The Summary Contempt Power: A Critique and a New Perspective

Richard B. Kuhns

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The Summary Contempt Power: A Critique and a New Perspective*

Richard B. Kuhns†

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† Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. A.B. 1964, LL.B. 1967, Stanford University; LLM. 1974, University of Michigan. This article has been submitted to the University of Michigan Law School in partial fulfillment of the requirements for the degree of Doctor of Science of Law.
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Introduction

The judiciary's inherent power to punish affronts to its authority as criminal contempt rests on the premise that courts must have the ability to vindicate their authority by ensuring obedience to their orders and respect for their processes. Traditionally, criminal contempts have been characterized as sui generis, and even today federal contempts are not considered "crimes" or "criminal prosecutions" within the meaning of the Fifth and Sixth Amendments to the Constitution. Nonetheless, the Supreme Court has recognized that "criminal contempt is a crime in every fundamental respect." Unless the conduct being punished occurs in open court and in the immediate view of the judge, a contemnor is entitled, as a matter of due process, to most of the procedural protections available to defendants in ordinary criminal prosecutions. At least some criminal contempts that occur in the immediate view of the judge, however, may be punished.
summarily—without affording the contemnor even the minimal pro-
cedural guarantees of prior notice and a hearing.\footnote{7}{E.g., United States v. Wilson, 421 U.S. 309 (1975); Ex parte Terry, 128 U.S. 289 (1888).} The term “summary” has sometimes been used to refer to contempt proceedings in which the defendant is afforded notice and a hearing, but not a jury trial. \footnote{8}{Sacher v. United States, 343 U.S. 1, 9 (1952); Cooke v. United States, 267 U.S. 517, 534-36 (1925).} In this article, unless the context indicates otherwise, the term is used to describe only those contemptS punished without prior notice and a hearing. On the summary contempt power generally, see N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT 220-30, 232-38 (1973); Sedler, The Summary Contempt Power and the Constitution: The View from Without and Within, 51 N.Y.U. L. Rev. 34 (1976).

The Supreme Court has offered a twofold rationale for the exercise of this extraordinary summary power. First, since the judge is person-
ally aware of the relevant facts, there may be no need for a hearing.\footnote{9}{United States v. Barnett, 376 U.S. 681, 692 (1964); Green v. United States, 356 U.S. 165, 179 (1958).} Second, punishment without the delay inherent in notice and a hearing may be necessary to vindicate the court’s authority or to prevent obstructions of justice.\footnote{10}{But see Panico v. United States, 375 U.S. 29 (1963), discussed at p. 51 infra (per curiam) (full hearing required on issue of contemnor’s mental competence).} The Court has rarely questioned the first rationale and has not dealt satisfactorily with the nature of the “necessity” that satisfies the second rationale.\footnote{11}{See pp. 70-99 infra.} Indeed, it is unclear to what extent necessity limits the power to punish summarily contempts observed by the judge.\footnote{12}{See pp. 89-90 & note 307 infra (discussing United States v. Wilson, 421 U.S. 309 (1975)).} Federal Rule of Criminal Procedure 42(a) specifically incorporates only the first rationale; it provides that “[a] criminal contempt may be punished summarily 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.”\footnote{13}{382 U.S. 162 (1965).} Nonetheless, the Supreme Court, particularly in recent years, has been sensitive to the potential abuses of a power that permits the same individual, acting as prosecutor, judge, and jury, to impose criminal penalties summarily for affronts, if not to his personal dignity, at least to the institution that he represents. For example, \textit{Harris v. United States,}\footnote{14}{Fed. R. Crim. P. 42(a). Rule 42(b) provides that any prosecution for contempt not covered by Rule 42(a) must proceed by notice and hearing.} decided in 1965, reversed the Rule 42(a) summary contempt conviction of a wit-
ness who, after receiving immunity, refused to obey a judge’s order to testify before a grand jury.\footnote{15}{Harris makes no reference to due process, and it is unclear whether its limitation on the summary contempt power is applicable to the states. See 1966 DUKE L.J. 814, 823-24.} The Court noted that the “[d]elay neces-
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sary for a hearing would not imperil the grand jury proceedings,"\(^{16}\) and in dictum the Court observed that "Rule 42(a) was reserved 'for exceptional circumstances' . . . such as threatening the judge or disrupting a hearing or obstructing court proceedings."\(^{17}\)

Subsequent to \textit{Harris}, the Court reversed summary contempt convictions, on either procedural\(^{18}\) or substantive\(^{19}\) grounds, in every case that it decided with a written opinion\(^{20}\) except the most recent one,

16. 382 U.S. at 164.
17. \textit{Id.} (citation omitted). \textit{Harris} overruled \textit{Brown} v. United States, 359 U.S. 41 (1939), which had upheld the summary conviction of a recalcitrant grand jury witness. In both cases the requirement that the contempt occur in the immediate view of the judge was supposedly satisfied when the grand jury was convened in the judge's presence and the witness was asked the same questions that he had previously refused to answer in the grand jury room. \textit{Harris} characterized the "real contempt" as having occurred outside the judge's presence, and it viewed the repetition of the contempt before the judge as merely a device to avoid affording the contemnor prior notice and a hearing. 382 U.S. at 164-65. \textit{Brown}, on the other hand, characterized the judge's personal involvement in the matter as a laudable attempt to encourage the witness to testify. The Court suggested that a judge whose sole objective was punitive might well have proceeded with notice and a hearing. 359 U.S. at 50.

In both cases the witnesses' counsel were present at the proceedings before the judge, and it is not clear whether spectators were removed from the courtroom. The exclusion of both counsel and spectators, if not the exclusion only of spectators, would probably violate a witness's due process right to a public trial. See \textit{Levine} v. United States, 362 U.S. 610, 619 (1960) (suggesting counsel must be present); \textit{In re Oliver}, 333 U.S. 257, 266-73, 278 (1948) (right to public trial extends to summary contempt adjudications and "an accused is at the very least entitled to have his friends, relatives and counsel present" as part of that right). Yet the presence of counsel or spectators during a grand jury proceeding is inconsistent with the requirement of grand jury secrecy. See \textit{Fed. R. Crim. P.} 6(d), (e). Neither \textit{Brown} nor \textit{Harris} discussed this problem.

18. See \textit{Taylor} v. \textit{Hayes}, 418 U.S. 488 (1974) (summary adjudication at end of trial failed to contain the due process violation but judge had become personally embroiled in controversy with contemnor and because contemnor had not been given prior notice and opportunity to be heard); \textit{Johnson} v. \textit{Mississippi}, 403 U.S. 212 (1971) (adjudication by judge involved in conflict with contemnor on unrelated matter denied contemnor due process); \textit{Mayberry} v. \textit{Pennsylvania}, 400 U.S. 455 (1971) (summary adjudication at end of trial denied contemnor due process because judge and contemnor had become personally embroiled in controversy); \textit{cf.} \textit{Groppi} v. \textit{Leslie}, 404 U.S. 496 (1972) (summary contempt conviction imposed by state legislature two days after disruptive incident denied contemnor due process because all legislators voting on contempt resolution may not have observed the incident and because contemnor was not given prior notice and opportunity to be heard).

19. See \textit{In re Little}, 404 U.S. 553 (1972), \textit{discussed at pp. 67-69 infra} (per curiam) (pro se defendant's overzealous advocacy did not constitute contempt). In one other contempt case, \textit{Eaton} v. \textit{City of Tulsa}, 415 U.S. 697 (1974) (per curiam), it is unclear whether the defendant received an adjudicatory hearing and an adequate opportunity to prepare a defense. \textit{See note 43 infra}. The Court's opinion describes the contempt action as having been initiated by information, 415 U.S. at 697, and an excerpt from the transcript of the proceedings leading to the contempt charge indicates that the defendant had until the next day to show cause why he should not be held in contempt. \textit{Id.} at 703 (Rehnquist, J., dissenting). This may not have been an adequate time to prepare a defense, however, and there is no reference to the nature of the proceeding on the following day. Justice Powell's concurring opinion refers to the contempt penalty as a "summary remedy," \textit{id.} at 701, but does not indicate in what sense the proceedings were summary. \textit{See note 7 supra} ("summary" may refer to lack of jury trial as well as to lack of notice and hearing).

20. In \textit{Howell} v. \textit{Jones}, 414 U.S. 803 (1973), the Supreme Court, without an opinion, dismissed for want of a substantial federal question a defendant's appeal from a state court
United States v. Wilson. 21 The defendants in Wilson were summarily convicted for their refusals, after grants of immunity, to testify during a criminal trial. The Court noted that the contempts fell “within the express language of Rule 42(a),” 22 and distinguished Harris on the ground that trial courts, unlike grand juries, do not have the flexibility “easily [to] suspend action on any one [case], and turn to another” while the contemnor is granted notice and a hearing. 23

Parts I and II of this article will analyze the development and inadequacies of the pre-Wilson limitations on the summary criminal contempt power in terms of the two rationales for its exercise: (1) the lack of need for procedural protections due to the judge’s personal observation of the contempt and (2) the necessity for action without the delay that would result from granting procedural safeguards to the contemnor. 24 Part III will argue that Wilson, despite the breadth of some of its language, suggests for the first time a narrow, acceptable basis for the exercise of summary contempt power. Building upon that suggestion, the analysis will then consider factors that should limit the use of summary punishment. 25 Finally, Part IV will offer two

summary contempt conviction for refusing to answer questions during a trial. See Ex parte Howell, 488 S.W.2d 123 (Tex. Crim. App. 1972). A decision on this ground is a holding on the merits of an appellant’s claims. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). The contemnor, however, did not raise the questions of (1) whether summary procedures were appropriate or (2) whether his conduct fell outside the constitutionally permissible scope of the judiciary’s contempt power. Instead, he based his appeal on the grounds that the state contempt statute was facially unconstitutional and that the state appellate court did not give proper consideration to his claims. Howell v. Jones, 42 U.S.L.W. 3013 (U.S. July 10, 1973) (docket summary); see Howell v. Jones, 516 F.2d 53, 58-59 (5th Cir. 1975), cert. denied, 424 U.S. 916 (1976) (rejection of some of contemnor’s procedural and substantive claims in subsequent habeas corpus proceeding). But see id. at 59 (“In upholding the contempt convictions . . ., the Supreme Court implicitly rejected Howell’s constitutional argument that summary contempt cannot be imposed for the orderly refusal to answer questions.”)

In In re Spencer, 397 U.S. 817 (1970), the Court by an equally divided vote affirmed an attorney’s criminal contempt conviction based on his statements in a motion to disqualify a judge. See In re Spencer, 38 U.S.L.W. 3162 (U.S. Nov. 4, 1969) (docket summary). It is unclear whether the contemnor was convicted without notice and a hearing. There is no Supreme Court or lower court opinion, and the issues presented to the Court on appeal were substantive, not procedural. See id.

22. Id. at 314-15 (footnote omitted).
23. Id. at 318.
24. Procedural requirements for and statutory definitions of contempt vary somewhat among jurisdictions. See Kuhns, Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury, 73 Mic. L. Rev. 483, 486 & n.14 (1975). Since this article is concerned with generally applicable limits on the summary contempt power, Supreme Court cases dealing with due process restrictions on the exercise of that power will be a focal point. Where constitutional issues are in doubt, the analysis will be restricted primarily to lower federal courts’ interpretations of the due process clause and nonconstitutional restrictions that have been imposed on the federal contempt power.

25. The proposals in this article for limiting the summary contempt power go well beyond the Supreme Court’s approach to the summary contempt power. Nonetheless, the limitations suggested here can be readily adopted under existing law by trial and ap-
modest proposals to enhance the effectiveness of the summary contempt power and to minimize the harm resulting from wrongful summary adjudications.

I. The Need for Procedural Safeguards

The judiciary's failure to deal adequately with the summary contempt power may be attributable in part to the two-fold justification for the exercise of that power. If one begins with the premise that there is an overriding necessity for summary punishment, the extent to which a contemnor would benefit from particular procedural safeguards is likely to be at best a secondary concern. At the same time, the claim that a judge's personal observation of allegedly contumacious behavior obviates the need for notice and a hearing may discourage careful consideration of whether the necessity for summary action actually exists. Before turning in Parts II and III to the question of the necessity for summary punishment, the analysis here will examine the extent to which procedural safeguards have been and should be considered important in summary contempt proceedings.

A. Prior Warning

The absence of an adjudicatory hearing in summary contempt cases obviates any need for prior notice of the charge to ensure the defendant an opportunity to prepare a defense. Requiring a judge to warn an individual that his conduct is considered contumacious, however, may have the salutary effect of restraining oversensitive judges from acting immediately to impose contempt sentences for relatively minor incidents of misconduct. Moreover, prior warning may be necessary in some cases in order to permit an individual to conform his conduct to expected courtroom norms or to ensure that the elements of the offense have been established.

Unlike Harris and Wilson, which involved violations of specific court orders, most summary contempt convictions are based on some
type of disruptive or indecorous behavior.\textsuperscript{30} The substantive definition and scope of the power to treat such activity as contempt set forth in 18 U.S.C. § 401(1) is typical; it provides that contempt of court includes "[m]isbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice."\textsuperscript{31} "Misbehavior" includes physical\textsuperscript{32} and verbal\textsuperscript{33} disruption of proceedings, failure to rise at the commencement and close of proceedings,\textsuperscript{34} failure to appear on time for a scheduled hearing,\textsuperscript{35} and overzealous advocacy by counsel.\textsuperscript{36}

Given the broad definition of contempt and the judicial discretion

\textsuperscript{30} See, e.g., notes 32-36 infra (citing cases).
\textsuperscript{31} 18 U.S.C. § 401(1) (1976). Although the court's contempt power is inherent and not dependent upon legislative action, see p. 39 & note 2 supra, the Supreme Court has approved legislative regulation of the power. Nye v. United States, 313 U.S. 33, 50-52 (1941); Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry., 266 U.S. 42, 65-67 (1924); see Kulms, supra note 24, at 486-87.

Nye held that the phrase "in the presence of or so near thereto" limits the scope of § 401(1) to conduct that occurs in the physical proximity of the court. 313 U.S. at 48-49. It is important to distinguish this substantive restriction on the federal contempt power from the procedural rule limiting summary punishment to those contempts that occur in the "actual presence" or "immediate view" of the judge. Cooke v. United States, 267 U.S. 517, 534-36 (1925); see Carlson v. United States, 209 F.2d 209, 213 (1st Cir. 1954); Fed. R. Crim. P. 42(a), quoted at p. 42 supra.

\textsuperscript{32} E.g., Rollerson v. United States, 343 F.2d 269, 276-78 (D.C. Cir. 1964) (defendant in criminal trial summarily convicted of contempt for throwing water pitcher at prosecutor; case remanded for consideration of mental capacity issues); United States v. Bentvena, 304 F.2d 883 (2d Cir. 1963) (per curiam) (affirmance of unreported criminal contempt judgment for throwing chair at prosecutor; facts giving rise to contempt citation are set forth in Mirra v. United States, 220 F. Supp. 361, 361-63 (S.D.N.Y. 1963)).

\textsuperscript{33} E.g., United States v. Galante, 298 F.2d 72, 73-76 (2d Cir. 1972) (continuing to speak after repeated orders from judge to stop); United States v. Hall, 176 F.2d 163, 163-69 (2d Cir.), cert. denied, 338 U.S. 851 (1949) (shouting at judge in loud, angry voices); In re Dellinger, 370 F. Supp. 1304, 1312-14 (N.D. Ill. 1973), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975) (series of remarks interrupting proceedings by criminals in criminal trial).

\textsuperscript{34} E.g., United States v. Abascal, 509 F.2d 732, 754-55 (9th Cir.), cert. denied, 422 U.S. 1027 (1975); United States ex rel. Robson v. Malone, 412 F.2d 848 (7th Cir. 1969) (sentence but not judgment of contempt vacated); cf. Comstock v. United States, 419 F.2d 1128, 1130-31 (9th Cir. 1969) (contempt conviction for failure to rise and approach bench after order to do so). But see note 79 infra.

In both Abascal and Comstock the trial judge had ordered the contemnors to rise, but the Ninth Circuit viewed the refusals as a violation of § 401(1) ("misconduct . . . [that] obstruct[s] the administration of justice") rather than § 401(3) (violation of a court order).

\textsuperscript{35} E.g., Blackmer v. United States, 328 U.S. 421 (1942); In re Gates, 478 F.2d 998, 999-1000 (D.C. Cir. 1973). But cf. In re Niblack, 476 F.2d 930, 932 (D.C. Cir.), cert. denied, 414 U.S. 909 (1973) (emphasizing that conviction was based on violation of specific order to appear rather than finding that failure to appear constituted "misconduct in the presence of the court").


\textsuperscript{36} E.g., United States v. Schiffer, 351 F.2d 91, 93-94 (6th Cir. 1965), cert. denied, 384 U.S. 1003 (1966); In re Osborne, 344 F.2d 611, 615-16 (8th Cir. 1965).

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to decide whether to invoke the contempt power, prior warning would be desirable in order to permit an individual to conform his conduct to the judge's expectations of proper behavior. In the absence of a warning, it may be unclear prior to summary adjudication whether the judge views the conduct as contumacious. The problem is particularly acute for attorneys, who must tread the fine line between vigorous advocacy and obstruction of justice.

Although a concern about fair warning is one of the considerations underlying the void-for-vagueness doctrine, the Supreme Court has never suggested that the federal contempt statute is unduly vague, nor has it held that prior warning is a prerequisite to summary punishment. At least one state court, however, has held that a warning is required in some situations, and several other courts have suggested that prior warning would be desirable in summary contempt cases.

37. One significant difference between ordinary criminal prosecutions and criminal contempt cases is that the court, as opposed to the public prosecutor, has the discretion to decide whether to initiate contempt proceedings. See Kuhns, supra note 24, at 494-95.

38. See In re McConnell, 370 U.S. 230, 236 (1970); In re Dellinger, 461 F.2d 389, 397, 401 (7th Cir. 1972); N. Dorsen & L. Friedman, supra note 7, at 139-40; Schwartz, Judges as Tyrants, 7 CRIM. L.B. 129, 134-35 (1971); Note, Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney, 63 Ky. L. Rev. 945, 949-32, 956-65 (1975); 1971 Wis. L. Rev. 329, 342-43.


In addition to ensuring fair warning, the void-for-vagueness doctrine has been invoked to invalidate statutes that by virtue of their vagueness may have a chilling effect on the exercise of constitutional rights. E.g., Winters v. New York, 333 U.S. 507, 509-10 (1948); see Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75-85 (1960). Exercise of the broadly defined contempt power can have the same effect on constitutional rights, and the Supreme Court has expressed concern about this potential chilling impact in cases involving overzealous advocacy. For example, in In re McConnell, 370 U.S. 230 (1962), an attorney had been summarily held in contempt for his unfulfilled threat to continue a line of questioning "unless some bailiff stops us." Id. at 235. Holding that this conduct did not constitute misbehavior that obstructs the administration of justice within the meaning of 18 U.S.C. § 401(1), the Court observed:

An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case.

370 U.S. at 236. When the potential chilling effect of the contempt power is urged as the basis for reversal, the fact that the contemnor received prior warning should not save an otherwise invalid conviction. Indeed, giving the warning may increase the chilling impact of the contempt power. For the proposition that § 401(1) should be held unconstitutionally vague, see Brautigam, supra, at 1526-33.

40. But cf. Illinois v. Allen, 397 U.S. 377, 346 (1970) ("circumstances" under which removal of disruptive defendant did not result in unconstitutional denial of his right to be present at his own trial included repeated warnings by trial judge that defendant "would be removed . . . if he persisted in his unruly conduct").


42. See United States v. Abascal, 509 F.2d 755, 755 (9th Cir.), cert. denied, 422 U.S. 1027 (1975) (failure to give warning that conduct may be contumacious not reversible error, but such warning may be appropriate); United States v. Schiffer, 351 F.2d 91, 95
Moreover, the failure to give such a warning may partially explain at least one Supreme Court decision reversing a contempt conviction on the ground that, as a matter of substantive law, the conduct was not contumacious.43

Prior warning may also be necessary in some contempt cases to ensure that the elements of the offense have been established. It is well settled that each element of a criminal contempt, including the requisite mental state, must be proved beyond a reasonable doubt.44 While courts have taken different and inconsistent approaches in defining the mental state that must accompany contumacious misbehavior,45 it seems clear that the mens rea requirement is not eliminated or reduced, at least theoretically,46 merely because summary procedures


In Eaton, a trial witness, the victim of an assault, referred to the defendant as a “chicken-shit.” Id. at 698. The Court held that “this single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt.” Id. at 698. In a concurring opinion Justice Powell stated:

[T]he controlling fact, in my view, and one that should be emphasized, is that petitioner received no prior warning or caution from the trial judge with respect to court etiquette . . . . 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.

Id. at 700-01. But see id. at 701 (Rehnquist, J., dissenting) (“Even the Court appears to shy away from a flat rule, analogous to the hoary doctrine of the law of torts that every dog is entitled to one bite, to the effect that every witness is entitled to one free contumacious or other impermissible remark.”)

On the question whether the contempt in Eaton was “summary” in the sense of there being an inadequate opportunity to prepare and present a defense, see note 19 supra.

44. E.g., In re Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971); United States v. Patterson, 219 F.2d 659, 662 (2d Cir. 1955).

45. See United States v. Smith, 555 F.2d 249, 252 (9th Cir. 1977) (“formulations of the requisite intent cannot be expected to be uniform in all contexts”); N. DORSEY & L. FRIED- MAN, supra note 7, at 108-11; Dobbs, supra note 2, at 263-65. Compare Offutt v. United States, 232 F.2d 60, 72 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956) (no wrongful intent required if conduct is “clearly blameworthy”) with United States v. Scale, 461 F.2d 345, 367-69 (7th Cir. 1972) (wrongful intent always required; acts punishable only if contemnor “knows or should reasonably be aware that his conduct is wrongful”) and Sykes v. United States, 444 F.2d 928, 930 (D.C. Cir. 1971) (intent may be inferred when lawyer’s conduct showed “reckless disregard for his professional duty”).

For a discussion of the mens rea requirement when a contempt charge is based on violation of a court order rather than on misbehavior that obstructs justice, see Dobbs, supra note 2, at 261-63; Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 COLUM. L. REV. 780, 793-96 (1943).

46. Courts seldom articulate the precise nature of the mens rea requirement in non-summary contempt cases. See Dobbs, supra note 2, at 263-64. Thus it is not possible to determine whether the requirement has in practice been diluted in summary contempt cases.
are invoked. The Seventh Circuit has recently defined the “minimal requisite intent” for summary criminal contempt as “a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.” Under this formula, which has been adopted by several other courts, it may be possible in some instances to infer beyond a reasonable doubt the existence of the requisite mental state merely from the actor’s conduct. For example, short of any question regarding mental capacity, such a finding presumably could be made if an individual assaulted a judge or bailiff. The same inference, however, may not be appropriate when the conduct consists solely of vigorous advocacy that the judge believes exceeds the bounds of propriety. In this type of case, prior warning may be the additional critical factor permitting the court to find that the contemnor “should have been aware” that his conduct was wrongful. At least one court has suggested in dictum that the absence of such a warning in a borderline case would be fatal to a summary contempt conviction.

B. Opportunity to Respond

1. Evidentiary Hearing

The premise that a judge’s personal observation of the contempt makes an evidentiary hearing unnecessary rests on the assumption that a judge will accurately perceive all the relevant facts. Numerous experiments, however, have demonstrated that individuals often mis-

47. See, e.g., In re Williams, 509 F.2d 949 (2d Cir. 1975) (reversal of summary contempt conviction because evidence insufficient to support finding beyond reasonable doubt that defendant had requisite mens rea).
48. United States v. Scale, 461 F.2d 345, 368 (7th Cir. 1972).
50. See p. 51 infra.
51. United States v. Scale, 461 F.2d 345, 366 (7th Cir. 1972); see ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE § 7.2, at 93 (1972) (trial judge should give “clear warning that the conduct is impermissible” before imposing any sanction other than censure, unless it is clear that conduct was “wilfully contemptuous”).
52. See Cooke v. United States, 267 U.S. 517, 534 (1925) (“There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense.”) Ironically, Ex parte Terry, 128 U.S. 289 (1889), often cited as the leading case for the proposition that contempts in the actual presence of the court may be punished without notice and a hearing, does not rely on the assumption that a trial judge will accurately perceive all the relevant facts. Rather, in denying Terry’s application for a writ of habeas corpus, the Supreme Court held that its power was limited to determining whether the trial court had jurisdiction to enter the contempt order and that for this purpose it must accept as true the findings of the trial court. Id. at 311. Yet the trial court may have misperceived the facts. See note 54 infra.
perceive even simple occurrences. The shock and spontaneity of most courtroom disturbances probably increases the margin for error, particularly when several individuals are involved in the same incident. Moreover, even if the judge accurately perceives the activities in the courtroom, at least two relevant facts—the defendant’s mens rea and his mental capacity—may be impossible to establish without an evidentiary hearing.

The extent to which the judge’s accurate observation of the events would be sufficient to permit a finding that the defendant acted with the requisite mens rea depends in part on the substantive intent requirement for criminal contempts. Some courts have emphasized that a subjective criminal intent must be shown, thereby implying that the defendant must actually intend to act wrongfully or at least be aware of the likelihood that his conduct is wrongful. Other courts, as noted previously, have held that it is sufficient to show that the contemnor “should reasonably [have been] aware that his conduct [was] wrongful.” This latter test is an objective one, akin to the Model Penal


54. See Note, supra note 53, at 979-80 & n.29. Even if a judge’s initial perception of the events is accurate, it may be distorted by subsequent suggestive influences. See id. at 982-85. This may have occurred in Ex parte Terry, 128 U.S. 289 (1888), where the trial court, in its summary contempt order, recited that Terry had assaulted a marshal with a deadly weapon during a disturbance in the courtroom. Id. at 298. Terry subsequently denied that he had used a deadly weapon in the courtroom, but he admitted that moments after the incident (and presumably beyond the view of the court) he drew a small knife at the door to the marshal’s office. Id. at 299-300. If Terry’s assertion was true, and if prior to the contempt order a marshal or spectator informed the court that Terry had brandished a knife without specifying the location of the incident, the trial court may have assimilated the knife story with its own perceptions of what happened in the courtroom. See, e.g., Loftus, Leading Questions and the Eyewitness Report, 7 COGNITIVE PSYCH. 560 (1975). See generally Bem, When Saying Is Believing, PSYCH. TODAY, June 1967, at 21.


56. See Panico v. United States, 375 U.S. 29 (1963), discussed at p. 51 infra (per curiam).


58. This type of characterization of the requisite mental state occurs most frequently in cases in which the contempt charge is based on the violation of a court order. E.g., United States v. UMW, 330 U.S. 298, 303 (1947); In re Brown, 454 F.2d 999, 1007 (D.C. Cir. 1971); see Moskowitz, supra note 45. These cases do not suggest that a different standard should apply when the contumacious conduct does not involve the violation of a court order. Since most contempt cases in the latter category do not discuss the mens rea issue, however, see note 46 supra, one cannot be certain that the same court would apply the same standard to all types of contempts. See United States v. Smith, 555 F.2d 249, 252 (6th Cir. 1977) (“Formulations of the requisite intent cannot be expected to be uniform in all contexts”).

