Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power. Part One: The Conflict Between Advocacy and Contempt

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ADVOCACY AND CONTEMPT:
CONSTITUTIONAL LIMITATIONS ON THE
JUDICIAL CONTEMPT POWER

PART ONE: THE CONFLICT BETWEEN ADVOCACY
AND CONTEMPT

Louis S. Raveson*

Abstract: The courts' inherent power to punish misconduct that interferes with the judicial process as criminal contempt often conflicts with attorneys' first amendment and due process rights, and their clients' sixth amendment rights to vigorous legal representation. In balancing these competing interests, the Supreme Court has employed seemingly diverse standards to demarcate the constitutional limitations on the substantive scope of the contempt power. Professor Raveson argues that the Constitution should limit the contempt power so that it may only be used to punish actual obstructions of the administration of justice. He maintains that because the goals of our system of justice are frequently in opposition, the appropriate dividing line between permissible advocacy and obstruction can be drawn only by balancing the various goals of a trial in a way that maximizes the value of these interests to the system of justice as a whole. The proper balance, in turn, can only be achieved by including within the calculus of contempt recognition of the actual experiences of trial participants. Professor Raveson concludes that appropriate consideration of the value of advocacy to the processes of justice requires that advocacy sometimes be permitted to interfere with competing aims of a trial. Realization of the full value of advocacy and maximization of the various goals of our trial system require that a buffer zone be constructed surrounding valuable advocacy to afford adequate protection from punishment and to diminish deterrence.

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The sensational political trials of the late 1960s and early 1970s thrust the issue of criminal contempt into the national spotlight and engendered a storm of articles from both legal scholars and the popular press. Most of these articles focus on the court's need and ability to summarily punish conduct in its presence when that conduct dis...

1. See, e.g., In re Dellinger, 461 F.2d 389 (7th Cir. 1972); United States v. Seale, 461 F.2d 345 (7th Cir. 1972). In addition, many of the earlier significant contempt cases arose from “political” trials. See, e.g., Sacher v. United States, 343 U.S. 1 (1952) (Smith Act prosecutions in Dennis v. United States, 341 U.S. 494 (1951)).


4. Contempts have traditionally been classified as either direct or indirect. Direct contempt takes place in the actual presence of the court, such that a judge can determine through his own
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rupts judicial proceedings or demonstrates disrespect for judicial processes. That focus, on disorder and disrespect, is not surprising given the nature of political trials; the essence of criminal contempt.

senses what is offensive. See, e.g., In re Oliver, 333 U.S. 257, 275 (1948); Pendergast v. United States, 317 U.S. 412 (1943); Ex parte Terry, 128 U.S. 289, 307 (1888). Indirect contempt is rarely defined independently; it has been described as being "composed of all contempts that are not direct." R. Goldfarb, The Contempt Power 70 (1963). A distinction, however, is crucial because only direct contempts may be disposed of summarily. Indirect contempts will always require notice and a hearing replete with the due process protections normally accorded criminal defendants. See, e.g., Fed. R. Crim. P. 42(a) (allowing summary procedures only if "the judge certifies that [he] . . . saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court"). Unless the events comprising the contempt are witnessed, the judge cannot decide the matter without an evidentiary hearing.

For example, in United States v. Seale, 461 F.2d 345 (7th Cir. 1972), and In re Dellinger, 461 F.2d 389 (7th Cir. 1972), contempt cases arising from the Chicago 7 trial, there were dozens of contempt citations against the defendants and their attorneys. Although many of the resulting contempt convictions ultimately were reversed, the record of the trial reveals hundreds of insulting comments to the judge, such as accusations of racism; remarks like, "I wonder, did you lose [your mind] in the Superman syndrome comic book stories? You must have to deny us our constitutional rights." Seale, 461 F.2d at 380; see also id. at 381 (telling the judge he was in contempt). Of course, the trial judge himself instigated much of the disruption that occurred there.

After the Black Panthers trial in New York City, considered by many to be extremely disruptive, the Association of the Bar of the City of New York appointed a Special Committee on Courtroom Conduct to study both the causes of courtroom disorder and its implications for the profession. The Commission's published report continues to stand as one of the best modern works on contempt. See N. Dorson & L. Friedman, Disorder in the Court (1973).

Contempt sanctions can be civil or criminal. Civil and criminal contempt differ not by the conduct cited as contempt, but rather by the purpose of the sanction and, to a lesser extent, by the proceedings. If the purpose of the contempt sanction is remedial, an indeterminate sentence is imposed to coerce a contemnor to comply with a particular order of the court. Civil contempt sentences may be imposed, for example, when a defendant refuses to pay alimony as ordered or to permit a former spouse the court-ordered right to visit children, Goetz v. Goetz, 181 Kan. 128, 309 P.2d 655 (1957), or where a defendant continues to trespass in violation of an injunction, Cleft v. Hammonds, 305 F.2d 565 (5th Cir. 1962). Because coercive contempt sanctions are equitable civil remedies, civil contempt need not be proved beyond a reasonable doubt; the contemnor does not have the right to a jury trial, and judgments are appealable according to the rules applicable to civil judgments. Kuhns, Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury, 73 Mich. L. Rev. 483, 516–17 (1975).

On the other hand, a criminal contempt sentence is imposed to punish and to vindicate the authority of the court, not for any remedial purpose. Thus, while a civil contempt sanction is indeterminate, a criminal contempt sanction is determinate. See, e.g., Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911).

A criminal contempt has been punished, however, with a partly coercive custodial sentence. See United States v. Wilson, 421 U.S. 309, 312 (1975) (defendants were convicted of criminal contempt for refusing to testify at trial despite grant of immunity, and sentenced to six months imprisonment; however, the judge made it clear that if they decided to cooperate during the period of incarceration, he would consider reducing their sentences).

Therefore, a civil contempt citation may arise from a criminal trial and vice versa. Moreover, one act, such as the violation of a court order, may be dealt with either by civil or criminal contempt sanctions or, theoretically, by the imposition of both. See United States v. UMW, 330 U.S. 258, 298–99 (1947) (if the procedural requirements for criminal contempt are complied
lies in the court’s inherent power to punish interference with its business and disobedience of its authority.\textsuperscript{7}

Some of these articles, and a second generation of writing on contempt, explore the question of what procedural safeguards must be afforded an alleged contemnor.\textsuperscript{8} The law of contempt presently permits, when “necessary,” an immediate and summary contempt proceeding, before the judge leveling the contempt charges, without representation by counsel.\textsuperscript{9} Most articles, however, fail to address the most critical issues: what conduct constitutes contempt, and how the court’s contempt power defines permissible advocacy. Commentators who recognize the importance of these questions do little more than note that the courts’ need for order and decorum must be balanced against the parties’ need for vigorous representation from an independent bar. Moreover, the dramatic political case genesis of most of the writing on contempt tends to obscure how contempt, or the potential for contempt, affects the scope and vigor of advocacy in all judicial proceedings.

Probably no more than a few minutes go by in this country without an attorney being charged or threatened by a judge with contempt.\textsuperscript{10} In Los Angeles County alone, one public defender is held in contempt or threatened with contempt every week.\textsuperscript{11} Although no one seems to maintain statistics on the frequency of contempt citations,\textsuperscript{12} anecdotal

with, both a civil and criminal contempt penalty may be imposed in the same proceeding. Imposing criminal sanctions, however, requires compliance with the constitutional safeguards of criminal trials, Dobbs, \textit{Contempt of Court: A Survey}, \textit{56} \textit{CORNELL L. REV.} 183, 238 (1971), unless the contempt is considered a direct contempt, which may be tried summarily with severely limited due process rights.


\textsuperscript{9} See Kuhns, \textit{supra} note 8, at 41--42.

\textsuperscript{10} This Article addresses the relationship between advocacy and contempt and therefore applies to attorneys more than non-attorneys. Indeed, as we shall see, whether or not particular conduct is contemptuous depends largely on whether it constitutes legitimate advocacy. Nevertheless, much of the analysis below applies equally to non-attorneys.


\textsuperscript{12} I was unable to find any state or federal administrative office of the courts that collects such information.
data suggests that the threat and use of contempt against attorneys, particularly those representing criminal defendants, is at an all time high and increasing. Thus, contempt affects not just political trials but every day cases as well.

Contempt is an extremely powerful tool to control attorneys' behavior. Commentators recognize the personal dangers posed to attorneys representing unpopular causes or unsympathetic clients by the contempt power. Presently, the courts' increased use of the contempt power corresponds to the expansion of sanctions against attorneys pursuant to Rule 11 of the Federal Rules of Civil Procedure and state analogues, as well as the more frequent issuance of grand jury subpoenas compelling attorneys to testify about their clients.

Use of the contempt power threatens attorneys' individual rights and security, especially when contempt charges are tried summarily. More importantly, the exercise of the contempt power, and even the

13. In conducting a survey for this Article, several students and I spoke with public defender's offices in every state in which such offices exist. The anecdotal data referred to in the text derives from these conversations as well as many others with prominent criminal and civil trial attorneys throughout the country (notes on file with the Washington Law Review).

14. In addition to the anecdotal data mentioned above, I also performed a computerized search of criminal contempt cases. This survey revealed a significant increase in the number of reported contempt cases, even allowing for the general increase in reported cases in the last two decades. Moreover, a great many contempt decisions are unreported. See infra note 20.


16. FED. R. CIV. P. 11 authorizes federal courts to impose sanctions, including attorney fees, on litigants and their counsel for filing pleadings that are not well grounded in fact and law, or that are interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in litigation costs. See generally Nelken, Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313 (1986). All commentators on Rule 11 agree that, since amendment of the Rule in 1983 to include the standards noted above, the number of decisions imposing sanctions have dramatically increased. See, e.g., Note, Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity, 76 KY. L. REV. 891, 893 (1987-1988).


Moreover, many of these subpoenas result in contempt citations when courts overrule claims of attorney-client privilege and attorneys persistently refuse to testify. See, e.g., In re Nackson, 114 N.J. 527, 555 A.2d 1101 (1989) (attorney subpoenaed before grand jury held in contempt for refusing to release phone numbers of his client, who had consulted attorney about fugitive warrant). Discussion of any deeper connection between the upsurge of use of these various mechanisms and contempt is beyond the scope of this article. That connection, however, as well as the dilution of the effective assistance of counsel standard, has been made. See Limitations on the Effectiveness of Criminal Defense Counsel: Legitimate Means or “Chilling Wedges?”, 136 U. PA. L. REV. 1779 (1988).
potential for its exercise, can have a serious chilling effect on the vigor of advocacy. Indeed, the greatest danger of this kind of Sword of Damocles "is that it hangs—not that it drops."18

Courts must have the power to enforce order and to compel compliance with their authority. Orderly proceedings and obedience to the courts' commands are essential to the proper administration of justice. An independent bar, however, is equally critical to the successful functioning of our justice system; for it is with the vigorous advocacy of adversaries that our judicial system exposes the truth and achieves justice. Moreover, legitimate advocacy is protected by the constitutional guarantees of freedom of expression, the sixth amendment rights of criminal defendants, and due process. If attorneys must fear that momentary antagonism, inadvertent insults, and the occasional lapses of decorum that inevitably result from zealous advocacy in the heat of courtroom battle might result in punishment for contempt, they will have little choice but to practice a more hesitant brand of advocacy, to avoid the personal jeopardy for such excesses.

The trial court contempt power goes largely unchecked. Most threats of contempt are acceded to and few findings of contempt appealed.19 Even when contempt convictions are appealed, not all appellate opinions are published.20 Presently, the standards governing both the limits of acceptable advocacy and the scope of the contempt power are haphazard and imprecise. Although numerous appellate decisions purport to specify standards for applying the contempt power, their open-ended and ill-defined criteria make it impossible to


19. See Brautigam, Constitutional Challenges to the Contempt Power, 60 GEO. L.J. 1513, 1525 (1972) ("Appellate decisions are infrequent, because the offending party's safest and most economical course is to placate the judge by apology and submission."). Many states also limit the availability of appellate review in contempt cases. See, e.g., Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Brizendine v. State, 103 Tenn. 677, 54 S.W. 982 (1899); Wagner v. Warwasch, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956). In addition, attorneys sometimes are held in contempt during a trial, and then the judge rescinds the citation at the end of the proceeding. Indeed, this has happened to me. This procedure provides an excellent method of controlling counsel. Attorneys know ahead of time that if they behave as the court desires, the conviction will be annulled.

20. I examined all of the New Jersey opinions on contempt in the past ten years. The great majority of these opinions were unpublished. Interestingly, most of the appellate decisions reversing contempt convictions were unpublished, while a majority of those affirming convictions were published. Query whether the courts are trying to convey the message that attorneys must obey the courts, yet recognizing abuses of the contempt power which must be reversed. Although New Jersey permits the use of unpublished opinions as authority if copies are provided to the court and opposing counsel, the decisions are not precedent binding on any court. See N.J. Ct. R. 1:36–3. Moreover, it is extremely difficult even to learn of the existence of these decisions.
predict, except in the most obvious instances, whether an attorney's conduct is punishable. Not only has this failing fostered idiosyncratic exercise of the contempt power by trial judges, it has also encouraged appellate courts to extend great deference to trial court determinations of whether an attorney's conduct is contemptuous. In essence, the personal sensibilities of trial judges largely govern the substantive scope of the contempt power; each court is free to enforce its own erratic rules.

The proper operation of our justice system requires identifying and formalizing appropriate variables for measuring the outermost limits of vigorous advocacy and the innermost reach of the contempt power, so both the bench and bar have sufficient understanding of the competing tensions to guide their behavior. The ad hoc and sporadic treatment of individual instances of contempt makes the limits uncertain, producing substantial self-censorship of zealous trial representation by lawyers. This chilling can have a profoundly adverse effect on the quality of advocacy and the processes of justice.

Just as important as the dampening effect of the contempt power, the actual use of that power establishes the limits of permissible advocacy. Just as decisions on ineffective assistance of counsel set the lowest limits on the quality of advocacy required by the Constitution, exercise of the contempt power defines the boundaries of the most vigorous advocacy protected by the Constitution. The real issue with contempt cases, as with ineffective assistance of counsel cases, is not so much the fate of the particular litigants, but the effect of these decisions on the practice of law.

To be sure, the outer confines of advocacy are also constrained by disciplinary rules, ethics decisions, and judicial decisions where the appropriate scope of advocacy is an issue affecting the merits of a case. The contempt power, nevertheless, plays a major and largely unrecognized role in imposing such limitations. Indeed, it may well be the largest single constraint on the vigor of advocacy. Contempt convictions and the threat of contempt can effect sweeping changes in the way attorneys try cases, not through the careful development of evidentiary rules, or trial procedures, but by disciplining attorneys and other participants in the trial process. A better understanding of the inter-relationship between advocacy and the contempt power is therefore critical to the evolution of justice through the adversarial process. Advocates must know both how far they are permitted to go and the point at which their conduct so exceeds those limits as to become punishable. Obviously, these two points are intimately related, but they are not identical.
The definition of contempt circumscribes legitimate advocacy, just as fixing the limits of permissible advocacy begins to demarcate the innermost reaches of the contempt power. The boundaries of contempt and legitimate advocacy together mark a contiguous border. The question remains, however, how wide that border is—how much latitude, if any, exists between the outermost bounds of what an attorney can do on behalf of a client and the beginning of the court's necessity to punish conduct to protect its own processes from harm?

The present substantive standards for exercising the contempt power are not appropriate or adequate to define the limits of proper advocacy. As contempt is presently used, often only a fine line separates the outer bounds of advocacy and contempt of court. Indeed, it is precisely that approach that makes the contempt power a primary limitation on aggressive advocacy. Rather, courts must recognize that there is a gulf between advocacy and contempt. The boundary of proper representation is not the same one indicating the front line of the contempt power.

Substantive limitations are also of special importance in contempt cases because the standards defining contempt, as well as the initiation of contempt proceedings, are, for the most part, controlled by one branch—the judiciary. Unlike ordinary criminal proceedings, where prosecution must be initiated by the executive branch and crimes are defined by the legislative branch, the normal checks and balances against abusive or mistaken exercise of the government's power to punish criminal conduct are not present. Thus, potential for excess inherent in unilateral control exists in this unique form of criminal justice.21 The process needs to be restrained by the definition of contempt and by more objective standards for contemptuous conduct.

21. Of course, the lack of legislative restraint contributes to excesses of the contempt power. One branch of government, here the judiciary, is understandably reticent to curtail its own prerogatives. Although state legislatures and Congress can—and do—place substantive limits on the contempt power by restricting the definition of contempt, the degree to which legislative bodies might be willing to impose such limits on the courts' nearly unbridled power is limited by several factors. First, separation of power considerations may prevent legislatures from imposing too narrow a definition of contempt. Many courts have invalidated such restrictions as violative of the separation of powers. See, e.g., State v. Heltzel, 526 N.E.2d 1229 (Ind. Ct. App. 1988) (contempt of court is purely judicial power and is inalienable and indestructible). Second, legislatures possess their own inherent power to punish for contempt. See, e.g., Marshall v. Gordon, 243 U.S. 521, 541 (1917). See generally Note, Constitutional Law—Due Process—Power of a Legislature to Punish for Contempt, 1973 Wis. L. REV. 268. Any limitation a legislative body places on the courts' power of contempt, therefore, may place irresistible pressure on itself to similarly limit its own power. Moreover, legislatures legitimately may believe that any restrictions they impose on the judicial contempt power will be reflected, and perhaps magnified, when the courts look to the constitutional limits of the legislative power of contempt. Most important, however, is the fact that even where legislatures have restricted the judicial power of
This Article explores the relationship between advocacy and contempt, and suggests procedures and principles for defining the substantive scope of the contempt power consistent with the constitutional rights of litigants and the ethical responsibilities of the bar. Section II examines the balance between the competing needs of the courts, to prevent interference with their business, and those of the bar, to maintain an independence essential to the protection of litigants' rights. The section attempts to articulate the constitutional limits on the definition of contempt. I identify two standards used by the Supreme Court—actual obstruction of the administration of justice, and the imminent threat of such obstruction—which should be treated as equivalent limitations.

Section III explores how the abstract definition of contempt derived in the previous section should be implemented: what is an obstruction of the administration of justice? It examines the tensions created by the conflicting goals of our adversarial system, the effect of these tensions on the limits of legitimate advocacy, and the application of the obstruction of justice standard. I assert that where expression has advocative value, it furthers the ultimate goals of justice underlying the courts' contempt power; therefore, determining whether justice has been obstructed requires considering the positive value of advocacy. The section concludes that vigorous advocacy must be permitted to interfere to some degree with competing interests of our justice system. Valuable advocative expression should be surrounded by a "buffer-zone," like that in the law of defamation, to insulate it from the power of contempt.

II. THE JUDICIAL POWER OF CONTEMPT AND THE CONSTITUTIONAL LIMITATIONS ON THAT POWER

A. The Courts’ Contempt Power

Courts have always claimed the inherent power to protect themselves by punishing for contempt individuals who defy their authority or interfere with the administration of justice. Historically, courts

contempt, the standards for measuring contemptuous conduct necessarily are imprecise and open to broad judicial interpretation.

22. See, e.g., Ex Parte Terry, 128 U.S. 289, 302-04 (1888), and cases cited therein. More recently, however, commentators have challenged the accuracy of the courts’ frequent declarations that the contempt power has always been an inherent power of common law courts and that summary proceedings have always been utilized by the courts to try contemnors. See, e.g., R. Goldfarb, supra note 4, at 13-45; Fox, The Summary Process to Punish Contempt, 25 L.Q. Rev. 238-54, (1909); Note, Constitutional Law: The Supreme Court Constructs a Limited
protected themselves with fierce force and swiftness. Amputating the right hand of a contemnor, and even execution,\textsuperscript{23} for attempting to assault a judge in court was not unusual in England. The practice continued a decade after the ratification of the United States Constitution.\textsuperscript{24} The English judges, moreover, demonstrated concern not only for restoring immediate order in their courtrooms, but also for deterring future misconduct. Thus, to impress participants in the judicial process with the need for obedience, contemnors' amputated hands frequently were displayed with prominence at the courthouse.\textsuperscript{25}

The contempt power of all courts derives from the court’s power of self-preservation as an institution of government.\textsuperscript{26} The power is inherent because it is necessary for the court to prevent disturbances of its business, the just resolution of disputes. Because the contempt power is inherent, it does not depend on legislative authorization.\textsuperscript{27} Although courts have accepted some legislative restrictions,\textsuperscript{28} they steadfastly deny that a legislature can constitutionally impair their inherent power to the point that they lose the ability to protect their authority.\textsuperscript{29}

The courts therefore exercised their inherent power to punish disruptions of their work, free from any external definition of disruption. The potential for abuse was obvious, and in fact abuse was prevalent. From the outset, judges equated disagreement with disrespect, and confused disrespect with obstruction. The contempt power quickly became a license to censor dissent and to command any level of respect or decorum desired by an individual judge.\textsuperscript{30}

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\textsuperscript{23} Davis's Case, 2 Dyer 188b (1631) 73 Eng. Rep. 415-16 (1907).

\textsuperscript{24} The last such reported case was R. v. Earl of Thanet in 1799. See G. Borrie and N. Lowe, The Law of Contempt 10 (1973).

\textsuperscript{25} See, e.g., Marshall v. Gordon, 243 U.S. 521, 541 (1917) (contempt power “rests solely upon the right of self-preservation”); \textit{Ex parte} Wall, 107 U.S. 265, 302 (1882) (contempt “power necessarily incident to all courts for the preservation of order and decorum in their presence”); \textit{Ex parte} Robinson, 86 U.S. (19 Wall.) 505, 510-11 (1873) (“The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power” to punish for contempt.)

\textsuperscript{26} See, e.g., Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry., 266 U.S. 42 (1924).


\textsuperscript{28} See supra note 21.

\textsuperscript{29} No case that limited the exercise of the court’s contempt power appears in any account of the early history of contempt in this country.
Until 1826, judges in this country exercised unrestrained power to punish conduct that offended them in their official capacity.31 In that year, however, a federal district judge, James H. Peck, summarily imprisoned a lawyer for publishing criticism of the judge's opinion. The public outcry resulting from this action provoked Congress to initiate impeachment proceedings against the judge.32

The impeachment proceedings, and arguments of the attorneys prosecuting Judge Peck, demonstrate a passionate opposition to the broad common law contempt powers Peck purportedly exercised. Constitutional concerns for the protection of vigorous advocates and their clients facing an unrestrained judicial power were at the heart of the impeachment proceedings. These concerns frame the central issue surrounding the contempt power, an issue which the courts today have come little closer to resolving: what conduct constitutes contempt? For example, during the proceedings, Buchanan read from the opinion of a "distinguished jurist" to "show how far the power of punishing contempts is necessary, and what barriers ought to be erected against it, for the preservation of personal liberty":33

Of all the words in the language, [contempt] is, perhaps, the most indefinite. Every thing, that can, by any process of reasoning, be considered as a disrespect to the court, is a contempt. . . . In short, there is nothing, from an indecorous gesture, or a rude, hasty word, up to the most violent opposition to legal authority, that cannot be brought within the purview of the law of contempts.

. . . .

"A want of regard and respect!"—but regard and respect cannot be commanded but by moral conduct, and not always by that. The most correct conduct will not always secure it; the feeling is involuntary, and cannot be punished. . . . When in my own defence, or in the prosecution of my right, I differ from the judge, and show that the opinion he has given is absurd, certainly I treat him with very little regard or respect.34

The proceeding also reflected how, under the then existing common law, the personal feelings of the judge largely determined whether a contempt was committed:

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31. See, e.g., R. Goldfarb, supra note 4.
32. The trial is reported in full in A. Stansbury, Report of the Trial of James H. Peck (1833) [hereinafter Stansbury Report].
33. See id. at 441.
34. Id. at 441-42. The jurist continued, arguing that the use of summary procedures to prosecute contempt violates "the plainest letter of the constitution . . . in its most sacred provisions." Id. at 442.
Another evil... is, that from the nature of the crime, its existence must depend on the temper of the Judge who happens to preside. Words, which a man of a cool and considerate disposition would pass over without notice, might trouble the serenity of another more susceptible in his feelings or irritable by his nature. . . . The judge carries the standard in his own breast.\textsuperscript{35}

Recognizing the tension between the “great law of necessity” and the rife potential for abuse and misuse of the contempt power, if disrespect and “indignity” could alone justify such power, Buchanan suggested the “Constitution of the United States presents the best and the only rule for judging of the extent and the limits of this necessity.”\textsuperscript{36} After Judge Peck’s narrow acquittal, Congress lost no time attempting to balance the competing interests of the “indispensable necessity” to the performance of the courts’ judicial functions,\textsuperscript{37} and the preservation of personal liberties and zealous advocacy. It enacted Buchanan’s bill confining the summary contempt power to punish only conduct that “obstruct[s] the administration of justice.”\textsuperscript{38} This limited substantive definition of contempt is nearly identical with that found in 18 U.S.C. section 401(1), the present statute defining contempt in the federal courts.\textsuperscript{39}

A number of states rushed to copy the federal statute’s restriction of contempt to obstructions of justice.\textsuperscript{40} The vast majority of the states, however, have not followed Congress’ proscription. They either con-

\textsuperscript{35} Id. at 442–43 (emphasis added). Other participants expressed concern about the judges’ practice of imputing wrongful intent purely from a contemnor’s conduct:

In the case of contumacious words, (and I see no reason why it should not extend to acts also,) if he admit the speaking or the writing, the court have the right to judge of the respectful intent as manifested by the words; and although the party should deny any disrespectful intent in the most unequivocal terms, the court may declare that the answer is false, and proceed to impose the punishment; and this power is given too, in the very cases where it ought to be withheld.

\textsuperscript{36} Id. at 443.

\textsuperscript{37} Id. at 438.

\textsuperscript{38} The validity of the Act was sustained by the Supreme Court in \textit{Ex Parte} Robinson, 86 U.S. (19 Wall.) 505 (1873).

\textsuperscript{39} Act of March 2, 1831, ch. 99, 4 Stat. 487 (codified as amended at 18 U.S.C.A. § 401 (West 1969)) states in its entirety:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

\textsuperscript{40} See, e.g., Mo. Rev. Stat. § 57 (1841).
fer an unlimited contempt power upon the courts, or define contempt only in the broadest fashion. 41

Although constitutional forces molded the federal statute, the constitutional limits of the contempt power are determined by the courts themselves. Congress intended to limit the contempt power to constitutional tolerances, both originally, and in enacting the present contempt statute. However, whatever definition of contempt the Constitution requires, constitutional limitations, not the federal statute, constrain state courts. 42 Moreover, if the Constitution, like the federal statute, restricts contempt to obstruction, the constitutional standard might provide greater protection than an identically worded statutory standard. 43

B. Constitutional Limitations on the Power of Contempt

A court’s exercise of the contempt power competes against four constitutional guarantees. 44 Courts must have the power to protect the integrity and continuity of a trial, and to secure compliance with their orders. On the other hand, an independent bar ensures litigants’ rights to effective counsel and zealous advocacy implicated or mandated by the sixth amendment, and due process guarantees of the fifth and fourteenth amendments. Judicial action which curtails or threat-

41. Many states make no effort to define contempt by statute, but only grant the power to the courts. See, e.g., ILL. ANN. STAT. ch. 38, para. 1–3 (Smith-Hurd 1987); KAN. STAT. ANN. §§ 20-1201 to -1206 (1980); LA. REV. STAT. ANN. § 13.4611 (West 1987); MISS. CODE ANN. § 9-1-17 (1972). Still others attempt to define contempt in part by prohibiting “contemptuous behavior.” See, e.g., DEL. CODE ANN. tit. 11, § 271 (1979).

42. In addition, 18 U.S.C.A. § 401(3) (West 1969), which grants the court authority to punish as contempt, “[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command,” contains no obstructiveness requirement. Thus, a constitutional restriction of the contempt power to obstruction might also limit the courts’ authority under this section. Of course, the same results might be achieved through statutory construction by reading in an obstructiveness requirement. See infra notes 64–66 and accompanying text.

43. Numerous state courts have rejected legislative attempts to limit their contempt power as a violation of the separation of powers. See supra note 21. If the obstruction standard were a constitutional mandate, however, that possibility could not exist. In addition, our constitutional jurisprudence includes special procedural and substantive mechanisms for protecting constitutional guarantees, such as first amendment due process, and the doctrine of least drastic alternatives. These kinds of devices are less frequently applied to protect non-constitutional or statutory interests.

44. In addition to the contempt power, courts also have claimed and frequently exercised an inherent power—apart from contempt—to fine attorneys and impose counsel fees summarily for misconduct. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) (approving use of inherent powers to impose monetary sanctions on erring counsel in appropriate circumstances). In addition, numerous statutes and court rules authorize courts to impose such penalties. See, e.g., CAL. CIV. PROC. CODE § 128 (West 1982 & Supp. 1990); N.J. CT. R. 1:2–4. The constitutionality of this practice, which has rarely been questioned, is beyond the scope of this Article.
ens to curtail the vigorousness of counsel may prejudice the rights of the client and impermissibly tilt the scales of justice. In addition, the courts' exercise of the contempt power also can infringe fundamental constitutional rights of the alleged contemnor. Thus, criminal punishment of an attorney's courtroom expression may violate the first amendment. Moreover, punishment for the transgression of vague and indefinite proscriptions can impinge the due process right to adequate notice of what conduct is unlawful. Finally, summarily punishing allegedly contemptuous conduct derogates the constitutionally guaranteed procedural due process protections afforded defendants subject to incarceration.

These four constitutional grounds have been considered by numerous state and federal courts, including the United States Supreme Court, as substantive limitations on the scope of the contempt power. Although these opinions sometimes exhibit a general hostility to summary contempt, they fail to articulate any coherent theory of the constitutional constraints on the power. No decisions attempt to unite the several constitutional principles competing with the contempt power in order to determine the appropriate place of summary contempt in our constitutional structure. Rather, they have engaged in ad hoc evaluations of whether the conduct in question interferes sufficiently with the administration of justice to warrant contempt sanctions. Thus, the courts have done very little to draw a precise line separating contemptuous conduct from constitutionally protected behavior.

Surprisingly, only a few state courts have decided whether the constitutional limitations on the substantive scope of the contempt power are identical to the federal statutory standard of obstruction. Supreme Court decisions suggest that the answer to that question may depend on the particular right or rights in question. Analysis reveals that a combination of the rights implicated when the court exercises its contempt power to punish an attorney's advocative conduct, and the critical importance of vigorous advocacy to the very interests that underlie the contempt power, call for the same level of constitutional protection against contempt that is provided by the federal statutory standard of obstruction.

45. But see Ex parte Krupps, 712 S.W.2d 144, 150–51 (Tex. Crim. App. 1986) (noting that criminal contempt in Texas is not restricted to conduct that obstructs or tends to obstruct the proper administration of justice; holding that refusal of pro se defendant and six spectators to rise upon entrance of judge, after being warned to do so, is proper ground for contempt), cert. denied, 479 U.S. 1102 (1987); In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260 (1987) (concluding that federal obstruction standard is not binding on states), aff'd, 118 N.J. 51, 570 A.2d 416 (1990).
1. Procedural Due Process

Many procedural due process rights extended to criminals are not applicable in a summary proceeding for criminal contempt. That derogation of fundamental rights should be tolerated, if at all, only where the conduct in question causes sufficient interference with justice as to warrant instantaneous punishment. Seventy years ago, in *Ex parte Hudgings*, the Supreme Court suggested that the Constitution, like the federal statute, restricts contempt to obstructions of justice. Overturning a witness's contempt conviction for perjury, the Court enunciated principles reflecting the constitutional boundaries of the contempt power:

Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured.

An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted.

*Hudgings* implied that this constitutional limitation is derived, in large part, from a concern with the trial court's summary procedures. Indeed, a series of cases following *Hudgings* indicates that because summary contempt proceedings derogate a contemnor's due process rights, the contempt power only can be exercised to punish actual obstructions of justice. For example, in *In re Michael*, the Court reversed the contempt conviction of a grand jury witness for perjury, stating that the congressional intent behind the federal contempt statute was:

> to safeguard constitutional procedures by limiting courts . . . to "the least possible power adequate to the end proposed." . . . The exercise by the federal courts of any broader contempt power than this would per-

47. *Id.* (citations omitted).
49. 326 U.S. 224 (1945).
mit too great inroads on the procedural safeguards of the Bill of Rights, 
since contempts are summary in their nature, and leave determination of 
guilt to a judge rather than a jury. It is in this Constitutional setting 
that we must resolve the issues here raised.50

These decisions indicate the Court's conviction that the federal statu-
mary obstruction standard reflects constitutional limits on the con-
tempt power. Because each of these cases arose in the lower federal 
courts, and was based upon the federal contempt statute, however, 
there was no need for the Court to reach the constitutional issue.

Moreover, it is not clear whether this obstruction standard provides 
substantive protection against the reach of the contempt power or only 
dictates the procedures for trying the contempt. In other words, what 
should the remedy be when a contemnor is summarily convicted of 
contempt for conduct that does not rise to the level of an actual 
obstruction of justice? If the constitutional protection is purely proce-
dural, the appropriate remedy would be a remand to the trial court to 
retry the contempt with full due process. If, on the other hand, the 
limitation is substantive, the conviction would be reversed without 
remand.

Presumably, the Court's concern over how obstructive conduct 
must be to justify a summary contempt hearing is primarily proce-
dural. Nevertheless, non-obstructive behavior may be punishable as 
contempt; the real issue is how much process is due. When a contem-
nor is summarily convicted for conduct not amounting to an obstruc-
tion, the appropriate remedy should be a remand for a plenary 
proceeding.51

50. Id. at 227 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 240 (1821)). See also In re 
McConnell, 370 U.S. 230 (1962). In McConnell, the Court again noted that the federal statute 
limiting the exercise of summary contempt to obstructions of justice was intended to safeguard 
constitutional procedures. Quoting Michael, the Court concluded that any broader contempt 
power would violate the procedural protections guaranteed by the Bill of Rights. Id. at 233–34. 
Before the drastic procedures of the summary contempt power may be invoked, "there must be 
an actual obstruction of justice." Id. at 234.

51. Otherwise, the logic of defining contemptuous conduct by the procedures utilized to try 
the charge could lead to strange results. Consider, for example, a summary contempt conviction 
for an attorney's continued argument in the face of a court's order to cease. If the attorney's 
conduct is deemed not obstructive, the constitution would require reversal of her conviction. 
Yet, if the attorney had been tried for the same behavior in a plenary proceeding, the conviction 
would stand (assuming that the conduct was otherwise punishable within the substantive scope 
of the contempt power). Despite the peculiarity of the consequences, several federal courts have 
nevertheless reversed, without remand, summary contempt convictions grounded solely on the 
infringement of procedural due process. See In re Greenberg, 849 F.2d 1251, 1255 (9th Cir. 
1988) (reversing outright a summary conviction for contempt rather than remanding it, because 
the conduct there did "not constitute the type of 'exceptional circumstances' that pose an 
immediate threat to the judicial process, thereby justifying a summary criminal contempt
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Alternatively, Hudgings could be read as suggesting that the diminishment, even in non-summary or plenary contempt trials, of the ordinary due process protections in criminal prosecutions, restricts the substantive scope of the contempt power to actual obstructions. Even contempt proceedings using plenary procedures bypass the checks on judicial power ordinarily in place for other crimes—legislative definition of the offense and initiation of charges by the executive branch. Thus, it is arguable that the ameliorated safeguards in all contempt proceedings are constitutionally allowable only if the conduct in question rises to a certain level of interference with the Court’s busi-

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conviction’); Edmunds v. Chang, 365 F. Supp. 941, 946 (D. Haw. 1973) (granting, on due process grounds, habeas relief voiding state summary contempt conviction of attorney for refusing to be seated after repeated orders of the court to do so):

[S]ince the Supreme Court [in Michael] has held that exercise of any broader contempt power than that allowed by the [federal] statute “would permit too great inroads on the procedural safeguards of the Bill of Rights,” the Court’s decisions construing § 401 must be seen as marking the outer limits of state contempt power as well. (Citation omitted.)

