ARTICLES

A New Perspective on the Judicial Contempt Power: Recommendations for Reform

By LOUIS RAVESON*

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* B.A., Antioch College, 1972; J.D., Rutgers Law School, 1976; Associate Professor of Law, Rutgers Law School, Newark. Research for this Article was supported by grants from the S.I. Newhouse Faculty Research Fund. I am deeply indebted to Susan Abraham for her insights, editing, and unceasing support.

Introduction

Recently, the highest courts of two states upheld contempt convictions against attorneys for the kind of conduct that occurs in virtually every serious trial. In one, the attorney was convicted for making a momentary facial gesture of frustration that the trial judge interpreted as disrespectful, in response to an adverse pretrial ruling in a hotly contested criminal case.[1] In the other, the attorney was held in contempt for his argument that his client's sentence, just announced by the trial judge, was "totally outrageous."[2] In both, the convictions were imposed immediately by the same judge leveling the contempt charges, with virtually none of the rights to a fair trial ordinarily accorded a criminal defendant.[3] This power to summarily punish contemptuous behavior surely stands as one of the greatest anomalies in our entire system of law.[4]

Neither contempt nor the use of summary procedures in contempt proceedings is unusual. It is doubtful whether much more than a few minutes go by in this country without an attorney being charged or threatened by a judge with contempt. In Los Angeles County alone, one public defender is held in contempt or threatened with contempt every week.[5]

Although no organization or governmental body appears to maintain statistics on the frequency of contempt citations,[6] anecdotal data[7] suggests that the threat and actual use of contempt against attorneys, particularly those representing criminal defendants, is at an all-time high

1. *See In re* Daniels, 118 N.J. 51, 570 A.2d 416, *cert. denied*, 59 U.S.L.W. 3326 (1990).

2. *See In re* Dodson, 214 Conn. 344, 572 A.2d 328, *cert. denied*, 59 U.S.L.W. 3326 (1990).

3. In *In re Dodson*, the contemnor was permitted to telephone an attorney, who immediately appeared and represented him in the contempt proceeding. *Id.* In this Article, the term "summary," unless the context indicates otherwise, is used to describe any contempt in which the full panoply of due process rights ordinarily accorded a criminal defendant are circumscribed. With respect to the summary contempt power generally, see Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39 (1978); N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT 220-30, 232-38 (1973).

4. For a discussion of the meaning of summary proceedings, see *infra* notes 39-44 and accompanying text.

5. *See* Tasoff, *Decorum v. Justice—Summary Criminal Contempt Power and Its Effect on the Lawyer-Advocate*, Jan.-Feb. BEVERLY HILLS BAR JOURNAL 11, 22 (1976).

6. I was unable to find any state or federal administrative office of the courts that collects such information.

7. In conducting a survey for this Article, several students and I spoke with public defenders' offices in every state in which such offices exist. The anecdotal data referred to in the text derives from these conversations as well as many others with prominent criminal and civil trial attorneys throughout the country.

and is increasing.[8] Many criminal contempts that take place in the presence of the court may be punished summarily, without affording the contemnor even the fundamental due process guarantees of prior notice and a hearing.[9]

Courts must have the power to enforce order and to compel compliance with their authority. Orderly proceedings and obedience to the courts' commands are essential to the proper administration of justice. The judicial power to punish challenges to the courts' authority as criminal contempt[10] derives inherently from the courts' need to ensure compli-

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8. In addition to the anecdotal data mentioned above, I also engaged in a computerized search of all criminal contempt cases in the two major computer law services. This survey revealed a significant increase in the number of such cases, even with rough consideration given to the increase in the number of reported cases generally, in the last two decades. Moreover, a great many contempt decisions are unreported. *See infra* note 13.

9. *See* United States v. Wilson, 421 U.S. 309 (1975); *Ex parte* Terry, 128 U.S. 289 (1888).

10. Contempt sanctions can be civil or criminal. Civil and criminal contempt are distinguishable not by the conduct cited as the basis for the contempt charge, but rather by the purpose of the sanction imposed, and, to a lesser extent, by the nature of the proceedings.

If the purpose of the contempt sanction is remedial, then an indeterminate sentence is imposed with the purpose of coercing a contemnor to comply with a particular order of the court. Because a civil sanction will end when the contemnor complies or agrees to comply with the court's order, it has been said that the person imprisoned for civil contempt carries the keys to the jail in his own pocket. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902). Because coercive contempt sanctions are viewed as equitable civil remedies, civil contempt need not be proved beyond a reasonable doubt, the contemnor does not have the right to a jury trial, and judgments are appealable in accordance with the rules applicable to civil judgments. Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 MICH. L. REV. 483, 516-17 (1975).

A criminal contempt sentence is imposed for the purpose of punishment, and to vindicate the authority of the court, not for any remedial purpose. Thus, while a civil contempt sanction is indeterminate, a criminal contempt sanction is determinate. As the Supreme Court explained in Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911):

> [I]mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. . . .
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> . . . .
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> On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done . . . [and in such a case] imprisonment operates, not as a remedy coercive in nature, but solely as punishment for the completed act of disobedience.

Id. at 442-443. In at least one case, however, a criminal contempt has been punished with a custodial sentence that is partly coercive in nature. *See Wilson*, 421 U.S. 309 (The defendants were convicted of criminal contempt for refusing to testify at trial despite a grant of immunity, and sentenced to six months imprisonment. The judge made it clear, however, that if they decided to cooperate during the period of incarceration, he would consider reducing their sentences).

It is clear, therefore, that a civil contempt citation may arise out of a criminal trial and vice versa. Moreover, one act, such as the violation of a court order, may be dealt with by the imposition of civil or criminal contempt sanctions, or, theoretically if not practically, by the

ance with their commands and to protect themselves from interference with the process of justice. An independent bar, however, is equally critical to the successful functioning of our system of justice, for it is upon the vigorous advocacy of adversaries that our judicial system primarily relies to expose truth and achieve justice. The exercise of the contempt power and even the potential for its exercise can have a serious chilling effect on the vigorousness of advocacy. Indeed, the greatest danger of this kind of Sword of Damocles "is that it hangs—not that it drops."[11]

If attorneys must fear that momentary antagonism, inadvertent insults, and occasional lapses of decorum that inevitably result from zealous advocacy in the heat of courtroom battle might lead to their punishment for contempt, they will have little choice but to practice a more hesitant brand of advocacy in order to avoid such excesses and the accompanying personal jeopardy.

The vast majority of the use of the contempt power by trial courts goes largely unchecked. Most threats of contempt are acceded to and few findings of contempt are appealed.[12] Even when contempt convictions are appealed, many and perhaps most appellate opinions seem to be unpublished.[13] Presently, the standards governing both the limits of acceptable advocacy and the substantive scope of the contempt power are terribly haphazard and imprecise. The statutory standards for contempt are so broad as to be virtually meaningless, especially when the conduct

imposition of both civil and criminal sanctions. *See* United States v. UMW, 330 U.S. 258, 298-99 (1947) (if the procedural requirements for criminal contempt are complied with, both a civil and criminal contempt penalty may be imposed in the same proceeding).

11. *See* Arnett v. Kennedy, 416 U.S. 134 (1974) (Douglas, J., dissenting) (discussing deterrent effect of statute imposing imprecise proscriptions on speech).

12. *See* Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1513, 1525 (1972) ("Appellate decisions are infrequent, because the offending party's safest and most economical course is to placate the judge by apology and submission." (citing Nelles, *The Summary Power to Punish for Contempt*, 31 COLUM. L.R. 956, 957-58 (1931)). In addition, attorneys sometimes are held in contempt during a trial, and then the judge rescinds the citation at the end of the proceeding. Indeed, this has happened to me. This procedure provides an excellent method for judges to control attorneys, if counsel knows ahead of time that if she behaves as the court desires, the conviction will be annulled.

13. I examined all of the published and unpublished opinions in the State of New Jersey on contempt in the past ten years. During this period, the great majority of these opinions were unpublished. Interestingly, far more of the appellate decisions reversing contempt convictions were unpublished while a majority of those affirming convictions were published. Query whether the courts are consciously or unconsciously trying to convey the message that attorneys must obey the courts, while recognizing at the same time that many abuses of the contempt power occur and must be reversed. Although New Jersey permits the use of unpublished opinions as authority if copies are provided to the court and opposing counsel, the decisions do not constitute precedent and are not binding on any court. *See* N.J. COURT RULE 1:36-3 (1983). Moreover, it is extremely difficult even to learn of the existence of these decisions.

in question is arguably advocative or not actually disruptive. Definitions such as "obstruction,"[14] "disorderly or insolent behavior,"[15] "misbehavior,"[16] and "insulting language"[17] do little to distinguish protected from punishable conduct.[18] Many states make little effort to define contempt by statute, but only grant the power to the courts.[19] Still others actually attempt to define contempt in part by prohibiting "contemptuous behavior."[20] The substantive limits placed on the contempt power by the Con-

14. *See* 18 U.S.C. § 401 (1966 & Supp. 1990); WIS. STAT. ANN. § 785.01(1)(b) (West 1981).

15. *See* CAL. PENAL CODE § 166 (Deering 1985); DEL. CODE ANN. tit. 11, § 1271 (1979); IDAHO CODE § 7-601 (1990); MO. REV. STAT. § 476.110 (1987).

16. *See* N.J. REV. STAT. § 2A:10-1 (1987); 42 PA. CONS. STAT. ANN. § 4131 (Purdon 1981); TENN. CODE ANN. §§ 29-9-102 (1980); UTAH CODE ANN. §§ 78-32-1 (1987).

17. UTAH CODE ANN. §§ 78-32-1 (1987); VA. CODE ANN. §§ 18.2-456 (1982).

18. A finding of obstruction of the administration of justice sufficient to sustain a contempt conviction requires in many instances a fine balancing of the value of the expression at issue to the processes of justice against the harm such expression might cause. As a result, it is extremely difficult, except where the conduct in question is very egregious or actually disruptive of a judicial proceeding, to determine whether such behavior is contemptuous. Thus, for example, appellate courts have affirmed contempt convictions for continuing to argue with the judge after one or two warnings to cease, *see* State *ex rel.* Smith v. District Court, 210 Mont. 344, 346-47, 677 P.2d 589, 591 (Mont. 1984), and have reversed convictions for excessive argumentation after as many as seven orders to stop, including several warnings that the attorney would be held in contempt. *See In re* Natale (N.J. App. Div., Docket No. A-1549-84T5, decided April 30, 1986). Similarly, courts have both upheld and overturned contempt convictions for an attorney's threats to refuse to obey a trial judge's order. *Compare* United States v. Baldwin, 770 F.2d 1550, 1556 (11th Cir. 1985) (attorney's statements that he would not appear and represent his clients on religious holidays despite court order to contrary constitute contempt) *with In re* McConnell, 370 U.S. 230, 235 (1962) (threats of attorney to violate direct court order to cease a line of questioning, "until some bailiff stops us," not an obstruction of justice).

With respect to the vagueness of the substantive standards governing the contempt power, see generally, Raveson, *Advocacy and Contempt—Part II: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 751 (October 1990). In that Article, I attempt to demonstrate that the subjectivity of the contempt power can be constrained by the recognition of various factors that can assist in exposing and balancing the tensions resulting from the conflict between the competing goals of a trial as well as the rights and obligations of litigants and their attorneys. By clarifying whether specific advocative expression is more beneficial than destructive to justice, the point at which such expression can be properly prohibited, and the quality of notice to attorneys, these variables also define the contours of the breathing room that should be accorded vigorous advocacy.

19. *See* ILL. REV. STAT. ch. 38, para. 1-3 (1987); KAN. STAT. ANN. §§ 20-1201-2103 (1980); LA. REV. STAT. ANN. § 13.4611 (West 1987); MISS. CODE ANN. § 9-1-17 (1972). Statutes may, of course, rely upon common law definitions to define the scope of prohibited conduct. *See* United States v. Turley, 352 U.S. 407 (1957). But where, as here, the common law development of standards fails to articulate a clearer definition, that is of little avail.

20. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1271 (1979) ("A person is guilty of criminal contempt when he engages in any of the following conduct: (1) Disorderly, contemptuous or insolent behavior . . . ."); *see also* CAL. PENAL CODE § 166 (Deering 1985); ALA. CODE § 12-1-8 (1986); IDAHO CODE § 7-601 (1990); MINN. STAT. ANN. §§ 588.01-.03 (West 1988).

stitution are no clearer.[21]

Despite the fact that numerous appellate decisions purport to specify more precise standards for application of the definition of contempt,[22] the open-ended and ill-defined nature of the criteria articulated in these opinions makes it impossible to know before the fact, except in the most obvious instances, whether an attorney's conduct is punishable.[23] This failing has fostered idiosyncratic exercise of the contempt power by trial judges and has contributed to the common practice by appellate courts of extending great deference to the trial court's determination of whether an attorney's conduct is contemptuous. In essence, the substantive scope of the contempt power is governed largely by the personal sensibilities of trial judges; each court is free to enforce its own erratic rules. This ad hoc and sporadic treatment of individual instances of contempt as isolated occurrences and the uncertainty surrounding the limits of contempt necessarily results in substantial self-censorship of zealous trial representation by lawyers. The proper operation of our system of justice requires that appropriate variables for measuring the outermost limits of vigorous advocacy and the innermost reach of the contempt power be identified

21. Indeed, the Supreme Court has not conclusively articulated the constitutional limits on the definition of contempt. The Court has suggested in a number of cases that the federal statutory standard for contempt, "actual obstruction of the administration of justice," is a constitutionally grounded limitation. *See Ex parte* Hudgings, 249 U.S. 378, 383 (1919); *In re* Michael, 326 U.S. 224, 227 (1945); *In re McConnell*, 370 U.S. at 233-34. At the same time, however, in every holding in which the Court was necessarily deciding the substantive limits of the contempt power on constitutional grounds, it has utilized an "imminent threat of obstruction" standard. *See* Eaton v. City of Tulsa, 415 U.S. 697 (1974); *In re* Little, 404 U.S. 553 (1972). For an argument that the correct constitutional standard is that of actual obstruction, see Raveson, *Advocacy and Contempt: The Constitutional Limits of the Contempt Power*, 65 WASH. L. REV. 506 (July 1990).

22. Some courts have promulgated interpretations limiting their state's contempt power to address only actual obstructions, or imminent threats of obstruction. *See, e.g., Ex parte* Stephenson, 89 Okla. Crim. 427, 435, 209 P.2d 515, 520 (1949) (construing contempt statute prohibiting "disorderly or insolent behavior" to apply only to "conduct that is directed against the dignity and authority of the court or judge acting judiciously, obstructive of the administration of justice . . . ."); State v. Harper, 297 S.C. 257, 259-60, 376 S.E.2d 272, 274 (S.C. 1989) (statute defining contempt as "undue disturbance of [judicial] proceedings" narrowed to actual obstruction standard). Others, however, have failed to restrict the application of the contempt power to either of these standards. *See, e.g., Ex Parte* Krupps, 712 S.W.2d 144, 149-50 (Tex. Ct. App. 1986) ("criminal contempt is not restricted only to conduct that obstructs, or tends to obstruct, the proper administration of justice"), *cert. denied*, 479 U.S. 1102 (1987); Snow v. Hawkes, 183 N.C. 390, 393, 111 S.E. 621, 622 (1922) (contempt defined in accordance with statute as conduct that tends to bring authority of court into disrespect).

23. There is nearly universal agreement that the courts have failed to define with any specificity the line that separates protected courtroom conduct from contemptuous misbehavior. *See* Brautigam, *supra* note 12, at 1526, 1529; Note, *Criminal Law—Contempt—Conduct of Attorney During Course of Trial*, 1971 WIS. L. REV. 329, 343; Note, *A Pragmatic Look at Criminal Contempt and the Trial Attorney*, 12 U. BALT. L. REV. 100, 101 (1982).

and formalized, so both the bench and the bar have sufficient understanding of the competing tensions to guide their behavior appropriately.[24]

Both substantive and procedural protections are of special importance in contempt cases because the standards for what constitutes contempt as well as the initiation of contempt proceedings are, for the most part, all controlled by one branch, the judiciary. Unlike ordinary criminal proceedings, where prosecution must be initiated by the executive branch and crimes are defined by the legislative branch, the normal controls that act as checks and balances against abusive or mistaken exercise of the government's power to punish criminal conduct are not present. Thus, the potential for abuse of discretion inherent in one branch's unilateral control over this unique form of criminal justice[25] needs to be controlled both by restraints upon the procedures utilized in trying contempt charges and by more objective standards to determine whether conduct is contemptuous.

The issue of summary contempt was thrust into the national spotlight by the sensational political trials of the late 1960s and early 1970s.[26] Since that time, the United States Supreme Court has made some inroads, both procedural[27] and substantive,[28] into the courts' power to im-

24. *See* Raveson, *supra* note 18, at 778-85.

25. The lack of legislative restraint plays some role in contributing to excesses of the contempt power. One branch of government, here the judiciary, is understandably reluctant to curtail its own prerogatives. Although state legislatures and Congress can, and have, placed substantive limits on the contempt power by somewhat restricting the definition of contempt, *see* Note, *Constitutional Law—Due Process—Power of a Legislature to Punish for Contempt*, WIS. L. REV. 268, the degree to which legislative bodies might be willing to impose and be capable of making further inroads on the courts' nearly unbridled power is limited by several factors. First, separation of power considerations may prevent legislatures from imposing too narrow a definition of contempt upon the courts' inherent authority. *See infra* notes 137-39. Second, legislatures possess their own inherent power to punish for contempt. *See* Marshall v. Gordon, 243 U.S. 521, 541 (1917). *See generally* Note, *supra*. Thus, legislatures may legitimately believe that any restrictions they might impose on the judicial contempt power will be reflected back, and perhaps magnified, when the courts look to the constitutional limits of the legislative power of contempt. Most important, however, is the fact that even where legislatures have acted to restrict the judicial power of contempt, the standards for measuring contemptuous conduct necessarily are imprecise and open to broad interpretation by the courts. *See supra* note 18.

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

27. *See, e.g.*, Harris v. United States, 382 U.S. 162 (1965) (reversing summary contempt conviction of witness on ground that delay necessary for hearing would not obstruct grand jury proceedings); Johnson v. Mississippi, 403 U.S. 212 (1971) (judge involved with contemnor on unrelated matter could not, consistent with due process, try contempt charges); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (due process violated where summary conviction, after trial ended, was imposed by judge who had become personally embroiled with contemnor

pose summary contempt sanctions. Nevertheless, the Court has failed to define satisfactorily either the substantive or the procedural limits of the summary contempt power. Indeed, the Court's most recent contempt decision seems to have retreated from its prior sensitivity to the potential abuses of a power that permits a trial court to act simultaneously as prosecutor, witness, judge, and jury, and to impose criminal sanctions for conduct often perceived by the judge as personally insulting as well.[29] State contempt decisions, of which the two previously noted are but examples, frequently grant trial judges essentially unreviewable power to determine whether conduct is contemptuous and when it should be punished summarily.

Calls for reform have followed two basic paths. Some commentators have argued that the summary contempt power should be abolished altogether.[30] Others have focused on the denial of due process rights attendant in the failure to provide particular procedural guarantees, such as a hearing or the right to counsel, in summary proceedings.[31] Many of

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during trial); Taylor v. Hayes, 418 U.S. 488 (1974) (summary contempt conviction at end of trial violated due process because judge had become personally embroiled with contemnor and because of failure to provide notice and opportunity to be heard).

28. *See, e.g., In re* McConnell, 370 U.S. 230, 235 (1962) (reversing contempt conviction of attorney, who, in response to trial court's order to refrain from asking certain questions to a witness, announced that he "proposed to do so unless some bailiff stopped him"); *In re* Little, 404 U.S. 553 (1972) (per curiam) (remarks of *pro se* criminal defendant during summation to jury that judge was biased against him did not constitute contempt); Eaton v. City of Tulsa, 415 U.S. 697 (1974) (per curiam) (witness who used term "chicken shit" while testifying did not commit contempt).

29. *See* United States v. Wilson, 421 U.S. 309 (1975). In *Wilson*, the defendants were convicted summarily of contempt for their refusal to testify during a criminal trial, despite having been granted immunity. The Court distinguished *Harris*, 382 U.S. 162, on the ground that trial courts do not have the same flexibility as grand juries to "suspend action on any one [case], and turn to another," while the contemnor is provided notice and a hearing. *Wilson*, 421 U.S. at 318.

30. The Court's authorization of the use of summary procedures at all has been severely and cogently criticized. *See* Kutner, *Contempt Power: The Black Robe, A Proposal for Due Process*, 39 TENN. L. REV. 1 (1971); N. DORSEN & L. FRIEDMAN, *supra* note 3, at 238; Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U. L. REV. 34, 88 (1976); Comment, *Counsel and Contempt, A Suggestion That the Summary Power be Eliminated*, 18 DUQ. L. REV. 289 (1980); Green v. United States, 356 U.S. 165, 193-94 (1958) (Black, J., dissenting) (citation omitted):

> The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment, the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as "perhaps, nearest akin to despotic power of any power existing under our form of government."

But see Hermann, *Contempt: Sacrilege in the Judicial Temple—The Derivative Political Trials*, 60 KY. L.J. 565, 591-605 (1972).

31. *See, e.g.*, Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney*, 63 KY. L.J. 945 (1975) (urging reform of various specific

these commentators have accepted to varying degrees the necessity for summary contempt proceedings and have sought to restrain the use of the power to a limited set of exceptional circumstances.[32] The severely limited reform that has come from the courts also has tended to respond in piecemeal fashion to the due process deprivations caused by the curtailment of one or another specific procedural guarantees.[33] Other than suggesting outright repeal, however, neither the literature nor the courts have offered meaningful alternatives for ameliorating the draconian nature of the summary contempt power.