59. See notes 48 & 49 supra (citing cases).
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Code’s definition of negligence. The defendant’s conduct is evaluated in terms of what a reasonable person would have been aware of without regard to the defendant’s actual awareness.

Both subjective and objective intent are often inferred from an actor’s conduct, and a trial judge, if he accurately perceives the relevant conduct, should have little difficulty in applying the objective test. If the mens rea requirement is subjective, however, the potential ambiguity in the inference from conduct to actual intent may preclude finding beyond a reasonable doubt that the defendant acted with the requisite intent.

Even if the judge properly perceives the contumacious conduct and the objective mens rea standard applies, an evidentiary hearing may be necessary to determine whether the defendant has the capacity to conform his conduct to accepted legal norms. In Panico v. United States, a criminal defendant had been convicted of criminal contempt pursuant to Rule 42(a) for his disruptive courtroom behavior. In a brief per curiam opinion the Supreme Court reversed the conviction and held that Panico was entitled to a hearing on the question of his criminal responsibility. The Court observed that there had been conflicting testimony on Panico’s capacity to stand trial and that shortly after the trial he had been committed to a mental hospital.

The mental capacity question in Panico and the perception and mens rea problems discussed previously may arise infrequently.

60. ALI Model Penal Code § 2.02 (2)(d) (1962).
62. For example, it may not be clear whether an attorney engaged in overzealous advocacy actually intends to misbehave in a manner that obstructs justice or is aware that he is doing so. See Offutt v. United States, 232 F.2d 69, 72 (D.C. Cir.), cert. denied, 351 U.S. 988 (1956) (inference of intent from attorney’s conduct sufficient to support only one of two charges of contempt).
63. 375 U.S. 29 (1963) (per curiam).
64. Id. at 30; accord, Rollerson v. United States, 343 F.2d 269, 276 (D.C. Cir. 1964).
65. 375 U.S. at 30. The trial judge had specifically found that Panico was sane at the time of the contumacious conduct. United States v. Panico, 308 F.2d 125, 127 (2d Cir. 1962), rev’d, 375 U.S. 29 (1965) (per curiam).
66. An evidentiary hearing will seldom be necessary in a situation involving a witness’s refusal to obey a court order. Such cases are unlikely to present problems of perception, intent, or mental capacity. But see United States v. Wilson, 488 F.2d 1231, 1234-35 (1973), rev’d, 421 U.S. 309 (1975) (possible mental capacity defense is one reason for requiring hearing in case involving recalcitrant witness).
67. In Harris v. United States, 382 U.S. 162 (1965), the Court stated, as an argument for the reversal of a recalcitrant grand jury witness’s summary contempt conviction, that notice and a hearing would have served “important ends” by allowing the witness to show “extenuating circumstances.” Id. at 166. The only circumstance hypothesized by the Court, however, was that the witness might have refused to answer because of fear. Id. Since fear of reprisal is probably not a defense to a charge of contempt, Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) (dictum); United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977) (per curiam) (dictum), by establishing this fact, the defendant could only hope to
When they do arise, however, they share one common characteristic: they present a situation in which the trial judge's personal observation of the contumacious conduct is not a completely satisfactory substitute for an evidentiary hearing. *Panico* is the only Supreme Court case holding—or even intimating—that a potential factual dispute may be the sole basis for prohibiting summary punishment of contumacious conduct that occurs in the actual presence of the judge. The reference there to conflicting psychiatric testimony suggests that a defendant must make some showing of the need for a hearing in order to avoid summary punishment. The Court, however, did not indicate what type of showing would be sufficient, nor did it indicate what, if any, other types of factual disputes might be governed by *Panico*. Moreover, since the Court based its holding only on the requirements of "the fair administration of federal criminal justice," it is unclear whether due process would require the same result in a state court contempt proceeding.

2. Legal Argument

Regardless of whether an evidentiary hearing is necessary to resolve factual disputes in a particular case, the decision to invoke the summary contempt power may raise important, unresolved legal issues. A major shortcoming of the rationale that a judge's personal observation of contumacious conduct obviates the need for notice and a hearing is its failure to view the presentation of legal arguments as part of the hearing process.

If a court order to testify is invalid, for example, because it violates the witness's privilege against self-incrimination, the refusal to answer affect the severity of his sentence, see *id.*, or perhaps to persuade the judge to exercise his discretionary power to dismiss the contempt, see United States v. Barnett, 346 F.2d 99 (5th Cir. 1965); Kuhns, *supra* note 24, at 494-95. An opportunity for the defendant to speak in mitigation following the summary conviction would be sufficient to protect these interests. See Groppi v. Leslie, 404 U.S. 496, 506 n.11 (1972). Both Harris and his attorney were given such an opportunity. 382 U.S. at 170 n.10 (Stewart, J., dissenting). The Court in *Harris* would have presented a much stronger argument for a hearing if it had emphasized the need to present legal arguments challenging the order to testify. See pp. 53-55 infra.

67. 375 U.S. at 30.
68. *Id.*
69. In the past the Court has sometimes first established a right under its supervisory power over lower federal courts and later elevated that right to constitutional status. See pp. 63-65 infra (discussion of embroilment doctrine). Compare Cheff v. Schnackenberg, 384 U.S. 373 (1966) (in dictum, Court gave federal criminal contemnors right to jury trial under Court's supervisory power over lower federal courts) with Bloom v. Illinois, 391 U.S. 194 (1968) (Court made right to jury trial for criminal contemnors due process right under Constitution).
70. U.S. CONST. amend. V.
is generally not contempt. Establishing such a defense, however, may require extensive research and involve intricate analysis. Although a number of courts have been sensitive to this need in cases involving recalcitrant grand jury witnesses, neither the majority nor the dissenting opinion in United States v. Wilson expressed concern that

71. The violation of a court order that is invalid may be punishable as contempt but only if the court has jurisdiction to issue the order. See Walker v. City of Birmingham, 388 U.S. 307, 313-19 (1967); United States v. Dickinson, 465 F.2d 496, 509-11 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973). But see In re Berry, 68 Cal. 2d 137, 147, 456 P.2d 273, 280, 65 Cal. Rptr. 273, 280 (1968) ("jurisdiction" includes not just personal and subject matter jurisdiction but also constitutional provisions and rules developed by other courts).

Courts have not been consistent in distinguishing between a void order, which the court lacks jurisdiction to issue, and a voidable order, which, although invalid, may support a contempt judgment. See Cox, The Void Order and the Duty to Obey, 16 U. Chi. L. Rev. 86 (1948); Rogers, The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings, 49 B.U. L. Rev. 251 (1969). Indeed, the question whether a court order is void or merely voidable may itself present a substantial legal issue that justifies holding a hearing. See Kuhns, supra note 24, at 504-10. It is clear, however, that the refusal to testify based on a valid self-incrimination claim cannot be punished as contempt. E.g., Hoffman v. United States, 341 U.S. 479 (1951). Moreover, in recalcitrant witness contempt cases, courts sometimes assume that the invalidity of the court order is a defense to the charge without considering whether the order is void or voidable. See, e.g., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (reversal of contempt conviction because court order was based on evidence obtained in violation of Fourth Amendment); Kuhns, supra note 24, at 508 n.118.


Even if there is no question regarding the application or scope of immunity, a court order to testify may raise other difficult legal issues. See, e.g., In re Fischel, 557 F.2d 209 (9th Cir. 1977) (attorney-client privilege); Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) (reporter's privilege); In re Snoonian, 502 F.2d 110 (1st Cir. 1974) (marital privilege); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972) (sufficiency of government's denial that grand jury questions were based on information obtained from illegal wiretap).

73. See, e.g., United States v. Alter, 482 F.2d 1016, 1023-24 (9th Cir. 1973) (in absence of prior resolution of legal claims, witness should be given at least five days to prepare for contempt adjudication involving issues of "some complexity," unless there is "compelling reason" for shortening time); United States v. Curcio, 234 F.2d 470, 473 (2d Cir. 1956), rev'd on other grounds, 354 U.S. 118 (1957) (noting that contemnor had opportunity to present legal claims when judge was deciding whether to issue order to testify).

Curcio was a summary criminal contempt case decided before Harris v. United States, 382 U.S. 162 (1965), held that recalcitrant grand jury witnesses charged with criminal contempt were entitled to the prior notice and hearing requirements of Fed. R. Civ. P. 42(b). Alter was a coercive civil contempt case, but the court held that the requirements of Rule 42(b) were nonetheless applicable. Other courts have reached the same conclusion. See, e.g., In re Grand Jury Investigation, 545 F.2d 385, 388 (3d Cir. 1976); In re Sadin, 509 F.2d 1252, 1255-56 (2d Cir. 1975). But see Jennings v. United States, 354 A.2d 855 (D.C. 1976) (Rule 42(b) hearing requirement applies only to criminal contempt).

For the distinction between criminal and coercive civil contempt, see pp. 81, 91 infra.

74. 421 U.S. 309 (1975), discussed at p. 44 supra & pp. 89-92 infra.
the contemnor's request for a continuance to research the legality of the court order had been denied.

Similarly, courts have not recognized that presenting other types of legal claims to the trial judge may be important in summary contempt cases, even though there are a number of ambiguities in the existing case law about the substantive scope of the contempt power. These ambiguities include, for example, questions regarding the mens rea requirement, the relationship between perjury and contempt, the power to punish symbolic acts such as refusing to rise at the opening and closing of proceedings, and the extent to which otherwise contumacious conduct must actually obstruct the administration of justice.

75. Id. at 312 n.4.
76. See pp. 48-51 supra.
77. Despite the fact that perjury can frustrate a proceeding as much as the refusal to testify, see In re Michael, 326 U.S. 224, 227-28 (1945), a number of courts have held that perjury is not contempt unless it is accompanied by some further element of obstruction. E.g., id.; see Dobbs, supra note 2, at 194-98. But the nature of this additional element is by no means clear. Compare In re Michael, 326 U.S. 224 (1945) with Clark v. United States, 289 U.S. 1 (1933). Some courts have found the additional element of obstruction to exist if a witness testifies "evasively," e.g., Collins v. United States, 269 F.2d 745, 751 (9th Cir. 1959), cert. denied, 362 U.S. 912 (1960); United States v. McGovern, 60 F.2d 880, 889 (2d Cir.), cert. denied, 287 U.S. 650 (1932), a result that is sometimes reached by equating evasive testimony with a contumacious refusal to testify, see Collins v. United States, 269 F.2d at 750-51; cf. Haimsohn v. United States, 2 F.2d 441, 442 (6th Cir. 1924) (evasive testimony by defendant supports contempt conviction for failure "to be examined according to law" as required by Bankruptcy Act).

The distinction between evasion and mere perjury is not obvious, however. The characterization of testimony as evasive is usually appended in a conclusory manner to a quotation from the witness's testimony. The most that can be said is that "evasive" testimony tends to fall into one of two categories: a witness's response that he does not recall events that it seems unreasonable for him to have forgotten, see, e.g., Haimsohn v. United States, 2 F.2d 441, 441-42 (6th Cir. 1924); United States v. Appel, 221 F. 495 (S.D.N.Y. 1913), or contradictory responses during a single course of questioning, see, e.g., Collins v. United States, 269 F.2d 745, 751 (9th Cir. 1959), cert. denied, 362 U.S. 912 (1960).

78. See Dobbs, supra note 2, at 200-04.
79. Most courts have held that the refusal to rise is punishable as contempt. See note 34 supra (citing cases). But see United States v. Snyder, 502 F.2d 645 (4th Cir. 1974) (refusal is not contempt); In re Chase, 468 F.2d 128, 139 (7th Cir. 1972) (Stevens, J., dissenting) (only obstruction in case resulted from judge's insistence that contemnor rise). However, they have differed in their reasons for reaching this conclusion. Compare note 34 supra (citing cases) (refusal to rise is misconduct that obstructs justice within meaning of 18 U.S.C. § 401(3), quoted at p. 46 supra) with In re Chase, 468 F.2d 128, 133, 136 (7th Cir. 1972) (refusal to rise may not constitute misbehavior that obstructs justice, but since judge had specifically ordered contemnor to rise, refusal is a violation of 18 U.S.C. § 401(3), quoted in note 29 supra).
80. The Supreme Court has reversed summary convictions for overzealous advocacy and the use of insulting language, in part because it has concluded that the conduct was not sufficiently obstructive to constitute contempt. See Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (insulting language); In re Little, 406 U.S. 533, 555 (1972) (per curiam) (overzealous advocacy); In re McConnell, 370 U.S. 229 (1962) (overzealous advocacy). In addition, several circuits have held that misbehavior is not contempt within the meaning of 18 U.S.C. § 401(1) unless it obstructs justice. See In re Williams, 509 F.2d 549, 560 (2d Cir.
Most of these issues regarding the substantive scope of the contempt power can be adequately resolved by appellate courts. In the absence of some overriding necessity, however, a contemnor should not be placed in the position of suffering a contempt conviction and possible incarceration pending appeal without having had the opportunity to address his legal claims to the trial court in the first instance.

3. **Allocution**

The right of an ordinary criminal defendant to address the court prior to sentencing—the right to allocution—is firmly established. His manifestation of contrition or suggestion of mitigating circumstances may persuade the judge to impose a relatively lenient sentence. Even if the defendant adamantly proclaims his innocence or his disdain for

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81. See, e.g., Fed. R. Crim. P. 32(a)(1) ("Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."); but cf. Hill v. United States, 368 U.S. 424, 428-29 (1962) (failure to afford right to defendant is not denial of due process, at least in absence of showing that failure was prejudicial or not inadvertent). See generally Barrett, *Allocution* (pts. 1-2), 9 Mo. L. Rev. 115, 232 (1944).

82. See Groppi v. Leslie, 404 U.S. 496, 506 n.11 (1972) ("Modification of contempt penalties is common where the contemnor apologizes or presents matter in mitigation").
the judicial system, the opportunity to make a public statement before the trial court serves the important function of affirming his individuality and freedom of conscience.\textsuperscript{83}

Although the time taken by granting a summarily convicted contemnor the right to allocution would only slightly delay the imposition of sentence, the necessity for immediate punishment that justifies denial of notice and a hearing arguably may also require,\textsuperscript{84} or at least permit,\textsuperscript{85} the denial of this right. On the other hand, the fact that a contemnor is denied a formal hearing that could establish mitigating circumstances or even a complete defense augments his need for the minimal procedural safeguard of allocution.\textsuperscript{86} In \textit{Taylor v. Hayes},\textsuperscript{87} the Supreme Court held that when a summary contempt adjudication is delayed until the end of a trial, the contemnor has the due process right "to be heard in his own behalf."\textsuperscript{88} \textit{Weiss v. Burr},\textsuperscript{89} a Ninth Circuit case decided one year before \textit{Taylor}, extended this right to situations in which the summary adjudication immediately follows the contumacious incident but sentencing is delayed. The court, however, left open the question whether the contemnor would have the right to allocution if the trial judge acted immediately both to convict and to sentence the contemnor.\textsuperscript{90} Dictum in \textit{United States v. Brannon},\textsuperscript{91} a Fifth Circuit case, adopts the American Bar Association's recommendation that a summarily convicted contemnor should always be afforded the right to allocution.\textsuperscript{92}

\textsuperscript{83} Cf. \textit{Faretta v. California}, 422 U.S. 806, 833-34 (1975) (defendant has right to refuse counsel and defend himself though such course of action may be "ultimately to his own detriment"); \textit{Polster, The Dilemma of the Perjurious Defendant: Resolution, Not Avoidance}, 28 CASE W. RES. L. REV. 3, 14 (1977) (rule permitting criminal defendant to testify despite tactical advice of counsel would promote important value of client autonomy).

\textsuperscript{84} See \textit{Ex parte Terry}, 128 U.S. 289, 309-10 (1888) (court "not bound to hear any explanation of [defendant's] motives when satisfied that justice required immediate action"); \textit{United States v. Galante}, 298 F.2d 72, 78 (2d Cir. 1962) (Friendly, J., concurring and dissenting). \textit{But see p. 57 infra.}

\textsuperscript{85} See pp. 72-73 infra (absence of necessity for immediate punishment does not make denial of all procedural safeguards guaranteed to ordinary criminal defendants violative of due process; however, when summary adjudication delayed until end of trial, contemnor has minimal due process right to allocution).

\textsuperscript{86} \textit{See Weiss v. Burr}, 484 F.2d 973, 987-88 & n.28 (9th Cir. 1973), \textit{cert. denied}, 414 U.S. 1161 (1974) (right to allocution not constitutionally guaranteed to ordinary criminal defendant because he "has theretofore had a constitutionally guaranteed opportunity to speak concerning his guilt or innocence either at the time he entered his guilty plea... or at trial"; summarily convicted contemnor whose sentencing is delayed, however, has due process right to allocution).

\textsuperscript{87} 418 U.S. 488 (1974).

\textsuperscript{88} \textit{Id.} at 499; see p. 72 \textit{infra.}

\textsuperscript{89} 484 F.2d 973 (9th Cir. 1973), \textit{cert. denied}, 414 U.S. 1161 (1974).

\textsuperscript{90} \textit{Id.} at 987-88.

\textsuperscript{91} 546 F.2d 1242 (5th Cir. 1977).

\textsuperscript{92} \textit{Id.} at 1249 (citing ABA \textit{PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE} § 7.4 (1972)).
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The Brannon dictum is inconsistent with the Supreme Court's holding in Ex parte Terry\(^9\) that a judge who immediately imposes summary punishment is "not bound to hear any explanation of [the contemnor's] motives."\(^{94}\) Terry's rejection of the right to allocution in this situation, however, has been undermined by recent Supreme Court cases stressing the importance of allocution in summary contempt adjudications. In Groppi v. Leslie,\(^95\) for example, the Court noted with approval that even when a judge acts immediately to punish contumacious conduct, it is customary to give the defendant the right to allocution.\(^96\)

At least some of the previously mentioned problems associated with the denial of an adjudicatory hearing may be minimized if a summarily convicted contemnor is given the right to allocution. Allocution, however, cannot fully remedy the inadequacies inherent in the denial of a hearing. There may not be sufficient time to prepare legal defenses, and the contemnor has no right to call or cross-examine witnesses. Moreover, since the judge will be acting on the premise that the defendant has already been convicted, he may be less inclined to consider the merits of a contemnor's evidentiary or legal claims than he would be in an adjudicatory hearing. To the extent that a judge considers absence of contrition an aggravating factor in sentencing,\(^97\) protestations of innocence or claims of justification may be counterproductive for the contemnor.

C. Right to Counsel

Gideon v. Wainwright\(^98\) established that an ordinary criminal defendant has the due process right to counsel whenever charged with a serious offense, and Argersinger v. Hamlin\(^99\) extended this right to any criminal defendant who is incarcerated, regardless of the seriousness of the charge. The Supreme Court, however, has never specifically held that a summarily convicted contemnor is entitled to counsel, nor has

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93. 128 U.S. 289 (1888).
94. Id. at 309.
95. 404 U.S. 496 (1972).
it repudiated its dictum in *Cooke v. United States* that counsel is unnecessary when the judge acts summarily to punish contempts that occur in his presence.

If the contemnor is not allowed to participate in the summary proceedings, the *Cooke* dictum is sound simply because there is no role for counsel to play. On the other hand, if the contemnor has the right to challenge the legality of a court order, to raise the question of his mental capacity, or to make a statement prior to sentencing, the assistance of counsel may be necessary for the effective exercise of these rights. *Mempa v. Rhay* held that an ordinary criminal defendant's right to counsel extends to the sentencing proceeding. Since allocution prior to sentencing may provide the only chance for a summarily convicted contemnor to defend himself, his need for counsel at this point is arguably even greater than that of the ordinary criminal defendant.

Given the decision in *Mempa* and the Court's emphasis in *Groppi* on the importance of allocution in summary contempt proceedings, it is unlikely that the Court would fully embrace the *Cooke* dictum. However, even if summary contempts were treated like other criminal proceedings for the purpose of determining the contemnor's right to counsel, that right would probably not apply in every case. *Bloom v. Illinois* held that the due process right to jury trial in criminal prosecutions is applicable to criminal contempts, but, as *Bloom* pointed out, this right does not extend to petty offenses. The prac-

100. 267 U.S. 517, 534 (1925).
101. See pp. 52-54 supra.
102. See p. 51 supra.
103. See pp. 55-57 supra.
105. See p. 57 & note 96 supra.
106. But see *Middendorf v. Henry*, 425 U.S. 25, 33-48 (1976) (no constitutional right to counsel in summary court-martial proceedings, even though they may result in thirty days' confinement at hard labor). Observing that summary court-martials are speedy, informal proceedings where "[t]he presiding officer acts as judge, factfinder, prosecutor, and defense counsel," id. at 32, the Court in *Middendorf* based its decision in part on the ground that summary court-martials, unlike civilian criminal trials governed by *Argersinger*, are not adversary proceedings. Id. at 40-42.

Although summary contempts may be no more adversarial than summary court-martials, two factors emphasized by *Middendorf* suggest that it should have little bearing on the counsel issue in summary contempt cases. First, unlike a contemnor, one charged with a military offense may refuse a summary court-martial in favor of a general court-martial where he may be represented by counsel. Id. at 46-47. Second, although *Bloom v. Illinois*, 391 U.S. 194 (1968), characterized a contempt as "a crime in every fundamental respect," id. at 201, *Middendorf* found that the military community presents unique considerations not applicable to due process analyses in a civilian context, and that most of the conduct punishable by summary court-martial is not a "crime in the civilian sense of the word." 425 U.S. at 38-39.

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tical effect of Bloom is to limit the potential penalty for summarily convicted contemnors to the maximum penalty for petty offenses, and in several cases the Supreme Court has focused on six months' imprisonment as the dividing line between petty and nonpetty offenses. As a result of this penalty limitation, summary contempts presumably are not serious offenses within the meaning of Gideon. Rather, the controlling case would be Argersinger, which requires that one charged with a nonserious offense be given the right to counsel only if he is actually imprisoned for the offense.

The more difficult question is whether all summarily convicted contemnors sentenced to imprisonment must be afforded the right to counsel. Dissenting from the Pennsylvania Supreme Court's affirmative answer to this question in Commonwealth v. Crawford, Justice Nix argued that the relevant precedents were not Gideon and Argersinger but Gagnon v. Scarpelli and Wolff v. McDonnell, cases setting forth the due process requirements for probation revocation and prison disciplinary proceedings. Although the Supreme Court conceded that these proceedings may result in the loss of liberty within the meaning of the due process clause, it held that the need for counsel should be evaluated on a case-by-case basis.

The primary reason for taking a similar approach in summary contempt proceedings is that the need for immediate punishment may preclude affording the contemnor the full benefits of the right to

109. E.g., Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); Baldwin v. New York, 399 U.S. 66, 69 (1970); see 18 U.S.C. § 1(3) (1976) (petty offense defined as one for which maximum statutory penalty does not exceed six months' imprisonment or $500 fine, or both). If the legislature has prescribed a maximum potential penalty of more than six months' imprisonment, its judgment that the offense is not petty is controlling. If, as is the case with the federal contempt statute, 18 U.S.C. § 401 (1976), there is no prescribed maximum penalty, the characterization of the offense as petty or not petty depends on the sentence actually imposed. See Codispoti v. Pennsylvania, 418 U.S. 506, 511-12 (1974); Duncan v. Louisiana, 391 U.S. 145, 159-62 (1968). In this latter type of situation, if an initial sentence of more than six months' imprisonment is imposed, the offense becomes petty if the trial judge subsequently reduces the sentence to six months or less. Taylor v. Hayes, 418 U.S. 488, 496 (1974), criticized in Comment, Right to Jury Trial in Contempt Cases: A Critical View of the Sentence Aggregation Rules in Codispoti v. Pennsylvania and Taylor v. Hayes, 70 Nw. U. L. Rev. 533, 557-58 (1975).

110. See p. 57 supra.

111. 466 Pa. 269, 352 A.2d 53 (1976); see Johnson v. United States, 344 F.2d 401, 411 (5th Cir. 1965) (suggesting right to counsel should always be afforded).

112. 466 Pa. at 80-86, 352 A.2d at 58-61 (Nix, J., dissenting).


counsel. It may not be possible to appoint counsel immediately for an indigent defendant. Even if counsel is available in the courtroom, the right to counsel for nonindigents includes the right to an attorney of one’s choice. More importantly, the right to counsel includes the right to effective assistance of counsel. The necessity for summary action, however, may preclude affording the attorney an adequate opportunity to prepare his case.

On the other hand, there are two inherent disadvantages in a flexible approach to the counsel question. First, in every case in which the contemnor is denied counsel, he has a possible basis for appellate reversal of his conviction. Because there are relatively few summary contempt convictions, the potential burden on appellate courts from litigation of this issue should not be substantial. The percentage of reversals, however, may be high. Once a trial judge has decided to take the extraordinary step of imposing criminal punishment without notice and hearing, he is unlikely to perceive any need to permit counsel to challenge his decision. In contrast, an appellate court, focusing on Bloom’s characterization of criminal contempt as a crime “in every fundamental respect” and Mempa’s extension of the right to counsel to sentencing, may be more willing to assume that counsel could have been helpful to the contemnor.

Regardless of how sensitive appellate courts are to the counsel

119. The Supreme Court initially adopted a flexible rule for determining whether a state criminal defendant charged with a serious offense had a due process right to counsel. See Betts v. Brady, 316 U.S. 455 (1942). Concurring in the decision to overrule Betts in Gideon v. Wainwright, 372 U.S. 335 (1963), Justice Harlan observed:
   In the first decade after Betts, there were cases in which the Court found special circumstances [that would require the appointment of counsel] to be lacking, but usually by a sharply divided vote. However, no such decision has been cited to us, and I have found none, after . . . 1950. At the same time, there have been not a few cases in which special circumstances were found . . . .

   Id. at 350-51.
120. One study reports that in both state and federal courts between 1960 and 1972 there were only 72 summary contempt cases disposed of with published opinions. N. Dorset & L. Friedman, supra note 7, at 233-34. Apparently the survey was limited to reported cases involving some form of disruptive behavior. The list of cases, id. at 416-17, does not include, for example, Harris v. United States, 382 U.S. 162 (1965), discussed at pp. 42-43 supra, or United States v. Pace, 371 F.2d 810 (2d Cir. 1967), another recalcitrant-witness contempt case. There are, however, relatively few recalcitrant witness cases in any single jurisdiction. See Kuhns, supra note 24, at 312-13 & nn.134-35.
121. 391 U.S. at 194, 201.
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issue, the second difficulty inherent in the flexible counsel rule is that the need for counsel may not be apparent unless the defendant is actually represented by counsel. For example, the trial judge may have interpreted the offense as requiring a lesser degree of mens rea or obstruction than an appellate court would require. Counsel could have raised these issues before the trial judge and perhaps even convinced him that there was a reasonable doubt as to the defendant's guilt under the proper standard. A counselless contemnor, however, may be unaware of the issues, and a trial judge is not likely to articulate the precise legal standard he is using. In such a case, unless the defendant's conduct was so innocuous that it was clearly noncontumacious under the proper standard, an appellate court presumably would affirm the conviction without knowing that the trial judge had misapplied the law or that counsel could have been of assistance in bringing this fact to light.