52. Some contempt proceedings are neither wholly summary nor plenary, but are hybrid hearings that may curtail some traditional procedural protections, but not others. See In re Yengo, 84 N.J. 111, 417 A.2d 533, 538–39 (1980). Practically, if summary procedures require that only actual obstructions are punishable as contempt, it may be difficult to determine when the abridgement of procedural protections mandates a stricter substantive standard.

53. Historically, contempt was regarded as sui generis, not criminal. See, e.g., Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); Myers v. United States, 264 U.S. 95, 103 (1924). In Bloom v. Illinois, 391 U.S. 194, 201 (1968), however, the Supreme Court determined that “[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.”

54. Contempt is the last remaining common law crime in the United States. See Tigar, Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1, 26 n.82 (1970). Despite the abolition of common law crimes, the courts of numerous states exercise the contempt power under an undefined grant of authority from the legislature. See, e.g., ILL. REV. STAT. ch. 38 para. 1-3 (1989); TEX. GOVT. CODE ANN. § 21.002 (Vernon 1988). Courts also exercise the contempt power pursuant to inherent judicial authority. See supra note 22 and accompanying text.
ness.\textsuperscript{55} If so, the \textit{Hudgings} procedural protection actually becomes a substantive safeguard, applicable to every contemptuous act.\textsuperscript{56}

Indeed, the \textit{Hudgings} Court's original statement that the contempt power only can be exercised to punish actual obstructions was prompted partially by the fact that contempt "is not controlled by the limitations of the Constitution as to modes of accusation."\textsuperscript{57} Similarly, the \textit{In re Michael} Court concluded that the derogation of procedural safeguards imposed the obstruction limitation, largely because contempt determinations are made by a judge rather than a jury,\textsuperscript{58} a factor which at that time applied to all contempts. Since \textit{In re Michael}, the right to a jury trial generally has been extended to con-

\textsuperscript{55} This suggestion appears to parallel the actual history of the federal statutory limitation to obstruction. The original federal statute, the Congressional Act of 1831, restricted the contempt power to punish actual obstructions where the power was imposed summarily. That Act provided, in pertinent part:

(See. I) That such power of the . . . courts . . . to issue attachments and inflict summary punishments for contempt of court shall not be construed to extend to any cases except the misbehavior of any person . . . as to obstruct the administration of justice. . . .

Act of March 2, 1831, ch. 99, 4 Stat. 487 (codified as amended at 18 U.S.C.A. § 401 (West 1969)). The term "attachments" referred to the actual physical seizure of a contemnor. See, e.g., \textit{Ex parte} Robinson, 86 U.S. (19 Wall.) 505 (1873) (reversing district court's order, which had summarily, upon attachment, disbarred an attorney for contempt because such punishment was outside the scope of the statute).

Sometime after this original federal limitation was enacted, the statute's qualification to "summary" contempts apparently was omitted by a congressional revision committee, without any discussion appearing in the bill's legislative history. Cf \textit{Ex parte} Savin, 131 U.S. 267, 276 (1889).

\textsuperscript{56} This exposes one aspect of an important structural relationship between the substantive and procedural safeguards against improper exercise of the contempt power. Both the definition of contemptuous conduct, and the allowable procedures to try the contempt, are controlled by the necessity for instant punishment of certain conduct and immediate vindication of the courts' authority. Both are a function of the obstructiveness of the behavior in question.

To the extent conduct is so obstructive that it requires an immediate response, the use of summary procedures may be more defensible. In a case where conduct is less egregious and does not constitute an obstruction of justice, it may be much more difficult for judges to determine both whether the substantive definition was met and whether the contemnor had the requisite willful intent. Plenary procedures may be necessary to render such determinations with a constitutionally required degree of fairness and accuracy. Where due process rights are then available, an alleged contemnor has a much better chance for an accurate assessment of what conduct actually occurred, the intent, and whether it adversely affected the administration of justice beyond a reasonable doubt.

Alternatively, it can be argued that the more egregious the conduct, the more necessary due process protections are because judges are likely to act most severely and reflexively, with least careful deliberation. Also, judges may be most prone, in such situations, to personal embroilment in the matter. Indeed, this observation argues against the constitutionality of ever utilizing summary procedures in a contempt hearing, a subject beyond the scope of this Article. To the extent summary contempt proceedings are constitutionally tolerable, it is only because the behavior at issue is sufficiently obstructive as to require immediate redress.

\textsuperscript{57} \textit{Ex parte} Hudgings, 249 U.S. 378, 383 (1919).

\textsuperscript{58} See supra note 50 and accompanying text.
tempt cases as it applies in the trial of other offenses. However, the additional deficiencies in the protections afforded contemnors remain. This contraction of the constitutional safeguards against abuses of the criminal justice system should interpose some corresponding level of substantive protection regarding the kind of conduct that may be punished as contempt.

Because, however, no cases explicitly discuss these issues, we can only infer a court's approach by looking at its remedy. In the federal system, and that of any state using the obstruction standard, the question of appropriate analysis should not arise because, regardless of the procedures, non-obstructive behavior cannot be contemptuous. Moreover, in those jurisdictions that permit contempt sanctions to issue for conduct that does not amount to an obstruction of justice, none has recognized a constitutional limitation on the contempt power to punish only actual obstructions where summary procedures are employed. Nevertheless, some have restricted the kind of behavior that can be summarily sanctioned as contempt. In all of those states, that limitation is treated as purely procedural; the remedy for a summary contempt conviction for conduct not sufficiently egregious to require summary disposition is a remand for a new hearing with full due process protections.

59. In Bloom v. Illinois, 391 U.S. 194, 210 (1968), the Court held that the constitutional guarantees of trial by jury applied to serious criminal contempts. A companion case to Bloom, Duncan v. Louisiana, 391 U.S. 145 (1968), extended the jury right to state courts. Although Bloom suggested that the right to jury trial applied to direct contempts, 391 U.S. at 209–10, the case itself involved only an indirect criminal contempt. Moreover, Bloom did not establish any precise line of demarcation between petty and serious offenses.

In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held that the constitutional right to jury trial applied to serious and direct criminal contempts. Only contempts with a penalty of greater than six months were deemed serious. Id. at 512. For purposes of determining whether the contempt was serious, consecutive contempt sentences must be aggregated; a jury trial is required if individual sentences summarily imposed after completion of the trial total more than six months. Id. at 516–17. By contrast, summary contempt convictions imposed during a trial are exempt from the aggregation rule. Summary convictions aggregating six months or more, imposed after a trial, are amendable by the trial judge (even during the appeal) to reduce the contempt sentences to six months or less and change consecutive to concurrent sentences to evade retrial before a jury. See Taylor v. Hayes, 418 U.S. 488 (1974). Thus, the right to jury trial may still be subject to significant evisceration in contempt cases.

60. But see supra note 51 and accompanying text.

61. See, e.g., In re Yengo, 84 N.J. 111, 417 A.2d 533, 539–40 (1980) (because of diminishment of due process rights in summary contempt proceeding, power must be permitted only where necessary); People v. Kurz, 35 Mich. App. 643, 192 N.W.2d 594 (1971) (summary contempt proceedings appropriate only where immediate corrective action is necessary).

62. See, e.g., supra note 61 (citing cases). Similarly, federal courts have limited the use of summary contempt proceedings to situations where the misconduct is so obstructive and egregious as to require an immediate response from the court. See, e.g., Harris v. United States, 382 U.S. 162, 164–65 (1965) (reversing contempt conviction of individual who refused to answer
Even assuming that the Supreme Court's dictum in *Hudgings* and its progeny is purely a procedural protection, it is nonetheless a safeguard of potentially enormous significance not heretofore recognized by any state court as a constitutional limitation on contempt power. Indeed, the approach of most state courts is to permit summary punishment for contempt whenever the conduct meets the minimal substantive contempt definition and occurs in the judge's presence. However, several circuit courts have relied on the *Hudgings* dictum, holding that the summary contempt power may be invoked only to punish an actual obstruction of justice. These cases arose in contempt proceedings pursuant to another federal statute, section 401(3), which provides that violation of a court order is punishable as contempt. Although section 401(3) contains no express obstructiveness requirement, the cases imposed that requirement as a matter of constitutional command.

It is entirely appropriate that concern for the diminishment of a contemnor's due process rights in a summary proceeding should, at a

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64. *Moschiano*, 695 F.2d at 250-51 (quoting *In re McConnell*, 370 U.S. 230, 234 (1962)); see also infra note 66 (citing cases).

65. 18 U.S.C.A. § 401(3) (West 1969) provides that federal courts may punish as contempt "disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

66. See, e.g., *Moschiano*, 695 F.2d at 250-51 (reversing contempt conviction under § 401(3) because failure of conduct to constitute actual obstruction negated compelling necessity for immediate remedy); United States v. Turner, 812 F.2d 1552, 1568 (11th Cir. 1987) (reversing conviction under both §§ 401(1) and 401(3) because conduct did not constitute actual obstruction of justice); cf. United States v. Trudell, 563 F.2d 889, 892-93 (8th Cir. 1977) (affirming conviction under § 401(3) against claim of legal insufficiency because refusal to obey federal marshals' requests resulted in actual obstruction of justice).

But see United States v. Martin, 525 F.2d 703, 709-10 (2d Cir. 1975) (contempt conviction under § 401(3) for disobedience of lawful court order did not require a finding of obstruction of justice). In *Martin*, although the trial judge summarily held the defendant in contempt, the Second Circuit did not consider whether the proper use of summary procedures required a finding of obstruction. Rather, the court seemed only to determine that the substantive limitation to obstruction in § 401(1) should not be incorporated into § 401(3). Thus, *Martin* apparently treated the issue as one of statutory construction, not constitutional restriction. Indeed, had the court considered the constitutional issue, it would at least have had to recognize the substantive constitutional limitations placed on the contempt power. See *In re Little*, 404 U.S. 553 (1972), and Eaton v. City of Tulsa, 415 U.S. 697 (1974), which restricted the power's reach to punish
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minimum, elevate the standard for properly punishable conduct in such an abbreviated hearing. Furthermore, the parallel mistrust of the judicial power to prosecute contemnors, not limited by the ordinary checks and balances applicable to the rest of the criminal law, arguably justifies some restriction on the definition of contempt, regardless of the procedures used. However, to find a source of more significant substantive protection against the contempt power, we must turn to other constitutional guarantees.

2. The First Amendment Right of Expression

In a series of cases beginning with Bridges v. California in 1941, the Supreme Court considered the applicability of the first amendment to state court contempt proceedings for out-of-court statements critical of the conduct of judges. In Bridges, the Court reversed a contempt conviction of a labor leader who publicized a telegram he sent to the Secretary of Labor. The telegram promised an enormous strike if the state court attempted to enforce its decision on who were the proper representatives of Pacific Coast dockworkers. The Court also struck down, as violative of the first amendment, the power of a judge to punish publications as contempt on a finding of "a reasonable tendency" to interfere with the orderly administration of justice in a pending case. Although the Court noted that it was unnecessary to determine whether the federal statute's obstruction requirement "was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings," it continued:

But we do find in the enactment [of the Act of 1831] viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.

only imminent threats to the administration of justice. See infra notes 95-101, 127-31 and accompanying text.

In contrast, although making actual obstruction of justice a precondition to summary contempt proceedings under § 401(3) might have been achieved through statutory construction, both Moschiano's and Turner's reliance on the statements in In re McConnell, 370 U.S. 230 (1962), that the obstruction standard is constitutionally mandated, clearly indicates the constitutional basis for their conclusions. After discussing the McConnell obstruction limitation, Moschiano notes that the due process requirement of some sort of hearing in certain summary contempt proceedings is a "further constitutional limitation on the use of summary contempt."

67. 314 U.S. 252 (1941).
68. Id. at 275-79.
69. Id. at 272-73.
70. Id. at 267.
The Court determined that out-of-court publications should be treated, for constitutional purposes, like other types of utterances punishable only where the substantive evil threatened "is extremely serious and the degree of imminence extremely high." The Court concluded that the publication there did not constitute such a clear and present danger.

Since Bridges, the Court has applied the clear and present danger test, or a functional equivalent, to out-of-court publications; the contempt power may be exercised to punish out-of-court speech only where there is no reasonable doubt that the threat to the administration of justice is substantial and imminent. It is natural that the Court concluded that out-of-court statements could interfere sufficiently with the administration of justice to be punishable as contempt, and thus adopted the clear and present danger test to measure the constitutional immunity of out-of-court speech. The Court has never held that speech was protected unless it constituted or caused a consummated harm. It apparently found no constitutionally significant distinction between either the substantive evil checked by the contempt power, or the nature of that power itself, to justify a stricter safeguard against its misuse. Indeed, in Wood v. Georgia, the Court suggested that out-of-

71. Id. at 263.
72. Id. at 273–75.
73. See Wood v. Georgia, 370 U.S. 375 (1962); Pennekamp v. Florida, 328 U.S. 331 (1946). In Wood, the Court considered a state court contempt conviction of a sheriff for issuing a statement to the press and a letter to a sitting grand jury that severely criticized a judge's charge to the grand jury. 370 U.S. at 376–82. The Supreme Court reversed, finding that the statement did not create a clear and present danger. The Supreme Court in large part relied upon the fact that no evidence was presented in the state court proceedings that the publications resulted in any actual obstruction of the court or the workings of the grand jury. Wood, 370 U.S. at 382.

In Pennekamp, the Court reversed a newspaper editor's contempt conviction for publishing editorials critical of certain judges' use of legal technicalities to dismiss serious charges against criminal defendants. 328 U.S. at 336 n.4. The Court concluded that these editorials did not rise to the level of a clear and present danger of obstruction of fair judicial administration. Id. at 348–50.

74. In Craig v. Harney, 331 U.S. 367, 378 (1947), the Court reversed a Texas contempt conviction for publication of editorials and news reports critical of the judge's conduct in a pending case. The Court concluded that it was difficult to see how the conduct in question could obstruct the course of justice. Id. at 377. The Court reasoned that:

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

Id. at 376.
75. 370 U.S. 375 (1962).
court speech might receive *lesser* protection when directed toward a trial by a petit jury.\(^7\)

In essence, the Court examined extrajudicial statements, as it would any other category of speech, to determine when they might constitute a punishable attempt to cause a substantive harm. It is not surprising that the Court seemed unconcerned with whether the contemnor’s diminished due process rights set any substantive limit on the kind of conduct that was punishable as contempt; the contempts in those cases were indirect, and the contemnors therefore received plenary hearings.\(^7\)

At the same time, however, the Court never had to define exactly what a clear and present danger of interference with fair judicial process might be; the contempt convictions were reversed because the conduct did not rise to that level. Therefore, it also was unnecessary for the Court to decide whether the clear and present danger standard was the maximum degree of constitutional protection from the reach of the contempt power. In several cases, the Court suggested that the Constitution might mandate even greater limitations on the power of contempt.\(^8\) Almost all of the cases, moreover, mentioned that the behavior at issue did not actually obstruct a judicial proceeding.

Even under the clear and present danger standard, *Bridges* and its progeny demonstrate an extreme tolerance for extrajudicial criticism of judges and the administration of justice. This derives from the realistic understanding of the substantive evil being protected against and the manner in which extrajudicial behavior might constitute such an evil. The primary danger of extrajudicial speech to the administration of justice must be that the outcome of a judicial proceeding, or the ability of the court to do its work, might be improperly influenced by people who have no legitimate part in the courts’ resolution of that matter. Of course, the person making an extrajudicial statement might actually be a party in an ongoing proceeding. Or, an out-of-

\(^7\) *Id.* at 389–90. Neither *Wood v. Georgia*, *Bridges v. California*, *Pennekamp v. Florida*, nor *Craig v. Harney* involved a trial by jury. The *Wood* Court contrasted the potential for prejudice from out-of-court expressions where, as there, a grand jury is conducting a broadscale investigation, with a situation where an individual is on trial. 370 U.S. at 389. The Court then stated that where extrajudicial speech was aimed at a trial by jury, “the limitations on free speech assume a different proportion.” *Id.* at 390.


\(^{78}\) See, e.g., *Bridges v. California*, 314 U.S. 252, 263 (1941) (the clear and present danger cases do not “purport to mark the furthermost constitutional boundaries of protected expression;” they do “no more than recognize a minimum compulsion of the Bill of Rights”).
court statement might not affect any pending matter, but might influence the course of some future proceeding. The point is that an attempt to interfere with the outcome of a case is properly punishable because justice is being affected through means other than those established for the proper disposition of a controversy.

When extrajudicial behavior does not pose an imminent likelihood of affecting the outcome of a judicial matter, the Court has steadfastly protected it against the exercise of contempt. For example, out-of-court criticisms of a matter no longer pending, the threat of future criticism of which judges nonetheless would likely be aware, and criticism that is not likely to affect a proceeding either because it is too general, or because judges should be able to ignore it are all shielded from the contempt power. Also protected are otherwise legal responses to court decisions, such as a labor strike. The Court simply has not permitted contempt power to enforce a broad mandate of extrajudicial respect for the courts. Indeed, the Court has even gone so far as to suggest that some extrajudicial statements may positively influence the proper functioning of the judicial process.

Let us assume, as I do, that without consideration of the effect summary procedures might have on the determination of the definition of contempt, the clear and present danger standard is the appropriate measure of whether extrajudicial statements critical of the administration of justice are contemptuous. Should that standard also apply to measure the level of protection of in-court expression? The Court's strict application of that test to extrajudicial behavior reflects its sensitivity to the fact that such statements are very unlikely to adversely affect even a pending judicial matter. It is at once obvious, however, that certain courtroom behavior during a trial is much more likely to affect judicial proceedings, either by influencing decisionmaking or by its sheer ability to disrupt.

80. See, e.g., Bridges, 314 U.S. at 273.
81. Id.
82. See, e.g., id.; Craig v. Harney, 331 U.S 367, 376 (1947):
[A] judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him . . . .

. . . . the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.
83. See, e.g., Bridges, 314 U.S. at 277.
The Supreme Court often has recognized that some institutions with appropriately decorous atmospheres, especially the courts, are particularly sensitive to obstruction. In addition, the Court has looked to whether an audience was "captive" in determining the degree of protection for particular expression, a variable always present in a judicial proceeding. The clear and present danger standard was introduced to distinguish protected speech from the punishable advocacy of illegal action, and to recognize the legitimate governmental objective of preventing certain harms. The test was directed to the content of speech, and its purpose was to fix the line separating innocuous preparation from a criminal attempt to commit a proscribed act without reference to expression. The applicability of this standard was later extended to measure the constitutionality of laws that make advocacy itself a crime. In a courtroom, not only does the content of an attorney's expression carry the potential for interfering with justice, but the mere utterance of words can obstruct a trial by causing confusion or disruption, or refusing a court's command to cease argumentation. Therefore, one might expect that a harsher or more categorical test of in-court conduct might be applied by the courts, or that courts could appropriately find that in-court statements more readily interfere with justice in an ongoing proceeding.

Conversely, the dynamics of a judicial proceeding often can counteract that hypersensitivity to interference from in-court expression. The clear and present danger test developed at a time when there

85. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 117 (1972) (upholding constitutionality of anti-noise ordinance and noting special vulnerability of school environment to disturbance); Cohen v. California, 403 U.S. 15, 19 (1971) (holding that wearing the words "Fuck the Draft" written on the back of a jacket worn in the halls of the courthouse could not be punished under statute applying to entire state, but failing to reach constitutionality of a like prohibition applicable only to courthouses or similarly sensitive places); Cox v. Louisiana, 379 U.S. 559, 562 (1965) (recognizing potential danger to the judicial system created by picketing near a courthouse).

86. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (Blackmun, J., for four-member plurality), 305-08 (Douglas, J., concurring) (1974) (upholding constitutionality of government policy of permitting commercial advertising on public transportation, while prohibiting political advertising on same vehicles; opinions relying in large part on invasion of privacy through forced exposure of "captive audience" to political expression); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (rejecting first amendment challenge to law providing that addressees receiving "a pandering advertisement" in the mail, considered by them to be offensive, could require names be deleted from mailing list).


88. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (reversing conviction of Ku Klux Klan spokesman under state statute prohibiting advocacy of crime or unlawful methods of terrorism because prohibition was not narrowly drawn to punish only advocacy directed to inciting and likely to incite "imminent lawless action").
was a prevalent fear that excessive advocacy could result in severe and irreparable harm. Indeed, the primary metaphor for the danger of uncontrolled speech was a comparison with fire.  

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time . . . to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Fear of a devastating harm, preventable only by punishing expression, may be less founded when an attorney's conduct is in court. The decorousness and solemnity of the courtroom atmosphere tends to stifle certain kinds of misconduct, such as disrespect for the judge and disorderly behavior. A judge can exercise substantial control over communicative expression in a courtroom without resort to the contempt power. In addition, the potentially negative consequences of imminently obstructive behavior on the outcome of the obstructive

89. "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." Gitlow v. New York, 268 U.S. 652, 669 (1925). The present formulation of the clear and present danger test utilized by the Court derives in large part from the dissenting and concurring opinions of Justices Holmes and Brandeis in Gitlow and several other cases. See infra note 132.


91. In fact, the ubiquitous presence of armed guards in courtrooms can deter even violent disruptions and quell them immediately if they occur. When necessary, courts have placed more armed guards around courtrooms or the courthouse. See Note, Dealing With Unruly Persons in the Courtroom, 48 N.C.L. Rev. 878, 880 (1970).

92. The possibility cannot be ignored that if judges are more limited in their use of the contempt power, they might seek to regain greater control of the courtroom by penalizing a litigant's case. For example, if a judge cannot use contempt to punish conduct threatening an obstruction, the judge might employ negative reinforcement techniques, such as making evidentiary rulings against the individual. Moreover, such judge's behavior could easily be an unconscious response to a perceived lack of power to punish the offender's conduct directly. Although appeal mechanisms provide some protection from the court's arbitrary actions affecting the merits of a case, the discretion accorded a trial judge's procedural rulings, and the operation of the harmless error rule often would make appeal an ineffective remedy or deterrent.

The possibility that judges might abuse their power and subvert justice cannot justify failing to restrict the contempt power to constitutional tolerances. It would be unthinkable to sanction abuses of the contempt power to deter alternative damage to the administration of justice. Moreover, such a practice would not likely be effective; whatever enhancement of justice might be achieved by removing restraints on the power of contempt probably would be offset by the increased chilling of vigorous advocacy. Other remedies can prevent the harms posed in this note; appellate courts can reverse where the trial court's actions constitute substantive error, reduce their reliance on the harmless error doctrine, or discipline trial judges directly for flagrant abuses of discretion. In any event, attorneys or clients should be allowed to decide whether to
advocate’s or party’s case often may be sufficient to draw a line that the obstructive individual will be willing to approach but unwilling to cross.

Furthermore, a judge has an array of alternatives to the contempt power, not least among them, “more speech,” for diffusing potential obstructions of justice before they do damage. For example, a judge often can prevent boisterous or over-emotional obstructions by resort to moral authority, warnings, or calling a recess for a cooling-off period. Where the threat of obstruction derives from the revelation to a jury of inappropriate information which is not significantly prejudicial, instructions from the court may ameliorate the damage and prevent an actual obstruction. A court can stop some disrespect from damaging its moral authority by publicly chastising such behavior.

It should be obvious from these examples, however, that the efficacy of such measures depends in large part on how obstruction is defined. If improperly placing information before a jury is defined as obstructive, without regard to the ultimate effect on the jury’s deliberative processes, such conduct should be punishable as contempt. When effective alternatives to the contempt power exist, however, a dominant concern embodied in the clear and present danger test—that behavior can be punished in order to prevent the occurrence of actual evils—is less applicable. If a judge can regularly constrain such dangers, there may be no need to wield the contempt power; alternatively, perhaps such threats are not truly imminent.

93. Indeed, when attorneys argue that information was improperly placed before a jury, either because of evidentiary rulings alleged to be erroneous, or because correct evidentiary rulings were disobeyed by an advocate or party, courts most often do not reverse the outcome of the trial. Rather, there is a recognition that some such errors are bound to occur, but are not likely to affect the outcome of a trial and therefore may not be extremely harmful to justice.

Nevertheless, we must be very careful not to suggest to attorneys and to the courts, that counsel’s purposeful disregard of the rules of evidence and trial practice controlling the release of information to the jury is usually harmless. Once the “cat is out of the bag,” it is virtually impossible for a jury to disregard what it has heard, or at least for us to know with any reasonable degree of certainty that it has. Thus, with respect both to providing grounds for reversal of a verdict, and to forming the basis for a contempt conviction, such deliberate and improper revelations to the jury of highly prejudicial information should be taken very seriously by the courts. In fact, this Article later argues that the courts have not acted with sufficient rigor in either context to safeguard adequately the proper administration of justice.

94. For example, revealing certain information to a jury might constitute a clear violation of a court’s previous evidentiary ruling or unquestionably transgress the rules of evidence and trial practice. In that case, such conduct might be viewed as obstructing the administration of justice even if the information played no role in the jury’s deliberation.
The Supreme Court has ruled that expression in a courtroom is protected by the first amendment’s clear and present danger standard applicable to extrajudicial speech. In *Eaton v. City of Tulsa*, the Court reversed the state court contempt conviction of a witness who used the term “chicken shit” to describe an alleged assailant. The Court concluded that this single use of “street vernacular,” not directed at the judge or any officer of the court, was not contemptuous absent a further showing that the language constituted “an imminent . . . threat to the administration of justice.” The decision reflects the Court’s proper concern that government shall not sanction expression purely on its content, without regard to the actual effect of the expression. Naturally, a trial’s sensitivity to obstruction, and the proximity of in-court behavior, often will justify a finding that in-court conduct posed an imminent threat of interference with the court’s business, while the same behavior outside the courtroom would not. The clear and present danger test accommodates these variables nicely, by incorporating a sensitivity to the likely effect of expression into its constitutional calculus. *Eaton* made no reference to whether the Constitution mandates a higher substantive standard where summary procedures are used, because it was unnecessary for the Court to consider that question.

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96. *Id.* at 699–700. The decision in *Eaton* necessarily was grounded on the Constitution; when the United States Supreme Court reviews state court contempt convictions, it is bound by the state court’s interpretation of its own contempt power.
97. *Id.* at 698 (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)).
98. Prior to its decision in *Eaton*, the Court held in *In re Little*, 404 U.S. 553 (1972) (per curiam), that a pro se criminal defendant’s remarks to a jury critical of the court must be measured by the clear and present danger standard, and were not contemptuous. *Id.* at 555. As we shall see, however, while the Court did employ the clear and present danger test, it implied an extremely strict reading of that standard where the expression in question is advocacy. See infra notes 127–31 and accompanying text.
99. Nevertheless, many courts expressed concern for the clash between the contempt power and the first amendment right to expression in a courtroom. See e.g., Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978) (attorney’s first amendment rights must be balanced against need for order in the trial process); United States *ex rel.* Lynch v. Werksman, 319 F. Supp. 353, 354 (N.D. Ill. 1970) (“If every disrespectful comment of losing counsel and litigants were to constitute criminal contempt, the prison population in the United States would be substantially increased and the first amendment would have a substantial new exception to its protection.”).
100. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (reversing conviction under state syndicalism law in part because not narrowly tailored to expression “likely to incite or produce such [lawless] action”); Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (per curiam) (reversing conviction pursuant to clear and present danger test of defendant, who, after a campus protest said “we’ll take the fucking street again [or later],” in part because remarks were not likely to cause imminent disorder).
101. Although the Court’s opinion in *Eaton* notes that the contemnor was prosecuted and convicted under an information that charged him with “direct contempt,” in violation of a Tulsa
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Despite the vulnerability of judicial proceedings to interference from in-court conduct, one class of courtroom expression should enjoy greater protection from the contempt power than the protection afforded extrajudicial speech. That class of expression is advocacy. Indeed, while the Court developed constitutional standards protecting in-court expression from the contempt power, it was independently establishing and expanding a doctrine of first amendment protection of the advocacy activities of lawyers. In a series of cases beginning with *NAACP v. Button*\(^{102}\) the Court held that certain state ethical rules governing attorneys' practice had to give way, under the first amendment, to the right to litigate claims as "a form of political expression" and "political association."\(^{103}\)

It is not solely, or even primarily, the decorousness of courts that ensures their value as institutions of justice; courts are most fundamentally arenas of advocacy, valued most for the contentiousness, adversarialness, and passion of the expression to which they give stage. Improper use and abuse of the contempt power threatens zealous

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\(^{103}\) Id. at 429-31. In *Button*, the Court held that the litigation activities of the NAACP, including the active solicitation of clients on whose behalf to initiate law suits, are modes of expression and association protected by the first amendment. A state may not prohibit, under its power to regulate the legal profession, this activity as improper solicitation of legal business. *Id.* at 428-29. As the Supreme Court noted, where a state seeks to regulate expressive and associational conduct at the core of the first amendment's protective ambit, "government may regulate in the area only with narrow specificity." *Id.* at 433; see also *In re Primus*, 436 U.S. 412 (1978) (application of state Disciplinary Rules prohibiting solicitation of clients by counsel violates first amendment rights of ACLU attorney to obtain meaningful access to the courts); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("broad rules framed to protect the public and to preserve respect for the administration of justice" must not work a significant impairment of first amendment values); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 8 (1964) (invalidating on first amendment grounds state proscriptions on a range of solicitation activities by labor organization and lawyers employed by organization seeking to provide low-cost, effective legal representation to its members). The Court distinguished between public interest organizations, such as the NAACP and the ACLU, and independent lawyers seeking to communicate purely commercial offers of legal assistance to lay persons. *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467-68 (1978) (states may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers seeking to communicate purely commercial offers of representation to prospective clients).
advocacy,\textsuperscript{104} and the value of vigorous advocacy, not only to individual litigants but to our system of justice, requires its protection. For the heat of advocacy is necessary to catalyze the processes engendering the just resolution of disputes: the forceful presentation of facts and argument and the crystallization of the issues and the positions of the parties.\textsuperscript{105}

3. \textit{The Constitutional Protection of Advocacy}

In \textit{In re McConnell},\textsuperscript{106} the Court recognized that whether an attorney's conduct constitutes an obstruction must be viewed in light of a lawyer's role in representing her client. \textit{McConnell} also recognized often competing obligations of an attorney to represent his client effectively and to obey the trial judge.\textsuperscript{107} The trial judge erroneously ruled that plaintiff's counsel in a civil antitrust action could not introduce certain evidence.\textsuperscript{108} Wishing to provide a record for appeal of this ruling, McConnell asked opposing counsel to stipulate that McConnell would have introduced certain evidence as to the issue in question had the trial court not refused to allow it.\textsuperscript{109} Opposing counsel refused, and insisted that McConnell make an offer of proof pursuant to Federal Rules of Civil Procedure 43(c), which requires that questions upon which the offer is based must first be asked in the presence of the jury.\textsuperscript{110} After being instructed by the judge to refrain from asking these questions, McConnell persisted in asserting his right to ask the questions and announced that he "propose[d] to do so unless some bailiff stops us."\textsuperscript{111} Although he eventually refrained from asking the

\textsuperscript{104.} As the Supreme Court so aptly recognized in Bridges v. California, 314 U.S. 252, 277–78 (1941), it is precisely where conditions are most sensitive to speech—where utterances are most timely and important—that the constitutional protection of expression must be emphasized rather than diminished. Indeed, the Court even acknowledged the positive value extrajudicial speech might have on the proper functioning of a grand jury when performing in its investigatory function into a general problem area. See Wood v. Georgia, 370 U.S. 375, 392 (1962).

\textsuperscript{105.} At this point, what is meant by the "just resolution of disputes" and the "importance of the zealfulness of advocacy," is necessarily indistinct. Does the content and ardency of an advocate's expression have independent constitutional worth or is it valued only to the extent it serves some ultimate goals of our justice system? These terms simply cannot be defined categorically; they cannot be separated from the complexities of the contexts in which they interact. Indeed, the following sections of this Article explore these questions and hopefully increase our understanding of the appropriate role and limits of advocacy in the courts.

\textsuperscript{106.} 370 U.S. 230 (1962).

\textsuperscript{107.} \textit{Id.} at 231–32.

\textsuperscript{108.} \textit{Id.} at 231.

\textsuperscript{109.} \textit{Id.}

\textsuperscript{110.} \textit{Id.}

\textsuperscript{111.} \textit{Id.} at 235.
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forbidden questions, after the trial ended he was held in contempt. The Supreme Court noted that the trial judge's ruling placed McConnell

in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43(c) and there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the Rule.

The Supreme Court reversed the contempt conviction, concluding that McConnell's repeated insistence that he be allowed to comply with the Rule was nothing more than "strenuous" and "persistent" advocacy undertaken in good faith.

As noted earlier, the contempt in McConnell occurred in a federal court and thereby was subject to the federal statutory obstruction standard. However, the Court's next opinions on the power of contempt to punish an advocate's in-court expression arose in the review of state cases, and therefore necessarily reflected constitutional concerns. In Holt v. Virginia, a state trial judge instituted contempt proceedings against an attorney who represented several defendants in a libel suit. The attorney filed motions seeking both the judge's disqualification from trying the contempt case and a change of venue. He alleged bias of the judge. Holt represented the attorney in the contempt proceedings and argued on behalf of a change of venue, reading the original motion during his argument. The judge immediately held both attorneys in contempt for the statements made in the motion papers and argument.

112. Id. at 232–33.
113. Id. at 232.
114. As the Court concluded, [t]he 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. The petitioner created no such obstacle here. Id. at 236.
115. 381 U.S. 131 (1965).
116. The trial court charged the attorney with playing some undefined role in "making the defendants in the libel case 'unavailable to be served with subpoenas.'" Id. at 132. At this point in the proceedings the case had already been dismissed by agreement of the parties.
117. The motion for change of venue charged inter alia that the judge was acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge, id. at 133, and was continuing to intimidate and harass Holt, seriously hampering the defense of his client. Id.
118. Id. at 132–33.
119. The Virginia Supreme Court of Appeals affirmed, holding that the language used in the motion violated VA. CODE ANN. § 18.1292 (1960 Repl. Vol.), which authorized summary
The Supreme Court reversed, holding that both due process and the sixth amendment guarantee a defendant "charged with contempt such as this" a right to be heard in his defense. This right necessarily embodies filing pleadings essential to present relevant claims. The Court concluded that due process precluded either attorney from being convicted for contempt for filing the motions "unless it might be thought that there is something about the language used which would justify the conviction," conditions that the Court had already indicated were not present.

Thus, Holt reveals that advocacy on relevant issues is shielded from the contempt power, even when it is harshly critical of the court, at least so long as the attorney's language and behavior are not in themselves offensive to the judge or other participants in the proceeding. When advocacy begins to be offensive or disruptive, or when in-court expression is unrelated to advocacy, the first amendment presumably still would limit the substantive scope of contempt until that advocacy presents a serious and imminent threat to the administration of justice. But the content of legitimate advocacy appears, under Holt, immune to the contempt power, because, by definition, such advocacy cannot be deemed obstructive of justice.