This Article suggests a new proposal, less radical than abolition of the summary contempt power, to improve the effectiveness of that power and to provide protection against its misuse. The Article recommends that appellate courts should independently review trial court findings of adjudicative fact in appeals of contempt convictions, and even findings of historical facts where the contempt was tried summarily. Although de novo review is not always a wholly adequate replacement for procedural due process at the original contempt hearing, it can compensate for most of the deficiencies associated with summary proceedings and offers great hope for the evolution of appropriate substantive limitations on the power of contempt. Indeed, in some circumstances, de novo review may even provide greater protection against abuse of the summary contempt power than if the contemnor were accorded a plenary hearing in the first instance.

I. The Independence and Interdependence of Substance and Procedure in the Law of Contempt

When conduct forming the basis of a contempt charge does not occur in open court and in the presence of the judge,[34] an alleged contem-

curtailments of due process rights in summary contempt proceedings); Kuhns, *supra* note 3 (same); Note, *Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors*, 1967 DUKE L.J. 632.

32. *See* Note, *The Role of Due Process in Summary Contempt Proceedings*, 68 IOWA L. REV. 176 (1982); Kuhns, *supra* note 3.

33. *See, e.g.*, Commonwealth v. Abrams, 461 Pa. 327, 336 A.2d 308 (1975) (extending a constitutional right to counsel to a contemnor in summary proceedings where a custodial sentence is imposed); Commonwealth v. Crawford, 466 Pa. 269, 352 A.2d 52 (1976) (same); *see also* cases cited *supra* note 27.

34. Contempts have traditionally been classified as either direct or indirect. Direct contempt is contempt which takes place in the actual presence of the court, such that a judge can determine through his or her own senses that it is offensive. *See In re* Oliver, 333 U.S. 257 (1948); *Ex parte* Terry, 128 U.S. 289, 307 (1888). Indirect contempt is rarely defined independently; it has been described as being "composed of all contempts that are not direct." R. GOLDFARB, THE CONTEMPT POWER 70 (1963). This distinction is crucial because only direct contempts may be disposed of summarily, while indirect contempts will always require notice

nor is entitled to most of the procedural due process protections applicable to ordinary[35] criminal prosecutions.[36] The United States Supreme Court has determined, conversely, that some categories of contempt which occur in the presence of the court may be adjudged summarily, without affording the contemnor the most basic due process rights to a fair trial. The Supreme Court has relied on two independent justifications for the summary imposition of criminal penalties, both of which must be present to permit the utilization of summary proceedings. First, immediate punishment without the delay inevitably caused by plenary proceedings is necessary to prevent and punish serious disruptions of the courts' business and to vindicate the courts' dignity or authority.[37] Second, because the contemptuous acts occur in the judge's sight, a hearing may not be necessary to adjudicate the facts.[38] Where both criteria are met, the Court has authorized the instantaneous infliction of contempt sanctions by the offended judge. In a summary contempt proceeding, the contemnor is without the benefit of an impartial fact-finder or jury,[39] is

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and a hearing replete with the due process protections normally accorded criminal defendants. *See, e.g.*, FED. R. CRIM. P. 42(a) (allowing summary procedures only if "the judge certifies that he saw or heard conduct constituting the contempt and that it was committed in the actual presence of the court"). The justification for the distinction in procedures is that unless the judge witnesses all of the events comprising the contemptuous act, she is not in a position to decide the matter without an evidentiary hearing.

Although this categorical distinction may seem obvious and unequivocal, this issue has been litigated frequently because of the difficulty of categorizing various hybrid situations, the most common of which is an attorney's absence from the courtroom. *Compare In re* Allis, 531 F.2d 1391 (9th Cir.) (mere absence from courtroom is not contempt), *cert. denied*, 429 U.S. 900 (1976) *and* United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973) (attorney's unexplained absence from pre-trial conference could not be tried summarily as it did not occur in the actual presence of the court) *with* Chula v. Superior Court, 57 Cal. 2d 199, 368 P.2d 107, 18 Cal. Rptr. 507 (1962) (attorney's absence held to be direct contempt warranting summary punishment) *and In re* Brown, 320 A.2d 92 (D.C. 1974) (same).

35. Although criminal contempts are not considered "crimes" for purposes of determining the defendant's procedural rights in a contempt proceeding, the Supreme Court has nevertheless recognized that "criminal contempt is a crime in every fundamental respect." Bloom v. Illinois, 391 U.S. 194, 201 (1968).

36. *See, e.g., In re* Oliver, 333 U.S. 257 (1948) (if conduct occurs outside the immediate presence of judge in court, ordinary criminal due process protections must be afforded contemnor); Cooke v. United States, 267 U.S. 517 (1925) (same).

37. *See* United States v. Wilson, 421 U.S. 309, 316 (1975); *Cooke*, 267 U.S. at 534-36.

38. *See* Sacher v. United States, 343 U.S. 1, 9 (1952); *Cooke*, 267 U.S. at 534-36.

39. In *Bloom*, 391 U.S. 194, the Court held that the constitutional guarantees of trial by jury applied to serious criminal contempts. A companion case to *Bloom*, Duncan v. Louisiana, 391 U.S. 145 (1968), extended the right to jury trial for serious criminal cases, including contempts, to state courts. Although *Bloom* suggested that the right to jury trial applied to direct contempts, *Bloom*, 391 U.S. at 209-10, the case itself involved only an indirect criminal contempt. In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held that the constitutional right to jury trial applied to direct contempts. *Codispoti* reaffirmed the rule in *Bloom* that only serious criminal contempts constitutionally required jury trials and that the serious-

denied the right to counsel,[40] and does not have notice and sufficient time to prepare a defense,[41] which generally includes the opportunity to speak to potential witnesses and to research the law, as well as to regain composure. Indeed, at a summary hearing the contemnor does not even have the right to present a defense or cross-examine principal witnesses, including, if necessary, the trial judge. The only basic guarantees retained by the contemnor in these abbreviated hearings are the right to be presumed innocent until proven guilty beyond a reasonable doubt,[42] the right to have the required wrongful intent proven beyond a reasonable doubt,[43] and generally, the guarantee of some sort of allocution,[44] the right to address the court prior to sentencing.

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ness of the contempt should be judged by the maximum statutory penalty provided for contempt or, in its absence, the actual sentence imposed. The Court also set a precise standard to distinguish petty from serious contempts: only contempts with a penalty of greater than six months were deemed serious. *Id.* at 512. Finally, *Codispoti* held that for purposes of determining whether the contempt was serious, consecutive sentences meted out for contempts must be aggregated; a jury trial is required if individual sentences, summarily imposed after completion of the trial, total more than six months, even though no sentence exceeding six months was imposed for any single act of contempt. *Id.* at 516-17. Summary contempt convictions, however, are not only imposed during trials exempt from the aggregation rule, but also where summary convictions that in their aggregate total more than six months are imposed after a trial, the trial judge can later amend her judgment (even during the pendency of an appeal) to reduce the contempt sentences to six months or less and change consecutive to concurrent sentences in order to evade retrial of the contempts before a jury. *See* Taylor v. Hayes, 418 U.S. 506 (1973). Thus, the right to jury trial may still be subject to significant evisceration in contempt cases.

40. Some states, however, have extended the constitutional right to counsel to a contemnor in summary proceedings where a custodial sentence is imposed. *See* Commonwealth v. Abrams, 461 Pa. 327, 336 A.2d 308 (1975); Commonwealth v. Crawford, 466 Pa. 269, 352 A.2d 52 (1976); Pitts v. State, 421 A.2d 901 (Del. 1980).

41. *See, e.g., Wilson*, 421 U.S. at 318 (sometimes notice is not possible as courts do not have the flexibility to suspend action on one case in order to turn to another); *Ex parte* Terry, 128 U.S. 289 (1888) (no notice, hearing or impartial judge required where contempt in presence of court). *See generally* Kuhns, *supra* note 3; Sedler, *supra* note 30.

42. *See* United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987).

43. *See* Falstaff Brewing Co. v. Miller Brewing Co., 702 F.2d 770, 782 (9th Cir. 1983) ("In criminal contempt willful disobedience must be proved beyond a reasonable doubt.").

44. *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."); Groppi v. Leslie, 404 U.S. 496, 504-05 (1972) (even where the judge summarily punishes contemptuous conduct, it is customary to give the contemnor the right to address the court before sentencing); United States v. Brannon, 546 F.2d 1242, 1249 (5th Cir. 1977) (suggesting in dictum that courts adopt recommendation by American Bar Association that contemnor convicted summarily should always be guaranteed right of allocution (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE § 7.4 (1972))). *But see* Hill v. United States, 368 U.S. 424, 428-29 (1962) (failure to afford right of allocution to defendant is not denial of due process, at least in absence of showing that failure was prejudicial or not inadvertent).

Because of the extraordinary lack of procedural safeguards afforded an individual who is summarily convicted of contempt, it is natural to look to reinstitute those protections to guard against the chilling effect on advocacy that results from abusive or mistaken exercise of the contempt power. In other contexts, courts have crafted novel procedural protections to vindicate favored rights.[45] Procedural safeguards against improper contempt citations and threats of contempt are in fact critical to the realization of vigorous advocacy. But the importance of such protection has too often been emphasized when discussing the contempt power, at the expense of the independent development of substantive safeguards. For example, one of the most insightful articles on contempt not only gives short shrift to the issue of substantive limitations, but also goes so far as to suggest that the benefits that could be achieved by narrowing the definition of contempt would be better accomplished by the provision of greater procedural rights, namely entitlement to a plenary hearing, prior to being convicted of contempt.[46]

Professor Kuhns is of course correct that the right to a hearing, like other procedural safeguards, constrains the arbitrariness of the contempt power and thereby reduces its potential to deter aggressive advocacy. But procedural protections do nothing whatsoever to address the actual limitations that contempt cases impose upon advocacy. Procedural protections do not provide any guidance to attorneys as to what conduct is permissible or perhaps excusable in the course of representing their clients. Just as the special procedural safeguards created to provide heightened protection to first amendment values[47] do not decrease the need for the substantive development of the normative values embodied by that constitutional right, neither do procedural protections against excessive use of the contempt power obviate the need for limiting that power's incursions upon legitimate advocacy. To accomplish that goal, we must have a much finer development of the definition of contempt and a far greater understanding of the types and degree of advocacy that are permissible and laudatory.

Moreover, it may be particularly inappropriate, in the context of contempt, to rely upon procedures to substitute for substantive safeguards. One of the greatest problems associated with contempt is the very lack of procedural rights afforded contemnors in summary proceed-

45. *See* Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 585-86 (1984) (noting special procedural safeguards surrounding First Amendment, and Eighth Amendment in death penalty cases); Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970).

46. Kuhns, *supra* note 3, at 68-69.

47. *See supra* note 45.

ings. That the courts readily embrace such proceedings is a pernicious singularity in American jurisprudence and beyond the scope of this Article to address. But until procedural regularity is accepted as the norm and not the exception in the adjudication of contempt, we cannot look to procedural safeguards to defend and encourage vigorous advocacy in place of substantive restrictions on the definition of contempt. In fact, given the prevalence of summary contempt proceedings, the need for substantive limits on the contempt power is even more urgent to compensate for the watered rights that pass for due process in such hearings.

In that sense, the substantive and procedural protections against excessive use of the contempt power may not be so much discrete divisible safeguards as they are together a synergism: a system of safeguards that effectuate a constitutionally required degree of fairness of which each is individually incapable.[48] To the extent that one of these protections is diminished, the others become more important. For example, the broader or more vague the definition of contempt, the more critical the procedural protections against misuse of the contempt power. Similarly, as noted above, any curtailment of procedural due process in a contempt proceeding increases the necessity for substantive limitations on the courts' exercise of the contempt power. Thus, regardless of how narrow the definition of contempt might be drawn, without the right to prepare a defense, a full opportunity to be heard before an impartial court, or the representation of counsel, the contempt power will still chill advocacy because attorneys cannot rely on the proper application of the definition.

Further, the remedy for violations of procedural rights at a contempt hearing is only a remand for a new hearing with the procedural protections restored. Thus, if reliance is placed solely, or even primarily, on procedural safeguards, the prospect of facing a retrial in which the contemnor's conduct will be reassessed against a loose substantive standard can undercut the bar's sense of whatever security or independence is provided by the procedural protections.[49]

48. This interrelationship between substance and procedure also exists to a great extent in other areas of the law, and has recently been explored by a number of scholars. *See, e.g.*, Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 223 (1987) ("To speak of procedural and substantive rules as if each can be defined independently of the other is inaccurate. Law is the product of interaction between substance and procedure, but the relationship between the two is more subtle and complex than simply their joinder in litigation."); *see also* Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189 (1982).

49. On the other hand, if plenary proceedings are provided originally in trial court contempt hearings, presumably fewer convictions will result, even in the absence of stricter constraints on the definition of contempt. Obviously, then, fuller procedural protections would

The functions of procedural and substantive safeguards against excesses of the contempt power are of independent importance. Yet, there is also a symbiotic relationship between the two. Each not only supports the other, but also each may be necessary to fulfill the other. To begin with, because we must essentially rely on the courts themselves to define advocacy and contempt and to limit the substantive scope of the contempt power,[50] procedural protections in contempt hearings are vital to identify the substantive questions about contempt that courts should consider.[51] Without such procedural rights, critical substantive issues concerning contempt often may not be preserved for appeal, and records appropriate for careful appellate consideration of these issues rarely will be created.[52]

In addition, procedural and substantive protections against abuse of the contempt power are connected by the commonality of the justification for overcoming them—the imminent necessity of protecting the court from interference with its business. That necessity provides the only justification for bypassing the normal processes of criminal justice both to permit a court to punish conduct and to curtail the due process rights that ordinarily would be available in a criminal trial. When a court determines that conduct so obstructs its processes that it is necessary to punish the actor with contempt, it is easy for the court to decide that the necessity for punishment coincides with the need for immediate and therefore summary action. Furthermore, when a court reacts to perceived misbehavior by suspending ordinary due process rights to try a

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strengthen the independence of the bar and encourage more vigorous advocacy. Therefore, I do not at all suggest that procedural safeguards are meaningless without corresponding substantive protections. Rather, the point is that both sets of safeguards are necessary to the realization of advocacy at the outermost limits of what is and what should be permissible.

50. *See* Raveson, *supra* note 18, at 759-78.

51. It is ironic that the central dangers posed by the contempt power, the limitation and chilling of vigorous advocacy, are greatly exacerbated by the abbreviated procedures commonly used to try contempt charges. Just as the threat of contempt and its actual use inhibit what should be the full range of zealous representation, so too does the contempt power and the curtailment of procedural rights under its auspices insulate itself from attack by limiting the ability of advocates to defend against its power. Indeed, accused contemnors, most often required to represent themselves in summary proceedings, are hard pressed to put up a vigorous defense while the judge who leveled charges is continuing to smart, for example, from the sting of a perceived insult. *See infra* note 208.

52. *See infra* notes 218-23. It might be said that the procedural safeguards against contempt actually derive from those substantive constitutional rights safeguarding zealous representation. Indeed, some commentators have argued that all procedural due process is not a "free-standing" or "independent" value but a correlative of substantive constitutional guarantees. *See* Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323 (1987); Grey, *Procedural Fairness and Substantive Rights in Due Process*, 18 NOMOS 182 (1977).

contempt charge summarily, it is implying a fragility of judicial processes calling for extreme measures to protect them. That exaggerated sensitivity to the needs of the court also encourages an oversensitivity as to the substance of what constitutes contempt.

The court's procedures and attitudes tend to ritualize the degree of respect and obedience owed to the court. When courts embrace the use of summary contempt proceedings they suggest that they can decide these matters themselves, without the ordinary procedures for trials, because they cannot be mistaken either in the determination that a contempt has occurred or in meting out punishment. That attitude institutionalizes a sense of royalty about the court and commands a sort of obeisance, the breach of which is, of course, contemptuous. If a trial judge has the discretion to decide that the necessity for preventing interference with the court's business or vindication of the court's authority requires the curtailment of fundamental due process rights, surely appellate courts must be hard pressed to decide that there was no necessity for punishment—no contemptuous behavior—in the first instance. Thus, permitting the trial court discretion to utilize summary procedures also probably increases the deference appellate courts accord trial judges' determinations that a contempt occurred.

Conversely, a fuller comprehension of both the substantive reach of the contempt power and when it is necessary to punish behavior to protect the administration of justice will assist in determining when, if ever, summary procedures are needed or appropriate. For example, to the extent that minor affronts to the dignity of the court are seen to undermine the court's authority, it is arguable that an immediate vindication of the court's dignity and authority through summary proceedings is necessary to restore both.

It should come as no surprise, therefore, that I suggest that one procedural device—de novo review—holds the potential for resolving many of the procedural and substantive difficulties surrounding the courts' use of the contempt power. Independent review of contempt convictions would reverse the presumption of correctness of trial court determinations of contempt and allow appellate courts to develop appropriate objective standards to govern the substantive scope of the contempt power on a case-by-case basis. Moreover, de novo review would provide a powerful protection against abuse of the contempt power in summary proceedings, where the ordinary procedural safeguards associated with criminal trials are absent.

II. The Role of the Appellate Courts: De Novo Review

Because the substantive definition of contempt is terribly imprecise[53] and because contempts are so frequently imposed in summary proceedings, the primary safeguard against trial courts' mistaken use and abuse of the contempt power has been appellate review. Appellate review does hold the promise of correcting individual instances of abuse[54] and of generating broadly applicable standards that can appropriately define the limits of the contempt power and give more detailed guidance to attorneys, judges and other participants in the judicial process as to the scope of permissible courtroom behavior. But as appellate review of contempt convictions presently operates in most jurisdictions, including the federal courts, it has achieved only passable success at the former and has been notably ineffectual at the latter.[55]

It is important to recognize at the outset that appellate review is limited as a safeguard against individual instances of abuse of the contempt power for the simple reason that most contempt convictions never reach appellate courts.[56] In some states, appellate review of contempt convictions is not even permitted as of right, and must be pursued by petition for certiorari or writ of habeas corpus.[57] For appellate review to

53. *See* Raveson, *supra* note 18, at 751-78 (arguing for necessity of developing clearer substantive limits on contempt power); Raveson, *supra* note 21, at 506-29 (urging adoption of more stringent constitutional standard governing exercise of summary contempt sanctions); Brautigam, *supra* note 12, at 1530-33 (concluding that the existing statutes defining the courts' contempt power are unconstitutionally vague and overbroad).

54. Numerous courts, including the Supreme Court, have expressed support for appellate review as a sufficient safeguard against instances of abuse of the contempt power. *See, 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, 343 U.S. 1, 13 (1954) ("It is to be doubted whether the profession will be greatly terrorized by punishment of some of its members after such extended and detached consideration [by appellate courts]."); *see also* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATION ON DISRUPTION OF THE JUDICIAL PROCESS 13 (1970).

55. Professor Kuhns argues persuasively that appellate review is an inadequate safeguard against abuse of the contempt power. *See* Kuhns, *supra* note 3, at 69-70. Kuhns asserts that appellate review cannot provide a sufficient substitute for procedural adjudications in a summary contempt adjudication. That inadequacy has also been recognized by several federal courts. *See, e.g.*, United States v. Seale, 461 F.2d 345, 355 (7th Cir. 1972) (appellate review does not afford the same measure of protection against arbitrariness as does "measuring the right to jury trial by the cumulative sentence imposed for contempts occurring during a single trial.").

56. *See supra* note 12 and *infra* note 59.

57. Limitations on the right to appeal from a contempt conviction have been both legislatively and judicially imposed. *See In re* Palmer, 265 N.C. 485, 144 S.E.2d 413 (1965); N.C. GEN. STAT. § 5-2 (1969) (a contemnor has the right to appeal from an indirect contempt but the only appellate remedy from a finding of direct contempt is by writ of habeas corpus); Brizendine v. State, 103 Tenn. 677, 54 S.W. 982 (1899) (if contempt is in the presence of the

act as an effective remedy against abuses of the summary contempt power, an appeal as of right from a conviction of contempt must be provided to at least one reviewing court.[58] In the federal courts, and those states that do permit direct appeals from contempt convictions, many contempts are never appealed because the effort is prohibitively expensive.[59] Often, charges are dismissed or fines are vacated when the contemnor apologizes to the offended court,[60] or the contemnor is released from jail when he complies with the court's order.[61] Even when con-

court, the only appellate remedy is by habeas corpus or petition for certiorari); Wagner v. Warnasch, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956) (a contempt conviction may only be challenged by writ of habeas corpus); Bell v. Hongisto, 501 F.2d 346, 352 (9th Cir. 1974) (in California, no direct appeal of contempt conviction; contemnor must proceed by petitioning for writ of habeas corpus or certiorari), *cert. denied*, 420 U.S. 962 (1975). Although some states that permit appeals by habeas corpus proceedings only limit the scope of appellate inquiry to questions regarding the court's jurisdiction, the term "jurisdiction" has sometimes been broadly construed to include questions of whether the alleged acts constitute contempt and whether the evidence was sufficient. At least where summary proceedings were held below, it is arguable that due process is violated when a state limits or denies appellate review of a contempt conviction. Exploration of this question, however, is beyond the scope of this Article.

58. At least where summary proceedings were held below, it is arguable that due process is violated when a state limits or denies appellate review of a contempt conviction. Professor Kuhns has argued for a right to appellate review of a contempt conviction, although he does not address the standard of review that should be employed. *See* Kuhns, *supra* note 3, at 118-19. As Professor Kuhns observes, "[T]he absence of procedural safeguards at the adjudicatory phase makes appellate review the most important safeguard against abuses of the summary contempt power." *Id.* at 119. As noted earlier, however, Professor Kuhns apparently does not agree that appellate courts can appropriately place substantive restraints on contempt. But for the reasons discussed in the text, and because of the potential for de novo review, Professor Kuhns' concerns appear to be overstated.

