209 F.2d 225, 226 (1st Cir. 1954) (citing Hoffman v. United States, 341 U.S. 479 (1951)). Where such an order does not violate the privilege, however, a witness' refusal to testify can be punished by contempt sanctions. Thus, the courts' nomenclature of "unlawful" orders in this context permits consideration of the validity of the underlying order in a contempt proceeding for violating the order. See, e.g., Hoffman, 341 U.S. at 486-87; United States v. De Lucia, 256 F.2d 493, 495 (7th Cir. 1958) (defendant entitled to claim fifth amendment privilege in the context of a pending denaturalization proceeding when defendant's answers would furnish evidence needed by the government to prosecute defendant for a federal crime). The only real justification, however, for singling out judicial orders that impinge upon the self-incrimination privilege derives not from the constitutional norm protected by the privilege, but from the inadequacy of appellate review of such orders, prior to an individual's choice either to violate them or irrevocably reveal privileged information. See Raveson, supra note 2, at 572-73, nn.320-22 and accompanying text. Indeed, judicial decisions discussing whether particular court orders are unlawful and beyond a court's jurisdiction or merely erroneous, are very haphazard. See Rodgers, The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings, 49 B.U.L. Rev. 251, 272-78 (1969); Cox, The Void Order and the Duty to Obey, 16 U. Chi. L. Rev. 86 (1948-1949).}

\footnote{215. As the Supreme Court of California noted:}

\footnote{The judge . . . should always appreciate that in the trial of a lawsuit the court is not composed of himself alone . . . . Each [the judge, the prosecutor, and the counsel for defendant] has his role and each in our scheme of things is equally essential to the concept of due process . . . . A fair trial is the product of the contributions of the judge and of all participating attorneys. Cooper v. Superior Court, 55 Cal. 2d 291, 359 P.2d 274, 280-81, 10 Cal. Rptr. 842 (1961) (reversing contempt convictions of attorney who, against the court's express order, objected when the trial judge interrupted the jury's deliberations in a homicide prosecution after three weeks, and informed jury of judge's views on comparative credibility of certain witnesses).}

\footnote{216. See Cooper, 55 Cal. 2d at 302, 359 P.2d at 280. The Cooper court concluded:}

\footnote{It is clear that under the circumstances of the case at bench [the attorney], if not required to make, was at least justified in presenting, immediate objection to the . . . procedure followed by the judge, which included, firstly, the interruption by the judge of the jury's deliberations, secondly, the substance of the judge's statement and, thirdly, the manner of its preparation (without participation of counsel) and presentation (without previous notice to counsel or opportunity given them to interpose objections). In view of these unusual
These same considerations often are present, however, even when the court is not preventing an attorney from arguing altogether, but is prohibiting a lawyer from completing an argument, making an additional point, or attempting to probe the outer parameters or steadfastness of a court's ruling. There is no principled line to draw between these connected bands on the spectrum of advocacy; under the latter circumstances, a court would be negating the attorney's role just in the former, by not extending adequate leeway to argue. Here, the propriateness, and perhaps even the duty, of defying a court's warning to stop arguing makes contempt sanctions inappropriate. This is particularly true because there frequently may be no effective appellate remedy to protect the parties' interests if the trial judge errs in making a ruling.

217. See, e.g., State v. Pokini, 55 Haw. 430, 521 P.2d 668 (1974) (reversing contempt conviction of attorney who continued to argue after being ordered to remain silent and be seated). The court in Pokini stated:

A lawyer, when engaged in the trial of a case, is not only vested with the right, but, under his oath as such officer of the court, is charged with the duty of safeguarding the interests of his client in the trial of an issue involving such interests. For this purpose, in a trial, it is his sworn duty, when the cause requires it, to offer testimony . . . in support of his case in accordance with his theory of the case, to object to testimony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety of impropriety of the testimony or of particular questions propounded to the witnesses. If, in discharging this duty, he happens to be persistent or vehement or both in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it.

218. See Raveson, supra note 2, at 571–76.
To some degree, then, although the inquiry into whether a trial court's order is "lawful" may not be particularly helpful, looking to see whether the court's action is egregiously incorrect can help determine the breathing room needed by an advocate attempting to protect the client's interests. While a judge's erroneous order does not justify outrageously obstructive conduct by counsel, it is understandable that an attorney would feel an obligation to advocate to the furthest limits in response to a judge's flagrantly erroneous rulings or conduct that might hopelessly prejudice the client's case, and argue less vehemently where the court is clearly correct.

Because it is better for the ends of justice that attorneys sometimes be permitted to ignore a court's warning, and because it also is not very clear exactly when that is the case, attorneys must have sufficient latitude to advocate in the face of a warning to cease, without fear of punishment. A warning by the court should help to establish the limits of that leeway. Indeed, a warning is a critical factor in determining whether particular advocacy is condonable or not; but the warning should not be decisive of whether any violation of the warning is contemptuous. To make that determination, we must look at all of the variables influencing that decision.

219. See, e.g., In re McConnell, 370 U.S. 230, 231–33 (1962) (trial judge's erroneous ruling and order that attorney could not place offers of proof on the record placed contemnor in dilemma between obeying the court's direction and his obligation to create an adequate record for appellate review and, therefore, excused the attorney's belligerent threat of disobedience); Cooper, 359 P.2d at 280 (extraordinary circumstances of trial judge interrupting jury deliberations after three weeks in homicide trial to instruct jurors of judge's own views of comparative credibility of witnesses excused and perhaps required defense counsel to interrupt the judge with objections).

220. An attorney's excessive reaction to a clearly correct ruling of the court, however, does not necessarily render the conduct obstructive. See, e.g., In re Logan, 52 N.J. 475, 246 A.2d 441, 442 (1968) (contempt conviction of attorney who refused to continue trial after judge sustained proper objection to his opening reversed because court did not give attorney a chance to continue trial after a cooling-off period). Such excesses may be no more than the excusable lapses that occasionally are unavoidable in the course of trial practice. See supra note 170 and accompanying text.

221. See United States v. Seale, 461 F.2d 345, 371 (7th Cir. 1972). As the Seventh Circuit recognized in In re Dellinger, 461 F.2d 389, 398 (7th Cir. 1972), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975), the line between when an attorney's continued argument in the face of warnings to cease is permissible advocacy and when it is punishable obstruction "[a]dmittedly . . . defies strict delineation." The Dellinger court's ambivalence with respect to this issue, or perhaps more accurately, its frustration with not being able to resolve the issue with greater precision, is apparent in the opinion. For example, Dellinger rejects the holding of the Supreme Court of California in Cooper v. Superior Court that "[t]he power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been afforded." 359 P.2d at 278. The Dellinger court deemed appellate review a sufficient deterrent to judges from arbitrarily cutting off argument, and reversal a sufficient corrective where a trial judge prejudicially denies counsel adequate opportunity to argue. The
E. Misconduct That May Affect a Trial's Deliberative Processes

Where an attorney clearly exceeds the limits of permissible advocacy and prejudices another party in the proceeding, the misconduct generally should be viewed as significantly more obstructive than similar behavior that has no adverse impact on a trial's deliberative processes.\textsuperscript{222} Unfortunately, our understanding of the appropriate limits of advocacy (short of use of the contempt power) is not extremely clear. Courts and commentators disagree on a plethora of issues concerning the ethics and propriety of many kinds of advocacy. For example, there are both supporters and critics of trial attorneys' common practices of discrediting accurate testimony, presenting the testimony of a witness that the lawyer believes to be perjured, and counseling a client in such a manner as to facilitate perjured testimony.\textsuperscript{223} Similarly, people disagree about, and trial judges have divergent standards for, the permissible scope of opening and closing arguments to the jury.

\begin{itemize}
  \item court stated elsewhere: "attorneys may [not] press their positions beyond the court's insistent direction to desist . . . . The necessity for orderly administration of justice compels the view that the judge must have the power to set limits on argument." 461 F.2d at 399.
  \item At the same time, however, Dellinger states:
    \begin{quote}
      [w]here the judge is arbitrary or affords counsel inadequate opportunity to argue his position, counsel must be given substantial leeway in pressing his contention, for it is through such colloquy that the judge may recognize his mistake and prevent error from infecting the record. It is, after all, the full intellectual exchange of ideas and positions that best facilitates the resolution of disputes.
    \end{quote}
  \item Id. Dellinger's identification of the competing tensions here is exactly on the mark. The Dellinger court's attempt to resolve these tensions incorporates a number of the variables suggested here, although in a slightly eviscerated form: (1) some sort of buffer zone around advocacy ("by our resolving doubts in favor of advocacy, an independent and unintimidated bar can be maintained while actual obstruction is dealt with appropriately."), \textit{id}. at 398; (2) the need for trial judges to avoid inhibiting valuable advocacy ("We simply encourage judges to exercise tolerance in determining [the] limits [on argument] and to distinguish carefully between hesitating, begrudging obedience and open defiance."), \textit{id}. at 399; and (3) the distinction between an order or warning of the court and the court's "insistent direction to desist," \textit{id}. But in the end even Dellinger, one of the highwater marks in the protection of advocacy from the power of contempt, relies too much on the efficacy of appellate review and too little upon the other variables that assist in determining whether conduct is obstructive to precisely identify the contours of the zone necessary to provide adequate breathing room for advocacy.
  \item 222. \textit{Cf.} State \textit{ex rel.} Spencer v. Howe, 281 Or. 599, 576 P.2d 4, 6 (1978) (statute defining contempt of court for witness' refusal to answer reflects important policy "to distinguish sharply between the gravity of those acts of contempt that disrupt proceedings or prejudice the 'right or remedy' of a party to a proceeding and other acts defined as contempt which do not result in such disruption or prejudice").
\end{itemize}
For many of these issues, the contempt power does not and need not play much of a role. The availability of case-related sanctions, such as mistrial or reversal, will sometimes deter excessive or improper advocacy. Moreover, courts have a wide range of tools at their disposal to compensate for violations of procedural justice and minor threats of prejudice to a trial’s deliberative processes. More often than not, these kinds of violations of the norms of practice will not sufficiently distort the administration of justice to rise to the level of an obstruction. Justice is resilient enough to absorb much of the give-and-take of advocacy excess and trial error. Instructions from the judge, the counterarguments of opposing counsel, other evidence, and the common sense of the jury all work to prevent much of attorneys’ improper advocacy from affecting the outcome of a trial.224 Where they do not, there is always appellate review.