In this regard, Holt's failure to cite In re McConnell is noteworthy. Remember that McConnell, decided only three years earlier, held that punishment of a person who misbehaves in the presence of the court so as to obstruct justice, or who uses "[v]ile, contemptuous or insulting language" to or about a judge in respect of his official acts. Holt, 381 U.S. at 135.

120. Holt, 381 U.S. at 138.
121. Id. at 136–37.
122. Of course, discerning whether advocacy is sufficiently offensive or disruptive so as to lose its protected status is a very difficult question indeed. See infra Section III (Advocacy and Obstruction).

123. In-court conduct, which is not itself advocacy in the sense of argument to the judge or jury may nevertheless have a sufficient nexus to advocacy to warrant a protected status. Query, for example, whether an attorney's facial expression of disappointment on disagreement with a judge's ruling during the course of trial should be protected by the sixth amendment and due process clause? See, e.g., In re Daniels, 219 N.J. Super 550, 530 A.2d 1260 (App. Div. 1987), aff'd, 118 N.J. 51, 570 A.2d 416 (1990). In any event, expressions that bear a close enough relationship to advocacy to be protected may still be punishable under the contempt power if they are offensive or obstructive. See infra notes 269–70 and accompanying text.

124. Although the Court left open the possibility that the advocacy at issue in Holt might not be immune if the attorneys' charges of judicial bias were proven to be false, it intimated that even that was unlikely. Holt, 381 U.S. at 137. On the other hand, if attorneys making such charges against a judge do not even have a good faith basis for their allegations, immunity from the contempt power should not and surely would not be found to exist, because that kind of advocacy, like the subornation of perjury, is improper. See also Maness v. Meyers, 419 U.S. 449, 468 (1975) (holding that advocate was not punishable for good faith advice that his client assert the fifth amendment privilege against self-incrimination).
an attorney's threat, in contravention of the trial court's order, to continue a line of questions, "unless some bailiff stops us," was not contemptuous because it did not obstruct justice. Because the Court in Holt, however, ruled on the ground that the contempt power could not be used to punish legitimate advocacy, it explicitly declined to decide whether the summary convictions were invalid because the attorneys' alleged misconduct "did not disturb the court's business or threaten demoralization of its authority." There were no guidelines in the Holt opinion delineating the standards that should govern the propriety or offensiveness of the language used in advocating.

Finally, in In re Little, the Court extended its substantive limitations on the contempt power to protect arguments made before a jury in a state court proceeding. In Little, a pro se criminal defendant argued in his closing to the jury that he was a political prisoner, accusing the court of prejudice. The trial judge summarily adjudged Little in contempt for making these statements and sentenced him to thirty days. Pursuant to the imminent threat test announced in Bridges and its progeny, the Supreme Court reversed, holding "that in the context of this case petitioner's statements in summation did not constitute criminal contempt."

These three cases, McConnell, Holt, and Little, seemingly apply three distinct standards to measure the constitutional protection of advocacy from the contempt power: actual obstruction, immunity of proper advocative content, and imminent threat, respectively. All three cases and standards, however, really reflect identical concerns and fit squarely within the doctrinal analysis of the Court's clear and present danger test.

The clear and present danger standard synthesizes two separate strains of thought concerning the constitutional protection of expression. One, which we have already discussed, embraces a concern with the likely effect of speech. It requires that for expression to be pun-

126. 381 U.S. at 135 n.2 (citing In re Oliver, 333 U.S. 257 (1948)). As discussed below, despite the fact that Oliver is a federal case decided under the actual obstruction standard, it nevertheless equated actual obstruction with the threat of harm to the court's authority.
127. 404 U.S. 553 (1972) (per curiam).
128. I use the word "extended" advisedly. The deliberative process of a jury is a component of the administration of justice far more vulnerable to obstruction by improper influence or demonstrations of flagrant disrespect for the court than the functioning of the court, itself.
129. 404 U.S. at 555.
130. Id. at 553.
131. Id. at 555.
132. This strain of the clear and present danger standard derives from the views of Justices Holmes and Brandeis, articulated in a series of dissenting and concurring opinions in first
ishable, the likelihood of a cognizable harm must be truly imminent.\textsuperscript{133} The other strain is concerned with the \textit{content} of expression and the specific intent of the speaker; only advocacy "directed to inciting or producing imminent lawless action," can properly be punished.\textsuperscript{134} The clear and present danger test demands that both conditions exist before the government can sanction expression.\textsuperscript{135} In addition, the clear and present danger test traditionally has considered the seriousness of the intended and likely effect of expression in determining the constitutional limits of speech, especially in the area of contempt.\textsuperscript{136} As Professor Tribe argues, "we should surely be able to

\textsuperscript{133} See \textit{Little}, 404 U.S. at 555 (quoting \textit{Craig v. Harney}, 331 U.S. 367, 376 (1947)): Therefore, "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . ."


\textsuperscript{135} \textit{Id.}

\textsuperscript{136} Remember that \textit{Bridges v. California}, 314 U.S. 252 (1941), and its progeny all make the seriousness of the imminent harm a critical factor in determining whether extrajudicial speech is contemptuous: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be \textit{extremely serious} and the degree of imminence extremely high before utterances can be punished." \textit{Id.} at 263 (emphasis added).

However, those cases were decided during a period in the Court's history where its freedom of speech cases began to turn more on the potential seriousness of harm than on its immediacy. See, \textit{e.g.}, \textit{Abrams v. United States}, 250 U.S. at 627–29 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (arguing for introduction of greater imminence into clear and present danger test); \textit{Whitney v. California}, 274 U.S. 357, 377–78 (1927) (Brandeis, J., joined by Holmes, J., concurring), \textit{overruled}, \textit{Brandenburg v. Ohio}, 395 U.S. 444 (1969) (per curiam). This trend culminated with \textit{Dennis v. United States}, 341 U.S. 494 (1951), in which the Court temporarily abandoned the prior formulations of the clear and present danger test, as envisioned by Justices Holmes and Brandeis, largely in response to a perception of real revolutionary potential in the United States. \textit{Id.} at 510. Instead, the Court applied the standard of " 'whether the gravity of the "evil," discounted by its improbability, justifies the invasion of free speech [at issue] as . . . necessary to avoid the danger.' " \textit{Id.} (quoting \textit{Dennis v. United States}, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.)).

In \textit{Brandenburg v. Ohio}, the Court first articulated the modern version of the clear and present danger test, returning primary importance to the imminence of lawless action, the content of the expression, and the intent of the speaker. 395 U.S. at 448–49. However, \textit{Brandenberg} did not discuss the extent to which the gravity of the intended and likely effect plays a role in the balance between governmental interests and freedom of expression. More recently, in \textit{Landmark Communications v. Virginia}, the Supreme Court noted in dictum that the clear and present danger test "requires a court to make its own inquiry into the imminence and \textit{magnitude} of the danger said to flow from the particular utterance and then to balance the character of the evil, as

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say that the state cannot constitutionally penalize speech which merely ‘incites’ pedestrians to walk on the grass or jaywalk across the street.”

Although only Little mentions the imminent threat standard, and there only with respect to the likely effect of the advocacy, McConnell and Holt, as well as Little, seem driven by both of these concerns. The Court’s concern with the content of advocacy and the lawyer’s intent was unmistakably explicated in McConnell’s insistence that “lawyers be able to make honest good-faith efforts to present their clients’ cases.” In Holt, the holding hinged on the Court’s finding that the attorneys’ allegations of bias of the trial judge were essential to present relevant claims. Because the intent of the attorneys and the content of the motions were perfectly appropriate, their allegations of bias were immune from punishment—protected by the sixth amendment well as its likelihood, against the need for free and unfettered expression.”

Modern contempt cases, at least in the federal courts, clearly and appropriately retain the requirement of serious harm, by insisting that only “material” obstructions may be punished as contempt. See, e.g., In re Gustafson, 619 F.2d 1354, 1359–60 (9th Cir. 1980), rev’d on other grounds, 650 F.2d 1017 (9th Cir. 1981) (en banc); Gordon v. United States, 592 F.2d 1215, 1218 (1st Cir.), cert. denied, 441 U.S. 912 (1979); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972).

Moreover, at least one federal circuit has suggested in dictum that the fourteenth amendment imposes the seriousness requirement as a substantive limitation on state courts’ contempt power. See Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978) (in a habeas proceeding challenging constitutionality of state court contempt conviction, minimum necessity to satisfy due process is that conduct must be found to pose “‘significant, imminent threats to the fair administration of justice’” (quoting Weiss v. Burr, 484 F.2d 973, 982 (9th Cir. 1973)); such findings properly made by the state trial court).

As discussed infra at Subsection III-E, this seriousness component as a limitation on the contempt power is appropriate to create an insulating or buffer zone around valued advocacy. Furthermore, as will be discussed later in the context of contempt, the harm caused or threatened to the administration of justice by alleged misconduct must be balanced against the advocative value of such conduct in order to determine whether justice has been impaired. Thus, this balance entails some weighing of the magnitude of the harms involved. Unfortunately, the vast majority of states have failed to give sufficient consideration to the seriousness of the injury from ostensibly contemptuous conduct, and have rejected any “materiality” or “substantiality” requirement. See, e.g., People ex rel. Woodward v. Oliver, 25 Ill. App. 3d 66, 322 N.E.2d 240, 247 (1975); Russell v. State, 428 N.E.2d 1271, 1275–76 (Ind. Ct. App. 1981).

137. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 849 n.59 (2d ed. 1988).


139. Even before McConnell and Holt, the Supreme Court acknowledged that: it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court’s considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

Sacher v. United States, 343 U.S. 1, 9 (1952) (affirming contempt convictions of counsel representing defendants in Smith Act prosecutions).
and due process clause—regardless of the likely or even actual effect on the proceedings. Indeed, the attorneys’ advocacy in *Holt* was not merely appropriate, it was required as a function of effective representation. Likewise, in *Little*, the Court concluded that *Holt* “necessarily required” the reversal of the contempt conviction, alleging that a trial judge is biased is appropriate advocacy, its content protected from the contempt power. Moreover, *Little* concludes that a pro se defendant or attorney in state court is entitled to the same latitude in conducting a defense as the federal obstruction standard permitted the attorney in *McConnell*.

Presumably, the constitutional guarantee of due process requires similar latitude for the vigorous advocacy of counsel representing a client in a civil case, like *McConnell*, in state court. The content of relevant advocacy in a civil proceeding, and the good faith of an attorney espousing a client’s cause, also should be critical variables in measuring the protection of advocacy from the contempt power. Nevertheless, the sixth amendment and due process rights of a criminal defendant arguably demand greater latitude for defense counsel in criminal cases. Just as a criminal defendant’s right to due process and the sixth amendment rights of confrontation and compulsory process sometimes require that court rules controlling the admissibility of evidence or proper modes of advocacy be overridden, perhaps a

140. *See infra* note 156.
142. In so holding, the *Little* Court employed an expansive definition of proper advocacy, never questioning the relevance of Little’s remarks that he was a political prisoner and the judge was biased against him. In *Holt*, the attorneys’ allegations of bias were critical to their claims for disqualification and change of venue. 381 U.S. at 136–38. In *Little*, however, the only possible relevance of Little’s statements was to suggest to the jury that Little was appearing pro se only because the trial judge had denied his motion for a continuance to allow his retained counsel (who was engaged in another trial) an opportunity to appear on Little’s behalf.
143. *Little*, 404 U.S. at 555. The Court balked slightly at fully equating self-representation with representation of a client by an attorney. The Court was careful to note that Little was appearing pro se only because the trial court had denied his request for a continuance to permit his retained counsel to appear. *Id.*
144. *See, e.g., Weiss v. Burr*, 484 F.2d 973 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974). In *Weiss*, the Ninth Circuit reversed a number of state court contempt convictions of a prosecutor for forensic misconduct. After concluding that “[d]ue process requires . . . something more serious than a minor disagreement . . . before a contempt citation can be issued,” *id.* at 980, the court added that, because the sixth amendment is also implicated when the accused contemnor is representing a criminal defendant, a defense attorney should enjoy even greater constitutional protection. *Id.* at 980 n.7.

Conversely, the due process rights of a criminal defendant are more vulnerable to obstruction from a prosecutor’s overzealousness or misconduct. *See infra* notes 303–40 and accompanying text.
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criminal defendant's constitutional rights to a fair trial permit greater interference with the administration of justice by defense counsel's advocacy before her conduct should be deemed contemptuous.146

The Court also was concerned with the effect of the advocacy in the three cases. McConnell concluded that "there was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice."147 Little noted that the conduct in question there caused neither an actual obstruction,148 nor the imminent threat of one.149 Holt sidestepped the issue, explicitly refusing to consider whether the summary convictions there were invalid because the attorneys' conduct did not sufficiently disturb the court's business.150 The Court's failure to reach this question is most interesting because it masks, and in a sense unmasks, a deeper relationship between the content and the expression of legitimate advocacy and the attorney's intent, on one hand, and the likely or actual effect of such expression, on the other: unless the content or expression of advocative expression is improper, whatever the effect of the advocacy, such expression cannot be considered to obstruct the fair administration of justice.151

record as juvenile offender violated confrontation clause); Chambers v. Mississippi, 410 U.S. 284 (1973) (reversing conviction of defendant because application of state hearsay rule and state's "voucher" rule, which precluded cross-examination and impeachment of defense witness, violated due process).

An even more obvious difference between the rights of civil litigants and criminal defendants, implying broader leeway to the advocacy of criminal defense attorneys, is the right to counsel. The right to counsel has, however, also been extended to a very limited degree to civil litigants in some circumstances, and recommended to a greater extent by commentators. See generally Swygert, Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel, 39 WASH. & LEE L. REV. 1267 (1982); Note, The Indigent's Right to Counsel in Civil Cases, 76 YALE L.J. 545 (1967).

146. On the other hand, perhaps the due process rights of civil litigants should provide equivalent protection of the scope of vigorous advocacy in non-criminal matters. Cf. Leubsdorf, Constitutional Civil Procedure, 63 TEX. L. REV. 579 (1984) (arguing for more extensive application of constitutional guarantees of due process, equal protection, and first amendment to procedural law in civil cases).

149. Id.; see supra note 133.
151. Thus, in the absence of improper advocacy and wrongful intent, there simply is no obstruction or harm to the court's business. This is quite unlike other areas of first amendment law, such as incitement to lawless action, where the effect of speech can independently cause harm (for example, a riot), irrespective of the content of the speech or the intent of the speaker.

With respect to the necessity for the existence of some wrongful intent on the attorney's part in order for certain kinds of conduct to constitute an obstruction, see generally 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 findings of wrongful intent).
Rather, some level of emotional reaction, some degree of temporary animosity, and a measure of turmoil, are part of the natural processes of trial advocacy. If a witness breaks down from a searing, yet entirely proper cross examination, there is no obstruction. 152 Similarly, if a judge's ability to function as a dispassionate arbiter is threatened by the appropriate give and take with counsel, it cannot be regarded as a wrongful interference with the court. 153 Obstruction must be measured objectively against the propriety of the advocacy at issue. 154 The opinions reveal a repeated caution that a judge's overreaction to the unavoidable contentiousness of trial advocacy—the confusion of "offenses to their sensibilities" with "obstruction to the administration of justice"—does not define contempt. 155 As the Court in Holt recognized, perfectly proper advocacy can seem inherently insulting to a trial judge. 156 Moreover, the kind of time, place, and manner restrictions on expression that ordinarily have been upheld as constitutional 157 may not be appropriate to limit trial advocacy; there is simply no other time and place, and may be no other manner, in which to advocate effectively.

Entirely proper advocacy, such as that in Holt, is shielded absolutely from the contempt power. But there comes a point at which the content or non-communicative aspects of advocacy are sufficiently

152. See, e.g., United States ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972) (reversing contempt conviction of lawyer for asking arguably improper questions to witness):

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 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.

153. The federal contempt statute seems to incorporate this understanding by requiring that only "misbehavior" which actually obstructs the administration of justice is contemptuous. 18 U.S.C.A. § 401 (West 1969); see supra note 39.

154. The issue of whether obstruction of the administration of justice should be measured objectively or subjectively is discussed more fully infra text following note 295.


156. "[I]f the [attorneys'] charges [against the judge] were 'insulting' it was inherent in the issue of bias raised, an issue which we have seen had to be raised, according to the charges, to escape the probability of a constitutionally unfair trial." Holt v. Virginia, 381 U.S. 131, 137 (1965).

157. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-51 (1981) (restrictions on speech governing time, place, and manner must be justified by significant governmental interest and must leave open ample alternative channels of communication); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (upholding anti-noise ordinance prohibiting individuals adjacent to school grounds from willfully making noise that tends to disturb peace of school session, as reasonable regulation of time, place, and manner of speech).
improper and its effects sufficiently harmful that the conduct may, consistent with the Constitution, be punished. *McConnell* calls that point the actual obstruction of the administration of justice; *Little* names it the imminent threat of such obstruction. Let me suggest, however, that because both standards arise from an identical set of concerns, they are in essence the same standard, or at least should be.

How do we determine what should be the point where in-court expression becomes punishable? Although some view the clear and present danger standard as a categorical test, it is better understood as a standard that tends implicitly to incorporate a balance by pitting the imminence and seriousness of the threatened harm against the need for free expression. Where non-advocative speech is punished by the contempt power, the two interests juxtaposed are the speaker's right to expression and the government's need to protect the court's business from interference. But, as will be further discussed in the next section, where advocative expression is at issue, the need for such

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158. The propriety or obstructiveness of the attorney's conduct at issue in *McConnell*, for example, was not related merely to the content of his expression. Rather, non-communicative elements of his argument with the court—disobedience to the court's command to cease argumentation, disrespect to the court, and the delay and disruption created by his repeated insistence that he be permitted to propound certain questions to a witness in front of the jury—all went appropriately into the balance of whether his conduct was contemptuous. *In re McConnell*, 370 U.S. 230, 235–36 (1962).

159. *Id.* at 236.

160. *In re Little*, 404 U.S. 553, 555 (1972) (per curiam).

161. See, e.g., Landmark Communications v. Virginia, 435 U.S. 829, 843 (1978) (describing clear and present danger standard explicitly as a balancing test); Dennis v. United States, 341 U.S. 494, 510 (1951) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."). Although Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), embraced the *Dennis* holding, *Brandenburg*’s clear and present danger test seems to give no indication that the improbability of an evil may be overridden by its gravity. See *supra* note 136. However, *Brandenburg*’s introduction of a concern with the content of expression and the intent of the speaker requires, in the context of contempt, a balancing of the helpful and harmful aspects of advocacy. See *infra* Section III.D.3.

For further discussion, see Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1 (1965). Karst explains:

The clear-and-present-danger test, even with its original emphasis on the immediacy of threatened harm, was always a "balancing" test. The Justices who used the language of clear-and-present danger did not shrink from making the legislative judgments which are inescapable in our system of judicial review.

*Id.* at 10. See also, P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 44 (1961):

Even where it is appropriate, the clear-and-present danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech . . . ; the availability of more moderate controls than those the state has imposed; and perhaps the specific intent with which the speech . . . is launched. No matter how rapidly we utter the phrase "clear and present danger," . . . [it is] not a substitute for the weighing of values.
expression cannot merely be balanced against the court's interest in maintaining the integrity and continuity of a trial; advocacy is itself essential to the court's achieving that interest. Therefore, any balancing test for determining whether advocacy interferes sufficiently with justice to make it punishable must also consider the positive value of the advocacy to the very interest sought to be protected by the contempt power. The most important point is that courts must undertake that same process of balancing to determine whether advocacy actually obstructs the administration of justice. For actual obstruction, just as the imminent threat of obstruction, can be defined only in reference to the propriety and value of the advocacy sought to be punished. Both standards necessarily reflect a determination that the harmful effect of the advocacy in question outweighs its value to our system of justice.

Of course, there generally is a difference between a clear and present danger of a harm and its actual occurrence. The clear and present danger doctrine marks the constitutional limits of the protection of speech at a point before actual harm occurs. In doing so, the doctrine represents an attempt to serve either or both of two conceptually distinct functions. First, the doctrine permits the punishment of speech that attempts to bring about substantive evils that the government has a right to prevent. Punishment of such expression serves the important purpose of deterrence, as well as the other aims generally associated with criminal sanctions. Second, the doctrine prevents serious harm from occurring by intervening between the moment an imminent danger is created and the time the injury might materialize.

As with criminal attempt generally, conduct or speech rises to the clear and present danger level when, with the requisite intent, an actor goes so far that the danger of a criminal harm resulting is imminent. The concept of imminence is fundamental to this attempt formulation: the threatened harm may or may not occur—but for reasons unrelated to any further action by the speaker. The essence of the imminent

162. See, e.g., In re McConnell, 370 U.S. 230, 236 (1962) (lawyers' ability to make honest good-faith efforts to represent their clients is "essential to a fair administration of justice").
163. See infra Section III.D.3. See also, Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978):

Thus [the attorney's] first amendment and due process rights and the sixth amendment rights of his client must be balanced against the need for order in the trial process. The need for judicial order is not fixed but must be considered in the context of each case.

164. In this sense, the test has been distinguished from another first amendment area, defamation, which has been said to focus instead upon redressing consummated harm. See, e.g., L. Tribe, supra note 137, at 861.
danger rationale is that having spoken, the actor has set forces into motion over which she no longer retains control.165

But in the context of contempt, there may be no meaningful distinction between an actual obstruction, as defined by the federal courts, and an imminent threat of obstruction, because even an actual obstruction rarely consists of a consummated harm. If we limit definition of actual obstruction to harms such as physical disruptions of a trial, or misconduct actually affecting the trial’s outcome or requiring a mistrial, we could clearly distinguish between an actual interference with justice and the imminent threat of such interference. However, the definition of obstruction, as presently and properly applied by those jurisdictions using it, is not so limited. Rather, the actual obstruction standard responds, in relation to advocacy, for the most part, to the probabilities of harm befalling the administration of justice from conduct such as disrespect, failure to heed an order to stop argument, and the revelation of improper information to the jury.166 These kinds of behavior rarely grind a trial to a halt, require a mistrial, or lead to reversal of a verdict. This conduct most often only threatens to interfere with the exceedingly intangible values that underlie what we mean by justice, and the processes we employ to achieve justice.

Of course, we still might view some of these examples as having caused a consummated harm. For example, the failure to cease arguing when the judge so orders causes some actual delay in the trial. Moreover, the disobedience itself to the court’s order might be deemed an actual interference with justice. However, these conclusions go more to the Constitution’s concern for the propriety of the content, intent, and non-communicative aspects of expression, than to its effect. To ground the scope of the contempt power on that alone would be to

165. The speaker could, of course, attempt to defuse the situation with further speech. Once the critical point of a clear and present danger has been reached, however, further speech may no longer reduce the danger of harm. Indeed, inherent in the nature of the necessary “imminence” is the notion that further speech would be unlikely to reduce the risk of harm effectively. Similarly, in some cases of criminal attempt, the actor might be able to take steps to undo the attempted crime; nevertheless, punishment is considered appropriate for having proceeded so far along the path of harm that the evil might occur without any further action.

166. See, e.g., In re Oliver, 333 U.S. 257, 277–78 (1948) (concluding that misconduct which threatens the demoralization of a court’s authority is contemptuous under the federal obstruction standard); cases cited infra note 184. Indeed, the original federal contempt statute enacted after the Peck impeachment proceedings provided in pertinent part “[t]hat if any person . . . shall, corruptly, or by threats or force . . . obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice . . . [he] shall be liable to prosecution therefor.” 4 Stat. 487, 488 (1831) (emphasis added). Thus, even the original federal statute limiting the contempt power to actual obstructions, from which the present wording of 18 U.S.C. § 401 descends, reflects the nexus between actual obstructions and attempts or imminent threats of obstruction.
ignore the Constitution's command that only expression that is imminently likely to be harmful can be punished. For so long as in-court expression has positive advocative value, its effect may in fact benefit the administration of justice, even where the expression is not entirely proper and even where it interferes with other component values of the administration of justice. Indeed, that may be the point at which advocacy, in certain circumstances, is most beneficial to the administration of justice.

This is not to say that the conduct in these examples is not contemptuous. Some conduct that merely threatens immediate harm to the administration of justice is properly considered contemptuous in the federal courts. For example, an attorney's intentional violation of the rules of trial practice, creating conditions such that the integrity of the deliberative processes cannot be ensured, may appropriately be considered an actual interference with justice, even though the outcome of the trial might not be affected. This is to say, and this is critical, that even if such conduct is in fact deemed to constitute an actual obstruction, we should not allow the contempt power to be used to punish behavior that interferes with the administration of justice to a lesser extent—conduct that merely threatens the harm considered "actual" under the federal standard. Conversely, threatened or actual harm which does not rise to the level of contempt under the federal standard should not be deemed contemptuous under the imminent threat standard.

Let me say this another way. Some injuries to the administration of justice, such as lengthy physical disruptions and forensic misconduct resulting in a mistrial, are clearly demonstrable and literally constitute "actual obstructions." Other kinds of injuries, such as the harm resulting from a disrespectful remark to the court, disobedience of a court's order to cease argument, or the violation of an evidentiary rule that does not necessitate a mistrial, are far more speculative. Yet each of these latter examples of conduct can potentially interfere with justice to such an extent that a court must have the power to treat them as contemptuous.

As previously noted, when the misconduct in any of these three examples is sufficiently egregious, federal courts treat the misconduct as contempt under the actual obstruction standard. In doing so, the courts must be responding to either or both the possibility of future harm to the administration of justice, or an understanding that the conduct causes actual or present harm. If courts are responding to the possibility of future harm—the potential that the jury's deliberations might be affected, or that the disrespect shown for the court might
interfere with its ability to function—the standard is equivalent to the clear and present danger test; when the likelihood of injury is sufficiently imminent or serious, the conduct is punishable as contempt. Merely calling the behavior or the potential harm an "actual obstruction" does not change the focus from the possibility of a future and speculative harm to a consummated demonstrable injury. If the likelihood of this future harm is not sufficiently imminent to be punishable as an actual obstruction of justice, neither should it be punishable as a clear and present danger. In other words, viewing an actual obstruction as a threat of some injury that might actually occur in the future, where there is instead only an imminent danger that there will be a threatened harm, the potential for harm is too attenuated to justify contempt sanctions; the conduct at issue presents only a clear and present danger of a clear and present danger, or an attempt to attempt.\footnote{The criminal law gives us numerous examples of doing exactly that—enacting laws that criminalize the preparatory actions leading up to a completed crime as a consummated crime in and of itself. For example, burglary is itself a complete crime, consisting of some action sufficiently directed toward the commission of another offense (e.g., breaking and entering), and the intent to commit that other crime. See \textit{Model Penal Code} § 221.1 comment (1980). As one commentator points out, with respect to this example, "[b]y prohibiting such conduct, the point at which the law might intervene is advanced." Beschle, \textit{An Absolutism That Works: Reviving the Original "Clear and Present Danger" Test}, 1983 S. ILL. U.L.J. 127, 138. The creation of the crime of burglary then permits the possibility of prosecution for attempted burglary. See \textit{Model Penal Code} § 221.1 comment (1980). As Beschle notes, it is one thing to allow the state to intervene this early to prevent breaking and entering, and quite another to permit that with respect to speech. As discussed earlier, the Constitution requires greater immediacy than this with respect to speech; and the courts' interest in the administration of justice is wholly in accord.}

On the other hand, if the actual obstruction standard is responding to a present and completed harm, such as the transgression of a rule of trial practice or decorum, or a minimal delay of the trial, how do we differentiate those delays or those rule violations that constitute an obstruction from those that do not? McConnell tells us that not all such violations are contemptuous. As discussed above, in determining whether the violation of an established rule of courtroom behavior obstructs justice, a court must consider the propriety of the conduct, balancing its value to the goals of justice against the harm it causes. But, in determining the harmfulness of conduct, to decide which violations of which rules of practice rise to the level of an actual obstruction, it is once again necessary to consider the likelihood of future injury from such conduct. There is no other way to delineate between obstructive and non-obstructive rule violations, where the transgres-
sion causes no immediate and observable harm apart from the violation itself. The analysis is again identical to that required by the clear and present danger test, even if we consider the harm from our examples to be actual rather than potential. Therefore, if courts factor in the likelihood of serious harm from the rule violation in determining whether the transgression actually obstructs justice, an imminent danger of causing an actual obstruction—in essence, the threat of a rule violation—is again too attenuated to be properly punished as contempt.\footnote{168}

To see this more clearly, consider the example of a short delay caused by an attorney's misconduct. If a delay is long enough to constitute an actual obstruction, it is patent and demonstrable. However, if a delay is not so long as to interfere sufficiently with a proceeding to be an actual obstruction, surely it should not be punishable as a clear and present danger of one. If the interference is not serious enough to amount to an actual obstruction after the delay has ended, it cannot threaten to cause such harm in the future. And any consideration of future harm with respect to the potential for demoralization of the court's authority or loss of respect for the court from the misconduct applies equally, as noted above, to the determination both of whether the harm is an actual obstruction or an imminent one.

Consider, for example, \textit{In re McConnell},\footnote{169} where the attorney refused to stop arguing and threatened to continue asking forbidden questions until stopped by the bailiff. The Supreme Court concluded that this conduct did not actually obstruct the fair administration of justice.\footnote{170} A state could not appropriately punish the same conduct under the imminent threat standard.\footnote{171} The elements of McConnell's conduct that could cause both actual or imminently threatened inter-

\footnote{168. It might be said, at a less abstract level, that in some cases of actual or constructive harm, what justifies the imposition of contempt sanctions is really the likelihood of further interference with justice. With respect to disrespect toward the court, for example, it is almost always the attendant dangers to the administration of justice that permit punishment for insulting a judge, not any present damage from the insult itself. Similarly, the short delay created by repetitious argument with the court rarely suffices to warrant the wielding of the contempt power. The real potential for contempt there flows from the likelihood of damage caused by challenging the court's authority and other intangible factors. See \textit{infra} Section III.E.}

\footnote{169. 370 U.S. 230 (1962).}

\footnote{170. \textit{Id.} at 236.}

\footnote{171. The discussion in the text might be criticized on the ground that the conduct in \textit{McConnell} arguably did not present even a clear and present danger to the administration of justice. An optimal case for this discussion is one in which the interference resulting from an attorney's misconduct falls just short of an actual obstruction, and therefore would ostensibly be punishable under a less stringent imminent threat standard. Let us assume, then, that however actual obstruction is defined, the conduct in \textit{McConnell} falls just shy of causing an actual obstruction.}
ference with the administration of justice—disobedience, disrespect, delay, and interference with the deliberative processes of the trial—are outweighed under either standard by the need for attorneys to have adequate leeway to argue their cases. In determining that McConnell's behavior was not actually obstructive, the Supreme Court explicitly decided that the administration of justice would be better served by not punishing the conduct, given the value of the advocacy involved and the potential for harm to the bar's vigoroussness and independence. Indeed, that balancing of interests is the only tenable process for defining an actual obstruction, where advocacy is at issue. To permit punishment of this identical conduct under a less rigorous test would be self-defeating, because the whole purpose of the contempt power is to protect the administration of justice from interference. Thus, the proper standard and the definition of obstruction derive not only from constitutional limitations on the contempt power, but also from the balance of benefits and burdens on the administration of justice resulting from its exercise.\(^\text{172}\)

Another interesting premise of the Court’s opinion in McConnell, reflective of the previous discussion regarding delays, negates the ordinary distinction between a clear and present danger and an actual obstruction. McConnell notes that the bailiff never interrupted the trial to arrest the attorney, because the attorney never followed through on his threat to ask the questions forbidden by the judge.\(^\text{173}\) Thus, whether the attorney’s conduct was obstructive depended in large part upon his own subsequent actions. Where the nature of the

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\(^{172}\) The content of speech relevant to a judicial proceeding has long been recognized by the courts in the context of defamation as deserving special protection. All participants in a court proceeding are afforded an absolute immunity from liability for defamation, even where utterances are known to be false and are motivated by bad faith. See e.g., W. Prosser, The Law of Torts § 114 at 777–78 (4th ed. 1971). The common-law grant of this privilege guarantees the independence of the various participants from possible intimidation by potential damage actions. Courts extend the immunity to cover all statements reasonably related to the matter before the court; and courts interpret this relevancy standard very broadly as a bad faith limitation. Id. at 779.

The tort of defamation protects against harms different in quality and degree from the evils of obstructing justice. See supra note 164. Nonetheless, the rationale underlying the common law immunity applies to the context of contempt. Because the independence of the participants in the judicial process is essential to its function, the law must shield witnesses, attorneys and other participants from influences that could prevent them from speaking openly at trial.

This is not an argument for extending absolute immunity from contempt to participants in a judicial proceeding; such immunity could interfere with the very process the court is striving to protect—the fair administration of justice. On the other hand, courts must recognize the value of advocacy as essential to the goals of the judicial process and the need to protect the independence of the bar. These factors militate strongly in favor of heightened protection of advocacy compared to conduct that plays no supporting role in the administration of justice.

\(^{173}\) In re McConnell, 370 U.S. 230, 236 (1962).
harm at issue is defined in this way—that is, the obstructive quality of the conduct depends upon the actor doing something—there is no distinction between an actual obstruction and an imminent threat of one; unless the actor does more, the conduct meets neither standard. For in these circumstances, it is clear that the danger protected against is not so imminent that it is merely fortuitous whether harm sufficient to warrant contempt sanctions might come about; that injury can only occur if the speaker takes further steps. The conduct, therefore, cannot rise to the level of an imminent threat of danger or attempt.\(^{174}\)

Moreover, the actual obstruction standard is sufficiently flexible to permit the courts to punish any conduct considered to pose an imminent threat of interfering with the administration of justice. The expe-

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\(^{174}\) Consider the application of this logic to a frequently recurring situation in trials: an attorney who, despite being told by the judge to stop arguing an evidentiary point continues to do so. Assume for now that however obstruction of justice is defined, this conduct does not constitute an actual obstruction. Does the conduct create an imminent threat of obstruction or an attempted obstruction that could be halted by the contempt power? If the harm to be prevented is disobeying the judge itself, or the delay caused by wasting time, itself, the conduct would not qualify as an attempt: given that the continued argument does not actually obstruct, it poses an imminent threat of disobedience or delay only if the attorney continues to argue again. If the attorney at this point heeds the judge's directive, no obstruction will have occurred. The conduct here does not rise to the level of an attempt, where the obstruction is imminently likely to occur, but for some intervention or fortuitousness. Here, the obstruction occurs only if the speaker does more than she already has. Thus, the conduct should not be punishable as a clear and present danger of obstruction. Any punishment would be more in the nature of deterrence of future misconduct rather than punishment for or prevention of an imminent harm. Even if the judge believes that the attorney will continue to argue and disobey the order to stop, the imminence of obstruction, unlike any attempt, comes only from the possibility that the attorney will do something more and that the something more will obstruct justice.