59. For example, if the sanctions imposed upon conviction are trivial, such as a small fine, the time and expense of appealing the contempt may persuade many simply to endure the penalties even where the chances for reversal on appeal are excellent. Similarly, the publicity generated by an appeal, especially if an appellate opinion is published, might adversely affect an attorney's career with regard to the perceptions of employers, clients, and judges.

60. In such circumstances, expediency often will triumph over the principle of pursuing appellate remedies. *See supra* note 12.

61. The imposition of incarceration in civil contempt is always a coercive measure meant to terminate when the contemnor cooperates with the court and, theoretically, is not to be considered punishment. A jail sentence imposed after a criminal contempt conviction, however, is determinate and intended as punishment. There have been cases, however, where a person held in criminal contempt is jailed with the express purpose of coercing cooperation with the court, for example to testify, after the contemnor has refused to do so. See, for example, United States v. Wilson, 421 U.S. 309 (1975), where the Supreme Court approved the practice of a trial judge who summarily held the defendant in contempt and imposed a six month penalty for his refusal to testify after he was granted immunity, but made it clear that a reduction of the sentence was possible if the defendant testified. Although the punishment imposed in *Wilson* bears a strong resemblance to the coercive indeterminate sentences imposed in civil contempt, the contempt conviction in *Wilson* was clearly criminal. As to the difference between civil and criminal contempt, see *supra* note 10.

tempt convictions do reach the appellate courts, review may often be an inadequate safeguard against contempt citations that exceed substantive limits. The ability of appellate courts to correct the erroneous imposition of contempt sanctions by trial judges and to develop clear and appropriate substantive limitations is severely hampered by the deferential standard of review utilized by most jurisdictions in appeals of contempt convictions.

At present, different jurisdictions apply a variety of standards of review in appeals of contempt sanctions. The issue of whether particular behavior constitutes contempt has been treated at times purely as a question of law because the conduct comprising the contempt was undisputed.[62] In those instances, the reviewing court has been free to elaborate on the norms underlying the contempt power and the constitutional rights threatened by contempt, unfettered by any deference to the trial court's original weighing of the competing interests. For example, in *In re McConnell*,[63] the Supreme Court reviewed the district court's finding that an attorney's statements admittedly made to the court were contemptuous.[64] The Supreme Court reversed the trial court apparently on the basis that it simply disagreed with its conclusion that the statement constituted an obstruction of justice.[65]

McConnell considered whether a single statement obstructed a judicial proceeding. The Court did not discuss the setting of the particular trial or any other facts relevant to whether an obstruction occurred. When the Supreme Court has been faced with more complex records that did raise these issues, at least in reviewing state court contempt convictions, it sometimes has engaged in an independent review of the entire record in order to make its own judgment of whether the conduct in question presented a clear and present danger to the administration of

62. *See In re* McConnell, 370 U.S. 230 (1962); *see, e.g.*, United States v. Seale, 461 F.2d 345, 371 (7th Cir. 1972) (regardless of intent of contemnor, charges insufficient as a matter of law because no actual material obstruction occurred); United States v. Dellinger, 461 F.2d 389 (7th Cir. 1972) (same).

63. 370 U.S. 230.

64. In response to the judge's ruling ordering the attorney to cease asking questions along a certain line, the attorney stated, *"[W]e have a right to ask questions, and we propose to do so unless some bailiff stops us."* *Id.* at 235 (emphasis added) (quoting Parmelee Transp. Co. v. Keeshin, 294 F.2d 310, 312, 314 (7th Cir. 1961)).

65. The Court concluded merely that:

> We cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts.

Id. at 236.

justice.[66]

At the same time, however, the Court has held that where the transcript of the trial court proceedings is inadequate to convey the complete picture of the courtroom scene,[67] the reviewing court must give deference to the trial court's decision to invoke the summary contempt power. Indeed, in its most recent contempt decision, the Court's overriding concern was with preserving the discretion of the trial judge to determine whether a contempt occurred and whether sanctions should be imposed summarily.[68] Circuit courts, as well, have employed various deferential standards of review in criminal contempt cases.[69] Although the appellate

66. The Court observed in Craig v. Harney, 331 U.S. 367, 373 (1947), "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made." *See also* Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (the Court is "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts . . . .").

67. Typical inadequacies of the trial record were noted by the Supreme Court in Fisher v. Pace, 336 U.S. 155 (1949), "[T]he transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge." *Id.* at 161.

68. *See* United States v. Wilson, 421 U.S. 309, 319 (1975) (concluding that appellate courts "can deal with abuses of discretion without restricting . . . [the summary contempt power] in contradiction of its express terms, and without unduly limiting the power of the trial judge . . . .").

69. *See In re* McDonald, 819 F.2d 1020 (11th Cir. 1987) (abuse of discretion standard); United States v. McCargo, 783 F.2d 507 (5th Cir. 1986) (sufficiency of the evidence is viewed in light most favorable to government); Moore v. United States, 150 F.2d 323, 325 (10th Cir.) (gross abuse of discretion standard), *cert. denied*, 326 U.S. 740 (1945); United States v. Galanate, 298 F.2d 72, 75-76 (2d Cir. 1962) (abuse of discretion standard); *In re* Contempt of Greenberg, 849 F.2d 1251 (9th Cir. 1988) (abuse of discretion); Weiss v. Burr, 484 F.2d 973, 980 (9th Cir. 1973) ("While we have great respect for the sovereignty of the Arizona courts and accord much weight to their decision involving contempt convictions, [a contempt conviction must be reversed where] the record reveals no facts supporting the challenged contempt conviction."), *cert. denied*, 414 U.S. 1161 (1974); United States v. Turner, 812 F.2d 1552, 1563 (11th Cir. 1987) (whether such findings are supported by any substantial evidence).

The standard of review applied by the federal court when they are reviewing state court contempt convictions in habeas corpus proceedings is whether any evidence appears on the record that the acts in issue constitute contempt under state law. *See* Hawk v. Cardoza, 575 F.2d 732, 734 (9th Cir. 1978); *Weiss*, 484 F.2d at 980.

With civil contempt citations, on the other hand, there is no question that the standard of review is the "abuse of discretion" or "clearly erroneous" standard. *See* Afro-American Patrolmen's League v. City of Atlanta, 817 F.2d 719 (11th Cir. 1987); *In re* Crystal Palace Gambling Hall, Inc., 817 F.2d 1361 (9th Cir. 1987).

The trial court's determination of whether to use summary or non-summary procedures is reviewed by the circuit courts exclusively on an abuse of discretion standard, as is the sentence imposed for contempt. *See, e.g.*, United States v. Flynt, 756 F.2d 1352 (9th Cir.) (district courts' exercise of summary contempt power reviewed for abuse of discretion), *opinion amended*, 764 F.2d 675 (9th Cir. 1985); United States v. Ray, 683 F.2d 1116 (7th Cir.) (con-

courts of at least one state engage in full de novo consideration of the law and the facts of summary contempt convictions,[70] the great majority of state courts review contempt findings solely for abuse of discretion.[71]

Appellate court deference to trial judges' findings that a contempt was committed and that the use of summary procedures was necessary would seem inevitably to resonate from the very core of the summary contempt power. That is, if one accepts the twin justifications for the exercise of that power—that summary sanctions are necessary to protect the court's business from interference and that there is no need to hold a hearing where the trial judge witnessed all of the events comprising the contempt[72]—then, by definition, authorization for the summary contempt power assumes that the trial court is in the best position to determine fairly whether summary punishment must be imposed and

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tempt sentence reviewed for abuse of discretion), *cert. denied*, 459 U.S. 1091 (1982); United States v. Brummit, 665 F.2d 521 (5th Cir. 1981) (same), *cert. denied*, 456 U.S. 977 (1982).

Often, however, courts have not been entirely clear, in reviewing a summary contempt conviction for abuse of discretion, whether the standard of review is being applied purely to the trial court's decision to use summary procedures or to its substantive finding of contempt as well. *See, e.g., Wilson*, 421 U.S. at 316-17 ("whether [summary contempt] is necessary in a particular case is a matter the Rule [Federal Rule of Civil Procedure 42(a)] wisely leaves to the discretion of the trial court"); *In re McDonald*, 819 F.2d at 1025 (no distinction drawn by circuit court between standard of review for use of summary power and substantive findings).

In Moschiano v. United States, 695 F.2d 236 (7th Cir. 1982), *cert. denied*, 464 U.S. 831 (1983), an appeal of a summary contempt conviction, the Seventh Circuit held that:

> Resort to summary disposition of criminal contempt under Rule 42(a) is permissible only when the express requirements of the rule are met and when there is a 'compelling reason for an immediate remedy' or time is of the essence. [Citations omitted]. Once the literal requirements of Rule 42(a) are satisfied, a trial court's decision to invoke summary procedures should be reviewed for an abuse of discretion. [Citation omitted].

Id. at 251-52. Despite the fact that the court employed an abuse of discretion standard, however, it emphasized "the *special duty* of an appellate court to give *careful* and *meticulous* consideration to the trial court's decision that summary disposition is appropriate. *Id.* at 252 (emphasis added).

70. *See* N.J. REV. STAT. § 2A:10-3 (1987); N.J. COURT RULE 2:10-4 (1983).

71. *See* Hawk v. Superior Court, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974); Currie v. Scwalbach, 132 Wis. 2d 29, 36, 390 N.W.2d 575, 578 (Wis. App. 1986), *aff'd*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987); Commonwealth v. Worthy, 354 Pa. Super. 454, 512 A.2d 39 (1986); Crudup v. State, 218 Ga. 819, 130 S.E.2d 733 (1963); Mason v. Siegel, 301 Mich. 482, 484, 3 N.W.2d 851, 852 (1942); Carolina Wood Turning Co. v. Wiggins, 247 N.C. 115, 100 S.E.2d 218 (1957) (findings of fact of the trial court are upheld if supported by "competent evidence"); LaGrange v. State, 238 Ind. 689, 153 N.E.2d 593 (1958) (when alleged contemnor's conduct was within presence or direct knowledge of court, contemnor cannot deny statements of fact made by judge; trial judge's statement must be taken as true); *see also* Note, *Attorneys and the Summary Contempt Sanction*, 25 ME. L. REV. 89, 93 (1973) ("The degree of departure in attorney conduct necessary to invoke the contempt sanction ultimately rests with the trial judge.").

72. *See supra* notes 37-38 and accompanying text; *see, e.g.*, Fisher v. Pace, 336 U.S. 155, 161 (1949) ("reliance must be placed upon the fairness and objectivity of the presiding judge");

deference to that judgment is appropriately due.[73] The problem is, however, that if appellate courts defer to trial courts' findings of obstruction and wrongful intent, all but extreme abuses of the contempt power may be insulated from correction, and the proper delineation of the boundary between contempt and advocacy will be virtually impossible. Furthermore, once it is believed that the trial court can determine more accurately than any other court whether conduct it has witnessed is an obstruction of justice, deference to its use of summary procedures to try the contempt seems natural.

Because the substantive standards for contempt leave so much room for subjective interpretation by trial courts, the application of the definition of contempt in the courtroom often involves numerous fact-specific determinations, such as whether an attorney was adequately warned that her behavior was contemptuous or whether an attorney's obstructive conduct was intentional.[74] Moreover, because courts have permitted contempt convictions to rest on highly interpretative factors, such as tone of voice and physical gestures that do not appear with any accuracy,[75] if at all, in a transcript,[76] it is difficult if not impossible for an

LaGrange, 238 Ind. 689, 153 N.E.2d 593 (trial judge's statements of fact must be taken as true).

However, efficiency alone is never a sufficient justification for the diminished due process of summary proceedings. *See, e.g.*, Harris v. United States, 382 U.S. 162 (1965) (summary contempt powers should be limited to the least possible power adequate to the end proposed); Taylor v. Hayes, 418 U.S. 488, 500 (1974) ("[d]ue process cannot be measured in minutes and hours or in dollars and cents"); *In re* Yengo, 84 N.J. 111, 417 A.2d 533 (1980) (summary contempt proceeding is only appropriate where conduct in presence of court and if not immediately suppressed, demoralization of court's authority would follow), *cert. denied*, 449 U.S. 1124 (1981).

73. Although appellate courts have made some inroads upon the broad discretion granted to trial judges to determine when summary procedures are necessary in the first instance, *see, e.g.*, Mayberry v. Pennsylvania, 400 U.S. 455, 463-64 (1971) (where it is possible for a judge to wait until the completion of the trial to try a contempt charge, the matter should be heard by a different judge); Offutt v. United States, 348 U.S. 11, 14-15 (1954) (where trial judge had become personally embroiled with counsel throughout trial, he should have requested another judge be assigned to hear counsel's contempt charge); *Harris*, 382 U.S. 162 (1965) (where contempt was based on refusal to testify before grand jury after witness was granted immunity, summary proceedings were improper because there was no need for immediate punishment), they have rarely questioned the fundamental justification for extending deference to trial courts to initiate, prosecute, and try contempts summarily.

74. *See* Raveson, *supra* note 18 at 775, 779-81.

75. Sometimes trial courts do describe for the record, either on the contemporaneous transcript or in the written order of contempt, facial expressions, tone of voice, and other characteristics of the behavior in question that would not otherwise appear on the record. *See infra* notes 219-20 and accompanying text. Even when they do attempt to describe the offending nonverbal conduct, however, the descriptions are usually inadequate for an appellate court to assess independently the conduct in question. Still, if the court attempts to describe the conduct, it is preferable that the description be made orally on the contemporaneous record so

appellate court to question the trial judge's characterization of the conduct in question.[77] In part, this highlights the need for plenary procedures at the trial level to produce records that more fully explore, in an adversarial proceeding,[78] the precise nature of the challenged conduct, the alleged harm to justice, and other factors bearing on whether the conduct was contemptuous.[79]

Guaranteeing plenary procedures in the trial court contempt hearing, however, is not the only means of providing fundamental fairness to

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that the contemnor can have the opportunity to rebut the judge's perceptions, and perhaps even call witnesses if the trial judge permits it. Indeed, if the court fails to do this, it may violate the contemnor's right to be heard. Where the judge characterizes the contemnor's conduct for the first time in a subsequent written order of contempt, the contemnor has no opportunity to respond, except in an appellate proceeding by supplementing the record, where that is allowed. *See In re* Hallinan, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (1969).

76. *See, e.g., In re* Daniels, 118 N.J. 51, 570 A.2d 416 (court stated on the record that contemnor exhibited insulting facial expressions and tone of voice, and that he laughed at the court, none of which appeared on the record), *cert. denied*, 59 U.S.L.W. 3326 (1990). *But see In re Hallinan*, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (reversing contempt conviction where trial court held attorney in contempt for using an "antagonistic, insulting, and disrespectful" tone of voice).

77. Thus, commentators have noted that appellate courts inevitably defer to the witnessing judge's conclusions as to what constitutes the contempt and presume the fairness and objectivity of trial judges. *See* 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 (1975). Where there has been a full hearing below, either before the offended judge or another court, the appellate court will be in a far better position to assess the objectivity of the trial court's findings about the allegedly contemptuous behavior that does not appear verbatim on the record. Similarly, where local procedures permit, an appellate record can be expanded either by remand to a trial court for findings of fact or by direct supplementation through affidavits or live testimony. *See infra* notes 228-30 and accompanying text.

78. When a contemnor is permitted representation by counsel and a plenary hearing, the facts and legal arguments will no doubt be set forth more clearly on the record than when the contemnor has no attorney and no time to prepare a defense or the ability to present one. With a plenary hearing, the contemnor can also call witnesses whose testimony will add to the findings of the trial judge.

79. If the full panoply of procedural protections were routinely afforded alleged contemnors in the trial court, appellate courts would be in a much better position to determine accurately whether the use of the contempt power in the particular case was mistaken or abusive, and to begin to develop more meaningful substantive standards. As one commentator noted, with a deferential standard of review, the "appellate procedure is no more than a real opportunity to perpetuate the initial problems of bias and the denial of constitutional rights which exist in the use of the summary procedure at the trial level." Note, *supra* note 71, at 97. Indeed, in *In re* Little, 404 U.S. 553 (1972), Chief Justice Burger, in his concurring opinion, noted the difficulty of setting substantive limits on the contempt power:

> 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.

Id. at 556 (Burger, C.J., concurring).

contemnors and creating a sufficient record for review. The salutary features of the summary contempt power, if indeed there are any, can be fully preserved by acknowledging the necessity for immediate punishment, where appropriate, in the trial court, but by rejecting the notion that the trial judge is in the best position to determine ultimately that a contempt occurred.[80] This acknowledgment, along with creating an adequate record for appeal, can be achieved quite nicely if appellate courts apply a de novo standard of review[81] in contempt cases, with broad authority and responsibility to supplement the record when necessary to fulfill their appellate function.[82]

A. The Justifications for De Novo Review

There are compelling reasons for concluding that a de novo standard of review should be applied in appeals of contempt convictions. First, independent appellate consideration is necessary because the only realistic hope for developing appropriate limits on the contempt power and the outermost bounds of protected advocacy is through the case-by-case appellate development of the underlying norms at stake. Thus, de novo review is not only necessary in reviewing summary proceedings but also in reviewing plenary contempt proceedings[83] because, even where a contemnor is accorded full due process rights in a plenary hearing, it remains important for appellate courts to exercise independent judgment as to whether the record establishes an obstruction.

Second, with respect to summary proceedings, the inherent potential for personal involvement and bias when a trial court alone institutes criminal charges and imposes summary punishment mandates an institutional check through independent appellate review.[84] De novo review would introduce a suspicion essential to appellate consideration of sum-

80. Indeed, the trial judge's personal observation does not necessarily obviate the need for procedural safeguards to protect against the abuse of the contempt power, or for searching appellate review. *See infra* notes 150-54 and accompanying text.

81. Throughout this Article the terms "de novo review" and "independent review" are used interchangeably.

82. The proposal for de novo review presented in the text should be equally applicable to appeals of contempt convictions in those states that do not permit direct appeals of contempts, but do provide some means of review. *See supra* note 57 and accompanying text.

83. De novo review would also be beneficial in review of a jury's conviction for contempt, although in that case a less compelling need is presented. *See* Comment, *The Contemptuous Attorney and Problems Concerning His Summary Punishment Under Rule 42(a) of the Federal Rules of Criminal Procedure*, 4 J. MARSHALL J. PRAC. & PROC. 74, 92 (1970).

84. Moreover, even where a contempt is tried in a plenary hearing, the absence of the legislative and executive checks and balances that are present with respect to all other crimes—detailed definition of the crime and penalties and initiation of the charges—militate in favor of closer scrutiny of trial court determinations of contempt.

mary adjudications in which the trial court has the power to act with so few of the constitutional protections taken for granted in all other criminal proceedings.

Third, apart from the potential for flawed decision-making in a summary proceeding where the offended judge tries the contemnor, the lack of other procedural protections such as adequate notice to prepare a defense and the right to counsel suggests the need for de novo review to facilitate the identification and presentation of substantive issues and to safeguard the fundamental fairness of the adjudicatory process for the contemnor.

De novo review has been employed by the United States Supreme Court, as well as state and federal appellate courts, in a number of contexts to review independently trial courts' findings of constitutional or adjudicative facts,[85] and by state and federal courts in review of administrative determinations implicating constitutional rights.[86] Particularly in the area of libel, the Court has held that independent appellate review of trial court findings has been necessary in order to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression."[87] The Court has also applied de novo review of lower court

85. *See, e.g.*, Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 499 (1984) (finding of "actual malice" in libel case must be subjected to independent appellate review); City of Houston v. Hill, 482 U.S. 451, 458 n.6 (1987) (independent review of record appropriate in overbreadth and vagueness challenge of city ordinance prohibiting interruption of police officer in performance of her duties); Miller v. Fenton, 474 U.S. 104 (1985) (findings on "voluntariness" of confessions subject to de novo review). Although at one point the Court in *Miller* refers to the "voluntariness" of a confession as a legal, rather than a factual question, *id.* at 110, the Court itself emphasizes that the "law/fact" distinction is a specious one, often made for purely conclusory reasons. *Id.* at 113-14. *See infra* note 165 and accompanying text.

With respect to the meaning and interchangeability of the terms "constitutional facts" and "adjudicative facts" on the one hand, and the distinction between these terms and simple "historical facts" on the other, see *infra* notes 143-44 and accompanying text.

86. *See* Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 34, 520 P.2d 29, 32-33, 112 Cal. Rptr. 805, 808-09 (1974) (citing Bixby v. Pierno, 4 Cal. 3d 130, 144-47, 481 P.2d 242, 251-54, 93 Cal. Rptr. 234, 243-46 (1971)); General Tel. Co. v. Public Serv. Comm'n, 335 So. 2d 151, 158 (Ala. 1976); Iowa-Illinois Gas and Elec. Co. v. Commerce Comm'n, 412 N.W.2d 600, 604 (Iowa 1987).

The State of California engages in independent review of adjudicative facts found by administrative agencies even if the right at stake is not a constitutional right but is deemed fundamental based on its economic significance and " 'the effect of it in human terms and the importance of it to the individual in [his] life situation.' " *Strumsky*, 11 Cal. 3d at 44, 520 P.2d at 40, 112 Cal. Rptr at 816 (quoting *Bixby*, 4 Cal. 3d at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244). For a detailed examination of de novo review of agency examinations, see Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483 (1988).

87. *Bose*, 466 U.S. at 499 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

findings in a number of other constitutional areas, most notably to findings of "voluntariness" of confessions,[88] and other first amendment areas such as obscenity,[89] fighting words,[90] incitement to riot,[91] and child pornography.[92] Indeed, in the context of contempt itself, the Court has sometimes eschewed a deferential standard of review in favor of an independent review of the findings of fact.[93]

Courts and commentators have derived a constitutional basis for employing independent review of constitutional facts from the Due Process Clause,[94] as an aspect of the importance accorded the substantive right at stake,[95] and from Article III of the United States Constitution.[96] Commentators relying on any or all three of these constitutional sources

88. *See Miller*, 474 U.S. 104. Since *Miller* was decided, numerous circuit courts have applied the independent review requirement to direct appeals from federal district courts involving the "voluntariness" of confessions. *See* U.S. v. Baird, 851 F.2d 376, 379 (D.C. Cir. 1988); United States v. Fraction, 795 F.2d 12, 14 (3d Cir. 1986).