The problem is, however, that the court, opposing counsel, and appellate review often may not provide an effective remedy for trial error. The harmless-error doctrine prevents many excesses of advocacy, which may have affected the deliberative processes of a trial, from constituting a basis for reversal.225 Thus, appellate review not only fails to ensure that forensic misconduct does not taint a jury’s decision-making, but also fails to deter such misconduct.226 Where

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224. This concept is very much like that adopted by courts to excuse most perjury from the reach of contempt. See, e.g., In re Michael, 326 U.S. 224, 227 (1945) (reversing contempt conviction for perjury). In Michael the court held:

All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses. Id. at 227–28; see also Dobbs, supra note 69, at 194 (“The lying witness is one of the things the system is designed to cope with through devices such as cross-examination.”). Where the ordinary processes of a trial may not expose and rectify improprieties, however, it is more important to use the contempt power for that purpose and as a deterrent. Thus, for example, when an attorney suborns perjury or tampers with documents, courts are less reluctant to use contempt to punish such misconduct. See, e.g., In re Melody, 86 Ill. App. 2d 437, 229 N.E.2d 873 (1967) (contempt conviction for suborning witnesses’ oaths to forged will), rev’d on other grounds, 42 Ill. 2d 451, 248 N.E.2d 104 (1969); People v. Gerrard, 15 Ill. App. 2d 301, 146 N.E.2d 229 (1957) (contempt is appropriate for an attorney who encouraged court reporter to change transcript to conform to attorney’s memory, but where no willful contempt was proven); Butterfield v. State, 144 Neb. 388, 13 N.W.2d 572 (1944) (holding attorney in contempt for substituting forged page in a pleading).

225. See Raveson, supra note 2, at 575–76, n.327–31 and accompanying text.

226. See id. at notes 445–55 and accompanying text. Similarly, the threat of mistrial also may be an ineffective deterrent. Courts are often reluctant to call a mistrial, especially towards the end of a protracted and serious matter. See United States v. Lowery, 733 F.2d 441, 445 (7th Cir.), cert. denied, 469 U.S. 932 (1984). Furthermore, attorneys may, at times, even try to create conditions justifying a mistrial, as an alternative to a probable verdict against them.
improper advocacy does not affect the outcome of a case, appellate review and case-related remedies do nothing to inhibit blatant misconduct that could have had that effect—such remedies do not address the violation of the norms of procedural fairness. Even if an attorney's misconduct does result in a reversal, there may be little deterrent effect on future misbehavior.

For these reasons, where an attorney violates a clear rule of evidence or trial practice, producing a high potential for prejudice, contempt ought to be considered an appropriate remedy. Courts have in fact utilized the contempt power for this purpose where the only offensive quality of an attorney's conduct was its potential for unfair influence on a jury's decision-making. Many more decisions hold that the combination of placing prejudicial argument or information before the jury, coupled with disobedience of a judge's order not to do so, or disrespect to the court, is contemptuous. In these circumstances, the leeway that otherwise should be given to attorneys to advocate vigorously and fight with the court is properly restricted. See, e.g., Lowery, 733 F.2d 441 (attorney held in contempt for asking improper question on cross-examination); United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981) (contempt conviction of attorney upheld for substituting someone at counsel table for his client with intent to cause misidentification), cert. denied, 455 U.S. 938 (1982); Offutt v. United States, 208 F.2d 842, 843 (D.C. Cir. 1953) (misconduct included asking questions that were highly prejudicial to the witness and for which there was no foundation), rev'd on other grounds, 348 U.S. 11 (1954); United States v. Vetere, 663 F. Supp. 381 (S.D.N.Y. 1987) (court dismissed indictment after concluding that remedies for prosecutor's presentation of double hearsay and erroneous information to grand jury are contempt or dismissal of indictment); Alexander v. Chapman, 289 Ark. 238, 711 S.W.2d 765 (1986) (contempt sanctions may be imposed upon counsel for asking improper leading questions).

In these cases, and others like them, the obstructiveness of the attorney's conduct derived solely from the improper interference with the deliberative process. The attorneys had not previously been ordered by the court to desist from the behavior; nor was the conduct insulting to the judge. See, e.g., United States v. Modica, 663 F.2d 1173, 1182 (2d Cir. 1981) (contempt citation appropriate where prosecutor makes flagrantly improper summation, in violation of court order to desist), cert. denied, 456 U.S. 989 (1982); Hallinan v. United States, 182 F.2d 880, 886 (9th Cir. 1950) (persistent improper cross-examination despite rulings of the court), cert. denied, 341 U.S. 952 (1951); In re Cohen, 370 F. Supp. 1166 (S.D.N.Y. 1973) (same); Hawk v. Superior Court, 42 Cal. App. 3d 108, 128, 116 Cal. Rptr. 713, 726 (1974) (improper impeachment of witness by attempting to show he was in jail), cert. denied, 421 U.S. 1012 (1975).

Nonetheless, it should be noted that although some misbehavior, such as disrespect to the court or disorder, may rarely threaten to prejudice another party, if the misbehavior is severe
out of considerations of fairness to the opposing party. Attorneys' obligation to struggle with the judge and opposing counsel to further their clients' interests does not imply permission to ignore established rules of practice to the detriment of opposing parties. But where the violation of accepted standards of trial practice is not clear, or the revelation to the jury is not substantially prejudicial, the accommodation and encouragement of zealous representation require that the behavior not be treated as contempt.231

What is surprising, however, is the scarcity with which the contempt power is used to punish flagrantly improper behavior that is prejudicial to an opposing party.232 Prejudicial argument to a jury or questions to a witness that clearly exceed the proper bounds of advocacy pose a much greater threat to the fairness of a trial, and probably to the public's and the bar's respect for the court as an institution of justice, than most of the conduct for which attorneys actually are held in contempt.233 And in this, we can detect an ironic consistency. The relative paucity of contempt sanctions for conduct prejudicial to an opposing party probably stems from the same roots as the surfeit of contempt sanctions for non-prejudicial but mildly disrespectful or dis-

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231. See, e.g., Weiss v. Burr, 484 F.2d 973, 980 (9th Cir. 1973) (contempt citation against prosecutor for improper argument to jury reversed, because argument could not have affected the defendant adversely when jury made critical determination regarding his guilt), cert. denied, 414 U.S. 1161 (1974); United States v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972) (contempt conviction for asking improper questions to witness overturned; the court noted, "the lack of any finding by the district judge that Oliver knew or should have known that the questions exceeded the bounds of conduct appropriate to his role as trial counsel we think substantiates our view that Oliver's conduct did not exceed the 'outermost limits' of vigorous advocacy"); United States v. Sopher, 347 F.2d 415 (7th Cir. 1965) (misstatements of material facts by attorney in closing argument to jury not contemptuous because court lacked positive evidence of a deliberate intent to pursue a course of improper argument); In re Ungar, 160 N.J. Super. 322, 331, 389 A.2d 995, 1000-01 (App. Div. 1978) (attorney may be held in contempt for asking a question designed to mislead the jury or prejudice an adverse party, but contempt conviction reversed because attorney's mistaken belief that factual basis existed for asking prejudicial questions negated inference of wrongful intent).

232. See Raveson, supra note 2, at 585–89. This is especially surprising because many courts decry such abusive litigation practices and even seem to recognize that contempt sanctions may be the only practical means of controlling them. See, e.g., Darden v. Wainwright, 477 U.S. 168 (1986); United States v. Cox, 664 F.2d 257 (11th Cir. 1981); United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), cert. denied, 456 U.S. 989 (1982).

233. For example, compare Darden, 477 U.S. at 180 n.12 (prosecutor who in closing argument expressed personal opinion about defendant's guilt, called defendant an "animal," and said he could see defendant with his face blown away by a shotgun not charged with contempt; Supreme Court held defendant was not deprived of fair trial) with In re Daniels, 118 N.J. 51, 570 A.2d 416 (1990) (defense attorney held in contempt for momentarily laughing under his breath and smirking at trial judge).
orderly behavior. Both phenomena reflect a undervaluation of the importance of fairness in process and outcome compared to the more ritualistic aspects of the judicial process. Thus, not only does the courts' reluctance to exercise the contempt power to punish prejudicial misconduct diminish the integrity of a trial in a particular case, and the deterrence of such misbehavior in the future, it also undermines the value of advocacy itself, as balanced against other goals of justice. The worth of vigorous and proper advocacy lies precisely in protecting the very same interests in the justness and fairness of a judicial proceeding.\textsuperscript{234}

What also seems strange about courts' collective attitude is that misconduct which is both blatant and prejudicial can easily be regarded as disobedient to the courts' commands (through settled law of appellate courts) and disrespectful of the inherent authority of the trial judge, who is charged with the enforcement of those commands. Thus, even if the contempt power were unrelated to the function of safeguarding the decisional processes of a trial,\textsuperscript{235} which can be protected by case-related remedies, one would expect that absolute disregard for the ground rules by which the court operates would trigger more frequent imposition of sanctions.\textsuperscript{236} The fact that it does not reveals a tension

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\textsuperscript{234} The inadequacy of the courts' protection of vigorous advocacy has not escaped the notice of commentators in other contexts. For example, Professor Rudovsky complains of the lack of judicial commitment to the ideal of truly effective assistance of counsel. See Rudovsky, \textit{The Right to Counsel Under Attack}, 136 U. PA. L. REV. 1965, 1972 (1988) ("While we are increasing our ethical demands on defense counsel, we denigrate the central purpose of the sixth amendment: meaningful and effective assistance of counsel.").