Gagnon acknowledged that this type of problem can arise under a flexible counsel rule. The Court, however, rejected this as a sufficient basis for adopting an absolute right to counsel because it viewed the due process rights of a probationer as more limited than those of a defendant in a criminal prosecution. The due process rights of a summarily convicted contemnor are also more limited than those of an ordinary criminal defendant, and the necessarily limited role that counsel can play in summary contempt proceedings may minimize his opportunity to suggest defenses that would not otherwise be apparent. On the other hand, the absence of a hearing that might reveal possible defenses arguably increases the need for ensuring that the contemnor's limited rights be exercised as effectively as possible.

In weighing the inherent inadequacies of a flexible counsel rule against the potential adverse impact of an absolute right to counsel on the effective exercise of the summary contempt power, several factors suggest that the absolute rule would be preferable. Although the need for swift punishment may preclude affording counsel an adequate opportunity to prepare a defense, the right to effective assistance of counsel in summary contempt proceedings need not be evaluated in

123. See pp. 50-51 supra (discussion of mens rea requirement); p. 54 & note 80 supra (discussion of obstruction requirement).
124. See p. 70 infra.
125. See Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1912) (burden of showing unfairness of lower court holding is on appellant and unfairness must be established "not as a matter of speculation but as demonstrable reality").
126. 411 U.S. at 789.
127. Id.
terms of the assistance required in ordinary criminal prosecutions. Rather, the contemnor could be given the maximum right to counsel consistent with the time constraints imposed by the summary process. This approach would avoid the difficulties inherent in trying to decide whether counsel would have been helpful to the contemnor. Moreover, since a summarily punishable contempt must occur in the actual presence of the court, there will probably be few instances in which it will be necessary to delay the proceedings in order to provide counsel for the contemnor. If the contemnor is a party in an ongoing proceeding, he will probably already be represented by counsel. Similarly, a recalcitrant witness may have anticipated a possible contempt citation and secured counsel to urge that his testimony may not be compelled. In those cases in which a contemnor does not have counsel, there may be an attorney in the courthouse who can quickly be appointed to represent him. Finally, in cases in which it is impossible to secure counsel immediately, the court could still punish the contemnor immediately as long as the sentence did not include incarceration.

D. A Fair Tribunal

The right to be judged by a fair and impartial tribunal is one of the most basic elements of due process. Yet there is a potential for bias or at least the appearance of bias in every contempt proceeding because the judge is considering conduct that allegedly constitutes an affront to the institution he represents, if not to himself personally. As the Supreme Court observed in Bloom v. Illinois:

Contemptuous conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament. Even where the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

128. See, e.g., United States v. Wilson, 488 F.2d 1231, 1232 (2d Cir. 1973), rev'd, 421 U.S. 309 (1975) (lawyer present in courtroom attempted to represent defendant whose counsel was absent).


The subsequent analysis will suggest that a trial court never need and never should resort to summary penalties other than removal or incarceration to commence immediately and to be served even when the court is in session. See pp. 85-86 & note 329 infra. Thus in those cases in which it is not possible to provide counsel immediately for the contemnor, one would have to decide whether to forego summary punishment or to create a limited exception to an otherwise absolute right to counsel rule. This analysis, see p. 71 infra, suggests that such an exception may be appropriate.


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In nonsummary contempt cases, this problem can be minimized by affording the contemnor the right to a jury trial before a judge who had no actual involvement in the contumacious episode. In summary contempt proceedings, however, the only checks against the judge's potential bias are his own objectivity and careful appellate review.\textsuperscript{132} Since only a judge who personally observes contumacious conduct can punish it without notice and a hearing,\textsuperscript{133} any further guarantee of a fair tribunal must come at the expense of the summary contempt power.

In \textit{Sacher v. United States}\textsuperscript{134} a trial judge had summarily held several attorneys in contempt at the conclusion of a long, bitter trial.\textsuperscript{135} The Supreme Court affirmed the convictions, despite the fact that both the contemnors' verbal attacks on the judge and his responses demonstrated the judge's potential, if not actual, bias.\textsuperscript{136} Only two years later in \textit{Offutt v. United States},\textsuperscript{137} however, the Court relied on its supervisory authority over lower federal courts\textsuperscript{138} to reverse an attorney's summary contempt conviction that had been imposed under similar circumstances.\textsuperscript{139} \textit{Offutt} characterized the trial judge as having "permitted himself to become personally embroiled in the controversy,"\textsuperscript{140} and emphasized that "justice must satisfy the appearance of justice."\textsuperscript{141} Two subsequent cases involving summary contempt judgments imposed at the end of a trial, \textit{Taylor v. Hayes}\textsuperscript{142} and \textit{Mayberry v. Pennsylvania},\textsuperscript{143} held that due process considerations require adherence to \textit{Offutt} in state contempt proceedings. According to \textit{Taylor}, the inquiry must be "not only whether there was actual bias . . . but

132. Appellate review may not always be an effective guard against judicial bias. See p. 70 infra.
134. 343 U.S. 1 (1952).
136. See 343 U.S. at 33-39 (Frankfurter, J., dissenting); id. at 42-89 (appendix to dissenting opinion of Frankfurter, J.). The majority did not specifically refute Justice Frankfurter's characterization of the proceedings as demonstrating actual or potential judicial bias. Rather, they began with the premise, conceded by the contemnors, that the trial judge could have acted immediately after each contumacious episode to punish the defendants. \textit{Id.} at 7. The majority reasoned that merely delaying the summary adjudication until after the trial could not prejudice the contemnors. Indeed, they suggested that delay was desirable because the judge would not be as likely to be "smarting under the irritation of the contemptuous act." \textit{Id.} at 10-11.
138. See note 69 supra.
139. Justice Frankfurter, who dissented in \textit{Sacher}, wrote the opinion for the Court, but \textit{Offutt} did not specifically overrule \textit{Sacher}.
140. 348 U.S. at 17.
141. \textit{Id.} at 14.
143. 400 U.S. 455 (1971).
also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interest of the accused.\(^\text{144}\) This concern with the appearance of fairness provides a sound theoretical basis for prohibiting a potentially biased judge from convicting a contemnor, but the manifestations of potential bias will vary in each instance. Thus the Court's after-the-fact finding of embroilment in some cases will be of limited assistance in dealing with others.\(^\text{145}\)

Indeed it may be impossible to formulate a generally applicable definition of embroilment. As the Court in \textit{Offutt} observed, "[t]hese are subtle matters . . ., for they concern the ingredients of what constitutes justice."\(^\text{146}\) Nonetheless, the Court's current ad hoc approach to the problem has several serious deficiencies.\(^\text{147}\) The very subtlety of the issue makes it a difficult one to resolve even on a case-by-case basis and, like the flexible counsel rule, the present approach creates a potential basis for appellate reversal.\(^\text{148}\) Moreover, just as the need for counsel may not be apparent to an appellate court,\(^\text{149}\) the extent of a judge's bias may not be apparent merely from the record of the pro-

\(^{144}\) 418 U.S. at 501.

\textit{Taylor} based its finding of embroilment primarily on the judge's actions. In addition to stressing his "mounting display of an unfavorable personal attitude" toward the contemnor, \textit{id.}, the Court pointed out that the judge refused to permit the contemnor to speak in allocution, \textit{see pp. 55-57 supra}, imposed a sentence of over four years' imprisonment, later disbarred the contemnor, and refused to grant him bail pending appeal. 418 U.S. at 502. In contrast, the judge in \textit{Mayberry} was not "an activist seeking combat," 400 U.S. at 465. He had been continually subject to vulgar and degrading epithets, however, and the Court concluded that "a judge [so] vilified . . . necessarily becomes embroiled in a running, bitter controversy." \textit{Id.}

\(^{145}\) Ungar v. Sarafite, 376 U.S. 575 (1964), decided before \textit{Mayberry} but cited with approval in \textit{Taylor}, 418 U.S. at 501, illustrates this problem. During the course of a criminal trial, Ungar, a prosecution witness, repeatedly rephrased questions and offered gratuitous remarks despite admonitions from the trial judge. At the conclusion of the trial, the judge, after notice and a hearing, found Ungar guilty of criminal contempt. In rejecting Ungar's claim that \textit{Offutt} entitled him to a hearing before a different judge, a majority of the Court concluded that the judge had not "become embroiled in intemperate wrangling with the petitioner." 376 U.S. at 585 (citation omitted). On the other hand, Justice Douglas, in a dissenting opinion joined by Justices Black and Goldberg, concluded that the judge had become personally embroiled in the controversy and that his bias was "apparent on the face of the record." \textit{Id.} at 598-601 (Douglas, J., dissenting).

The exchanges between the judge and contemnor in \textit{Ungar} were less vituperative than those in \textit{Offutt}, \textit{Mayberry}, and \textit{Taylor}, but one would be hard-pressed to devise a workable formula that would clearly distinguish \textit{Ungar} from the other cases. \textit{Cf.} Nilva v. United States, 352 U.S. 385, 395-96 (1957) (judge does not have to disqualify himself when contempt does not arise from statements offensive to judge personally); Fisher v. Pace, 336 U.S. 155, 158-59, 163 (1949) (trial judge's mildly provocative language did not excuse defendant's contempt).

\(^{146}\) 348 U.S. at 14.


\(^{148}\) See p. 60 & note 119 supra.

\(^{149}\) See p. 61 supra.
Finally, it hardly satisfies the "appearance of fairness" to grant the right to trial before another judge to the most abusive contemnors, while denying the same right to those whose contumacious conduct is less patently offensive. Recognizing these problems and observing that inquiry into a judge's potential bias is "unseemly, as well as a poor use of time," the Michigan Court of Appeals in *People v. Kurz* held that except when immediate action is necessary, a contempt must be adjudicated by a judge other than the one initiating the charge.

The only potential disadvantage of *Kurz* is that it may encourage some trial judges to avoid the necessity of a hearing before another judge by punishing contempts that occur in their presence immediately. Rejecting a rule on the unsubstantiated assumption that judges will try to subvert it, however, is at least as unseemly as inquiring into a judge's bias on a case-by-case basis. Moreover, the *Kurz* rule is unlikely to add substantially to the incentive that already exists for a judge to act immediately. Under the Court's embroilment rule, a contempt judgment may be less likely to be reversed if the trial judge immediately punishes the contemnor. In *Mayberry*, where the finding of potential bias was based almost exclusively on the contemnor's conduct toward the trial judge, the Court stated that a judge "cannot be driven out of a case," and that the judge there "could, with propriety, have instantly acted, holding petitioner in contempt." *Codispoti v. Pennsylvania* provides a further incentive for immediate action. *Codispoti* held that if a judge delays the contempt adjudication until the end of a trial, the aggregate sentence for multiple acts of contempt cannot exceed the maximum penalty for a petty offense unless the contemnor is granted the right to a jury trial. The Court, however, rejected the proposition that this same limitation should apply if the

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150. See p. 70 infra.
152. Id. at 660, 192 N.W.2d at 603; accord, Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974).
153. See note 144 supra.
154. 400 U.S. at 463. Even if a judge decides to act instantly or if he has not become personally embroiled in the controversy, other factors may disqualify him from adjudicating a contempt. See *Johnson v. Mississippi*, 403 U.S. 212 (1971) (per curiam) (judge disqualified because of involvement with contemnor on matters not relating to contempt); *In re Murchison*, 349 U.S. 133 (1955) (judge who acts as one-man grand jury cannot subsequently hold witness in contempt for giving false and evasive answers before that grand jury).
156. See pp. 58-59 supra.
157. 418 U.S. at 515-17.
punishment is imposed immediately after each contumacious act.\textsuperscript{158}

Regardless of whether Kurz or Mayberry and Codispoti actually encourage it, some contempts are punished immediately, and, as the Court pointed out in Sacher, the potential for bias is greatest when the judge is "smarting under the irritation of the contemptuous act."\textsuperscript{159} There is no way to eliminate this problem without abolishing the summary contempt power. The problem can be minimized, however, if the exercise of the power is strictly limited to those situations in which immediate punishment serves some overriding purpose. The analysis in Parts II and III will suggest that the likelihood of bias is least in cases in which the need for immediate action is the greatest.\textsuperscript{160}

E. Substitutes for Procedural Regularity

The potential for judicial bias, the broad substantive definition of contempt, and the absence of procedural safeguards available in ordinary criminal prosecutions all contribute to the possibility that the contempt power may be abused. The Supreme Court has frequently acknowledged this possibility in both summary\textsuperscript{161} and nonsummary\textsuperscript{162} contempt cases, and from time to time has imposed limitations on the contempt power that are designed to minimize its abuse.\textsuperscript{163} This section focuses on restrictions that tend to compensate for the absence of procedural safeguards in summary contempt adjudications.

1. Penalty Limitation

The Supreme Court has characterized the right to a jury trial in criminal cases as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."\textsuperscript{164} When it extended this right to criminal contemnors in Bloom v. Illinois,\textsuperscript{165} the Court acknowledged the possibility of judicial

\textsuperscript{158} Id. at 517. For criticism of the Court's refusal to extend contemnors the right to jury trial in this type of situation, see Note, Direct Criminal Contempt: An Analysis of Due Process and Jury Trial Rights, 11 NEW ENG. L. REV. 77, 93-95 (1975); Comment, supra note 109, at 547-50.

\textsuperscript{159} 343 U.S. at 11.

\textsuperscript{160} See pp. 96-97 infra.

\textsuperscript{161} E.g., United States v. Wilson, 421 U.S. 309, 319 (1975); Sacher v. United States, 343 U.S. 1, 12 (1952); Ex parte Terry, 128 U.S. 289, 313 (1888).

\textsuperscript{162} E.g., Bloom v. Illinois, 391 U.S. 194, 202 (1968); In re Michael, 326 U.S. 224, 227 (1945).

\textsuperscript{163} E.g., Harris v. United States, 382 U.S. 162 (1965), discussed at pp. 42-43 supra; In re Michael, 326 U.S. 224 (1945), discussed in note 180 infra; Nye v. United States, 313 U.S. 33 (1941), discussed in note 31 supra.

\textsuperscript{164} Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

\textsuperscript{165} 391 U.S. 194 (1968).
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bias in all contempt proceedings\(^{166}\) and specifically refused to exempt summary contempts from the jury trial requirements.\(^{167}\) The precedent for the petty offense exception to the jury trial right\(^{168}\) permitted the Court to take this step without abolishing the summary contempt power, but, as noted previously,\(^{169}\) the effect of *Bloom* is to limit the maximum incarceration after summary conviction to six months. Although this limitation does not minimize the potential for bias, it at least ensures that a contemnor will not suffer a serious penalty\(^{170}\) without having been afforded the opportunity for a jury trial.

2. *Substantive Limitations*

In at least one case, *In re Little*,\(^{171}\) the Supreme Court imposed a substantive limitation on the contempt power when it would have been preferable to dispose of the case on procedural grounds.\(^{172}\) *Little*, the defendant in a criminal trial, proceeded to represent himself after the trial judge denied a motion for a continuance based on the fact that Little's counsel was presently engaged in another trial. In his closing argument, Little, claiming that he was a political prisoner, referred to

166. *Id.* at 202.
167. *Id.* at 209-10 (dictum).
168. See p. 59 & note 108 *supra*.
169. See p. 60 *supra*.
170. *But see* Muniz v. Hoffman, 422 U.S. 454 (1975) (criminal contempt fine of $10,000 imposed against labor union proper despite denial of jury trial). *Muniz* is the only case in which the Court has considered the circumstances under which a fine may render a criminal contempt nonpetty and thereby require that the contemnor be afforded the right to a jury trial. Reasoning that a $10,000 fine is not necessarily a serious penalty for a large union or corporation, the Court rejected the contemnor's argument that any fine over $500 should be regarded as nonpetty, *id.* at 476-77. In doing so, the Court reaffirmed its position that 18 U.S.C. § 1(3) (1976), defining a petty offense as one for which the penalty does not exceed six months' imprisonment or $500 or both, is not controlling for constitutional purposes.

Implicit in the Court's emphasis on the defendant's status as a large union, 422 U.S. at 477, is the proposition that a $10,000 fine imposed on an individual is not necessarily nonpetty. The Court, however, did not indicate whether it would adopt a specific monetary limit or consider the contemnor's wealth in deciding whether a fine imposed against an individual defendant is petty or nonpetty. Two subsequent circuit court decisions have adopted the former approach. Douglas v. First Nat'l Realty Corp., 543 F.2d 894, 902 (D.C. Cir. 1976) (interpreting *Muniz* as limited to multimember organizations and holding that individual contemnor cannot be fined more than $500 without having been afforded right to jury trial); *accord*, Richmond Black Police Officers Ass'n v. City of Richmond, 548 F.2d 123, 128 (4th Cir. 1977) (dictum). *But cf.* Girard v. Goins, 575 F.2d 160, 163-65 (8th Cir. 1978) (individual fined more than $500 not necessarily entitled to jury trial, but when fines imposed against individual contemnors range from $2,500 to $10,000, contemps are serious offenses).

172. The following textual discussion is also generally applicable to Eaton v. City of Tulsa, 415 U.S. 697 (1974) (per curiam), if that is a summary contempt case. See notes 19 & 43 *supra*. 67
the court as prejudiced against him. The trial judge summarily held him in contempt for these statements. In a brief per curiam opinion the Supreme Court held that "in the context of this case petitioner's statements did not constitute criminal contempt." The Court analogized the situation in Little to that in In re McConnell, a case in which it had held that an attorney's unfulfilled threat to continue a line of questioning "unless some bailiff stops us" did not constitute contempt.

The difficulty with relying on McConnell is that there the Court was interpreting the scope of the federal contempt statute. In contrast, Little was a state contempt conviction. Unless the conviction was unconstitutional, the Supreme Court should have been bound by the state court's interpretation of its contempt power. Ensuring effective advocacy may require some substantive due process restrictions on the scope of contempt power, but the limited record available to an appellate court reviewing a summary contempt conviction hardly presents an adequate basis for imposing these restrictions. As Chief Justice Burger observed in his Little concurrence:

A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record.

The transcript of the hearing on a contempt charge may elaborate on these matters and give an appellate court a better basis for evaluating the contemnor's conduct. Also, more detailed development of the relevant events at the hearing would provide an appellate court with

173. 404 U.S. at 554.
174. Id. at 555.
176. Id. at 235.
177. Id. at 233-34. The Court held that the conduct was not proscribed by 18 U.S.C. § 401(1) (1976), set forth at p. 46 supra, because it was not sufficiently disruptive to constitute an obstruction of justice. 370 U.S. at 235-36.
178. In Holt v. Virginia, 381 U.S. 131 (1965), also relied on in Little, 404 U.S. at 556, two attorneys were summarily held in contempt by a state judge for charging in a change of venue motion that the judge was biased and had harassed and intimidated them. In reversing the conviction, the Supreme Court noted that it was not improper to charge bias in such a motion and that the words used were "in no way offensive in themselves, and wholly appropriate to charge bias." 381 U.S. at 137. The Court, however, left open the question whether the charges of bias, if proven to be false in an adjudicatory hearing, could be punished as contempt. Id.
179. 404 U.S. at 556 (Burger, C.J., concurring).
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an opportunity to focus specifically on the facts that justify or prohibit treating the conduct as contempt. Even if a transcript of the contempt hearing does nothing more than present a reviewing court with conflicting testimony about tone of voice, facial expressions, and physical gestures, the contemnor will at least have had the opportunity to have these "elusive factors" evaluated in an adjudicatory hearing. These benefits could have been achieved and the contemnor's interest adequately protected in Little if the Court had held, not that Little's conduct did not constitute contempt, but that he was entitled to a hearing.180

3. Appellate Review

To facilitate appellate review,181 which is the most important existing safeguard against abuse of the summary contempt power,182 most

180. A somewhat different but equally troublesome problem is presented by the Supreme Court's explicit reliance on a procedural ground in In re Michael, 326 U.S. 224 (1945), to hold that perjury is not within the substantive scope of the federal contempt statute. Although the contemnor had been granted a hearing, the case arose prior to Bloom v. Illinois, 391 U.S. 194 (1968), and the Court focused on the absence of jury trials in contempt proceedings as the primary motivation for its holding, 326 U.S. at 227. Unless Bloom undermines Michael, it would seem to follow from the Court's jury trial rationale that conduct proscribed by other criminal statutes should not be punishable as contempt. The Court has never questioned Michael, however, nor has it extended the jury trial rationale to other cases. Indeed, the proposition that conduct proscribed by other criminal statutes can be treated as contempt is well-established. See, e.g., Green v. United States, 356 U.S. 165, 173 (1956) (dictum) (noting passage of legislation specifying that contempt sanctions as well as criminal sanctions can be applied to those who violate surrender orders); United States v. Rollerson, 449 F.2d 1000, 1001-94 (D.C. Cir. 1971) (summary contempt conviction for throwing water pitcher at prosecutor during trial for robbery did not bar subsequent prosecution for assault with deadly weapon); United States v. Channel Wing Corp., 376 F.2d 675 (4th Cir.), cert. denied, 389 U.S. 850 (1967) (criminal contempt conviction for violation of securities laws after being enjoined from further violations); 18 U.S.C. § 402 (1976) (contempt includes violations of criminal laws).

Although not articulated by the Court, there is a viable substantive basis for distinguishing Michael from at least some other situations where conduct is both contumacious and violative of an ordinary criminal statute. For example, in United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971), where a criminal defendant was convicted of both contempt and assault for throwing a water pitcher at the prosecutor, it is arguably appropriate to view the contempt penalty as punishment for disrupting a judicial proceeding and the assault penalty as punishment for attempting to cause personal injury to another individual. See id. at 1001, 1004; United States v. Mirra, 220 F. Supp. 361, 365-66 (S.D.N.Y. 1963). But see note 418 infra. In contrast, contempt and perjury both serve the same general purpose—proscription of activity that obstructs the administration of justice. Thus it is unnecessary to resort to the contempt sanction to ensure the existence of a remedy designed to punish the obstruction.

181. For a discussion of whether a summarily convicted contemnor has or should have an absolute right to appellate review, see pp. 118-119 infra.

182. On several occasions the Supreme Court has suggested that appellate review is an adequate safeguard. E.g., Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974) ("summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review"); Sacher v. United States, 345 U.S. 1, 13 (1954) ("it is to be doubted whether the profession will be greatly terrorized by punishment of some of its members
jurisdictions require that the trial judge recite the relevant facts and certify that he observed them in open court. Although the Supreme Court has never held that due process considerations require such a recitation, courts generally demand strict compliance with the recitation requirement. Regardless of how rigorously the requirement is enforced, however, appellate review cannot be an adequate substitute for procedural protections in a summary contempt adjudication. First, the accuracy of the judge's perceptions cannot be tested. Second, appellate courts tend to be primarily concerned with receiving a detailed statement of the facts constituting the contempt. They may not require, and the trial court judgment is not likely to contain, an explicit statement of the legal standard for obstruction or mens rea applied by the trial judge. Third, as Chief Justice Burger observed in *Little*, whether conduct constitutes contempt may depend on such elusive factors as the contemnor's tone of voice or his physical gestures. Since a transcript will be of little, if any, help in assessing these factors, an appellate court must ultimately rely on the trial judge's characterization of the events. There is no guarantee, however, that the trial judge has been objective. Indeed, there is an inherent potential for judicial bias, but unless the transcript happens to reveal that the judge has become personally embroiled in the controversy, an appellate court will have no basis for assessing his objectivity.

II. The Need for Summary Punishment: The Pre-*Wilson* Case Law

Necessity can be both the justification for and a limitation on the exercise of criminal contempt power. The need for immediate punish-
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ment in a particular case may outweigh the disadvantages of denying notice and a hearing. On the other hand, the mere fact that the judge personally observed the contumacious conduct should not be a sufficient justification for summary punishment. The Supreme Court has often stated that the contempt power should be limited to "the least possible power adequate to the end proposed." It has relied on this standard both to impose substantive limits on the contempt power and to require notice and a hearing when the need for immediate punishment is absent. The Court, however, has not always dealt satisfactorily with the relationship between necessity and summary action. Nor has it carefully considered the type of necessity that should justify summary punishment. The analysis in this part explores the manner in which the Court has dealt with these problems in cases prior to United States v. Wilson.

A. The Relationship Between Necessity and Summary Action

There are two basic approaches in considering the extent to which necessity justifies depriving a contemnor of procedural safeguards that would be available to an ordinary criminal defendant. First, relying on Bloom's characterization of criminal contempt as "a crime in every fundamental respect," one could begin with the premise that procedural regularity is the norm. Under this approach it would be proper to deny a contemnor a particular procedural safeguard only if the denial were necessary to avoid frustrating the objective that justifies summary punishment. For example, the need for immediate incarceration might require that counsel be denied an adequate opportunity to prepare a defense or even that the right to counsel be denied altogether, if none were readily available. The mere fact that the proceedings were in some respects summary, however, would not justify departing from Argersinger's requirement that all persons sentenced to prison are entitled to counsel.

Alternatively, one could view necessity as a general justification for

191. See pp. 92-97 supra.
192. The Court first used this phrase in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821), a case dealing with the congressional contempt power. For references to the "least possible power" doctrine in judicial contempt cases, see, e.g., United States v. Wilson, 421 U.S. 309, 319 (1975); notes 193 & 194 infra (citing cases).
193. See In re Michael, 326 U.S. 224, 227 (1945), discussed in note 180 supra.
195. See note 129 supra.
196. See p. 57 supra.
summary action. Once the condition of necessity had been established, the question would not be whether the denial of a particular procedural right is necessary, but rather what procedural protections are essential to protect the contemnor’s interests in an admittedly sui generis \textsuperscript{199} summary proceeding. For example, if counsel would not appear to be of value in a particular case or in summary contempt cases generally, this would be a sufficient reason for denying that right.\textsuperscript{200}

The Supreme Court in \textit{Taylor v. Hayes}\textsuperscript{201} adopted the latter approach for the purpose of determining due process limitations on the summary contempt power.\textsuperscript{202} The contemnor, an attorney, was summarily held in contempt at the conclusion of a trial for his conduct during the trial. The Court assumed that he, like the attorneys in \textit{Sacher v. United States},\textsuperscript{203} could have been summarily convicted after each incident of misconduct, but unlike \textit{Sacher}, \textit{Taylor} recognized that “the usual justification of necessity . . . is not nearly so cogent when final adjudication and sentence are postponed until after trial.”\textsuperscript{204} \textit{Taylor} held that the contemnor was entitled as a matter of due process to “reasonable notice of the specific charges and an opportunity to be heard in his own behalf.”\textsuperscript{205} The opportunity to be heard granted in \textit{Taylor}, however, may be nothing more than the right to allocution, which had been denied by the trial judge in that case.\textsuperscript{206} The Court emphasized that it was dealing only with “elementary due process protections,”\textsuperscript{207} and observed that a “full scale trial” might not be appropriate.\textsuperscript{208} Indeed, without specifically considering whether necessity demanded any curtailment of the contemnor’s procedural rights,\textsuperscript{209}

\textsuperscript{199} See p. 41 & note 3 \textit{supra} (citing cases).