89. *See* Roth v. United States, 354 U.S. 476 (1957).

90. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

91. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

92. *See* New York v. Ferber, 458 U.S. 747, 767 (1982).

93. *See* Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Craig v. Harney, 331 U.S. 367, 373 (1947); Wood v. Georgia, 370 U.S. 375, 386 (1962); Sacher v. United States, 343 U.S. 1, 12-13 (1952). *But see* Fisher v. Pace, 336 U.S. 155, 160 (1948) (state court contempt conviction will be upheld if there is sufficient evidence to support the conviction); Illinois v. Allen, 397 U.S. 337, 347 (1970) (contempt conviction upheld as within trial court's discretion).

94. In his dissenting opinions in Crowell v. Benson, 285 U.S. 22 (1932) and St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1938), Justice Brandeis developed a due process-based theory for judicial review of administratively determined facts of constitutional magnitude, arguing, in essence, that sometimes due process requires access to a judicial tribunal. *See Crowell*, 285 U.S. at 87-88 (Brandeis, J., dissenting). The Due Process Clause has been invoked in subsequent Supreme Court decisions holding that de novo review of certain agency determinations is constitutionally mandated. *See infra* notes 125-28 and accompanying text. At least one commentator has urged that a due process based test would provide a unified framework for a court to determine when independent review of both administrative and inferior judicial determinations are warranted. *See* Note, *supra* note 86, at 1486-90.

95. *See* Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 503-11 (1984). Of the three justifications offered by the *Bose* Court as underlying its use of independent review—the common law heritage of actual malice, the need for norm elaboration, and the importance of the constitutional values protected—the importance of first amendment values actually "drives the opinion." *See* Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 242-44 (1985).

96. Article III establishes the jurisdiction of the United States Supreme Court and inferior federal courts, and Section 2 extends the federal judicial power to, *inter alia*:

> [A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

of de novo review have identified a number of variables or tests to determine when de novo review should, and perhaps even must, be exercised under certain circumstances.[97] The various tests rely on a number of overlapping concerns which, in essence, fall into three general areas, all of which apply with particular force to contempt: a need for norm elaboration by appellate courts through case-by-case determinations of individual factual situations, the importance and unique vulnerability of certain rights, and the need to compensate for inherent institutional deficiencies.[98]

1. Norm Elaboration

The need for norm elaboration has been emphatically recognized by the Supreme Court in the area of the First Amendment in *Bose Corp. v. Consumers Union of United States, Inc.*,[99] a libel case in which a loudspeaker manufacturer charged that a magazine article evaluating numerous brands of loudspeaker systems contained a false statement of fact

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For a discussion of the reliance on article III concerns as requiring independent judicial review, see generally *Crowell*, 285 U.S. 22. For commentary, see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 642 n.7, 651 (1965); Monaghan, *supra* note 95, at 254 n.1.

97. For example, Professor Monaghan argues that independent review of constitutional facts may be mandatory as to judicial review of administrative decisions, but should be discretionary with a reviewing court in cases involving judicial review of inferior federal and state courts. Monaghan asserts that the Constitution endows reviewing courts with the authority to employ de novo review (despite legislative deferential standards of review), but that it should only be used as needed, depending on the existence in each case of certain factors, the two most important being "the need for continuous development of constitutional principles on a case-by-case basis" and "the danger of systemic bias of other actors in the judicial system." *See* Monaghan, *supra* note 95, at 238-39.

Another model that urges a "flexible approach" to de novo review suggests that the determination of whether independent review is warranted should be based on due process concerns rather than the nature of the right at issue. This analysis is derived from the balancing test applied by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Court had to determine whether it was a violation of due process to allow a procedure by which social security benefits could be taken away without a hearing. The *Mathews* test takes into account the private interests implicated: the risk of an erroneous determination by reason of the process accorded, the probable value of added procedural safeguards, and the public interest and administrative burdens, including the costs that additional procedures would involve. *Id.* at 335. This is a broader test than Monaghan's as it would apply equally to review of both administrative and judicial determinations, and does not limit independent review to constitutional rights, but would include any rights deemed to be of sufficient importance, even those guaranteed by state law. According to this view, even judicial review of administrative decisions involving constitutional rights only warrants de novo review in those cases where there is a demonstrated bias or inability in a particular agency to decide particular kinds of issues, and the other factors, in balance, warrant de novo review. *See* Note, *supra* note 86, at 1500-03.

98. One commentator would add to these three considerations the public interest and administrative burdens involved with de novo review. *See* Note, *supra* note 86, at 1500-03.

99. 466 U.S. 485 (1984).

when it described the sound of instruments heard through the speakers as "wandering along the wall." The district court found that the manufacturer was a "public figure" as defined in *New York Times v. Sullivan*,[100] but that the plaintiff had sustained its burden of proof that the statement was made with "actual malice." The United States Supreme Court reversed, holding that its review of the "actual malice" determination was not limited to the "clearly erroneous standard" ordinarily applicable to federal district court findings of fact,[101] but that it had an obligation to review that finding de novo. The Court explained that its rationale for employing de novo review of ultimate facts was based in good measure[102] on the proposition that first amendment concepts derive from fluid constitutional norms only through the "evolutionary process of common law adjudication"[103]—a case-by-case development of legal principles—rather than the simple application of a clear rule of law by a trial court. In "actual malice" libel cases, like *Bose*, fixing the degree of fault or recklessness that can sustain a libel judgment requires a court implicitly to weigh free speech interests against reputational interests, and therefore warrants independent judicial review.

This process of elaborating dynamic constitutional norms through case-by-case development is necessary in some areas because the meaning of some concepts cannot be expressed adequately in a simple pronouncement. Legal standards, such as "actual malice" and "reckless disregard," that are not capable of being defined with certainty, can only be given sufficient meaning through repeated application to varying factual situations by appellate courts.[104]

One concern underlying the *Bose* Court's rationale was its apparent dissatisfaction with the fact that the district court had created a rule of inference to determine actual malice with which the Supreme Court dis-

100. 376 U.S. 254 (1964).

101. FED. R. CIV. P. 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

102. The Court also found justification for its use of de novo review in the unique susceptibility of first amendment rights to deterrence. *See infra* notes 115-20 and accompanying text.

103. *Bose*, 466 U.S. at 502.

104. *See id.* at 503 n.21 (quoting L. GREEN, JUDGE AND JURY 304 (1930)):

> And it must be kept in mind that the judge has another distinct function in dealing with these elements, which though not frequently called into play, is of the utmost importance. It involves the determination of the *scope* of the general formula, or some one of its elements. It comes into play in the marginal cases. It requires the judge to say what sort of conduct can be considered as condemned under the rules which are employed in such cases. It is the function through which the formulas and rules themselves were evolved, through which their integrity is maintained and their availability determined.

agreed. The Court was concerned that lower court findings of actual malice in general, and the district court's finding there, in particular, could establish inferential rules which, if affirmed, might have wide-scale applicability in free expression cases. In particular it was concerned that if the lower court ruling were permitted to stand, any time an intelligent journalist used a malapropism[105] actual malice could be presumed.[106]

Thus, it is not likely that the Court ever viewed the district court's finding of actual malice as limited to the specific facts of *Bose*, but saw it as a determination of how malice can be proved, one that threatened to inhibit protected expression. Because the elaboration of constitutional norms is so important in first amendment cases, the Court found de novo review of the district court absolutely necessary in order to maintain the rule-making function strictly within the province of the appellate courts.

Another area where the fluidity of a constitutional norm has warranted independent review is in the "voluntariness" of confessions.[107] A major issue in forced confessions cases is whether any particular interrogation technique is "so offensive to a civilized system of justice" as to run afoul of due process limitations,[108] an inquiry that subsumes a " 'complex of values.' "[109] This kind of issue obviously involves a continuous elaboration of a constitutional norm and judicial analysis of social facts, and is, therefore, the kind of substantive constitutional issue the resolution of which dictates independent appellate review.[110]

Like actual malice and the voluntariness of confessions, the area of contempt involves a continuous elaboration of constitutional norms that

105. As noted earlier, the statement considered libelous by the plaintiff in *Bose* was that the "instruments . . . tended to wander about the room." In testimony, the reporter stated that what he meant to imply was that the sound of the instruments moved "across the rear wall from the two speakers." *Id.* at 495 n.11. It was apparent that had this statement been made instead, it would not have been libelous.

106. The Court noted, "Under the district court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time." *Id.* at 513.

107. *See* Miller v. Fenton, 474 U.S. 104 (1985). Although *Miller* arose out of a habeas corpus proceeding involving federal review of a state court determination as to "voluntariness," it is clear that the Supreme Court's utilization of independent review was based on the need for norm elaboration in this area rather than out of a particular distrust of the state court's fact-finding or institutional deficiency. Since *Miller* was decided, numerous circuit courts have applied the independent review requirement to direct appeals from federal district courts involving the "voluntariness" of confessions. *See* United States v. Baird, 851 F.2d 376, 379 (D.C. Cir. 1988); United States v. Fraction, 795 F.2d 12, 14 (3d Cir. 1986).

108. *Miller*, 474 U.S. at 109.

109. *Id.* at 116 (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1958)).

110. See Monaghan, *supra* note 95, at 242-43, for a complete description of the kinds of norms the application of which requires de novo judicial review.

balance, on the one hand, the need for vigorous advocacy and the right of free expression, and, on the other hand, the need for respect of the court and a fair and orderly system of justice.[111] Indeed, the concept of an obstruction of the administration of justice has, other than in the most blatant circumstances, virtually no meaning absent this process.[112] Of all the complex and vague concepts related to the First Amendment, the

111. It is natural that the two areas, defamation and contempt, should reflect similar issues and means of resolution. The earlier contempt cases, especially, involved at their core the defamation of public officials, namely judges. In fact, in New York Times v. Sullivan, 376 U.S. 254, 273 (1964), the Court analogized the issue of defamation to contempt of court by publication, citing a prior contempt case, Pennekamp v. Florida, 328 U.S. 331 (1946) (criticism of judges' inclinations or actions did not present clear and present danger to administration of justice such as to constitute contempt because, although cases were still pending on other points or might be reviewed by rehearings, criticism was of judicial action already taken).

It is extremely interesting in light of the Court's analogy that, although *Pennekamp* and the Court's other contempt cases involving extrajudicial criticism of judges, Bridges v. California, 314 U.S. 252 (1941) (union leader's public release of telegram to Secretary of Labor predicting massive strike if California state court attempted to enforce its decision in labor dispute not contempt because did not rise to level of clear and present danger of interference with administration of justice); Craig v. Harney, 331 U.S. 367 (1947) (newspaper's criticism of elected county layperson judge for mishandling of civil case not contemptuous); Wood v. Georgia, 370 U.S. 375 (1962) (sheriff's letter to grand jury and the press criticizing as racist grand jury's investigation into charges of electoral corruption involving bloc-voting by African-Americans not contempt), utilized the clear and present danger test to measure the constitutional limits of speech, *New York Times* ultimately eschewed that standard for the "actual malice" test. It seems quite clear, however, that while the Court's opinion rejected the kind of ad hoc balancing usually associated with the clear and present danger test, it engaged in the same balancing process, grounded on more generic considerations, to produce a categorical standard. Any effort to fashion a similarly categorical or definitional standard with respect to the limits of advocacy and the contempt power must fail. *See* Raveson, *supra* note 18, at 775-78. For, whatever the definitional standard for obstruction or contempt, whether an attorney's specific conduct comes within that test, whether in fact it is obstructive at all, as opposed to beneficial to the administration of justice, can only be determined in the context of a particular case. *Id.*

The kind of definitional balancing of generic interests engaged in by the Court in *New York Times*, which underscored the need there for a zone of insulation around valuable expression, is equally critical in the context of contempt. Just as the Court, in order to neutralize the chilling effect of possible defamation actions, mandates a higher standard than mere falsehood, so too with minor lapses of advocacy and courtroom decorum; it is not that the falsehoods or lapses are themselves valuable, but that the vigorousness of debate is. Thus, adequate protection of the zealousness of trial advocacy requires that a similar "buffer zone" be fashioned around in-court expression that is valuable to the realization of justice, in order to insulate it from the contempt power. *See* Raveson, *supra* note 18, at 779-85.

The difference in the area of contempt, however, is that rather than resulting in a categorical definition of obstruction, the creation of a zone of insulation around vigorous and valuable advocacy will inform, or be an element of the calculus in, the case-by-case resolution of the issue. *Id.* This "buffer zone" analysis manifests itself in many of the variables that should be utilized in properly balancing the interests at stake. Indeed, as discussed in the preceding text, even with respect to the actual malice standard, there is a continuing case-by-case evolution of the constitutional norms encompassed within that test.

112. *See supra* notes 107-11 and accompanying text.

concept of an "obstruction of the administration of justice" perhaps carries the greatest risk of misapplication, not only because the term itself is so susceptible to varying definitions in different contexts but also because the determination of whether an "obstruction" occurred is most often made within a very short time of the incident and by one who is personally involved. If independent review is necessary in first amendment cases because the standards are simply too indeterminate to be left to the jury or trial judge, the case for independent review in the area of contempt is even more compelling. Because the definition of obstruction is inherently indeterminate, vigorous advocacy will inevitably be confused with disrespect and obstruction of justice.

Given the criminal nature of contempt and the possible deprivation of liberty involved, the necessity of the development and enunciation of clear rules of law in the area of contempt may be even more essential than in the context of libel.[113]

Moreover, as the only remaining common law crime,[114] contempt is particularly dependent on norm elaboration by appellate courts for its definition. Only appellate courts, with their special expertise in applying legal standards to facts and their broader view of the significance of individual facts, are equipped to develop legal norms through specific case analysis. With this task presently entrusted to individual trial courts, the resulting legal standards for contempt have been unmanageably and unpredictably disparate.

2. *The Importance of the Right and Its Susceptibility to Deterrence*

A second, though considered by some commentators to be primary, justification offered by the *Bose* Court for employing de novo review is derived from the value of the right of free expression[115] and its particular vulnerability to the "chilling effect."[116] As the Supreme Court stated:

113. Indeed, to the extent that more precise elaboration of the outer limits of contempt is the only way to provide adequate notice of the actual definition of the crime of contempt, careful norm elaboration by appellate courts may be required by the Due Process Clause.

114. *See* Viereck v. United States, 318 U.S. 236, 245 (1943).

115. It has been suggested that the first amendment right is a favored right, that in addition to its particular vulnerability to chilling it has some intrinsic importance beyond that of other constitutional rights. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 582 (1976) (first amendment right is a preferred right). Professor Monaghan identifies a special first amendment "due process," "a special concern for procedural protection adequately sensitive to First Amendment interests." Monaghan, *supra* note 95, at 270 n.230. For a more thorough discussion of this proposition, see Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

116. *See* Monaghan, *supra* note 95, at 242-44 (arguing that this concern "drives" the Court's opinion in *Bose*).

> [T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.[117]

Thus, the Supreme Court goes so far as to say that the susceptibility of first amendment rights to improper self-censorship makes independent review by an appellate court mandatory in this area. The extremely high rate of reversal that exists in first amendment cases is a strong indication that a high level of improper deterrence does in fact exist[118] and that trial courts are not well-suited to applying the complex and indeterminate standards governing the law of contempt to the facts before them. Thus, independent review may be necessary in order to reduce the wide margin of error.

Although the *Bose* Court ostensibly confined its holding to first amendment cases,[119] the rationale supporting the *Bose* holding would apply as well to the scope of review given to the adjudicative facts in a wide range of constitutional claims, at least where a constitutional right has been denied by a lower court.[120] Even if the holding is limited to first

117. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984) (footnote omitted).

118. The high rate of reversal in first amendment cases generally has been documented by Professor Monaghan. *See* Monaghan, *supra* note 95, at 230 n.10. Monaghan questions whether independent review is necessitated by the high reversal rate, however, arguing that "without a breakdown showing a high rate of reversal on 'straight' law application grounds," there is no reason to believe that deferential review and a discretionary application of de novo review would be insufficient to protect first amendment rights from being chilled. Because the facts and the law are hopelessly intertwined, however, at least in some first amendment contexts, I would suggest that a breakdown along "fact/law" lines would be impossible, and to some degree irrelevant. Certainly in the area of contempt, where the issue on appeal most often involves the "mixed" question of whether particular conduct amounted to an obstruction of the administration of justice, a high rate of reversal would indicate that independent review is necessary to ameliorate the chilling effect.

119. *Bose*, 466 U.S. at 514.

120. The *Bose* Court suggested that independent review is warranted in free expression cases in order "to confine the perimeters of any unprotected category within acceptably narrow limits . . . *to ensure that protected expression will not be inhibited*," *id.* at 505 (emphasis added), and "in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 511. Thus, the opinion suggests that the appropriate division of judicial duties requires judges to engage in independent appellate review only of lower courts' denials of certain federal constitutional rights in order to ensure that the right is not improperly denied or deterred. Some courts have since explicitly differentiated their application of an independent standard of

amendment rights, contempt is unquestionably in large part a first amendment concern. Finally, because a contempt conviction may chill an attorney's zealous advocacy as well as his free expression, any improper factual finding in a contempt adjudication may deprive the contemnor's client of his precious fifth, sixth, and fourteenth amendment rights, and threaten the independence of the bar.

Thus, the nature of the constitutional rights imperiled by the contempt power would seem to warrant as careful an independent review by appellate courts as the determination of "actual malice" in libel actions. Whether or not contempt is viewed as a first amendment issue—a right of expression—or a sixth amendment or due process issue—a right and obligation to engage in vigorous advocacy—or some combination thereof, the right to advocate aggressively is clearly subject to chilling by the improper use of the contempt power.[121] Indeed, the high reversal

review, utilizing de novo review where a trial court holds a restriction on speech constitutional, but deferring to the trial court when the government challenges the trial court's finding of unconstitutional restriction on speech. *See* Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988) (This rule " 'reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged,' while not affording special protection 'for the government's claim that it has been wrongly prevented from restricting speech.' " (quoting Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985))).

On the other hand, one might posit a concern for the necessity of de novo review deriving from the fact that in certain first amendment areas, such as defamation, courts are willing to allow some individuals to be harmed by the false but not malicious speech of others as a trade-off for insuring adequate breathing room for expression. Under this view, independent review would be most important where the first amendment right of expression was upheld in the trial court, to ensure that individuals' reputational interests were not being injured by the improper extension of constitutional immunity to defamatory speech. In combination with the interests discussed above, de novo review might be justified most appropriately by the concern for a correct outcome, regardless of whether the constitutional right at stake was vindicated or found not to be infringed at the trial level.

Of course, in the context of contempt, even if the important interests of the administration of justice such as order, obedience, and respect for the court arguably would justify independent review where those interests were trumped by the need for vigorous advocacy, as a practical matter the issue can never arise because in such circumstances, there can be no appeal. Moreover, it is abundantly clear that even if a concern for the interests that may conflict with the protection of a constitutional right might warrant a stricter standard of review, that in no way undercuts the necessity for such review where it is the constitutional interests that are not upheld in the trial court.

121. If an attorney's conduct is punishable substantively and summarily at the virtual discretion of the trial court, conduct at the outer bounds of what the obstruction standard should permit is very likely to be deterred. In addition, the sanctions that can be imposed under the contempt power are severe and are likely to deter a substantial amount of protected conduct if, as is presently true, the definition of what is punishable as contempt is imprecise. In almost all jurisdictions, including the federal courts, each instance of contempt is punishable by as much as six months in jail before there is even a constitutional right to a jury trial. *See supra* note 39. In many jurisdictions, there is no prescribed maximum penalty at all for convictions of crimi-

rate in first amendment cases generally is rivaled only by the frequency of reversals in contempt convictions in particular.[122]

3. *Institutional Deficiency*

Although not articulated as a factor weighing in the Supreme Court's use of independent review in *Bose*, other courts and commentators have recognized some kind of institutional deficiency in the proceedings below as a condition that requires the use of de novo review by an appellate court to compensate for that deficiency. The deficiency most frequently cited has been referred to by courts and commentators as the "legitimacy deficit" inherent in an administrative agency's determination of a constitutional right. The legitimacy deficit in the case of agency adjudications is rooted in the fact that administrative tribunals are neither subject to the electoral accountability of the legislature and the executive nor enjoy the independence of an article III court.[123] According to this view, Article III is violated when a litigant pressing a constitutional claim is denied access to an independent judgment by a judicial forum,[124] as Article III not only imposes the separation of powers but also makes it the duty of federal courts to ensure that the Constitution is enforced, and that a constitutionally protected right is not violated through the factual or legal error of a non-judicial body. Thus, in most circumstances where constitutional rights are at stake, the Supreme Court has required reviewing courts to conduct a de novo examination of those administrative agency findings which are determinative of the constitutional right.[125]

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nal contempt. *See, e.g.*, Frank v. United States, 395 U.S. 147 (1969) (Congress has authorized courts to impose penalties for criminal contempt but has not placed any specific limits on the discretion of the courts); People v. Stoler, 3 Ill. 2d 154, 201 N.E.2d 97 (1964) (when no maximum penalty is authorized, as with contempt, the seriousness of the charges is to be determined by the severity of the actual sentence); *see also supra* note 39 and accompanying text.

122. *See* N. DORSEN & L. FRIEDMAN, *supra* note 3, at 233-34.

123. For a general discussion of this concept, see Note, *supra* note 86, at 1487-88; Monaghan, *supra* note 95, at 263-64.