\textsuperscript{235} The dynamics of a trial are designed to deal with prejudicial misconduct, without need for resort to the contempt power. Most courts have accepted this theory to immunize most perjury from contempt sanctions. See \textit{supra} note 94. In fact, as discussed in the text, contempt is also inappropriate where a proceeding can absorb prejudicial misconduct because the violation of accepted norms of practice is not flagrant, or the prejudice is insignificant. Moreover, with respect to perjury, unlike the prejudicial behavior of a lawyer, the criminal penalties available to punish false testimony under oath should be an adequate deterrent. Using the contempt power to punish perjury in a system where truth often is measured in light of the results of a trial can inhibit the level of participation and candor needed from witnesses at a trial. See \textit{supra} note 94. Conversely, so long as an attorney's prejudicial misconduct is only punished when the violation of practice rules is clear, valuable advocacy should not be chilled.

\textsuperscript{236} An argument, however, can be tendered that it is the immediacy of the defiance of a trial court's direct order that adds to the obstructiveness of that misconduct, and more clearly reveals a wrongful intent. Indeed, the immediacy of defiance is a factor that should be weighed in determining whether an obstruction occurred. See \textit{infra} notes 253–61. Nevertheless, even if the purpose of contempt is not to protect against the interjection of prejudice per se, a rule of trial practice should be unambiguous, and violation of the rule must be flagrant to constitute contempt. Moreover, where an attorney's behavior can affect the outcome of a trial, the attorney should know she must be more deliberate in her expression. In such case, grossly prejudicial misconduct can again be fairly viewed as intentional and outside the permissible range of battling over a court's ruling. Finally, where the effect of misconduct is considered in determining
at the heart of the contempt power that strains the substance and procedures of the law: judges impose most contempt sanctions for conduct that they regard as threatening to their own authority, or insulting to their dignity. Such reactions by trial courts to perceptions of personal affront or offense to personal sensibilities pervades the law of contempt.\textsuperscript{237} A great number of contempt convictions are overturned because appellate courts said that the conduct in question did not obstruct the proceedings, or that the trial judge was personally embroiled in the matter and was, therefore, ineligible to try the contempt summarily.\textsuperscript{238} This is the flip side of the coin of undervaluing advocacy in relation to obedience, order and respect.

One factor that can profoundly affect whether the deliberative processes of a trial might be obstructed is the presence or absence of the jury when misconduct occurs. Most misconduct that improperly influences the decision-making processes of a trial, such as the revelation of inadmissible and prejudicial information, is of concern only when the jury is present to observe the conduct. Judges presumably are capable of preventing prejudicial information from infecting their own decision-making, because judges frequently must hear inadmissible and prejudicial facts and argument when ruling on their admissibility. The truth-finding function of a trial can be seriously impaired by misconduct such as insulting the judge sufficiently to interfere with the judge's ability to function, or by failing to comply with a sequestration order for witnesses. But even these examples of misbehavior are considerably more obstructive when they are viewed by the jury, or ultimately affect the information that the jury hears. For example, an attorney who improperly intimidates or insults a witness during cross-examination may obstruct the search for truth by adversely affecting

\textsuperscript{237} Overestimation of the value of respect for the court in comparison to the fairness and outcome-oriented goals of justice probably derives in part from the history of the contempt power, which "evolved from the divine law of kings, and its aspects of obedience, cooperation, and respect toward government bodies." R. Goldfarb, \textit{The Contempt Power} 11 (1963). At the same time, however, the desire of the judiciary to ensure its own dignity and authority surely played a role in the unfolding of that history. Indeed, it continues to play a major role. As the Supreme Court noted in Sacher v. United States, 343 U.S. 1, 12 (1952):

It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other.

\textsuperscript{238} \textit{E.g.}, Offutt v. United States, 348 U.S. 11, 15 (1954) (reversing contempt conviction where judge had become personally embroiled with the attorney cited for contempt).
the witness' performance. Were the cross-examination to take place with the jury present, the search for truth might be further hampered by a lowered estimation of the witness in the jurors' eyes.

Obstructive conduct that is disrespectful to the court is enhanced when it occurs in front of the jury. As discussed earlier, the offensive character of disrespectful remarks to a judge derives largely from the potential of conduct to taint the deliberative processes of a proceeding.\textsuperscript{239} To the extent that the obstructive quality of disrespect inheres in the harm done to the perception of a judicial proceeding as a sacrosanct ritual, the demonstration of disrespect in front of a jury is more obstructive not only because it occurs before a larger audience whose esteem for the judicial system may be tarnished, but also because disrespect in the presence of the jury is a greater incursion upon the formal ritual of judicial proceedings. For this reason, and because of the potential adverse impact an attorney’s misconduct can have on a jury’s decision-making, lawyers are on notice to be more careful when the jury is in the courtroom. Thus an attorney’s misconduct in front of the jury often permits a more probative inference of wrongful intent.

The need for order also may be greater when the jury is present. Disruption and disorder can be confusing to jurors and thereby affect the deliberative process. Moreover, disorder, like disrespect, can affect the jurors’ perception of ritual in the courtroom. Finally, the need to prevent delays is generally more important in a jury trial, where the jurors might have to give up additional days from their lives if cumulative disruptions extend the length of the trial.

Considering the significance of the jury’s presence to a determination of obstruction, it is surprising that most courts ignore the issue and some have gone so far as to deny any connection whatsoever.\textsuperscript{240} Nevertheless, a few courts recognize that misconduct occurring

\textsuperscript{239} See, e.g., United States v. Scale, 461 F.2d 345, 370 (7th Cir. 1972) (“A showing of imminent prejudice to a fair and dispassionate proceeding is, therefore, necessary to support a contempt based upon mere disrespect or insult.”); Dixon v. Maritime Overseas Corp., 490 F. Supp. 1191 (S.D.N.Y.), aff’d mem., 646 F.2d 560 (2d Cir. 1980), cert. denied, 454 U.S. 838 (1981). The Dixon court said:

The disrespectful approach is bound to bring on judicial retort if the jury is not to be “lost”—i.e., if its members are (or even one is) made to look upon the judge as “weak,” they are very likely to pay little attention (even without disclosure) to the law charged by an infirm judicial officer, one for whom they have lost respect.

\textit{Id.} at 1198.

\textsuperscript{240} See, e.g., United States v. Schiffer, 351 F.2d 91, 94 (6th Cir. 1965) (upholding contempt conviction of attorney for disrespectful remarks to court because “[t]he fact that all except one of [the remarks] did not take place in the presence of the jury did not make them any the less contemptuous”), cert. denied, 384 U.S. 1003 (1966); In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260, 1281 (App. Div. 1987), aff’d, 118 N.J. 51, 570 A.2d 416 (1990); State v. Gonzalez, 134
outside the jury's presence is less likely to be contumacious. A greater number have intimated the relevance of this factor by mentioning whether or not a jury was in the courtroom.

F. Pattern or Single Incident

All other things being equal, an isolated instance of misconduct is less likely to obstruct justice than a pattern of misbehavior. Similarly, several incidents during the course of a one-day trial will be more obstructive than the same number of incidents distributed out over the length of a longer proceeding. Of course, misbehavior is not necessarily obstructive merely because it is repeated. Conversely, even a single incident, if sufficiently obstructive, can constitute contempt. But in a close case, repetition of the offending conduct may be one key to determining whether the conduct obstructed the administration of justice. For example, arguing with the judge on one or two occasions after a ruling probably would not be obstructive. But repeating this behavior throughout the duration of a trial may sufficiently obstruct the efficiency of the proceeding as to constitute contempt. Similarly, if a judge has issued warnings to an offending individual to cease misbehavior, a pattern of misconduct also suggests more direct defiance of the court's authority, which may constitute obstruction.


241. See, e.g., Hampton v. Hanrahan, 600 F.2d 600, 647 (7th Cir. 1979), rev'd in part, 446 U.S. 754 (1980); Dixon, 490 F. Supp. at 1198 (trial attorneys have right to object to trial judge's questions, but must be respectful; "[t]his is especially imperative when the jury is present"); George v. Toal, 6 Ill. App. 3d 329, 286 N.E.2d 41 (that remarks were made outside presence of jury could be considered in assessing contemptuous effect of conduct); cf. United States v. Marra, 482 F.2d 1196, 1201 (2d Cir. 1973) ("[W]hile an orderly refusal [to testify] in the added presence of the jury may increase the chance of demoralization of the court's authority that fact alone . . . does not usually embarrass the court sufficiently to warrant summary contempt procedure.").


243. Professors Dorsen and Friedman also make this point. See N. DORSEN & L. FRIEDMAN, supra note 133, at 94.

244. See, e.g., Schiffer, 351 F.2d at 94 (affirming as contempt a pattern of disrespectful conduct toward judge):

In the present case the evidence must be viewed in the background of a bitterly contested trial charged with emotions, where things are sometimes said that should have remained unsaid. Here, however, we do not have an isolated outburst in the heat of a trial, but rather deliberate, continuous and repeated acts, extending throughout the trial, which were wholly unwarranted.