\textsuperscript{200} Even if necessity is viewed as only a general justifying principle for summary action, a rule mandating counsel in all cases where the contemnor is imprisoned would be desirable for other reasons. See pp. 60-62 \textit{supra}.

\textsuperscript{201} 418 U.S. 488 (1974).

\textsuperscript{202} Harris v. United States, 382 U.S. 162 (1965), appeared to take the former approach. There the Court emphasized the lack of necessity for summarily punishing a recalcitrant grand jury witness as the primary basis for requiring notice and a hearing under Fed. R. Crim. P. 42(b), 382 U.S. at 164-65, even though there is likely to be little need in such a case for the type of evidentiary hearing that the Court contemplated, see note 66 \textit{supra}. \textit{Harris}, however, was based on the Court’s interpretation of Rule 42, not due process. See 382 U.S. at 164-65.

\textsuperscript{203} 343 U.S. 1 (1952), \textit{discussed at p. 63 \textit{supra}}.

\textsuperscript{204} 418 U.S. at 499.

\textsuperscript{205} \textit{Id}.

\textsuperscript{206} \textit{See id. at 497}.

\textsuperscript{207} \textit{Id. at 500 n.9}.

\textsuperscript{208} \textit{Id. at 499}.

\textsuperscript{209} \textit{Taylor} offered only two reasons for not granting the contemnor a full-scale trial. First, the Court observed that “[u]sually, the events have occurred before the judge’s own eyes, and a reporter’s transcript is available.” \textit{Id. at 499}. These circumstances, however, do not even obviate the need for an adjudicatory hearing, see pp. 49-55 \textit{supra}, much less
the Court rejected the suggestion that it was repudiating Sacher's approval of post-trial summary contempt adjudications.210

The Taylor approach to the due process issue is unsatisfactory for several reasons. In addition to being inconsistent with Bloom's acknowledgment that criminal contempt is "a crime in every fundamental respect,"211 it ignores Bloom's recognition that the potential for abuse of the contempt power creates a greater need for procedural safeguards in contempt proceedings than in ordinary criminal prosecutions.212 Although nothing prevents the trial judge from responding to this problem by affording the contemnor additional procedural safeguards not required by due process, reliance on the judge to mitigate his own potential bias is hardly an adequate protection for the contemnor. Moreover, in the absence of an affirmative constitutional requirement of procedural regularity if summary action is not necessary, even an unbiased trial judge may not appreciate the importance of extending procedural protections to a contemnor. After observing the contemnor's conduct and deciding that it warrants punishment, a judge is probably unlikely to question his own perceptions, to recognize potential legal issues regarding the scope of the contempt power, or to see the need to provide the contemnor with counsel. Finally, unnecessary denial of procedural safeguards undermines the very purpose for which the contempt power is exercised. The power exists—indeed, is said to be essential—to maintain dignity and respect for the courts.213 Dignity and respect, however, cannot be fostered by the unnecessary curtailment of procedural rights. Rather, as Justice Frankfurter observed in his Sacher dissent, "public respect for the . . . judiciary is best enhanced . . . by discouraging an assertion of power which is not restricted by the usual demands of Due Process."214

provide a justification for dispensing with procedural regularity. Second, the Court noted that immediate summary punishment is not to be encouraged, 418 U.S. at 500-01 n.9 (quoting Sacher v. United States, 343 U.S. 1, 9-10 (1952)), thereby implying that any further restrictions on post-trial summary adjudications might encourage unwarranted summary adjudications during trial. But see pp. 74-75 infra (this is not sufficient justification for delayed summary punishment).

210. 418 U.S. at 500 n.9.
211. 391 U.S. at 201.
212. Id. at 202.
214. 343 U.S. at 41-42 (Frankfurter, J., dissenting); see Bloom v. Illinois, 391 U.S. 194, 208-09 (1968).

The deficiencies in the Taylor approach to the relationship between necessity and summary action will also exist under the Bloom approach if courts are not careful to ensure that the necessity for departing from procedural regularity actually exists in a particular case. By the same token, the extent to which the Taylor approach will lead to the unnecessary curtailment of procedural rights depends in large measure on how one initially defines the necessity that justifies summary action. The proposition that necessity
B. *The Meaning of Necessity*

Most summary contempt cases have involved disruptive or disrespectful courtroom conduct, and prior to *United States v. Wilson*, the Supreme Court focused exclusively on the need to maintain order as the necessity that justifies summary punishment. This section examines the strength of that justification, first as it relates to the imposition of summary punishment at the conclusion of a trial, and second as it relates to the immediate imposition of a summary contempt penalty.

1. *Delayed Adjudication or Sentencing*

The only justification offered by the Supreme Court for summary adjudication at the conclusion of a trial is Sacher's suggestion that this may restrain judges from acting immediately "while smarting under the irritation of the contemptuous act." As was noted previously, however, the Court's willingness to apply a stricter embroilment standard and its limitation on aggregating sentences in cases of delayed adjudication already provide incentives for trial judges to punish immediately. In the absence of some compelling reason to believe that the elimination of post-trial summary adjudication would substantially increase the existing incentive for immediate punishment, Sacher's is only a general justifying principle for summary action implies that summary proceedings may be appropriate regardless of whether necessity exists in a particular situation. If the general justifying principle were found to exist only when the denial of an adjudicatory hearing is usually justifiable, the minimal rights extended to a contemnor under the *Taylor* approach would tend not to constitute an unnecessary departure from procedural regularity in most cases. See also p. 72 & note 200 supra (even if *Taylor* approach would not require affording contemnor right to counsel, this right should be granted for other reasons).

215. See, e.g., notes 32-34 supra (citing cases).
218. 343 U.S. at 11.

The Court also observed that immediate adjudication would interrupt the ongoing trial, and that summary punishment of a contumacious attorney could leave the client without representation. Even if only the adjudication were immediate, the Court pointed out that the jury's knowledge of an attorney's contempt conviction could be prejudicial to the client. *Id.* at 10. Although these are important reasons for foregoing immediate punishment or adjudication, they are not justifications for delayed summary adjudication.


220. Judges who prefer summary remedies for their own convenience might be tempted to use immediate punishment after summary adjudication if the option of delayed
judicial restraint argument is not a sufficient justification for depriving a contemnor of important procedural safeguards.\textsuperscript{221}

In some cases a trial judge has acted immediately to adjudicate an individual in contempt but then deferred imposition of the sentence until the conclusion of a trial.\textsuperscript{222} As in the case of delayed adjudication, the delay in sentencing demonstrates the absence of any necessity for immediate punishment, but immediate adjudication coupled with the certainty of subsequent punishment may deter an individual from summary adjudication were removed. But this temptation will present a substantial danger only if, as is presently the case, the concept of necessity does not limit the scope of the summary contempt power to cases in which there is an overriding need for immediate punishment. See pp. 76, 85-86 infra (despite current law, no need exists for immediate punishment to deal with disruptive courtroom behavior). If the necessity that initially justifies summary action were defined as suggested in Part III of this article, see pp. 97-100 infra, the danger that eliminating post-trial summary adjudication would result in unwarranted immediate summary adjudication and punishment would be substantially averted.

\textsuperscript{221} The only other "justification" for summary adjudication at the conclusion of a trial would be to view the denial of procedural safeguards as a necessary punishment for the contemnor’s activity. See Harper & Haber, Lawyer Troubles in Political Trials, 60 Yale L.J. 1, 39-41 (1951). The only penal objectives that could be served by summary adjudication at this time, however, are retribution and deterrence of future misconduct by the defendant and others. These objectives could adequately be served by a more severe penalty imposed after a full adjudicatory hearing. See Sacher v. United States, 343 U.S. 1, 37 (1952) (Frankfurter, J., dissenting); N. Dorsen & L. Friedman, supra note 7, at 225. Indeed, to the extent that unnecessary summary action contributes to disrespect for the judiciary, see Offutt v. United States, 348 U.S. 11, 14-15 (1954), summary adjudication at the conclusion of the trial may undermine the deterrence objective. Moreover, if the denial of procedural safeguards is a legitimate form of punishment, it would seem to follow that the more serious the offense, the greater the justification for summary action. But “due process of law has always tended in the other direction: the more serious the crime charged, the more reason for making sure through meticulous judicial safeguards . . . that no mistake is ultimately made.” Harper & Haber, supra, at 41.

Despite the absence of necessity for summary adjudication at the conclusion of a trial, the Supreme Court has made only two limited concessions to contemnor's interests in procedural safeguards when adjudication is delayed until that time. Taylor v. Hayes, 418 U.S. 488 (1974), ensures that the contemnor will have at least the rights to notice and allocution, \textit{id.} at 498-500 \& n.9, and Mayberry v. Pennsylvania, 400 U.S. 455 (1971), suggests that the standard for determining whether the judge has become personally embroiled in the controversy may be more rigorously applied, \textit{id.} at 465-64.

\textsuperscript{222} See Weiss v. Burr, 484 F.2d 973, 978-79 (6th Cir. 1973), \textit{cert. denied}, 414 U.S. 1161 (1974); MacInnis v. United States, 191 F.2d 157, 159 (9th Cir. 1951), \textit{cert. denied}, 342 U.S. 953 (1952). The due process right to allocution when summary adjudication is delayed until the end of trial \textit{see} p. 72 supra; Taylor v. Hayes, 418 U.S. 488, 498-500 \& n.9 (1974), may not be applicable when only the sentencing is delayed. In \textit{Taylor}, although the trial judge characterized the conduct as contumacious immediately after each disruptive incident, \textit{id.} at 490 \& n.1, the Supreme Court couched its holding in terms of delayed adjudication, \textit{id.} at 497 ("[I]t does not appear to us that any final adjudication of contempt was entered until after the verdict [in the main trial] was returned.") Cf. Weiss v. Burr, 484 F.2d 973, 982 (9th Cir. 1973), \textit{cert. denied}, 414 U.S. 1161 (1974) (dictum) (strict embroilment standard articulated in Mayberry v. Pennsylvania, 400 U.S. 455 (1971), for cases of delayed adjudication is not applicable to cases in which judge adjudicates contempt immediately but defers sentencing).
engaging in further contumacious activity during the trial.223 This deterrence, however, can be achieved without the disadvantages of summary adjudication. The threat of future punishment inherent in a formal charge of contempt to be adjudicated at a later hearing would be an equally effective deterrent if the severity of the threatened sentence were sufficient to compensate for the risk that the contemnor may be acquitted.224

There are two potential disadvantages to relying on the threat of a subsequent conviction as an alternative to summary adjudication for preventing continued misconduct. First, in some instances the severity of the threatened future sentence may not adequately compensate for the contemnor’s assessment of the likelihood of a subsequent acquittal. When this occurs, the certainty of some punishment as a result of summary adjudication may be a more effective deterrent. This justification for summary adjudication, however, rests on the probably unrealistic premise that judges can distinguish such a case from one in which the contemnor is unwilling to alter his behavior regardless of the consequences.225 Moreover, there is no guarantee that summary adjudication would be invoked only when the judge believes that it would be a more effective deterrent than the threat of subsequent adjudication. Indeed, the contrary is likely. The history of the summary contempt power is one of abuse, not of judicial restraint.226 The

223. See Harper & Haber, supra note 221, at 30. But see Mayberry v. Pennsylvania, 400 U.S. 449, 467 (1971) (Burger, C.J., concurring) (summary punishment not very useful in deterring one “bent on frustrating the particular trial or undermining the processes of justice”; summary removal may be “the really effective remedy”). The interest in preventing continued misconduct may be especially acute when the contemnor is a litigant or attorney whose removal would have substantial disadvantages. See pp. 84-85 infra.

224. See N. DORSEY & L. FRIEDMAN, supra note 7, at 255; Hazard, supra note 190, at 443.

225. Requiring trial judges to charge an individual with contempt before resorting to summary adjudication would establish whether the threat of a future conviction would be effective. Many people who would not be deterred by a formal charge of contempt, however, probably would also not be deterred by immediate adjudication. See p. 85 infra (attorney or litigant who wants to cause mistrial or create substantial delay not likely to be deterred even by immediate imposition of fine or jail sentence to be served only while court not in session); Mayberry v. Pennsylvania, 400 U.S. 455, 467 (1971) (Burger, C.J., concurring).

226. The Supreme Court has repeatedly acknowledged that the summary contempt power is subject to abuse, see, e.g., note 202 supra (citing cases), and, like other appellate courts, see, e.g., In re Dellinger, 461 F.2d 389 (7th Cir. 1972); United States v. Marshall, 451 F.2d 372 (9th Cir. 1972), it has been sensitive to this problem, see pp. 42-44 supra. Trial judges, however, frequently abuse the power. The Report of the Association of the Bar of the City of New York on courtroom disorder observed:

In our analysis of the published cases of summary contempt from 1960 to 1972 we found that of a total of seventy-two cases where the trial judge imposed summary punishment, forty (more than sixty percent) were later reversed by an appeals court... In many of these cases, the arbitrariness of the judge's action is obvious. In a case involving members of the S.D.S. in Chicago, the judge held all sixteen de-
potential for abuse more than offsets the added deterrence that summary adjudication might provide in other cases.

The second problem with relying on the threat of subsequent adjudication to deter continuing misbehavior is a concomitant of its potential effectiveness. In the absence of summary adjudication, a judge may threaten severe future penalties in order to minimize the possibility that contemnors will risk future acquittal. In most cases the threat is likely to be effective, but at least a few individuals will probably continue their disruptive behavior. In these instances, the judge will have to carry out his threat in order for it to have credibility in other cases. If the resulting sentences are primarily a manifestation of the judge's unfulfilled deterrent purpose and do not sufficiently take into account the countervailing interest of every individual in personal liberty, they may be disproportionately severe.

An initial difficulty with this concern is that it is simply not clear to what extent sentencing practices would be affected by the unavailability of summary adjudication with delayed punishment. Even if disproportionately severe sentences would result, however, there are defendants in contempt for laughing at one of his questions ("Who is in charge of the S.D.S.?") and sentenced them to ten days in jail.

N. DORSEN & L. FRIEDMAN, supra note 7, at 239-34. In contrast to its documented abuses of the summary contempt power, the Report found that "there is no serious quantitative problem of disruption in American courts." Id. at 6. Moreover, the reported cases probably do not fully indicate the extent to which the summary contempt power is abused. See p. 79 & note 236 infra (possible chilling effect of threat to use summary contempt power).

227. Retaining the summary contempt power for its value in persuading individuals to forego further disruptive behavior, of course, would not prevent judges from using the potentially more effective method of threatening severe sentences following a subsequent adjudication. Eliminating the possibility of summary adjudication, however, may encourage such action. See note 230 infra.


229. See generally G. FLETCHER, RETHINKING CRIMINAL LAW 414-20 (1978) (discussion of goals of punishment). The penalty may be disproportionate in relation to penalties for similar and more serious crimes, see, e.g., People v. Lorentzen, 387 Mich. 167, 176-78, 194 N.W.2d 827, 831-32 (1972), or it may be disproportionate in relation to the nature of the conduct without regard to penalties for other crimes, see, e.g., State v. Ward, 57 N.J. 75, 80-83, 270 A.2d 1, 4-5 (1970). A court may consider both types of disproportionality in reaching a decision. See In re Lynch, 8 Cal. 3d 410, 425-29, 503 P.2d 921, 930-33, 165 Cal. Rptr. 217, 226-29 (1972).

The courts in Lorentzen, Ward and Lynch held that the penalties were so disproportionately severe that they constituted cruel and unusual punishment. The discussion of disproportionality in this article is not intended to suggest that disproportionately severe post-hearing contempt sentences would necessarily constitute cruel and unusual punishment within the meaning of the Eighth Amendment. Nonetheless, the problem of disproportionality should be a serious concern.

230. Although judges have often delayed adjudication until the end of trial even in the face of extreme misconduct, see note 237 infra (citing cases), there are relatively few reported cases in which a judge has summarily held a disruptive individual in contempt
compelling reasons for not permitting summary adjudication. The disproportionality may be a manifestation of the judge's overcompensation for the absence of summary adjudication, rather than his attempt merely to provide a deterrent equivalent to immediate adjudication. An adequate and direct response to this problem would be to alleviate the disproportionality through appellate reduction of the sentences or, if the problem were pervasive, through legislative action. On the other hand, a threatened sentence that merely compensates for the deterrence that would have been gained by immediate adjudication may itself be disproportionately severe. Even if this is true of threatened sentences designed to deter continued disruptive behavior, however, the aggregate unjustified deprivation of liberty resulting from the during trial and delayed sentencing. Thus, to the extent that the reported cases are representative of trial judges' actions, they suggest that the unavailability of immediate adjudication with delayed punishment as a deterrent would not affect existing sentencing practices. On the other hand, it is reasonable to assume that judges more often have used the threat of summary punishment to deter continued misconduct, and this article recommends that the summary contempt power should never be available to punish individuals who disrupt courtroom proceedings. See pp. 85-86 infra. In most cases a threatened penalty following a subsequent adjudication should not have to be substantially greater than a threatened summary penalty in order to have the same deterrent force. See note 231 infra. But see note 234 infra (when minimally disruptive conduct is involved, threatened post-hearing sentence may have to be increased to compensate for contemnor's belief that judge will not follow through with hearing for minor infractions); Spears, Introduction to Myers, The Curtailment of the Contempt Power of the Federal Judiciary, 17 S. Tex. L.J. 1, 1-4 (1975) (Adrian A. Spears, Chief Judge, United States District Court for Western District of Texas, perceives unavailability of summary adjudication option as severe limitation on ability to control courtroom behavior).

231. In a case of serious disruption that is clearly contumacious, the chance of an acquittal following a subsequent hearing is probably slight. Thus, a threatened one-year sentence would probably have at least the equivalent deterrent impact of immediate adjudication that could result in only six months' imprisonment. A judge, however, may overcompensate for the absence of summary adjudication, for example, by threatening to impose a ten-year sentence if the disruption continues and the contemnor is subsequently convicted. A one-year sentence for serious courtroom misconduct may not be disproportionately severe, but the same is not likely to be true of a ten-year sentence. Cf. 18 U.S.C. § 111 (1976) (maximum penalty of $5,000 fine and three years' imprisonment for assaulting federal officer or employee; maximum of $10,000 fine and 10 years imprisonment for assault with dangerous weapon); 18 U.S.C. § 1501 (1976) (maximum penalty of $300 fine and one year's imprisonment for obstructing process server); 18 U.S.C. § 1503 (1976) (maximum penalty of $500 fine and five years' imprisonment for threatening or influencing juror or witness).


233. On the question whether such legislative action would constitute an unconstitutional infringement on the judiciary's inherent contempt power, see Kuhns, supra note 24, at 495-500.

234. This may be true, for example, in cases of minimally disruptive conduct that would warrant only a small fine or a few days' imprisonment. A threatened post-hearing sentence would have to compensate both for the greater likelihood of acquittal since the conduct is not as obviously contumacious and for the possibility that a judge, despite his threat, may not deem the conduct to be serious enough to warrant the time and expense of
imposition of such sentences is not likely to be as great as the aggregate unjustified deprivation of liberty resulting from the availability of summary adjudication. The ease with which the summary contempt power can be invoked and the potential for judicial bias present a substantial risk of unduly severe summary sentences and wrongful summary convictions. Moreover, there is a danger that an overbearing judge will use the easily fulfilled threat of summary conviction to stifle conduct that is in fact not contumacious. To the extent that post-hearing sentences with the equivalent deterrent force of immediate adjudication may be disproportionately severe, the solution is not to permit an equal or greater evil, but rather to give up some degree of potential deterrence by limiting the severity of sentences imposed after a subsequent adjudication.

2. The Alternatives to Immediate Punishment

The fact that trial judges have frequently delayed summary punishment even in the face of extremely disruptive conduct casts doubt on the Supreme Court's repeated assertion that immediate punishment is necessary to deal with courtroom disruption. Moreover, there are alternatives available to the trial judge that eliminate the need for immediate punishment in such cases. *Illinois v. Allen*, a case involving a disruptive criminal defendant, approved, in addition to criminal contempt, binding and gagging, coercive civil contempt, and removal of a full adjudicatory hearing. As a practical matter, in cases of relatively minor misbehavior the contemnor's belief that a judge will not want to bother with a full scale adjudicatory hearing may well be correct. See Nelles, *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956, 964 (1931). Thus the elimination of summary adjudication is more likely to lead to a decrease in the ability to deter marginally contumacious behavior rather than to disproportionately severe sentences for such conduct. This should be regarded as a benefit, not a loss.

235. See note 226 supra. Even if a summary contempt judgment is reversed before a contemnor serves his sentence, the stigma of a conviction and the necessity for devoting time and resources to the appellate process constitute infringements on one's interest in liberty.

236. See N. DORSEN & L. FRIEDMAN, supra note 7, at 199-200; Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 729-34 (1972); Schwartz, supra note 38, at 132, 135; Note, supra note 38, at 951.


238. See p. 74 supra.


240. Justice Black, the author of the Court's opinion, in the past had paid lip service to but never specifically endorsed the exercise of summary criminal contempt power. See, e.g., *In re Oliver*, 333 U.S. 257, 274-75 (1948). Whether *Allen* approves summary criminal adjudication is not clear. Initially Justice Black suggested that "citing or threatening to cite a contumacious defendant for criminal contempt might in itself be sufficient to make a defendant stop interrupting a trial." 397 U.S. at 345. This statement appears to contemplate, or at least is not inconsistent with, the view that the judge may formally charge
from the courtroom. Moreover, Allen made it clear that these options were not exclusive and stressed that trial judges "must be given sufficient discretion to meet the circumstances of each case." The following analysis explores the alternatives for dealing with disruptive behavior and suggests that one of them—removal from the courtroom—is always preferable to summary criminal punishment.

a. Binding and Gagging

As Allen recognized, binding and gagging has substantial disadvantages: it may prejudice the defendant in the eyes of the jury, and the sight of a bound and gagged defendant is itself an affront to the dignity of the court. Moreover, binding and gagging prevents the party from taking advantage of one of the most important benefits of remaining in the courtroom—consulting with counsel. Nonetheless, Allen concluded that "in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant."

Binding and gagging may usually, if not always, be less desirable than summary punishment for criminal contempt. The Court's approval of a less desirable alternative, however, does not justify maintaining summary punishment as a viable option. Given the inherent disadvantages of binding and gagging, the situations that the Court did "not attempt to foresee" should be limited to cases in which there is a need for the defendant to remain in the courtroom. If this need ever exists, a fortiori summary imposition of a jail sentence is undesirable, and, as the subsequent analysis demonstrates, the immediate imposition of a penalty, such as a fine, that permits the contemnor to remain in the courtroom is never appropriate.

the defendant with contempt but that an adjudicatory hearing is required to establish guilt. Later in the same paragraph, however, Justice Black observed, "criminal contempt has obvious limitations . . . [T]he defendant might not be affected by a mere contempt sentence when he ultimately faces a far more serious sanction." Id. (emphasis added). This statement may presume that summary adjudication is permissible, or it may be merely an explanation that a formal charge of contempt may not by itself solve the disruption problem. In any event, Justice Black did not explicitly authorize the immediate imposition of summary criminal punishment. Nonetheless, it is clear from other cases that this option is available. See note 217 supra (citing cases).

242. 397 U.S. at 343.
243. Id. at 344.
244. Id.
245. Id.
246. For the proposition that binding and gagging is never appropriate "even as 'a last resort,'" see N. DORSEN & L. FRIEDMAN, supra note 7, at 101.
247. See pp. 85-86 infra.
b. **Coercive Civil Contempt**

Unlike the criminal contempt sanction, which is a fixed penalty imposed to punish past misconduct, a civil contempt sanction is designed solely to coerce future behavior. The incarcerated contemnor is said to carry the keys to the jailhouse door in his pocket: as soon as he agrees to conform his conduct to the expected standards of behavior, he is entitled to be released. *Allen* suggested that the trial judge could hold the defendant in civil contempt, incarcerate him, and stop the trial until the defendant promised to behave.

One difficulty with the civil contempt alternative in *Allen* is that it contributes to the problem that the exercise of summary criminal punishment is designed to avoid—the disruption of an ongoing proceeding. Witnesses may become unavailable, and a lengthy delay may violate the defendant’s right to a speedy trial. Even if a judge were willing to tolerate a substantial delay in pretrial proceedings, discontinuing a trial for more than a few days would be inconvenient for jurors, and the loss of continuity attributable to a lengthy delay may necessitate a mistrial.

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248. See Shillitani v. United States, 384 U.S. 364, 368-70 (1966). A second objective of civil contempt is to compensate parties for injuries suffered as a result of the violation of a court order. When civil contempt is used for this purpose, the judgment is a fine payable to the injured party. See United States v. UMW, 330 U.S. 258, 303-04 (1947). On the objectives of the civil contempt power generally, see R. Goldfarb, supra note 2, at 49-67; Dobbs, supra note 2, at 235-41.

249. In re Nevitt, 117 F. 448, 461 (8th Cir. 1902); see R. Goldfarb, supra note 2, at 58-61 (criticism of courts’ use of “carry-the-keys-to-his-prison” expression).

250. 397 U.S. at 345.

251. *Allen* did not consider the possibility of a conditional jail sentence that would be served only when the court is not in session or a fine that would be payable only in the event of continued disruptive activity. In some cases this type of conditional sentence might deter further misconduct, and it would not necessitate delaying the trial or removing the contemnor from the courtroom. Nonetheless, the reasons suggested subsequently for rejecting unconditional summary criminal sentences that do not require immediate incarceration are also applicable to conditional summary sentences of the same type. See pp. 85-86 & notes 277-280 infra.

252. See N. Dorsen & L. Friedman, supra note 7, at 104 (recommendation that coercive sentence and delay should not extend beyond seven days).

253. *Allen* recognized this problem when it cautioned that a defendant should not be permitted to benefit from his own wrong by electing “to spend a prolonged period in confinement . . . in the hope that adverse witnesses might be unavailable after a lapse of time.” 397 U.S. at 345.

254. See N. Dorsen & L. Friedman, supra note 7, at 104; Note, supra note 241, at 152-53.


256. Cf. United States ex rel. Gibson v. Ziegele, 479 F.2d 775, 775-77 (3d Cir.), cert. denied, 414 U.S. 1008 (1973) (trial judge declared mistrial over defendant’s objection when key prosecution witness became ill and would be unavailable for “one to two weeks or more”; reprosecution not denial of double jeopardy since mistrial was “manifest necessity”
A lengthy delay would eliminate any need for immediate adjudication. Moreover, neither the "civil" label nor the fact that the sentence is conditional eliminates the potential for abuse of the summary contempt power. A civil contempt adjudication that may result in a lengthy period of incarceration should not be tolerated in the absence of prior notice and a hearing.