What if, on the other hand, the harm sought to be prevented in our hypothetical is not the disobedience itself, but the effect of the disobedience on other participants in the judicial proceeding? Thus, for example, one attorney's disobedience might encourage opposing counsel or witnesses to defy the court's authority. Similarly, an attorney's disobedience, unpunished by the judge, might influence a jury to give less weight to the court's authority, for example, in following the judge's instructions. Finally, the attorney's challenge to the court's authority might adversely affect the judge's ability to try the case dispassionately. Although the threat may be extremely speculative, it must be considered that some level of misconduct may be foreseeable detrimental to the adjudicatory process. At the point when misconduct has such a high likelihood of interfering with the deliberative processes of a jury, for example, the behavior may fairly be seen as constituting an attempted obstruction. In that case, using the contempt power serves both to punish the attempt and to prevent the actual obstruction from occurring by reestablishing the judge's authority in the courtroom. In addition, punishment of an imminent threat of obstruction also sets a limit for appropriate behavior for the rest of the trial as well as for future cases. However, conduct that threatens this level of imminent harm to the administration of justice should be deemed an actual obstruction as well, and is properly treated as such by the federal courts. Thus, whether any meaningful difference exists between an actual obstruction and the imminent danger of one, necessarily depends largely upon how we define obstruction of justice and what we consider to be the nature of the harm flowing from an obstruction.
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rience of the federal courts and those states using the actual obstruction standard demonstrates\(^\text{175}\) that there is no need to punish conduct as contempt under a more relaxed standard. There is no indication that the application of the federal statutory limitation on contempt has unduly hampered the ability of federal courts to maintain order and protect the administration of justice. To the contrary, there is considerable consensus that even those court systems that employ that standard, including the federal courts, have generally overreached in their use of the contempt power\(^\text{176}\).

4. The Adequacy of Notice

It is difficult even under the actual obstruction standard to determine with precision whether an attorney's expression is contemptuous,\(^\text{177}\) and to provide advance notice of that determination sufficient

\(^{175}\) In the past, the Supreme Court has looked to the experience of some jurisdictions with particular legal standards to help decide whether to make such standards constitutionally required. For example, in Mapp v. Ohio, 367 U.S. 643, 651–52 (1961), the Court examined the experience of states using standards other than the exclusionary rule to help determine whether the exclusionary rule was the best means of protecting fourth amendment guarantees.

\(^{176}\) See, e.g., N. DORSEN & L. FRIEDMAN, supra note 5, at 9: "Disorder has been over-emphasized because . . . its incidence in American trials is low; and because both public and bar tend to focus on dramatic and publicized confrontations without bearing in mind that these are highly exceptional."

The availability of less restrictive alternatives to contempt demonstrates that certain conduct need not and should not be punished as contempt under some broader test than the obstruction standard as it is applied in federal courts. If the administration of justice can absorb instances of misconduct without being harmed, necessity does not justify the exercise of the contempt power. Where courts seek to justify using the contempt power by the need for punishment of attempted obstruction and deterrence, rather than by the desire to prevent an immediately threatened harm from materializing, less restrictive alternatives may be insufficient. But where alternatives less drastic than contempt sanctions can prevent an imminent threat from becoming an actual obstruction, the need for punishment and deterrence will not be sufficiently compelling to warrant a contempt citation; this kind of buffer zone is essential for vigorous advocacy to be adequately insulated from the contempt power.

\(^{177}\) The uncertainty of the division between the most vigorous permissible advocacy and a punishable contempt causes several serious problems. First, the lack of adequate notice of what conduct is contemptuous may violate an attorney's due process rights. Justice Powell noted the importance of fair notice to a contemnor in Eaton v. City of Tulsa, 415 U.S. 697, 700-01 (1974) (Powell, J. concurring):

I place a high premium on the importance of maintaining civility and good order in the courtroom. But before 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.

Second, if trial counsel do not know where the outermost bounds of zealous advocacy lie and where the innermost reach of the contempt power begins, their advocacy will be substantially less vigorous, and the rights of their clients to the most zealous permissible representation will be diminished.

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to prevent chilling zealous representation; but it is considerably more difficult to do so with a less restrictive limitation. The clear and present danger test is itself fraught with uncertainty as it applies even to non-advocative expression. As we shall see, however, this problem is more acute in the context of advocacy both because the balance of competing interests often makes it difficult to ascertain when the threat of obstruction is imminent, and because attorneys have a professional obligation to advocate to the outer limits of what is permissible.

The further we allow the contempt power to intrude, and the closer we permit it to come to the kind of advocacy we wish to encourage, the more the imprecision of its confines, and the greater the deterrent effect on valuable lawyering. As the contempt power can extend earlier and more deeply to punish conduct further and further removed from consummated and demonstrable injury to justice, the greater the room for speculation and interpretation about whether the behavior is harmful, let alone contemptuous. Thus, not only does the need for certainty require clearer standards for defining punishable conduct, whatever the test used to measure whether conduct is contemptuous,

178. See, e.g., Pennekamp v. Florida, 328 U.S. 331 (1946) (reversing contempt convictions of newspaper editor for publishing editorials criticizing the administration of criminal justice in certain pending cases):

It was, of course, recognized that [the clear and present danger] formula, as would any other, inevitably had the vice of uncertainty, [citing Bridges v. California, 314 U.S. 252, 263 (1941)], but it was expected that from a decent self-restraint on the part of the press and from the formula's repeated application by the courts standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion.

Id. at 334; P. Freund, supra note 161, at 44 (the clear and present danger test “tend[s] to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle”); Kalven, “Uninhibited, Robust, and Wide-Open”—A Note on Free Speech and the Warren Court, 67 Mich. L. Rev. 289, 297 (1968) (“the clear and present danger test—whatever sense it may have made in the limited context in which it originated—is clumsy and artificial when expanded into a general criterion of permissible speech”).

179. A general problem with the clear and present danger test (as well as the standard of actual obstruction applied to the likelihood of future injury) is that the further from a consummated harm the government’s regulatory power over expression extends, the more a court’s determination of whether the Constitution protects the expression depends on the facts of each specific case. In turn, the more fact-specific individual contempt decisions are, the less adequate the notice provided to attorneys to guide their conduct. Furthermore, as contempt determinations become more sensitive to individual circumstances, the need for full due process rights at the contempt adjudication increases for two reasons. First, to the extent contempt decisions are very fact-specific, the feelings of trial judges, conscious or unconscious, are likely to have far greater impact on the determinations. Thus, the dangers of permitting the offended judge to “try” the contempt spontaneously, without benefit of defense counsel and other due process safeguards, greatly increases the likelihood for overreaching. Second, the more such decisions turn on particular facts, the more important it becomes to identify those facts through the ordinary criminal processes to facilitate appellate review.
but it also demands that the contempt power not be unleashed from the minimal restraints of the actual obstruction standard.

5. *The Concurrence of the Rights Implicated*

The preceding discussion demonstrates that the appropriate protection of advocacy from the contempt power derives from a variety of constitutional sources that are not fungible alternatives from which to randomly pick and choose. They reflect distinct normative values and guard those values to different degrees. An attorney's in-court advocacy implicates, to a greater or lesser extent, all of the considerations discussed above, and the cumulative force of the rights at stake should elevate the protection over what it might be if only a single right was in question. These considerations argue for constitutionally imposing on the states the same quality and degree of substantive protection against the contempt power as that provided by the actual obstruction standard.

The courts have implicitly recognized the relative equivalence of the clear and present danger and actual obstruction standards in the area of contempt. In *In re Little,* as noted earlier, the Supreme Court, despite using the imminent threat standard, stated that a pro se defendant was entitled to the same latitude in defending himself as the attorney in *McConnell*—that is, to the point of actually obstructing

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180. I do not mean to suggest that the various justifications for overcoming the rights at issue should simply be added together, thereby requiring some super-justification or obstruction to warrant exercising the contempt power. The governmental interest necessary to overcome each of the rights at stake is, for the most part, sufficient with respect to that right alone. Thus, one can argue that as long as each individual right is not unduly infringed, there should be no stricter standard merely because the government's interests may overcome several parallel rights at once. My point, however, is that the standard for determining whether each of the rights at issue is violated is so imprecise that, where several rights may be infringed by using the contempt power, it is appropriate to raise the standard of protection of those rights together. Essentially, this builds into the standard a margin of protection of multiple rights by ensuring that doubts are resolved in favor of the various constitutional guarantees rather than against them.

181. 404 U.S. 553, 555 (1972) (per curiam).

182. Similarly, although the *Holt* court found it unnecessary to consider whether the attorneys' contempt convictions were invalid because their conduct did not interfere sufficiently with the judicial process to constitute contempt, it framed the issue by asking whether this behavior disturbed the court's business or threatened demoralization of its authority. 381 U.S. 131, 136 (1965). In posing the question in this way, the Court paraphrased its earlier decision in *In re Oliver,* 333 U.S. 257, 277–78 (1948), relying upon *Oliver's* standard of actual disturbance of the court's business. Furthermore, *Oliver,* grounded on the federal obstruction standard, also applied the litmus test of whether an individual's behavior threatened demoralization of its authority, *id.*, a standard clearly directed to the likelihood of harm as opposed to consummated injury.
the administration of justice. Conversely, numerous federal courts, using the actual obstruction standard, have concluded that conduct causing an imminent threat of certain harm to a fair trial constitutes an actual obstruction, punishable under the federal statute. Several courts have, in addition, held or indicated that the obstruction standard set forth in *McConnell* is a constitutional limitation applicable to state courts. Still others have acknowledged, without articulating

183. Moreover, *Little*, and virtually every other Supreme Court contempt case using a clear and present danger formulation, noted that in fact no actual obstruction had occurred in the trial court. 404 U.S. at 555. See, e.g., *Wood* v. Georgia, 370 U.S. 375, 393 (1962) (reversing contempt conviction for extrajudicial statements questioning advisability of grand jury investigation into block voting by Black constituency): "Thus, in the absence of any showing of an actual interference with the undertakings of the grand jury, this record lacks persuasion in illustrating the serious degree of harm to the administration of law necessary to justify exercise of the contempt power."

184. See, e.g., United States ex rel. *Robson* v. Oliver, 470 F.2d 10, 14 (7th Cir. 1972) (reversing contempt conviction of attorney for asking arguably improper question of witness): "We hold that the record does not 'clearly show' that the conduct cited in the second specification of contempt 'actually and materially obstructed' so as to 'immediately imperil' the judge in the performance of his judicial duty." The court in *Oliver* relied on *In re Little*, 404 U.S. 553 (1972) (per curiam). See also United States v. *Seale*, 461 F.2d 345, 370–71 (7th Cir. 1972). After discussing the rule laid down in *Little*, that only an imminent threat to the administration of justice can constitutionally be punished, *Seale* stated that a "showing of imminent prejudice to a fair and dispassionate proceeding is, therefore, necessary to support contempt based upon mere disrespect or insult." *Id.* at 370. Cf *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972) (disrespectful or insulting conduct constitutes an actual obstruction of justice where "the remarks create an imminent prejudice to a fair and dispassionate proceeding"). Moreover, *Seale* is one of the highwater marks of a court's imposition of substantive limitations on the contempt power.

Several other cases follow reasoning similar to that above. See *In re Greenberg*, 849 F.2d 1251, 1255 (9th Cir. 1988) (reversing contempt conviction of attorney because his conduct did not constitute "the type of 'exceptional circumstances' that pose an immediate threat to the judicial process, thereby justifying a summary criminal contempt conviction"); United States v. *Lumumba*, 794 F.2d 806, 808 (2d Cir. 1986) (" 'To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to the administration of justice.' " (emphasis added) (quoting *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975))); Gordon v. United States, 592 F.2d 1215, 1217 (1st Cir. 1979) ("To amount to criminal contempt . . . insult must go beyond affront and in some way obstruct the proceedings or threaten the dispassionate administration of justice." (citing *In re Little*, 404 U.S. 553 (1972) (per curiam)).

185. See, e.g., *Weiss* v. *Burr*, 484 F.2d 973 (9th Cir. 1973). In an appeal of a habeas proceeding the court stated that "[d]ue process requires . . . something more serious than a minor disagreement . . . before a contempt citation can be issued," *Id.* at 980, concluding that where the contemnor represents a criminal defendant, the actual obstruction standard must apply before the contempt conviction can be sustained. *Id.* at 982 n.13; see also *Hawk* v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978) (applying actual obstruction standard to alleged contempt of criminal defense attorney in state court proceeding); Edmunds v. Chang, 365 F. Supp. 941, 946 (D. Haw. 1973) ("[S]ince the Supreme Court has held that exercise of any broader contempt power than that allowed by the [federal] statute 'would permit too great inroads on the procedural safeguards of the Bill of Rights,' *In re Michael* [citation omitted], the Court's decisions construing § 401 must be seen as marking the outer limits of state contempt power as well."). *State v. Harper*, 297
any specific standard against which to measure conduct, that the Constitution protects vigorous advocacy from the contempt power even where an attorney continues to argue in the face of a judge's direct order to be silent.\textsuperscript{186} Finally, only a very few cases explicitly distinguish between an immediate threat of obstruction and an actual obstruction;\textsuperscript{187} both federal and state cases uniformly rely on precedent grounded on both standards interchangeably.\textsuperscript{188} Indeed, some


186. \textit{See, e.g.,} Cooper \textit{v. Superior Court}, 55 Cal. 2d 291, 359 P.2d 274, 281, 10 Cal. Rptr. 842 (1961) (reversing contempt conviction of attorney for continuing to object to judge's instructions to jury in contradiction of court's order to cease). Indeed, some state cases such as \textit{Cooper}, decided under the imminent threat test or even more relaxed standards, are stricter than most federal cases in their protection against the contempt power. \textit{See, e.g.,} \textit{In re Logan}, 52 N.J. 475, 246 A.2d 441 (1968) (reversing contempt conviction of attorney who refused to continue with trial after the judge correctly sustained objection to his opening to the jury).

187. \textit{See In re Daniels}, 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987), \textit{aff'd}, 118 N.J. 51, 570 A.2d 416 (1990); \textit{Ex parte Krupp}, 712 S.W.2d 144 (Tex. Crim. App. 1986), \textit{cert. denied, 107 S.Ct. 1333} (1987). In \textit{Krupp}, with four dissenting opinions and two judges concurring in the result only, the court held that the criminal contempt was proper where a pro se defendant and six other spectators refused to rise when the trial judge entered the courtroom, after they had been warned of the consequences of failing to do so. Although the \textit{Krupp} plurality noted that "criminal contempt is not restricted . . . to conduct that obstructs, or tends to obstruct, the proper administration of justice," 712 S.W.2d at 149, the constitutional implications of its decision were never discussed in the plurality opinion and apparently were not presented to the court. Indeed, the court did not even recognize the constitutional limitation of the clear and present danger test when it concluded that conduct may constitute contempt even without rising to the level of a tendency to obstruct justice.

188. \textit{See, e.g.,} Pennsylvania \textit{v. Local 542, Int'l Union of Operating Eng'rs}, 552 F.2d 498, 509 (3d Cir. 1977) ("[W]e agree . . . as we must, that 'before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice . . .'." (quoting \textit{In re McConnell}, 370 U.S. 230, 234 (1962)); \textit{In re Williams}, 509 F.2d 949, 960 (2d Cir. 1975) (citing Eaton \textit{v. City of Tulsa}, 415 U.S. 697 (1974) and \textit{In re Little}, 404 U.S. 553 (1962) (per curiam)).

To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior which rises to the level of an obstruction of and an imminent threat to the administration of Justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice.

\textit{accord Little}, 404 U.S. at 555; Gordon \textit{v. United States}, 592 F.2d 1215, 1217 (1st Cir. 1979) (\textit{citing Little} in support of meaning of obstruction standard); \textit{United States ex rel. Robson v. Oliver}, 470 F.2d 10, 14 (7th Cir. 1972) (quoting imminent threat language from \textit{Little}); \textit{In re Dellinger}, 461 F.2d 389, 400 (7th Cir. 1972) ("[W]here the insult or disrespectful remark is shouted, the insult itself may not amount to \textit{an obstruction of the judicial process}, but by the manner in which it was made it may.") (emphasis added) (citing \textit{Little}); \textit{In re Dougherty}, 429 Mich. 81, 413 N.W.2d 392 (1987) (relying on \textit{McConnell} in vacating contempt conviction); \textit{Werlin v. Goldberg}, 517 N.Y.2d 745 (App. Div. 1987) (affirming contempt conviction of attorney for repeated challenges to court's rulings; apparently relying on standard set forth in \textit{McCon-
combination of the Court's decisions in *McConnell, Eaton, Little,* and *Holt* continues to form the basis for analysis in virtually every federal case and a great many state cases, raising the issue of the substantive limits of the contempt power.

Despite all this, given that both standards exist simultaneously, it is quite natural for state courts to treat the inherent threat of obstruction standard as a less stringent test than actual obstruction. Few state courts have explicitly accepted or rejected the actual obstruction standard as constitutionally required; those states that have rejected it also determined that even the imminent threat of obstruction standard did not limit their courts' contempt power.\(^8\) \(^9\) Yet, it seems unavoidable that with the two standards coexisting, many state courts will compare the actual conduct at issue in federal contempt cases to the behavior in their own cases, and determine that the imminent threat standard permits the punishment of behavior found not to constitute contempt under the federal obstruction limitation. Thus, although the clear and present danger test can appropriately accommodate concerns identical to those embodied in the actual obstruction standard, there will be an inherent tendency to treat the former standard as a less stringent limitation on the contempt power. To the extent that the two tests should in fact yield the same results, we should use the same nomenclature to describe them; given the dangers described above, and the legislative imposition of the actual obstruction standard in federal and some state courts, that definition of contempt is the proper choice.\(^10\)

The more fundamental question is how to determine whether an attorney's conduct interferes sufficiently with the fair administration of justice, regardless of what the standard is called, so as to warrant exercise of the contempt power. Furthermore, how can we draw the

\[^{189}\] See supra note 187.

\[^{190}\] Although not a relevant policy consideration in determining the correct standard, adopting the obstruction standard as a constitutional mandate would, as a practical matter, be very helpful. As we shall see, it is enormously difficult to define obstruction with particularity. Drawing the line between protected advocacy and contempt with precision is possible only by considering, case-by-case, the particular circumstances of the recurring situations in which attorneys are cited for contempt. That work has begun, in large part, in the federal courts, which have considered many hundreds of cases of criminal contempt. But the individual states are unlikely to render a sufficient number of appellate decisions on a wide variety of contempts to provide an adequate base for close comparisons. However, if the state standard, imposed by the federal constitution, was the same as the federal courts' obstruction standard, the large federal base of cases would control far more precisely the development of an appropriate definition of contempt. Of course, so long as the constitutional standard produces the same results as the federal test this benefit could be achieved. However, for the reasons described above, differently described standards would be less likely to be treated alike.
line between the most zealous representation and contempt, such that vigorous advocacy will not be deterred? These issues will be addressed in the next several sections.  

III. ADVOCACY AND OBSTRUCTION  

To ask what constitutes an obstruction of the administration of justice is to probe the nature of the judicial process. To understand what interferes with a trial, one must first know what the goals of a trial are and how the dynamics of a judicial proceeding bring those goals to fruition. Unless we understand what it is that a trial attempts to achieve and how it goes about achieving it, we cannot know whether conduct might interfere with or advance the goals of a trial.

In determining whether conduct obstructs the administration of justice, it is also critical to explore the qualities that define legitimate advocacy and the limits of vigorous advocacy. For advocacy—conduct that advances the aims of a party and the broader goals of justice—presumably does not obstruct a proceeding. But here we have a problem: although the content of legitimate advocacy, by definition, cannot obstruct justice, and is immune from the contempt power, the expression of advocacy can be obstructive, and is susceptible to the power of contempt. Thus, advocacy can simultaneously advance and hinder the administration of justice. What we need, then, is to be more aware of the ways in which the expression of advocacy can have both of these effects, to understand better what the outermost limits of the expression of advocacy should be, and to develop a calculus for resolving the competing tensions when advocacy both hinders and helps the cause of justice.

A. The Conflicting Goals of Trials  

The essence of the meaning of obstruction must be some interference with the functioning of justice. But the way in which justice functions is no simple matter. An ever-growing body of literature seeks to identify various models of the administration of justice, in

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191. Subsequent sections of the article are couched in terms of exploring the meaning of an “actual obstruction” of the administration of justice. Except where a distinction is explicitly drawn between this standard and the clear and present danger test, I treat the two as equivalent. If I fail in my attempt to persuade that the two standards should be treated as one with respect to advocacy, this does not diminish the applicability of the following investigation and conclusions drawn. Even if the clear and present danger test states a lesser standard of protection than that of actual obstruction, it is equally important to understand what is an actual obstruction, both in applying that standard, and in extrapolating from it to discern an imminent threat of obstruction.

192. Clarence Darrow, for example, once suggested that “[t]he litigants and their lawyers are supposed to want justice, but, in reality, there is no such thing as justice, either in or out of court.
part competing and in part complementary.\textsuperscript{193} The tensions between
the forces reflected in these models shape every aspect of trial proce-
dure, including the scope of both the contempt power and permissible
advocacy.

One model, perhaps the most prevalent, is that a trial is a search for
the truth. This model assumes roughly that some objective truth
exists and that the processes of litigation recreate that reality in a
courtroom to ensure litigants the right to a correct outcome—that the
findings of fact coincide with what actually occurred in the past (or
will occur in the future). In addition, for a correct outcome, the law
must properly be applied to the findings of fact.

We often speak as though this goal of finding the truth and produc-
ing the correct outcome is the raison d'être of a trial. For example, the
Federal Rules of Evidence state that the purpose and construction of
the Rules is to secure the "promotion of growth and development of
the law of evidence to the end that the truth may be ascertained and
proceedings justly determined."\textsuperscript{194} Similarly, the Supreme Court has
frequently noted that "[t]he basic purpose of a trial is the determina-
tion of truth."\textsuperscript{195} Some cases and commentators have argued that
"truth and . . . the right result" are not only the primary value served
by our courts\textsuperscript{196} but "the sole objective of the judge."\textsuperscript{197}

However, truth and the correct outcome clearly are not the only
purposes fostered by our institutions of justice, nor do they always
have primacy over others. Numerous privileges, for example, prevent
the revelation of highly probative, and at times the most probative,
information that would otherwise assist the trier in determining the
truth.\textsuperscript{198} Likewise, the fourth amendment exclusionary rule requires

\textsuperscript{193} In fact, the word cannot be defined." Darrow, Attorney for the Defense, ESQUIRE, May 1936, at
36–37.


\textsuperscript{196} See, e.g., Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 MICH. L. REV. 1485, 1487 (1966) (fundamental purpose of trial is to produce most accurate results possible).


\textsuperscript{198} An argument can be made, on the other hand, that even if evidentiary privileges were
abrogated, the truth-finding function of a trial would not be furthered. If privileges did not bar
the admission of certain communications, such as those from a client to her attorney, potentially
damaging communications might never be made in the first instance for fear of later revelation

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the suppression of evidence that often might be dispositive of a case as a remedy for an illegal search and seizure. Requiring proof of guilt beyond a reasonable doubt in criminal cases also subordinates the goal of an accurate determination to a presumably more important societal interest—guarding against the conviction of an innocent defendant, even at the expense of acquitting some of the guilty.

In addition to these specific interests given precedence over accurate outcomes in litigation, our entire system of trial procedure and ethics compels any thinking person to wonder whether there isn’t something else going on in judicial proceedings besides a serious search for the truth. Many of the rules, procedures, and accepted tactics of litigation in our system, in practice if not by design, not only fail to further the goal of accurate fact-finding but actually impede it. The rules of evidence and trial practice arm advocates with devices to make witnesses who are telling the truth appear to be lying and witnesses who are lying appear to be telling the truth. These rules engender techniques for preventing the whole truth from reaching the factfinder, for filtering the truth, for limiting and qualifying the disclosures that are made. They permit attorneys to obfuscate the truth by presenting information that can mislead the trier.\(^{199}\)

and evidentiary use. (Indeed, in the case of the attorney-client privilege, an essential justification of protecting the confidentiality of communications is to maintain that flow of information so attorneys can better represent their clients). Thus, theoretically, no additional information would be made available to the factfinder than if the privileges remained intact.

If evidentiary privileges were abolished, surely some communication would be curtailed within relationships that presently enjoy such privileges; and therefore there would be less information available to be revealed at trial. Moreover, some confidants, such as spouses, nevertheless would refuse to testify despite the imposition of sanctions for doing so. But it also is undoubtedly true that some evidence that otherwise would have been inadmissible due to privilege would go to the factfinder. Privileges do sacrifice some accuracy in triers’ factfinding in order to promote other important values.

Another argument, that at least some privileges do not detract from the accurate determination of the truth, is more powerful. Consider the fifth amendment privilege against self-incrimination. Excluding evidence of confessions, for example, made while in custody without a knowing waiver of the right to remain silent, may in the long run aid the search for truth by reducing the number of coerced (and therefore unreliable) confessions. However, even if on average the truth-finding function of a trial is helped more than it is harmed by the privilege, there must be individual cases in which a purely voluntary and truthful confession is kept from the trier merely because a defendant was not informed of his right to remain silent prior to confessing. In those instances, the truth in a particular case is subservient to the long-range need to promote the truth in other cases.


\(^{200}\) See, e.g., Simon, supra note 199, at 45.
From the investigation of the facts to the presentation of the evidence, partisan advocates control the process of developing the truth and have a broad arsenal for manipulating the perception of the truth in order to achieve the result they desire—victory for their clients. Where victory and truth are mutually incompatible, as they often are, for one side or the other, the lawyers' duty is to achieve victory, not to expose the truth. Thus, for example, a leading commentator in the area of trial ethics, Professor Freedman, has argued that it is proper for an attorney to advise a client in a manner likely to suggest that the client should commit perjury, put a witness on the stand knowing the witness will commit perjury, and to attempt to impeach the credibility of an adverse witness whom the attorney believes to be telling the truth. These propositions may be debatable and have been challenged, but they express a prevalent view of advocacy, one that captures the essence, if not the particulars, of the importance of the value of "adversarialness" in our system of justice.

These corollaries of our adversary system, pursuant to which attorneys struggle to reconstruct their individual and biased versions of reality, are not merely unfortunate byproducts of our jurisprudence of advocacy. Rather, they comprise one of the goals of the system, forming the basis for a second model of a trial: a fight or contest between combatants. The truth may still surface in this model, but it is incidental to another value—a pitched struggle between adversaries bent on victory.

Furthermore, a trial is a battle waged by representatives whose duty, as noted earlier, is not to the truth but to do the best for their clients within the limits of the law. Through their discretion, informed by ethical obligation, attorneys may employ tactics hampering the search for truth; and the success of these techniques, such as the invocation of privileges and destructive cross-examination, depends very much upon the skill of the attorneys practicing them.

201. Freedman, supra note 199, at 1469, 1482.
203. See, e.g., Noonan, supra note 196.
204. Numerous commentators have recognized the pervasiveness of the fight ethic in our jurisprudence of advocacy, but have argued to limit it and to give greater weight to the value of accurate discovery of the truth. See, e.g., Frankel, supra note 193; Noonan, supra note 196.
205. See Frankel, supra note 193. Even if these examples of conduct are considered abuses of the adversary system rather than the implementation of its design, they surely are the kinds of abuses that are the inevitable byproducts of the system's design.
206. See, e.g., Freedman, supra note 199, at 1482 (policy considerations at times justify frustrating the search for truth and the prosecution of a just claim); Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 AM. L. REV. 729, 739 (1906) (referring to the "Sporting Theory" of justice).
Advocacy and Contempt

These devices and attorneys' skills in manipulating them, moreover, are not looked upon as an unpleasant service borne of obligation; rather, mastery of these devices is revered as the highest art of our profession.207

At the same time, the adversarial nature of our system is seen as justifying a judicial tolerance of something less than the fully effective assistance of counsel. Thus, judges commonly refrain from intervening in the development of evidence and legal argument, even where it appears that a party's rights are being compromised by an attorney's seeming ignorance of the rules of evidence, highly questionable strategies,208 and even outright incompetence.209

Of course, this battle is not a free-for-all; as to both the basic models discussed above, it is fought according to a rich body of rules and procedures. These procedures, or the processes of advocacy, themselves constitute a fundamental value underlying our perceptions of the way in which courts administer justice. This principle of procedural justice implies several values that derive from treating the fairness of the trial process as an autonomous goal of litigation. First, the procedures governing trials and the development of evidence have a profound effect on the search for an objective truth. These rules help to produce an accurate outcome to the extent that they are fair to both sides and provide mechanisms for placing relevant information before the trier, for testing the accuracy of information and the credibility of witnesses, for limiting the introduction of misleading information, and

207. See, e.g., Frankel, supra note 193, at 1034 ("The shop talk in judges' lunchrooms includes tales, often told with pleasure, of wily advocates who bested the facts and prevailed."). Also revered are stories of attorneys who seemingly obstructed the administration of justice, but instead of being cited for contempt, were admired for masterful advocacy. See, e.g., A. COHN & J. CHISOLM, "TAKE THE WITNESS!" 220 (1934); I. STONE, CLARENCE DARROW FOR THE DEFENSE 454-55 (1941).

208. Dissatisfaction with this aspect of adversarial proceedings is growing, as is displeasure over the degree to which our system of justice often permits, or fails to discourage, the domination of the truth by the "fight" characteristics of a trial. Calls for reform have taken several avenues. Ex-Chief Justice Burger, for example, has argued for greater training of trial and appellate attorneys to increase their competence. See Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?, 42 FORDHAM L. REV. 227 (1973). Judge Frankel and Professor Noonan suggest that attorneys should accord the purpose of truth-seeking greater value than they do presently. See Frankel, supra note 193; Noonan, supra note 196, at 1487.

209. Of course, in criminal cases, the inadequate representation of counsel at some point reaches constitutional dimensions and requires reversal of a conviction due to ineffective assistance. Unfortunately, the ineffective assistance standard is very difficult to meet; much of the mediocre lawyering that in fact contributes to the conviction of criminal defendants fails to rise to that standard. See infra note 343. Moreover, even where an attorney's representation in a case is ineffective under that standard, trial judges frequently do not intervene to protect the defendant's rights. The remedy, if any, comes at the end of a lengthy appellate process.
for promoting the well-ordered presentation of information and argument. Second, the justness of the trial process serves to legitimate the outcome. If the procedures of litigation are considered to be fair and effective, a trial does not merely find the truth, it actually creates the truth. Thus, we define the truth by the outcome of our institutions of justice; if a defendant is convicted of a crime, we "know" that he committed the acts of which he is accused. As Professor Haar has noted, "[i]t's not [the advocate's] job to pursue the truth, but [to] pursue the process from which the truth emerges." Even if we acknowledge that the result of a trial might occasionally be inaccurate, we are more willing to accept it as the appropriate outcome—the closest approximation to the truth—if we have faith that the procedures which produced it are the best ones available.

Some of these values inherent in the principle of procedural justice are so fundamental as to be expressed in various constitutional guarantees. For example, the due process, confrontation, and compulsory process clauses provide for some degree of fairness in trials, and, at least in criminal cases, for mechanisms to test the accuracy of evidence and to ensure that a defendant can present exculpatory information to the trier. These constitutional commands serve the purpose of furthering the search for the truth. That they reflect other values as well, however, such as legitimizing the results of litigation and furthering the adversarial model, has not been lost on commentators or the courts.

210. See, e.g., Simon, supra note 199. Simon notes that the principle of procedural justice "holds that the legitimacy of a situation may reside in the way it was produced rather than its intrinsic properties." Id. at 38.

211. In some cases, notably criminal prosecutions, the higher-than-preponderance burdens of proof, such as "beyond a reasonable doubt," increase the likelihood that the "truth" or reality coincides with the outcome of the trial when the higher standards are met. However, when, for example, guilt is not determined beyond a reasonable doubt, there may remain some justifiable belief that the defendant in fact did commit the crime with which he is charged, despite the fact that reasonable doubts exist as to his guilt.

212. Of course, the "outcome" of the litigation includes the outcome of appeals as well. The appellate process ensures that the accepted trial processes have not been violated.


214. See, e.g., Lee v. Illinois, 476 U.S 530 (1986) (use of hearsay against criminal defendant violated right to confrontation because hearsay had insufficient indicia of reliability); United States v. Norman, 518 F.2d 1176, 1177 (4th Cir. 1975) (with respect to the common law "voucher" rule, maximum truth-gathering rather than arbitrary limitation is the favored goal).

Moreover, these procedures provide a frame of reference to guide attorneys' conduct in litigation, apart from any accountability to the substantive outcome such conduct helps produce.216 Thus, lawyers can justify their actions based on what the processes of litigation permit and compel them to do on behalf of their clients. If an attorney is faithful to the processes of advocacy, as for example a diver might be faithful to the individual twisting and somersaulting components of a dive, the outcome of the trial, like the result of the dive, will take care of itself.

A third aspect of the principle of procedural justice is that without regard to whether or not the end result of a trial is correct, the proverbial "day in court" functions as a state-sanctioned ceremony for resolving disputes. This ceremonial aspect of trials has been analogized to theater,217 to ritual,218 and to a game219 that personifies and reaffirms important cultural values,220 sublimates conflict,221 and justifies the outcome by reference to the proper application of fair procedures. The fair fight, played to a neutral audience and arbiter, has a cathartic effect perhaps as beneficial to some litigants222 as a favorable outcome.223

The realization of these various goals of trials, and the ability of courts to command compliance with their decrees, require that the judiciary preserve respect for the courts as institutions of justice, and obedience of litigants and society as a whole. Engendering respect merely for the procedures, not the institutions, of justice is unlikely;

216. See also Simon, supra note 199, at 38.

217. See, e.g., C. FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 123-35 (1970) (trials, like artistic performances, have inherent value apart from material consequences of litigation); Ball, supra note 193 (live presentation of cases in the courtroom, although a means to the end of judgment, is also an end in itself).

218. Compare Llewellyn, On Reading and Using the Newer Jurisprudence, 40 COLUM. L. REV. 581, 610 (1940) ("[A]n impressive ceremonial has a value in making people feel that something is being done; this holds, whether the result is right or wrong; and there is some value in an institution which makes men content with fate, whatever that fate may be.") with articles cited supra note 193 and Simon, supra note 199.

219. See Simon, supra note 199, at 104.

220. Id. at 92.

221. See, e.g., id. at 113 ("[A]n important, subsurface reason for the success of adversarial advocacy is that it serves the goal of social stability by sublimating conflict."); Ball, supra note 193, at 107 (theatrical character of lawsuits allows them to redirect aggression).

222. Indeed, some litigants may care little about the outcome of a trial, or may even prefer that their claims be rejected. For example, Jehovah's Witnesses refuse to permit even life-saving blood transfusions, yet they often have no ethical objection to being ordered by a court to undergo the medical procedure.

223. See, e.g., Simon, supra note 199, at 45.
such limited respect surely would not succeed in promoting the values ascribed to the principle of procedural justice. Disrespect for the court, moreover, could also interfere with the trial's search for the truth by diminishing participants' acceptance of the court's orders and procedures. Thus, for example, a lack of respect for the court might result in diminished seriousness of witnesses taking their oaths to tell the truth, attorneys following the rules of practice, and jurors listening to the judge's explication of the law.

This respect for the courts is frequently spoken of in reverential, almost religious, terms. Veneration for our institutions of justice, "enhanced by costuming and ceremony," fosters the perception of the courts as sacrosanct; no affront to their dignity is tolerated. Thus, for example, the Supreme Court, in holding that a disruptive defendant can be held in contempt, bound, and gagged at his trial, concluded that these actions are necessary to demonstrate that "our courts, palladiums of liberty as they are, cannot be treated disrespectfully" and to ensure that they will "remain . . . citadels of justice."