245. See, e.g., Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), cert. denied, 414 U.S. 1161 (1974). The Weiss court held:

Due process requires, we think, something more serious than a minor disagreement, such as may often and understandably follow an attorney's failure strictly to comply with this
Isolated instances of misbehavior certainly can obstruct the administration of justice. But such misconduct must be egregious, such as physical violence, gross disrespect, or prejudicial argument to a jury clearly exceeding the scope of the issues in a case. Mere delay resulting from a single instance of excessive argumentation, minor disrespect demonstrated by a momentary lapse of composure after an adverse ruling, or a single failure to heed an instruction of the court to remain silent, would rarely be considered an obstruction of justice by the vast majority of the bench and bar. Some courts have held that such conduct does constitute contempt. Better reasoned decisions, however, properly demonstrate a greater tolerance for what is often nothing more than a transient loss of composure brought on by the pressures of trial practice, with no real adverse effect on the administration of justice. Even an overt insult aimed at the judge, at least when uttered by a non-attorney, is not terribly obstructive if it is the product of a single emotional outburst, rather than a pattern of conduct repeated throughout the proceedings. Moreover, to the extent that one justification for the contempt power is to prevent misconduct from recurring, an isolated instance of misbehavior provides little basis for inferring that the offensive conduct will continue.

Behavior which is not excessive or offensive, even if it borders on being so, should never be considered obstructive regardless of how type of order, before a contempt citation can be issued. In general, the misconduct must entail a persistent disregard for the court's authority that the attorney could have avoided through a reasonable, good faith effort.

Id. at 980–81 (citation omitted).

246. See, e.g., In re Logan, 52 N.J. 475, 246 A.2d 441, 442 (1968) (attorney refused to continue with trial after court sustained objection to his opening statement to jury).


248. See, e.g., United States v. Seale, 461 F.2d 345, 374–76 (7th Cir. 1972) (reversing four contempt convictions as legally insufficient, including remarks that the judge was a "blatant racist", was "railroading" the defendant and that "they got you [the judge] running around here violating my constitutional rights.")

249. See State v. Jones, 105 N.J. Super. 493, 253 A.2d 193, 199 (Essex County Ct. 1969) (defendant's utterance in court of profanity at the judge not contempt, because his action "created no disturbance or disorder in the courtroom, and . . . the proceeding then in progress continued uninterrupted").

250. See, e.g., In re Chaplain, 621 F.2d 1272 (4th Cir.) (affirming contempt conviction of pro se defendant for pattern of conduct, when individual incidents themselves were insufficient to justify sanctions), cert. denied, 449 U.S. 834 (1980); Tarrant v. State, 537 So. 2d 150, 153 (Fla. Dist. Ct. App.) (affirming contempt conviction of attorney because his "continued improper and unethical behavior was not an isolated incident of improper behavior"), review denied, 544 So. 2d 201 (Fla. 1989) (en banc); Jones, 253 A.2d at 199 (single utterance of profanity by pro se defendant did not sufficiently interfere with trial as to warrant contempt sanctions).
often it is repeated. For example, conduct at the outermost bounds of protected advocacy should not only be permissible, but also encouraged. However, isolated instances of misconduct that are excessive but not obstructive seem properly punishable when the whole pattern of instances obstructs a proceeding. Thus, for example, interrupting the judge once or refusing to sit down when ordered to do so might not be per se obstructive. But as part of a pattern of similar conduct, including such behavior as evading questions from the court, badgering witnesses, being disrespectful, and stationing a stenographer alongside the official court reporter, all during a single two-hour hearing, the conduct becomes contemptuous. 251

A pattern of misbehavior also may allow a court to draw an inference of wrongful intent more readily than an isolated occurrence of offensive behavior. Despite the fervent emotionality of many trials, litigants and especially attorneys must maintain some degree of control over emotional excesses such as shouting, disrespect, and refusal to stop arguing. At some point, repeated violations of that norm of composure are no longer excusable. Indeed, even conduct for which a contemnor is not cited for contempt may fairly be considered by the court in determining the intent of contemptuous conduct. 252 However, inference of wrongful intent may be justifiable only where the obstructive qualities of the behavior are clear or where the judge has warned the actor not to continue. In the absence of one of these factors, the contemnor may have a reasonable basis for believing that her conduct is not contumacious.

251. Many cases have upheld contempt findings for patterns of misbehavior where many of the individual acts making up the pattern would be unlikely to be considered contemptuous by themselves. See, e.g., United States v. Martin-Trigona, 759 F.2d 1017, 1025 (2d Cir. 1985) (when attempts to confuse the court by repeated interruptions and diversions regarding irrelevant matters failed, defendant resorted to insults in the judge's presence, including characterizing the proceeding as an "inquisition," stating that the judge was guilty of dereliction of his duty and should be indicted, and anti-Semitic references to opposing counsel, accompanied by a raised voice and an "insolent, belligerent display"); In re Stanley, 102 N.J. 244, 507 A.2d 1168 (1986) (pattern of laughing, smirking, and pointing finger at judge, coupled with sarcastic comments held contemptuous).

252. See, e.g., United States v. Lumumba, 794 F.2d 806, 811 (2d Cir.), cert. denied, 479 U.S. 855 (1986): Although courts cannot uphold the contempt if the cited conduct is not contumacious but other uncited conduct is or has been, [Eaton v. City of Tulsa, 415 U.S. 697, 698-99 (1974)], a court can nevertheless look at the cited conduct in the context of other closely related behavior in the case to determine if that conduct is in fact contumacious. See also Martin-Trigona, 759 F.2d at 1025-26 & n.7; In re Dellinger, 461 F.2d 389, 401 (7th Cir. 1972) (the trial judge was aware that defendant had done many things to the trial judge in other proceedings for which defendant was not issued a contempt citation), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).
G. Immediacy and Persistence of Defiance

The immediate refusal to obey direct and repeated orders of the court often has the flavor of open challenge and defiance of the judge’s authority and ability to control the proceeding.\textsuperscript{253} It is one thing to try to avoid an adverse evidentiary ruling with a new theory of admissibility, or to make a mildly sarcastic or disrespectful comment, and quite another to immediately disobey an unambiguous order of the court. This distinction probably accounts in large part for cases upholding contempt convictions for conduct that would otherwise seem to interfere only slightly with the court’s business.\textsuperscript{254}

Where advocacy is involved, however, there must be some latitude for an attorney to argue with the judge in order to attempt to change the judge’s mind. That is why some courts appropriately distinguish between threats by attorneys to disobey the court and actual defiance.\textsuperscript{255} Of course, even threats to disobey the court, attempts to persuade a judge to retract a ruling, and objections or offers of proof to protect the record are often in defiance of court orders to remain silent. And although attorneys need some room to protest,\textsuperscript{256} when it appears that the court is adamant in its repeated demand, persistent refusal to comply can indeed become obstructive and can fairly be deemed intentional.\textsuperscript{257}

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\item \textsuperscript{253} See, e.g., United States v. Wilson, 421 U.S. 309, 316 (1975) (summary contempt conviction of recalcitrant witness justified because the “face-to-face refusal to comply with the court’s order itself constituted an affront to the court”); In re McDonald, 819 F.2d 1020, 1025 (11th Cir. 1987) (affirming contempt conviction of attorney because his “face-to-face refusal to comply with the court’s order” created an actual obstruction of justice).
\item \textsuperscript{254} See, e.g., People v. Boynton, 154 Mich. App. 245, 247, 397 N.W.2d 191, 193 (1986) (affirming contempt conviction of attorney who continued to argue with judge in an apparent attempt to understand the scope of an order, despite warnings to stop arguing and a threat of contempt), appeal denied, 426 Mich. 878 (1986); State ex rel. Smith v. District Court, 210 Mont. 344, 677 P.2d 589 (1984) (upholding contempt conviction of attorney who refused to obey several successive orders to sit down); State v. Goeller, 263 N.W.2d 135 (N.D. 1978) (two criminal defendants during a short arraignment repeatedly giggled, laughed, and smirked at the judge, despite numerous orders to cease). In most cases like these, because the only obstructive conduct involved is the contemnor’s defiance of the court’s authority, the need for any use of the contempt power could have been avoided with little detriment to the administration of justice, had the court not insisted on such tight control to begin with.  
\item \textsuperscript{255} See supra note 143 and accompanying text. 
\item \textsuperscript{256} See, e.g., In re Sanborn, 208 Kan. 4, 490 P.2d 598, 608 (1971). The Sanborn court reversed the contempt conviction of a prosecuting attorney for continuing to argue about a ruling after being ordered to stop. The court noted that it did not see “hostility or defiance toward the court on [the attorney’s] part, anything abusive or insulting, or undue persistence in opposing any ruling . . . .” Id. (Emphasis added). 
\item \textsuperscript{257} See, e.g., Boynton, 397 N.W.2d at 193. The Boynton court affirmed the contempt conviction of an attorney who continued to argue with the court in an effort to understand the judge’s evidentiary ruling after several orders to stop arguing, including a threat of contempt.
\end{itemize}
The problem is that it is impossible to determine that point with any precision. Nevertheless, as with much of the law of contempt, the ends of the spectrum are clear. When an attorney has had ample opportunity to argue with the court and the court is persistent in its demand for obedience to its orders, little harm is done to the protection of valuable advocacy if an attorney's immediate defiance is punished as contempt. On the other hand, the middle range between a court's foreclosure of any argument and counsel's disobedience of an insistent repeated command is shadowy, at best. Conduct within that zone should be shielded from the contempt power even if it might be appropriate to discourage the conduct. Furthermore, trial courts should always permit attorneys sufficient opportunity to address the court, on the record, and avoid direct orders that would create circumstances in which confrontations between court and counsel are likely to occur.

The immediacy of an individual's defiance of a court's directive can, however, cut both ways. Where a judge is directly ordering an attorney to do or stop doing something, immediate refusal to accede to the court's command indicates an intentional flouting of judicial authority. At the same time, immediate retorts to a command of silence in a heated atmosphere can be reflexive and unintentional, and may result solely from frustration rather than challenge. The synthesis of the seeming contradiction rests in the recognition of the frequent need for some cooling-off period before subjecting an attorney to the litmus test of immediate and persistent disobedience. This partially explains why some courts immunize mere threats of disobedience from the contempt power and reverse convictions of contempt for disobeying an order to cease or responding to a judge's provocation. Conversely, conduct is considerably less obstructive where an attorney disobeys a court directive not particularly important to the integrity or continuity of a proceeding, some time after the order was issued. Thus, for example, where a judge issued ground rules for a trial that neither counsel should address each other, fail to state the

The appellate court concluded: "By the time the court declared that further discussion would result in a contempt order, . . . counsel had fully advocated his position. Violation of that ruling could not reasonably be said to have been in the name of advocacy.")