On the other hand, if the judge were willing to discontinue the proceeding for only a few days, it might not be feasible to afford the defendant prior notice and a hearing, and the brevity of the delay would minimize the adverse impact of an erroneous summary adjudication. The possibility of only a short period of incarceration, however, undermines the claim that such a remedy is necessary to prevent courtroom disorder. Before resorting to either removal or summary criminal or civil contempt, the trial judge should explore less drastic alternatives. For example, he could attempt to persuade the defendant that his conduct was prejudicial to his own interests or, if that failed, charge the defendant with criminal contempt and tell him that the adjudication would take place at the end of the trial. The judge

within meaning of United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Loux v. United States, 389 F.2d 911, 920-21 (9th Cir.), cert. denied, 393 U.S. 867, 869 (1968) (when one of three codefendants hospitalized during trial and other defendants objected to request for five-day continuance to determine whether hospitalized defendant could return, mistrial declaration as to hospitalized defendant was "manifest necessity" within meaning of Perez); Note, supra note 241, at 152-53 (defendant's right to speedy trial may rule out lengthy delay during trial even if delay is caused by need to coerce proper behavior from defendant).

257. See Note, Procedures for Trying Contempts in the Federal Courts, 73 Harv. L. Rev. 353, 356-57 (1959) (insofar as civil contempt sanction has coercive goal and is not related to recovering "cost of making the complainant whole," it, like criminal contempt, is "analogous to a penal statute" with deterrence goal). See also note 226 supra (abuse of summary contempt power).

258. There is no right to a jury trial in civil contempt cases. Shillitani v. United States, 384 U.S. 364, 370-71 (1966); see Dobbs, supra note 2, at 231-33. Thus, in the absence of a statutory penalty limitation, summary coercive imprisonment for disruptive behavior, at least theoretically, could extend even beyond the six-month limitation on summary criminal punishment. See N. Dorson & L. Friedman, supra note 7, at 104.

259. Cf. p. 67 supra (existence of six-month ceiling on penalty in summary criminal contempt cases limits potential impact of erroneous or biased result).

Allen's brief reference to coercive contempt, 397 U.S. at 345, does not address the question whether summary imposition of such a penalty would be appropriate. But the answer is probably affirmative. Although several courts have held that a civil contemnor is entitled to the same rights of notice and a hearing as a criminal contemnor, see note 73 supra, a disruptive defendant charged with criminal contempt is probably not entitled to these rights. See note 217 supra (citing cases). Moreover, these is some authority for the proposition that a civil contemnor is not entitled to notice and a hearing even in situations where a criminal contemnor would have those rights. See Jennings v. United States, 354 A.2d 855, 856 (D.C. 1976); Brown v. United States, 339 U.S. 41, 55 (1959), overruled, Harris v. United States, 382 U.S. 102 (1965) (Warren, C.J., dissenting).

260. See ABA Project on Standards for Criminal Justice, The Function of the Trial Judge § 6.3 (1972); N. Dorson & L. Friedman, supra note 7, at 95-98.
could even delay the proceeding for a few days without holding the defendant in contempt in the hope that upon reflection the defendant would alter his behavior. In the event that these efforts fail or would obviously be useless, it is unlikely that the defendant could be coerced by a few days in jail.  

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c. Bail Revocation

Trial judges sometimes have responded to a defendant’s disruptive behavior by revoking his bail—an action that is not likely to be preceded by prior notice and a hearing. Regardless of the propriety of summary bail revocation to ensure that a defendant will not flee the jurisdiction or intimidate witnesses, such an action should not be considered an appropriate remedy for disruptive behavior. First, even the use of nonsummary bail revocation for this purpose may be inconsistent with the Eighth Amendment’s proscription of “excessive bail.” Second, there is no guarantee that the bail revocation would

261. If the judge does not specifically commit himself to only a brief delay, the coercive impact of the sentence may be greater, but there is no guarantee that the sentence would be a short one. At least in situations in which there is no jury that would be burdened by delay, a judge may feel constrained to postpone the proceeding for more than a few days in the hope that the contemnor will change his mind.

262. See In re Dellinger, 461 F.2d 389, 415-16 (7th Cir. 1972); N. Dorsen & L. Friedman, supra note 7, at 102-94.


Several courts have held that summary bail revocation prior to trial violates due process. E.g., Vacendak v. Indiana, 261 Ind. 217, 302 N.E.2d 779 (1973); Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968). The right to bail prior to trial, however, may be more extensive than the right to bail during trial. See United States v. Bentvena, 288 F.2d 442, 445 (2d Cir. 1961). But cf. Riggins v. State, 134 Ga. App. 941, 944, 216 S.E.2d 723, 725 (1975) (convicted felon whose bail was revoked pending appeal entitled to “minimal due process protections”).

264. These are the traditional purposes for which bail has been required and sometimes denied or revoked. See, e.g., Stack v. Boyle, 342 U.S. 1, 4-5 (1951); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961); Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974).

265. U.S. Const. amend. VIII; see Schlib v. Kuebel, 404 U.S. 357, 365 (1971) (“Bail, of course, is basic to our system of law, . . . and the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment.”) (citations omitted); Stack v. Boyle, 342 U.S. 1, 4-5 (1951) (“[A] person arrested for a noncapital offense shall be admitted to bail . . . [which] serves as . . . assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”)

In Bitter v. United States, 389 U.S. 15 (1967) (per curiam), defendant’s bail had been summarily revoked during trial because he was 37 minutes late for one court session. On appeal he claimed that his incarceration had interfered with his right to counsel and opportunity to prepare a defense. Without considering the extent to which the bail revocation actually impaired the defendant’s right to counsel, the Supreme Court reversed the con-
solve the disruption problem. Finally, and most importantly, summary bail revocation is the equivalent of a summary contempt penalty,\textsuperscript{266} which, as the following analysis demonstrates, is an unnecessary and undesirable means of controlling courtroom misbehavior.\textsuperscript{267}

d. \textit{Removal from the Courtroom}

Of the alternatives approved in \textit{Allen}, the one actually used by the trial judge was removal from the courtroom. The Supreme Court, emphasizing that the removal must be conditioned on the defendant's future behavior,\textsuperscript{268} specifically rejected the claim that Allen's removal violated his constitutional right to confront adverse witnesses.\textsuperscript{269} There is also ample precedent for removing disruptive spectators\textsuperscript{270} and more limited but equally persuasive authority for the proposition that disruptive attorneys can be removed from the courtroom.\textsuperscript{271}

Although removal accomplishes the objective of ending the disorder, it has inherent disadvantages. The exclusion of an attorney may necessitate a mistrial,\textsuperscript{272} and, despite its constitutionality, the exclusion of a conviction: "In these circumstances, the trial judge's order of commitment, made without hearing or statement of reasons, had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial. Punishment may not be so inflicted. Cf. Rule 42 of Fed. Rules Crim. Proc." \textit{Id.} at 17.

One commentator has suggested that \textit{Bitter} stands for the proposition that bail revocation cannot be used as a purely punitive measure. \textit{A. Amsterdam, Trial Manual for the Defense of Criminal Cases} §72 (3d ed. 1976). There are, however, two equally plausible alternative interpretations. First, the Court may have meant that the conduct was too innocuous to warrant punishment of any kind. \textit{Cf. Eaton v. City of Tulsa, 415 U.S. 697 (1974) (per curiam); In re Little, 404 U.S. 553 (1972) (per curiam); In re McConnell, 270 U.S. 230 (1962) (all reversing contempt convictions because conduct was not sufficiently obstructive to constitute contempt).} Second, the Court may have meant that unauthorized absence from the courtroom is not punishable without notice and a hearing. \textit{Cf., e.g., United States v. Dalahanty, 488 F.2d 396 (6th Cir. 1973) (tardiness not punishable pursuant to Fed. R. Crim. P. 42(a)).}

\textsuperscript{266} Bail revocation conditioned on the defendant's future behavior would be the equivalent of a civil contempt penalty. \textit{See note 251 supra.}

\textsuperscript{277} \textit{See pp. 85-86 infra.}

\textsuperscript{268} The Court also noted with approval that the trial judge had previously warned the defendant that continued disruptive behavior would result in his removal. \textit{See note 40 supra.}

\textsuperscript{269} 397 U.S. at 342-43.

\textsuperscript{270} \textit{See N. Dorfen & L. Friedman, supra note 7, at 250-53.}

\textsuperscript{271} \textit{See note 40 supra.}

\textsuperscript{272} \textit{See United States v. Dinitz, 424 U.S. 600, 612-13 (1976) (Burger, C.J., concurring); Fisher v. Pace, 336 U.S. 155, 156-59, 161-63 (1949); Laughlin v. Eicher, 145 F.2d 700, 702 (D.C. Cir.), cert. denied, 325 U.S. 866 (1944); ABA Project on Standards for Criminal Justice, \textit{The Function of the Trial Judge} §6.5 (1972); N. Dorfen & L. Friedman, supra note 7, at 407 n.97; Trial Lawyers Report, supra note 182, at 14-15 (Principle VI(a)).}

\textsuperscript{273} \textit{See United States v. Dinitz, 424 U.S. 600 (1974) (trial judge removed attorney and gave defendant options of (1) recess pending appellate review of propriety of removal, (2) proceeding with co-counsel, (3) mistrial declaration; retrial following defendant's selection of mistrial option not violation of double jeopardy); Trial Lawyers Report, supra note 182, at 17-18 (mistrial is "only solution which is fair" if attorney is removed and no other attorney "is available to carry on after a reasonable continuance").}
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litigant is prejudicial to his interests. In addition to the adverse impact that it may have on the jury, removal inhibits the litigant's ability to consult with counsel. Furthermore, the power to remove an individual from the courtroom summarily, like the summary contempt power, can be abused.

Despite these problems, removal not only eliminates the need for but is preferable to immediate criminal punishment as a means for dealing with disorderly courtroom conduct. Immediate incarceration pursuant to a summary contempt judgment involves removal from the courtroom with all of its disadvantages, and, at the same time, incarceration increases the degree of harm caused by an overzealous judge who abuses his summary power. Even in the case of a disruptive attorney or litigant, where the adverse impact of removal on the continuing proceeding may minimize the potential for abuse, there is no countervailing interest that justifies the additional harm inherent in immediate incarceration. The only benefit from such action would be that other individuals may be deterred from engaging in similar conduct. This objective, however, can be adequately achieved by the imposition of a more severe penalty following a subsequent non-summary adjudication.

The immediate imposition of a criminal penalty that does not require removal—for example, a fine or a jail sentence to be served only when the court is not in session—may deter an individual from engaging in further misconduct. In the case of a disruptive spectator, however, simple removal would be an adequate and less drastic remedy. And in the case of a disruptive attorney or litigant, where the need for deterrence is greatest because of the disadvantages of removal, the value of this type of sanction is likely to be minimal. If an attorney or litigant perceives a mistrial or removal as something to be avoided, the threat of removal and subsequent criminal punishment will probably

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273. See Note, Guidelines for Controlling the Disruptive Defendant, 56 MINN. L. REV. 699, 700-02 (1972); cf. Bitter v. United States, 389 U.S. 15, 16-17 (1967) (per curiam) (bail revocation 'constituted an unwarranted burden upon defendant and his counsel in the conduct of the case').

274. This disruption, however, does not have to go unpunished. At the time of his removal or subsequently, the defendant could be formally charged with criminal contempt. The trial on the charge could take place at a later date.

275. In the case of a disruptive criminal defendant, immediate incarceration for a fixed term pursuant to a summary criminal contempt judgment would appear to be inconsistent with the requirement that a defendant's exclusion from the courtroom must terminate when he agrees to behave properly, Illinois v. Allen, 397 U.S. 337, 343 (1970).

276. Judges have often permitted disruptive attorneys and litigants to remain in the courtroom. See, e.g., p. 79 and notes 222 & 237 supra (citing cases where disruptive litigants and attorneys were not removed).

277. Cf. note 221 supra (denial of procedural safeguards should not be used as punitive device).
be an adequate deterrent; if he is intent on disrupting the proceeding in the hope of obtaining a mistrial or creating a substantial delay, the perceived advantage of this tactic is likely to outweigh the force of any deterrent sanction. Finally, and most importantly, from the judge's perspective the immediate imposition of a penalty that does not require removal would have a minimal adverse impact on the ongoing proceeding. As a result, the potential for abuse of the summary contempt power would remain virtually unchecked.

C. The Concern with Flexibility

Given the unsatisfactory nature of the disruption justification for summary punishment and the Supreme Court's recognition that the summary contempt power can be easily abused, it may seem anomalous that the Court has continually reaffirmed the existence of that power. Absence of criticism cannot be the explanation. A number of commentators have questioned the propriety of summary punishment. Nor can the long historical tradition behind the summary

278. This is most likely to be true of an unconditional criminal contempt fine, which may be limited to $500 by the extension of the jury trial right to criminal contempts. See p. 67 & note 170 supra. A conditional civil contempt fine would not have to be so limited, see note 313 infra, but it should be rejected as an acceptable coercive device even if there were reason to believe that it might be effective. See note 329 infra.

279. See p. 76 & note 226 supra.

280. Even though removal from the courtroom is an adequate remedy for the immediate problem created by disruptive behavior, there are two arguable bases not discussed in the text for retaining the power to punish summarily one who is removed from a proceeding. Neither of them, however, is compelling.

First, an individual who has been removed from a courtroom might attempt to return to continue his disruption. Rather than viewing such repetitive criminal activity as a justification for summary punishment, this problem should be addressed in terms of the appropriate scope of pretrial release. See generally Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 Va. L. Rev. 1223 (1969); Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970).

Second, trying the contemnor at a later date may have a disruptive impact on ongoing judicial proceedings. If the judge before whom the contempt occurred is engaged in a lengthy trial, he may be unable to conduct the contempt hearing within a reasonable time without interrupting the trial. Assigning the contempt case to another judge would not itself be difficult, and the previous analysis has suggested that this would be desirable in all cases where immediate action is not strictly necessary. See pp. 64-66 supra. Assignment of the case to another judge may not, however, solve the interruption problem. The judge before whom the contempt occurred may have to be a witness at the contempt hearing and this could require a delay in the case he is currently hearing, although not a lengthy one. Moreover, the inconvenience to the judge or others involved in the case he is currently hearing is no greater than the inconvenience caused by the requirement that other witnesses put aside their normal obligations and give evidence in judicial proceedings. See generally Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950).


282. See, e.g., N. Doisen & L. Friedman, supra note 7, at 226-30, 232-38; Sedler, supra note 7, at 85-98; Note, supra note 57.
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contempt power account fully for the Court's failure to analyze critically the need for its existence. Particularly in recent years, the Court has extended procedural protections to individuals involved in decisionmaking processes that traditionally have been carried out with complete informality.

Perhaps the most plausible explanation for the Court's approval of the summary contempt power is an overriding concern that trial judges should have the power to respond adequately to the myriad types of contumacious behavior that may confront them. The Court has consistently stressed the importance of judicial flexibility in dealing with contumacious conduct. Indeed, Allen approved the extreme alternative of binding and gagging, even though the Court did not suggest any situation in which this action would be preferable to the other options it approved.

Although the analysis has already demonstrated that trial judges have sufficient flexibility to control courtroom misconduct without resorting to summary punishment, the summary contempt power traditionally has been used and justified almost exclusively as a device for dealing with disruptive behavior. In the absence of some other justification for summary punishment, it is reasonable to view the Court's repeated dictum that such punishment is essential for maintaining order as a concern with flexibility in a broader sense—a fear that abolishing the summary contempt power may prevent judges from responding adequately to some unforeseen (but not necessarily disruptive) type of contumacious conduct.

283. See Ex parte Terry, 128 U.S. 289, 302-04 (1888); J. Fox, supra note 2, at 50-55; R. Goldfarb, supra note 2, at 15-16.
285. To some extent the Court's approval of summary criminal punishment may result from confidence in the fairness and objectivity of trial judges, see Sacher v. United States, 343 U.S. 1, 12 (1952), or an unwillingness to forego a convenient device for dealing with affronts to judicial authority. The Court's recognition that the summary contempt power can be abused and its own record of reversing convictions in recent years, see pp. 42-44 & note 226 supra, however, cast doubt on these explanations for the continued existence of the summary contempt power.
287. See p. 80 supra (Allen makes clear that devices enumerated in case for dealing with disruptive behavior are not exclusive; other devices may be necessary for trial judge to deal with circumstances of particular cases).
288. See pp. 79-86 supra.
289. See p. 74 supra.
290. See note 217 supra (citing cases).
291. See Sedler, supra note 7, at 91. Indeed, the Court's reversal of summary contempt convictions on relatively narrow grounds in cases like Harris, see pp. 42-43 and notes 15
III. *United States v. Wilson:* A New Perspective on the Summary Contempt Power

A. Background and Analysis

Relying on the 1965 decision in *Harris v. United States,* a series of Second Circuit cases reversed summary criminal contempt convictions of witnesses who refused to obey orders to testify during the course of ongoing trials. The court, noting that the refusals were orderly and polite, stressed the *Harris* dictum that summary punishment should be reserved for extreme situations involving disruptive behavior.

The most recent of these cases is *United States v. Wilson.* Wilson and Anderson had been charged with the armed robbery of one bank and Bryan and Anderson with the armed robbery of another bank. Both Wilson and Bryan pleaded guilty and were awaiting final sentencing when they were called by the prosecution to testify in Anderson’s trial. After invoking the Fifth Amendment, they were granted immunity and ordered to testify. When they refused, the trial judge summarily held them in contempt. Subsequently the court granted Anderson’s motion for an acquittal on one charge, and the jury was unable to reach a verdict on the other. The Supreme Court reversed the Second Circuit and upheld Wilson’s and Bryan’s summary contempt convictions.

& 66, *supra,* Mayberry, see pp. 63-65 & note 144 *supra,* and *Taylor,* see pp. 72-73 *supra,* may be attributable to a conscious decision to avoid facing the fundamental inadequacies of the disruption rationale for summary punishment.

292. 382 U.S. 162 (1965), discussed at pp. 42-43 & note 66 *supra.*

293. United States v. Wilson, 488 F.2d 1231 (2d Cir. 1973), rev’d, 421 U.S. 309 (1975); United States v. Marra, 482 F.2d 1196 (2d Cir. 1973); United States v. Pace, 371 F.2d 810 (2d Cir. 1967).

294. United States v. Marra, 482 F.2d 1196, 1200-01 (2d Cir. 1973); United States v. Pace, 371 F.2d 810, 811 (2d Cir. 1967).


296. Wilson’s sentence had been deferred and Bryan had received a provisional 25-year sentence pending an evaluation pursuant to 18 U.S.C. § 4208(b) (1970) (repealed 1976). 488 F.2d at 1232.

297. *See note 72 supra.*

298. United States v. Wilson, 421 U.S. 309, 312-13 (1975). Anderson was subsequently retried and convicted for the offense upon which the jury in the original trial was unable to reach a verdict. *Id.* at 313.


Although they did not pursue the issue in the Supreme Court, *id.* at 311 n.3, Wilson and Bryan urged before the Second Circuit, as an independent ground for reversal, that the court order to testify was illegal. Since they had not been finally sentenced for their involvement in the crimes with which Anderson was charged, they claimed that their testimony might have adversely affected their sentences. Thus, they argued, the immunity granted them pursuant to 18 U.S.C. §§ 6002-6003 (1976) was not coextensive with the
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1. The Emphasis on Trial Court Discretion

The refusals to testify in *Wilson* clearly fell within the express language of Rule 42(a), which limits the judiciary's broad summary contempt power only by requiring a judge to certify "that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." At one point *Wilson* suggested that this is "all that is necessary." It seems clear from other portions of the opinion, however, that the Court did not mean to imply that inquiry into the necessity for summary action is never relevant. If it had meant this, there would have been no need to distinguish *Harris* on the ground that trial courts, unlike grand juries, do not have the flexibility to interrupt ongoing proceedings in order to provide the contemnor with notice and a hearing. Moreover, the Court suggested that summary punishment may not be appropriate "where time is not of the essence." Rather, *Wilson*’s overriding concern appears to be privilege against self-incrimination. Without deciding whether the Fifth Amendment protects a defendant against use of compelled testimony at sentencing, the Second Circuit held that the contemnors had not "followed what we deemed [sic] to be proper procedure in raising the issue of forbidden use." 488 F.2d at 1233. The court suggested that *Wilson*, who was to be sentenced by the same judge who was presiding in *Anderson*’s trial "should . . . have testified as ordered, but requested a different judge for sentencing." *Id.* Bryan, who was awaiting sentencing by another judge "should have given evidence, then asked that proper precautions be taken (e. g., sealing the record) to insure that [the sentencing judge] would not be privy to the statements made under grant of immunity." *Id.* To support this conclusion the Second Circuit relied exclusively on "the mandate of 18 U.S.C. § 6002 that 'the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination . . . .'" *Id.* This mandate, however, to be valid must be based on the premise that the immunity granted to the contemnors is coextensive with the scope of the Fifth Amendment privilege. See *Kastigar v. United States*, 406 U.S. 441, 449 (1972).

Although *Kastigar* held as a general proposition that the use immunity granted by §§ 6002-6003 is coextensive with the Fifth Amendment, it did not deal with the question of how one ensures that immunized testimony will not be used in subsequent sentencing proceedings. Assuming that the Fifth Amendment prohibits the use of compelled testimony in these proceedings, *see* McCormick’s HANDBOOK OF THE LAW OF EVIDENCE 256-57 (2d ed. E. Cleary 1972) [hereinafter cited as *McCormick*], the alternatives suggested by the court may not sufficiently protect the contemnors' Fifth Amendment interests. Since the contemnors' testimony would have occurred in a public trial, there would be no guarantee that the judge who ultimately sentenced them would not have heard of and been influenced by their testimony. *See* Maness v. Meyers, 419 U.S. 449, 460 (1975) ("Compliance [with an order to produce evidence] could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error."); *cf.* Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 489-92 (1974) (discussion of whether Fifth Amendment protects against threat of foreign prosecution, and if so, whether immunity is coextensive with Fifth Amendment privilege).

302. *Id.* at 318-19.
303. *Id.* at 319.
ensuring flexibility for the trial judge. Although the Court acknowledged that the summary contempt power can be abused, it concluded that appellate courts "can deal with abuses of discretion without restricting . . . [Rule 42(a)] in contradiction of its express terms, and without unduly limiting the power of the trial judge." 304

There are two major difficulties with this approach to regulating the summary contempt power. First, as this analysis has already pointed out, appellate review is not an adequate substitute for procedural safeguards at the adjudicatory level, 305 and the judge's personal observation of the contempt does not obviate the need for these safeguards. 306 Second, Wilson failed to articulate the content of its abuse-of-discretion test. 307 Prior experience with the summary contempt power, particularly in disruption cases, demonstrates that trial judges often are not sensitive to the proposition that the summary power should be limited to the "least possible power adequate to the end proposed." 308 An unwillingness to articulate specific limitations and guidelines for trial judges to follow and appellate courts to enforce represents a substantial abdication of appellate responsibility to ensure that the summary contempt power is not abused.

2. The Court's Justification for Summary Punishment

In addition its unwarranted emphasis on judicial discretion, Wilson addressed itself briefly to the specific justification for summarily punishing the witnesses' refusals to testify:

The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here,
summary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify.\(^\text{309}\)

The denial of fundamental procedural rights is never appropriate merely to vindicate the authority of a court,\(^\text{310}\) and traditionally the civil contempt power has been invoked to induce compliance with a court order.\(^\text{311}\) Since the purpose of the civil sanction is coercive rather than punitive, however, a civil contemnor's incarceration must terminate when compliance with a court order becomes impossible.\(^\text{312}\) When the trial is a relatively short one, a contemnor’s realization that at most he will have to spend only a few days in jail is not likely to act as much of an incentive to testify.\(^\text{313}\) In Wilson, according to the Supreme Court,\(^\text{314}\) the trial judge avoided this problem by imposing the maximum criminal contempt penalty, six months' imprisonment, and at the same time making it clear that he would consider reducing the sentences\(^\text{315}\) if the witnesses testified.\(^\text{316}\)

\(^{309}\) 421 U.S. at 316.

\(^{310}\) See p. 73 supra; cf. note 221 supra (denial of procedural safeguards not appropriate as punitive device).


\(^{313}\) See United States v. Marra, 482 F.2d 1196, 1202 (2d Cir. 1973).

\(^{314}\) 421 U.S. at 312.

\(^{315}\) See Fed. R. Crim. P. 35 (court may reduce sentence within 120 days of its imposition).

\(^{316}\) The excerpts from the transcripts of the contempt proceedings available to the Court do not support this statement. See Appendix at 19-20, 33-34, United States v. Wilson, 421 U.S. 309 (1975) (possibility of later sentence reduction suggested but no indication given that compliance with court order would have bearing on decision). The judge's only reference to coercing testimony came prior to Bryan's sentencing when Bryan was not in the courtroom. Id. at 92. Moreover, whatever coercive impact the sentences may
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The Court had not previously suggested that the need to coerce testimony from a recalcitrant witness could justify summary criminal punishment, and none of the opinions in Wilson addressed the question whether this need provides an independent justification for summary punishment. By referring to the refusals to testify as “intentional obstructions . . . that literally disrupted the progress of the trial and hence the orderly administration of justice,”317 the majority seemed to be equating the conduct with the type of disruptive behavior that has provided the traditional, but unsatisfactory, justification for summary punishment.318 Justice Blackmun’s concurring opinion did not mention the coercion rationale,319 and Justice Brennan’s dissent focused on the nonviolent, respectful nature of the refusals as the basis for urging that summary punishment was inappropriate.320

B. Coercion as a Justification for Summary Punishment of a Recalcitrant Trial Witness

The Supreme Court has repeatedly affirmed the importance of every witness’s obligation to provide relevant evidence in judicial proceedings.321 In Wilson, the refusal to testify led to the acquittal of a criminal defendant, and, as the Court observed, “the same kind of contumacious conduct could, in another setting, destroy a defendant’s ability to establish a case.”322 If there is no reasonable alternative to summary coercive punishment, the magnitude of the potential loss to a party seeking a recalcitrant trial witness’s evidence is, arguably, a sufficient justification for depriving the witness of prior notice and a hearing.323 The analysis in this section suggests that in some cases have had was undermined by the fact that their imposition was stayed pending appeal. Id. at 19, 34; see Brief for Respondent (Wilson) at 14-15, United States v. Wilson, 421 U.S. 309 (1975). Even if the trial judge had acted as the Supreme Court claims he did, the fact that Wilson and Bryan were already in custody as a result of their prior guilty pleas would have minimized the coercive impact that the sentences might otherwise have had. See p. 106 infra.

317. 421 U.S. at 315-16 (citations omitted); see note 80 supra (discussing whether finding of obstruction is prerequisite to summary punishment when contempt is for violation of court order).

318. See pp. 70-79, 84-86 supra.


320. 421 U.S. at 322-29 (Brennan, J., dissenting).


322. 421 U.S. at 316.

323. The remainder of this article discusses the propriety of utilizing summary punishment to coerce testimonial evidence from a recalcitrant witness. The analysis is also applicable to situations in which a witness refuses to produce physical or documentary evidence.
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summary punishment may be the only reasonable method for coercing a witness's testimony, and that, at the very least, the coercion rationale for summary punishment is preferable to the traditional disruption rationale.