B. Shaping Trials with the Goals of Justice

The various values embodied in the overlapping goals of justice also find expression in a kind of institutional schizophrenia. On the one hand, trials require a calm, deliberative atmosphere conducive to the precise dispassionate finding of facts and application of complex legal precepts. On the other hand, courts are the forum not only for resolving some of the most critical disputes in our society, but also for mak-

224. Of course, there are mechanisms other than respect for the court for commanding obedience to the procedures and institutions of justice. For example, the sanctions for perjury will encourage many witnesses to tell the truth, despite their feelings about the court. Similarly, the contempt power itself provides courts with a device for ensuring obedience to its orders. Although the contempt power holds the potential for coercing compliance in many circumstances, it may often do so at the expense of increasing disrespect for the court. More importantly, the threat or use of contempt sanctions frequently is ineffective without respect, and cannot replace the need for respect. For example, the contempt power has little effect on a jury's power to disregard the court's instructions if the jury does not respect the court enough to comply. Even participants in the trial process such as attorneys, who are subject to the contempt power, will cooperate with the court far less when they have lost respect for the judge or the court as an institution of justice.


226. Ball, supra note 193, at 83. Professor Ball suggests that the wearing of judicial robes, and ceremonies, such as the "Oyez" and the mandatory rising at the judge's entrance and exit, "create a dramatic aura which has even been described in hyperbolic religious terms." Id.

227. Illinois v. Allen, 397 U.S. 337, 346-47 (1970). Not coincidentally, I use as an example a contempt case. As we shall see, it is the value courts place on respect that causes one of the greatest problems in defining the respective limits of advocacy and contempt.
ing the most personal gut-wrenching decisions concerning the fates of individual lives. One need only witness a parental-custody termination proceeding to understand the nature of the emotions evoked by the administration of justice. To call a serious criminal trial emotionally charged is to describe what takes place inside of a nuclear reactor vessel as a rolling boil.

It is not just the parties to litigation whose emotions are stirred. Most attorneys, too, are deeply moved by their roles in serious trials. Clients rely on their attorneys to protect their interests, their liberty, and their lives. The experience of attorneys spending sleepless nights during trials is far too common to conclude that lawyers who feel and express powerful emotions in the court are taking their jobs too seriously or are personalizing the disputes.228 These pressures are unavoidable, for it is not only litigants that rely upon lawyers, but the judicial system that counts upon lawyers to make the administration of justice work.

The emotions referred to thus far are those stirred by the gravity of the decisions being made in the courtroom—the consequences of litigation—and by the general feelings of responsibility that attorneys have for their clients' causes. But there is another powerful force at work adding heat and pressure to the courtroom atmosphere—the adversarial system. The adversarial system requires far more from advocates than the mere presentation of opposing viewpoints; it requires that advocates do everything possible to further their clients' interests. Thus, attorneys must be vigorous, contentious, argumentative, and above all, persuasive. By design, a trial is a clash of intellects, a struggle to influence the minds and hearts of the factfinders; it is a contest for control to frame the issues, to shape the controversy, and to place information and argument before the factfinder.

As all trial judges and attorneys have experienced, this contest often becomes a heated battle in which tempers flare and egos bristle. This too is an accepted corollary to our adversarial system. For it is this very adversity that embodies the process value of a trial as a fair fight, and safeguards and promotes its truth-finding.

In this adversarial atmosphere, emotions are highly visible because the ability to persuade flows not only from the strength of an attorney's logic but from the force of her feelings and the power of her personality. Thus, an advocate should not, indeed cannot, repress all

228. Indeed, one argument frequently advanced against the death penalty is that the strain it puts upon attorneys representing clients in capital cases is too great.

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of her reactions and emotions; these are necessary to the effective presentation of her client’s case.

To be sure, the goals of justice require some degree of order to judicial proceedings. Disorder in the court can interfere with the truth-finding functions of a trial, negate the perceptions that the procedure is fair and the outcome just, and diminish the dramatic or ritualistic value of the proceeding.\textsuperscript{229} For the degree of order in the proceedings affects not only the perception of fairness, but also the actual continuity and fairness of the processes of justice. Indeed, at some point a chaotic trial would violate the due process rights of a litigant prejudiced by the lack of orderly procedures.\textsuperscript{230}

The orderliness of a trial also relates to respect for the court; the two are mutually reinforcing. Without some consensus acknowledging respect for the authority of the court and fairness of the trial process, the judge probably could not retain control.\textsuperscript{231} The rules of trial procedure, backed up by the force of the contempt power, may be insufficient to maintain order\textsuperscript{232} in the absence of the participants’ respect.\textsuperscript{233}

\textsuperscript{229} It is nevertheless possible to imagine that the theatrical and cathartic values inherent in a trial persist in, and perhaps even are magnified by, disorder. For example, Professor Ball has compared the Chicago Seven trial to theater of the absurd. Ball, supra note 193, at 97.

\textsuperscript{230} But see, United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963) (upholding criminal convictions of several defendants in “mass conspiracy” trial against due process claim arising from trial court’s refusal to sever other defendants who engaged in outrageous conduct during trial, such as hurling a chair at the prosecutor and climbing into jury box and pushing jurors).

\textsuperscript{231} For the most part, there is a startling level of compliance with the orderly processes of justice given the inevitable consequences, for example, to many criminal defendants. See, e.g., N. Dorson & L. Friedman, supra note 5, at 114. It certainly seems that in many instances where respect for the court or the judge was wanting the orderliness of the trial was compromised. See, e.g., In re Dellinger, 461 F.2d 389 (7th Cir. 1972).

\textsuperscript{232} Therefore, overuse of the contempt power may ultimately prove counterproductive, failing to prevent disorder, and engendering greater disrespect for the courts. Respect for the courts, in many instances, is more likely to be fostered by the restraint of power and the exercise of moral authority. See, e.g., Bridges v. California, 314 U.S. 252, 270–71 (1941) (with respect to published criticism of judges, a silence enforced by contempt power, however “limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect’’); Note, Disruption in the Courtroom, 23 U. Fla. L. Rev. 560, 583 (1971).

To increase regard for the judicial system, as well as the orderliness of trials, judges must take a more active role than they currently do to avoid both confrontations and challenges to their authority. Judges should also use methods other than the contempt power when the need to assert their power is unavoidable. This approach to the contempt power would maximize the scope of permissible advocacy in addition to regard for the judicial system.

\textsuperscript{233} The contempt power alone has often proven inadequate to protect the orderliness of proceedings. For example, in In re Vincenti, 92 N.J. 591, 458 A.2d 1258 (1983), the trial judge issued numerous contempt citations to an attorney during the course of trial for conduct such as accusing the judge of racism, cronyism, collusion with the prosecution, permitting the proceedings to have a “carnival nature,” conducting a “kangaroo court,” being caught up “in his
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But order and immediate obedience to judges' commands are not the only, or even the most important, dynamics of a trial; too great a preoccupation with them can defeat the core values of the administration of justice. Thus, there often is an unavoidable clash between the courts' need for order and decorum and the attorneys' duty to argue to the outermost bounds permissible by law. Attorneys are obliged by ethical responsibilities, moral imperatives, and constitutional mandates to work at the very edge of permissible advocacy. Just over that edge, they may be jailed for contempt. Too little control over the participants in the trial process can interfere with the ability of the courts to conduct their business. But too quick a resort to the contempt power, either by imposition or by threat of sanctions, can chill the independence of the bar and stifle the ardor with which attorneys argue their clients' causes; this too can effectively undermine the ability of the courts to dispense justice.

C. The Diversification of Roles in a Trial

The various values and tensions discussed above are personified in the roles of lawyer and judge. The lawyer is, above all, partisan—committed to advocate vigorously to further her client's ends; the judge is neutral, committed to advancing the search for truth. The lawyer exercises broad discretion as to what procedures, rules, and tactics to exercise, while the judge reacts to these and interprets and applies the rules as they are invoked. Just as the lawyer is passionate in her advocacy, the judge must remain dispassionate—indifferent to the emotions stirred by the battle.

Moreover, even within the individual roles of attorney and judge, these dynamics persist. An attorney is both an advocate and an officer of the court, thus engendering debate whether her primary duty is to advance her client's interests or to assist the trier in finding the truth, whether to accede immediately to every ruling and command
of the court or to struggle with the court to convince it of error. A judge must balance her duty to remain neutral, outside the fray, with the obligation to intervene to protect the purpose of truth-seeking, and must maintain order in the courtroom while permitting attorneys adequate leeway to argue. Each role embodies a spectrum of responsibility and discretion within which some range of conduct is acceptable. There is room to move through these ranges, but neither judges nor attorneys can stray too far. An attorney cannot, consistent with her obligations both to the client and to the administration of justice, either kowtow to the court or ignore its commands. Although a judge can intervene to promote an accurate outcome, aligning her authority with one side or the other may constitute reversible error.

The roles of attorney and judge are in many ways adverse, but they are also mutually dependent. While each attempts to steer the trial in a different direction, they must recognize and rely upon each other's function to fulfill their own roles and to produce what we consider to be justice. In so doing, the judge is no mere bystander observing the trial, or even a referee; the battle is fought through the judge. The judge is a party to the proceeding whom the attorneys must ceaselessly convince of the correctness of myriad arguments. Although attorneys are considered "officers of the court," with certain ill-defined obligations to the judicial system apart from their loyalty to their clients and their duty to obey the rules of litigation. Prosecutors in particular have obligations to interests other than "victory" for their clients. See infra note 336. Moreover, lawyers such as public defenders and public interest attorneys, who not only represent individual clients, but also constantly struggle to reform the legal system itself, may have conflicts between the loyal representation of an individual client and their advocacy for systemic relief or for other clients. These conflicts create internal tension for lawyers. See, e.g., United States v. Hickman, 592 F.2d 931, 933 (6th Cir. 1979).

Literally, the attorneys are forbidden from arguing directly with each other. Rather, they must address all their arguments to the court, which in turn filters the arguments, adding its own interpretation, and directs them back to opposing counsel. I use the phrase "a party to" advisedly. In a sense, the court acts as a third litigant or party to the action, with an independent interest in furthering the possibility of a correct outcome. When that interest coincides with the position of one party or the other, the judge's viewpoint may take on the posture or arguments of that party. And, of course, even in pursuing justice, the judge attempts to further her own perceptions of what is an accurate outcome. Indeed, judges' individual perceptions of cases and their conceptions of justice undoubtedly lead them at times to impose their views on the direction of the litigation through trial rulings or remarks to the litigants, counsel, and jury.

It must, for example, be extremely difficult for a judge who has suppressed highly incriminating but reliable evidence not to attempt to compensate to further what she, with the knowledge gained from the suppression hearing, perceives to be the accurate outcome. Further, it would be naive to think that judge's actions are not affected by various personal feelings about the merits of the litigation, the parties, attorneys, and many other factors, despite what the trial rules classify as determinative criteria for resolving the matter in dispute. For example, docket pressure on the court might lead a judge to curtail the number of witnesses a litigant may
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ney's must accept the court's commands as the ultimate authority in a trial, it is often the lawyer's responsibility to persuade the court that its own views are wrong—to prevail upon the judge to change her mind. Not surprisingly, it is often difficult for attorneys to reconcile, in the heat of trial combat, their duties to their clients with those to the court.

D. Integrating the Values of Justice with the Definition of Obstruction

I have suggested in this section that the various goals of justice and of trials are in conflict, thereby resulting in competing tensions for the trial participants. If that is so, two questions critical to our discussion of obstruction emerge. First, if the goals and values of a trial conflict, how should we treat conduct that simultaneously advances one goal while it impedes another? Second, what quantum of interference with the values underlying our notions of justice suffices as an obstruction punishable by contempt?

There are a number of potential resolutions to the first question. One answer is that I am wrong in arguing that the values of justice are in conflict. If the goals of a trial are in fact harmonious, conduct which interfered with any one of them could obstruct the administration of justice because no countervailing benefit to justice would accrue from such behavior. Even if it is concluded that the goals of a trial do conflict, however, interference with any of the values of justice might be considered contemptuous despite any corresponding benefit to another value. On the other hand, the positive value to a particular interest of justice could be weighed against the detriment to another interest resulting from the conduct to determine whether the administration of justice, as a whole, is obstructed. When we examine each of the three approaches it becomes clear that only the last solution maximizes the various values underlying our system of justice.

1. Harmony or Conflict

Many courts and commentators suggest that a trial represents a synthesis of its various goals; that, for example, the vigorous battle of

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adversaries is “best calculated to getting out all the facts.” Of course, there is a substantial degree of overlap between the different models and corresponding values of justice. For example, the fight model of advocacy overlaps with aspects of the principle of procedural justice: both value the attributes of a fair fight between adverse interests. Similarly, the goals of order and respect for the court overlap with and assist in fulfilling the principle of procedural justice.

The techniques of trial practice encompassed by some models of justice can be extremely effective in promoting the principal values of other models. At least one writer has cautioned against exaggerating the differences between the “fight” and “truth” models of a trial. A fight between adversaries will often do a marvelous job of ferreting out the truth. Whether the fight model, however, or emphasis on the value of ritual, for example, is the best means for achieving an accurate outcome is another question. So too is it another question whether, despite the ability of these models and values of advocacy to reinforce one another, there are also inherent contradictions between them.

As one highly regarded jurist has noted, for example, “we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.”

It is unnecessarily to debate whether, as a whole, our system of adversary litigation is riddled with contradictory values and objectives. Even if the influences exerted by the different versions and values of trial advocacy do in fact harmonize to produce a result true to all the values, they do so only at a systemic level. That is, strict and immediate compliance by attorneys with the court’s directives, for example, in some big view, harmonizes with the attorneys’ duty to vigorously fight for their clients. But, at the moment-to-moment level of a particular trial, the level at which specific advocacy decisions are made and ruled upon, there are unquestionable conflicts between the models of litigation, 244 the values of justice, and the functions of lawyers and judges. At this level, privileges prevent disclosure of the

242. See, e.g., articles cited supra at note 193.
243. Frankel, supra note 193, at 1036. Nevertheless, one can still argue that it is not the values of our adversary system that conflict with the search for truth and an accurate outcome, but abuses of the adversary process, in disregard of those values, which contradict the principles of justice.
244. Noonan, for example, suggests that the entire system of trial procedures is designed as a whole to be the most effective process for exposing and determining the truth. He recognizes,
truth, the lawyer's duty to argue strenuously frequently conflicts with the court's desire for decorum, and vigorous advocacy or disagreements with the judge may appear disrespectful. Here, it is not so easy to gauge the overall effect on the administration of justice when the same conduct advances one value and harms another. As to these conflicts over particular rulings and tactics, attorney and judge, whose roles complement each other so well in producing justice in the system as a whole, experience tension and struggle. The change in focus reveals different dynamics, just as the forces of random mutation and natural selection driving evolution do not appear quite so harmonious to individual predators and prey, engaged in a specific struggle to survive.245

Thus far I have suggested that the individual values which together form our concept of justice might have independent worth to the fair administration of justice. That is, the importance we accord to interests such as the "fight" aspect of litigation and to order, respect for and obedience to the court may be separate and apart from their contribution to some ultimate goal of justice; rather, they are aspects of justice. But even if we view the entire system of trial practice as structured to best further the fundamental purpose of seeking truth and producing accurate results, and that, therefore, any independent value of the individual components of justice is subsumed by or subordinated to that ultimate goal, the search for truth itself still encompasses unavoidable conflict between those individual components at the level of specific courtroom conduct.

Thus, for example, when a judge orders an attorney to move on to a new area of cross-examination because the current line of questioning appears to be exhausted, but the attorney believes additional questions will expose the witness' mistakes, or lies, or biases, both positions however, that this overriding goal does not dictate the course of the particular actions of attorneys. Noonan, supra, note 196.

245. Consider, for example, the following hypothetical. Assume that an attorney objects to a cross-examination question directed to her client by opposing counsel. The attorney, who has two separate grounds for the objection, irrelevance and privilege, is able to voice only the first before the judge overrules the objection. But when the attorney presses the objection on the privilege ground, the judge orders her to cease further argument because the judge has already ruled, and after the attorney tries more times to argue her point, the judge threatens contempt. In these circumstances the attorney is placed in a seemingly irreconcilable dilemma, with several values of justice pitted against each other: vigorous representation, societal and personal interests underlying the privilege, and fairness of the trial process on the one hand; respect for the court, obedience to its orders, and orderliness of the proceedings on the other. Whatever action the attorney now takes, some of these values will be advanced and others diminished.
come cloaked in the banner of furthering the "truth." The lawyer is attempting to demonstrate that the testimony of a witness is unworthy of belief; this promotes the truth-seeking function. But the judge is also working to promote that function by preventing repetitive questioning which might be confusing or prejudicial, and perhaps by protecting the witness from verbal assault, which could unfairly affect her performance, and the perception of her credibility.

Furthermore, there is tension here between the roles of attorney and judge in the trial process. Although the attorney’s duty is to fight to bring out the truth (pursuant to the “truth-seeking” model of justice we are now considering), it is a truth favorable to her client. The judge may be interested in a different truth—one that corresponds perhaps to the adversary’s version or to neither version. In any event, the ways in which the two roles promote the truth are different, and they operate in large part through opposition. The two roles bring different perspectives to bear, and reflect different levels of understanding. The attorney brings a greater knowledge of the action: she comes with a theory of the case, of how the evidence and arguments fit together, of the importance of particular information, and of how the case will develop at trial. The judge brings distance from the case, a non-partisan’s eye, more finely tuned to detect prejudice, cumulative evidence, and fairness to both parties. It is of no matter that the judge might merely parrot the position of one attorney or the other; there is

Of course, to the extent that some independent value of advocacy is recognized, apart from its truth-seeking function, there is even greater weight on the lawyer's side of the balance. At a subtler level, moreover, if the role of the attorney is to manipulate perceptions of reality to create truth for the trier, and the trial procedures permit this, then additional questioning that would foster the perception that the witness was not credible would complement the lawyer's role without regard to whether the witness was in fact telling the truth, and irrespective of what was actually the truth.

Moreover, protecting witnesses from harassment, embarrassment, and needlessly repetitious questioning also promotes the long-term goal of truth-seeking in trials by encouraging witnesses’ participation and cooperation. However, apart from either these long-term or more immediate goals of furthering the search for truth, the processes of justice protect witnesses from unnecessarily unpleasant experiences as a function of their right to be free from abuse. See, e.g., Fed. R. Evid. 611 (providing that the court shall exercise control to protect witnesses from harassment or undue embarrassment).

Numerous cases have noted the difficulty for a judge, without the benefit of counsel's understanding of the case, to comprehend fully the importance of the evidence and the applicability of salient legal principles. For example, in the context of in camera inspection of documents, courts have noted that a judge's solitary perusal of information may be inadequate without the informed argument of advocates. See, e.g., Natta v. Zletz, 405 F.2d 99 (7th Cir. 1968) (criticizing in camera inspection in context of trade-secrets privilege on ground that counsel seeking disclosure had no opportunity to rebut privilege claim), cert. denied, 395 U.S. 909 (1969).
still conflict between what the judge wants to do and what at least one attorney wishes to accomplish.

Nevertheless, the very function of the judge is to rule on these kinds of conflicts, to determine the best course for advancing justice. But the problem is, many of these disputes over trial practice do not have clear answers. When the answers are clear, as, for example, when a prosecutor suggests a defendant is guilty based on his failure to testify, there is little conflict between the values of justice; no goal of justice or theory of advocacy justifies such conduct explicitly placed outside the bounds of legitimate advocacy, as in this case by the Constitution. Where there is room for argument, however, the lawyer’s function is to argue; and there is usually room for argument. Thus, there must be latitude for an attorney to rephrase an objectionable question to cure the defect, to argue with the judge to persuade her to change her mind, to pursue a new theory that might justify the attorney's intended action, to minimize the scope of adverse rulings, and to reexplore rulings as the evidence develops and the theory of the case evolves. For a judge to refuse to listen to all of the attorney's arguments or to cut them off prematurely interferes with the attorney's ability to function properly.

On the other hand, the court must have ultimate control of the proceedings and must be able to order the cessation of argument after being fully informed and ruling on the issue. An attorney's insistence to continue arguing, repeating arguments in unchanged circumstances, and refusal to obey the court's direct and clear rulings hampers the function of the judge and of the trial.

Furthermore, once the judge has ruled, disobeying the court's authority implicates an additional set of values beyond order, and beyond concerns for the continuity and fairness of the trial: respect for the court. The judge must have the power to command obedience to the court's orders whether or not they are correct. After all, the lawyer lacks the exclusive ability to discern the correctness of rulings;

249. Even in circumstances where the trial procedure is clear, many commentators would argue that it is entirely appropriate for lawyers to attempt, for example, to introduce patently inadmissible evidence, because it is incumbent upon opposing counsel to object. However, this conduct becomes less tolerable where, as with the prosecutor commenting on the defendant's silence, the information being revealed to the trier is extremely prejudicial and the judge has no prior chance to rule on its admissibility.

250. See, e.g., Griffin v. California, 380 U.S. 609 (1965) (adverse comment to the jury by either prosecutor or judge on defendant's decision not to take stand violates fifth amendment privilege against self-incrimination); United States v. Rodriguez, 627 F.2d 110 (7th Cir. 1980) (prosecutor's comment to jury concerning one of three defendant's failure to testify violated fifth amendment rights of all (three defendants).
more importantly, that is not the lawyer’s function. However, when the court breaches its own responsibility by prematurely cutting off debate, or where the judge appears to misunderstand the issues, many of the values of justice would be furthered by the lawyer’s efforts to persuade the judge that her ruling is incorrect or is inapplicable, or to question the judge concerning the grounds for the ruling. Surely justice does not require an attorney’s complete cooperation with the misfunction of the trial process. Unfortunately, when the attorney pursues any of these courses, it may appear to the judge that this conduct is disrespectful and challenges the court’s authority.

One additional dynamic of litigation that causes tension between the goals of justice is the vigorousness of advocacy; such advocacy frequently strains the court’s interest in control, decorum, and respect. Courts have concluded that many minor excesses of advocacy obstruct order and demonstrate disrespect, including impolite or abrasive comments to the judge, or to witnesses, or outright disobedience of the courts’ commands.

251. See, e.g., In re Cohen, 370 F. Supp. 1166, 1173 (S.D.N.Y. 1973) (attorney commented, “Come on, Your Honor, this is ridiculous,” and “[the] court’s conduct in this trial makes it a travesty of justice”); In re Buckley, 10 Cal. 3d 237, 514 P.2d 1201, 1204, 110 Cal. Rptr. 121 (1973) (attorney stated to judge, “This court obviously doesn’t want to apply the law”); In re Gates, 248 A.2d 671, 674 (D.C. 1969) (in response to court’s request for counsel’s authority for pleading “not guilty,” counsel stated that he had not come before the court “to listen to a whole lot of stuff from you” and that he was not in the mood for “a whole lot of stuff” from the court); In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260, 1265 (App. Div. 1987) (attorney commented to the court that counsel was “tired of this kind of stuff,” in reaction to court’s alleged mischaracterization for the record of attorney’s physical gestures), aff’d, 118 N.J. 51, 570 A.2d 416 (1990).


253. See, e.g., Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs, 552 F.2d 498 (3d Cir. 1977) (attorney disregarded trial judge’s explicit and repeated instructions not to state the basis for his objections); People v. Boynton, 154 Mich. App. 245, 397 N.W.2d 1919 (1986) (attorney continued to contest court’s ruling after judge made basis of ruling clear several times); In re Burns, 19 Mich. App. 525, 173 N.W.2d 1 (1969) (attorney continued to argue after trial judge advised him not to do so during court’s instructions and judge banged gavel three times but attorney refused to comply); State ex rel. Smith v. District Court, 677 P.2d 589 (Mont. 1984) (attorney failed to cease argument after several orders to do so); In re Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976) (attorney persisted in making arguments after court made its ruling and warned that further statements were not in order).
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to sit down\textsuperscript{254} or be quiet,\textsuperscript{255} and tantrums of frustration.\textsuperscript{256} But these acts frequently are as much a byproduct of zealous representation and the heat of the courtroom as, for example, carbon dioxide is a waste product of combustion. We tell attorneys that the highest standard of their profession is to practice advocacy at the very limits of what is permissible.\textsuperscript{257} Indeed, it is upon the vigorousness of advocacy that the truth-seeking function of a trial depends. We do that, however, knowing not only that occasional excesses, lapses of decorum, and momentary antagonism toward the judge are inevitable consequences of zealous representation, but that the outer bounds of aggressive advocacy are not entirely clear, and that the personal sensitivities of judges often will lead them to see an obstruction where none may be present. That is not to say that moments of intemperance are commendable as vigorous advocacy; but they are part of the price we pay for the benefits of that advocacy. Thus, the intensity of an attorney's representation can simultaneously reinforce and gnaw at the foundation of our system of trial justice, and these stresses are pervasive. If the ordinary processes of trials and the conduct of the participants promote some values of justice while they impair others, what is the ultimate effect on justice?

2. Accepting the Conflicts but Rejecting a Balance of Interests

One could acknowledge the existence of competing values of justice and their manifestation in day-to-day conflicts in the courtroom, and nevertheless conclude that an attorney's conduct impairing any value

\textsuperscript{254} See, e.g., \textit{In re} Nesbitt, 345 A.2d 154 (D.C. 1975) (repeatedly and willfully refused to obey order to leave bench and be seated); \textit{State ex rel.} Smith v. District Court, 677 P.2d 589 (Mont. 1984) (affirming conviction of attorney for failing to sit down after being ordered to do so); State v. Wilson, 30 Ohio St. 2d 312, 285 N.E.2d 38 (1972) (defense counsel disregarded orders to sit down).


\textsuperscript{256} See, e.g., Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) (reversing contempt conviction of attorney for flinging papers on counsel table and breaking water pitcher); People v. Roberts, 42 Ill. App. 3d 604, 356 N.E.2d 429 (1976) (counsel loudly expelled air from his lungs while prosecutor was arguing an objection and shouted “How come everything he does is right and everything I do is wrong?”); \textit{In re} Logan, 52 N.J. 475, 246 A.2d 441 (1968) (reversing contempt conviction of attorney who, after the court correctly sustained an objection to a remark in the attorney's opening statement to jury, refused to continue with trial); \textit{In re} DeMarco, 224 N.J. Super. 105, 539 A.2d 1230, 1235-36 (App. Div. 1988) (attorney stated to judge at pretrial hearing, “He's somebody from the state, it's got to be, right? . . . Your Honor . . . you are dancing to the tune of the state. . . . Thank you for the justice today.”).

\textsuperscript{257} See, e.g., \textit{Model Code of Professional Responsibility EC 7-1} (1980).
would at some point constitute an obstruction,\textsuperscript{258} regardless of the countervailing benefits to other goals of the trial process. Under this approach, an attorney could legitimately seek to advance a goal of justice only to the point where it interfered with another value. Thus, for example, attempts to advocate after a judge had ruled or ordered cessation of debate, or any abrasive comment to the court would be impermissible and might be considered an obstruction of the court’s interest in order, obedience, and respect.

This approach to the dilemma of the competing goals of trial practice appears to be the doctrinal basis for many contempt decisions.\textsuperscript{259} Such a solution protects the autonomy of the interests at stake and maximizes the value of each with respect to the others. Essentially, this methodology mirrors that generally accepted for resolving other conflicts between competing interests, such as those arising between first amendment values and the police power interests in health and welfare. In that context, speech is protected up to the point where it interferes with a compelling governmental interest, as when it incites (or poses a clear and present danger of inciting) illegal conduct. As discussed earlier, that is precisely the test used by the Supreme Court to measure the limits of extrajudicial speech criticizing the administration of justice in ongoing judicial proceedings against the courts’ interest in preventing a punishable attempt to obstruct justice.

Those cases correctly recognize, however, that not every interference with an individual value of justice is tantamount to an obstruction. In fact, those cases teach that out-of-court statements demonstrating disrespect for the administration of justice,\textsuperscript{260} or criticizing the honesty or competence of a judge, generally are insufficient to trigger punishment of such expression as contemptuous.\textsuperscript{261}

\textsuperscript{258} Not every adverse effect on each interest promoted by trial justice, even when there was no corresponding advancement of any other value, would be sufficiently harmful to constitute an obstruction of the administration of justice. See infra Section III.E.

\textsuperscript{259} See, e.g., cases cited supra notes 250–56.

\textsuperscript{260} See, e.g., Wood v. Georgia, 370 U.S. 375 (1962):

Whatever the Judges’ intention, the action . . . ordering [the grand jury] . . . to investigate “negro block voting” will be considered one of the most deplorable examples of race agitation to come out of Middle Georgia in recent years. . . . [T]his action appears either as a crude attempt at judicial intimidation of negro voters and leaders, or, at best, as agitation for a “negro vote” issue in local politics. Id. at 379; see also Craig v. Harney, 331 U.S. 367, 380 (1947) (“That was the travesty on justice, the judge’s refusal to hear both sides. That’s where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury.”)

\textsuperscript{261} See cases discussed supra notes 67–104 and accompanying text. Similarly, criticism of a judicial proceeding that is no longer pending, or the threatened protest of a court’s pending decision, presents no punishable attempt to obstruct justice at least where such a critical response
Although this conduct might diminish respect for the court, it does not obstruct the administration of justice because it does not pose a direct and immediate threat of affecting the outcome of the proceedings or the ability of the court to conduct its business properly. Judges are presumed to be able to ignore influences outside the processes of litigation. However, where the Court has found that out-of-court conduct did in fact present a clear and present danger of influencing judicial decision-making, such as picketing near a courthouse, it has permitted the suppression of such activity.

This approach—protecting an individual's right to speech until it interferes with a sufficiently important governmental interest—works tolerably well in the context of extrajudicial non-advocative speech. As we have seen, it is capable of distinguishing between the harm to some values of justice, such as respect, which is not sufficient to obstruct the administration of justice, and the danger to others, such as insulating judges from improper influence, which may be obstructive. Thus, this solution for resolving the conflict between conflicting values appropriately recognizes that each individual component or value of justice is not synonymous with the administration of justice, and further, that each of these various values is not necessarily of equal worth.

But where the conduct in question involves advocacy in the ongoing judicial proceeding, that same resolution of the competing interests requires further analysis to determine whether justice is in fact being hampered. This is so because advocacy is itself one of the most

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262. Craig v. Harney, 331 U.S. 367, 376 (1947) (judges "are supposed to be men of fortitude, able to thrive in a hardy climate").

263. See, e.g., Cox v. Louisiana, 379 U.S. 559, 565 (1965) (court upheld statute prohibiting picketing "near" a courthouse to prevent judges, jurors, and court officials from being influenced).

264. Indeed, this principle of accounting for the value of advocacy in determining whether an obstruction has occurred should also be applicable to out-of-court speech, to the extent that such speech may further the ultimate ends of justice. Although extrajudicial speech may provide only minimal benefits to the goals of trial justice, whatever value it does serve should not be ignored. For example, in Wood v. Georgia, 370 U.S. 375, 392–93 (1962), the Supreme Court found that out-of-court statements criticizing a grand jury's investigation into charges of electoral corruption did not rise to the level of an imminent obstruction. The Court noted that the
important components of the administration of justice. Therefore, even where the particular expression of advocacy is harming another important value of justice, such as the orderliness of the proceeding, it may be simultaneously furthering the goals of the trial. Thus, the use of the contempt power to stifle advocacy—determining that particular advocative behavior obstructs the administration of justice—may be inconsistent with the ultimate goals invoked to justify the contempt power.

This point can be seen clearly by focusing on truth-seeking as the fundamental objective of trial justice. An attorney's refusal to comply immediately with the court's orders might at times advance the truth-finding function of a trial far more than it would harm it. For example, continuing to argue with the judge about an objection to an examination question after a ruling or an order to cease argument is likely to benefit truth-seeking when this continued argument leads the judge to correct the ruling or refine it as the trial continues. At the very

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265. See, e.g., Strickland v. Washington, 466 U.S. 668, 685 (1984) (sixth amendment envisions counsel "playing a role that is critical to the ability of the adversarial system to produce just results"); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

266. This proposition assumes that the correct result of a particular evidentiary ruling increases the probability of an accurate outcome. But, as discussed earlier, the proper application of some rules and procedures, such as evidentiary privileges, may achieve the opposite result. Correct rulings on those issues, however, furthers the specific values underlying the procedures. For example, correctly upholding a claim of privilege may hinder the search for truth, but will reinforce the purposes for the privilege, which are meant to trump the truth. Therefore, the positive value of advocacy, even where the conduct in question interferes with other goals of the trial, also advances other interests in the trial process besides truth-seeking. See infra notes 268–69 and accompanying text.

267. Refining the scope of a ruling that has continuous vitality in the litigation—a standing order—ensures that the attorneys will not interpret the ruling too broadly or too narrowly as they seek to apply it throughout the trial. An error by counsel in either direction could interfere with the truth-seeking function of the trial. To take a simple example, assume that a judge precludes evidence of a subsequent remedial measure pursuant to Fed. R. Evid. 407, which bars
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least, such additional argument provides some benefit to the goal of producing an accurate outcome,\(^\text{268}\) whatever its negative impact on that goal or any other value of justice might be.

Even if the ultimate goal or goals of a trial are deemed to be broader than that of an accurate outcome—an amalgam of all the values of justice—advocacy advances those goals to some extent although it may simultaneously harm others. All seasoned trial attorneys have had numerous experiences in which additional argument after a court's ruling or order to cease in fact persuaded the judge to change her mind. In those circumstances, the administration of justice may be aided even where the judge changes her ruling to an incorrect one (as measured by a subsequent appeal), because the values of trial justice contemplate that judges make decisions based on a full exchange of views and understanding of the issues. Additional argument causing a judge to change her mind adds to a fuller appreciation of the issue, whether or not the final decision is correct. Furthermore, to the extent that there is some potential for the advocacy itself to contribute to the judge's decision-making, it may be beneficial whether or not it actually persuades the judge to reverse her ruling.

Of course, to say that particular expression has advocative value and therefore provides some benefit to the administration of justice, is not to conclude that it cannot constitute an obstruction. Whatever benefits such expression provides may be far outweighed by the detriment it causes. For example, if an attorney violates a direct and clear—but erroneous—court order not to reveal certain information to the jury, her conduct has advocative value in that the information will actually further the truthfinding function of the trial. Nevertheless, the attorney's actions may constitute an intolerable obstruction. Not only does disobeying the judge interfere with the court's interests in respect and order, but such conduct directly threatens the deliberative processes of the trial. That is, although an attorney's attempt to persuade a judge that a ruling is erroneous is within the scope of an attorney's legitimate function, the violation of a clear ruling regarding what may be said to the jury is not. As to the former, the difficult question

admission of such evidence except in limited circumstances. Although the circumstances justifying admission of the evidence may not exist at the time of the judge's ruling, further development of the facts might create a foundation for admissibility, as, for example, if the defendant later denies control over the device that was repaired. It is critical for both counsel to know whether the court's ruling leaves open such a possibility or forecloses it. Thus, additional argument that clarifies the judge's understanding of her ruling may be extremely beneficial to promoting an accurate outcome in the case.

\(^{268}\) Moreover, to the extent that the trial judge's change of ruling is correct, it obviates the potential for reversal and remand on appeal, and perhaps even the appeal itself.

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is: when might it be permissable for an attorney to continue to argue with the judge once the judge has indicated the debate should end. As to the latter, the assessment of what a jury may hear probably is a determination reserved solely for the trial judge, whether the court’s decision is right or wrong.\textsuperscript{269}

There might be several other characteristics that distinguish the relative net benefits or burdens to the administration of justice in the two examples.\textsuperscript{270} For now, the important point is that different kinds of advocacy in different circumstances can be of greater or lesser value to the goals of a trial, and can interfere to varying degrees with other components of the administration of justice. If we know that the expression of advocacy in a particular situation causes harm to the administration of justice sufficient to outweigh its positive value, I do not want to suggest that the advocative conduct cannot constitute an obstruction because it adds \textit{some} good to the system. To the contrary, if, despite the benefits flowing from the expression of advocacy, such expression nevertheless interferes with the administration of justice—the ultimate or composite goal of a trial—it should be considered an obstruction.