258. See supra notes 142–43 and accompanying text; In re Logan, 52 N.J. 475, 246 A.2d 441, 442 (1968) (reversing conviction of attorney for refusing to continue with trial after court sustained objection to his opening statement to the jury). In Logan, the New Jersey Supreme Court reversed the contempt conviction because, although "the trial court correctly offered defendant a cooling-off period," it failed to "inquire the next morning whether defendant remained adamant . . ." nor "order[ed] defendant to go ahead."

259. See infra notes 273–75 and accompanying text.
grounds for all objections "succinctly" and with "perspicuity," argue a matter after it had been ruled on by the court, or object to any question before the question had been stated completely, and the court further warned counsel that any violation of the rules would be treated as contempt, more than one hundred transgressions of these rules throughout the course of trial by one attorney were not deemed by the appellate court to be sufficiently obstructive or intentional as to constitute contempt.\textsuperscript{260} Courts cannot command the level of exquisite control needed by an attorney to avoid the inadvertent violation of orders like these; such control, if it is achievable at all, can come only at the expense of attorneys wholly shifting their concentration from the substance to the form of a trial, and cultivating an air of emotional detachment antithetical to the interests of justice.

Of course, the trial court's directives in the above-described case were not themselves of great consequence to the proper administration of justice. But even with respect to orders like these, the degree of obstructiveness from an attorney disobeying them would be greater where such defiance occurred immediately after the court's order.\textsuperscript{261} Even inadvertent conduct begins to look like willful defiance of authority once it is pointed out by the court and the attorney is ordered to cease. On the other hand, an attorney's failure to obey a court's order might be contemptuous months after the order was given, if the directive addressed a critical issue in the trial, such as the admissibility of prior offenses in a criminal case. Control over the handling of potentially prejudicial information can reasonably be expected of all attorneys, because the processes for and consequences of revealing the information require great deliberateness.

\textit{H. The Nature or Seriousness of the Issue or the Case}

The importance of a particular issue in a case and the gravity of the case as a whole are factors that should influence both the scope of permissible advocacy and what lapses of decorum are excusable. Surely, for example, an attorney fighting to keep her client from being executed should be permitted greater leeway of advocacy without fear of contempt, than counsel challenging a traffic ticket.\textsuperscript{262} Or should


\textsuperscript{261} This is especially true where, as in the hypothetical, the attorney would have the opportunity to object or argue after opposing counsel's question was completed.

\textsuperscript{262} Undoubtedly, the seriousness of the underlying issues in the case and the corresponding pressures on the advocates partly explains why a disproportionate percentage of contempt citations occur in serious criminal, political, and civil rights trials. See Raveson, supra note 2, at 583 nn.346–48, 587 n.362 and accompanying text.
she? On the one hand, where the consequences to the litigants or to society as a whole—as in, for example, class action civil rights cases—are momentous, attorneys must have the greatest flexibility in arguing for their causes. On the other hand, precisely because these issues are critical, it is extremely important that they be decided correctly.

Thus, to the extent that expanding the limits of advocacy by limiting the reach of the contempt power interferes with the deliberative processes of the trial, the importance of the case may militate against a more cramped scope of the contempt power. When the arguably contemptuous conduct affects only the routine order of a proceeding and not the truth-finding processes, however, there is no interference with correct disposition of the issues. In those circumstances, when important questions are at stake, the reasons justifying heightened tolerance for excesses of advocacy are not undercut by the possibility of prejudice to the proper outcome of the case.

Furthermore, even where excessive advocacy may pose a risk of prejudice to the deliberative processes of justice, the interests of both parties—and therefore the interests in the correct disposition of the case—are not necessarily symmetrical. For example, in criminal cases, the burdens of proof and the constitutional rights afforded defendants are designed to ensure that error is weighted against conviction. In criminal actions, some of the constitutional protections to which defendants are entitled protect a vigorousness of advocacy that at times transcends the normal rules of trial practice. The due process, compulsory process, and confrontation clauses all have been read at times to permit a criminal defense to override longstanding rules of advocacy governing other aspects of the trial process.263 The policies embodied in these constitutional provisions also should be a factor in delineating the zone between the limits of advocacy in criminal cases and the corresponding reach of the contempt power.264

263. Considerations of fairness, the differing roles of a prosecutor and defense attorney, and the constitutional guarantees of the sixth amendment should provide greater latitude for the advocacy of attorneys representing defendants in criminal cases. See, e.g., Weiss v. Burr, 484 F.2d 973, 980 n.7 (9th Cir. 1973) ("a prosecutor . . . representing the public . . . should not necessarily have all the leeway in presenting his cases that the sixth amendment . . . guarantees to defense attorneys"), cert. denied, 414 U.S. 1161 (1974); cf. Collier v. Poe, 732 S.W.2d 332, 343 (Tex. Crim. App. 1987) (en banc) ("The State is not entitled to the due process of law . . . "), appeal dismissed, 484 U.S. 805 (1987).

264. To be sure, there are cases of great importance to the particular parties that are not weighted on one side, such as child custody disputes or actions for large sums of money. In these kinds of cases, there should still be greater leeway for vigorous advocacy when there is no harmful effect upon the truth-finding function of the trial. But when excesses of advocacy prejudice the deliberative process, no rationale favors a more limited scope of the contempt power in important cases.
Some cases also may be more susceptible to obstruction than others.\textsuperscript{265} For example, a trial involving racially motivated murder might easily be tainted by an attorney's attempts to stir any potential of prejudice in the jury. More routinely, where the evidence in an action is close to equipoise, the outcome of the case could be affected more easily by attorneys making improper arguments, or revealing inadmissible information to the jury. Other cases, such as well publicized political trials in which the courtrooms are crowded, may be more sensitive to disruption by spectators\textsuperscript{266} than from the misconduct of the litigants or their attorneys.\textsuperscript{267} In the latter circumstances, however, we must exercise great care not to permit spectators to enjoy a "heckler's veto," or inadvertently to restrain the advocacy and expression of those they support.\textsuperscript{268}

Momentous cases generate greater emotion.\textsuperscript{269} More ardent emotions, in turn, result in more lapses of composure and decorum. These

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\item \textsuperscript{265} The Supreme Court also has suggested that the nature of the case may affect whether out-of-court publications present a clear and present danger of obstruction to the administration of justice. See Craig v. Harney, 331 U.S. 367, 378 (1947):

There is a suggestion that the case is different from Bridges v. State of California, 314 U.S. 252 (1941), in that we have here only private litigation, while in the Bridges case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied.

\item \textsuperscript{266} How susceptible the audience is to incitement has sometimes been a factor that courts consider in determining whether speech poses a clear and present danger of a substantive evil against which the government can legislate. See, e.g., Feiner v. New York, 340 U.S. 315, 316–18 (1951) (speech attempting to arouse African-Americans against whites in a racially mixed crowd not protected by the first amendment).

\item \textsuperscript{267} See, e.g., United States v. Seale, 461 F.2d 345, 370 (7th Cir. 1972) ("In determining whether . . . disrespectful remarks so imperil the proceeding [as to constitute a material obstruction], 'the reasonably to be expected reactions of those in the courtroom to the words or acts under scrutiny are relevant.' " (quoting Parmalee Transp. Co. v. Keeshin, 292 F.2d 806, 810 (7th Cir. 1961)); In re Sanborn, 208 Kan. 4, 490 P.2d 598, 609 (1971) (noting presence of "volatile, partisan audience" as one of elements affecting balance between vigorousness of advocacy and trial court's control).

\item \textsuperscript{268} An obviously better and less restrictive alternative to inhibiting the vigorousness of advocacy in reaction to the conduct of spectators is to chastise the spectators themselves, remove them from the courtroom, or even hold them in contempt.

\item \textsuperscript{269} Many commentators have explained the misconduct that frequently occurred in many of the big political trials of the 1960s and early 1970s as intentional disruptions of the judicial process. See, e.g., Burger, The Necessity for Civility, 52 F.R.D. 211, 212–13 (1971) (lawyers claiming theirs is a "political trial" seem to find irrelevant "rules of evidence, canons of ethics and codes of professional conduct"). Undoubtedly, some of the excesses marking those trials were intentional. For example, during the Chicago Seven trial, when several of the defendants came to court dressed in judge's robes it could hardly be characterized as emotional lapse. Nevertheless, much of the apparent misconduct in those trials was unquestionably attributable to the importance of and deep commitment to the issues at stake.

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lapses occur not because of disrespect for the court or intent to obstruct, but simply because the stress of a serious, lengthy trial is bound occasionally to trigger emotional outbursts by participants. Thus, courts should be more willing to tolerate lapses of composure in cases where critical interests are at stake, especially when the outbursts do not obstruct the court’s search for truth.

The special importance of some issues, such as the death penalty, is universal. But other questions may be unusually meaningful to the lawyers in a particular trial. For example, an attorney might become more personally involved in a matter in which she has had a long-standing relationship with an ongoing controversy, or an attorney might feel a heightened sense of personal responsibility on a certain issue because of a tactical decision the attorney made, that now threatens to harm the client’s interests. Where that kind of personal involvement is present and objectively reasonable, a greater degree of tolerance for emotional excesses should guide the court’s use of the contempt power.

270. Few things are as frustrating to an attorney in a courtroom as when the attorney is intimately familiar with the complex facts of a case but is not given a fair opportunity to convey them adequately to the court.