124. Although technically this argument applies only to federal courts because the Constitution does not impose the separation of powers on the states, some cases suggest that due process may require state court review of state agency decisions. *See* Chicago, Milwaukee, & St. Paul Ry. v. Minnesota, 134 U.S. 418, 457-58 (1890). Moreover, state constitutions contain their own separation of powers provisions as well.

125. *See* Pickering v. Board of Educ., 391 U.S. 563, 578-82 (1968); Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964); *cf.* Crowell v. Benson, 285 U.S. 22 (1932) (in challenge to Congress' power to provide workers' compensation for seamen, Court required independent review by judicial body "upon its own record and the facts elicited before it"); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) (independent review of agency's constitutional and jurisdictional facts upheld, but it would take a "clear case" for it to consider evidence not presented to an agency). *But see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,

It has been correctly pointed out by several commentators, however, that the legitimacy deficit of agency adjudications of constitutional rights arises as much from due process concerns as from Article III,[126] and indeed, an entire line of Supreme Court cases demonstrates that due process concerns have to a large extent driven many of the Court's decisions to employ de novo review of agency adjudications that result in a deprivation of a liberty or property interest.[127]

In essence, both Article III and the Due Process Clause embody an overlapping policy concern that some institutional or systemic deficiencies in the original tribunal, be it judicial or administrative, require a more searching review by an appellate court in order to counteract the deficiencies and adequately protect the rights of the litigants.[128] In fact, federal courts, relying on due process, have on occasion employed a de

458 U.S. 50, 82 n.34 (1982) (plurality opinion) (where the Supreme Court observed that "*Crowell*'s precise holding, with respect to the review of 'jurisdictional' and 'constitutional' facts that arise within ordinary administrative proceedings, has been undermined by later cases").

In the same footnote, however, the Court cites two subsequent cases that approved of constitutional fact review: *St. Joseph Stock Yards*, 298 U.S. 38, and Ng Fung Ho v. White, 259 U.S. 276 (1922). Thus, it appears that the Court's comment refers to the limitations imposed in *St. Joseph Stock Yards* on the creation of a new record on appeal, rather than independent review of an existing record. Commentators have more recently cited *Crowell* with approval for the proposition that courts may not give deference to the facts found by administrative agencies when constitutional rights depend on those facts. *See* W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTTLAND, ADMINISTRATIVE LAW: CASES AND COMMENTS 1238-42 (8th ed. 1987).

It is unclear, however, whether there are some factual situations arising out of administrative adjudications that require a de novo factual hearing by the appellate court. *See, e.g., Northern Pipeline Constr.*, 458 U.S. 50 (plurality opinion) (article III courts, not legislative courts or administrative agencies, must find the underlying facts in common law disputes governed by state law); *Ng Fung Ho*, 259 U.S. 276 (de novo judicial hearing required in deportation proceedings). But see United States v. Raddatz, 447 U.S. 667 (1980), where the Supreme Court held that an article III judge could give deference to an agency's findings of fact on a motion to exclude evidence allegedly obtained in violation of the Fourth Amendment. *Raddatz* can be distinguished, however, on the ground that the exclusionary rule is not a constitutional rule, but rather a judge-made remedy, and therefore may not be entitled to the same degree of de novo review.

126. *See* Note, *supra* note 86, at 1487-1489; Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 249, 268-9 (1967); *cf.* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1049 n.22 (1984).

127. *See* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); *St. Joseph Stock Yards*, 298 U.S. 38; *Ng Fung Ho*, 259 U.S. 276. For further discussion of this proposition, see Note, *supra* note 86, at 1487-89.

128. In particular, in this context, both Article III and the Due Process Clause are fundamentally concerned with the requirement of an independent fact-finder and the need for procedural regularity. Indeed, one comentator has suggested that article III concerns actually are subsumed within due process considerations. *See* Note, *supra* note 86, at 1495-1502. Professor Monaghan, on the other hand, would keep the "legitimacy deficit" arising from article III concerns analytically distinct from a due process concern with the possibility of systemic bias

novo standard of review of the findings of state courts in specific areas where there is an institutional distrust, based on a demonstrated historical bias, of the state's ability to render impartial findings. For example, in *Norris v. Alabama*,[129] in which a number of criminal defendants challenged the State of Alabama's grand and petit jury selection processes as being unconstitutionally discriminatory on the basis of race, the Supreme Court independently reviewed evidence, including books containing the jury rolls, and concluded that, despite the state court's finding to the contrary, the evidence showed that Alabama's jury practices did in fact unconstitutionally discriminate on the basis of race.[130] The clear implication of *Norris* and its progeny,[131] as well as the Supreme Court's treatment of state court findings in coerced confession cases,[132] is that the Supreme Court has at times harbored an inherent distrust of the state courts' ability to correctly decide these cases due to a fear of the state courts' systematic distortion of fact-finding and law application in certain areas.[133] Although some commentators have looked askance at the Supreme Court's lack of faith in the ability of state courts to adjudicate federal claims fairly,[134] the Supreme Court has persisted in its wariness

in the proceedings below, asserting that there is "quite plainly" no legitimacy deficit with respect to inferior state and federal courts. Monaghan, *supra* note 95, at 262-63.

129. 294 U.S. 587 (1935).

130. *Id.* at 596.

131. *See infra* note 147.

132. *See* Culombe v. Connecticut, 367 U.S. 568 (1961) (plurality opinion); *id.* at 641-42 (Brennan, J., concurring); Reck v. Pate, 367 U.S. 433 (1961); Blackburn v. Alabama, 361 U.S. 199, 208-09 (1960); Spano v. New York, 360 U.S. 315 (1959); Crooker v. California, 357 U.S. 433 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Payne v. Arkansas, 356 U.S. 560, 562 (1958). *But see* Wainwright v. Sykes, 433 U.S. 72 (1977) (where defendant failed to challenge below the admission of his statements as violative of the Fifth Amendment, a state procedural rule may bar a federal habeas challenge absent a showing of "cause" or "prejudice" attendant to state procedural waiver).

For a discussion of the Supreme Court's substitution of its own judgment for that of state courts in coerced confession cases, see Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 341-46 (1962).

133. But see Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) and Rogers v. Lodge, 458 U.S. 613 (1982), where the Supreme Court failed to employ de novo review to state courts' findings regarding unconstitutional discrimination in the areas of school desegregation and voting rights, respectively. Later, when reaffirming the holding in *Dayton Bd. of Educ.*, the Court asserted that the question of the defendant's intent to maintain a segregated school system was a question of historical fact subject to the "clearly erroneous" rule. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

134. Professor Monaghan, for example, finds the premise that state courts are not to be trusted in applying constitutional principles "disquieting" and does not think it should be a premise on which to base the mandatory use of de novo review. At the same time, however, Monaghan's discretionary approach to the use of de novo review urges the Court to consider "the need to guard against systemic bias brought about or threatened by other actors in the judicial system." Monaghan, *supra* note 95, at 271-73.

and has viewed it as a well-founded and necessary protection of certain constitutional rights.[135]

Another example of the use of de novo review to correct an institutional deficiency of lower court proceedings is a practice some states have adopted to expeditiously resolve criminal cases at the trial level without interfering with defendants' due process rights. These states either require or offer criminal defendants the choice of a non-jury trial before a justice of the peace, magistrate, or municipal judge.[136] If a conviction results, the defendant is entitled to a de novo trial or jury trial depending on the seriousness of the potential penalty. In this way, state courts can lessen the burden of increasing case loads by the use of abbreviated hearings, while ensuring full due process at a second hearing if the defendant is not satisfied with the original outcome.

Although the term "legitimacy deficit," therefore, is not ordinarily associated with judicial proceedings, and traditional article III concerns do not arise in fashioning the appropriate scope of appellate review in contempt cases,[137] the underlying policy concerns justifying de novo re-

135. Of course, there are many areas in which the Supreme Court relies on state court fact-finding and even deems state adjudications dispositive of federal claims. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (where state provided opportunity for full and fair litigation of fourth amendment claim, state prisoner could not be granted habeas relief on ground that evidence obtained through unconstitutional search was introduced at trial). Even within the area of coerced confession cases, the Court has deferred to state court findings that a defendant has waived his right to challenge an admission on fifth amendment grounds. *See Wainwright*, 433 U.S. 72. Supreme Court deference to state courts, however, often rests on deference to a state's procedural rule rather than upon findings of fact.

136. *See* Ludwig v. Massachusetts, 427 U.S. 618 (1976); Colten v. Kentucky, 407 U.S. 104 (1972); Swisher v. Brady, 438 U.S. 204 (1978); Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984); State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971).

137. Indeed, to some extent in contempt proceedings, even plenary proceedings, there are separation of powers considerations akin to those of administrative proceedings in that the usual executive and legislative checks on the judicial power are bypassed. That is, with respect to contempt, neither the executive nor the legislature has any role in ensuring that there is sufficient evidence to sustain a charge, or in defining the crime. *See supra* note 84 and accompanying text.

Restrictions on both the substantive and procedural scope of the contempt power can be imposed, at least to some degree, by the legislative branch as well as by judicial limitation of its own prerogatives. A full discussion of whether, or the extent to which, legislatures can regulate the courts' exercise of their inherent contempt power, or whether such regulations violate the separation of powers, is beyond the scope of this Article. The one, rather old, article devoted to the issue concludes that the enactment, by Congress, of legislation regulating certain procedures in federal court contempt hearings, is a constitutional exercise of legislative power. *See* Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

Courts are split on whether the legislative branch may limit the substantive and procedural scope of the judicial power. *Compare* Michaelson v. United States, 266 U.S. 42, 65-66 (1924) (recognizing validity of congressional limitation of federal courts' contempt power to

view of agency findings have great force with respect to review of lower court findings of contempt. Indeed, there is a striking resemblance between the inadequacies of administrative determinations and the institutional deficiencies inherent in lower court contempt adjudications, particularly with summary proceedings. For just as the separation of powers doctrine is intended to act as a check on arbitrary abuses of power by individual branches of government, and therefore imposes an obligation on the judiciary to review findings of a legislative court, so does the concept of due process act as a check on governmental power, by imposing the procedural requirements of an impartial fact-finder, notice, representation by counsel, and the substantive requirement that a punishable offense has definite delineations. A trial court's use of summary procedures, authorized by a legislature[138] or exercised under the court's inherent power, bypasses the whole gamut of constitutional safeguards guaranteeing fair trials. Like administrative determinations involving important constitutional rights, the diminution of due process rights permitted in summary proceedings and, to a lesser extent, in contempt proceedings in general, can only be remedied, if at all, by de novo consideration of the matter on appeal.

The Supreme Court's recognition of the danger of distortion and bias inherent in certain state court adjudications, where at least the minimal procedural protections of due process were accorded litigants, argues for similar recognition by both state and federal appellate courts of the far more ubiquitous potential for bias and distortion of facts in contempt proceedings.[139] In summary contempt proceedings, those instances in which the judge becomes personally embroiled in reaction to the perception of personal affront could be cured by that judge's recusal.[140] The

"obstruction" of the administration of justice) *and* Haines v. District Court, 199 Iowa 476, 479-80, 202 N.W. 268, 270 (1925) (legislative limitations on judicial contempt power "universally recognized as valid") *with* State v. Heltzel, 526 N.E.2d 1229, 1229-30 (Ind. App. 1988) (contempt of court is purely judicial power, not the creature of the legislature, and is inalienable and indestructible) *and* State v. Heiner, 29 Wash. App. 193, 198, 627 P.2d 983, 986 (1981) ("court of general jurisdiction has inherent power to punish for contempt—a power which the legislature cannot abridge"). The United States Supreme Court has recognized without comment the authority of a state court to reject legislatively imposed limitations on its contempt power. *See* Wood v. Georgia, 379 U.S. 375, 385-86 (1972).

138. Both statutes and court rules provide for summary procedures in contempt proceedings. *See* DEL. CODE ANN. tit. 11, § 1272 (1989); VA. CODE ANN. § 18.2-456 (1990); N.J. COURT RULE 1:10-1, 2 (1983).

139. As the Ninth Circuit stated in *In re* Gustafson, 650 F.2d 1017 (9th Cir. 1981), "Summary contempt proceedings are unique to criminal procedure: the otherwise inconsistent functions of prosecutor, jury, and judge are united in one individual. Courts have long noted the manifest potential for abuse." *Id.* at 1022.

140. *See, e.g.*, Offutt v. United States, 348 U.S. 11, 17 & n.3 (1954) (court's comments in presence of jury regarding counsel's "disgraceful and disreputable performance" was evidence

vast remainder of contempt cases, however, will invariably involve judges who are certain to have some difficulty distinguishing a personal affront from an obstruction of the integrity or continuity of a trial, or of the authority of the court.[141] Were the judge to have this degree of personal involvement in an incident tried before her in any other area of the law, there would be little question of the need for her recusal.[142]

B. The Distinction Between Adjudicative and Historical Facts

The term "adjudicative facts" frequently has been used along with the term "constitutional facts" to refer to the ultimate facts found in constitutional cases, usually by the application of legal principles to historical facts, which determine the outcome of such litigation. Historical facts, on the other hand, are the simple answers to the case-specific question, "what happened here?"[143] Constitutional facts have alternatively been characterized as a special category of factual questions that, because of their importance, must be independently reviewed by appellate courts, or as mixed questions of law and fact, because they involve the application of legal principles to facts.[144]

As the majority made clear in *Bose*, only the constitutional facts and not the historical facts generally are subject to de novo review by appellate courts in constitutional cases. Indeed, it was disagreement over this distinction that divided the Court in *Bose*, as the majority concluded that independent review was warranted because a determination of "actual malice" involved the application of constitutional principles to the historical facts[145]—at the least, a mixed question of law and fact—while the dissenting justices asserted that it involved no more than "the mens rea of an author . . . a pure question of [historical] fact."[146] Because the first

that contempt charge was a result of judge's personal embroilment); Taylor v. Hayes, 418 U.S. 488 (1974) (summary adjudication at end of trial violated due process because judge was personally embroiled and contemnor was not given notice and opportunity to be heard); Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (violation of due process where judge adjudicating contempt involved in conflict with contemnor on unrelated matter); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (contemnor denied due process because judge and contemnor had become personally embroiled in controversy).

141. As the Court noted in Codispoti v. Pennsylvania, 418 U.S. 506 (1974), abuse of the contempt power is not uncommon because contemptuous conduct "often strikes at the most vulnerable and human qualities of a judge's temperament . . . [and even when not insulting] represents a rejection of judicial authority." *Id.* at 516 (citing Bloom v. Illinois, 391 U.S. 194, 201-02 (1968)).

142. *See* Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 624-27 (1984).

143. *See* Monaghan, *supra* note 95, at 234-35.

144. *See* Monaghan, *supra* note 95, at 234-38.

145. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 (1984).

146. *Id.* at 515-16 (Rehnquist and O'Connor, JJ., dissenting).

two justifications for independent review, the need for an evolving constitutional norm and the particular importance and vulnerability of certain rights, do not call into question the trial court's ability to find historical facts, it is fitting that independent review based on these justifications would only involve independent review of constitutional facts. When the rationale for employing independent review, however, derives from a need to correct some form of institutional deficiency in the fact-finding process—either because of a strict article III concern that constitutional rights should be adjudicated in a judicial rather than an administrative tribunal, or because of a distrust of trial court fact-finding in certain areas—the historical facts, as well, should, under this rationale, be subject to de novo review by appellate courts.[147]

For this reason, it would appear necessary to employ independent review of historical facts as well as constitutional facts in appeals of summary contempt convictions. Because of the institutional deficiency regarding the fact-finding process in a summary hearing, as well as the inability of the appellate court to determine from the record produced by a summary proceeding whether the factual findings are accurate, all of the findings of historical fact may rightfully be regarded with the same degree of suspicion as the constitutional facts in first amendment cases generally.[148] Such suspicion is warranted because the historical facts—the trial judge's conclusions as to the contemnor's tone of voice, demeanor, and intent,[149] as well as to the courtroom atmosphere in general—contribute to the determination of whether the conduct was in fact contemptuous.[150]

147. *See, e.g.*, Norris v. Alabama, 294 U.S. 587 (1935) (Supreme Court independently examined evidence presented to state court regarding charge that Blacks were unconstitutionally excluded from jury service); Whitus v. Georgia, 385 U.S. 545, 550 (1967) ("it becomes our solemn duty to make independent inquiry and determination of the disputed facts"); Pierre v. State, 306 U.S. 354 (1939) (the Court must independently determine disputed facts where claim involves equal protection of the laws); Ng Fung Ho v. White, 259 U.S. 276 (1922) (in deportation proceeding appellate court required to compile independent record); *see also* Monaghan, *supra* note 95, at 254-59 (discussing the assertion in some early constitutional fact cases that federal courts reviewing agency adjudications should compile their own record de novo in order to make independent findings of historical fact).

148. In New Jersey, where the standard of review in contempt cases is de novo, the court reviews historical as well as adjudicative facts independently. *See In re* Yengo, 84 N.J. 111, 127, 417 A.2d 533, 542 (1980), *cert. denied*, 449 U.S. 1124 (1981).

149. The question of intent in contempt cases is always a factual determination to be proved by such facts as whether the contemnor was sufficiently warned that her conduct would be deemed contemptuous, the specificity of any prior warnings, and any pattern of continuous misbehavior. *See* Raveson, *supra* note 18, at 830-36.

150. For example, in *In re* Daniels, 118 N.J. 51, 570 A.2d 416, *cert. denied*, 59 U.S.L.W. 3326 (1990), the trial judge asserted on the record that Mr. Daniels "laughed" in response to a court ruling, but because there was no hearing and, therefore, no testimony besides the judge's

The rationale supporting an appellate court's deferential treatment of a trial court's findings of fact generally does not apply to summary contempt proceedings, as the trial court's expertise as a sifter of evidence and finder of fact—the ability to judge the evidence fairly in a case in which the judge has no personal interest—does not enhance the judge's ability as a witness, which is one of the roles the court plays in a contempt hearing.[151] Moreover, the ability to judge the evidence fairly is fundamentally a function of the judge's position as an impartial fact-finder, something he cannot truly be when the incident being judged involves a perceived challenge to his authority or ability to maintain order in the courtroom.[152] Finally, the factual findings made summarily by a trial court in a contempt hearing are often extremely unreliable in the absence of an evidentiary hearing and representation by counsel.[153] Ap-

characterization, an appellate judge could not possibly know what the judge meant by the word "laughed." Although the natural meaning of the word involves making a sound, the judge in that case was apparently describing a silent facial gesture that could not possibly have been reflected in the record. Therefore, in the absence of de novo review, the appellate court can only assume the correctness of the trial judge's conclusions as to the historical facts—that Mr. Daniels "laughed."

Also, the question of whether the contemnor had a fair warning that his conduct might be deemed contemptuous is always a question of fact. See, for example, United States v. Seale, 461 F.2d 345 (7th Cir. 1972), in which the court held that whether the defendant was advised as to what was improper courtroom behavior was a factual question bearing on the larger factual question of his reasonable awareness that his behavior violated minimal standards of courtroom propriety. See also *In re* McDonald, 819 F.2d 1020 (11th Cir. 1987), in which the court concluded that in order for a contempt conviction to stand, a reviewing court would have to find that the trial judge entered a "reasonably specific" order which the contemnor willfully violated. As the court correctly noted, the question of the "specificity" of the order was a question of fact which "must be evaluated in the context in which it [was] entered and the audience to which it [was] addressed." *Id.* at 1024 (citation omitted).

151. In most non-contempt cases, deferential review of a trial court's fact-finding is justified by the fact that trial judges have amassed a great deal of experience listening to witnesses' testimony and sifting through evidence in order to make considered factual determinations. *See, e.g.*, Anderson v. Bessemer City, 470 U.S. 564 (1985) (rationale for deference to trial court's findings of fact is not only based on trial judge's superior position to make credibility determinations, but also on her expertise in this area). In contempt cases, however, the judge is not acting solely within the role for which she has developed expertise. Instead she is acting, to some extent, as a witness herself, and is just as likely to misperceive an event that takes place in her courtroom as any other witness. For a detailed discussion of the possibilities of misperception, particularly when the incident is of short duration and the witness is under stress, see Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 971-80 (1977).

152. Moreover, as Professor Kuhns notes, "The shock and spontaneity of most courtroom disturbances probably increases the margin for error [in the trial judge's perception of relevant facts]." Kuhns, *supra* note 3, at 50.

153. For example, in *In re Daniels*, 118 N.J. 51, 570 A.2d 416, witnesses in the courtroom, including the trial judge's own bailiff and court reporter, filed affidavits with the appellate court attesting to the inaccuracy of the trial judge's crucial factual findings in a summary contempt proceeding. Similarly, sufficient proof of wrongful intent in a contempt case fre-

pellate courts could begin to resolve these difficult problems by rejecting the assumption that the trial judge's observation of the allegedly contemptuous conduct obviates the need for strict appellate scrutiny, and replacing the deference normally accorded these decisions with suspicion.[154]

For all the reasons discussed above, both substantive and procedural, it would appear that the harshness and arbitrariness of the summary contempt power would be greatly ameliorated if the first appellate court to review a trial court's summary contempt findings always reviewed both the historical and constitutional facts de novo. The first court to review a contempt conviction resulting from a plenary hearing, however, would need to review only the constitutional facts independently, as there would be no institutional deficiency to cast suspicion on the historical facts found by the trial court. If there is available a second tier of appellate review of either a summary or plenary contempt citation, in either a state or the federal system, the above analysis suggests that the standard of review should be de novo as well, at least with respect to the constitutional facts. Unless the highest court of a particular jurisdiction independently applies the legal norms to the historical facts, lower courts will be left to elaborate complex constitutional norms, and a primary purpose for de novo review will be undermined.[155] The second tier appellate court would not need to review the historical facts independently, however, as the institutional deficiencies of the trial court, in the case of summary proceedings, resulting in unreliable findings of fact will have been corrected by the first appellate court's independent fact-finding.[156]

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quently may be impossible without some evidentiary hearing. *See supra* note 150. Moreover, even where an evidentiary hearing is unnecessary to resolve factual disputes in a specific case, one would hope that legal argument with respect to whether the conduct in question constitutes contempt would have significant influence on the trial judge's determination. *See infra* note 172. Yet, courts have seemed particularly unconcerned with the necessity for providing presentation of legal claims to the trial court in summary adjudications of contempt. *See* United States v. Wilson, 421 U.S. 309, 312 n.4 (1975).