My thesis, rather, is that one cannot determine whether the ultimate ends of justice are obstructed by the expression of advocacy unless the positive value of the advocacy is weighed against the harm it causes to other aspects of the administration of justice. For, if justice is composed of many different values, the essence of administering justice must be to balance the relative importance and maximize the effectuation of those values such that each can achieve its fullest expression with the least interference to the others. And maximization of the total benefits of justice may, in some circumstances, require that one value be permitted to encroach upon another. What we need, then, is a methodology for balancing the relative benefits and harms to the administration of justice flowing from particular conduct, and a calculus for defining the limits of the various components of justice in relation to one another.

\textsuperscript{269} The text speaks of clear rulings by the trial judge. However, the same principles are applicable to well-established and unequivocal appellate rulings concerning the permissibility of making certain references to the jury. For example, legitimate advocacy never allows a prosecutor to suggest to the jury that an inference of guilt or credibility can be drawn from a defendant’s membership in a minority group. If an attorney did make such a comment to the jury, it would clearly be obstructive of justice without advocative value.

\textsuperscript{270} For example, in the latter hypothetical any obstructive effect of the attorney’s conduct could fairly be considered more intentional. In addition, using the contempt power to punish the behavior in the second example would likely have less of a chilling effect on vigorous and legitimate advocacy than using the contempt power on the conduct in the first example.
3. **Balancing the Values of Justice**

This proposal for balancing the competing interests underlying the administration of justice to maximize their synergistic potential may appear to manifest an assumption that we cannot obtain all the benefits of advocacy without suffering some corresponding detriment to other values or goals of the trial. Therefore, it is fair to ask whether, if we prohibit the expression of advocacy that does interfere with other values, we could nevertheless derive the same benefits from the advocacy by demanding a form of expression that does not interfere with other values? If so, there would be no justification for permitting advocacy to impinge upon those other values.

In some circumstances advocacy could be expressed differently to create little or no conflict with other interests of the judicial system and still realize its maximum potential. For example, an attorney might tell a judge in the course of argument to “drop dead,” or register his disagreement with a ruling by stating his hope that the judge had “recovered from his psychotic breakdown.”\(^{271}\) There is little question that the entire value of any advocative component to these remarks could have been achieved without such disrespectful expressions. Conversely, it is equally clear that the optimal value of some advocacy cannot be fully realized without some interference with the court’s interests in order, respect, and obedience. Thus, for example, where the judge has cut off debate but appears to have misunderstood the attorney’s argument, there is no less intrusive alternative to continuing to argue with the judge if the attorney is to try to expose and rectify the misunderstanding.

A more complex class of the expression of advocacy includes minor lapses of decorum and excesses of advocacy, such as irritating remarks to the judge or refusals to obey an order to sit down or be quiet. It can be argued that the advocative value of such conduct could be retained with less contentious behavior, and that the particular excesses themselves have no legitimate advocative worth. The problem is, however, that to the extent these minor lapses are the inevitable by-product of the most vigorous permissible advocacy, treating them as punishable obstructions would chill the zealousness of the bar. Therefore, while there may be no acceptable advocative value to the specific excesses, the **vigorousness** of the advocacy is critical to our system of justice.

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That vigorousness can be protected only if we permit the expression of advocacy in which such excesses occasionally arise.\textsuperscript{272}

These minor lapses, however, are qualitatively different from more flagrant excesses such as telling the judge to “drop dead,” or the persistent refusal to obey a direct order from the court. This latter category of misbehavior represents a quantum jump beyond the other precisely because these kinds of gross excesses do not inevitably result from vigorous advocacy. We know this by examining the collective experience of many trials. Although minor excesses occur every day in court, misconduct of this more egregious class is uncommon,\textsuperscript{273} even in serious and hotly fought proceedings. Moreover, the two classes of conduct obviously demonstrate markedly disparate attitudes towards the court’s authority. It is difficult to make any colorable claim that behavior in the latter category accepts the court’s authority and merely seeks to register disagreement or change the judge’s mind. Rather, it appears to be a negation of the judge’s function. Thus, courts could treat such conduct as an obstruction without causing any appreciable harm to the value of advocacy. If, however, courts demand the kind of exquisite control necessary to avoid fleeting and trivial excesses of advocacy, that control can come only at the expense of subduing zealous representation and diverting the lawyers’ concentration from the trial to a self-conscious awareness of each expression and gesture.\textsuperscript{274}

A major difficulty, of course, is in distinguishing the two categories when the behavior at issue seems to lie somewhere in between.\textsuperscript{275}

\begin{itemize}
\item \textsuperscript{272} I am reminded of the strategic principle espoused by my high school basketball coach with regard to fouling players on the opposing team. If, at the end of the game, the starting players on our team did not have at least three or four fouls each, the coach criticized us. That did not mean, however, that he wanted us to intentionally foul the opposing players. Rather, his point was that if we were playing aggressively—to the limits of the rules—we would invariably pick up numerous fouls as an unavoidable result of going all out.
\item \textsuperscript{273} This brief discussion presages a fuller exploration of the utility of looking at whether particular conduct deviates significantly from the norm in determining whether it constitutes an obstruction. See infra Section III.E.
\item \textsuperscript{274} Indeed, attorneys have even been held in contempt for non-verbal expressions and facial gestures. See, e.g., In re Stanley, 102 N.J. 244, 507 A.2d 1168 (1986) (affirming contempt conviction of attorney for staring at court in rude and insolent manner); In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987) (contempt conviction of attorney for smirking upheld), aff’d, 118 N.J. 51, 570 A.2d 416 (1990).
\item \textsuperscript{275} Consider, for example, a problem that arises frequently when attorneys are faced with a court order affecting the admissibility of a category of evidence or the propriety of a line of argument, which may not be entirely clear with respect to its application to a specific item of evidence or slight variation on the excluded argument. The question is whether an attorney who elicits such evidence or makes an argument that might be excluded by the judge’s ruling, without first giving the judge an opportunity to rule on the evidence or argument, could obtain the same benefits from the advocacy without preempting the judge’s function of determining the scope of
\end{itemize}
These tensions are similar in many ways to those created by the competing interests of freedom of the press and a public official's right to enjoy her good reputation in the area of defamation, and the Supreme Court's resolution of conflicting concerns in that context parallels the approach I suggest here. Just as an "erroneous statement is inevitable in free debate," occasional petty excesses of advocacy are unavoidable consequences of vigorous representation. If liability were imposed upon speakers for statements that were merely false, first amendment activities would be unduly inhibited by the self-censorship.
necessary to avoid sanctions. To neutralize the chilling effect of possible defamation actions, the Court mandates a standard of "actual malice," a higher standard than mere falsehood. As with minor lapses in the context of contempt, it is not that the falsehoods themselves are valuable, but that the vigorousness of debate is. Adequate

277. Similarly, in the context of contempt, the chilling effect is exacerbated by the fact that most contempt charges are tried summarily by the offended judge, often "while smarting under the irritation of the contemptuous act." Sacher v. United States, 343 U.S. 1, 11 (1952).

If inevitable lapses are punished, both the freedom of speech and the expression of advocacy are likely to be chilled by the time and expense of litigating a defamation action or appeal of a contempt conviction, even where the publisher or attorney believes his actions will ultimately be vindicated. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971); Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 424-25 (1975).

278. See New York Times v. Sullivan, 376 U.S. at 279-80. According to the Court, it was necessary to pronounce a doctrinal rule rather than review individual libel suits on a case by case basis in order to remove the chilling effect on speech. Id. at 271-75. Thus, the Court's balancing of competing interests resulted in a non-balancing test to measure the limits of protected speech. Nevertheless, the Court has continued to weigh the conflicting normative considerations in applying and refining the test through de novo review of defamation judgments. See, e.g., Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984); Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985).

Moreover, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), when faced with the issue of defamation suits brought by private individuals, the Court moved away from a categorical test that determined when defamatory falsehoods were absolutely protected to a balancing approach intended to reveal the exact limits of protection in different circumstances. The Court rejected application of the "actual malice" standard to actions by non-public individuals, holding that in that context the Constitution prohibited only the imposition of liability without fault. Id. at 347.

In the context of contempt, this same sort of case-by-case balancing is necessary to determine the precise degree of protection to be afforded to the expression of advocacy in various circumstances. Indeed, that need is even more compelling in contempt cases because of the necessity of accounting for the positive value of advocacy on the opposite side of the scale, and because the number of variables that should properly play a role in the result may be greater. In other words, contempt determinations probably are more fact specific. Furthermore, the exercise of de novo review of contempt convictions by appellate courts is also critical, as it is in defamation actions, to the proper application and development of the balancing process. See Raveson, Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy, 65 Wash. L. Rev. — (1990).

279. In essence, the "actual malice" standard is a constitutionally grounded privilege of good faith—an intent test that insulates the speaker from liability even for false statements unless they were made with the requisite mental state: knowledge of the error or reckless disregard of whether or not they were false. A number of commentators and courts have likewise argued that a "good faith" standard is the answer to balancing the need of an attorney to represent her client against the interest of the court in fair and orderly proceedings—so long as the attorney is engaged in a good faith attempt to represent her client, she should not be found in contempt. See, e.g., United States v. Sophner, 347 F.2d 415 (7th Cir. 1965); Note, Criminal Law—Contempt—Conduct of Attorney During Course of Trial, 1971 Wis. L. Rev. 329, 336-37. To be sure, some measure of intent is a critical element that must be present for conduct to constitute contempt, and the courts have not adequately understood the significance of intent in contempt cases. However, use of a good faith or intent test cannot by itself provide sufficient protection from abusive or mistaken exercise of the contempt power.

To begin with, "good faith" must be given some content, as it is given in the context of defamation by the "actual malice" standard. But that is easily remedied; let us assume that good
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protection of the zealousness of trial advocacy requires that a similar “buffer zone” be fashioned around in-court expression that is valuable to the realization of justice, in order to insulate it from the contempt power.  

faith representation utilizes the same standard as good faith criticism of government officials in libel cases. Accordingly, an attorney's conduct that obstructed the administration of justice would constitute contempt if she knew it would be obstructive or if she acted with reckless disregard of whether it would or not. The real problem here is that the formulation begs the more fundamental question: what constitutes an obstruction?

In libel suits, the injury to the plaintiff can be ascertained with relative ease. Although determining damages with accuracy may be difficult, proof that the statements which give rise to the action are defamatory and false is not. Furthermore, whether the writer or publisher acted with the requisite mental state is provable by reference to facts other than the falsehood itself. Factors such as the source of the information, whether attempts were made to corroborate, and whether the writer accurately reported his data are all probative of his state of mind.

In contrast, as explored in the text, in many contempt cases, including probably all those in which the conduct in question is the good faith effort of an attorney to represent her client, it is extremely difficult to determine whether the administration of justice was obstructed. Moreover, in virtually all contempt cases an attorney's good faith or lack of it can be proven only by reference to the conduct at issue. Therefore, if a court concludes that an attorney's failure to cease argument after being ordered to do so, or her abrasive remarks to the judge constitute an obstruction, it is a simple matter and a common practice for the court to infer wrongful intent from the “misbehavior.” For example, if an attorney obstructs the administration of justice by disobeying a court order, it is always at least arguable that she knew, or should have known, that her conduct would be obstructive, or that she acted with reckless disregard of whether her conduct would be obstructive. Indeed, this is a problem generally with the intent requirement in contempt cases.

Thus, primary or sole reliance on a “good faith” standard cannot provide adequate protection of vigorous advocacy and of the independence of the bar. Relegating the contempt decision to a good faith test in a sense concedes the presence of an obstruction, or at a minimum ignores the critical importance of the obstruction determination as an independent element of contempt. And, because the presence or absence of good faith can be imputed directly from a finding of obstruction, that standard may be a wholly inadequate safeguard. “Good faith” cannot have any real content without first developing a calculus for determining whether an attorney's conduct is obstructive, permissible, or valuable to the administration of justice.

Although it has not been suggested by any of the courts or commentators, where the concept of good faith can and should play a role is in the actual analysis of whether the conduct in question rises to the level of an obstruction. As we have seen, the value of advocacy from good faith attempts to represent a client vigorously should properly be a part of the obstruction determination. Moreover, whether or not an attorney's conduct is obstructive may, in some circumstances, depend in part on her state of mind when acting.

280. It is natural that the two areas should reflect similar issues and resolutions. The earlier contempt cases, especially, involved at their core the defamation of public officials—namely judges. In fact, in New York Times v. Sullivan, 376 U.S. 254, 268 (1964), the Court analogized contempt of court by publication to the issue of defamation, citing Pennekamp v. Florida, 328 U.S. 331 (1946).

It is extremely interesting in light of the Court's analogy that, although Pennekamp and the rest of the Bridges progeny utilized the clear and present danger test to measure the constitutional limits of speech, New York Times ultimately eschewed that standard for the “actual malice” test. However, it seems quite clear that while the Court’s opinion rejected the kind of ad hoc balancing usually associated with the clear and present danger test, it engaged in the same balancing process, grounded on more generic considerations, to produce a categorical
E. Assessing the Harm to the Administration of Justice

Before discussing how to strike an appropriate balance between vigorous advocacy and courts' needs for order, obedience, decorum and respect, it will be helpful to consider in somewhat greater detail the nature of the harm threatened by interference with these values. With respect to all of the component interests of justice that may at times compete with the vigorousness of advocacy, however, interference with any or all of them must threaten imminent harm to the administration of justice of some sufficient magnitude in order to warrant exercise of the contempt power.281 The contempt power should not respond to a demand for the imposition of order for order's sake, or respect purely for the sake of respect. These interests are insufficient in themselves to merit enforcement by contempt sanctions; it is only where they are encroached upon so egregiously as to create an obstruction of the trial that exercise of the contempt power may be appropriate.

For example, any misbehavior on the part of counsel which causes some delay in the proceeding, even if only for the judge to respond to a patently frivolous objection, conflicts with the values of order and continuity of the proceedings. Even assuming that the attorney's conduct offers no countervailing value to justice, surely not every such delay justifies contempt sanctions. At some point, on the other hand, if such delays are long enough, either individually or cumulatively, and do not result from proper advocacy, they can certainly obstruct the fair administration of justice.

As the remainder of this article seeks to demonstrate, any effort to fashion a similarly categorical or definitional standard with respect to the limits of advocacy and the contempt power must fail. For whatever the definitional standard for obstruction or contempt, whether an attorney's specific conduct comes within that test, whether in fact it is obstructive or beneficial to the administration of justice, can only be determined in the context of a particular case.

On the other hand, the kind of definitional balancing of generic interests engaged in by the Court in New York Times, which underscored the need for a zone of insulation around valuable expression, is equally critical to the context of contempt. The difference in the area of contempt, however, is that rather than resulting in a categorical definition of obstruction, the creation of a zone of insulation around vigorous and valuable advocacy will inform or be an element of the calculus in the case-by-case resolution of the issue. As we shall see, this "buffer-zone" analysis manifests itself in many of the variables later suggested for properly balancing the interests at stake. Indeed, even with respect to the actual malice standard, there is a continuing case-by-case evolution of the constitutional norms encompassed within the test. See supra note 268.

281. Of course, these two factors are at one level related to each other. Unless the conduct in question threatens a sufficiently serious harm to an individual value, or several interests of the administration of justice, it cannot rise to the level of harming justice itself. On the other hand, not every threat to the administration of justice is serious enough to justify a court's use of the contempt power to prevent it or to punish the behavior that presents the threat.
Similarly, where conduct disrespectful of the court is at issue, it should not be targeted as a cognizable harm under the contempt power unless it is so extreme or occurs in circumstances so sensitive as to threaten the administration of justice. Disrespect for the judge in the courtroom carries the potential for influencing other participants in the trial process to take the judge and the rules of our justice system less seriously. An attorney's face-to-face insult of a judge can also interfere with the judge's own ability to do her job properly.\textsuperscript{282}

Similarly, while it is obvious that not every abrasive, discourteous, or irreverent comment to the court rises to the level of threatening

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\textsuperscript{282} Flagrant insults by one attorney to another or to a witness can similarly interfere with the processes of a trial. See, e.g., In re Finkelstein, 112 N.J. Super. 534, 271 A.2d 916 (Ch. Div. 1970) (remark of individual attending deposition to attorney that, "[i]t takes a pig to represent a pig," justified issuance of order to show cause why he should not be adjudged in criminal contempt).
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Query, whether the truth of the statements in question should establish a defense to contempt charges for use of disrespectful language. The Supreme Court determined almost a century ago, in Patterson v. Colorado, 205 U.S. 454 (1907), that the truth of statements accusing a judge of bias is irrelevant to a charge of criminal contempt. Nevertheless, a number of subsequent state court decisions have held that the truth of such remarks should be considered as a defense in contempt proceedings. See, e.g., Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 102 (1907); In re Dingely, 182 Mich. 44, 148 N.W. 218 (1914); Ex parte Pease, 123 Tex. Crim. 43, 57 S.W.2d 575 (1933); Ex parte O'Fiel, 93 Tex. Crim. 205, 246 S.W. 664 (1923). But see State ex rel. Giblin v. Sullivan, 157 Fla. 496, 26 So. 2d 509 (1946).

Justice Holmes, who authored the majority opinion in Patterson, concluded:

In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjuror, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

205 U.S. at 462.

When statements alleging that a judge is biased have no relevance whatsoever to a proceeding (if that can ever be the case), Justice Holmes would appear to have the better side of the argument. What Holmes really seems to be getting at, however, is the propriety of the manner in which a charge of judicial bias is raised. Clearly, where such a claim is relevant and raised properly, as in Holt v. Virginia, 381 U.S. 131 (1965), not only are truthful allegations immunized from the contempt power, but incorrect charges made in good faith are insulated from the contempt power as well. See supra note 116. Where allegations of a judge's bias are made in bad faith or are stated in flagrantly disrespectful terms, especially in front of a jury, the mode of presenting the charges is sufficiently outside the proper procedures for raising such a claim that, as Holmes states, it tends to obstruct the administration of justice irrespective of whether the allegations are true. Compare In re Little, 404 U.S. 553 (1972) (pro se defendant's statements in summation to jury that the court was biased and had prejudiced the case and that defendant was a political prisoner not contemptuous) with Gordon v. United States, 592 F.2d 1215 (1st Cir. 1979) (pro se defendant's charges to judge, with no jury present, that court had him politically arrested to remove him from presidential campaign and that court conducted kangaroo proceedings and criminally tampered with and rigged the election, constituted contempt).
these harms, such conduct can rise to the level of an obstruction. Calling the judge an "asshole" while he is delivering instructions to the jury probably is contemptuous. Some courts and commentators have responded appropriately to the distinction by concluding that "mere disrespect or affront to the judge's sense of dignity will not sustain a citation for contempt." As can be readily observed from the Supreme Court's decisions in In re McConnel and In re Little, where extremely contentious and discourteous remarks were found not contemptuous, the Court contemplates no easy correspondence

283. See, e.g., United States v. Werksman, 319 F. Supp. 353 (N.D. Ill. 1970) (dismissing order to show cause issued against attorney for comment to client that personal relationship between himself and the judge assured particular disposition of criminal case).

284. Indeed, the delay occasioned by disrespectful behavior may itself constitute an obstruction, if it is sufficiently substantial, as well as the manner in which insulting statements are made, as by shouting and physically disrupting the proceedings. See, e.g., Gordon, 592 F.2d at 1217 (affirming contempt conviction for disrespectful statements to court, in part because "there is a point at which mere words are so offensive and so unnecessary that their very utterance creates a delay which is an obstruction of justice"); United States v. Seale, 461 F.2d 345, 370 (7th Cir. 1972).

285. See, e.g., Gordon, 592 F.2d at 1217 n.1 (pro se litigant stated to court that he did not recognize the "totally corrupt fum [sic] kangaroo court proceedings"); MacInnis v. United States, 191 F.2d 157, 160 (9th Cir. 1951) (affirming conviction of attorney as contempt per se for telling judge he should be ashamed of himself and should cite himself for misconduct), cert. denied, 342 U.S. 953 (1952); In re Vincenti, 92 N.J. 591, 458 A.2d 1268 (1983) (upholding contempt convictions of attorney for calling judge ridiculous, accusing him of advising "extortionist psychologist" to extort money from attorney's client, "sleep-walking through [his] judicial duties," irrational conduct, and having a breakdown when judge ruled against him).

An argument can be made, however, that even conduct as grossly disrespectful as these examples should not be considered contemptuous. Tensions in a serious trial can run so high that even the profanity aimed at the judge may be an understandable expression of frustration from time to time, at least where such remarks are not repeated. Substantial disrespect has been tolerated by some courts without any evidence of subsequent impairment of their ability to function. See, e.g., State v. Jones, 105 N.J. Super. 493, 253 A.2d 193, 199 (Law. Div. 1969) (defendant's utterance in open 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"); United States v. Seale, 461 F.2d 345 (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"). Of course, even if one "free shot" at the court is uniformly treated as non-obstructive, at some point the repetition of invectives or profanity is likely to pose a threat of interfering with the proceeding. Moreover, where insults are flagrant, it is difficult to imagine that valuable expression, especially advocacy, would be substantially deterred by treating them as contemptuous.

286. See Seale, 461 F.2d at 369; Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183, 208 (1971) ("[P]ersonal discourtesy or insult is on an altogether more trivial plane . . . and a certain amount of that should be tolerated when it falls short of interfering with the nature of the trial."). But see Radin, Freedom of Speech and Contempt of Court, 36 U. ILL. L. REV. 599, 610 (1942) ("[E]ven a slight indication of disrespect or a slight disorder in the court's presence . . . is a substantial interference with [the proceeding] and an impairment of justice.").


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between disrespect and obstruction of the administration of justice.\textsuperscript{289} Other courts have not demonstrated that same level of tolerance in distinguishing disrespect from obstruction.\textsuperscript{290} Indeed, numerous state contempt statutes explicitly make disrespect to the court an independent basis for sanctions.\textsuperscript{291}

Determining the point at which disrespectful behavior interferes sufficiently with the processes of a trial to constitute an obstruction is a matter of substantial difficulty and imprecision, even where the expression at issue is not arguably advocative.\textsuperscript{292} Where disrespectful conduct also contains an element of legitimate advocacy, as it did in

\begin{footnotes}
\item[289] The level of the Supreme Court's tolerance in \textit{Little} is underscored by the observation in \textit{Seale}, 461 F.2d at 370, that Little's remarks were made during his summation to the jury, a period which lends itself easily to the interjection of prejudice.
\item[290] See, e.g., \textit{In re Osborne}, 344 F.2d 611 (9th Cir. 1965). In \textit{Osborne}, the Ninth Circuit affirmed an attorney's contempt conviction for repeated complaints that the court's refusal to grant numerous requests for a recess and to try the case during normal hours prevented him from adequately representing his client. Although the judge accused counsel of doing all of this to suggest to the jury that the court was biased against his client, the record indicates that counsel was merely advocating aggressively for his position. \textit{Id.} at 615; cf. \textit{State v. Sax}, 139 N.J. Super. 157, 353 A.2d 113, 114 (App. Div. 1976) (individual held in contempt for sending letter to a court violations clerk accompanying payment of fine, stating "[y]our coercive methods of getting money are rather ugly . . . . Fuck you"). Query, whether a letter to a court clerk or even a judge in a matter that is not pending before the court and is not published to a wider audience, should ever be deemed a sufficient interference with the administration of justice to constitute contempt. On the other hand, such a letter is not entitled to any additional protection as legitimate advocacy either.
\item[291] See, e.g., \textit{CAL. CIV. PROC. CODE} § 1209(1) (West 1982) ("insolent behavior toward the judge"); \textit{N.Y. JUD. LAW} § 750(A)(1) (McKinney 1975) ("insolent behavior"); \textit{VA. CODE ANN.} § 18.2-456(3) (1988) ("insulting language addressed to or published of a judge").
\item[292] Among other complexities in making this determination, \textit{Seale}, 461 F.2d at 370, correctly notes that in deciding whether disrespectful comments to the court rise to the level of obstruction, it is necessary to consider the fact that language patterns and word choice vary greatly between diverse socio-economic, ethnic and political groups. \textit{Seale} concludes that these differences are relevant to the issue of the contemnor's intent. \textit{Id.} at 370. But the questions of intent and disrespect actually share a deeper relationship; disrespect connotes intent.

Unless a speaker intends to insult it may not be appropriate to consider her remarks disrespectful. Of course, the speaker may nevertheless be violating mores of courtroom decorum or even those of polite extrajudicial expression. However, speech that merely is not genteel is not disrespectful. Although the lack of wrongful intent theoretically is enough to defeat a charge of contempt because of the relative ease with which intent might be inferred from a court's finding of obstruction in a contempt case, there may be an important practical difference deriving from the understanding of intent as an element of the obstructiveness of alleged misbehavior.

Moreover, whether remarks are intentionally disrespectful must also be measured against the relevance and propriety of making the comments in the context of a particular case. It is this connection between wrongful intent and the obstructiveness of disrespect that may justify the frequent practice of many courts of dismissing contempt charges after receiving an apology from the alleged contemnor. See, e.g., \textit{In re Daniels}, 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987), aff'd, 118 N.J. 51, 570 A.2d 416 (1990). A more cynical view of this common practice, however, is that the ostensibly disrespectful remarks were not obstructive in the first instance, and that the judge was only overreacting to personal perceptions of affront in bringing contempt charges.
\end{footnotes}
McConnell and Little, finding the proper division between a punishable obstruction and the outer limits of permissible advocacy is even more difficult.

First, it is necessary to balance the value of advocacy, in light of the goals of justice, against the harm to those same goals that the particular advocative expression threatens. As we have learned from Holt and Little, even conduct that may seem to the court to be very disrespectful or insolent can be material to the proceeding, and may be required of an attorney in representing her client professionally. Where the content of in-court speech is material, and its expression not egregiously excessive, courts must tolerate greater interference with their interest in respect. When courts focus solely on the harm that might be caused by disrespectful conduct and ignore the value to the administration of justice from that conduct, they draw the line between advocacy and contempt in the wrong location. A balancing process assists the maximization of the various values of justice in relation to each other.

The second difficulty in defining the limits of the contempt power with respect to disrespectful advocacy is that there is a great need to tolerate some additional degree of interference with certain interests of our judicial system in order to avoid the deterrence of valuable advocacy. Thus, as suggested earlier, this maximization of the mix of values implicated requires that there be some buffer zone between the outer boundaries of valuable advocacy and contempt; merely because in-court expression does not further the fair administration of a trial should not mean it is contemptuous. This reveals another fundamental issue to which these questions relate: obstruction of the judicial process must be measured objectively rather than subjectively. There is an inherent tendency for trial charges. Thus, an apology to the court (especially when made privately) can only serve to mollify the judge's hurt feelings. There is probably some truth to both views.

293. The trial court in In re Little, 404 U.S. 553, 554 (1972), did in fact conclude that Little's remarks were "very disrespectful," "reflected on the integrity of the Court," and "tended to subvert and prevent justice."

294. Conversely, where an attorney's conduct has no legitimate advocative value, it should be more susceptible to punishment when it interferes with other interests of justice. In these circumstances, the lack of proper advocative worth not only negates whatever immunity legitimate lawyering should enjoy from the contempt power, but increases the likelihood that disrespectful remarks may have a damaging effect on justice.

295. See infra Section III.E.; see also In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972) ("[M]ere 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."). aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).
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judges, in the heat of courtroom debate, to mistake aggressive advocacy, disagreement, and breaches of etiquette for disrespect, and disrespect for interference with the judicial process. Yet, many courts and commentators alike have insisted that the standards for contempt necessarily depend upon the temper of the presiding judge.296 But if a trial judge’s subjective feelings were permitted to supply the critical element of an obstruction, contempt convictions would be insulated from judicial review,297 and the independence of the bar would be in grave jeopardy.298 Moreover, too great an effort to compel respect for

296. See, e.g., Brautigam, supra note 19, at 1525.

297. In essence, permitting contempt sanctions to be grounded on the subjective reactions of trial judges would elevate the “heckler’s veto,” prohibited under first amendment jurisprudence (see, e.g., Street v. New York, 394 U.S. 576, 592 (1969)), to the status of a compelling governmental interest.

298. See, e.g., United States v. Lumumba, 603 F. Supp. 913, 920 (S.D.N.Y.) (“objective standard of propriety” is the proper measure in contempt adjudication), aff’d, 794 F.2d 806 (2d Cir. 1983), cert. denied, 479 U.S. 855 (1986); In re Hallinan, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (1969) (burden of proof cannot be sustained by “the subjective reactions of the offended judicial officer”); cf. Offutt v. United States, 348 U.S. 11, 14 (1954) (trial judge must make certain he or she does not “unwittingly identify offense to self with obstruction to law”). The distinct likelihood that trial judges often will confuse minor affronts to themselves with obstructions to judicial processes also creates a serious constitutional problem where the offended judge sits in judgment of the contemnor in a summary proceeding. See, e.g., Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (reversing and remanding contempt conviction because series of personal insults by contemnor toward judge created likelihood of prejudice even without any outward showing of bias, and judge should have recused himself); Offutt, 348 U.S. at 17 (reversing summary conviction of contempt because trial judge had become “personally embroiled” with the attorney cited for contempt).

Nevertheless, a surprising number of courts and commentators continue to argue that the determination of whether particular in-court conduct is contemptuous should be left to the sound discretion of the trial court. See, e.g., United States v. Wilson, 421 U.S. 309, 319 (1975) (concluding that appellate courts “can deal with abuse of discretion without restricting... [the summary contempt power] in contradiction of its express terms and without unduly limiting the power of the trial judge”); Fisher v. Pace, 336 U.S. 155, 161 (1949) (“Reliance must be placed upon the fairness and objectivity of the presiding judge.”); In re McDonald, 819 F.2d 1020 (11th Cir. 1987) (employing abuse of discretion standard); United States v. McCargo, 783 F.2d 507 (5th Cir. 1986) (in determining whether contempt conviction is sufficiently supported by the evidence, evidence is viewed in light most favorable to government); United States v. Flynt, 756 F.2d 1332 (9th Cir. 1985) (gross abuse of discretion standard); cf. Tasoff, Decorum v. Justice—Summary Criminal Contempt Power and Its Effect on the Lawyer-Advocate, 1976 J. BEVERLY HILLS B. ASS’N 11, 16 (1976) (“[A]lthough a reviewing court may reverse in egregious cases, this does little in defining the standard at the trial court level since by its very nature, it will always be a subjective determination.”). These authorities rely on the assumption that the trial judge is in the best position to recognize when the fair processes of justice are being obstructed. See, e.g., In re Yengo, 84 N.J. 111, 417 A.2d 533, 540 (1980), cert. denied, 449 U.S. 1124 (1981). Indeed, that logic has been offered to support the trial court’s utilization of summary procedures as well. See, e.g., Codispoti v. Pennsylvania, 418 U.S. 506, 513 (1974); Yengo, 417 A.2d at 540. The problem with the underlying assumption, however, is that trial judges, like attorneys and litigants, are not insulated from the heat and stresses of trial practice. Thus, just as aggressive attorneys on occasion inevitably transgress the bounds of decorum, sensitive judges do not infrequently
the courts through the exercise of the contempt power is not only counterproductive to the ultimate aims of our system of justice, but is even self-defeating in relation to its narrower goal; such efforts are likely only to engender disrespect for the judiciary. If the perceptions of the public and of participants in the judicial process is that the courts’ increasing demand for decorum prevents advocates from representing their causes vigorously without fear of punishment, the greater the degree of “respect” demanded by the court, the more the legitimacy of the process will suffer.

We have opened this discussion of the need for an objective standard of contempt by examining the possible obstructiveness of the content of expression that is disrespectful to the court. As we will see, the issue of objective measures of obstructiveness becomes far more complicated where the conduct at issue is disobedience to a court’s command, such as the continuation of argument after an order to cease. In that context, both the content and the non-communicative aspect of an attorney’s speech—the expression of words itself—can interfere with justice because they violate the court’s directives. But the most complex component of this problem is deciding whether a judge can transmute her subjective standards for courtroom decorum and respect, as well as her directives concerning the scope and duration of argument and the vigorousness of advocacy, into an objective measure of “obstruction” simply by ordering that certain conduct is forbidden.

In both contexts, we should realize that the objectivity of any standards for measuring the obstructiveness of an attorney’s behavior is to a large extent imposed by the courts themselves. That is, there is little, if any, empirical basis for determining whether a disrespectful remark to the court or the continuation of argument after an order to stop speaking is likely to have a truly adverse effect on the administration of justice, apart from whatever time is taken up by the expression itself. Thus, contempt can be self-defining; if we deem certain conduct contemptuous because we do not want that conduct to occur in a courtroom, engaging in that behavior may in fact be obstructive purely because it challenges the court’s authority and violates the rules of practice that have been established for a judicial proceeding. Con-

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299. See infra notes 312-13 and accompanying text.
300. The effort to introduce empirical data to defend a contempt charge, grounded on an individual’s published criticism of the courts that was alleged to have brought the court system into public ridicule, was rejected by the courts of Canada. See McDonald, Contempt of Court: An Unsuccessful Attempt To Use Sociological Evidence, 8 OSGOODE HALL L.J. 573 (1970). Neither cases nor legal literature indicate whether similar efforts have been made in this country.
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versely, where courts are willing to tolerate a certain amount of disorder and disrespect in order to promote zealous advocacy, the conduct contributing to these results is correspondingly less obstructive because it is incorporated into our accepted processes for trying a case. It is very important that we do not permit exagerated notions of civility, etiquette, decorum, respect, or the trial judge's subjective

301. Largely for these reasons, the availability of less drastic alternatives to the contempt power and the court's ability to avoid the kind of confrontations that are likely to lead to the potentially obstructive conduct of counsel are factors that should be considered in determining whether an attorney's behavior is contemptuous.

For example, numerous individuals have been held in contempt, or threatened with contempt, for symbolic acts in the courtroom, such as the failure of two courtroom spectators to rise upon entrance of the trial judge, United States v. Malone, 412 F.2d 848 (7th Cir. 1969), and even an attorney using her own name preceded by "Ms." rather than adopting her husband's last name, N.Y. Times, Jul. 14, 1988, at A23, col. 2. Surely none of these incidents required the exercise of the contempt power to protect the respect and authority of the court. As one commentator has written with respect to the courts' punishment of such conduct:

[(I]n a pluralistic society where differing values coexist in the community at large, judges act inappropriately when they enforce their own values by requiring symbolic acts not directly related to the needs of judicial administration. A judicial system that seeks conformity to the judge's values in trivial matters will eventually fail; it will necessarily alienate large numbers of people by ethnocentric attitudes, and ultimately respect for the legal process will suffer.

Dobbs, supra note 6, at 204. If courts were to recognize the right of individuals to engage in certain conduct in a courtroom that really does not threaten to interfere with justice, or at least did not treat such behavior as contemptuous, the conduct would be free of the only obstructive quality it truly has, which is that the behavior transgresses the courts' injunctions against it.

302. Then Chief Justice Burger delivered an address to the American Law Institute in which he argued for recognition of the overriding importance of civility to the proper functioning of trial justice, and indeed, to organized society as a whole. See Burger, The Necessity For Civility, 52 F.R.D. 211 (1971). The then Chief Justice is certainly correct in noting that civility is an important component of any judicial proceeding. Yet his only acknowledgment of the possibility for conflict between enforced civility and vigorous trial representation is the refutation of the possibility by the observation that, "[T]oday English Barristers are the most tightly regulated and disciplined in the world and nowhere is there more zealous advocacy." Id. at 215.