1. The Need for a Summary Remedy

The length of a trial or the nature of the legal issues raised by the demand for a witness's evidence may eliminate any need for summary action. If a witness is called early during a lengthy trial, summary punishment could be avoided simply by scheduling a contempt hearing before another judge after the witness has had an opportunity to prepare a defense. In the event that he is found guilty, there would still be ample time for his incarceration to have coercive impact. Usually a trial will not be sufficiently long to permit this alternative. In these cases, however, it might be possible to delay the trial until the witness has had an adjudicatory hearing. If the issues raised by the witness's recalcitrance can be quickly resolved or if he has anticipated and prepared for the contempt charge, the trial might not have to be interrupted for more than a few hours. Such a short delay to accommodate the contemnor's interest in an adjudicatory hearing would be preferable to immediate punishment.

On the other hand, there will be cases where substantially more time is required for the thorough preparation, presentation, and consideration of the issues. The Ninth Circuit has suggested, for example, that a recalcitrant grand jury witness should usually have at least five days to prepare for a hearing involving legal issues of "some complexity."

324. Even in a lengthy trial, a recalcitrant witness's testimony may be important as a foundation for other evidence. Summary imprisonment, however, may not have an immediate impact on the witness. If the most likely possibility is that the coercion may have its desired impact but not in time to counteract the inconvenience of not getting the evidence immediately, summary punishment may not be appropriate. Cf. pp. 106-08 infra (summary coercive sanctions should not be applied in some situations where likelihood is low that such sanctions will succeed); pp. 109-11 infra (discussing situations in which importance of evidence should outweigh factors such as low likelihood of successful coercion in deciding whether summary coercive sanction should be permissible).

325. Cf. United States v. Marra, 482 F.2d 1196, 1202 (2d Cir. 1973) (in simple case, "no sound reason why the hearing could not be held within a day or two of the witness' refusal to obey the court's order"; since hearing in such case would probably require only one or two hours, main trial "could be suspended with a minimum disruption to the judicial process").

326. Moreover, in some situations, denying the contemnor an adequate opportunity to explore the legality of the court order may undermine the coercive rationale for summary punishment. A contemnor with a good faith belief that the order to testify is illegal may be willing to risk a contempt conviction with the hope that it will be reversed on appeal. A thorough examination of the basis for his claim at the trial court level may convince him that success on appeal is unlikely and induce him to testify.

327. United States v. Alter, 482 F.2d 1016, 1023-24 (9th Cir. 1973).
A similar delay in a trial that would otherwise last only a day or two would at best be extremely inconvenient for the other participants in the proceeding. At worst, there is a possibility that during the delay jurors or other witnesses would become unavailable.\textsuperscript{328}

If for these reasons delay is not acceptable, one potentially effective coercive device other than immediate incarceration is the threat of future punishment.\textsuperscript{329} Relying exclusively on this alternative, however, is likely to lead to disproportionately severe sentences in some cases.\textsuperscript{330} If a judge viewed immediate incarceration for up to six months as a minimally sufficient coercive penalty, a threatened future sentence might have to be substantially longer to compensate for the absence of immediate incarceration.\textsuperscript{331} Moreover, since a contemnor sentenced to more than six months’ imprisonment is entitled to a jury trial, the threatened penalty would have to compensate for the possibility of a subsequent acquittal. Thus, in at least some cases in which the threat was not effective, it would be reasonable to expect a judge to impose sentences ranging, for example, from two to four years. Indeed, there is limited precedent for sentences of this length in recalcitrant witness cases.\textsuperscript{332} The maximum penalty for perjury, however, is five years’ im-

\textsuperscript{328} See United States v. Wilson, 421 U.S. 309, 318-19 (1975) (delay to afford contemnor notice and hearing may be substantial and “all essential participants in the trial may no longer be available when [it] reconvenes”).

\textsuperscript{329} In some cases the immediate imposition of a conditional fine may be a potentially effective coercive device. Unlike summary criminal punishment, which has been limited by the extension of the jury trial right to criminal contemnors, see pp. 66-67 & note 170 supra, however, there is no limitation on the amount of a conditional civil contempt fine. As a result, there is a danger that in some cases the penalty for a contemnor who does not purge himself will be disproportionately severe. See p. 77 supra; cf. pp. 95-96 infra (threatened future incarceration with equivalent coercive force of immediate incarceration likely to be disproportionately severe in some cases). More importantly, the question whether a conditional fine is disproportionately severe in an individual case is difficult to assess, particularly in a summary proceeding. At least in part, the determination should depend on the impact of the fine, which unlike the impact of imprisonment, depends primarily on the financial resources at the contemnor’s disposal. A further question should be whether a heavy fine for continued recalcitrance would induce the witness to commit perjury. See p. 95 infra. Finally, there is the difficult question whether or at what point a fine becomes disproportionately severe without regard to the contemnor’s wealth or the possible incentive to commit perjury. See note 229 supra. Regardless of the propriety of imposing conditional fines after notice and a hearing, the potential for disproportionately severe fines coupled with the difficulty in assessing the disproportionality problem in individual cases should be a sufficient basis for rejecting summary imposition of a fine as a coercive device.

\textsuperscript{330} See p. 77 supra.

\textsuperscript{331} On the other hand, the mere threat of even a short period of incarceration may be a sufficient incentive to testify for some witnesses.

\textsuperscript{332} See, e.g., United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977) (four-year contempt penalty imposed on principal prosecution witness for re-
prisonment and a $10,000 fine. Since proving perjury is more difficult than establishing a simple refusal to answer, the possibility of a severe sentence for refusing to testify would provide some witnesses with an incentive to testify falsely. Yet it undoubtedly is better to go without some evidence than to coerce false evidence.

Even apart from the desire to avoid encouraging false testimony, only a sentence that is substantially less than the maximum penalty for perjury should be regarded as proportionate to the crime of refusing to testify. A recalcitrant federal grand jury witness cannot be incarcerated pursuant to a civil contempt judgment for more than eighteen months, and federal statutes proscribing the refusal to testify in other contexts generally limit the period of imprisonment to no more than one year. Moreover, although perjury has traditionally been

**333.** The federal criminal statute that actually labels false swearing as perjury limits the maximum fine to $2,000. The federal statute that actually labels false swearing as perjury limits the maximum fine to $2,000. 18 U.S.C. § 1621 (1976). Section 1623 permits the greater fine when the false swearing occurs in conjunction with court or grand jury proceedings. In addition, § 1623 differs from § 1621 in that the former (1) eliminates the requirement that the falsity be established by two independent sources, cf. Weiler v. United States, 325 U.S. 606 (1945) (falsity must be established by two sources to sustain § 1621 conviction), and (2) permits conviction upon a showing that one of two inconsistent statements is false without establishing which one is untrue.

**334.** Despite the relaxed evidentiary requirements of § 1623, see note 333 supra, the prosecutor must still prove beyond a reasonable doubt that the defendant knowingly made a false statement, 18 U.S.C. § 1623(e) (1976), and that the false statement was material to the investigation or trial, United States v. Phillips, 540 F.2d 319, 327 n.6 (8th Cir.), cert. denied, 429 U.S. 1000 (1976).

**335.** The incentive to commit perjury would not be a significant factor in all cases. For example, a reporter who refused to reveal a confidential source would probably remain silent rather than falsely identify his source, regardless of the penalty for refusing to testify. Moreover, for some witnesses the possibility of a $10,000 fine in addition to imprisonment may lessen the incentive to commit perjury. For others, however, the possibility of such a fine may be of little consequence.

**336.** But see United States v. Patrick, 542 F.2d 381, 393 (7th Cir. 1976), cert. denied, 429 U.S. 931 (1977) (four-year contempt sentence).

**337.** See 28 U.S.C. § 1826(a) (1970); cf. Federal Grand Jury: Hearings on H.J. Res. 46, H.R. 1227 and Related Bills Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) (consideration of proposals to amend § 1826 by limiting period of confinement to six months); ABA SECTION OF CRIMINAL JUSTICE, POLICY ON THE GRAND JURY, RECOMMENDATION No. 24 (1977) ("The period of confinement for a witness who refuses to testify before a grand jury and is found in contempt should not exceed one year.")

**338.** See, e.g., 2 U.S.C. § 192 (1976) (maximum penalty of one year's imprisonment and $1,000 fine for refusal to testify before congressional body); 10 U.S.C. § 847(b) (1976) (maximum penalty of six months' imprisonment and $500 fine for refusal to testify before court-martial, military commission, court of inquiry, or any other military court or board); 15 U.S.C. § 50 (1976) (maximum penalty of one year's imprisonment and $5,000 fine for refusal to testify before Federal Trade Commission).
regarded as an extremely serious offense,\textsuperscript{339} the maximum penalty is often not imposed.\textsuperscript{340}

The previous discussion of disruptive courtroom behavior argued that appellate court or legislative action to eliminate disproportionately severe sentences was preferable to permitting summary adjudication.\textsuperscript{341} For two reasons, however, this response is not as satisfactory for recalcitrant witness cases. First, at least in some recalcitrant witness cases, a post-hearing sentence that is merely the equivalent of six months' imprisonment in its coercive power will be disproportionately severe.\textsuperscript{342} Therefore, eliminating both summary punishment and disproportionately severe sentences in recalcitrant witness cases would result in the loss of some degree of coercion. Given the importance of securing relevant testimony from all witnesses,\textsuperscript{343} this is not a loss to be taken lightly.\textsuperscript{344} Second, the summary contempt power is not as likely to be abused in recalcitrant witness cases.\textsuperscript{345} The court order to testify identifies clearly the nature of the conduct that becomes the subject of the contempt conviction,\textsuperscript{346} and establishing a simple refusal to obey the order is not likely to involve factual disputes that could properly be resolved only in an evidentiary hearing.\textsuperscript{347} More importantly, when the refusal to testify is not accompanied by disruptive behavior or

\textsuperscript{339} See United States v. Levy, 533 F.2d 969, 973 (5th Cir. 1976) ("perjury is one of the most serious offenses known to the law"); R. Perkins, Criminal Law 453-55 (2d ed. 1969).


\textsuperscript{341} See pp. 77-79 & notes 227-36 supra. The earlier discussion referred to summary adjudication and threatened post-hearing sentences as alternative methods for deterring an individual's continued misconduct. The discussion here refers to those devices as methods for coercing testimony. The shift in terminology is merely a concession to the traditional rhetoric about the contempt power. Courtroom disruption is treated as criminal contempt, and specific deterrence (i.e., deterring the defendant from engaging in further similar conduct) is usually recognized as one of the objectives of criminal punishment. See, e.g., W. Lafave & A. Scott, supra note 61, at 22. On the other hand, refusing to testify is often treated as civil contempt, the sole objective of which is to coerce compliance with the order to testify. See, e.g., Shillitani v. United States, 384 U.S. 364, 368-70 (1966). For the purposes of the present discussion and the previous discussion at pp. 77-79, the terms deterrence and coercion are interchangeable.

\textsuperscript{342} As in the disruption situation, there is also a danger that disproportionately severe sentences will result from a judge overcompensating for the lack of the immediate punishment option as a deterrent. See p. 78 & notes 231-34 supra.

\textsuperscript{343} See p. 92 supra.

\textsuperscript{344} Cf. note 234 supra (unavailability of summary adjudication to deter marginally contumacious conduct would not be undesirable).

\textsuperscript{345} Cf. p. 76 & notes 235-36 supra (substantial possibility for abuse of summary contempt power in disruption cases).

\textsuperscript{346} Cf. p. 47 supra (need for prior warning in order for contemnor to know what conduct judge views as contumacious).

\textsuperscript{347} See note 66 supra.
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disrespectful language, there is less danger that the trial judge will become personally embroiled in the controversy.

2. A Pragmatic Defense of Wilson’s Coercion Rationale

The proposition that the need to coerce testimony from a recalcitrant witness may be a sufficient justification for summary punishment is not beyond criticism. The need to challenge the legality of a court order to present evidence of mental incapacity, and to have the assistance of counsel is as great in a case like Wilson as in any contempt case. Moreover, there may be few cases in which threatening a future sentence that is not disproportionately severe, delaying the trial, or scheduling a contempt hearing before another judge is not a reasonable alternative to summary punishment. A trial judge may prefer the convenience of the summary remedy even when it is not necessary, however, and an appellate court would probably be reluctant to regard his decision as an abuse of discretion.

This potential for unnecessary summary action arguably outweighs the value of retaining immediate incarceration as a coercive device for the perhaps limited number of cases in which its use would be appropriate.

Nonetheless, there will be some cases in which immediate imprisonment is the most reasonable means of attempting to secure possibly

348. For a discussion of the situation where a refusal to testify is accompanied by disruptive or disrespectful behavior, see pp. 111-13 infra.
349. Cf. pp. 62-64 supra (possibility of bias when judge becomes personally embroiled in controversy).
350. See pp. 52-55 supra.
351. See p. 51 supra.
352. See pp. 55-57 supra.
353. See pp. 57-62 supra.
354. In Wilson, the contemnors were given the right to raise mitigating circumstances prior to sentencing, 421 U.S. at 312, and there was some indication that the primary motive for Wilson’s refusal to testify was loyalty to codefendant Anderson rather than a good faith belief that the court order was illegal, see 488 F.2d at 1233 n.4. Moreover, the Second Circuit had little difficulty in concluding that the court order was legal, id. at 1232-33. Nonetheless, the contemnors at least had a colorable claim that the order to testify violated their Fifth Amendment rights, see note 299 supra, but the trial judge denied their request for a continuance to study the matter, 421 U.S. at 312 n.4. Furthermore, codefendant Bryan was not represented by his own counsel, 488 F.2d at 1234, and despite some evidence of Wilson’s psychological difficulties, the trial judge did not pursue the question of Wilson’s mental capacity, see id. at 1234-35.
355. See note 331 supra.
356. See p. 93 supra.
357. See p. 93 supra.
359. Taking this position would probably necessitate making a choice between permitting disproportionately severe sentences or foregoing some degree of coercion. See pp. 95-96 supra.
critical evidence from a recalcitrant trial witness, whereas invoking the summary contempt power is never appropriate to coerce proper behavior from, or to punish, an individual who physically disrupts courtroom proceedings.\footnote{360} Thus, to reject the coercion rationale for summary punishment of a recalcitrant trial witness is tantamount to saying that the summary contempt power should be abolished or at least reserved for some unforeseen types of contumacious conduct. Regardless of the merits of this position, it is not acceptable to the Supreme Court. \textit{Wilson} stands for the proposition that the summary power is firmly entrenched as an acceptable device for dealing with at least some instances of contumacious behavior. The task at hand, therefore, is to provide the most acceptable framework for the exercise of that power. The most important step toward the accomplishment of this objective is to recognize that one can safely abandon the disruption rationale and still maintain that there is a legitimate role for the summary criminal contempt power.

C. \textit{Limitations on the Coercion Rationale for Summary Punishment}

Before summary punishment can be invoked for coercive purposes, there should be an overriding, immediate need to coerce the contemnor to behave in a particular manner and an absence of less severe alternative means to accomplish this objective.\footnote{361} Perhaps the only type of conduct for which such punishment may be appropriate is the refusal\footnote{362} of a witness to provide evidence in a civil or criminal trial. See pp. 74-79, 85-86, 96-97 \textit{supra}.

\footnote{360} See pp. 74-79, 85-86, 96-97 \textit{supra}.

\footnote{361} Like the interest in coercing proper behavior from an individual who physically disrupts courtroom proceedings, the interest in coercing an individual to refrain from symbolic acts such as refusing to rise when a judge enters the courtroom, see, e.g., \textit{In re Chase}, 468 F.2d 128 (7th Cir. 1972), should not justify summary punishment. In the event that the threat of a later contempt judgment is not a sufficient specific deterrent, the symbolic protestor, like the disruptor, can be removed from the courtroom. See generally pp. 84-88 \textit{supra}. If the protester is a party to the action and removal seems too harsh, or if he is a witness whose presence is needed in the courtroom, the symbolic gesture can simply be tolerated. The court can still function efficiently, and the subsequent punishment of his conduct, if indeed it constitutes a contempt, see United States v. Snider, 502 F.2d 645, 660 (4th Cir. 1974) (mere failure to rise is not contempt), should be a sufficient deterrent to others.

\footnote{362} Although evasive testimony has sometimes been equated with a refusal to respond, see note 77 \textit{supra}, a coercive sanction should probably not be used against a witness who the judge thinks is evasive. The imposition of a coercive sanction in such a case creates the danger that the witness will be induced to say what he believes the judge wants to hear rather than what may in fact be true. See \textit{In re Eskay}, 122 F.2d 819, 823-24 (3d Cir. 1941); \textit{cf. Ex parte Hudgings}, 249 U.S. 378 (1919) (perjury is not civil contempt). \textit{But see Howard v. United States}, 182 F.2d 908 (8th Cir.), \textit{vacated as moot}, 340 U.S. 898 (1950) (civil contempt judgment for evasive testimony upheld).

\footnote{363} Prior experience demonstrates the absence of necessity for immediate punishment of a recalcitrant witness in nontrial settings. For example, witnesses appearing before administrative bodies commonly have the right to appeal court orders to produce

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when there is an immediate need\textsuperscript{364} for the evidence and when a sufficiently coercive, threatened future sentence would be disproportionately severe.\textsuperscript{305} Limiting the summary contempt power to only these cases, however, would be inconsistent even with the Court's pre-Wilson concern with flexibility.\textsuperscript{306} There may be unforeseen situations in which the use of an immediate coercive sanction is necessary. Rather than attempting to anticipate such situations, the analysis here will be limited to a consideration of additional factors that should restrict the summary incarceration of recalcitrant trial witnesses. In the event that a need for immediate coercive punishment arises in another setting, the principles discussed here should be helpful in evaluating the propriety of such action.\textsuperscript{307}

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\textsuperscript{364} See Penfield Co. v. SEC, 143 F.2d 746 (9th Cir.), cert. denied, 323 U.S. 768 (1944); Jaffe, \textit{The Judicial Enforcement of Administrative Orders}, 76 HARV. L. REV. 865, 870-71 (1963). Although there may be undesirably long delays in the enforcement of administrative orders for other reasons, see Bartosic, \textit{Labor Law Reform—the NLRB and a Labor Court}, 4 GA. L. REV. 647, 650-55 (1970) (institutionalized delay is major obstacle to vigorous Taft-Hartley enforcement), this right of appeal does not appear to have created an intolerable burden on the administrative process.

A similar right to appeal the legality of a court order is usually not available to grand jury witnesses. See United States v. Ryan, 402 U.S. 530, 553 (1971); Cobbleick v. United States, 309 U.S. 323 (1940). But see United States v. Nixon, 418 U.S. 683, 691 (1974) (immediate appellate review available if "the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique situation in which the question arises"). Several courts, however, have held that a grand jury witness charged with coercive civil contempt has the same right to prior notice and a hearing that \textit{Harris} mandates for grand jury witnesses charged with criminal contempt. See note 73 supra (citing cases). Because a grand jury has the flexibility to call early in its term witnesses it believes will be recalcitrant, there should be ample time for a coercive penalty, imposed after notice and hearing, to have its impact. Even in those cases where the witness is called shortly before the grand jury plans to adjourn, it may be possible to extend the grand jury term. See, e.g., 18 U.S.C. §§ 3331, 3333(e) (1976). Alternatively, the witness could be called before the next grand jury at the beginning of its term.

\textsuperscript{365} See pp. 92-94 supra. If the witness refuses for the first time to answer questions on cross-examination, summary coercive punishment may not be necessary. The judge could merely exclude from evidence the prior direct examination, see \textit{McCormick}, supra note 599, at 44-45, or, if the witness is a party in a civil action, enter a judgment against him. See Brown v. United States, 356 U.S. 148, 160 (1958) (Black, J., dissenting).

\textsuperscript{366} See p. 91 & note 286 supra (citing cases).

\textsuperscript{367} Regardless of whether the coercion rationale for summary punishment ultimately replaces the disruption rationale, as it should, or merely becomes an additional basis for summary punishment, its potential limits deserve exploration. Even if the Supreme Court is unwilling to restrict the summary power beyond the express language of Rule 42(a), see United States v. Wilson, 421 U.S. 309, 315 (1975), the factors considered in this section should have a bearing on how a trial judge exercises his discretion and perhaps on how an appellate court evaluates his exercise of discretion. Moreover, state courts, in interpreting the scope of their own contempt powers and the requirements of state constitutional provisions, are free to impose restrictions that go beyond those mandated by the federal constitution and the Supreme Court's interpretation of the federal contempt power. See State v. Brown, 446 F.2d 925, 925-36 (Alaska 1971) (right to jury trial in all criminal contempt cases unless penalty is fine of $100 or less). See \textit{generally} Brennan, \textit{State Constitutions and the Protection of Individual Rights}, 90 HARV. L. REV. 489 (1977).
1. **The Existence of a Court Order**

Usually a specific order to produce evidence will precede any attempt to hold a recalcitrant witness in contempt. For example, if the witness initially claims that his testimony is privileged, the trial judge either will accept the claim and excuse the witness or, after rejecting the claim, will order the witness to testify. In the event of continued recalcitrance, the basis for the contempt judgment would be the refusal to obey the court order.

An alternative theory for holding a recalcitrant witness in contempt would be to view the refusal, even in the absence of a court order, as misbehavior that obstructs the administration of justice. No court has suggested that in the absence of a court order a witness's good faith claim that he may legally refuse to testify constitutes contumacious misbehavior, and at least one court has specifically held that a good faith claim of the Fifth Amendment privilege is not misbehavior that obstructs justice. A bad faith claim of privilege or the failure to offer any legal basis for the refusal, however, may constitute such misbehavior.

The substantive criminal law does not usually consider a good faith but erroneous belief in the legality of one's conduct a defense. Thus the reason for not treating a good faith refusal to provide evidence as contempt in the absence of a court order must rest on the premise that a court order serves some unique function in recalcitrant witness cases. Although it is seldom specifically articulated, that objective appears to be ensuring that the witness has an opportunity to test the legality of his claim before being subjected to the risk of a criminal conviction. An ordinary criminal defendant usually does not have a similar

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370. See id. § 401(1), quoted at p. 46 supra.
371. Carlson v. United States, 209 F.2d 209, 214-15 (1st Cir. 1954); see Brown v. United States, 359 U.S. 41, 50 (1959), overruled in Harris v. United States, 382 U.S. 162, 167 (1965) (recalcitrant grand jury witness was not guilty of contempt until judge ordered him to testify and he refused).
372. Evasive or inconsistent testimony, which courts have equated with the refusal to testify, see note 77 supra, has been punished as contempt in the absence of a court order. See Collins v. United States, 269 F.2d 745 (9th Cir. 1959), cert. denied, 362 U.S. 912 (1960). Contra, Hooley v. United States, 209 F.2d 219, 222 (1st Cir. 1954) (alternative holding); Carlson v. United States, 209 F.2d 209, 214-15 (1st Cir. 1954) (dictum).
373. See W. LaFave & A. Scott, supra note 61, at 362-65.
374. But see Carlson v. United States, 209 F.2d 209, 214 (1st Cir. 1954).
375. The fact that this judicial determination will often not be immediately appealable, see note 363 supra, may help explain why courts have been more willing in recalcitrant witness cases than in other cases to consider the illegality of the order as a defense to a contempt charge, see note 71 supra. See generally Kuhns, supra note 24, at 504-08 & nn.112, 114, 116.
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opportunity for a prior judicial determination of the legality of his conduct, but he at least has the option to refrain from engaging in the questionable conduct. In contrast, the recalcitrant witness, by virtue of the demand for his evidence, must either act in a manner that he believes may not be required by law or risk punishment.

If prior determination of the legality of a witness's good faith refusal to testify is to be meaningful, there must be an adequate opportunity for him to prepare and present legal arguments to the trial judge. Granting this opportunity to a recalcitrant trial witness may be inconsistent with the need for an immediate coercive penalty. Even if the witness is not given sufficient time to prepare legal arguments, however, the requirement of a court order should focus the judge's attention at least momentarily on the legality of the demand for evidence. Since the witness will not have the opportunity to present his legal claim at the time of the summary contempt adjudication, this minimal safeguard against an unwarranted conviction should be a prerequisite to summary punishment.

This same requirement should exist even if the judge is convinced that the refusal to answer is not based on any good faith legal claim. The relatively simple act of ordering the witness to testify will avoid the potential collateral inquiry on appeal into whether the refusal was in fact in good faith. Moreover, the order will make clear both to the witness and to the appellate court precisely what was required of the witness and what the basis was for the contempt judgment. Without such an order in a situation in which the recalcitrant witness manifests some disrespect for the judge, it may not be clear whether the punishment is for refusing to answer or for behaving disrespectfully. Only the former objective should justify summary punishment.

376. See Note, Declaratory Relief in the Criminal Law, 80 HARV. L. REV. 1490 (1967).
377. The option may not be meaningful, however, if the proscribed conduct is not clearly defined. See id. at 1491-96.
378. A recalcitrant witness before a congressional committee may face this dilemma. See Carlson v. United States, 209 F.2d 209, 212 (1st Cir. 1954). Similarly, the dilemma may exist for an individual who can be punished for his failure to act in other contexts. Usually, however, a legal duty to act does not exist independently of some more general course of conduct in which an individual has chosen to engage. For example, the decision to drive an automobile may impose a duty upon one to report his involvement in an accident. See Hughes, Criminal Omissions, 67 YALE L.J. 590, 599-600 (1958). In those "rare instances when a duty is geared by an event entirely unconnected with the activity of the defendant"—for example, a duty to aid a stranger in distress, id. at 599—there is not likely to be an opportunity, as there is in recalcitrant witness cases, for prior judicial consideration of the legality of the particular omission.
379. Cf. p. 60 supra (flexible right-to-counsel rule may create issue for collateral inquiry on appeal); p. 64 supra (personal embroilment standard may create potential for appellate reversal).
380. See pp. 111-13 infra.
2. The Anticipation of Recalcitrance

In Wilson if the prosecutor reasonably believed that the witnesses would testify, the brevity of the trial may have justified summary punishment.\textsuperscript{381} On the other hand, if the prosecutor knew that the witnesses would not testify, he could have taken steps that would have minimized the adverse impact of, or eliminated the need for, summary proceedings during the trial. The failure to take these steps arguably should have a bearing on the appropriateness of summary punishment in a given case.

One way to minimize the deficiencies of summary contempt proceedings would be for the party seeking evidence from a potentially recalcitrant witness to notify the witness in advance of trial that his evidence would be sought. For example, ten days' notice should give the witness an adequate opportunity to obtain counsel and explore the possible legal objections to the request for his evidence. Even if the contempt proceeding were relatively summary, the witness would at least be able to evaluate the legality of his position and prepare possible defenses to suggest to the trial judge.

Instead of merely giving notice to the potentially recalcitrant witness, it would be possible in many cases to attempt to coerce his testimony prior to trial. In civil cases the witness can be deposed. In criminal cases in which, as a practical matter, recalcitrant witness problems are more likely to arise, the deposition alternative may not be available,\textsuperscript{382} but it may be possible to call a potentially recalcitrant prosecution witness before a grand jury. Recalcitrance in a deposition or before a grand jury could be treated as contempt.\textsuperscript{383} Since there would be no immediate need for the evidence, the contempt proceeding would not have to be summary.\textsuperscript{384}

\textsuperscript{381} See pp. 93-94 supra (summary punishment may be necessary in recalcitrant witness cases when delaying trial is unacceptable).


\textsuperscript{383} If the deposition is taken in conjunction with a civil action, a court order to testify must precede the contempt adjudication. See Fed. R. Civ. P. 37(a), (b); 8 C. Wright & A. Miller, supra note 382, § 2282 at 757, § 2289 at 790-91 (1970). The Federal Rules of Criminal Procedure do not deal specifically with the problem of a witness who refuses to answer questions in a deposition. Fed. R. Crim. P. 15; see 18 U.S.C. § 3503 (1976). The reason for requiring a court order in the case of a recalcitrant trial or grand jury witness, see pp. 100-01 supra, however, is equally applicable to the case of a recalcitrant deponent.

\textsuperscript{384} In addition to avoiding the necessity for summary punishment, this course of action would give the party seeking the evidence an opportunity to evaluate whether to pursue the case to adjudication. For example, if Wilson and Bryan had been held in con-
In the event that the contemnor yields to the coercion and agrees to testify prior to the trial, there is no guarantee that he will also testify in the trial. In many jurisdictions, however, his pretrial statements would be admissible in the event that he refused to testify at trial.\textsuperscript{385} In jurisdictions that would not admit the prior statements, it would be possible to hold the witness in contempt again for his refusal to testify at the trial.\textsuperscript{386} Even if the proceedings were summary the second time, the legal issues would most likely be the same as those in the prior contempt proceeding. Thus the summary nature of the proceedings probably would not be as prejudicial as they otherwise might be.

Despite the advantages of pretrial proceedings to coerce evidence and the relative ease with which a potentially recalcitrant witness could at least be notified that his evidence would be sought at trial, a general rule requiring a party to take either of these steps when dealing with a potentially recalcitrant witness would be undesirable.\textsuperscript{387} One dif-

\textsuperscript{385} See, e.g., Fed. R. Crim. P. 15(c); Fed. R. Evid. 804(a)(2), (b)(1). See generally Mccormick, \textit{supra} note 299, at 612-13. See also California \textit{v.} Green, 399 U.S. 149 (1970) (Sixth Amendment right to confront adverse witnesses may not bar admission at trial of witness's testimony at preliminary hearing).


\textsuperscript{387} The following textual discussion raises problems applicable to both the notice and the pretrial testimony options. There is a further consideration applicable only to the latter option. Prosecutors have sometimes used the contempt power against recalcitrant witnesses as a device for punishing politically unpopular beliefs. See Alexander \textit{v.} United States, 181 F.2d 480, 486-87 (9th Cir. 1950) (Denman, C.J., supplemental opinion). Although requiring prosecutors to seek pretrial testimony from potentially recalcitrant witnesses would not necessarily contribute to this type of abuse of the contempt power, it would provide the abuse, when it occurs, with the guise of legitimacy.
difficulty with such a rule is that there may be legitimate reasons for waiting until the trial to confront the potentially recalcitrant witness. For example, a party may fear that detailed pretrial examination or prior notice of the specific information that will be sought will provide the witness with an opportunity to testify evasively at trial. Yet, if the pretrial questioning is only very general, it may not reveal whether the witness will be recalcitrant when more specific questions are asked at trial. Similarly, prior notice that does not specify what information will be sought from the witness may not give him an adequate basis for preparing legal objections to the request for his evidence.

Additional difficulties arise from the fact that, regardless of how precisely one attempts to define "potential recalcitrance," neither litigants nor courts have the expertise to predict accurately whether a witness will refuse to provide evidence. If this uncertainty leads courts to accept most claims that the party desiring particular testimony expected it to be forthcoming at trial, a requirement of notifying potentially recalcitrant witnesses or seeking to elicit evidence from them prior to trial will have little value. On the other hand, if courts tend to refrain from summarily punishing recalcitrant trial witnesses who have not received prior notice or whose evidence has not been sought in pretrial proceedings, parties will presumably attempt to protect themselves from the potential loss of trial evidence by engaging in the required pretrial procedure when the likelihood of recalcitrance is only slight. The requirement of a pretrial attempt to coerce evidence would burden courts with unnecessary proceedings, be costly to litigants, and create inconvenience for nonrecalcitrant witnesses who would be forced to testify twice. Even if a potentially recalcitrant witness only had to be notified in advance that he would be asked to produce evidence, the specificity necessary to make the notice meaningful might impose a substantial burden on the party seeking the evidence. Moreover, given the relatively few witnesses who are in fact recalcitrant and the probability that some of these witnesses will know in advance of trial what evidence will be sought, the requirement is likely to have little utility in the long run.

388. The burden would be greatest in those cases where there is a danger that detailed prior notice of the information to be elicited at trial will permit a witness to testify evasively. The party seeking the evidence would have to weigh the risk of this possibility against the risk of losing the benefit of a summary coercive remedy and draft the notice carefully enough to minimize both problems.

389. See Kuhns, supra note 24, at 312-13 nn.134-35.

390. Witnesses whose potential recalcitrance could be most clearly and easily demonstrated would be those who affirmatively stated prior to trial that they would refuse to testify. A person who is in a position to make such a statement is likely to be aware of his situation as a potential witness and thus would probably not need any advance notice to prepare his defense.
Finally, in those cases in which no action has been taken in anticipation of the witness's recalcitrance, inquiry into whether any such action should have been taken may substantially delay the trial. Since the justification for summary punishment is the need to coerce testimony without interrupting the trial for an adjudicatory hearing, a lengthy inquiry into the reasons for not anticipating the witness's recalcitrance would undermine the very values that summary punishment seeks to preserve.

Nonetheless, the failure to anticipate a trial witness's recalcitrance should not be completely irrelevant in considering whether summary punishment is appropriate. If a witness has affirmatively stated prior to trial that he will refuse to provide evidence or if he has refused to provide evidence in a pretrial proceeding and has not been subjected to a contempt adjudication, the potential for recalcitrance at trial is clear and can be demonstrated quickly and easily. In this situation, the party seeking summary coercive punishment for the witness's recalcitrance at trial should have the burden of establishing that his failure to pursue a coercive remedy earlier was reasonable.\footnote{Even this limited requirement for seeking pretrial testimony may give the appearance of legitimacy to abuses of the contempt power. See note 387 supra (discussing use of contempt power to punish politically unpopular beliefs). The importance of procedural regularity in contempt proceedings, see p. 97 supra, should justify taking such a risk.}

A party could meet this burden by showing, for example, that before the trial he reasonably believed the witness's testimony would not be necessary or that from a tactical standpoint it would have been unreasonable to give the witness the advantage of prior exposure to a probing examination.\footnote{If the witness's initial recalcitrance were based on a Fifth Amendment claim, the failure to grant the witness immunity prior to trial should be regarded as per se reasonable. A prosecutor may be engaged in plea bargaining with several prospective witnesses and hope that he can obtain the necessary evidence without granting immunity to anyone, or at least not the witness in question. Even if a prosecutor knows in advance that he will grant immunity to a witness who claims the Fifth Amendment, he should not be forced to take this step before it is absolutely necessary.}\footnote{It is not likely that a judge will deny a party's request for a pretrial coercive sanction. See Kuhns, supra note 24, at 512. Theoretically, however, the decision to initiate criminal contempt proceedings rests with the court, not the aggrieved party, see id. at} It should take only a few minutes to present these matters to the court, and since the potential for recalcitrance will have been clearly manifested by the witness's prior conduct, it is reasonable to expect the party seeking the evidence to be prepared immediately to offer his explanation for not trying to coerce the testimony earlier. In the absence of such a showing, acceptance of the initial recalcitrance followed by an invocation of the summary contempt power during the trial constitutes an unnecessary deprivation of procedural protections for the witness.\footnote{It is not likely that a judge will deny a party's request for a pretrial coercive sanction. See Kuhns, supra note 24, at 512. Theoretically, however, the decision to initiate criminal contempt proceedings rests with the court, not the aggrieved party, see id. at}
3. **The Likely Impact of a Coercive Sentence**

A premise underlying the imposition of every purely coercive sentence is that the contemnor will—or at least may—yield to the coercion. If this premise is incorrect, the sentence, regardless of its initial purpose, is in fact punitive.\(^{394}\) Since it is never necessary to convict a contemnor *summarily* solely for noncoercive, punitive purposes, knowledge that a contemnor will not yield to coercion should preclude the summary imposition of a contempt sentence.

Just as it is impossible to predict whether a witness will in fact be recalcitrant, it is also impossible to know in advance whether a recalcitrant witness will yield to the coercive impact of a contempt sentence. Given this uncertainty, the fact that at least some witnesses agree to provide evidence after being incarcerated,\(^{395}\) and the absence of reasonable alternatives for obtaining the witness’s evidence, it is probably reasonable to presume that most witnesses will yield to the coercion. In some cases, however, the factual basis for making this presumption will be extremely weak. This is likely to be true in at least three types of situations. First, a recalcitrant witness who is currently incarcerated or about to be incarcerated for a substantial period of time on another charge is not likely to be influenced by the possibility of an additional six months’ imprisonment.\(^{396}\) Second, in the absence of a specific basis

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494-95, and the same may be true with regard to coercive civil contempts. See Penfield Co. v. SEC, 330 U.S. 585, 592 (1947) (judge’s failure to grant requested coercive sanction was abuse of discretion). But see MacNeil v. United States, 236 F.2d 149, 154 (1st Cir.), cert. denied, 352 U.S. 912 (1956).

The possibility that a judge may deny the request for a pretrial coercive sanction raises the question of whether the wrongful denial of such a request should preclude summary punishment during the trial. Since the rationale for requiring a party to seek a potentially recalcitrant witness’s testimony prior to trial is to minimize the witness’s loss of important procedural rights, it arguably should not matter whether the failure to pursue a pretrial remedy is attributable to a litigant or a judge. On the other hand, a party who has made a good faith effort to secure the testimony prior to trial—particularly if he is a criminal defendant, see Chambers v. Mississippi, 410 U.S. 284, 294-303 (1973) (state murder conviction reversed because application of restrictions in Mississippi rules of evidence violated due process right to fair trial by preventing defendant from calling and cross-examining certain witnesses)—arguably should not be denied the opportunity to coerce testimony at trial merely because a judge erroneously rejected his earlier request for a coercive sanction. \(^{394}\) See In re Farr, 64 Cal. App. 3d 605, 612, 13 Cal. Rptr. 595, 598 (1976); Catena v. Seidl, 68 N.J. 224, 229, 343 A.2d 744, 747 (1975).


396. See In re Maguire, 571 F.2d 675, 677 (1st Cir. 1978) (contempt weapon “drastically blunted when the defiant witness is already incarcerated for a long period”). If a contempt sentence is imposed in this type of situation, its limited coercive impact will be maximized by postponing or interrupting the contemnor’s other sentence. See, e.g., In re Grand Jury Investigation, 542 F.2d 166, 169 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977); Martin v. United States, 517 F.2d 906 (8th Cir.), cert. denied, 423 U.S. 856 (1975). But cf. In re Liberatore, 574 F.2d 78, 84-90 (2d Cir. 1978) (federal court has no power to interrupt state court sentence while recalcitrant federal grand jury witness serves civil contempt sentence).
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for a contrary belief, it is reasonable to assume that a witness who has recently resisted a coercive contempt sanction will not yield when a second coercive sanction is imposed. Third, a witness who bases his recalcitrance on some strongly held moral or political belief will probably not yield to a coercive sentence. For example, a reporter is likely to be willing to spend six months in jail rather than reveal a confidential source.\(^{397}\)

The existence of these factors can be quickly demonstrated to the trial judge. When any of them exists, the party seeking the evidence, as a prerequisite to summary punishment, should have the burden of showing that there is nonetheless a reasonable basis for believing that the witness will yield to the coercive pressure of a contempt sanction. Since there is probably little likelihood that the witness will yield to coercion in these situations, the burden should be a heavy one. Meeting the burden, however, should not require the lengthy presentation of evidence, for this would undermine the initial rationale for summary punishment—the need for a speedy remedy to prevent interruption of the trial. An affidavit, or perhaps even an oral statement from the party seeking the evidence, should be an adequate method of meeting the burden. If the party asserts, for example, that the witness had previously provided or agreed to provide the evidence, this should be a sufficient showing to permit summary coercive punishment.

It is important to note several characteristics of a rule that would prohibit summary punishment when there is little likelihood that a witness will yield to coercion. First, the existence of one of the three factors mentioned earlier need not and should not be viewed as the exclusive basis for placing a special burden on the party seeking the evidence.\(^{398}\) One common explanation for refusing to provide evidence is fear of physical retaliation;\(^ {399}\) and in at least some cases this fear will undoubtedly be sufficient to overcome the coercive pressure of a contempt sentence.\(^{400}\) Since it will usually be difficult to estimate a fearful witness's susceptibility to coercion, a purported fear of physical retaliation probably should not be sufficient to require the party seeking the

\(^{397}\) See, e.g., In re Farr, 64 Cal. App. 3d 605, 612, 134 Cal. Rptr. 595, 598 (1976). For a collection of scholarly opinions and empirical studies supporting the proposition that reporters will rarely yield to the coercive impact of incarceration, see Eckhardt & McKey, Caldero v. Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources, 14 Idaho L. Rev. 21, 61 n.258 (1977).


\(^{400}\) On the question whether fear of reprisal constitutes a defense to a charge of contempt, see note 66 supra.
evidence to show a likelihood that the coercive sentence will have its desired impact. Nonetheless, the witness's association with organized crime coupled with evidence that other similarly situated witnesses have not responded to a coercive sentence or that prior intimidation of the witness and his family has occurred may suggest that the witness will not yield to coercion.\textsuperscript{4} When because of such fear, or other factor, it appears likely that the witness cannot be coerced, the trial judge should exercise his discretion to forego summary punishment.

Second, there will continue to be an empirical basis for evaluating and revising the types of factors that should require a party to show that coercion is likely to be effective. Recalcitrant witness problems occur much more frequently in the grand jury setting, where the witness is entitled to notice and a hearing.\textsuperscript{4} In these cases it is arguably permissible to impose a coercive sentence without inquiring into its likely impact. Even if the witness remains recalcitrant, incarceration after notice and a hearing can be viewed as appropriate punishment for the refusal to obey the court order.\textsuperscript{4}

Finally, and most importantly, precluding summary punishment when a trial witness is unlikely to yield to coercion provides neither an excuse for illegal conduct nor a substantial incentive for witnesses to assert that they are not susceptible to coercion. The recalcitrant trial witness can always be held in criminal contempt after notice and a hearing.\textsuperscript{4} This opportunity for subsequent criminal punishment would adequately vindicate the authority of the court, and the witness's knowledge that he may be subjected to such a penalty should minimize any incentive to exaggerate the extent of his conviction not to testify at trial.

\textsuperscript{401} Cf. Catena v. Seidl, 68 N.J. 224, 230, 343 A.2d 744, 747 (1975) (after over five years of incarceration pursuant to civil contempt judgment for refusing to testify about organized crime, contemnor released because there was no substantial likelihood that further incarceration would have coercive impact).

\textsuperscript{402} See note 79 supra (citing civil contempt cases); Harris v. United States, 382 U.S. 162 (1965) (criminal contempt).

\textsuperscript{403} The proposition that a civil contempt sanction can be justified as criminal punishment is inconsistent both with the traditional rhetoric that civil contempts are wholly coercive and with the denial of the right to a jury trial to civil contemnors. See Shillitani v. United States, 384 U.S. 364, 368-71 (1966). Nonetheless, the Supreme Court has recognized that the same conduct may lead to both coercive civil and punitive criminal contempt sanctions, see Yates v. United States, 355 U.S. 66, 74-75 (1957), and there is ample precedent for imposing criminal contempt sanctions against recalcitrant witnesses. See, e.g., Harris v. United States, 382 U.S. 162 (1965); United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971). Thus, even if a judge's primary objective is coercive, the likelihood that this objective cannot be achieved should not be a sufficient reason for prohibiting incarceration following notice and a hearing. It may, however, be a sufficient reason to limit the amount of imprisonment that can be imposed. See note 443 infra (use of limitation on penalties as way to deal with possible tendency of coercive civil contempt sentences to result in disproportionately severe punishment).

\textsuperscript{404} See United States v. DiMauro, 441 F.2d 428, 432 (8th Cir. 1971).
4. **The Importance of the Evidence**

It would be consistent with the necessity rationale for summary punishment to require the party seeking evidence from a recalcitrant witness to show that the evidence was critical, or at least more than marginally relevant, to his case.\(^{405}\) It may be difficult, however, to evaluate the importance of the witness's evidence until other evidence has been received, and by then it may be too late for a coercive sanction to be of any value. Moreover, except in situations when the evidence is clearly of only marginal value, it may be difficult to evaluate the party's representation that the evidence is likely to be important without a time-consuming hearing. For these reasons, a court should be reluctant to forego a coercive contempt penalty solely because the recalcitrant witness's evidence may not appear to be critical to the case. The apparently noncritical nature of the evidence should not, however, be completely irrelevant. It will often be difficult to establish clearly the existence of one of the previously mentioned factors that should preclude summary punishment.\(^{406}\) Yet a colorable showing that summary punishment may be inappropriate coupled with the fact that its potential benefit is likely to be marginal should be a sufficient reason to forego the summary remedy.

The more difficult question is the extent to which the critical nature of the evidence should be considered as a factor favoring summary punishment. On the one hand, it may be unrealistic, and perhaps undesirable, to require that judges always ignore this factor. For example, even the slight possibility of obtaining evidence against an allegedly dangerous terrorist might justify summary punishment of a critical eyewitness who is not likely to testify because of threats to his family. On the other hand, permitting reliance on the importance of the evidence to justify summary punishment could undermine the previously suggested limitations on the use of the summary sanction. There will probably be few cases in which the evidence is only marginally relevant,\(^{407}\) and some judges may tend to be less concerned with a recalcitrant witness's procedural rights than with seeing that their orders are obeyed and that relevant evidence is forthcoming.

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406. For example, there may be some doubt about whether the party seeking the evidence acted reasonably in not pursuing a pretrial remedy, see p. 105 supra, or whether a witness's fear of retaliation is sufficiently strong to overcome the impact of a coercive sanction, see pp. 107-08 supra.

407. In a criminal case, the defendant's constitutional right to present evidence on his behalf, see Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973), or the prosecutor's heavy burden of proof, see In re Winship, 397 U.S. 358, 361-64 (1970), is likely to reinforce the view that the recalcitrant witness's evidence is significant.
To maintain the viability of the previously suggested limitations on summary punishment, judicial consideration of the critical nature of the evidence should be restricted in the following manner. If there is no need for summary adjudication because the trial is sufficiently long to afford the witness a hearing, the importance of evidence should not be a reason for permitting summary punishment.\(^4\) In all other cases, the importance of the evidence should not be a factor favoring summary punishment, unless the case has some overriding social significance.\(^4\)

The prosecution of terrorists or a mass murderer who had been threatening the community might fit within this category, but the more usual civil or criminal case would not.\(^4\)

Although these restrictions on the consideration of the critical nature of the evidence are severe, they should not be a substantial impediment to the goal of obtaining relevant evidence. The unavailability of summary punishment would not preclude using the threat of future prosecution as a coercive device.\(^4\) Moreover, the question of whether to consider the critical nature of the evidence, and hence the suggested restrictions, would arise only after the judge is convinced that one of the factors precluding summary punishment might be applicable. Most trials are sufficiently short to preclude even a colorable claim that there would be enough time to grant the witness a hearing, and the situations in which it would arguably be reasonable to pursue a pretrial coercive remedy are extremely limited.\(^4\)

There is only one type of

408. Similarly, the importance of the evidence should not be a reason to forego specifically ordering the witness to testify. See pp. 100-01 supra. This is a simple requirement that can be met without incurring any substantial delay in the proceedings.

409. One might argue that there should be an additional restriction. The clearly unreasonable failure to pursue a pretrial coercive remedy against a critical witness is more inexcusable than failure to do so against a noncritical witness. Indeed, the apparently noncritical nature of the evidence may be a basis for concluding that the failure to pursue such a remedy was reasonable. If the requirement is to be meaningful it must be applied in critical witness situations generally, and perhaps it should be applied even if the case has particular social significance. The greater importance of the evidence in a case of overriding social significance, however, should be sufficient to justify this limited exception to the pretrial coercive remedy requirement.

410. Reasonable people may disagree about the overriding social significance of a particular case, just as they may disagree about whether one of the previously suggested limitations on summary punishment exists. The possibility for disagreement, however, does not diminish the importance of making decisions about the propriety of summary punishment in light of the criteria suggested in this article. Indeed, more rigid and precise restrictions on summary punishment, although perhaps less susceptible to varying interpretations, would tend to be inconsistent with the Supreme Court’s concern with the need for judicial flexibility in dealing with contumacious conduct. See pp. 86-87 supra.

411. The threat of a future sentence that is not disproportionately severe will probably not be as effective a coercive device in some cases as immediate incarceration. See pp. 94-96 supra. Nonetheless, it may be an adequate coercive device in cases where the reason for foregoing summary punishment is the unreasonable failure to pursue a pretrial remedy rather than the likelihood that the witness will not respond to the coercion.

412. See p. 105 supra.
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situation that may arise with any frequency in which the restrictions suggested here would preclude summary punishment to obtain critical evidence: when the case does not have some overriding social significance and the witness has demonstrated that a coercive sanction is not likely to be effective. If such a witness were summarily held in contempt, he would probably have only a few days to decide whether to yield to the coercion. The possibility that a witness firmly committed to his recalcitrance will respond in such a short period of time, even to a conditional six-month sentence, is probably so remote that the importance of the evidence should not provide a general overriding justification for summary punishment.

5. The Disruptive Witness

The fact that a recalcitrant witness accompanies his refusal with disruptive behavior or insulting remarks to the judge in no way minimizes the need for a coercive sanction. It does, however, increase the potential for judicial bias. Presumably an unbiased judge would initially impose a six-month sentence in order to maximize the coercive impact of the contempt sanction, but even if the judge is not biased, summary conviction of a disruptive witness may create the appearance of bias. Moreover, there are at least two ways in which a witness's misbehavior may improperly influence the judge. First, the judge may give less serious consideration than he otherwise would to the witness's claims that the underlying court order is invalid or that one of the factors previously discussed should prevent the imposition of summary punishment. Second, in the event that the incarcerated witness agrees to comply with the court order, the judge may be less willing to reduce the sentence to the time already served. If the sentence is not so reduced, however, the contempt judgment, regardless of its initial coercive purpose, results in the unwarranted summary imposition of a purely punitive sentence.

413. If there were a substantially longer period of time, there would be no need for summary punishment in the first place.
415. See pp. 58-59 supra.
417. See p. 91 supra.
418. The summary imposition of a coercive penalty probably would not preclude the subsequent imposition, after notice and a hearing, of a punitive penalty for the disruptive behavior. See United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971). In Rollerson the court rejected a defendant's double jeopardy claim, see U.S. Const. amend V, that his summary contempt conviction for throwing a water pitcher at the prosecutor prevented his prosecution for assault on a federal officer. The court noted that strict application of the "same evidence test," see Gaviere v. United States, 220 U.S. 338, 342 (1911), for double
Since the witness could be punished for his disruptive behavior after notice and a hearing, eliminating summary punishment in cases where the witness is disruptive would not provide a significant incentive for recalcitrant witnesses to behave improperly. Nonetheless, both the party seeking the evidence and the integrity of the fact-finding process itself would suffer if an otherwise necessary coercive sanction were precluded merely because of the fortuity that a witness's refusal was accompanied by disruptive or disrespectful conduct. Although the potential for bias cannot be eliminated, speedy appellate review would prevent multiple punishment for the same conduct. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The court apparently felt it was unnecessary to address this problem since it “found persuasive the observation that contumacious conduct in court can be an offense against the court’s jurisdiction as well as an offense against the laws of the United States.” 449 F.2d at 1004 (citing United States v. Mirra, 220 F. Supp. 361, 365-66 (S.D.N.Y. 1963)). This observation suggests an analogy to the “dual sovereignty” doctrine, which permits both a state and the federal government to punish the same conduct. Abbate v. United States, 359 U.S. 187 (1959); see United States v. Wheeler, 98 S. Ct. 1079, 1086-91 (1978) (Indian tribe is separate sovereignty from United States; thus prosecution by both tribe and United States does not violate double jeopardy clause). The Supreme Court, however, has held that the dual sovereignty doctrine does not permit both a state and a political subdivision of the state to punish the same conduct. Waller v. Florida, 397 U.S. 387 (1970). Moreover, dictum in Bloom v. Illinois, 391 U.S. 194 (1968), casts doubt on the viability of the proposition that a court’s interest in punishing contumacious behavior is distinct from the state’s interest in enforcing its substantive criminal law. Id. at 201. See People v. Gray, 69 Ill. 2d 44, 370 N.E.2d 797 (1977) (where defendant was tried, convicted, and punished for contempt after notice and hearing for violating protective order of court, later prosecution for battery and attempted murder of wife was barred by double jeopardy clause).

Even if the dual sovereignty analogy in Rollerson is sound, it would not be applicable to the disruptive recalcitrant witness. Both the initial coercive criminal sanction and the subsequent punitive sanction would be for contempt of court. Nonetheless, it may still be possible to justify imposition of both criminal contempt sanctions without resorting to a narrow application of the same evidence test. Rollerson’s holding that a summary adjudication is not the type of proceeding that invokes the double jeopardy prohibition against multiple trials is sound, and there is substantial authority for the proposition that the same conduct can result in both coercive civil and punitive criminal penalties. See, e.g., United States v. UMW, 330 U.S. 258, 298-99 (1947). This latter precedent may be sufficient to overcome any double punishment claim.

Despite its possible legality, the imposition of both a summary coercive sanction and a subsequent punitive sanction against a disruptive witness would be undesirable. If the witness’s conduct is so outrageous that foregoing subsequent punishment seems intolerable, his behavior is likely to be an indication that a coercive sanction will not be effective, see pp. 106-08 supra, or that there is an issue regarding his mental capacity that can be adequately explored only in an adjudicatory hearing, see p. 51 supra. On the other hand, if a summary sanction is warranted, the witness’s anticipation of future punishment, regardless of whether he testifies, would tend to undermine its coercive value.

419. See pp. 75-76, 84-86 supra.
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be a preferable\textsuperscript{420} and less drastic remedy for possible bias in the disruptve witness situation.\textsuperscript{421}

IV. Two Modest Proposals

A. The Need for an Explicitly Conditional Criminal Contempt Sentence

A recalcitrant trial witness should automatically be entitled to release from incarceration if he agrees to comply with the court order at any time during the evidentiary stage of the trial.\textsuperscript{422} For the trial judge to state only that he will consider reducing the sentence if the witness agrees to provide the evidence, as the judge in Wilson did,\textsuperscript{123} is inadequate for two reasons. First, as previously noted, the failure to release the contemnor who purges himself of the contempt results in an unwarranted, summarily imposed punitive sentence. Second, the coercive impact of the sentence is likely to be diminished if the witness is not assured that compliance with the court order will result in his freedom. Unfortunately, a trial judge, at least in the federal system, may not be able to impose a six-month criminal sentence that will automatically terminate if the witness complies with the court order.

In Shillitani v. United States,\textsuperscript{424} two grand jury witnesses, Pappadio and Shillitani, after having been granted immunity, refused to obey the court's order to answer questions. After a hearing both witnesses

\textsuperscript{420} The previous analysis pointed out that appellate review does not adequately protect against potential abuses of the contemt power. See p. 70 \textit{supra}. Appellate review is offered here as an acceptable remedy for potential judicial bias only because in some cases there may be no reasonable alternative to summary punishment for coercing testimony from a recalcitrant trial witness.

\textsuperscript{421} Since coercion is the only legitimate objective of the summary sanction, an appellate court, in addition to examining other possible indications of bias, should consider carefully whether the trial judge manifested a coercive purpose in imposing the sanction. The judge's failure to communicate to the contemnor that the sanction is solely coercive or, in the event that the contemnor testifies, the judge's failure to release him immediately should be a sufficient basis for reversal.

\textsuperscript{422} In some cases the automatic release arguably should not be immediate. For example, it may be appropriate to impose a conditional six-month sentence that would terminate immediately if the witness testified within 24 hours and would extend for one week after the witness testified if he obeyed the court order before the end of the trial but after the 24-hour period had lapsed. Although the certainty of some additional imprisonment would diminish the coercive value of the sentence for the witness who did not testify immediately, this type of sentence may be desirable to maximize the incentive for speedy compliance with the court order in situations where the witness's testimony is important as a foundation for other evidence. On the other hand, permitting this type of sentence creates the danger that some judges may deny the contemnor immediate release for noncoercive, punitive reasons. See p. 112 \textit{supra}.

\textsuperscript{423} 421 U.S. at 312. \textit{But see} note 316 \textit{supra}.

\textsuperscript{424} 384 U.S. 364 (1966).
were held in contempt and given two-year jail sentences.\textsuperscript{425} The sentences were conditioned upon further order of the court.\textsuperscript{426} The Second Circuit, in affirming the convictions,\textsuperscript{427} interpreted Shillitani’s sentence as entitling him to immediate release from imprisonment if he purged himself of the contempt.\textsuperscript{428} The Supreme Court gave the same construction to the conditional language in both sentences.\textsuperscript{429} Although the parties, the trial judge, and the Second Circuit all assumed that the contempts were criminal,\textsuperscript{430} the Supreme Court, focusing on the trial judge’s coercive objective and the conditional nature of the sentences, held that they were in fact coercive civil contempts.\textsuperscript{431} The grand jury term had expired,\textsuperscript{432} and since a civil contempt penalty cannot extend beyond the time when compliance with the court order becomes impossible,\textsuperscript{433} Shillitani and Pappadio were entitled to be released from imprisonment.

Wilson’s recognition of the coercive justification for summary criminal punishment suggests that Shillitani may not prohibit an explicitly conditional, summary criminal contempt sentence. Indeed, if Shillitani were applicable to summary contempts, the trial judge’s suggestion in Wilson that he would consider reducing the sentences if the witnesses testified arguably should have been sufficient to categorize the contempts as civil. Furthermore, it is arguable that Shillitani was more concerned with unwarranted fixed criminal penalties than with conditional criminal penalties. The Shillitani Court, assuming that civil contempt was a less onerous remedy than criminal contempt,\textsuperscript{434} stated in dictum that a trial judge “should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.”\textsuperscript{435} There was no indication in Shillitani that the time remaining in the grand jury term would not have been sufficient for a completely conditional sentence to have its desired coercive effect. Even

\footnotesize{\textsuperscript{425} The Supreme Court had not yet extended the right to jury trial to criminal contempts carrying sentences greater than six months. See pp. 66-67 & note 69 supra; Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).}

\footnotesize{\textsuperscript{426} 384 U.S. at 366, 368.}


\footnotesize{\textsuperscript{428} 345 F.2d at 294.}

\footnotesize{\textsuperscript{429} 384 U.S. at 368 n.3.}

\footnotesize{\textsuperscript{430} See id. at 369.}

\footnotesize{\textsuperscript{431} Id. at 368.}

\footnotesize{\textsuperscript{432} Id. at 372.}

\footnotesize{\textsuperscript{433} Id. at 371-72.}

\footnotesize{\textsuperscript{434} The assumption is not necessarily correct. In at least one instance a recalcitrant witness remained incarcerated for more than five years pursuant to a civil contempt judgment. See Catena v. Seidl, 68 N.J. 224, 343 A.2d 744 (1975).}

\footnotesize{\textsuperscript{435} 384 U.S. at 371 n.9.}
if the term were about to end, the witnesses could have been called early in the term of the next grand jury. Therefore, there was no necessity for a two-year criminal sentence in the event that the contemnors remained recalcitrant. In contrast, as the Court observed in Wilson, the brevity of the trial would have limited the maximum possible civil contempt sentence to only a few days' imprisonment.

On the other hand, the civil contempt/criminal contempt distinction traditionally has applied to both summary and nonsummary contempts. Thus, Wilson's affirmation of the criminal contempt judgment may mean either that the Court did not view coercion as the overriding objective in Wilson or that it is appropriate to impose a summary criminal contempt penalty for coercive reasons as long as the fixed sentence is not explicitly conditioned on the witness's failure to purge himself of the contempt.

The difficulty in determining whether Shillitani precludes all fixed criminal contempt sentences with a purge clause is compounded by the Court's failure to articulate its objections to this type of sentence; Two other factors, neither of which casts doubt on the propriety of explicitly conditional criminal sentences, may help explain the Court's conclusion that the contempts were civil. First, by the time the case reached the Court, there was substantial confusion over the nature and purpose of the sentences. The trial judge did not explicitly condition the two-year terms on the contemnors' agreement to testify, 384 U.S. at 366, 368, and the Second Circuit's construction of Shillitani's sentence "to mean that defendant has an unqualified right to release from imprisonment once he obeys Judge Watt's order," 345 F.2d at 294 (emphasis added), is anomalous. Use of the present tense implies that Shillitani would be entitled to release if he agreed to testify at any time during the two-year period of incarceration. Unless there happened to be a subsequent grand jury investigating the same matters, however, his testimony would be useless after the grand jury term had expired. The term of the grand jury before which Shillitani and Pappadio were ordered to testify had expired in March, 1965, 384 U.S. at 372, and the Second Circuit's construction affirming the contempt judgments were not rendered until after that date. Pappadio v. United States, 346 F.2d 5 (2d Cir. 1965), vacated, Shillitani v. United States, 384 U.S. 364 (1966) (decided May 24); Shillitani v. United States, 345 F.2d 290 (2d Cir. 1965), vacated; Shillitani v. United States, 384 U.S. 364 (1966) (decided May 18). Given the Court's premise that civil contempt is a less onerous sanction than criminal contempt, see p. 114 supra, it is not surprising that it resolved this confusing situation by treating the contempts as wholly civil.

Second, on the same day that it decided Shillitani, the Court, relying on its supervisory power, see note 69 supra, announced that federal criminal contemnors could not be sentenced to more than six months' imprisonment without having been given the right to a jury trial. Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (plurality opinion of Clark, J.). Since the contempt sentence in Cheff had been only six months, the Court affirmed the conviction. The Court was able to avoid dealing with whether this newly announced rule required reversal of the contempts in Shillitani by labeling them as civil.

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437. 421 U.S. at 317 n.9.

438. See McCrone v. United States, 307 U.S. 61, 63-65 (1939) (nonsummary civil contempt); Giancana v. United States, 352 F.2d 921, 922, 924-25 (7th Cir.), cert. denied, 382 U.S. 939 (1965) (summary civil contempt). Both McCrone and Giancana were cited in Shillitani to illustrate the nature of civil, as opposed to criminal, contempt. 384 U.S. at 370. See p. 92 supra.

439. Occasionally courts have imposed coercive civil contempt sentences that will automatically terminate prior to the time when compliance with the court order becomes im-
however, there would appear to be only one possible objection. Even if a fixed sentence is explicitly conditional, some contemnors will probably not yield to the coercion, \(^{441}\) and, as was noted previously, \(^{442}\) a fixed sentence based solely or primarily on a coercive objective may be disproportionately severe. \(^{443}\)

If one fears that judges would tend to
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impose disproportionately severe fixed conditional sentences, it may be desirable to eliminate this option altogether rather than to rely on legislative or appellate court action, which might not be forthcoming, to eliminate the disproportionality.

Regardless of the merits of this position in other contexts, it is not a sufficient basis for prohibiting explicitly conditional fixed sentences in the limited type of situation that justifies summary coercive punishment in the first place. The fixed portion of the sentence would make the contempt criminal rather than civil, and the extension of the due process jury trial right to criminal contempts limits the period

legitimate justification for summary punishment and, in some cases, perhaps deprive a party of critical evidence. See pp. 92, 96-99 supra. Second, one could refuse to impose a coercive penalty at least in those situations where the contemnor is unlikely to yield to the coercion. Regardless of whether this limitation should exist in all cases, the analysis has already urged that it be imposed on summary coercive punishment. See pp. 106-08 supra. Third, recognizing that both criminal and civil coercive sentences may result in disproportionately severe punishment, see Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955), modified, 355 U.S. 66 (1957); Note, supra note 257, at 356-57, one could limit the severity of coercive sentences, see p. 78 supra, or at least grant criminal contemnors the same procedural rights applicable to criminal contemnors. Compare Shillitani v. United States, 384 U.S. 364, 370-71 (1966) (no right to jury trial in civil contempt cases) with Bloom v. Illinois, 391 U.S. 194, 211 (1968) (due process right to jury trial in criminal contempt cases where sentence indicates offense is not petty). For present purposes, it is sufficient to note that a six-month conditional sentence for a recalcitrant trial witness is not likely to be disproportionately severe, see p. 118 infra, and that a summarily convicted trial witness who is given such a sentence would at least be granted the procedural rights due to other summarily convicted criminal contemnors.

444. See pp. 77-78 supra.

445. Compare United States v. Patrick, 543 F.2d 381, 393 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977) (refusal to reduce recalcitrant trial witness's four-year criminal contempt sentence) with pp. 94-96 supra (sentence of four years for refusal to testify should be regarded as disproportionately severe).

446. The best solution to this problem would be a statute permitting conditional fixed sentences of a limited duration. Cf. Mich. Comp. Laws Ann. § 767-1c (Supp. 1978) (recalcitrant grand jury witness can be imprisoned for one year and fined up to $10,000; if witness agrees to purge himself of contempt, court shall order recalling of grand jury, and if witness purges himself, commute the sentence). The penalty limitation would minimize the danger of disproportionately severe sentences, and the use of conditional fixed sentences would enhance uniformity in the treatment of similar cases. For example, the need for evidence from a grand jury witness ordered to testify eight months before the grand jury term will expire may be just as great as the need for evidence from a witness who had been ordered to testify two months earlier. Under existing federal law, however, the fortuity of the time remaining in the grand jury term, if that time is less than 18 months, see p. 95 supra, determines the maximum imprisonment pursuant to a civil contempt judgment. Thus one witness would be subjected to an eight month coercive sentence and the other to a ten month coercive sentence. But see 18 U.S.C. §§ 3331, 3333(e) (1976) (defining special grand juries and specifying that such grand juries may be extended 18 months beyond their original term; under special circumstances set out in 18 U.S.C. § 3333(e), extension may exceed 18 months).

447. See pp. 98-99 supra.

of incarceration to six months' imprisonment. Given the importance of coercing possibly critical evidence from a witness, a six-month sentence for continued recalcitrance should not be regarded as disproportionately severe in most cases. Indeed, a federal grand jury witness's civil contempt sentence can extend for eighteen months. Rather the problem is that in the absence of an explicitly conditional six-month penalty, there is no guarantee that the trial judge will exercise his discretion to reduce the sentence to the time served if the contemnor purges himself.

It would be desirable to adopt either by statute or court rule a provision that required, or at least permitted, trial judges to make fixed sentences explicitly conditional in summary criminal contempt cases involving recalcitrant trial witnesses. In the absence of such a statute or rule, the Supreme Court should indicate at the earliest available opportunity that conditional fixed sentences are appropriate in these cases. In the meantime, trial judges should go as far as their reading of Shillitani or relevant state precedents permits in impressing upon summarily convicted trial witnesses the coercive nature of their sentences.

B. The Need to Minimize the Impact of Wrongful Incarceration

The scope of review and the procedure for obtaining appellate review in criminal contempt cases vary among jurisdictions. Some jurisdictions treat criminal contempts as ordinary criminal convictions for the purposes of appellate review. Others, focusing on the sui generis nature of contempts, have special rules for the review of criminal contempt convictions. Regardless of the treatment of nonsummary contempts, a summarily convicted contemnor should have the right to full

449. See pp. 66-67 supra. The subsequent analysis suggests that summarily incarcerated contemnor should have the right to speedy appellate review. See pp. 120-21 infra. If this proposal is adopted, the length of incarceration for wrongfully convicted contemnor will be kept to a minimum.

450. See p. 92 supra.

451. One might regard a six-month sentence as disproportionately severe if the evidence were only marginally relevant. Cf. Harris v. United States, 382 U.S. 162, 166-67 (1965) (grand jury witness's evidence may be "so inconsequential . . . [and] the fear of reprisal so great that only nominal punishment, if any, is indicated"). The analysis has already suggested, however, that the noncritical nature of the evidence, as well as the likelihood that the witness will not yield to a coercive sanction, are factors that should limit the availability of summary punishment. See pp. 106-09 supra.


453. See p. 111 supra.

454. See, e.g., Moore v. United States, 150 F.2d 323 (10th Cir.), cert. denied, 326 U.S. 740 (1945); United States ex rel. Brown v. Lederer, 139 F.2d 861 (7th Cir. 1943).

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review of his conviction by at least one appellate court. As noted in Part I, the absence of procedural safeguards at the adjudicatory phase makes appellate review the most important safeguard against abuses of the summary contempt power.456

The discretionary power to grant bail pending appeal457 may eliminate the problem of temporary wrongful incarceration for the individual whose conviction is ultimately reversed. In the limited situation where the previous analysis suggests that summary punishment may be justifiable,458 however, release pending appeal would undermine the sanction’s primary value—the coercive force of immediate incarceration.459 Thus, in those cases in which summary imprisonment is arguably necessary to coerce compliance with a court order and in which the judge makes it clear that he will release the contemnor if the contemnor purges himself of the contempt,460 bail pending appeal should be the exception and not the norm.461 In order to obtain release pending appeal, the contemnor in such a case should be required to make at least a colorable showing that the court order was illegal or

456. See p. 69 supra.
457. See United States v. Baca, 444 F.2d 1292, 1296 (10th Cir.), cert. denied, 404 U.S. 979 (1971); Note, Post Conviction Bail: The Application of an Unjust and Outmoded System—A Case for Reform, 15 N.Y.L.F. 889, 889 (1969) (in most jurisdictions, decision to admit defendant to bail pending appeal “rests in the . . . realm of judicial discretion”). Compare ABA Project on Standards for Criminal Justice, Pretrial Release §§ 5.1-5.2 (1968) (for determining pretrial release judge should use presumption that defendant is entitled to release on his own recognizance) with ABA Project on Standards for Criminal Justice, Criminal Appeals § 2.5 (1970) (for determining release pending appeal burden is on appellant to show that no substantial risk exists that he “will not appear to answer the judgment” following conclusion of appellate proceedings and that he “is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice”).
458. See pp. 98-99 supra.
459. Indeed, without immediate imprisonment, it would be difficult to justify summary punishment in the first place. If the sentence were stayed, the certainty of imprisonment in the event of an unsuccessful appeal would provide some incentive for the contemnor to obey the court order. A threatened post-hearing sentence probably would not, however, have to be substantially longer than a stayed summary sentence to have the equivalent coercive force. See note 250 supra. Thus a primary basis for permitting summary coercive punishment—the probable disproportionality in some cases of a post-hearing sentence that compensated for the absence of immediate punishment, see pp. 94-96 supra—would be severely eroded if the coercive contempt sentence did not have to be served immediately.
460. See pp. 111, 112 supra.
461. If the trial judge does not clearly indicate that the sentence is coercive, or if the case does not fall within the limited range of situations in which summary punishment is an arguably necessary coercive device, see pp. 74-79, 84-86 supra (summary punishment not necessary to coerce proper behavior from person who disrupts courtroom proceedings); pp. 98-99 supra (summary punishment may be necessary in some recalcitrant trial witness cases), the contemnor’s right to release pending appeal should be governed by the same standards applicable to the pretrial release of an ordinary criminal defendant. See note 263 supra. Although technically the summarily convicted contemnor cannot claim the “presumption of innocence,” see Note, supra note 457, at 916-18, his incarceration pending appeal, like the pretrial incarceration of an ordinary criminal defendant, results in imprisonment without an adequate opportunity to address the charges against him.
that one of the previously suggested limitations\textsuperscript{462} on summary coercive punishment is applicable to his case.

Whenever a summarily convicted contemnor is denied bail pending appeal, he should have the right to speedy appellate review in order to minimize the possibility of unwarranted imprisonment.\textsuperscript{463} Federal legislation governing appellate review of civil contempt judgments in recalcitrant witness cases requires that an appeal from the witness's order of confinement for civil contempt must be disposed of within at most thirty days of the filing of an appeal.\textsuperscript{464} A similar rule should be adopted for appeals from orders of confinement in summary criminal contempt cases,\textsuperscript{465} and the failure of an appellate court to comply with the rule should result in the contemnor's release.\textsuperscript{466}

\textsuperscript{462} See pp. 98-113 supra.

\textsuperscript{463} Cf. Note, supra note 257, at 359 (recommendation that there be expedited appeal of all contempt judgments).


\textsuperscript{465} The expedited appeal requirement of 28 U.S.C. § 1826(b) has led some courts to give a civil contemnor's legal arguments less than full and complete consideration. See \textit{In re Berry}, 521 F.2d 179, 181 (10th Cir.), \textit{cert. denied}, 423 U.S. 928 (1975); \textit{In re Reed}, 448 F.2d 1276, 1277 (9th Cir. 1971), \textit{cert. denied}, 408 U.S. 922 (1972). Since there are relatively few contempt cases in any jurisdiction, however, see note 120 supra, the extent to which the expedited appeal requirement places a substantial burden on conscientious appellate courts is questionable. If § 1826(b) does create an undue burden for appellate courts, it would be preferable to amend that statute rather than to deny summarily convicted criminal contemnors a speedy appeal. Since the need for prompt appellate resolution of the legal issues is greatest when an incarcerated contemnor has not been afforded an adjudicatory hearing, one could deny expedited appeals to civil contemnors who had an adequate opportunity to present their legal claims to the trial judge. See note 73 supra. The number of expedited appeals from summary criminal contempt judgments could then be kept at a minimum simply by not using the summary remedy—or at least by not requiring pre-appeal incarceration following summary adjudication—in cases involving disruptive courtroom behavior.

Even with only a limited number of expedited appeals, there may be cases where the parties are unable to prepare their legal arguments in a short enough time for appellate courts to give the issues full consideration. To alleviate this problem, it may be desirable to permit the contemnor to waive the time limitation, or to set forth the time limitation in terms of the various stages of the appellate review process rather than as a single limitation running from the time the contemnor files his notice of appeal. For example, the expedited appeal rule might require that the record be transmitted to the appellate court within 10 days after the filing of the notice of appeal with the trial court, \textit{cf.} Fed. R. App. P. 11(a), (d) (record to be transmitted within 40 days unless court lengthens or shortens time), that the appellee file and serve his brief within 10 days after the contemnor has filed and served his brief, \textit{cf.} Fed. R. App. P. 31(a) (appellee to file and serve brief within 30 days after appellant serves his brief), and that the appellate court dispose of the matter within 10 days after the filing and service of the appellee's brief. This type of rule would ensure that each participant in the appellate process has a reasonable opportunity to consider and address the issues. At the same time, the absence of a special rule limiting the period within which the contemnor must file his brief would permit him some flexibility in weighing the importance of speedy appellate disposition against the possible need for additional time to prepare his legal arguments.

\textsuperscript{466} An incarcerated civil contemnor whose appeal is not disposed of within the 30-day period mandated by 28 U.S.C. § 1826(b) is entitled to be released at the end of the 30-day
To some extent an expedited appeal requirement would lessen the impact of a summarily imposed coercive sentence. A trial witness who knows that he may be released within thirty days will be less likely to testify than one who has no assurance of speedy appellate review. Most trials are relatively brief, however, and summary coercive punishment may not be justified if the trial is lengthy. Thus, a recalcitrant trial witness will probably have to decide whether to testify before his appeal is heard. For most witnesses, the possibility of release within thirty days would probably not be a sufficient reason to risk the certainty of six months' imprisonment in the event that the conviction is affirmed. Moreover, if a witness makes it clear that he expects to be vindicated by an appellate court and will testify if, but only if, the contempt judgment is affirmed, the trial judge retains the option of delaying the trial and requesting that the appeal be given immediate attention. The interest in minimizing incarceration following unwarranted summary convictions outweighs the probably inconsequential loss of coercive power that would result from an expedited appeal rule.

period. *See, e.g.*, Melickian v. United States, 547 F.2d 416, 419-20 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977); Brown v. United States, 465 F.2d 371, 372 (9th Cir. 1972). Courts have reached differing conclusions, however, on the question whether the release should be absolute or merely temporary until the appeal is disposed of. For a collection of the cases, *see* Melickian v. United States, 547 F.2d 416, 417-19 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977).

467. *See* p. 93 *supra.*

468. In contrast, a recalcitrant grand jury witness held in civil contempt pursuant to 28 U.S.C. § 1826 would have to risk only 30 days' imprisonment for the possibility of appellate vindication. If the judgment were affirmed, he could decide immediately to purge the contempt.

469. The primary factor in deciding to take this risk will probably be the contemnor's assessment of the likelihood that an appellate court will reverse the conviction. In cases where the contemnor is willing to risk six months' imprisonment and his prediction of appellate vindication turns out to be correct, the expedited appeal rule would simply be encouraging otherwise legal action. It would be likely to have a substantial detrimental impact only in cases where the contemnor miscalculates the probability that his conviction will be reversed, a problem that can be minimized by the sound advice of counsel. *See generally* pp. 37-62 *supra* (discussion of right to counsel in summary contempt cases).

The magnitude of the risk also will depend in part on whether the appellate court is likely to dispose of the matter within thirty days and whether the court's failure to do so would entitle the contemnor to unconditional release or only temporary release in the event that the conviction is ultimately affirmed. If the likelihood of the court's failure to dispose of the matter promptly remained constant, a rule mandating unconditional release would increase the incentive to risk six months' imprisonment. On the other hand, a rule mandating unconditional release may encourage appellate courts to dispose of appeals within the prescribed time and thereby minimize the incentive to risk six months' imprisonment.

Regardless of how one resolves the conditional/unconditional release issue in the civil contempt context, *see* note 466 *supra*, the primary consideration in the trial witness context should be reducing the incentive to risk a six-month sentence, insofar as that incentive does not depend on the probability of prevailing on appeal. A trial witness held in criminal contempt, unlike a grand jury witness held in civil contempt, will probably have only a few days to decide whether to testify. Therefore it is more important in the case of the trial witness to maximize the immediate coercive impact of the sentence.
Conclusion

Although the Supreme Court has not dealt adequately with the summary criminal contempt power, its pre-Wilson decisions resulted in significant limitations on the exercise of the power. Indeed, an attorney for the contemnor in *Taylor v. Hayes*, one of the most recent pre-Wilson cases, has commented that in arguing the case to the Court it "seemed propitious to revive the challenge to the constitutionality of the summary contempt power itself." *Taylor* did not address the challenge, nor did it provide any justification for permitting the curtailment of procedural safeguards when an attorney’s contempt adjudication is delayed until the end of a trial. Nonetheless, by requiring that the contemnor in such a case is entitled at least to notice of the charge and some opportunity to be heard, *Taylor* was consistent with the trend toward a narrowing of the scope of the summary power.

Several commentators have suggested that *Wilson* represents a substantial step back from the Court’s restrictive view of the summary contempt power in earlier cases. Whether this assessment turns out to be correct will depend in large measure on how both trial and appellate judges react to *Wilson*’s statement that "the courts of appeals . . . can deal with abuses of discretion without restricting . . . [Rule 42(a)] in contradiction of its express terms." For the most part, the reported cases citing *Wilson* have not departed from the limitations on the summary power developed prior to *Wilson*. Several of these

472. See p. 72 *supra*.
473. 418 U.S. at 498-50.
474. See 13 Am. Crim. L. Rev. 271, 280 (1975); 9 Sw. U. L. Rev. 747, 757-78 (1977); cf. Note, *supra* note 158, at 82 (although *Wilson* is distinguishable on its facts, it may represent retreat from *Harris* line of cases).
475. 421 U.S. at 319. See pp. 89-91 *supra*.
476. E.g., United States v. Brannon, 546 F.2d 1242, 1248 (5th Cir. 1977) (reversal of summary contempt conviction imposed at conclusion of trial for witness’s failure to testify during trial; *Wilson* cited for proposition that summary contempt power is available “only where there is ‘compelling reason for an immediate remedy.’”); Krueger v. State, 351 So. 2d 47, 50 (Fla. Dist. Ct. App. 1977) (reversal of attorney’s contempt conviction for remarks made in allegedly disrespectful manner; *Wilson* relied on to support proposition that there was “no need for summary action in this instance”). *But see* McDonald v. State, 321 So. 2d 453 (Fla. Dist. Ct. App. 1975); State ex rel. Spencer v. Howe, 30 Or. App. 25, 566 F.2d 190 (1977) (both upholding immediate summary contempt convictions of recalcitrant trial witnesses without suggesting that contempt penalties were or should have been imposed to coerce testimony). At least one court prior to *Wilson*, however, had upheld a noncoercive summary contempt conviction for a witness’s refusal to testify in open court. Baker v. Eisenstadt, 456 F.2d 382, 388 (1st Cir.), *cert. denied*, 409 U.S. 846 (1972).
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cases, however, have relied in part on Wilson to affirm immediate summary punishment for disruptive courtroom behavior.\textsuperscript{477} Although this is not a departure from the Court's pre-Wilson dictum\textsuperscript{478} or the holdings of other courts,\textsuperscript{479} it represents, as this article has attempted to demonstrate, an unnecessary and undesirable use of the summary contempt power. The most important feature of Wilson, although it was not stressed by either the majority or the dissent, is its coercion rationale, which provides an alternative, independent basis for summary criminal punishment.


478. \textit{See} note 217 supra (citing cases).

479. \textit{E.g.}, notes 32 & 33 supra (citing cases).
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