271. For example, in In re Daniels, 118 N.J. 51, 570 A.2d 416 (1990), a public defender had entered into a stipulation with the prosecutor on behalf of his client, which provided that the results of a polygraph test to be conducted by the state’s expert would be admissible in evidence, that the results of any other polygraph test would not be admissible, and that the defendant could not put on another expert to refute the state’s expert. Daniels had sought this stipulation because the defendant had passed “with flying colors” a polygraph test administered by the public defender’s expert, who advised Daniels that in his long experience no one who passed so convincingly had ever failed a subsequent test. The prosecutor agreed in return for Daniels’ stipulation that if the defendant passed the state’s test, all charges would be dismissed. The defendant failed the state’s test, and this was the only evidence the jury would hear under the terms of the stipulation. Faced with the dire consequences to his client, Daniels struggled stubbornly with the judge to have the stipulation voided or modified. It was during the course of argument over a number of Daniels’ suggestions for ameliorating the devastating impact of the stipulation, that after a long string of adverse rulings from the court, Daniels covered his eyes and shook his head in frustration. He was summarily held in contempt for these gestures and sentenced to two days in jail.

It was quite clear from the transcript of these proceedings that the vehemence of Daniels’ arguments, as well as his gestures of disappointment or disagreement, stemmed from deep feelings of responsibility for having negotiated an agreement for his client that backfired so terribly, and that his frustration was directed at least as much, if not more, against himself than at the judge.

272. Of course, it will not always be obvious to a judge that the attorney is personally involved in the manner discussed in the text. But where that kind of involvement is apparent, or where the attorney offers such circumstances to the court in mitigation of her actions, they should be factored into the determination of whether the conduct is contemptuous. Moreover, the relevance of such circumstances demonstrates the necessity for holding a hearing, rather than proceeding summarily, in order to provide the contemnor with an adequate opportunity to defend herself.

276
Advocacy and Contempt

I. Participation or Provocation by the Judge

Sometimes disrespectful or insulting remarks by counsel or a party are provoked by the judge’s own improper statements. In those circumstances, it hardly seems appropriate to charge the attorney with obstructing the proceeding. Even assuming that the disrespectful reply was obstructive, the court must bear the lion’s share of responsibility for obstructing the proceedings by inciting a response. On the other hand, an argument can be made that a judge’s lapse does not justify an insulting response by counsel. But the question is not whether a disrespectful remark made in response to provocation should be condoned; the question is whether it is intentionally obstructive. And where the court itself has already interrupted the ritualistic decorum of a trial by insulting a participant, a response in kind does not have the obstructive impact that it might if made unprovoked. Moreover, debate at trial is not like the considered argument presented in briefs; it is spontaneous and reflexive. It is expecting too much of any trial participant to silently suffer the abuse of the court. Such abuse should negate the wrongful intent of counsel.

Opposing counsel may also provoke attorneys or witnesses. Although the judge normally should be the arbiter of disputes between participants in a judicial proceeding, often the judge may be unaware of the opposing counsel’s provocation, and the offended party may be disinclined to involve the court in a minor matter irrelevant to the disposition of the case. Even when the court is aware of an attorney’s provocative behavior, little may be done to stop the conduct.


274. See, e.g., In re Dellinger, 461 F.2d 389, 399 (7th Cir. 1972) (where judge has charged attorney in courtroom with unprofessional conduct, attorney has right to make respectful reply despite court’s order not to do so), aff’d, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975); Abse, 251 A.2d at 656; People v. Ravitz, 26 Mich. App. 263, 182 N.W.2d 75 (1970) (where attorney’s retort to judge, for which he was held in contempt, was provoked by court’s questioning of attorney’s motives in prolonging the examination of a witness, retort did not constitute contempt); cf. United States v. Schiffer, 351 F.2d 91, 95 (6th Cir. 1965) (noting, in affirming contempt conviction of attorney for disrespectful remarks, that the trial court had “infinite patience” and “did not engage in wrangling or bickering with counsel”), cert. denied, 384 U.S. 1003 (1966).

275. Where a response greatly exceeds the provocation, however, contempt may well be appropriate. No verbal abuse by the court, for example, should give carte blanche to any individual to respond with physical violence, or a prolonged tirade.

276. For example, I was told by co-counsel for the defendant in a highly publicized criminal trial that the senior defense attorney continually made derogatory remarks under his breath to the less-experienced prosecuting attorney, who refrained from “telling” the judge because he did not want to appear to need the court’s intervention.
these circumstances, there must be some recognition of greater justification for behavioral excesses by the provoked attorney.

In addition, the errors of a trial judge, or opposing counsel, may obligate an attorney to reply in an effort to protect the client's interests.\textsuperscript{277} There, too, an attorney's advocative response to the potential threat to a trial's fairness makes conduct that might, in other circumstances, seem excessive or obstructive, appropriate or at least not contemptuous.\textsuperscript{278}

Subtler than actual provocation by a judge, the participation of the court in heated argument or barbed repartee—the willingness to "slug it out" with counsel—also should be considered in determining whether obstruction has occurred. A judge can encourage excesses of advocacy by setting a tone that permits excessive argumentation or sarcastic banter.\textsuperscript{279} A judge's consenting participation in that kind of give and take should be viewed as actually raising the limits on the kind of expression that is permitted in the proceeding and therefore as constricting the reach of the contempt power\textsuperscript{280} to punish such conduct.\textsuperscript{281}

\section*{J. The Inadequacy of Appellate Review}

It has been suggested that the potential inadequacy of an appellate remedy may raise the value of trial advocacy as compared to other interests of the administration of justice.\textsuperscript{282} It is often difficult to predict during the tumult of a trial whether appellate review is likely to be

\begin{footnotesize}
\bibitem{278} See supra note 138.
\bibitem{279} See, e.g., In re Dellinger, 461 F.2d 389, 399 (7th Cir. 1972) (when trial court coupled numerous directives to cease argument with rejoinder or a statement that calls for a response by the attorneys, the attorneys' replies cannot subsequently be viewed as contemptuous violations of the orders), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).
\bibitem{280} Although the Seventh Circuit in Dellinger recognized that counsel's retort, in violation of an order to remain silent, in response to the trial court's provocation was proper if respectful, 461 F.2d at 399, it also concluded that "impropriety on the part of the trial judge cannot justify or excuse contemptuous conduct." 461 F.2d at 401. Instead, such judicial provocation should be considered only "in extenuation of the offense and in mitigation of any penalty." \textit{Id.}
\bibitem{281} Dellinger is certainly correct that an egregiously disrespectful rejoinder to a provocative comment by the court should not be insulated from the contempt power. The court, however, fails to recognize that the same fluidity in the obstruction standard that requires us to treat some violations of court orders as non-contemptuous also permits flexibility of the standard where the judge is antagonizing and provoking counsel.
\bibitem{282} Indications of provocation by the judge not only should restrict the substantive reach of the contempt power, but also demonstrate a level of personal embroilment or lack of objectivity that should preclude the judge from trying any contempt summarily. See, e.g., O'Neill v. United States, 348 U.S. 11 (1954) (reversing and remanding summary contempt conviction where judge who heard the case had become personally embroiled with attorney throughout course of trial).
\end{footnotesize}
Advocacy and Contempt

effective as to a particular issue. Indeed, that is a significant factor in choosing to afford greater leeway to advocacy in the trial court.

Nevertheless, on some occasions it is clear that appellate review cannot provide a sufficient remedy for trial court error. This inadequacy can stem from vesting in the trial court discretion to decide certain questions that are unlikely to be reversed because of deferential standards of review. Alternatively, there simply may be no time to appeal, or the specific issue might not be cognizable by an appellate court. For example, in Thomas v. Collins, the Supreme Court reversed a contempt conviction on first amendment grounds where the defendant had violated a judicial injunction served several hours before the enjoined speech was scheduled. When an attorney is in court, fighting the issuance of such a restraining order, knowing that there is no time for further review, greater latitude for advocative expression and breaches of order and decorum should be tolerated. In such cases, the need for attorneys to fully argue their causes and engage in searching dialogue with the judge, combined with the increased likelihood of emotional stress, justifies allowing advocacy to interfere more with competing values of justice.

283. See, e.g., In re Abse, 251 A.2d 655 (D.C. 1969) (attorney charged by trial judge with unprofessional conduct insisted upon right to answer charges until he was held in contempt); People v. Harrington, 301 Ill. App. 185, 21 N.E.2d 903 (1939) (holding it proper for an attorney to interrupt unrelated judicial proceedings in order to make emergency applications in another action).

284. 323 U.S. 516 (1945).

285. There is an interesting structural relationship among the degree of latitude that should be afforded trial court advocacy, the availability of appellate review prior to violation of a court order, and a contemnor’s ability to challenge the validity of a court order in a contempt proceeding for violation of the order. In Thomas v. Collins, 323 U.S. 516 (1945), discussed above, the Supreme Court reversed a contempt conviction for an admitted violation of a restraining order, by treating the injunction as an unconstitutional application of a state statute requiring a permit prior to soliciting membership in a union, pursuant to which the injunction was granted. Although the Court did not rely on the unavailability of further judicial review of the injunction to justify reversal of the contempt conviction, one commentator suggests two reasons that Thomas does not stand for the proposition that a contemnor may always challenge the constitutional validity of a statute’s application in a contempt proceeding. See Kuhns, Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury, 73 Mich. L. Rev. 483, 507 n.114 (1975). First, it was suggested in a later case, by the author of the plurality opinion in Thomas, that the result in Thomas was largely in response to the unavailability of judicial review. See United States v. UMW, 330 U.S. 258, 351–52 (1947) (Rutledge, J., dissenting). Second, after Thomas, the Court did not permit a contemnor who violated a valid registration ordinance that had been unconstitutionally applied to him to raise the invalid application as a defense to the contempt. See Poulos v. New Hampshire, 345 U.S. 395 (1953). In Poulos, although the Court did not explicitly rely on the fact that the defendant had time to seek judicial review of a permit denial, the Court implied that it was a factor in its reasoning. The Court has in various contexts suggested that the unavailability of judicial review makes it appropriate to consider the validity of the underlying proscription in a contempt
V. INTENT

Although few statutes expressly include wrongful intent as an element of contempt, the vast majority of contempt decisions require some form of intent to obstruct.286 A number of these impose the further requirement that intent be proven beyond a reasonable doubt, as a matter of constitutional mandate.287 Courts and commentators have argued strongly about two issues with respect to the role of intent in contempt cases: first, whether there must be an explicit finding of wrongful intent;288 and second, whether the standard of intent should be subjective—requiring that the contemnor actually intended the act to obstruct the judicial process or at a minimum was aware that her proceeding for violating the order. See Kuhns, supra; see, e.g., Carroll v. President & Commrs. of Princess Anne, 393 U.S. 175, 180 (1968); In re Green, 369 U.S. 689, 692–93 (1962), discussed in, Walker v. City of Birmingham, 388 U.S. 307, 315 n.6 (majority opinion), 332–33 n.9 (Warren, C.J., dissenting), and in, 56 CALIF. L. REV. 517, 522 (1968); Oklahoma Operating Co. v. Love, 252 U.S. 331, 337 (1920); Alexander v. United States, 201 U.S. 117, 121 (1906).

Where a contemnor is permitted to challenge the validity of an underlying proscription in a contempt proceeding for violation of a court order because pre-violation review is unavailable, the need for allowing advocacy to override competing values of otherwise equal weight is arguably lessened. Under these circumstances, however, a contemnor would at least have to be aware that a post-violation challenge to the prohibition was permissible, in order to avoid the deterrence of protected expression. Unfortunately, the availability of post-violation review of the validity of an underlying court order in a contempt proceeding is not widespread or predictable, especially where the order originates with the court itself rather than being issued to enforce a statute. See supra note 22 and accompanying text.

More importantly, protected expression is likely to be inhibited even where the validity of an underlying proscription can be raised as a defense in a contempt hearing. If the prohibition in question is found to be proper on its face and as applied, intentional violation of the prohibition will generally be considered contemptuous. There are few situations where a contemnor is given a second chance after violation of a court order to comply with the order and annul a criminal contempt citation, after the validity of the order has been upheld. See id. Therefore, the need for greater leeway in advocating, where pre-violation judicial review or appeal is not available or will be ineffective, remains important.

286. See, e.g., United States v. Seale, 461 F.2d 345, 367 (7th Cir. 1972) (noting that virtually every decision under the federal contempt statute, which contains no intent requirement, mandates some finding of wrongful intent); In re Mattera, 34 N.J. 259, 168 A.2d 38, 46 (1961) (although state contempt statute does not make intent an element, contempt “must be knowing and willful and evidence an intent to flout the authority of the Court”).

287. See, e.g., Hawk v. Cardoza, 575 F.2d 732, 734 (9th Cir. 1978) (“We infer that fourteenth amendment due process . . . does demand some showing of intent for conviction of criminal contempt.”). However, a number of courts often disregard the need to prove intent, or appear to be unaware that intent may even be an issue. See Note, Summary Punishment for Contempt: A Suggestion that Due Process Requires Notice and Hearing Before an Independent Tribunal, 39 S. CAL. L. REV. 463, 465 (1966).

conduct probably was obstructive, or objective—requiring merely that the contemnor should have known the conduct was obstructive. The debate is an important one. Its importance, however, lies not simply in resolving the question in isolation, but in understanding its integral relationship to two other issues—the role intent plays in actually defining whether conduct is obstructive, and the practical problems of proving specific intent in the context of contempt.

The actor’s intent is a necessary part of determining whether the administration of justice has been obstructed. For example, where an attorney arguing with the court is engaged in good faith efforts to represent a client, as opposed to gratuitously insulting the judge, the attorney’s conduct should be subject to greater insulation from the contempt power. This additional protection derives both from the salutary rather than wrongful intent of the lawyer, and from the positive effects, or at least the lack of serious harm, to justice. Indeed, whether expression is “directed to inciting or producing imminent lawless action” is, along with the possibility of producing such harm, a key to determining whether speech is protected generally under the clear and present danger test. But the “direction” of expression and the specific intent of the actor neither share an identity nor are wholly independent. They are both indicators of the propriety of an attorney’s conduct—whether behavior is productive or destructive to the administration of justice.

Consider, for example, an attorney who makes a clearly irrelevant and highly prejudicial argument to the jury, or who absolutely refuses to stop arguing with the judge despite repeated, insistent orders to cease. Surely these are the kinds of misconduct, when sufficiently egregious, that should be punished as contempt, even if the attorney honestly but mistakenly believes that she is aiding the administration.

289. See, e.g., Falstaff Brewing Co. v. Miller Brewing Co., 702 F.2d 770, 782 (9th Cir. 1983) (in cases of criminal contempt, willful disobedience must be proved beyond a reasonable doubt and “willful” means deliberate or intentional violations); In re Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971) (“Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt, as to most other crimes.”); United States v. Sopher, 347 F.2d 415, 418 (7th Cir. 1965) (noting absence of “positive evidence of a deliberate intent to pursue a course of improper argument or prohibited conduct”).

290. See, e.g., United States v. Marx, 553 F.2d 874, 876 (4th Cir. 1977); United States v. Seale, 461 F.2d 345, 368 (7th Cir. 1972). Some courts have gone so far as to conclude that it is sufficient if the contemnor's actions were volitional, that is, the conduct was not accidental. See, e.g., United States v. Polizzi, 323 F. Supp. 222, 226 (C.D. Cal.), rev'd, 450 F.2d 880 (9th Cir. 1971); Currie v. Schwalbach, 132 Wis. 2d 29, 390 N.W.2d 575, 578 (Ct. App. 1986) (it is the conduct which must be intentional, not its effect upon the proceedings), aff'd, 139 Wis. 2d 544, 407 N.W.2d 862 (1987).

of justice and has no intention of obstructing it.\textsuperscript{292} It is not rare for attorneys who conduct themselves in this manner to believe that they are acting within the bounds of legitimate advocacy and not intending to obstruct the proceeding.\textsuperscript{293} Yet, with a purely subjective test of intent, assuming that a court could know the actual intent of the offending individual, such conduct would be immune from the contempt power. This is undoubtedly the unstated premise that calls for an objective standard of intent in contempt cases.

On the other hand, if the intent standard is purely objective, imposing liability whenever the actor should have known that conduct was obstructive, the ease with which wrongful intent might be inferred from a finding of obstruction essentially negates intent as a meaningful element of the offense.\textsuperscript{294} This is a particularly serious problem in contempt cases. There really is no way of proving wrongful intent in a contempt case other than by imputing it from the conduct itself; there rarely is any other evidence upon which to base a finding of intent. In contrast, with most other crimes, a defendant is often engaged in acts leading up to the commission of the crime itself that might demonstrate intent. In addition, the manner in which many crimes are committed might tend to prove that the actor performed the act willfully.\textsuperscript{295}

With contempt, however, the conduct at issue is an attorney's spontaneous reaction to events taking place in the courtroom and involves no preparation or premeditation. Sometimes the trial judge can rely on such things as prior warnings that an attorney's conduct was bor-

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\item 292. On the other hand, some courts have even held contemptuous the repeated assertion of apparently valid objections after the court orders counsel to refrain from making them. See, e.g., United States v. Landes, 97 F.2d 378, 380-81 (2d Cir. 1938). Although such contempt convictions arguably can be based on disobedience of the court's directives, presumably, regardless of intent, wholly proper advocacy should not be deemed contemptuous.

\item 293. According to one commentator, contempt "might be regarded as willful only if the defendant intended both to violate the injunction and to express defiance in doing so." Dobbs, \textit{Contempt of Court: A Survey}, 56 \textit{CORNELL L. REV.} 183, 263 (1971).

\item 294. Virtually all cases hold that the requisite criminal intent can be inferred from the contemnor's actions. See, e.g., United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972); People v. Siegel, 94 Ill. 2d 167, 445 N.E.2d 762, 764 (1983).

\item 295. For example, if a defendant defends against a charge of arson by claiming accident, a prosecutor might counter the defense, and prove an intent to commit the act, by introducing: evidence of the defendant's prior threats against the resident of the razed home; a history of animosity between the defendant and the resident; receipts demonstrating the defendant's purchase of accelerants or other materials used to set the fire; a witness who heard the defendant make incriminating statements; an expert who could determine from the way the fire spread that it was not accidental; or the purchase or increase of fire insurance for the burned building shortly before the fire.
\end{footnotes}
dering on the contemptuous, a specific court order prohibiting the conduct engaged in, or a contemporaneous comment by the contemnor shedding some light on the contemnor's intent. However even where these indicators exist, they often do not themselves demonstrate beyond a reasonable doubt an intent to obstruct justice. The contemnor may have honestly and justifiably believed that the conduct was necessary to protect the client's interests, and had to be done in the interests of justice in spite of, not because of the fact that it violated a court's order or might offend the judge.

Indeed, even with respect to a subjective standard of intent, courts can only impute intent from the conduct in question. Once a court determines that conduct is obstructive, and that the acts in question are volitional, it is not difficult to conclude that an attorney intended the outcome of her specific actions. This is particularly true for attorneys, as opposed to lay persons, because attorneys are charged with knowledge of acceptable standards of courtroom conduct. Thus, any deviation from those standards by an attorney may be considered intentionally obstructive. Moreover, to the extent that the contemnor's subjective intent is at issue, adjudicating the charge in a summary proceeding makes it impossible for the court to consider any other evidence on intent, or for the accused to present an adequate defense to rebut the presumption of wrongful intent. Conversely, if

296. See, e.g., In re Gustafson, 650 F.2d 1017 (9th Cir. 1981) (en bane); State v. Goeller, 263 N.W.2d 135 (N.D. 1978). But see In re Dellinger, 461 F.2d 389, 398 (7th Cir. 1972) (circuit court reversed numerous contempt citations against attorneys for refusing to stop arguing and to be seated after repeated orders of the trial court to do so), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).

297. Cf. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (applying subjective standard of intent in equal protection challenge: discriminatory purpose implies that the decision-maker acted at least "because of," not merely "in spite of" its adverse effects upon an identifiable group).

298. Often the practice of permitting a contemnor to demonstrate in a summary proceeding that she did not act with the requisite mens rea appears to shift the burden of proof on an essential element of the crime. Cf. In re Winship, 397 U.S. 358, 364 (1970). Moreover, it is at best questionable whether the judge, after charging the attorney with contempt, can fairly determine whether the defendant has dispelled the judge's previous assumption of criminal intent. Courts sometimes consider the contemnor's efforts to defend the contemnor's actions, or even her silence, as opposed to an apology to the court, as probative evidence of the defendant's wrongful intent at the time of the original conduct. See, e.g., In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260, 1280-81 (App. Div. 1987), aff'd, 118 N.J. 51, 570 A.2d 416 (1990).

299. Several commentators have suggested that it is a contradiction in terms to permit summary adjudications of contempt, while declaring mental state to be an element of the offense. The use of summary hearings is premised on the assumption that the judge saw and heard all of the elements of contemptuous conduct, but because neither good faith nor an intent to commit contumacious conduct may be perceived by the judge, it must be inferred from conduct. See Note, Criminal Law—Contempt—Conduct of Attorney During Course of Trial, 1971 Wis. L. Rev. 329, 347-48.
intent is not recognized as a vital element of contempt that may require proof, courts will frequently resort to summary procedures when a full evidentiary hearing is in order.

Inferring wrongful intent beyond a reasonable doubt is terribly difficult in any contempt case where the conduct in question does not flagrantly violate the established rules of practice or commands of the court. As discussed earlier, the division between the most aggressive advocacy tolerable and the minor excesses resulting from such advocacy is very uncertain. Even a judge's order or warning does not necessarily state the limits beyond which the contempt power properly lies in wait. Thus, the practice of inferring wrongful intent from a finding of obstruction, like the inappropriate and haphazard application of the obstruction standard itself, has a powerful deterrent effect on zealous representation.

The Seventh Circuit in United States v. Seale and In re Dellinger seemed to recognize implicitly some of these tensions. The court concluded that “an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.” This standard recognizes the needs of the court, by incorporating an objective measure of intent. It also safeguards aggressive advocacy by recognizing that attorneys’ obligations to represent clients, as well as the pressurized atmosphere of trial practice, must be factored into any determination of whether lawyers intend to be obstructive or are unintentionally carried too far by the

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300. The conduct in question can be so egregious as to leave no doubt of the wrongful intent of the actor (except, that is, to mental capacity, see, e.g., Panico v. United States, 375 U.S. 29, 30-31 (1963) (per curiam) (reversing criminal contempt conviction and remanding for hearing on criminal responsibility of contemnor)). Some courts have even dispensed with the intent requirement altogether. See, e.g., Offutt v. United States, 232 F.2d 69 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956). In Offutt, the court held that if a contemnor's comments were insolent and insulting in a way that constituted “misbehavior” in the course of a trial, “there would be no need to make special inquiry into intent, except as to mitigation.” Id. at 72. Offutt at least noted, however, that where conduct is not “clearly blameworthy,” proof of intent is still required. Id.

301. See, e.g., Caldwell v. United States, 28 F.2d 684 (9th Cir. 1928) (punishing conduct "where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client").

302. 461 F.2d 345 (7th Cir. 1972).

303. 461 F.2d 389 (7th Cir. 1972), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).

304. Id. at 400. Other courts have also adopted this formula. See, e.g., Hawk v. Cardoza, 575 F.2d 732, 734-35 (9th Cir. 1978); United States v. Marx, 553 F.2d 874, 876 (4th Cir. 1977); Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 552 F.2d 498, 510 (3d Cir. 1977), cert. denied, 434 U.S. 822 (1977).
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heat of the moment. This standard also appears to acknowledge the
distinction discussed earlier between misconduct that interferes with
the truth-finding function of a trial, and that which "facilitates the
search for truth," or at least does not hinder it.

The problem with this standard, however, is that it fails to account
adequately for the substantial likelihood that courts, having initially
determined that an attorney's conduct is sufficiently obstructive to
level a contempt charge, will not pause to consider independently
whether the lawyer could reasonably have been unaware that the con-
duct was wrongful. This is particularly true because many of the
factors that would tend to indicate or dispel the presence of wrongful
intent are also probative of whether conduct should be adjudged
obstructive. For example, a court's warning to an attorney to cease
certain behavior helps establish that the transgression of the court's
command was intentionally obstructive. Similarly, where a lawyer
engages in a pattern of misconduct, wrongful intent is more readily
inferable from the behavior. At the same time, however, these vari-
ables help establish whether the conduct constitutes obstruction. But
in doing so, in facilitating the balance of the competing interests
involved and helping to measure any damage to the administration of
justice, these and many of the other factors suggested in the previous
section already account in large part for the intent of the actor. This is
so because the obstructiveness of certain misconduct—interference
with the courts' interests in respect and obedience and with the func-
tion of the judge's role in a trial—should be affected by whether the
conduct at issue is intentionally wrongful or results from a good faith
effort to advocate. Conduct should not be considered obstructive
unless it evidences substantial indicia of wrongful intent. Conversely,

305. Thus, for example, numerous opinions affirm contempt convictions of attorneys for
continuing legal argument or objections after a court's ruling, despite fervent and, for the most
part, probably honest remonstrances of good faith. See, e.g., Sacher v. United States, 343 U.S. 1
(1952); United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965), cert. denied, 384 U.S. 1003 (1966);
In re Osborne, 344 F.2d 611 (9th Cir. 1965). Nevertheless, a few courts have concluded that
despite an attorney's obstructive conduct, there was insufficient evidence of wrongful intent to
support a contempt conviction. See, e.g., United States v. Sopher, 347 F.2d 415, 418 (7th Cir.
1965) (although counsel made misstatements of material fact and improper inferences to jury in
closing argument, contempt conviction reversed because "[p]ositive evidence of a deliberate
intent to pursue a course of improper argument or prohibited conduct [was] absent").

306. See Raveson, supra note 2, at 561 n.292 and accompanying text; In re Ungar, 160 N.J.
Super. 322, 332–33, 389 A.2d 995 (App. Div. 1978) (because purpose of criminal contempt is to
"punish an offender for his affront to government," "lack of wrongful intent is probative in the
1978)).

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what we consider to be good faith or criminal intent depends on how we define the limits of proper advocacy.

Therefore, the necessity of establishing wrongful intent will inevitably be structured into any accurate calculus for determining the division between protected advocacy and punishable contempt. Indeed, given the ease with which a court can impute illicit intent from a finding of obstruction, and the practical inability to prove or disprove actual intent in any other manner, the only effective way of giving expression to the important policies underlying the requirement that intent be an element of contempt—the promotion of vigorous advocacy by preventing the punishment of mistaken but unintentional excesses—is to incorporate those protections into the substantive standards for defining obstruction.307

This Article has attempted to incorporate an objective standard of intent, such as that articulated in Dellinger, in the selection of variables for determining whether conduct is obstructive, with the critical addition of a buffer zone that insulates valuable advocacy from the contempt power. This combination of an objective intent standard and the creation of adequate breathing room for advocacy protects the administration of justice from the use of a purely subjective intent test in circumstances where the specific purpose of obstructing the proceeding often is virtually impossible to prove. This combination also protects the interests of attorneys and their clients by insuring that the measure of whether conduct is obstructive is sufficiently objective—representing an egregious departure from the norms of trial practice which can not be addressed by any less drastic alternative—that it is fair to impute wrongful intent from obstructive conduct itself.

VI. CONCLUSION

A colleague of mine recently wrote that both physicists and legal scholars search for “elegant” theories to explain the phenomena or concepts they strive to express.308 “An ‘elegant theory’” he writes, “is not, as one might surmise, filled with complicated equations but is, instead, the simplest possible explanation of the phenomenon in question.”309 The simplest, perhaps the only, satisfactory explanation of contempt is “obstruction of the administration of justice.” However, the simplicity of this definition is deceptive. As this Article explains,

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307. This idea is reflected in an incipient fashion by a number of opinions noting that “formulations of the requisite intent [in contempt cases] cannot be expected to be uniform in all contexts.” See United States v. Smith, 555 F.2d 249, 252 (9th Cir. 1977).
309. Id.
we can only determine whether the processes of justice have been obstructed by balancing competing values of our judicial system. The need for this balancing process is both most evident and most necessary where the conduct at issue is that of an attorney representing a client at trial.

Because the values underlying our adversary system are themselves diffuse, and because the contempt power exists to protect the very interests that may be threatened by its misuse, the calculus for determining whether an obstruction has occurred is frequently complex. This complexity is reflected in the number of variables that must be considered in determining whether conduct is sufficiently obstructive to constitute contempt. Thus, the elegance of the theories discussed here can only be measured by their inelegance. As William Blake said, “the road of excess leads to the palace of wisdom.”

The application of these factors delineates the contempt power with far greater precision than any definition can. However, because the variables involved are numerous, it is often difficult for an attorney to know with mathematical certainty before the fact whether specific behavior will be deemed contemptuous. Therefore, aggressive advocacy can only be protected from the deterrent effect of this inexact power if courts fashion a buffer zone around valued advocative expression. The same variables that determine whether an obstruction has occurred trace the contours of that insulating zone.

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