Even assuming that Burger's factual assumptions are correct, there is no indication that the advocacy of attorneys in this country would not be even more zealous than our British counterparts if the vigorousness of advocacy were more highly prized, and if the contempt power here did not pose a constant risk of reprisal for the inevitable excesses of zealous representation. Burger's plea for greater civility wholly misses this connection between the zealousness of advocacy and the unavoidability of minor breaches of decorum. Rather, he treats all such lapses as egregious and intentional obstructions of the judicial process:

[A]ll too often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters—including the judges.

A large part of the new litigation involves the rights of the whole of society, or claims of so-called "new property," or new constitutional theories or what some advocates describe as "political cases." At the drop of a hat—or less—we find adrenalin-fueled lawyers cry out that theirs is a "political trial." This seems to mean in today's context—at least to some—that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant.
imposition of arbitrary limits on the conduct of counsel, to define the innermost reaches of the contempt power or to dampen the ardor of valuable advocacy.

These considerations assist us in assessing the threat of harm to the administration of justice, but they cannot tell us whether, in a particular case, the harm is sufficient to warrant exercise of the contempt power. That determination can be made only after further exploration of the policy issues encountered in balancing the competing interests involved, and identification of appropriate variables to effectuate that balance in the process of case-by-case application.

F. Effectuating the Balance

Courts have not been oblivious to the need in contempt cases to consider the value of advocative expression and to minimize the chilling effect on vigorous representation. However, even those cases that do recognize the necessity for some balancing of interests have failed to develop any meaningful mechanism for doing so. Like those decisions that essentially reject any balancing approach, their determinations of whether an obstruction occurred are based almost

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*Id.* at 213.

It is this kind of myopic focus on the specter of purposeful disruption that so thoroughly misinforms the views of many courts and commentators as to the appropriate function and scope of the contempt power. They overlook the real threat of substantial deterrence of valuable advocacy and self-inflicted harm to the administration of justice where the contempt power is not restrained.

303. *See, e.g.,* Hawk v. Cardoza, 575 F.2d 732 (9th Cir. 1978):

Where the contemnor is an attorney representing a criminal defendant, there is more at stake than just the attorney’s right to speak freely and not to be punished criminally without findings of intent and obstruction (citations omitted).

Thus petitioner’s first amendment and due process rights and the sixth amendment rights of his client must be balanced against the need for order in the trial process. The need for judicial order is not fixed but must be considered in the context of each case.

*Id.* at 735; Commonwealth of Pa. v. Local 542, Int’l Union of Operating Eng’rs, 552 F.2d 498, (3rd Cir.), cert. denied, 434 U.S. 822 (1977):

A balance must be maintained . . . between the necessity for judicial power to curb obstruction of justice in the courtroom and the need for lawyers to present their clients’ cases fairly, fearlessly, and strenuously. In preserving the balance, a court must not exercise its summary power of contempt to stifle courageous and zealous advocacy and thereby impair the independence of the bar.

*Id.* at 503.

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entirely on subjective standards or tests that ignore the real tensions and complexities of trial practice.\textsuperscript{305}

Where the conduct in question is not violating any clear mandate of the court, it is not possible to draw a bright line distinguishing advocacy from contempt. However, in the broad class of circumstances in which an attorney's behavior does transgress the trial court's commands, many courts and commentators have drawn a bright line, attempting to reconcile the conflicting interests of an attorney's obligation to represent her client zealously with the court's interest in order by concluding that although an attorney should be permitted a reasonable opportunity to advocate, she must always obey the court's rulings and orders.\textsuperscript{306} The premise of this solution is that any conflict between the roles of attorney and judge should be resolved by giving the judge's function preemptive authority.\textsuperscript{307} The expressed rationale for drawing the line there is that any prejudice to the client's case resulting from the judge's error or restraint of advocacy can be corrected by appellate review.\textsuperscript{308}

It may seem a natural solution to give deference to the trial court's function where conflict develops between the court and counsel; indeed, that is the court's role. Furthermore, that is the only bright line that can be traced in the geometry of contempt. However, there are two fundamental problems with this approach, both of which arise from an undervaluation of the weight of the attorney's role in our system of justice. First, it is quite difficult to know what constitutes a

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\item \textsuperscript{305} See, e.g., United States v. Seale, 461 F.2d 345 (7th Cir. 1972) (disobedience of trial court's order is contemptuous). In \emph{In re Gustafson}, 619 F.2d 1354 (9th Cir. 1980), rev'd on other grounds, 650 F.2d 1017 (9th Cir. 1980) (en banc), 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. \textit{Id.} at 1359.
\item \textsuperscript{306} See, e.g., \emph{In re Dellinger}, 461 F.2d 389, 398-99 (7th Cir. 1972), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975); \textit{Seale}, 461 F.2d at 362-63.
\item \textsuperscript{307} In addition, the serious problem of the lack of adequate notice of the outermost limits of permissible advocacy is ameliorated where the judge can state those limits in a direct order.
\item \textsuperscript{308} See, e.g., \textit{Dellinger}, 461 F.2d at 398-99 ("If a trial judge prejudicially denies counsel an adequate opportunity to argue a point, appellate courts will reverse, and that alone will deter most judges from arbitrarily cutting off argument."); \textit{Seale}, 461 F.2d at 362-63 (emphasis added):
\end{itemize}

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The reason that the rulings of a trial judge, no matter how sincerely felt to be or in fact indefensible, cannot excuse contumacious protestation is that "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country."
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\ldots It is precisely because appellate courts sit to vindicate error that this principle is viable.
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reasonable opportunity to advocate, as it must differ with the facts of each case. Second, and more importantly, the solution frequently is unworkable precisely because appellate review is not always an effective remedy for trial court error or less than fully zealous advocacy. Thus, a lawyer may feel, with some justification, that she is obligated to resist the directives of the court in circumstances where harm to her client resulting from her compliance with the court is not reversible on appeal. If the law of contempt is to be responsive to the dilemma of attorneys, who in these circumstances must choose between their duty to obey the court and their responsibility to represent their clients, it must factor the adequacy of an appellate remedy into its calculus for evaluating the interactions between court and counsel.

Moreover, it is not just the internal conflict a lawyer might feel that justifies greater leeway for advocacy to conflict with the court’s directives; more fundamentally, it is because we often cannot rely on the appellate process to correct trial errors that the broadest possible latitude for argument and debate with the court maximizes the goals of justice. To the extent appellate review exists to protect the fairness of process in litigation and the accuracy of the outcome, more zealous advocacy compensates for the inadequacy of appellate review as a safeguard of those ultimate goals.

Of course, even recognizing the inadequacy of appellate review to remedy all trial errors, one could nevertheless argue that even the attainment of these interests, or the overriding need for order and respect for the courts, requires that the judge always be obeyed at the risk of contempt. But this would miss much of the value of advocacy with little compensation in return. If we are trying to give effect to the judicial system’s interests in procedural justice and accuracy of result, it is critical not to overvalue the interests of order and respect at the expense of vigorous representation when advocacy is operating to ensure that the trial judge is as fully informed as possible in making all important decisions. Characterizing any disobedience of a judge’s order as an obstruction of justice places too high a premium on those values309 and works against the ultimate interests of our judicial system by increasing the chances that trial courts will make less

309. Often, what is most harmful about an attorney’s disobedience of a court’s command, such as an order to cease argumentation, is the disobedience itself—the refusal to accede to the court’s authority. However, if judges were to appreciate more fully the value of advocacy, they could frequently avoid the kinds of circumstances in which this conflict with counsel is likely to arise by being more sensitive to the need for further argument before they cut off debate. In fact, even if judges were to acknowledge that the failure of attorneys to submit immediately to every directive was not such a serious challenge to the court’s authority and control, such conduct would not imply the quality of disrespect often attributed to it.
informed, and therefore more likely incorrect, decisions which frequently will not be remedied on appeal.\(^{310}\)

Recall, for example, our earlier discussion of an attorney who continues arguing a point after being ordered by the court to cease doing so, behavior for which many lawyers have been held in contempt.\(^{311}\) The difficulty in determining when an attorney has had enough time to argue a point, such that continued argument would be obstructive, is reflected in the numerous cases exhibiting extremely different degrees of tolerance for excessive argumentation. Some courts have found repetitive argument to be contemptuous after only one or two warnings,\(^{312}\) while others have reversed contempt convictions despite continued argument after at least six orders to cease.\(^{313}\) Once it is recognized, as it must be, that attorneys must have some opportunity

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\(^{310}\) At least one court has commented on this reasoning, but in very different circumstances than those suggested here. See United States v. Lowery, 733 F.2d 441, 443–46 (7th Cir.), cert. denied, 469 U.S. 932 (1984). In Lowery, the appellate court affirmed the contempt conviction of a defense counsel in a criminal case for continuing to ask certain questions of a witness on cross-examination after being warned by the trial judge not to ask them. The contemnor argued on appeal that the trial court had improperly fenced in her cross-examination, and that she was therefore justified in violating its order. The court concluded that:

an error in curtailing cross-examination is reviewable by this court on appeal from the final judgment. The appellants point out that such an error might be deemed harmless by the appellate court. But if it is harmless, their clients have no reason to complain about it. The appellants' real concern is that the error might be harmful yet the appellate court might erroneously rule that it was harmless. This is possible, of course; but to use this possibility as the basis for excusing the appellants' misconduct is to make the fallibility of the appellate process a ground for defiant behavior in the trial court. A lawyer could never be held in contempt for disobeying a trial judge's order. Id. at 446.

The result in Lowery probably is correct, but there is a critical difference, which did not have to be faced by the court in Lowery, between an attorney's violation of a court's order not to ask particular questions to a witness or reveal certain information to the jury, and the transgression of an order to stop arguing. The former command is directed, for the most part, to protecting the deliberative processes of a trial; the latter protects an aspect of the trial less vulnerable to obstruction—the court's control of debate between itself and counsel. Whether an attorney's continued argument after an order to be silent is commendable is certainly questionable; but such behavior is almost always less likely to obstruct the administration of justice than the disobedience of a court's direct order not to ask particular questions of a witness. Indeed, that is precisely the distinction drawn by the Supreme Court in In re McConnell, 370 U.S. 230, 234 (1962), discussed earlier. McConnell even recognizes to some degree the relationship between the possibility of an ineffective appellate remedy and the lawyer's duty to protect his client's interests at trial. See infra note 319 and accompanying text.

\(^{311}\) See cases cited supra note 253.

\(^{312}\) See, e.g., State ex rel. Smith v. District Court, 210 Mont. 344, 677 P.2d 589 (1984) (upholding contempt conviction of attorney for ignoring court's warning to stop arguing and be seated).

not only to persuade the judge, but to change the judge's mind after the judge has made a decision, how should a court determine whether the continued argument is so repetitive as to interfere with the administration of justice? Moreover, convincing a judge that she is wrong about a ruling sometimes requires an attorney first to convince the judge that she is mistaken in her belief that she has heard enough argument.

On the other hand, once a judge believes that she does understand the issue and has made a ruling, the court must have the enforceable authority to move the trial along. But the cutoff point for argument should not be the court's ruling itself; otherwise there would be no leeway for attorneys to try to change a judge's mind. At the very minimum, a court should first be required to order the attorney to stop arguing and to warn the attorney that further argument will result in a contempt citation. Merely because the court takes those steps, however, does not mean contempt is automatically appropriate. To the contrary, if the court cuts off argument prematurely and threatens use of the contempt power, counsel may feel a legitimate obligation to present further argument were the interest of her client might not be adequately protected on appeal. This does not mean that the potential inadequacy of appellate review to cure trial court errors provides a blanket justification for ignoring a judge's order to stop arguing. However, it is important to appreciate that appellate review may sometimes be insufficient in understanding the pressures on conscientious counsel and judging whether their behavior is obstructive.314

When we discuss the possibilities of rights being unprotected by an appeal, we are really speaking about two different contexts.315 First, appellate review might well provide an adequate remedy for trial court errors, but in order to protect the record for the appeal, an attorney must make certain offers of proof or argument. Second, sometimes appellate review simply does not provide an adequate remedy for certain kinds of trial court errors. Although the courts have infrequently referred to the first context, and virtually never discussed the latter with regard to contempt, the inadequacy of appellate review seems

314. These are also precisely the kinds of pressures of which courts must be cognizant when determining whether an attorney subject to a contempt charge had the requisite wrongful intent.

315. The possible ineffectiveness of appellate review of an underlying order or ruling of the court, the violation of which forms the basis of a contempt charge, is to be distinguished from the difficulties that arise with the efficacy of appellate review of the actual contempt conviction.
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implicitly to underlie some of the appellate courts' appropriate tolerance for excessive argumentation.316

In re McConnell317 provides an excellent example of the dilemma faced by an attorney who has an ethical responsibility to protect the record through further argument or questioning of a witness, but at the same time is ordered by the judge to be quiet. The attorney in McConnell repeatedly insisted that he be allowed to make his offer of proof and ultimately threatened to ask the disputed questions unless a bailiff stopped him.318 As discussed previously, the Supreme Court reversed the contempt conviction, concluding that the conduct was not obstructive, and expressing a sensitivity to the plight of an attorney caught between his responsibility to his client and the demands of the court where obedience to the trial judge's demands to cease argument might foreclose appellate review.319

At other times, an attorney's reluctance to acquiesce to the court's order is grounded not upon a desire to protect the record for appeal, but upon the fear that appellate review will be an inadequate remedy. There, the attorney's only hope is to convince the trial judge of her error. Recall, for example, an earlier hypothetical in which an attorney attempting to object to the cross-examination of her client on the ground that privileged information would be disclosed, was cut off by the judge and ordered to stop arguing. In these circumstances, if the objection is overruled and the witness compelled to answer, the revela-

316. Appellate courts probably are more tolerant of the excessive conduct of attorneys than are trial courts for a number of reasons. This tolerance likely stems, in part, from the fact that there is far less of a need for utilization of the contempt power in appellate tribunals; the atmosphere in appellate courts is more rarefied than the pressurized struggle that so often characterizes trial practice, and the give-and-take between court and counsel generally less contentious. Nevertheless, there is also a high degree of tolerance for minor lapses of decorum and excesses of advocacy from many trial judges. We rarely get to see that expressed in any opinions, however, because obviously if a judge does not hold an individual in contempt, no opinion results. Occasionally, we are able to witness that trial court tolerance where plenary procedures are used to try a contempt charge and a judge other than the one leveling the charges presides over the hearing. See, e.g., State v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (Law Div. 1969) (holding contempt charges against criminal defendant for uttering profanity in court not warranted).


318. Id. at 235.

319. The Supreme Court noted that the trial judge's ruling:

placed [the attorney] in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43(c) and there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the Rule. Id. at 232. Thus, the court implicitly recognized both that appellate review might in fact be an ineffective remedy for the trial court's error and that the potential inadequacy of appellate review might justify greater latitude for advocacy in the trial court.
tion of extremely confidential facts will be irreparable; even if an appellate court were to reverse the judge's ruling and hold that the information is privileged and inadmissible, it cannot reverse disclosure. It seems appropriate, under such conditions, to countenance, if not to encourage, an expansion of the limits of permissible advocacy.

Interestingly, the law of contempt somewhat recognizes the Hobson's choice confronting the witness who is ordered by a trial court to disclose information despite a claim of privilege. Thus, courts have held that a witness may test a privilege ruling by refusing to comply and appealing from any ensuing contempt citation. On appeal, if the claim of privilege is upheld, the contempt charge generally will be vacated. Of course, to the extent that the witness or the client's rights are adequately protected by appellate review, the attorney's justification for refusing immediate compliance with the court's orders is diminished. But, at a minimum, even a direct order by the court to remain silent should not foreclose an attorney from informing a wit-

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321. See, e.g., In re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979) (contempt vacated where subpoena of records overbroad); In re Brogna, 589 F.2d 24 (1st Cir. 1978) (grand jury witness held in contempt for refusing to answer questions on Fifth Amendment grounds; contempt reversed after privilege claim recognized by Court of Appeals). Where a non-party's claim of privilege is denied, most courts permit him to argue that the trial judge's privilege ruling was incorrect in an appeal from the judgment of contempt. See, e.g., In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982); Thyssen, Inc. v. S/S Chuen On, 693 F.2d 1171, 1173 n.2 (5th Cir. 1982). Otherwise, the claimant of the privilege would have no other means to obtain such review because any appeal of the underlying action will not protect his interests.

However, even with respect to a witness who is forced to choose between disclosure and contempt, the appellate process does not always provide an adequate remedy. First, when a party claiming the privilege is held in civil contempt, he may not have the right to question the privilege ruling by appeal. See, e.g., International Business Machines Corp. v. United States, 493 F.2d 112, 117 (2d Cir. 1973). Second, where a witness is held in contempt by the trial court for failure to answer questions because a privilege claim is overruled and the appellate court affirms that the privilege is inapplicable, usually the reviewing court also affirms the judgment of contempt. See, e.g., United States v. Flores, 628 F.2d 521 (9th Cir. 1980) (no attorney-client privilege found; contempt affirmed). Thus, witnesses remain in the precarious position of having to disclose confidential information or risk a contempt citation; there may be no opportunity to obviate the contempt by complying after the appellate determination. In order to be truly responsive to the inadequacy of the appellate remedy in these circumstances, witnesses would have to be given another chance to obey the trial court's order to answer the questions at issue after the privilege claim is resolved by the appellate tribunal. In fact, courts have at least permitted non-party witnesses or intervenors to appeal the denial of a claim of privilege prior to the issuance of contempt citations. See, e.g., In re Grand Jury Proceedings, 641 F.2d 199, 201-02 (5th Cir. 1981); In re Grand Jury Proceedings, 563 F.2d 577, 580 (3d Cir. 1977). Their rationale for so doing has not been the potential ineffectiveness of appellate review, but rather, they have reasoned that a non-party witness is unlikely to risk contempt in order to preserve someone else's privilege. See, e.g., In re Grand Jury Proceedings, 641 F.2d at 201-02; In re Grand Jury Proceedings, 563 F.2d at 580.

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ness or client (or asking the judge to do so) of the grounds for asserting a privilege claim and about the choice and consequences of refusing to answer.

This interconnection between privilege claims and contempt where appellate review might be inadequate should have broader implications for attorneys faced with similar dilemmas. There must be some recognition of the conflict here in structuring the relationship between court and counsel so attorneys are not placed in the position of having to choose between personal risk and compromising what they legitimately feel to be the faithful representation of their clients' interests. Failing to do so inevitably will both dampen the ardor of advocacy and inappropriately punish attorneys who err on the side of protecting against potentially irreversible harm.

A few courts have recognized, in the context of a judge's defamatory remarks to counsel, that the attorney's lack of any appellate remedy justifies his insistence on responding despite direct orders to remain silent. For example, in In re Abse, an attorney charged by the trial court with unprofessional conduct repeatedly insisted on the right to be heard in response until he was held in contempt. The appellate court reversed the conviction, holding that fundamental fairness required that the attorney be given a reasonable opportunity to answer such a charge. This right to be heard was itself grounded in large part on the inability of the appellate process to correct the trial

322. Where an attorney, after asserting a claim of privilege on her client's behalf, is herself ordered to disclose information, the Code of Professional Responsibility provides that she may reveal her client's confidences without it constituting a breach of her ethical obligations. See Model Code of Professional Responsibility DR 4-101(C) (1980). However, in these circumstances, most jurisdictions permit an immediate appeal by the client of the lower court's order directing the attorney to disclose information. See, e.g., In re Grand Jury Proceedings, 641 F.2d at 201-03; In re Berkley & Co., 629 F.2d 548, 550-52 (8th Cir. 1980); Velsical Chemical Corp. v. Parsons, 561 F.2d 671, 674 (7th Cir. 1977), cert. denied, 435 U.S. 942 (1978). Thus, despite giving discretion to the attorney to comply with the court's order, the provision by most courts of an effective appellate remedy to the client blunts the attorney's conflict of personal versus client's interests. Conversely, the availability of immediate review, where it exists, justifies the Professional Responsibility Code's endorsement of permissive disclosure.

Moreover, when an attorney is ordered to disclose a client's secrets, her role is more akin to that of a witness than a lawyer. Of course, prior to the trial judge's final ruling on the privilege claim, the attorney may well be advocating on her client's behalf. But once the judge has finally ruled, the attorney should not be professionally obligated to defy the court, as she is bound only to do everything within the limits of permissible advocacy to persuade the court to rule in favor of her client. The disparate value to the system of trial justice from the two kinds of behavior—unyielding disobedience and the most vigorous representation—is an indicator of the appropriate limits on the reach of the contempt power; at some point, defiance of the court ceases being even arguably advocative.

judge's error. 324 Several appellate courts also have recognized the right of an attorney to respond to insulting or provocative remarks by the trial judge. 325 Although these cases have been based on a sort of personal privilege or excusability of responses provoked by the court, they are best understood as recognizing greater latitude for argument in the trial court where appellate review is likely to be futile.

The nearly absolute ineffectiveness of appellate review in Abse 326 makes it a natural case for detecting the connection between the efficacy of appeal and the scope of permissible conduct for an attorney. Unfortunately, it also permits a simple distinction to be drawn between the personal interests of counsel, which are neither cognizable on, nor effectively protected by, appeal, and the interests of parties to the action, which presumably are. But the distinction is too simple because, in reality, appellate review is at times an inadequate safeguard for litigants' rights as well.

Experienced attorneys are all too aware of the fact that when trial court decisions are reviewed for an abuse of discretion, failure to persuade the trial judge to rule in their favor means that the interests at stake may be irretrievably lost. Under that standard of review, an appellate court will not reverse the trial court's decision unless it concludes that the judge acted outside the range of her discretion. Moreover, whatever the standard of review, appellate courts also can err in upholding a trial court's decision as proper.

Even if an appellate court does conclude that a trial court's ruling was erroneous under an "error" standard of review, or an abuse of

\textsuperscript{324} \textit{Id.} at 656 (footnotes omitted):

In the representation of a client in court a lawyer has the right to press his claim, even if it appears farfetched and untenable, but if the court's ruling is adverse, the lawyer has no right to persist in pressing his claim. His right is only to preserve his point for appeal and thus protect his client's interest. . . . The situation here is quite different. . . . The attorney was personally charged by the judge with unprofessional conduct and no appeal could be taken from the judge's remarks. Can a judge make such a charge and deny the attorney the right to answer? Must the attorney stand silent and helpless in the face of such a charge? Is it contempt of court for the lawyer to insist that he is entitled to answer the charge?\textsuperscript{325}

\textsuperscript{325} See, e.g., 

\textit{State v. Yates}, 208 Or. 491, 302 P.2d 719, 722 (1956) (attorney may object to the tone of voice judge used when addressing client's witness, "provided the objection is made in a respectful manner").

\textsuperscript{326} Even under these circumstances, however, appellate courts are not wholly powerless to provide some relief. If there is an appeal of the underlying action an appellate court can at least comment on the propriety of the judge's remarks and the attorney's behavior. Moreover, whether or not any judgment in the underlying action is appealed, the highest court of a jurisdiction can invoke its supervisory power to censure or discipline a judge for inappropriate behavior. Similarly, judicial ethics boards also have the power to discipline judges for misconduct. Indeed, all of these possibilities are important mechanisms for curbing abuse of the contempt power.
discretion under a more deferential standard, increasingly widespread invocation of the “harmless error” doctrine prevents redress of many trial court mistakes. There is substantial reason to question whether all of the trial court errors found to be harmless by appellate courts did not in fact have some effect on the outcome of the trials. This uncertainty is aggravated by the appellant’s burden of proof to clearly demonstrate that the errors at trial may have affected, or actually prejudiced, the result. Thus, numerous errors which might have produced an unjust judgment are not sufficient to require reversal. Surely, at least some of these errors do affect the outcome of the trial and are simply overlooked in the appellate process; it is extremely difficult for the reviewing court, let alone an attorney in the throes of trial, to know which particular item of evidence or cross-examination question will affect a juror’s deliberation.

327. The harmless error rule provides that even constitutional errors at trial do not require reversal for a criminal conviction where an appellate court concludes beyond a reasonable doubt that the errors did not affect the ultimate determination of guilt. See, e.g., Chapman v. California, 386 U.S. 18, 24 (1967) (“Beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”). Numerous commentators have noted that the use of the harmless error doctrine is on the rise. See, e.g., Stacy & Dayton, Rethinking Harmless Constitutional Error, 88 COLUM. L. REV. 79 (1988).

328. See, e.g., Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 TEX. L. REV. 629, 659–62 (1972); Capra, Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review, 53 FORDHAM L. REV. 391, 396 (1984) (arguing that appellate court cannot accurately evaluate effect on trial of undisclosed evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963)); Singer, Forensic Misconduct by Federal Prosecutors—And How It Grew, 50 ALA. L. REV. 227, 269 (1968) (harmless error rule, which was “intended to be a meaningful and rational approach to technical deviations has grown, like Topsy, into a trite phrase, repeated by rote, dealing with and concealing truly important substantive errors”).


330. A “bare possibility” that [the] defendant may have suffered prejudice is not enough to overturn a guilty verdict.” State v. Norris, 26 N.C. App. 259, 215 S.E.2d 875, 877, cert. dismissed, 288 N.C. 249, 217 S.E.2d 673 (1975), cert. denied, 423 U.S. 1073 (1976); see also United States v. Rochan, 563 F.2d 1246, 1250 (5th Cir. 1977) (“A clear effect on the jury is required to reverse for comment by the trial judge.”); Fountain v. State, 382 A.2d 230, 231 (Del. 1977) (“A defendant must show not only that a violation occurred but that it actually had a prejudicial effect.”); Harrell v. State, 405 So. 2d 480, 484 (Fla. Dist. Ct. App. 1981) (“Absent proof of actual reliance by the jury, or absent the presence of constitutional error, the standard of trial fairness applies, and the burden remains on the defendant to prove the error resulted in an unfair trial . . . .” (citations omitted)); State v. Blaney, 160 W. Va. 462, 284 S.E.2d 920, 924 (1981) (“The general rule in this State is that [a] verdict of guilty in a criminal case will not be reversed by this Court because of error committed by the trial court, unless the error is prejudicial to the accused.”).
Moreover, even if we can judge with complete certainty whether an error was truly harmless with respect to its effect upon the verdict in a case, it may nevertheless have abridged a constitutional guarantee that promotes values other than, or in addition to, the accurate outcome of a trial, such as fourth amendment rights or the right to a grand jury selected in a race-neutral manner. There, the harmless error doctrine may interfere with full vindication of the importance of process, another value entrusted to the protection of counsel through vigorous representation.

Appellate review also is an ineffective remedy where the economics of the case, or the effort needed to prosecute an appeal, do not justify the result even if the appeal would be successful. Similarly, review of a lower court’s grant or denial of injunctive relief may come too late to provide any remedy at all. Finally, neither litigants, nor for that matter society, should be put to the expense of an appeal if the need for appellate review would be obviated by a few minutes more argument in the trial court.

The relationship between the unavailability of an appellate remedy and the appropriate limits on advocacy has a pronounced effect on attorneys’ aggressiveness in the courtroom. When a lawyer perceives that appellate review will be unavailing, she is likely to be more assertive in order to maximize the only chance of prevailing on the issue, and to feel duty-bound to do so. Here, the risks of alienating the trial judge by refusing complete compliance is counterbalanced by the seeming lack of remedy if the attorney is unsuccessful in persuading

331. See Stacy & Dayton, supra note 327, at 81 (arguing that Supreme Court’s application of harmless error rule and treatment of “all constitutional rights as designed to promote only factual accuracy . . . undermines those rights that promote values other than the reliability of guilty verdicts”).

332. Even where an appeal is pursued, issues often are abandoned for tactical or economic reasons, or are lost in the shadows of larger issues. For example, the very real possibility that an appellate court might lose the central thrust of an appeal, or react negatively to the perception of a “kitchen sink” approach to the case—if every conceivable ground for reversal is briefed—leads many advocates to pick and choose the issues they think will be most promising to the court. Yet, in reality, the actions taken in the trial court that might have been presented in the abandoned issues may well have affected the verdict.

333. The acknowledgement of timing problems in litigation has led at least one court to recognize that it is proper for an attorney to interrupt the proceedings of an unrelated case in order to make “emergent” applications in another action, and that the judge has no right to refuse to hear them. See People v. Harrington, 301 Ill. App. 185, 21 N.E.2d 903 (1939).

334. Of course, if one party, given greater leeway to argue her point, is able to turn the judge around, the need for appeal might just change from that party to her adversary. However, at least there the appeal would not have been precipitated by a ruling resulting from the premature curtailment of legitimate advocacy. Moreover, regardless of the range of argument permitted by the trial court, obviously an appeal might be taken in any event.
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the judge or the jury. The possibility is quite strong, for example, that
the prevalence of prosecutorial overzealousness\(^3^{35}\) may be due, in sig-
nificant part, to the fact that the government cannot appeal an acquit-
tal.\(^3^{36}\) The lack of an appellate remedy must also occasionally be

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335. Most writers on the subject contend that overzealousness of prosecutors is widespread. See, e.g., Dershowitz, Foreword to J. LAWLESS, PROSECUTORIAL MISCONDUCT at ix (1985) ("Prosecutorial misconduct . . . is rampant."); Alschuler, supra note 328, at 631 (footnote omitted) ("The academic commentators who have examined the problem of prosecutorial misconduct have almost universally bemoaned its frequency.").

336. Cf. Fisher, In Search of the Virtuous Prosecutor: A Conceptual Framework, 15 AM. J. CRIM. L. 197, 211 n.69 (1988) (because the defendant's sole right to appeal the verdict insulates questionable defense tactics from appellate review, "[i]f some, prosecutorial 'overzealousness' . . . might be justified as 'fighting fire with fire'"); United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) (recognizing that where prosecutorial impropriety is designed to avoid acquittal, reprosecution might be barred after defense motion for mistrial granted). It is surprising that several writers on the subject of prosecutorial misconduct have not discussed this phenomenon as a factor contributing to abusive practices. See, e.g., Alschuler supra note 328.

Given that prosecutors cannot appeal a judgment of acquittal, should they be permitted a wider latitude of advocacy than defense counsel? A full exploration of the relative ranges of permissible advocacy of prosecutors and criminal defense attorneys is more properly the subject of a separate article. Nevertheless, it is probably safe to say that the absence of an appellate remedy should not bestow upon prosecutors any advantage over opposing counsel with respect to the vigorousness of their advocacy. Indeed, Professor Alschuler has argued quite cogently that a prosecutor should be accorded less leeway in his courtroom conduct than the defense. See id. at 631–33. Alschuler cites several decisions that have explicitly adopted this double standard. See, e.g., Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), cert. denied, 268 U.S. 706 (1925); Fitter v. United States, 258 F. 567, 572 (2d Cir. 1919). But see United States v. Cook, 432 F.2d 1093, 1106-07 (7th Cir. 1970) (defense attorney and prosecutor should be judged on same standards), cert. denied, 401 U.S. 996 (1971); State v. Brown, 214 La. 18, 36 So. 2d 624, 626 (1948) (same).

To begin with, the effectiveness of appellate review is but one of many factors that a court should consider in setting the limits of advocacy and contempt. But even as to the relationship between this factor and the scope of a prosecutor's advocacy, the additional leeway, which I suggest should be extended where appellate review is ineffective to correct trial court errors, probably is counterbalanced by the unique function of prosecutorial advocacy.

The very thing that arguably justifies more aggressive advocacy on the part of prosecutors—the absence of an appellate remedy—also cuts the other way. With other attorneys, appellate courts count on the adequacy of review to assist in setting specific limits on advocacy. The problem is, however, that appellate review may be defective and may not provide the mechanism for correcting errors which may have occurred as a result of the premature curtailment of argument; therefore, the limits on advocacy may properly be different from where they might otherwise be if in fact appellate review did rectify all mistakes at trial. It is the failure of the safeguard that should have an effect on where to draw the line limiting advocacy.

But with prosecutors, the courts, which have imposed the same or even stricter limits on their advocacy than those imposed on defense counsel, obviously are not relying on the availability of review to help determine the appropriate boundaries of a prosecutor's courtroom conduct. For prosecuting attorneys, the lack of appellate review is not an inadequacy of the system, but a deliberate institutional bias. Thus, there must be other considerations that justify restrictions on prosecutorial advocacy. Although the courts have not adequately articulated them, it seems clear that such limitations should arise from the special role of a prosecuting attorney as a governmental official committed to the accomplishment of impartial justice, and the heightened vulnerability of, and corresponding protections accorded to, a criminal defendant. See, e.g., Commonwealth v. Nicely, 130 Pa. 261, 18 A. 737, 738 (1889) (because prosecutor should be an
responsible for excesses of advocacy, such as abrasive comments, borne of the frustration of an attorney's inability to persuade the judge

impartial officer of the court, "heated zeal" has no place in prosecutor's conduct); Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1218 (1958) ("The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged.").

For one thing, prosecutors do not have to be concerned with protecting the record for appellate review of trial errors in favor of the defendant because there is none. More importantly, the prosecutor's duty to seek justice rather than to convict (see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980)) is in part a concomitant of the systemic prejudice that it is better to free the guilty than to convict the innocent. See, e.g., Alschuler, supra note 328, at 637 (footnote omitted) ("Although even an occasional conviction not based on the evidence is a terrifying prospect, an occasional 'nonevidentiary' acquittal is a tolerable and probably desirable occurrence."). Therefore, the very purpose of permitting the most vigorous tolerable advocacy—ensuring an accurate outcome and serving whatever independent value is accorded zealous representation under the various models of trial practice—does not come into full play with the advocacy of a prosecuting attorney. The degree to which the expression of advocacy should be permitted to interfere with other values of justice may lead to different results for the two kinds of attorneys.

This disparity between the roles of prosecutors and other attorneys is made wider by the marked difference in the vulnerability of a criminal defendant as opposed to the government. See, e.g., id. at 631 ("[T]he likely subjects of a defense attorney's disrespect, the prosecutor and trial judge, are not themselves on trial. A criminal defendant, whose liberty is at stake and who is involved in one of the most traumatic experiences of his life, presents a far more vulnerable target."). Additionally, the prosecutor may have a built-in advantage of greater credibility before the judge and jury. See, e.g., People v. Kirkes, 243 P.2d 816, 831-33 (remarks of defense counsel "have little weight as compared with similar statements of the district attorney... . A statement of the prosecutor... is weighted with the authority of his office. It... cannot fail to make an impression upon the minds of the jurors."). aff'd, 39 Cal. 2d 719, 249 P.2d 1 (1952); Alschuler, supra note 328, at 632. And, although it has been suggested that "the defendant's sole right to appeal the verdict... may give trial judges an incentive to favor the defense in evidentiary disputes," see Fisher, supra note 336, at 211 n.69, it is at least equally likely, and in the opinion of many attorneys more probable, that judges compensate consciously or unconsciously for the prosecutor's inability to appeal by favoring the prosecution when disputes arise.

Finally, any acknowledgment of a broader latitude for the advocacy of prosecutors over that of defense attorneys would raise serious due process questions. Indeed, the due process and sixth amendment rights of a criminal defendant, as well as the imbalance of prosecution and defense resources and the severity of criminal sanctions, may themselves imply a greater tolerance generally for the zealusness of defense counsel. See, e.g., Luban, The Adversary System Excuse, in THE GOOD LAWYER 83, 91-93 (D. Luban ed. 1983); Schwartz, The Zeal of the Civil Advocate, 1983 AM. B. FOUND. RES. J. 543, 548-52.