154. Although it may seem that employing independent review of historical facts violates statutorily imposed standards of review, where there is a constitutional imperative to employ de novo review in order to guarantee due process, *Bose* makes clear that the Constitution overrides any existing statutory standards. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

155. The Supreme Court emphasized the need for de novo review in the highest appellate court when it stated in *Bose* that the requirement of independent appellate review "reflects a deeply held conviction that judges—*and particularly Members of this Court*—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11 (emphasis added).

156. This is only true, however, so long as the appellate court has the broad authority and obligation to supplement the record where necessary. *See infra* notes 214-31 and accompanying text.

The historical facts as found by the first level of de novo appellate review may, as is ordinarily the case, be given deference by subsequent reviewing courts as findings of an impartial fact-finder.

C. Should De Novo Review Be Mandatory or Discretionary?

In the various contexts in which de novo review has been applied, courts and commentators have differed as to whether such review is constitutionally required or is instead a matter of judicial discretion. In *Bose*, in addition to holding that a finding of actual malice requires independent review, the Court also suggested that with respect to the area of protected speech generally, it has not only the authority, but also the duty, to independently review the constitutional facts.[157] Although the mandatory nature of independent review of constitutional facts has been questioned by some commentators, especially because there is no constitutional right to appellate review at all,[158] the lower federal and state courts have extended *Bose* to require de novo review in various areas of first amendment litigation besides libel actions.[159] The extent to which de novo review might be mandatory in other areas, however, is not clear because the Supreme Court in *Bose* dealt with independent review as an aspect of first amendment jurisprudence rather than developing a unified theory of a standard of review that would include other constitutional claims as well. Indeed, despite the Court's broad assertions with respect

157. *Bose*, 466 U.S. at 499, 510-11. At least one commentator has taken issue with the Court's conclusion that de novo review in the first amendment area is mandatory, however, and argues that although a concern for chilling expression is real, it does not rise to a level requiring independent review in every first amendment case. *See* Monaghan, *supra* note 95, at 268-69. It must be noted, however, that Professor Monaghan has taken into account a special level of due process protection accorded first amendment cases—"first amendment due process"—and is, therefore, concerned about the possibility of "double-counting" the first amendment interest. *Id.* at 270 n.230 (citing Calder v. Jones, 465 U.S. 783, 790 (1984)). *See supra* note 115. In contempt, on the other hand, precisely the opposite is true. Unlike the First Amendment, where a heightened level of due process exists, a contemnor is afforded less than the normal level of due process. Thus, a greater sensitivity to the potential for chilling advocacy is absolutely crucial.

158. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956); McKane v. Durston, 153 U.S. 684, 687-88 (1894).

159. *See, e.g.*, New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940, 941 (1st Cir. 1989) (holding independent review mandatory in free exercise and establishment clause challenges to state law), *cert. denied*, 110 S. Ct. 1782 (1990); Koch v. City of Hutchinson, 847 F.2d 1436, 1441 (10th Cir.) (same), *cert. denied*, 488 U.S. 909 (1988); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (de novo review mandatory in challenge to municipal ordinance regulating portable signs), *cert. denied*, 485 U.S. 981 (1988); Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 897 (D.C. Cir. 1984) (reviewing court must employ de novo review of prior restraint on free expression prohibiting artist from displaying poster critical of Reagan Administration in Washington subway station).

to the obligation to exercise independent review in the area of free speech generally, it is not yet clear whether the Supreme Court intends *Bose* to apply to all mixed questions of law and fact concerning the application of free speech principles.[160]

The debate over whether de novo review should be mandatory or discretionary may appropriately be viewed as a restatement of the question whether "constitutional facts" are to be treated as questions of law or questions of fact, thereby determining whether the standard of review should be independent or deferential.[161] Although pure findings of fact are normally due deference by a reviewing court,[162] mixed questions of law and fact, especially those factual conclusions that define whether certain conduct is protected by the Constitution, are not entitled to deference if an appellate court thinks an error has been made.[163] For example, although pure intent may always be a factual determination appropriately made by the original fact-finder,[164] a conclusion that a journalist acted with "actual malice" necessarily involves the application of broad constitutional principles to established facts, just as a finding of contempt—that judicial proceedings were "obstructed"—involves an ap-

160. *See* Rankin v. McPherson, 483 U.S. 378, 386 n.9 (1987) (applying independent standard of review to claim of wrongful discharge for political expression); Renton v. Playtime Theaters, 475 U.S. 41, 54 n.3 (1986) (reserving this issue for future consideration); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 41 n.3 (D.C. Cir. 1985) (refusing to apply *Bose* to an issue of false and deceptive advertising).

161. *See generally* Louis, *Allocating Adjudicative Decision Making Authority Between The Trial And Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 994-1007 (1986).

162. *See* FED. R. CIV. P. 52(a); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985).

163. The standard of appellate review for mixed questions of law and fact has not been consistent, as courts have persistently, and impossibly, tried to classify them as either law or fact. *See* Louis, *supra* note 161, at 996-1007. Where a constitutional right is at stake, however, reviewing courts often do not give deference to the "mixed" conclusions of trial courts. *See* Miller v. Fenton, 474 U.S. 104 (1985).

164. A finding of intent may be based on a pure credibility determination, in which case it is considered an historical fact and is entitled to deference. However, findings of intent, especially in constitutional cases, may involve many complex inferences, often not wholly factual in nature. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). *But see* Rogers v. Lodge, 458 U.S. 613, 623 (1982) (an intent to discriminate on racial grounds is a pure question of fact subject to 52(a)'s "clearly erroneous" standard). In *Bose*, the majority found that a finding of actual malice involved the application of complex legal norms to facts and thus was not a simple historical fact. For a more detailed discussion of the complex nature of intent, see Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976). Moreover, as Professor Monaghan has pointed out, any historical fact may be transformed into a question of law if the sufficiency of the evidence is called into question. *See* Monaghan, *supra* note 95, at 241. In that light, even *Bose* could be viewed as a case where the appellate court determined only a legal question: that the district court's finding of actual malice was not based on legally sufficient evidence.

plication of legal norms to specific facts, including the actor's intent. The real question to be resolved is not whether these issues are to be labeled fact or law,[165] but, as Professor Monaghan has succinctly asked, to what extent does "the Constitution itself control the allocation of functions among the various decisionmakers—appellate and trial judges, juries, administrative agencies—that commonly participate at some stage in the resolution of *all* types of constitutional claims."[166]

The resolution of the question as to whether de novo review should be mandatory or discretionary outside of the first amendment area is beyond the scope of this Article.[167] The Supreme Court in *Bose* made it clear, however, that within the First Amendment, at least with respect to findings of actual malice in defamation cases, the court must employ de novo review so as not to leave the determination of whether the speech in question is to be stripped of first amendment protection to the trier of fact. Mandatory de novo review in contempt cases would appear to be as compelling, particularly when the contempt is originally tried in summary proceedings. In addition to norm elaboration and the vulnerability of the constitutional right at issue, which the Court found to necessitate de novo review in *Bose*, summary contempt hearings suffer from a serious institutional deficiency. Even commentators who criticize the *Bose* Court's conclusion that de novo review is mandatory in the first amendment area agree that a legitimacy deficit may in itself suffice to mandate independent review.[168] If we take the constitutional allocation of judicial resources as the basis for determining whether independent review should be discretionary or mandatory, one could hardly think of a more

165. It is often impossible to distinguish between factual and legal questions as these categories are often irrelevant to the issues at hand. Even the Supreme Court admits to the inability to distinguish a question of fact from a question of law. *Miller*, 474 U.S. at 113. But beyond these elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Id.*; *Pullman-Standard*, 456 U.S. at 288.

166. Monaghan, *supra* note 95, at 231. Justice O'Connor has restated this problem another way: "The fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller*, 474 U.S. at 114.

167. For an in-depth discussion of this question, see Monaghan, *supra* note 95, and Note, *supra* note 86.

168. Professor Monaghan, who argues that independent review of constitutional facts found by judicial tribunals should only be employed on a discretionary "as needed" basis, concedes that independent review of agency determinations of constitutional facts may well be mandatory because of the legitimacy deficit in administrative adjudications. *See* Monaghan, *supra* note 95, at 239, 262-64. Moreover, as to review of judicial determinations of constitutional facts, Monaghan himself suggests that one of the two most important considerations warranting independent review is the danger of systemic bias, which is one kind of institutional deficiency that exists in summary contempt. Monaghan, *supra* note 95, at 239.

obvious need for independent review than in the area of contempt. For here, the only possible justification for the abridgement of fundamental due process rights in a summary contempt proceeding is the grave necessity for instantaneous action.[169] Where that necessity no longer exists—in an appeal of a contempt conviction—the Due Process Clause should require "the repayment of interest" on the contemnor's "borrowed" due process rights by reallocating judicial responsibility so that appellate courts rule independently.

While some commentators have argued that constitutional fact review undermines our well-balanced system of allocating judicial authority and threatens the economical application of precious judicial resources,[170] it would be difficult to demonstrate why independent review should not be applied to the limited area of contempt. The arguments that have been made against independent review are basically threefold: First, that it undermines the trial court's authority; second, that it would overburden the appellate courts either by increasing the total number of appeals, encouraging frivolous appeals, or requiring more judicial resources; and third, that it needlessly reallocates judicial authority.[171]

These arguments are not particularly persuasive when weighed against the benefits of independent review generally, but are even less convincing when viewed in light of the anomalous character of a contempt conviction. As to the objection that the trial court's authority would be undermined, judicial authority would not be undermined but would be allocated between trial and appellate courts to the extent necessary to achieve a fair and impartial hearing. Moreover, a remand by an appellate court for a supplemental evidentiary hearing to aid the appellate court in conducting de novo review is not in any way inconsistent with, nor does it undermine, the trial court's summary contempt power. Allowing an appellate court the opportunity to obtain a fuller and more accurate record and to review the facts independently in no way diminishes a trial judge's power to level a charge of contempt or adjudicate that charge summarily. Thus, trial courts would retain full power to control their courtrooms, and to prevent or deter obstructive misconduct. Conversely, the power of the trial judge to control her courtroom

169. Of course, in addition to the need for instantaneous action, the judge must have personally observed the conduct constituting the contempt and must have fairly concluded that it would be a waste of judicial resources to hold a full-blown hearing before a different judge. *See supra* note 38 and accompanying text.

170. *See* Louis, *supra* note 161, at 1015; Weiner, *The Civil Non-Jury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1039-41 (1967).

171. *See* Pendergrass v. New York Life Ins. Co., 181 F.2d. 136, 138 (8th Cir. 1950).

does not ameliorate the appellate court's responsibility to conduct a de novo review and, to that end, obtain a full and complete record.

On the contrary, the proven potential for mistaken use and abuse of the summary contempt power would appear to require such review. With summary hearings in particular, the findings of a trial judge who was also a "witness" to, and perhaps the perceived victim of, the alleged contempt, and who heard the matter without the benefit of defense counsel,[172] or on occasion without any defense presented at all, ought not to be entitled to deference. Rather than strip the trial court of its power to use summary procedures, however, de novo appellate review would simply compensate on appeal for the deficiencies of summary procedures when the need for summary action no longer exists.[173] In any event, the trial court has no valid interest in immunizing its decisions and findings from proper appellate review; the only interests of the trial court in a contempt proceeding are in controlling the courtroom at a given time and deterring future misconduct. With respect to deterrence of misbehavior, although nothing could be more effective than arbitrary contempt convictions insulated from effective appellate review, the problem is that the arbitrary use of the court's power inhibits, to a constitutionally impermissible degree, protected advocacy and expression. The sole "power" undermined by de novo review of summary contempt hearings is the power to ensure that the insufficiency of the proceedings below, with respect to both the outcome and the adequacy of the record created, makes affirmance of a conviction far more likely. That is not only a power that the courts do not need, but also a power that the Constitution should forbid them from exercising.

172. The benefit defense counsel provides to the court, as well as to the contemnor, should not be overlooked. With an uncounseled contemnor, the court is called upon to be not only judge and prosecutor, but, in a sense, defense counsel as well, as it is incumbent upon the court to be aware of any possible violations of the contemnor's due process rights, any possible defenses the contemnor may legitimately raise, and all relevant law. With defense counsel present, the court should have all relevant issues and any defenses brought to its attention by counsel.

173. When summary procedures were used below and a supplementary evidentiary hearing is necessary on appeal, it is frequently indicative that plenary procedures should have been used originally. This is not always so, however. There are instances where summary procedures could be justified by necessity, the need for immediate action by the court, but, for example, because the contemptuous conduct consisted of nonverbal behavior, the appellate court would need a supplemental hearing in order to review the facts de novo. In those cases, a supplemental hearing would not necessarily indicate that a summary hearing should not have been conducted in the first instance. Still, it should be a rare case where the necessity for immediate action is so great that a judge cannot take the time to hear any evidence regarding the facts. *Cf.* United States v. Moschiano, 695 F.2d 236, 252 (7th Cir. 1982) (when there is no real threat that the contempt will recur, the court should not interrupt the trial and employ summary procedures), *cert. denied*, 464 U.S. 831 (1983).

As to the second objection, it is unlikely that independent review of contempt cases would either substantially increase the number of appeals or take up a greater portion of the courts' time. Because the universe of contempt cases accounts for only a small percentage of the appellate courts' entire docket, the use of de novo review would not overburden the courts, nor would it impose a major financial expense on the system.[174] Moreover, the fact that appeals frequently are not taken from contempt convictions, at least where no custodial sentence was imposed, probably has more to do with the fact that it is often too costly to pursue an appeal than that present deferential standards of review decrease the chances of prevailing on appeal.[175] Thus, even if de novo review increases a contemnor's chances of obtaining a reversal on appeal, because of the time it would require and the financial deterrent, it would most likely have only an insubstantial effect on the number of appeals taken of cases with noncustodial sentences. Moreover, one could reasonably assume that virtually all contempt convictions resulting in custodial sentences, at the very least where the contemnor is an attorney, would be appealed regardless of the standard of review. Finally, even if a greater percentage of appeals would be taken if the standard of review were modified, in the long run the total number of appeals may not increase substantially because de novo review should minimize the number of contempt convictions in the trial court for two reasons. First, because the trial court will be aware that the appellate court will be looking over its shoulder with suspicion rather than deference, trial judges are more likely to exercise greater caution in their resort to the contempt power. Second, because independent review will result in clearer, less disparate standards, trial courts and the bar will have greater guidance and the courts will be better able to apply the law of contempt correctly. There should consequently be fewer contempt convictions to be appealed.

The argument that de novo review would take up a greater portion of the court's time even if the number of appeals does not increase, because it requires a more searching review and independent judgment, in addition to a possible supplemental hearing, is similarly unconvincing. Even under a deferential standard of review, the appellate court must review the entire record for an abuse of discretion or a finding that is clearly erroneous. Thus, unless a supplemental hearing is required, independent consideration would involve a similar review of the record but with the appellate court substituting its own judgment for that of the trial

174. As discussed above, at present, many contempt convictions never reach appellate courts. *See supra* notes 56-61.

175. *See supra* note 59 and accompanying text.

court. This should not require a great deal of additional time.[176]

Although supplemental hearings would require additional time and expense, they would not be necessary as often as it may at first appear. Where an appellate court can determine from the existing trial court record that the conduct in question does not rise to the level of contempt, the conviction may be reversed without a supplemental hearing. Indeed, a high percentage of contempt appeals are reversed on those grounds already. In addition, a supplemental factual hearing is not required every time a contemnor asserts a disagreement with the trial court's findings; an appellate court must decide that a "reasonable" factual dispute exists.[177]

To the extent supplemental hearings are necessary, of course they will involve a greater expenditure of judicial resources than will deferential review following a summary hearing. However, the argument that de novo review is too costly has been proffered with respect to appeals of lower court or agency determinations, when at least the rudimentary, if not the full panoply of, due process rights have been afforded the litigants. Whatever validity this argument may have in such circumstances probably is eviscerated by the anomalous deprivation of virtually all due process rights in a summary contempt proceeding. In this singular context, it would be difficult to conclude that the minimal increase in costs to the judicial system outweighs the Constitution's guarantee of a full and

176. The proposals suggested here for changes in the present scope of appellate review of contempt convictions are relatively modest when applied to those jurisdictions that provide for appeals from contempt citations. A number of states, however, do not permit appeals as of right from contempt convictions. *See supra* note 57; *see also* Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Brizendine v. State, 103 Tenn. 677, 54 S.W. 982 (1899); Wagner v. Warnasch, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956). In those states, obviously, changes in the appellate process would have to include more sweeping reforms in order to fulfill the purpose of appellate review, delimiting the contempt power, adequately.

177. An appellate court will only require a supplemental hearing when a reasonable factual dispute exists and when it is necessary to resolve the dispute in order to determine whether contemptuous conduct occurred. For example, if an attorney is held in contempt for making an insulting comment to the judge in a sneering, derisive tone, and the contemnor admits making the statement but denies the court's characterization of his tone of voice, a remand will not be necessary where the language is sufficiently egregious to constitute contempt irrespective of its tone, or is insufficient to rise to the level of contempt even assuming a derisive attitude.

On the other hand, if a trial judge holds an attorney in contempt for saying "fuck you" to the judge, and the stenographer's record reflects the same language the judge believed she heard, a supplemental hearing might be required if the attorney claims he said "thank you" and can supply affidavits from others present in the courtroom who heard him say "thank you." However, if the attorney claims he said nothing at all, or said something that sounds nothing remotely resembling what the judge and the stenographer believed they heard, and the attorney offers no witnesses to support his contention, the dispute would most likely not be considered reasonable and no hearing would be necessary.

fair hearing. If cost is to play a role in this determination, however, it must be recognized that whatever additional expense de novo review would impose has already been saved by the judicial system's permitting summary proceedings in the first instance.

Finally, the argument regarding needless reallocation of judicial authority and expenditure of time is circular. If one accepts the arguments offered in support of de novo review in contempt cases, the reallocation is critical, not needless. Furthermore, the Supreme Court itself has asserted that the use of independent review is less a reallocation of authority than it initially appears because, as noted above, appellate courts must review the entire record in any case to look for an abuse of discretion or clearly erroneous conclusion. Thus, the closer look at the record below could be characterized as a difference in the degree of scrutiny rather than a qualitative reallocation of authority.[178]

D. Resolving Procedural Deficiencies

1. The Extent to Which De Novo Review Cures the Procedural Deficiencies of Summary Contempt

The fundamental rights denied to a contemnor when the trial court acts summarily are the most basic guarantees of a fair trial—an impartial

178. In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Supreme Court described the conflict between the deferential standard of review of Federal Rule 52(a) and the independent review of the record required in first amendment cases as "more apparent than real." *Id.* at 499. Explaining how independent review does not differ significantly from review under Rule 52(a), the Court stated:

> The *New York Times* [*v. Sullivan*] rule emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire record. . . . Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due.

Id. at 499-500.

The Court went on to explain how even the "clearly erroneous" standard of Rule 52(a) is not a fixed standard but requires a stronger "presumption of correctness" in some cases than in others, depending on such factors as the nature of the evidence and the expertise of the trial court. *Id.* at 500.

Thus, the Supreme Court seems to be asserting that the distinction between the two standards of review in terms of the judicial effort required to utilize them is not absolute. The Court goes on to state that "[t]he difference between the two rules, however, is much more than a mere matter of degree." *Id.* at 501. While this last statement seems to contradict the previous discussion, it is beyond the scope of this Article to explore fully the degree of similarity between the two standards of review. Suffice it to say that whether the difference is qualitative or merely one of degree, the Supreme Court has made it clear that even under a deferential standard of review the Court spends a roughly equivalent amount of time and effort examining the lower court's findings as it does when reviewing the record independently.

fact-finder; the right to counsel; notice and sufficient time to prepare, and the right to present, a defense; the right to testify; and the right to cross-examine principal witnesses.[179] De novo review compensates for these violations of the contemnor's rights to varying degrees. Although de novo review may not always be a complete substitute for full due process at the trial level, it, along with the appellate court's broad authority and obligation to supplement the record where necessary, can often come close to remedying the procedural infirmities in most summary contempt proceedings. For example, the systemic bias and lack of institutional checks created by allowing the "aggrieved" judge to serve as prosecutor, witness, and fact-finder, could be corrected on appeal as a panel of new judges[180] would consider the findings anew.[181] Likewise, the denial of counsel would be cured by allowing representation by counsel on appeal.

179. *See supra* notes 39-41 and accompanying text.

180. All state and federal appellate court panels reviewing criminal and quasi-criminal convictions are comprised of more than one judge. The consideration de novo by a panel of judges of a criminal conviction raises the question of whether the requirement of jury unanimity of verdicts in criminal cases has any implications for contempt. That is, must an appellate panel hearing the matter anew be unanimous in finding a contemnor guilty of contempt? The federal Constitution does not require unanimity in a guilty verdict of a twelve person jury, but does require unanimity from a six member jury in criminal cases. Burch v. Louisiana, 441 U.S. 130 (1979). In addition, some states require unanimity of a twelve member jury by court rule, *see* N.J. COURT RULE 1:8-9 (1983), or by state constitutional guarantee. *See* State v. Lipsky, 164 N.J. Super. 39, 45, 395 A.2d 555, 558 (App. Div. 1978).

Obviously, a jury unanimity requirement has no direct application to a panel of judges. One of the policy reasons underlying the unanimity requirement, however, is that it seeks to ensure the constitutional standard of proof beyond a reasonable doubt. *See* M. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 24-27 (1977). It has been suggested, on the other hand, that jury unanimity serves other functions instead, such as promoting the common sense judgment of a group of laypersons, a sense of community participation, and shared responsibility. Burch v. Louisiana, 441 U.S. at 135. It is beyond the scope of this Article to discuss the various purposes unanimity may serve; but to the extent that it serves to ensure compliance with the "beyond a reasonable doubt" standard, it may also be applicable to a group of judges charged with finding fact. To the extent that one judge of three finds a reasonable doubt, it would be difficult to conclude that a contemnor is guilty beyond a reasonable doubt.

Indeed, the requirement of a unanimous verdict may more logically apply to a three judge panel than to a layperson jury. First, judges have a more sophisticated understanding of the definition of reasonable doubt and are less likely than jurors to err on the side of finding reasonable doubt where none exists. Second, when one member of a three judge panel is not convinced beyond a reasonable doubt that the facts warrant a conviction, his decision constitutes one-third of that panel, equivalent to four members of a twelve person jury.

181. Nevertheless, there is always a question as to whether even an appellate judge can ever be truly impartial in her consideration of a contempt matter because, in a sense, the resolution of every contempt citation sets the limits of all judges' prerogatives to maintain order and authority in the courtroom. Moreover, because the appellate judge presides in the same jurisdiction as the "aggrieved" judge and most likely considers herself a colleague, there always exists the potential, or at least the appearance, of cronyism. *See* Note, *Criminal Law—Contempt—Conduct of Attorney During Course of Trial*, 1971 WIS. L. REV. 329, 351 (the potential

Even indigents who could not afford counsel would retain the right to appointed counsel through at least one level of appeal.[182]

Where the contemnor was not afforded notice or the opportunity to prepare a defense below, de novo appellate review would grant additional time to the appellant to "cool off," marshal the facts, research the law and prepare a defense. Of course, where the defense on appeal relies on evidence not introduced at the trial level because of a lack of time or denial of representation by counsel or refusal to allow the cross-examination of witnesses, the deficiency would not be cured without a supplemental factual hearing.[183] In particular, when the contemnor finds it necessary to cross-examine the trial judge, whose perceptions and observations form the basis of the contempt citation, de novo review, along with a supplemental factual hearing, would provide that opportunity to the contemnor.

Courts must be circumspect in delineating the conditions that would permit a contemnor to call and cross-examine the trial judge who imposed the contempt summarily. If trial judges were subject, as a matter of course, to being cross-examined at a supplemental hearing whenever they exercised the summary contempt power, they would understandably be reluctant to impose contempt sanctions, even if punishment was clearly called for.[184] Thus, the mere fact that an appellate court reviews the trial judge's conclusions on the record of the original contempt proceeding should not expose the judge routinely to cross-examination for bias or personal embroilment. In such circumstances, at least where the contemptuous conduct consists of unambiguous language appearing clearly on the record, we should be able to rely on appellate courts to

for, or appearance of, judicial bias even on appeal is inescapable). Although de novo review cannot cure this problem, it does make it far more likely that the factfinder will be impartial.

182. Douglas v. California, 372 U.S. 353 (1963).

183. *See infra* notes 214-31 and accompanying text.

184. In general, courts are split concerning the propriety (with respect to the opposing party) of calling a judge as a witness in a cause not on trial before her. *Compare* Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973) (holding trial judge's testimony as expert witness on behalf of opposing party with respect to matters that took place before him in his judicial capacity prejudicial) *and* Commonwealth v. Connolly, 217 Pa. Super. 201, 269 A.2d 390 (1970) (judge's testimony in prosecution for blackmail as to matters previously stipulated to by accused overly prejudicial) *with* Woodward v. City of Waterbury, 113 Conn. 457, 155 A. 825 (1931) (testimony of two judges in personal injury action concerning prior testimony of deceased party at former trial held admissible). With respect to whether a judge may be compelled to testify, compare *Woodward*, 113 Conn. 457, 155 A.2d 825 (concluding that while calling of judges should be avoided whenever reasonably possible, judges have no privilege to refuse to testify) and State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (N.J. 1943) (same) with Hale v. Wyatt, 78 N.H. 214, 98 A. 379 (1916) (judge has personal privilege to refuse to testify as to matters before her in previous trial of same case).

ignore the trial courts' findings of contempt[185] and make their judgments independently under a de novo standard of review. So long as the appellate court does not rely upon the trial court's findings of fact or conclusions of law, where they are contested, examination by the contemnor of the trial judge for any purpose simply is not relevant to the question of whether the conduct in question was contemptuous.[186]

On the other hand, when an appellate court reviews a transcript containing findings of fact that are reasonably contested,[187] including such subtleties as the contemnor's demeanor, tone of voice, or facial gestures, there seems little choice but to permit the contemnor to investigate through cross-examination the potential for the trial judge's flawed perception and prejudice.[188] Otherwise, the appellate court would have no basis for exercising its independent judgment as to the contested facts that constituted the contempt.[189]

Of course, for de novo review to be a truly effective safeguard against abuse or misuse of the contempt power in an individual case, the

185. *See infra* notes 206-12 and accompanying text.

186. Thus, for example, in remands of summary contempt convictions for new hearings with plenary procedures, courts uniformly and correctly hold that the contemnor may not introduce evidence addressing the alleged bias of the trial judge. *See* Howell v. Jones, 516 F.2d 53, 58 (5th Cir. 1975) (holding that alleged bias of trial judge was "not material to the issue of whether Howell's conduct was actually contumacious"), *cert. denied*, 424 U.S. 916 (1976); Offutt v. United States, 232 F.2d 69, 72 (D.C. Cir.) ("in the exercise of a sound discretion the hearing judge may . . . prevent placing on trial . . . the judge before whom the alleged contempt occurred"), *cert. denied*, 351 U.S. 988 (1956); United States v. Lumumba, 598 F. Supp. 209, 212 (S.D.N.Y. 1984).

187. *See supra* note 177.

188. *Cf.* State v. Green, 783 S.W.2d 548, 549-50 (Tenn. 1990) (on remand of summary contempt convictions for plenary hearing, where trial judge in original proceeding testified against accused, and portions of transcript from original proceeding read into record, consideration given to evidence of trial judge's personal antagonism against contemnor held inadequate); State v. Pothier, 104 N.M. 363, 366-67, 721 P.2d 1294, 1297-98 (1986) (in jury trials for contempt, where portions of transcript of original contempt occurrence read into record, contemnors would have been permitted to call as witness the judge before whom the contempt was committed). Nevertheless, as a tactical matter, a contemnor might often be better off calling other witnesses to the events at issue to contradict the trial judge, rather than attempting to impeach the trial court's findings through cross-examination of the presiding judge. *See also* United States v. Seale, 461 F.2d 345, 372 (7th Cir. 1972) (hearing judge in remand of contempt conviction may decide it is "unnecessary" for contemnor to call trial judge as witness). In any event, even if trial judges were in fact deterred to some degree from exercising the summary contempt power as a result of the disinclination to subject themselves to the possibility of cross-examination in an appellate proceeding, it must be remembered that such self-censorship would not affect the trial court's willingness to charge for contempt, only to convict the contemnor summarily.

189. This, of course, assumes that the appellate court would affirm the contempt conviction were it to agree with the trial judge's findings of fact. If the appellate court were going to conclude that the conduct in question, even as described by the trial court, were not contemptuous, obviously there would be no need for a supplemental hearing.

contemnor must appeal her conviction.[190] But because of the time and expense required by the pursuit of an appellate remedy, many contempt convictions will not be appealed despite the fact that de novo review offers a more effective remedy.[191] Moreover, the possibility that an appellate court might impose a harsher sentence could tend to deter the exercise of appellate remedies even more.[192] Thus, the possibility that a trial court may employ summary proceedings might continue to chill zealous advocacy despite the availability of de novo review.

On the other hand, with respect to the deterrent effect of the additional time and expense required by independent review, the deterrence of advocacy might not be much greater if de novo appellate review followed summary proceedings than if deferential review followed plenary proceedings below. Although de novo review may add the expense of hiring an attorney, and the time and expense involved in conducting a factual hearing to supplement the record for appeal, those expenses would not be in addition to the expenses of a trial, because the contemnor never would have had the opportunity to hire an attorney and prepare and present a defense at his initial summary hearing.[193] The costs en-

190. As discussed throughout this section, de novo review has significant salutary effects, including the benefits of the appellate courts' expertise in the elaboration of constitutional norms, as well as the probable deterrence of trial courts' misuse of the contempt power, and a reduction of the chilling effect on advocacy.

191. *See supra* notes 59 and 175 and accompanying text.

192. Whether an appellate court, after independently reviewing a contempt conviction, could constitutionally increase a contemnor's sentence is beyond the scope of this Article. Any increase in sentence will be presumed improper unless the court places on the record facts justifying the increase, such as conduct that took place subsequent to the original sentencing. North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969). *But see* Alabama v. Smith, 109 S. Ct. 2201 (1989) (the *Pearce* presumption of vindictiveness does not apply when a sentence imposed after trial exceeds that imposed after a guilty plea).

Some cases suggest, however, that *Pearce* may not apply to a de novo trial following a non-jury trial in those states that have a two-tiered trial system. *See* Lemieux v. Robbins, 414 F.2d 353 (1st Cir.), *cert. denied*, 397 U.S. 1017 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. DeBonis, 58 N.J. 182, 276 A.2d 137 (1971). A de novo trial and de novo consideration by an appellate court are not identical, however. With de novo appellate review, unlike a de novo trial, the defendant does not always have the opportunity to present a defense, or indeed any evidence whatsoever, if the appellate court deems the record of the original hearing sufficient.

Furthermore, not only constitutional considerations, but policy considerations as well, might lead the courts to conclude that a defendant's sentence should not be increased after she exercises her right to appeal. *See, e.g.*, State v. Vasky, 203 N.J. Super. 91, 101, 495 A.2d 1347, 1352 (App. Div. 1985) (in New Jersey, where a de novo standard of review is applied to appellate review of contempt convictions, courts have relied on policy reasons, declining to reach the constitutional issue, in concluding that a contemnor's sentence may not be increased on appeal).

193. If a contemnor was afforded a plenary hearing below, she should still be granted de novo review on appeal because it is necessary to further the substantive goal of norm elabora-

tailed in de novo review of summary proceedings would instead be roughly equivalent to the time and expense spent by a contemnor who was afforded a plenary trial in the first instance.[194]

Ironically, because de novo review after summary proceedings only permits the contemnor to defend himself on the appeal rather than at the original hearing, that combination of procedures may actually reduce the deterrence of advocacy even more than plenary proceedings followed by an appeal utilizing a deferential standard of review.[195] When a summary hearing is followed by de novo review, a contemnor will have the benefit of waiting to see what sentence the judge imposes before determining whether to hire an attorney and conduct a complete defense. If the contemnor had an opportunity at trial to conduct a comprehensive defense, followed by an appeal under a deferential standard of review, she would be compelled to defend herself against the possibility of serious sanctions. Thus, with de novo review, the contemnor would be given the opportunity to make an informed choice as to whether she wishes to invest substantial time and effort into her defense against the contempt. This

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tion, even if it is not needed to cure procedural deficiencies. In that case, the contemnor would not be required to invest additional time and expense on the de novo appeal, because she would have had the opportunity to present a full defense below, and the de novo appeal would only require the appellate court to apply a different standard of review.

194. Because a broad spectrum of contempt proceedings is available to the trial court, however, many times the trial judge will conduct a hybrid hearing affording the contemnor some due process protections—the right to counsel, time to prepare a defense, and the opportunity to call witnesses—but not others—an independent judge. *See In re* Yengo, 84 N.J. 111, 417 A.2d 533 (1980), *cert. denied*, 449 U.S. 1124 (1981); Holt v. Virginia, 381 U.S. 131, 136 (1965). The contemnor thus must sometimes bear the costs, both in time and money, of a plenary hearing without a real opportunity for acquittal or impartial fact-finding because of the lack of an impartial judge. In cases like this, where the contemnor is afforded anything less than full due process protections, a de novo appeal will inevitably require some duplication of the contemnor's efforts to defend himself, and thus impose some added investment of time and expense. The additional burden, however, may not be as great as it would at first appear. For example, when de novo appellate proceedings might have the effect of curing the deficiencies of an otherwise plenary hearing before the "offended" judge, the additional burdens of independent review would be minimal as the independent standard of review would require little, if any, additional effort by the party or her attorney; the existing record would reflect all of the pertinent facts and all that would be needed would be the impartial fact-finder—the appellate court—to judge the evidence anew.

In fact, this is a persuasive argument against ever allowing an "aggrieved" judge to preside over plenary proceedings below. Once a judge determines that plenary proceedings are appropriate, there is no reason not to have the matter heard by an independent judge, except for the convenience of the court, and convenience alone is never sufficient justification for the curtailment of due process. *See* FED. R. CRIM. P. 42(b) (not permitting "offended" judge to sit on indirect contempt cases without contemnor's consent).

195. Obviously, the best combination for the contemnor is plenary procedures below followed by independent appellate review.

might be very effective in reducing the chilling effect of summary proceedings.

Even if de novo review were utilized, despite its beneficial qualities, it cannot put the contemnor in exactly the same position that she would have been in were she granted the full panoply of due process protections at the original hearing. For even if a de novo appellate hearing includes all of the due process protections of a fair trial, the appellant has been denied "two bites at the apple"—the opportunity for a full-fledged and fair decision at the trial level prior to appellate consideration—that are accorded others charged with punishable offenses.[196] It is clear, how-

196. Whether a contemnor, or indeed any criminal defendant, has any entitlement to an original finding of guilt or innocence made fairly at the trial level rather than the appellate level is unclear. In Hicks v. Oklahoma, 447 U.S. 343 (1980), the defendant had a state law entitlement to have his sentence imposed by a jury, but the law under which the jury sentenced him, which mandated a forty-year sentence, was found unconstitutional subsequent to his sentencing. In that case, the Supreme Court held that the matter must be remanded to the trial court so that the defendant could have the opportunity to be properly sentenced by the jury. The Court reasoned that the defendant had a right to give the jury the opportunity to impose a lesser sentence. Because the appellate court could not increase a sentence of the trial court, it could only reduce it. Subsequently, however, in Cabana v. Bullock, 474 U.S. 376 (1986), the Supreme Court held that a defendant sentenced by a jury to death did not have the right to be resentenced by the jury where, subsequent to the imposition of sentence, the Supreme Court rendered a decision forbidding the imposition of the death penalty upon a felony murderer "who does not himself kill . . . ." Enmund v. Florida, 458 U.S. 782, 797 (1982). *Cabana* was distinguished from *Hicks* on the ground that the defendant in *Hicks* at the time of his sentencing had a state law entitlement to be sentenced by a jury, whereas the defendant in *Cabana* did not have any right to have the "Enmund" factor found by a jury. Although it could be argued that the holding in *Cabana* does not preclude a defendant from having the *Enmund* finding made by a trial court, and thus does not deny him his "two bites at the apple," it does preclude him from having his original fact-finder, the jury, determine his sentence.

Thus, according to *Hicks* it would seem that when a criminal defendant has some entitlement to be sentenced by a jury, due process would be violated by allowing an appellate court to make that determination.

An argument could be made that the contemnor has a right to have factual determinations made by a trial court because that court, as opposed to an appellate court, has developed expertise in making such determinations. This claim could be satisfied by having an appellate court remand any factual disputes to a trial court for a supplemental evidentiary hearing while making the final adjudication itself upon de novo review. Still, the contemnor convicted summarily will have only one level of judicial consideration instead of two.

Indeed, the determination of whether a criminal defendant has a due process right to "two bites at the apple" has more serious implications as applied to contempt than criminal convictions generally. For, if a summarily convicted contemnor is entitled to a fair proceeding in the trial court, it would be tantamount to doing away with summary proceedings altogether. That is, in order to ensure two tiers of review in every instance of summary contempt, an appellate court would have to either reverse the contempt conviction or remand for plenary proceedings. Thus, a summary conviction ultimately could never be sustained. Even if this right is recognized, presumably it would be overcome by the judiciary's need to utilize summary procedures which, in contempt cases, has overcome such established fundamental constitutional rights as representation by counsel.

ever, that a contemnor is in fact losing something valuable by not having the original chance with full due process rights for acquittal in the trial court prior to appeal. That is, the contemnor has been denied the opportunity to present a full defense before an impartial trier and therefore any realistic chance of being acquitted by the trial court. Because the state could not appeal such an acquittal, even de novo appellate review cannot wholly substitute for a fair proceeding in the trial court. Obviously, to the extent that summary procedures are permitted at all,[197] we must accept the fact that a contemnor's right to a full and fair proceeding followed by a fair appeal may be abridged where necessity dictates. To say that the contemnor's right to two bites at the apple could never be abridged would be to do away with summary procedures altogether.[198] De novo review, however, should not be held up as a justification for the denial of due process below, as any suspension of due process can only be tolerated, if at all, because of necessity and the lack of any factual dispute.[199]

On the other hand, whenever an appellate court determines that summary procedures were unconstitutional, because, for example, they were not justified by necessity, because the judge could not determine the facts without a hearing, or because the judge was personally embroiled,[200] there is no longer any justification for depriving that contemnor of her right to two full tiers of judicial consideration. In those circumstances, permitting the appellate court to "remedy" the constitutional violation below by employing de novo review, even with a supplemental hearing, probably is unwise; the better procedure in that case would be to remand the entire matter to the trial court for a plenary adjudication so that the contemnor is assured the right to a constitutionally fair trial.[201]

There are a number of other reasons why an appellate court should reach the issue of whether summary proceedings were unconstitutional

197. A very strong argument can be made that summary procedures result in an unjustifiable abridgement of due process and should not be permitted at all. The constitutionality of summary procedures, however, is a complex question beyond the scope of this Article. For a critical examination of the use of summary procedures, see articles cited *supra* note 30.

198. *See supra* note 196.

199. *See supra* notes 27-38.

200. *See supra* notes 140-41.

201. When the appellate court itself reverses a summary contempt conviction for substantive reasons, *i.e.*, the conduct in question did not rise to the level of contempt, the appellate court may nevertheless rule on the lower court's use of summary proceedings as well, in order to provide sufficient guidance to lower courts as to the appropriate use of the summary contempt power. An outright reversal of the trial court's determination to use summary proceedings, rather than a mere declaratory statement, would be more likely to have a deterrent effect on the trial court's improper resort to summary adjudications.

in a particular case, and should remand for a plenary adjudication[202] once it determines that the use of summary procedures in fact violated due process. First, the abridgement of the fundamental constitutional right to a fair criminal trial resulting from summary contempt proceedings is so egregious that it should never be viewed either as harmless error[203] or remediable even by independent appellate review. Indeed, because so few procedural rights are accorded the contemnor in summary proceedings, the limited rights that remain must be preciously guarded. Moreover, if the appellate court will have to remand to the trial court in order to supplement the record with factual findings in any event, it can as easily remand for a full plenary adjudication by the trial court because a new trial will not require substantially more time than a factual hearing. As the purpose of de novo review is remedial, it would be perverse to use de novo review as a justification for trial courts to violate due process in the first instance because it may be "corrected" on appeal.

Another factor that makes de novo review inferior to a fair hearing in the first instance is that a contemnor is forced to suffer the stigma of a conviction and all of its collateral consequences during the entire pendency of the appeal. That burden could be alleviated in part by affording contemnors an automatic stay of any punishment imposed as a result of the contempt citation until the matter is resolved on appeal. Still, even if a stay were required, and even in those states that have determined that contemnors will not suffer any of the ordinary disabilities associated with criminal offenses,[204] certain collateral consequences such as negative publicity, professional embarrassment, and loss of job opportunities are inevitable,[205] and are likely to have some chilling effect on advocacy.

202. This is to be distinguished from a remand to a trial court to make findings of fact in order to supplement the record for de novo review on appeal.

203. *See, e.g.*, Satterwhite v. Texas, 486 U.S. 249 (1988) (certain sixth amendment violations that pervade the entire criminal prosecution fall within the category of constitutional violations that cast so much doubt on the proceedings that they may never be considered harmless); United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980) (comments that penalize a defendant for the exercise of his right to counsel and "strike at the core of his defense" can never be treated as harmless error).

204. *See, e.g., In re* Buehrer, 50 N.J. 501, 516-17, 236 A.2d 592, 600-01 (1967) (a person convicted of contempt in New Jersey does not acquire a criminal record with the stigma and disabilities associated therewith, such as disqualification for jury service, ineligibility for civil service, forfeiture of public office or position, or impaired credibility as a witness).

205. Even if the state in which the contemnor resides imposes no disabilities on a contemnor whose conviction is pending appeal, other states' practices may impose some kind of punishment during the pendency of the appeal. For example, the attorney in *In re* Daniels, 118 N.J. 51, 570 A.2d 416, *cert. denied*, 59 U.S.L.W. 3326 (1990), who practiced and was held in contempt in New Jersey but resided in New York, was denied bar admission in the State of

Finally, de novo review, even with supplementation of the record to allow the appellant to introduce additional evidence, will not always cure the deficiencies below, as the record may be hopelessly tainted as a result of the improper procedures. For although supplementation of the record does serve to bring to the appellate court's attention significant facts that were not made part of the trial record, and gives the contemnor the opportunity to call and cross-examine principal witnesses, including perhaps the trial judge, for bias or mistaken perception,[206] it is difficult to erase the harm that may already have been done by a judge who has been either personally embroiled in the incident[207] or involved to the extent that he has perceived an affront to the dignity of the court. Furthermore, the record below may be tainted because the accused, who is unprepared as well as uncounseled,[208] may have said things in the heat of the moment, in response to a charge of contempt, that might be mistaken for a demonstration of willfulness to obstruct or a lack of good faith, which never would have found its way into the record in any ordinary proceed-

New York during the pendency of the appeal of his contempt citation, which, as of the writing of this Article, has lasted more than three years.

Moreover, contempt proceedings may lead to disciplinary actions against attorneys, including disbarment proceedings. *See In re* Isserman, 9 N.J. 269, 87 A.2d 903 (1951) (permanently disbarring attorney as a result of summary contempt convictions which were affirmed by the United States Supreme Court in Sacher v. United States, 343 U.S. 1 (1952)), *cert. denied*, 345 U.S. 927 (1953); Note, *Contempt Citation as Evidence of Unfitness to Practice Law*, 13 J. LEGAL PROF. 271 (1988).

206. *See supra* notes 184-88 and accompanying text.

207. *See, e.g.*, People v. Ravitz, 26 Mich. App. 263, 182 N.W.2d 75 (1970) (where judge inadvertently admitted during the trial that he was angry with the attorney appearing before him for having written a letter of complaint to the University of Michigan about the manner in which the judge conducts hearings). Obviously, in most cases where the judge has acted with bias toward a particular attorney, it will not be as explicit as it was in *Ravitz*. In fact, during the contempt hearing, the judge in that case conceded that it was "unfortunate" that he referred to the article by the University of Michigan and admitted that he was "a little peevish on that day on that subject." *Id.* at 268-69, 182 N.W.2d at 78.

208. Even attorneys who are held in contempt need representation by counsel, particularly if they are in the midst of complex trials, focusing all of their concentration on the defense of their clients, when suddenly charges are lodged against them. *See, e.g., In re* Lependorf, 212 N.J. Super. 284, 293, 514 A.2d 1335, 1341 (App. Div. 1986) (because contemnor had undertaken the "awesome responsibility of representing a defendant in a capital case" and "was surprised by the sudden initiation of contempt proceedings against her, [her] own statements were vague and somewhat disjointed"); *In re Daniels*, 118 N.J. at 57, 570 A.2d at 420 (attorney who was charged with contempt during heated pre-trial arguments requested a few moments to collect himself and, when that was denied, requested counsel). In fact, there are times when an attorney's defense against a contempt charge may result in a conflict of interest with her client. *See In re Lependorf*, 212 N.J. Super. at 293, 514 A.2d at 1341 (attorney's violation of court order to turn over witness list to prosecutor did not constitute contempt where list may have included inculpatory witnesses). For these reasons, courts have frequently concluded that the better course is to wait until the trial has concluded before trying the attorney for contempt.

ing. In fact, attorneys' responses to judges when summarily cited for contempt have been used by courts to establish their mens rea for the contemptuous conduct charged.[209] Thus, de novo review, even along with a supplemental factual hearing, will not cure this fundamental lack of fairness unless the appellate court also disregards those tainted portions of the transcript, such as statements of the contemnor.

Indeed, the circumstance of a summary contempt trial may also implicate the contemnor's fifth amendment privilege against self-incrimination, because the accused contemnor who is not represented by counsel has no practical alternative but to waive that privilege and speak on his own behalf in order to present any defense at all.[210] Even where the contemnor has an attorney available at a summary hearing, he may still feel constrained to speak on his own behalf, not having had sufficient time to prepare or be properly counseled by his attorney. Without the time to speak to potential witnesses in the courtroom to see if they may be called to testify in place of the contemnor, there may be no other way of challenging the judge's factual assertions, especially as to the contemnor's intent.[211]

The most important point is that even though de novo review goes a long way toward curing the deficiencies of diminished due process pro-

209. See *In re Daniels*, 118 N.J. at 69-70, 570 A.2d at 426, where the trial court relied on the contemnor's spontaneous explanation of his behavior while defending himself as evidence of his wrongful intent. Of course, where a contemnor engages in conduct or makes statements in the course of defending himself that would in and of themselves constitute contempt, the court is not barred from charging him with an additional instance of contempt, for which the contemnor should be tried. Conduct that occurs during one's attempt to defend oneself, however, should not provide the basis for an inference of intent relating to the prior conduct.

210. This is unlike an uncounseled defendant charged with a disorderly persons offense, facing less than six months of imprisonment, because even though that defendant may also be forced to speak in order to defend himself, his words in the courtroom do not bear so directly on his intent to commit the crime. While a non-contempt defendant's demeanor and statements in the courtroom will go to his credibility as a witness, a contemnor's attitude and demeanor in court will often bear heavily on the court's finding as to his intent to commit contumacious conduct. Also, in contempt, unlike other more clearly "definable" crimes, intent is often more difficult to prove because there are so few physical "steps" or actions necessary to complete the crime. Finally, when an uncounseled defendant charged with a disorderly persons offense chooses to remain silent in the courtroom, the contemnor's failure to speak or even to apologize may well be taken as a further effort to flout the authority of the court and used as evidence against him to prove the contempt charge itself.

211. A contemnor's failure to call witnesses at a summary proceeding, in the rare circumstance that the opportunity is made available, should not be construed as a waiver of that right. If the contemnor is offered the "opportunity" to call witnesses without having the time to speak with them before they will be called as witnesses, the contemnor is effectively denied the right to call witnesses. Indeed, in any other case, if an attorney divulged the names of witnesses with whom he had not spoken and did not know the content of their testimony, let alone called those witnesses, it would undoubtedly be considered ineffective assistance of counsel if not professional malpractice.

tections, the availability of de novo review should not be used as a justification for the use of summary procedures; the suspension of full due process rights can only be justified by absolute necessity, not by the convenience of the court. The utilization of summary procedures in contempt cases can be viewed in either of two ways.[212] In the first model, contempt is viewed as a "crime in every fundamental respect"[213] and, as such, the alleged contemnor would ordinarily be entitled to full plenary proceedings with identical due process protections to those accorded other criminal defendants, except where necessity and the fact that the judge observed the conduct could justify eliminating particular due process rights. Alternatively, one could view summary proceedings in contempt cases as the norm, an exception carved out of the normal constitutional requirements of due process, justified by necessity, and proceed to determine which procedural protections would be absolutely necessary to protect the contemnor in a specific proceeding. In either case, the Constitution is allocating power by carving an exception out of the normal constitutional requirements and allowing proceedings that involve a possible deprivation of liberty without full due process, so that the power of the courts may be sustained. In order to maintain a balance of the allocation of judicial resources, appellate courts need to compensate for the suspension of due process rights at the trial level by engaging in de novo review, as the urgency justifying the suspension of due process no longer exists on appeal.

2. *The Need for Broad Authority and Obligation of Appellate Courts to Supplement the Record*

In order to exercise de novo review, an appellate court must have access to a record that sufficiently exposes the facts to enable an independent judgment to be made. Even with a discretionary standard of review, an appellate court needs an adequate record to determine whether the trial court has abused its discretion or whether there is sufficient evidence to support a contempt conviction.[214] Thus, most jurisdic-

212. This point is also made by Professor Kuhns. *See* Kuhns, *supra* note 3, at 71-74.

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

214. *See, e.g.*, Miller v. Vettiner, 481 S.W.2d 32, 35 (Ky. Ct. App. 1972) ("it is imperative, incident to the right of appeal, that the facts be shown by a proper record"); Fisher v. Pace, 336 U.S. 155, 167-68 (1948) (Murphy, J., dissenting) ("[a] printed record cannot reveal inflections and gestures, the tenor of a judge's conduct of a trial . . . .").

As one commentator noted, "Unfortunately, most appellate tribunals content themselves with merely determining whether the facts set out in the findings are sufficient to show a contempt. In other words, they accept as conclusive the findings made by the trial judge and pass only upon their sufficiency." Lane, *The Contempt Power v. The Concept of a Fair Trial*, 50 KY. L.J. 351, 392 (1962).

tions at least require the trial court to certify that the judge personally observed facts sufficient to support a conviction.[215] Although this requirement has, for the most part, been enforced,[216] the deference accorded trial court determinations under the abuse of discretion standard has led a number of courts to accept very conclusory findings with regard to the factual bases of contempt citations.[217]

Indeed, the record of summary contempt proceedings generally available to appellate courts frequently is not adequate even for a rigorous determination of the sufficiency of the evidence.[218] When the contempt is not based on language unambiguously set forth in the contemporaneous transcript,[219] but depends instead on facial expres-

215. *See* CAL. CIV. PROC. CODE § 1211 (West 1972); OR. REV. STAT. § 33.030 (1989); FED. R. CRIM. P. 42(a). Because these statutes generally require nothing more than a statement of facts, courts and commentators rarely mention the need for a specification of legal standards. *See* Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974); Note, *Criminal Law—Contempt—Conduct of Attorney During Course of Trial*, 1971 WIS. L. REV. 329, 350-51.

216. *See* United States v. Marshall, 451 F.2d 372, 374 (9th Cir. 1971); Pietsch v. President of the United States, 434 F.2d 861, 864 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Tauber v. Gordon, 350 F.2d 843, 845 (3d Cir. 1965); State *ex rel.* Spencer v. Howe, 281 Or. 599, 576 P.2d 4 (1978).

217. *See, e.g.*, *In re* Daniels, 118 N.J. 51, 570 A.2d 416, *cert. denied*, 59 U.S.L.W. 3326 (1990) (despite affidavits from those present in courtroom stating that they were close to contemnor but did not hear him laugh, appellate court accepted trial judge's certification that contemnor laughed); *In re* Stanley, 102 N.J. 244, 507 A.2d 1168 (1986) (trial judge characterized contemnor's facial expressions as smirking, which contemnor denied); Kotowski v. Kotowski, 3 Ill. App. 3d 231, 278 N.E.2d 856 (1971) (where no record of contempt proceedings exists, reviewing court is bound to accept truth of court's allegations as set forth in written contempt order); Parmelee Transp. Co. v. Keeshin, 292 F.2d 806, 809-10 (7th Cir. 1961) (trial court's finding of contemnor's sneering held sufficient, but finding that he was laughing at the court reversed as being merely a conclusion).

218. The record from a plenary proceeding may also be insufficient to permit proper appellate review under either an abuse of discretion or an independent judgment standard. In those circumstances, although the transcript of the contempt proceeding is likely to contain a much more detailed explanation of the facts than if the contempt were tried summarily, it still might be inadequate to capture any bias or misperceptions of the judge who has herself witnessed the events in question. *See infra* note 223 and accompanying text.

219. By unambiguous language set forth in the transcript, I am referring to language that the court stenographer has transcribed as spoken by the contemnor. Of course, the trial judge can make her own perceptions part of the contemporaneous record simply by stating for the record her own characterization of the events. Similarly, a judge's order of contempt, certifying the facts upon which the contempt is based, is also considered part of the record on appeal from which an appellate court can judge the sufficiency of the evidence. *See, e.g.*, Sacher v. United States, 182 F.2d 416, 431 (2d Cir. 1950) (certification stated that counsel "[u]rged one another on to badger the Court . . . [and] made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court"), *aff'd*, 343 U.S. 1 (1952); *In re* Osborne, 344 F.2d 611, 612-13 n.1 (9th Cir. 1965) (certification asserted that "[t]he statements . . . were stated . . . in a tone of voice and general manner which must be characterized as surly, defiant, and contemptuous"); *Parmelee Transp. Co.*, 292 F.2d at 809 (certification stated that "Lee A.

sions, physical gestures, and/or tone of voice,[220] there is no way of testing the accuracy of the facts as to the possibility either of misperception or biased interpretation by the trial judge.[221] Moreover, unlike the review of other kinds of trials where the trial judge is the fact-finder, in summary contempt cases there is almost always a real potential for bias on the part of the judge.[222] Although the record will occasionally demonstrate judicial bias sufficient to raise some question as to the impartiality of the judge, or even to require a remand for a new hearing before a different court, appellate courts ordinarily would have no way, short of such evidence, of testing the accuracy of the trial judge's findings.[223]

In any event, where the trial record does not adequately disclose the specific facts that demonstrate a contempt was committed, as opposed to the judge's conclusions, the appellate court should be scrupulous in reversing the conviction.[224] Where the record reflects the trial judge's statements regarding facts not otherwise appearing on the record, such as physical gestures or tone of voice, something more should be required than the mere recitation by the trial court of such facts. In those circumstances, appellate courts should insist upon some indication in the contemporaneous transcript that the gestures occurred, such as warnings by

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Freeman conducted himself in a contumacious manner by employing a tone of voice and an attitude indicating contempt and defiance of the Court, by sneering and laughing").

220. *See, e.g.*, Rollerson v. United States, 343 F.2d 269, 276-77 (D.C. Cir. 1964) (contempt consisted of throwing water pitcher at prosecutor); United States v. Hall, 176 F.2d 163, 165-69 (2d Cir.) (shouting at judge in loud, angry voices), *cert. denied*, 338 U.S. 851 (1949); Comstock v. United States, 419 F.2d 1128, 1130-31 (9th Cir. 1969) (contemnor failed to rise and approach bench after being ordered to do so); *In re Daniels*, 118 N.J. 51, 570 A.2d 416 (body language and laughter showed disrespect for court); *In re* Hallinan, 71 Cal. 2d 1179, 1180 n.2, 459 P.2d 255, 256 n.2, 81 Cal. Rptr. 1, 2 n.2 (1969) (sarcastic tone of voice and disrespectful gestures).

221. *See supra* note 208.

222. *See, e.g., Sacher*, 343 U.S. at 12 ("It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority.").

223. This is another reason that de novo review is not only preferable to an abuse of discretion standard, but is necessary in summary contempt cases. Moreover, de novo review provides a much greater opportunity for testing the trial judge's perceptions for mistake and bias through supplementation of the appellate record. Of course, an appellate court can also supplement the record when reviewing under a discretionary standard. The court rules of most jurisdictions permit supplementation of the appellate record when a party questions whether the record fully discloses what occurred in the court below. *See* N.J. COURT RULE 2:5-5 (1983). Even in jurisdictions that apply an abuse of discretion standard, perhaps the appellate court should permit a supplementation of the record if the defendant can demonstrate bias, but certainly the court's authority to do so is greater when the standard of review is de novo.

224. *See* Tauber v. Gordon, 350 F.2d 843 (3d Cir. 1965); *In re* McConnell, 370 U.S. 230 (1962); Parmelee Transp. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961).

the judge to cease,[225] or an apology by the contemnor admitting an angry tone of voice.[226] In the absence of these kinds of objective indicia that the challenged expressions in fact happened, contempt convictions would be rendered unassailable on appeal by the trial court's sheer certification of such conduct.[227]

As noted earlier, de novo review will only serve to cure the due process violations of summary hearings to the extent that the factual record is supplemented whenever the trial court's findings of fact are insufficient for the appellate court to discharge its responsibilities of de novo review. This insufficiency occurs when the trial court's findings of fact are contested and the contemnor did not have a full opportunity to present a defense before an impartial fact-finder below. The record may be supplemented either by an appellate court remanding the matter to a trial court, other than the one in which the contempt arose, to conduct a supplemental factual hearing and make findings of fact,[228] by an appellate

225. *See, e.g., In re* Hallinan, 71 Cal. 2d 1179, 1184, 459 P.2d 255, 258, 81 Cal. Rptr. 1, 5 (1969) (if words used by counsel are not disrespectful, court must warn attorney that his tone and facial expressions are offensive before charging the attorney with contempt); *In re* Daniels, 118 N.J. 51, 570 A.2d 416 (trial judge warned contemnor on the record the previous day that if he continued to manifest outward disapproval of the court's rulings, he would hold him in contempt and put him in jail), *cert. denied*, 59 U.S.L.W. 3326 (1990); *Sacher*, 343 U.S. at 10-11 (trial judge's repeated warnings to counsel demonstrated his "well-considered" judgment.).

The value of prior warnings by the judge as an indication of the accuracy of the court's characterization of the conduct contained in the warning depends in large part on the contemnor's acquiescence in the charge. To some degree, a contemnor's failure to refute the judge's characterization could be taken as a concession or admission. Even where the contemnor immediately refutes the court's characterization of her conduct, the court's contemporaneous characterization still has some value in assessing the reliability of the judge, at least to the extent that it demonstrates that the judge believed the conduct took place at that time. But where the contemnor objects to the court's characterization of her conduct, and especially where other witnesses in the courtroom join in her disagreement with the court's characterization, it is an indication that the appellate court should proceed more carefully, either by remanding for plenary proceedings or, at the least, supplementing the trial record with an evidentiary hearing. *See infra* notes 228-29 and accompanying text.

226. *See, e.g., In re Daniels*, 118 N.J. 51, 570 A.2d 416 (contemnor apologized but denied court's characterization of his behavior); *In re* McDonald, 819 F.2d 1020, 1025 (11th Cir. 1987) (contemnor's justification—". . . and that's why I did it"—relied on by court as admission of a willful violation of court order); *In re Hallinan*, 71 Cal. 2d 1179, 459 P.2d 255, 81 Cal. Rptr. 1 (attorney apologized for sarcastic remarks made to judge but not those made to witness).

227. *See, e.g., In re Hallinan*, 71 Cal. 2d at 1182, 459 P.2d at 257, 81 Cal. Rptr. at 3 ("If a trial judge had only to state that a contemnor raised his voice and twisted his features, no contempt order could be attacked."). Of course, even if the contemnor did make disrespectful gestures or used a sarcastic tone of voice, the conduct is not necessarily obstructive or contemptuous. *See* Raveson, *supra* note 18, at 778-85.

228. This supplemental hearing would be conducted purely for the purpose of finding facts that the appellate court could consider in its independent review, and should not be confused

court itself hearing either testimonial or documentary evidence,[229] or by the filing of testimonial affidavits with the appellate court.[230] Often, where the contempt citation is the result of unambiguous language on the record that constitutes an obstruction by itself, no supplemental hearing may be necessary.[231]

III. Conclusion

The Supreme Court has failed to deal adequately with the summary criminal contempt power. Although the Court has in the past imposed some limitations on the exercise and substantive scope of the power,[232] it has more recently retreated from the prior sensitivity to the potential for abuse of the power reflected in its earlier opinions.[233] Against calls for abolition and cutting reform of a court's power to inflict immediate punishment for conduct it perceives as obstructive, a single argument has prevailed: the power is necessary to a court's ability to prevent interference with its business. Once it is accepted that the courts must have the power to impose immediate sanctions, the rationale for dispensing with ordinary due process protections, that the judge has witnessed all of the relevant events, can be asserted with relative ease. Grounded upon these

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with a remand for a plenary contempt proceeding in which the court would have the power to re-adjudicate the contempt.

229. Although this is one available alternative, it should not be the preferred method because it is not within the appellate court's realm of expertise to sift through evidence and make factual and credibility determinations itself. Trial courts, on the other hand, have vast experience in making findings of fact after evidentiary hearings.

In New Jersey, where a court engaging in de novo review of a contempt conviction deems the factual record inadequate, the most common practice is to remand the matter to a trial court for a supplemental evidentiary hearing. *See In re* Lependorf, 212 N.J. Super. 284, 514 A.2d 1335 (App. Div. 1986); *In re Daniels*, 118 N.J. 51, 570 A.2d 416. The appellate court, however, has also accepted the submission of witness affidavits on behalf of the contemnor attesting to their observations of the contemnor's conduct. *Id.*

230. Despite the fact that affidavits are by their very nature hearsay, some courts have relied upon them as one means of supplementing the record. Although this practice may not present a serious problem when the affidavits are sworn statements of the contemnor or the contemnor's witnesses, affidavits submitted by the state present a Confrontation Clause problem as well. *See* 4 LOUISELL & MUELLER, FEDERAL EVIDENCE §§ 410-18 (1981).

231. *See supra* note 219 and accompanying text.

232. *See supra* notes 27-28 and accompanying text.

233. *See supra* note 29 and accompanying text. *Accord*, Note, *Direct Criminal Contempt: An Analysis of Due Process and Jury Trial Rights*, 11 NEW ENG. L. REV. 77, 82 (1975) (although United States v. Wilson, 421 U.S. 309 (1975) is distinguishable on its facts, it may represent a step back from the Court's earlier cases); Recent Development, *Summary Contempt May Properly Be Applied to the Orderly Refusal of Witnesses to Testify at Trial After Grant of Immunity*—United States v. Wilson, *421 U.S. 309 (1975)*, 13 AM. CRIM. L. REV. 271, 280 (1975) (authored by Robert L. Wyld); United States v. Wilson: *An Expansive Approach to the Power of the Federal Courts to Punish Contempts Under Rule 42(a) of the Federal Rules of Criminal Procedure*, 9 SW. U.L. REV. 747, 757-78 (1977) (authored by Scott Jacobs).

two justifications, the summary contempt power has had a long history of abuse and surely has resulted in the substantial self-censorship of vigorous advocacy.

Despite the many compelling voices to the contrary, there is little question, at least in the foreseeable future, that the summary contempt power will remain as one of the most anomalous features of our justice system. Perhaps it is simply too unrealistic to expect courts to curtail their own age-old prerogatives. This is especially so because almost all of the suggestions for limitations of the summary contempt power have struck at its very core, the necessity and authority for immediate action, by arguing for the reintroduction of the very due process rights that must be abridged for the contempt power to be exercised summarily.[234]

However, the authority to act without delay can be preserved at the same time as an alleged contemnor's due process rights are given far greater protection than at present, by acknowledging, or at least tolerating, the courts' perception of their need for immediate action in the trial court, and providing expanded due process protections in appeals of contempt convictions. As demonstrated in this Article, this can be achieved without any diminishment of the courts' power by subjecting such appeals to a de novo standard of review. At its heart, this recommendation rejects the fiction, once a contempt conviction is on appeal and it is no longer critical to the trial court's ability to maintain order, that the trial judge's observation of the events in question obviates the need for fundamental due process protections. By providing greater procedural due process in the appellate courts, de novo review holds the promise for significantly reducing the deterrent effect of the contempt power through the guarantee of fundamental fairness to the contemnor in the adjudication of the contempt and facilitation of the development of appropriate limits on the substantive scope of the power.

234. *See supra* notes 30-33 and accompanying text.