For all of these reasons, it may be appropriate to impose upon prosecutors stricter limits on the expression of advocacy that interferes with other values of justice and to require greater obedience to the directions of the trial judge in setting those limits. Indeed, as noted earlier, the special advocacy rights accorded criminal defendants by the Constitution and the constitutional obligations of defense counsel may require that advocacy on behalf of a criminal defendant be permitted to interfere more with competing interests of justice before being deemed obstructive. See supra notes 133–35 and accompanying text. Certainly, there is little to recommend a suggestion that prosecutors should enjoy a more permissive range of courtroom conduct than that of their adversaries. Thus, to the extent that the unavailability of appellate review should in fact justify greater leeway to prosecutors to argue with the judge or to attempt to discover a clever way of circumventing a ruling, that freedom is offset by the many arguments against permitting prosecutorial advantage in advocacy.
or even to present her argument fully. Of course, the mere fact that attorneys react to the unavailability of an appellate remedy does not necessarily make the reaction proper. But it does suggest that they are responding to a real dynamic of the system to which more aggressive advocacy is reasonably designed to respond, just as zealous representation, including some of the abuses of advocacy, naturally derives from the values of the various models of a trial.

Therefore, it is not appropriate to consider a judge’s ruling as setting an absolute limit on advocacy, every violation of which would constitute an obstruction. The inability of appellate review to effectively remedy a trial court’s error should raise a court’s tolerance for an attorney’s continued argument or objection in spite of the judge’s order for silence. Courts must allow attorneys additional room to argue and to test the resoluteness of the judge’s order to desist, in order to compensate for that failing. However, the unavailability of an effective appellate remedy is but one of many forces at work in a trial that join in carving out the boundaries of the range of permissible courtroom conduct.

337. Indeed, the response of some criminal defense attorneys to the government’s inability to appeal an acquittal surely must be to exceed the limits of permissible advocacy intentionally, knowing that if they win the case their misconduct is insulated from review. Not only may such misbehavior be inappropriate, but it may well constitute an obstruction that should be punished as contempt, especially where it appears to have had affected the outcome of the trial. On the other hand, the limits of advocacy and the definition of obstruction must devolve in part from the common practices of attorneys and the tolerance of such conduct by trial courts.

338. As the Seventh Circuit observed in In re Deilinger, 461 F.2d 389, 399 (7th Cir. 1972), a highwater mark in restricting the reach of the contempt power:

[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.

339. It is not always easy, of course, to discern whether the opportunity for an appeal may provide an adequate remedy, or exactly what record is necessary to preserve a point for appeal. I do not mean to suggest that appellate (or for that matter trial) courts should attempt to engage in detailed assessments of the likelihood of effective review. Rather, because of the frequent ineffectiveness of appellate review, the tolerance of advocacy to interfere with the trial court’s interests in absolute control and obedience to its authority should generally be greater. However, in those circumstances where it can be determined in advance that review clearly cannot or is unlikely to afford relief from a trial court’s error or misconduct, as in In re Abse, 251 A.2d 655 (D.C. 1969), the leeway for argument should be expanded even further.

340. Indeed, some of these forces act in opposition to each other. For example, I suggest below that courts should also permit greater leeway to attorneys to argue where the specific issue in question is critical to the proper disposition of the action. See Raveson, supra note 278. However, the decisions of trial courts on these kinds of important issues generally have the best chance of being corrected on appeal if erroneous. On the other hand, where advocacy about a critical issue is excessive and reveals information to the jury that they should not have heard, the adverse effect on the deliberative processes of the trial justify stricter limits on courtroom...
G. Ensuring Adequate Breathing Room for Advocacy

The manner in which the courts define obstruction sets actual limits on the scope of permissible advocacy, and the distinction between tolerable and obstructive advocacy can become easily blurred.\(^\text{341}\) Obstruction must be defined broadly enough to protect the ability of the courts to conduct their business. But if the range of behavior that is considered to be impermissible is defined too broadly, it will include in its sweep advocacy that should be protected, as it accomplishes more good than harm. The balance between the interests of the court (and the litigants) in fair and orderly proceedings, the needs of the litigants (and the court) for vigorous advocacy, and the extent to which advocative expression would in fact be inhibited must be structured to leave sufficient breathing room for advocacy. The concept of ensuring adequate breathing space for advocacy encompasses three overlapping concerns that emerge from our prior discussion—the overvaluing of order and respect for the court, the undervaluing of advocacy, and the potential for deterrence of vigorous representation.

1. Overvaluation of Order and Decorum

First, any overemphasis on order and decorousness in this balance would tend to be self-defeating and undermine the administration of justice because the unnecessary dampening of advocacy is not compensated by an insistence upon greater punctiliousness than that which is minimally required to protect the fairness and continuity of the proceeding. So long as sufficient order and decorum exist that the deliberative processes of the trial are not prejudiced, the trial is not hampered by substantial and unnecessary delays, and the judge and other participants in the proceeding can fulfill their functions and be free from abuse, little value would be added to a trial by requiring greater civility, obedience, or respect for the judge.

341. Thus, for example, Professors Dorsen and Friedman note that “[t]he precise point when argumentation becomes defiance and obstruction of proceedings occurs is often difficult to pin down.” N. DORSEN & L. FRIEDMAN, supra note 5, at 157. Dorsen and Friedman suggest that the tone of the lawyer’s remarks and the length of time consumed in argument may be the two dispositive factors in determining whether an obstruction has occurred. Id. The authors certainly are correct in looking to other factors to assist in pinning down the point of obstruction. However, while it is unclear whether they intend the two factors to be exclusive or if they are offered by way of example, there are numerous other relevant considerations for assessing the propriety of such conduct. Indeed, Dorsen and Friedman suggest several relevant considerations with respect to regulating the conduct of parties. See id. at 92–94.

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Moreover, implementing those requirements would interfere greatly with the ability of attorneys to be aggressive and effective advocates. One measure of whether the definition of obstruction leaves too little breathing room for advocacy should be the extent to which there remains for attorneys alternate modes of expression of material advocacy that are of comparable persuasive effect to those that are prohibited. Courts must be very careful not to allow their interest in order and decorum to foreclose the presentation and thereby the content of arguments by counsel. Once the emphasis on orderliness and civility begins to mean a loss of advocacy, the cause of justice is no longer being served. Increasing the demand for order and decorum over that which is minimally necessary very quickly reaches the point of diminishing returns and thereafter elevates form over substance.

2. Undervaluation of Advocacy

Second, and conversely, restricting the vigorousness of advocacy to a level that affords only minimally adequate representation misses by a wide mark the maximum value that zealous lawyering can provide.

342. The content and expression of advocacy obviously are integrally related, probably more so than with respect to most other kinds of speech. As discussed earlier, because there is no other time and place for trial advocacy, limitations on the presentation of an attorney's speech may also restrict the content of the speech. See supra note 157 and accompanying text. Moreover, Marshall McLuhan's insight that "the medium is the message," see M. McLuhan, UNDERSTANDING MEDIA 7 (1964), has particular strength in describing trial advocacy. The persuasiveness of an attorney's argument in court may derive as much from the manner in which it is presented as from its content. Thus, restrictions on the mode of expression of advocacy can severely limit the ability of counsel to convince the court and the jury. Indeed, legal commentators have suggested that we analyze even substantive legal argument as an example of rhetoric by focusing on the effects of an argument as an effort to persuade the audience. See, e.g., Frug, Argument as Character, 40 STAN. L. REV. 869, 872 (1988) (footnotes omitted):

A rhetorical analysis of legal argument involves examining its elements, such as facts, precedents and principles, not in terms of how they support the argument's conclusion but in terms of how they form attitudes or induce actions in others. . . . Traditional legal analysis, by emphasizing the search for the sources of law, discounts its evangelical element; rhetorical analysis, by contrast, makes this aspect its focus.

See also Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 N.C.L. REV. 481 (1987) (lawyers' choices of what to say, when to object, and every other manner of the presentation of advocacy contribute to the persuasiveness of the attorney's expression, quite apart from its content).

343. Minimally adequate or competent representation is more or less the standard for measuring claims of ineffective assistance of counsel for the purpose of determining whether a defendant in a criminal case was denied the constitutional right to be represented by an attorney prior to imposition of a custodial sentence. Although that standard is explicitly based on an objective standard of reasonableness, see, e.g., Strickland v. Washington, 466 U.S. 668, 687-88 (1984), it has been interpreted as requiring only a fairly minimal level of competence. See, e.g., Burger v. Kemp, 483 U.S. 776 (1987) (failure of defense counsel to present any mitigating evidence at sentencing hearing of client convicted of murder, despite facts that defendant was seventeen-year-old army private with sub-normal I.Q. and history of psychological illness at time...
Lukewarm advocacy not only fails to achieve all of the benefits of aggressive, emotional, and insistent representation, but in an arena where vigorous advocacy is expected, it can also send a message to the judge and jury of disaffection for the lawyer's cause, which can damage a client's interests. Unlike expanding the demand for order and decorum, permitting broader latitude for advocacy can maximize benefits to the system of justice. Indeed, to reach the optimal balance between advocacy and order and decorum, some degree of interference with those latter values must be tolerated; courts must leave sufficient space for lawyers to be aggressive advocates and to struggle with the judge.

In setting the actual limits on advocacy through the definition of obstruction, it is also important that courts be sensitive to whether seemingly neutral standards impact unevenly upon attorneys representing particular causes,344 a variable that appears to have wholly escaped their attention.345 Contempt citations against public defenders and attorneys representing defendants in political cases, for example, are grossly disproportionate to the number issued to

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344. Analogously, first amendment jurisprudence clearly has recognized that courts must subject government restrictions on speech such as prohibitions on sound trucks or door-to-door distribution of circulars, which fall more heavily on the poor, to close scrutiny. See, e.g., Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating restrictions on door-to-door distribution of circulars); cf. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) (“There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places.”).

345. In addition, contempt charges, if made by the judge in the presence of the jury, can be far more prejudicial to some litigants than others. Although courts have recognized that any disciplining of an attorney in front of the jury is inappropriate because it can harm the litigant's case, see, e.g., Whittenburg v. State, 46 Okla. Crim. 380, 287 P. 1049, 1051 (1930); Bell v. State, 130 Tex. Crim. 90, 92 S.W.2d 259, 260 (1936), the prejudice to a criminal defendant from such action, for example, is likely to exceed the prejudice suffered by the government's case when a prosecutor is disciplined. See, e.g., Alschuler, supra note 328, at 654-55.
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One might theorize that the reason for this disparity is that public defenders and movement attorneys misbehave more than their prosecutorial counterparts. That is unlikely, however, and even more unlikely to account for the very high degree of disparity demonstrated; there is a strong consensus that prosecutorial misconduct is rampant. Rather, it is probable that several other factors explain why the contempt power falls more heavily upon defense attorneys than prosecutors, and these factors in turn assist in arriving at the proper scope of permissible advocacy vis-à-vis the contempt power. Although the discussion of these factors focuses on the disparate use of the contempt power against particular classes of attorneys, it echoes the tensions of broader issues—the unavoidable dialectic built into our trial system requiring certain kinds of advocacy that necessarily interfere with other interests of justice, and the extreme difficulty of eliminating the subjectivity that pervades the application of the standards governing contempt.

The first is that successful functioning of a defense or movement attorney often requires a different substance and style of advocacy than that of a prosecutor. A prosecutor may benefit substantially from her association with the authority of the court. After all, she, like the judge, is a public official, cloaked in the mantle of the state. Consequently, a prosecutor may be less likely than defense counsel to challenge the court and risk disturbing the jury's perception of that

346. Professor Alschuler notes that in surveying twenty-five years of reported decisions, although he found a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, he did not find a single case in which a prosecutor had been similarly disciplined. He did find one case in which a trial court had held a prosecutor in contempt, but the conviction was reversed on appeal. Alschuler, supra note 328, at 674. Professor Singer, whose review of the decisions was limited to federal cases, but went back more than twenty-five years, similarly found no contempt citation for a prosecutor's courtroom misbehavior. See Singer, supra note 328, at 276. Since those articles were written, at least one case has upheld the contempt conviction of a prosecutor. See Smith v. Adams, 161 Ga. App. 820, 288 S.E.2d 775 (1982) (the prosecutor, in response to the judge's remark that he had practiced law for forty years, commented "[Y]ou can't tell"). Another case reversed, on procedural grounds, the contempt conviction of a prosecutor for forensic misconduct, and remanded to the state court for prosecution of the conduct as contempt. See Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), cert. denied, 414 U.S. 1161 (1974).

347. This is precisely the suggestion made by former Chief Justice Burger. See Burger, supra note 302, at 213.

348. See, e.g., Alschuler, note 328, at 631; Hobbs, Prosecutor's Bias, An Occupational Disease, 2 ALA. L. REV. 40 (1949); Singer, supra note 328.

349. This may be true as well of public interest attorneys generally. It certainly is true with respect to the need of public interest lawyers to raise novel and imaginative claims that might be viewed by the court as frivolous and therefore sanctionable. See LaFrance, Federal Rule 11 and Public Interest Litigation, 22 VAL. U.L. REV. 331 (1988) (Rule 11 has disproportionate impact on public interest attorneys).
association. Defense attorneys, on the other hand, who were prohibited from vigorously sparring with the court would lose the legitimate benefits of that kind of assertive advocacy without any return for the abstinence. In addition, a prosecutor probably enjoys greater credibility than the attorney representing the defendant. Defense attorneys may have to work harder and be more vigorous advocates, just to stand on an equal footing with the prosecution. Here too, however,

350. See supra note 323; see also Alschuler, supra note 328, at 632:
The assistant district attorney is the representative of an elected, presumably popular public official, and the mere fact that he is a state employee may create a sense of trust and an expectation of fairness that a defense attorney would find difficult to match through the most strenuous exertion of his charm.

351. Because the primary subject of this Article is the relationship between advocacy and contempt, the discussion naturally focuses upon the function and discipline of attorneys. Many of the observations herein, however, are applicable to the litigants themselves. Moreover, pro se litigants obviously stand in virtually the same shoes as attorneys.

Particular sensitivity should be shown to criminal defendants with respect to the standards defining the scope of the contempt power. To begin with, the emotional pressures on defendants facing serious criminal sanctions are qualitatively different from most pressures resulting from other kinds of proceedings. The occasional release of these pressures as a flippant remark, or even a single outburst of profanity, is certainly understandable, if not tolerable. Cf. State v. Jones, 105 N.J. Super. 493, 253 A.2d 193, 199 (Law Div. 1969) (defendant’s utterance of profanity in open court held not to constitute contempt because it created no disturbance or disorder in the courtroom and the proceeding in progress continued uninterrupted). Indeed, it has been noted with surprise just how little criminal defendants misbehave or resist the inexorable process leading to such enormous consequences to their lives. See N. DORSEN & L. FRIEDMAN, supra note 5, at 6.

Beyond the susceptibility to occasional emotional outbursts, defendants in criminal proceedings are also often forced to choose between the observance of courtroom formality and the efforts to understand, protect, and exercise their own rights. Professor Tigar has highlighted the tension created by the conflicts faced by criminal defendants caught up in a system where their rights are constantly subject to waiver by the action of their attorneys and where their own attempts to exercise some personal control over the proceedings in an unskilled or unlawyerly way can result in contempt penalties or removal from the courtroom. See Tigar, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1 (1970). As Tigar explains, the defendant:
seldom either knows or cares about the subtleties of criminal procedure or elevated constitutional ideals. But he knows what in fact the criminal process is doing, or can do, to him and his family. And, as a heightened sense of injustice steals across the face of America and finds devotees in the inner city, the factory, and the campus, he is often conscious of what that process is doing to his community, his class, or his race as well. It palters in a double sense, therefore, to admonish him to observe the arcane rituals of the courtroom and to entrust his future to the remote world of judges and lawyers—only to discover at the end of the process that his rights have mysteriously evanesced through “waiver.” As he becomes less patient and more aware of the gulf between the real world and the imaginary city of procedural rights bespoken by Justice Black [in Illinois v. Allen, 397 U.S. 337 (1970)], there will doubtless be more assertive behavior in court.

Id. at 26. Professor Tigar goes on to suggest that lawyers, responding to the pressures and participation of their clients and the resulting loss of their own control, will also become more assertive advocates and “[r]ituals will bend.” Id. at 27.
excesses can be both self-defeating and obstructive to the administration of justice.

In “political” trials, still another dynamic may operate to weight facially neutral standards for defining obstruction against the defense. Defendants in a political prosecution are charged with conduct challenging the authority or legitimacy of the prevailing political institutions.352 Their defense often includes claims that the political order against which their conduct was aimed is in fact illegitimate. Therefore, not only were the acts in question non-criminal, but the resulting prosecution and judicial proceeding themselves are not legitimate.353

Often, a salient aspect of this claim is that the court’s reliance on procedural niceties interferes with substantive justice for the defendants354 or, conversely, that the court is subverting justice by failing to properly observe its own procedural rules.355 These claims are directed toward persuading the trier that the acts in question were justified or necessary, even if the trier should conclude that all the elements of a crime are otherwise established under the positive criminal law. For example, a defense offered in several trials in the sixties for burning draft records was the illegitimacy of the Vietnam War and defendants’ opposition to it. These defenses seek to appeal to a higher moral or political code than the positive law, and may, if other defenses fail, ultimately seek jury nullification.356

These are the kinds of claims that may sometimes be perceived by the trial judge as shading into hostility or disrespect for the court. They challenge the legitimacy of the system from which the judge

353. See, e.g., Hazard, supra note 352, at 449.
354. The conflict between formal procedures and substantive justice, which is particularly felt by those subjected to prosecution, is noted more eloquently by Professor Tigar:

[If] one believes that the courts in their day-to-day operation are the means by which a disproportionate number of the nation’s poor and powerless are dealt with arbitrarily, then one’s primary insistence will be upon fairness and respect for personal rights. And if one further believes than the judicial system in the hands of a hostile government is used as a weapon to repress dissent, then his anger and frustration will be channeled into dramatizing this fact and attempting to cast aside procedural formalisms which mask injustice and make it easier to inflict.

Tigar, supra note 351, at 28.
355. Id.
356. See, e.g., Robinson, Legality and Discretion in the Distribution of Criminal Sanctions, 25 HARV. J. ON LEGIS. 393 (1988) (patterns of jury nullification indicate that jurors frequently exercise their nullification power to circumvent specific rules where there is a strong moral component involved and when they believe that applying the rules would conflict with broad normative notions of justice).
derives her authority, and suggest that the jury can exercise a transcendent power over that of the ordinary functioning of law enforcement, including perhaps, the judge's directives and instructions. Such claims, even if made respectfully, may sometimes color the judge's perception of the propriety of counsel's courtroom conduct. In addition, the interjection of these defenses in political cases creates evidentiary complications that pervade the proceedings with uncertainty and ambiguity. Thus, there is often a great deal more argument and conflict between the court and defense counsel who are raising controversial claims in an extremely unsettled area of the law. Finally, seeking to use trial as a forum for informing the public about political controversies and government policies may conflict with the court's desire to narrow the scope of material issues in the case. For all of these reasons, political trials often present a more immediate clash

357. See, e.g., Comment, Richardson v. Marsh: Codefendant Confessions and the Demise of Conformation, 101 HARV. L. REV. 1876, 1881 n.36 (1988) (jury's willingness to obey court's instructions as opposed to exercising their power of nullification depends on whether they agree "in conscience" with them (citing S. KASSIN & L. WRIGHTSWAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 109 (1988)).

358. Hazard, supra note 352, at 450.

359. Cf. Colbert, supra note 352, at 1297–316 (discussing unsettled state of the law governing resolution of motions in limine in political trials). Of course, to the extent these issues are well settled, the justification of counsel for vigorously fighting over the parameters of defenses that have been clearly prohibited is vitiates and repeated efforts to interject an improper defense would be obstructive rather than constructive.

360. Professor Tigar makes note of a sentiment apparently prevalent in earlier trials, which presently informs the sixth amendment right to a public trial, of defendants and attorneys who "cast aside formalism and spoke their minds about the process in which they were engaged," Tigar, supra note 351, at 26 n.81 (referring to, among others, The Trial of William Penn and William Mead [1670], 6 HOWELL'S STATE TRIALS 951, 955–61 (1810), and The Trial of George Gordon [1781], 21 HOWELL'S STATE TRIALS 485 (1814)). There is evidence that early in our country's history, the degree of deference to trial judges was generally far less than it is today, and the kind of open critique of the judicial process noted by Professor Tigar, more common. See Speech by T. McClesky, speech to the American Society for Legal Historians (Oct. 21, 1988) (on file with the Washington Law Review). That the judicial system has functioned seemingly as well with quite different standards of order and decorum, may indicate that any justification of a broader definition of obstruction than that which tolerates greater zeal in advocacy is more a function of the judge's self-perception than of utility, let alone necessity.

Modern cases also have recognized that one of the legitimate purposes of litigation, especially in public interest and political cases, is to inform the public about the issues involved in the litigation. See, e.g., In re Primus, 436 U.S. 412, 431 (1978) (ACLU attorney's letter soliciting client within zone of first amendment protection, because ACLU "engages in litigation as a vehicle for effective political expression . . . as well as a means of communicating useful information to the public"); Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979) (lawyers involved in civil actions of public concern play important role of enlightening public debate).

In addition, curtailment of the educational component of political and public interest trials is not often likely to be cognizable on appeal. Thus, there may be additional pressure on the attorneys and litigants to assert their position vigorously in the trial court and a corresponding need for greater leeway in doing so.

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between the court's demand for order and decorum and the defend-
ant's exercise of vigorous advocacy and demand for substantive jus-
tice. These tensions, which are present to a greater or lesser extent
in all trials, are like the strains that build up along a geographical fault
line; if no mechanism exists for the dissipation of stress they are bound
to be dissipated either in a series of smaller tremors, or if restrained, to
accumulate and be released in a more explosive burst. Facilitating
the more gradual release of tensions through a broader tolerance for
advocacy is not only a less obstructive method for relieving potentially
destructive energy, but it also channels that energy back into the
system.

361. These tensions are also recognized by Professor Tigar:
From commanders of power both public and private we hear more and more stridently the
claim that order must have primacy even over justice; by such an assertion is meant that the
speaker prefers that the existing constellation of political and economic power be preserved.
From alienated and dispossessed there comes an increasing insistence that the formal
guarantees of fairness are primary, and there is a growing willingness to insist upon these
guarantees militantly and even disruptively. In such a time, to speak of accommodation of
order to justice becomes more and more beside the point, for in the real world they are more
and more perceived in counterposition.

362. In addition, there is probably greater emotion felt and exhibited by all participants in
political cases than in many other kinds of cases. Moreover, attorneys' connection to their clients
and the clients' causes frequently are more personal. Finally, the stakes of the proceeding to
society as a whole are frequently as high or higher in political trials than in other kinds of
litigation.

363. One more variable that contributes to the disproportionate exercise of the contempt
power against attorneys representing clients in criminal and political cases is the tendency of
courts to hold the lawyers accountable for failing to control their clients' behavior. See, e.g.,
United States v. Sacher, 182 F.2d 416, 423, 444-45 (Contempt Specification 27), aff'd on other
grounds, 343 U.S. 1 (1952) (defense of Communist Party leaders in Smith Act prosecution); cf.
AMERICAN COLLEGE OF TRIAL LAWYERS, COMMITTEE ON DISRUPTION OF THE JUDICIAL
PROCESS, REPORT AND RECOMMENDATION ON DISRUPTION OF THE JUDICIAL PROCESS
Principle III(d) (1970) (a lawyer is obligated "to advise any client appearing in a courtroom of
the kind of behavior expected and required of him there, and to prevent him, so far as lies within
the lawyer's power, from creating disorder or disruption in the courtroom").

Despite the fact that an attorney is considered to be an "officer of the court" for some
purposes, she is not bound to assume the job of the court bailiff or marshall. See Cammer v.
United States, 350 U.S. 399, 405 (1956). Nevertheless, while acknowledging that the outer limits
of any duty of an attorney to control her clients is imprecise, one commentator has argued that
trial counsel at least has the basic obligation to "tell his client to behave himself, and do so with
sincerity or at least its verisimilitude." See Hazard, supra note 352, at 445. The conflicts
inherent in a lawyer's role as an officer of the court, between loyalty to her client and obligation
to the judicial institution, or more generally to the public interest, is a topic properly the subject
of its own article. See, e.g., Gaetke, Lawyers as Officers of the Court, 42 VAND. L. REV. 39
(1989). Suffice it to say that even if Professor Hazard is correct that attorneys have at least some
minimal obligation to assist the court in trying to impose control on their clients, utilization of
the contempt power to punish a lawyer in this context for anything other than an outright refusal
to state to her client the bare admonition suggested by Hazard, would be wholly inappropriate.

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The second factor that probably plays a role in explaining the disparate impact of the contempt power on criminal defense and movement attorneys is the courts' oversensitivity to disrespect in the decisions defining obstruction, and undervaluation of the harmful effect of certain kinds of misconduct on the deliberative processes of justice. As discussed above, a prosecutor may be less likely to conduct herself in a way that might be perceived as challenging the court's authority. Rather, the forms that a prosecutor's forensic misconduct most often assume are derogatory remarks to and about the defendant or his attorney, inflammatory argument, and appeals to the trier's prejudice—all behavior that can improperly affect the outcome of a trial. Yet, despite appellate court expressions of disapproval, reprismands, and assertions that such conduct ought to be punished by disciplinary review boards or considered contemptuous by trial courts, it almost never is. For example, in Darden v. Wainwright, the prosecutor argued in summation to the judge that he wished he could see the defendant with "no face, blown away by a shotgun," referred to the defendant as an "animal," and offered his own opinion that the defendant was guilty. Despite the fact that every appellate court, both state and federal, to consider the case agreed that the prosecutor's conduct was reprehensible, he was never charged with contempt, and the defendant's conviction was not

364. See Alschuler, supra note 328, at 634.
365. See, e.g., State v. Ramseur, 106 N.J. 123, 524 A.2d 188, 290 (1987) (suggestion by prosecutor in summation in capital case that jury's deliberations should be influenced by need to protect society from crime improper; noted "Supreme Court will not hesitate to refer on its own motion possible violations of the special ethical rules governing prosecutors . . . for disciplinary action"); United States v. Ofshe, 817 F.2d 1508, 1516 & n.6 (11th Cir.), cert. denied, 484 U.S. 963 (1987).
367. See, e.g., Ofshe, 817 F.2d at 1516 & n.6.
369. See supra note 346 and accompanying text.
371. Id. at 180 n.12.
372. Id. at 180. It is improper for an attorney to express her personal opinion as to the truth or falsity of any testimony, the culpability of a litigant, or as to the guilt or innocence of an accused. See STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE § 3-5.8(b) (1979); see, e.g., United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986); In re Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982).
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reversed. The reluctance to treat such patent misconduct as contemptuous may skew justice all the more, especially in light of courts' failure to employ any other effective remedy for or deterrent to such misbehavior.

Of course, defense attorneys also make improper arguments to the jury, offer their personal opinions as to their clients' innocence, and insult opposing counsel. However, such misconduct on the part of defense counsel is often less likely to have a prejudicial effect on the deliberative processes of a trial or on public regard for the courts as institutions of justice, than when a prosecutor engages in it. To make matters worse, defense attorneys, unlike prosecutors, are frequently held in contempt for these kinds of forensic misbehavior. This oddity brings us to the third factor—bias.

Putting aside any suggestion of purposeful discrimination against defense attorneys or movement lawyers by trial judges, facially neutral criteria for defining obstruction may frequently be applied discriminatorily because they are so vague as to be subject to the "moment to moment enforcement" of trial judges. Thus, the

373. Reversal for a prosecutor's forensic misbehavior is rare, even where the reviewing court finds the conduct in question inexcusable. See, e.g., Darden v. Wainwright, 477 U.S. 168 (1986); United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), cert. denied, 456 U.S. 989 (1982).

374. As Professor Alschuler notes: "[A] prosecutor's abuse of a criminal defendant seems more damaging to both the substance and appearance of justice than any disrespectful wisecrack that a 'movement' defense attorney has ever uttered in a courtroom." Alschuler, supra note 328, at 631.

375. Cf. id.; Comment, Harmless Error Abettor of Courtroom Misconduct, 74 J. CRIM. L. & CRIMINOLOGY 457 (1983) (discussing general lack of effective remedies for prosecutorial misconduct). Query whether the reticence of the courts to exercise the contempt power to punish prosecutorial misconduct arises in part from a concern that if the prosecutor is found to have obstructed the administration of justice, particularly as it relates to the deliberative processes of a trial, it would make it more difficult for a reviewing court to treat the misconduct as harmless error and affirm the conviction. In other words, if a prosecutor refers to the defendant as an animal in front of the jury and expresses his desire to see the defendant murdered, it might appear too much a sleight of hand for a court to conclude that the impropriety interfered with the trial sufficiently to constitute an obstruction, but insufficiently to have potentially prejudiced the outcome. If so, the contempt power would act less as an alternative deterrent and remedy to reversal and more as a triggering agent for it.

376. See, e.g. supra note 336 and accompanying text; Alschuler, supra note 328, at 632–33.

377. See supra note 346.

378. Contempt, as well as other sanctions, such as disciplinary actions, certainly can be an extremely effective means of control over attorneys' behavior, and that power is undoubtedly used by some judges to effectuate their biases. See, e.g., Comment, Controlling Lawyers by Bar Associations and Courts, 5 HARV. C.R.-C.L. L. REV. 301 (1970) (suggesting that contempt and other devices for controlling lawyers' behavior are purposefully employed against attorneys based on political bias).

unpopularity of the client or the cause might cause a judge unconsciously to view a defense attorney’s efforts to represent her client at the furthermost bounds of permissible advocacy as more obstructive than similar conduct of the prosecutor. Moreover, this is particularly so where judges feel that their rulings or orders are more vigorously challenged by defense counsel, or perceive themselves as the target of movement lawyers’ criticism of the court’s procedures. These problems with the contempt power, although exacerbated in the circumstances discussed above, underscore the fundamental danger of the subjectivity with which that power can be wielded.

3. The Potential for Deterrence of Vigorous Representation

The third concern that must be considered in attempting to ensure adequate breathing room for advocacy is that in defining obstruction we have to be concerned not only with the actual limits imposed upon advocacy, but with the real possibility of deterring conduct that would be protected under the particular definition itself. If an attorney’s

380. One recent example of this kind of discriminatory use of sanctions was observed by the author in the Federal District Court in New Jersey. There, both the United States Attorney and defendant’s counsel walked into the courtroom fifteen minutes late after unsuccessfully attempting to reach a plea bargain. The judge fined the defense attorney but not the prosecutor. A more famous example was highlighted by Justice Black, dissenting from the Supreme Court’s affirmance of the summary contempt conviction in Sacher v. United States, 343 U.S. 1 (1952), of one of the attorneys in the communist-conspiracy case of Dennis v. United States, 341 U.S. 494 (1950):

[F]rom the very parts of the record which [the trial] Judge Medina specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributable to their Communist leader clients.

343 U.S. at 19.

381. The sanctions that can be imposed under the contempt power are severe and likely to deter a substantial amount of protected conduct if, as is presently true, the definition of what is punishable as contempt is imprecise and subject to arbitrary application by trial courts. In virtually all jurisdictions, including the federal courts, each instance of contempt is punishable by as much as six months in jail before there is even a constitutional right to a jury trial. See People v. Goodman, 17 Mich. App. 175, 169 N.W.2d 120, 122 (1969); In re Yengo, 84 N.J. 111, 417 A.2d 533, 538 (1980). In many jurisdictions, there is no prescribed maximum penalty for convictions of criminal contempt. See, e.g., Frank v. United States, 395 U.S. 147, 149 (1969) (Congress has authorized courts to impose penalties for criminal contempt but has not placed any specific limits on the discretion of the courts); People v. Stolar, 3 Ill. 2d 154, 201 N.E.2d 97, 100-01 (1964) (when no maximum penalty is authorized, as is the case with contempt, the
conduct is punishable the moment it is no longer laudatory, conduct at
the outer bounds of what the obstruction standard permits is likely to
be chilled. Thus, even where a lawyer's forensic behavior may itself
have little or no value as advocacy, punishing it would be destructive
to the goals of a trial by chilling the vigor of representation. Here
again, we must be more careful not to overvalue order and decorum in
comparison to advocacy because this chilling effect only runs one way.
Although the threat of contempt may cause self-censorship among
attorneys, the possibility of disorder is likely only to increase judges'
resolve for obedience and respect.

IV. CONCLUSION

My initial foray into the area of contempt began with a phone call
from a colleague, who had just been summarily convicted of contempt
and sentenced to two days in jail for having grimaced in response to an
adverse ruling in a hotly contested criminal trial. Without the bene-
fit of counsel, or an opportunity to prepare and present a defense, he
had been convicted, searched and handcuffed in the courtroom, and
transported to jail. I was certain, intuitively, that his conduct was not
contemptuous; but in the course of the next several years, appealing
his conviction, I discovered that the case law I looked to to establish
this simple understanding was a morass of discursive definitions and
conflicting standards for measuring the limits of the contempt power.
So I set out on my journey to describe my resolute sense of the con-
tours of contempt in an elegant theory—a categorical definition sus-
ceptible to unerring application. This article, demonstrating that no
categorical test can meaningfully describe the limits of the contempt
power, is the result. In applying the actual obstruction standard as a

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362. This colleague, a public defender, was the defendant in In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987), aff’d, 118 N.J. 51, 570 A.2d 416 (1990), cited throughout this article.
matter of constitutional mandate, courts can only define obstruction with reference to the actual tensions created by the conflict between the various goals of justice experienced by attorneys and other participants in the trial process.

Having spent much of the article exploring how our understanding of the adversary system of justice must inform our understanding of the contempt power, it seems worthwhile to pause for a moment to consider the obverse—what does the courts' exercise of the contempt power, as it presently operates, tell us about the nature of our system of justice? If the symbols of deliberateness—etiquette, civility, decorum—are permitted to supplant the soul of deliberation—ardent advocacy in the service of justice—it suggests that the aim of justice is the appearance of authority rather than the just resolution of disputes. For the institution of government charged with the responsibility of determining whether its citizens live or die, of safeguarding their fundamental guarantees of liberty and equality, and resolving the social conflicts of a nation, this ordering of priorities could not be more incongruous.

It is difficult to expect any authority to curtail its own prerogatives. But it is imperative that courts rethink the parameters of their role in the trial process and the nature of their relationship with the bar. Judges and lawyers are not adversaries, they are complementary components of the machinery of justice. Throughout history, lawyers who have been most revered and most sought after are those who have skated on the edge of permissible advocacy. Surely, even judges, if faced with the need for representation at trial, would choose those attorneys who have demonstrated the ardor that may so offend the bench. If we wish to encourage attorneys to skate on the edge, we must ensure that the surrounding ice is not too thin.

In creating breathing room for vigorous advocacy, courts must insist that any proscriptions on contemptuous conduct must be narrow and precise enough that they neither punish nor appear to punish constitutionally protected conduct, give adequate notice of what expression is properly punishable, and do not inhibit the exercise of the most aggressive level of advocacy tolerable within our system of justice. In order to achieve these critical objectives it is necessary to identify and develop appropriate variables that will expose the internal tensions between the goals of justice, and which provide tools for measuring and balancing those competing interests. How that may be accomplished and what those variables are is another story—one that will be
told in a companion article appearing afterward in this same volume: "Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy."