CONSTITUTIONAL LAW—CONTEMPT PROCEEDINGS—DUE PROCESS RIGHTS OF CONTEMNOR INCREASE WHEN IMPRISONMENT IS ORDERED FOR DIRECT CONTEMPT—*In re Daniels*, 118 N.J. 1, 570 A.2d 416 (1990).

The summary power to punish contemptuous behavior[1] is an inherent element of the judicial structure.[2] Statutes and rules of court and procedure[3] have supplemented case law in the development of this judicial authority. In essence, the court is vested with the ability to adjudicate *facie curiae*[4] affronts to its authority[5]

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[1] Such behavior has traditionally been defined as "an act or omission substantially disrupting or obstructing the judicial process in a particular case." Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 185 (1971).

[2] *See* Sacher v. United States, 343 U.S. 1, 6 (1952); United States v. Shipp, 203 U.S. 563 (1906); *Ex Parte* Terry, 128 U.S. 289, 302-03 (1888). *See also* Comment, *The Role of Due Process in Summary Contempt Proceedings*, 68 IOWA L. REV. 177 (1982) (advocating the narrowing of the use of summary contempt).

[3] 18 U.S.C. § 401 (1976) authorizes a federal court to exercise summary contempt power. N.J. STAT. ANN. § 2A:10-1 (West 1987) serves as the New Jersey state corollary to the aforementioned federal provision. Concerning rules of court and procedure, FED. R. CRIM. P. 42(a), entitled Summary Disposition, provides in full:

> A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Id. N.J. CT. R. 1:10-1 entitled *Contempt in the Presence of the Court* provides "[c]ontempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt." *Id.*

[4] The phrase *facie curiae* is synonymous with " 'under the eye or within the view of the court,' or 'in open court' or 'in the face of the court.' " Cooke v. United States, 267 U.S. 517, 536 (1924). The labels "contempt in *facie curiae*" and "direct contempt" are used interchangeably. *In re* Yengo, 84 N.J 111, 131, 417 A.2d 533, 544 (1980) (Handler, J., concurring).

[5] *See* Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39 (1978). Contempt may be categorized pursuant to two schemes: a criminal/civil distinction and a direct/indirect distinction. *See* Note, *The Modern Status of the Rules Permitting a Judge To Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553 n.1 (1987). Concerning the first delineation, the process of "labelling" contempt depends upon the purpose for citation. *Id.* If coercive or corrective, the contempt is civil. *Id.* If punitive, a criminal contempt arises. *Id.* The distinction is important because the constitutional safeguards accompanying criminal trials will become an issue in criminal contempt, but not in civil contempt. *Id. See generally* United States v. United Mine Workers of America, 330 U.S. 258, 295-301 (1947) (discussing requirements for civil and criminal contempt). New Jersey has discarded the term "civil" and replaced it with "relief to litigants." *In re* Daniels, 118 N.J. 51, 60, 570 A.2d 416, 421 (1990).

The second distinction will depend upon the manner in which the behavior occurred. *See* Note, *supra*, at 553 n.1. If the contumacious conduct occurred in the

without the procedural safeguards attendant other criminal proceedings.[6] Traditionally, for conduct to constitute direct defiance it need only occur in the presence of the court.[7] Recognizing, however, the vast potential for bias and abuse,[8] courts have attempted to restrict the exercise of summary process.[9] Hence, summary adjudication must be predicated upon some showing that the chosen procedure is necessary to prevent demoralization of the court's dignity and authority.[10]

The trend toward narrowing the scope of a court's summary contempt power stems from immense concern over the resulting deprivation of due process.[11] Both federal and state courts have attempted to reconcile the necessity for maintaining judicial decorum with the constitutional rights accorded individuals.[12] In

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presence of the court it is direct contempt. *Id.* Whereas, indirect contempt occurs outside the presence of the court. *Id. See, e.g., In re* Oliver, 333 U.S. 257, 274-76 (1948); *Cooke*, 267 U.S. at 534-35. This distinction will determine the manner of adjudication. *See* Note, *supra*, at 553 n.1. Unlike direct contempt, indirect contempt provides for notice. *See* FED. R. CRIM. P. 42(b); N.J. CT. R. 1:10-2.

6 Kuhns, *supra* note 5, at 41 n.6. Summary contempt proceedings do not encompass the right to indictment, trial by jury, right to counsel, notice or hearing. *Id.* (citations omitted). *See Sacher*, 343 U.S. at 9.

7 *See Sacher*, 343 U.S. at 11.

8 *See In re* Mattera, 34 N.J. 259, 272, 168 A.2d 38, 45 (1961). In summary proceedings,"[t]he court is at once the complainant, prosecutor, judge, and executioner." *Id.*

9 *See* Harris v. United States, 382 U.S. 162, 164 (1965). *Harris* represents an early attempt by the United States Supreme Court to restrict the parameters of the summary contempt power. *Id.* The Harris Court adopted an "exceptional circumstances" standard whereby summary power is limited to those situations whereby a judge is threatened or court proceedings are disrupted. *Id.* To curb this vast power, the Court defined it as "[t]he least possible power adequate to the end proposed." *Id.* at 165 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)). The New Jersey Supreme Court has also adopted this rationale. *In re* Yengo, 84 N.J. 111, 122, 417 A.2d 533, 539 (1980).

10 *See* Bloom v. Illinois, 391 U.S. 194 (1968). The United States Supreme Court recognized that summary contempt "[a]lso rests on the need to maintain order. . . ." *Id.* at 210. The New Jersey Supreme Court further restricted the justification for summary adjudication, noting that "[t]he sole credible basis. . .is necessity, . . .that the judiciary be not frustrated." *In re* Fairlawn Educ. Ass'n, 63 N.J. 112, 114-15, 305 A.2d 72, 73 (1973) (involving civil contempt of teachers refusing to obey court order against strike efforts). *See Sacher*, 343 U.S. at 36 (Frankfurter, J., dissenting).

11 *See Sacher*, 343 U.S. at 9-11. The power, by its nature, involves a diminishment of due process rights. *Id.*

12 *See* Note, *supra* note 5, at 558. To the contrary, it has been held that no conflict exists between the maintenance of judicial order and individual liberty. *Ex Parte* Terry, 128 U.S. 289, 307 (1888). Rather, it is proposed that the protection of one is the fulfillment of the other. *Id.* at 306-07. Moreover, it is proffered that individual liberties are in fact protected through maintenance of an orderly trial. *Id. See also* Note, *supra* note 5, at 559-60.

furtherance of this goal, some courts have formulated standards which extend greater due process protections to alleged contemnors.[13] The New Jersey Supreme Court has embraced the federal sliding scale method[14] for assessment of due process requirements and has applied it to contempt cases.[15] Such a scheme is premised upon the degree of reliability fostered by the proceedings and the particular liberty interest involved.[16] Recently, the New Jersey Supreme Court in *In re Daniels*[17] broadened the application of the sliding scale approach.[18] The *Daniels* court held that in cases of direct contempt, the due process rights of the contemnor increase when custodial sentencing is ordered.[19]

On March 18, 1986, James B. Daniels, an attorney with a New Jersey Public Defender's unit, represented his client in the first day of pre-trial hearings.[20] Denying two of Mr. Daniels' motions,[21] the trial court subsequently took exception to the attorney's non-verbal response to the rulings.[22] Judge Alfred J. Lechner Jr. issued a warning to the attorney-defendant that such further behavior would result in a contempt citation.[23] Following a brief recess, the defendant apologized to the court claiming that no disrespect was intended.[24]

After jury selection, but prior to swearing in, Mr. Daniels asserted a *Gilmore* motion[25] and requested a mistrial.[26] The trial

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13 *See* Comment, *supra* note 2, at 186. *See, e.g.*, Harris v. United States, 382 U.S. 162 (1965) (employing an "exceptional circumstances" standard).

14 *In re* Daniels, 118 N.J. 51, 64, 570 A.2d 416, 423 (1990). Under the standard articulated in Mathews v. Eldridge, 424 U.S. 319 (1976), evaluation of due process claims involve three main factors: (i) the government's interest, (ii) the risk of error and potential value of supplemental safeguards, and (iii) the effected private interest. *Id.* at 335.

15 *In re* Daniels, 219 N.J. Super. 550, 575, 530 A.2d 1260, 1273 (App. Div. 1987) (citing Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985); New Jersey State Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983)).

16 *In re* Daniels, 118 N.J. at 63-64, 570 A.2d at 423 (1990).

17 *Id.* at 51, 570 A.2d at 416.

18 *Id.* at 64, 570 A.2d at 423.

19 *Id.* at 71, 570 A.2d at 426-27.

20 *Id.* at 55, 570 A.2d at 418. The underlying criminal trial involved first degree robbery. *In re* Daniels, 219 N.J. Super 550, 555, 530 A.2d 1260, 1262 (App. Div. 1987).

21 *Daniels*, 118 N.J. at 55, 570 A.2d at 418-19. Additionally, the court denied Mr. Daniels' motion to take judicial notice of scholarly articles. *Id.*, 570 A.2d at 419.

22 *Id.* at 55-56, 570 A.2d at 419. The record reflects that Mr. Daniels was "sitting there shaking his head, smiling and being disrespectful." *Id.*

23 *Id.* at 56, 570 A.2d at 419.

24 *Id.*

25 *Id.* The defendant claimed that the prosecution had discriminately used its

judge criticized the motion as untimely and the defendant's physical reaction to denial as disrespectful.[27] Specifically, Judge Lechner stated, "[p]ut on the record right now, you laughed, you rolled your head, you threw yourself back in your seat."[28] The court discharged the jury, terminated the proceedings and pronounced Mr. Daniels in contempt of court.[29] Prior to sentencing, Judge Lechner afforded the defendant an opportunity to be heard.[30] Asserting that the response was merely "human," Mr. Daniels objected to the court's characterization of his behavior.[31] Mr. Daniels stated, "I did nothing other than sit back in my chair, put my head down and cover my eyes when the [c]ourt ruled [against the Gilmore application]."[32] However, the defendant declined the court's offer to call witnesses in his favor.[33]

The trial judge, ascertaining that the attorney's conduct constituted "an open threat to the orderly procedure of the [c]ourt,"[34] imposed a fine of $500.00 and ordered a two-day custodial sentence.[35] Five days later, the court issued a supplemental order outlining the reasons for the penalty.[36]

Pursuant to New Jersey Court Rule 2:10-4,[37] the defendant appealed to the New Jersey Superior Court Appellate Division

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peremptory challenges to exclude certain segments of the population from the jury. *Id.* (citing State v. Gilmore, 199 N.J. Super. 389, 489 A.2d 1175 (App. Div. 1985), *aff'd*, 103 N.J. 508, 511 A.2d 1150 (1986)).

26 *Id.*

27 *Id.* at 56-57, 570 A.2d at 419.

28 *Id.* at 57, 570 A.2d at 419.

29 *Id.*

30 *Id.*

31 *Id.* Mr. Daniels also reasserted his protest of the court's *Gilmore* ruling. *Id.* The court responded, "Don't raise your voice." *Id.*

32 *Id.*

33 *Id.*, 570 A.2d at 420. The court clerk and other eyewitnesses subsequently filed affidavits stating that they witnessed no laughing or other audible disruption by the contemnor. *In re* Daniels, 219 N.J. Super. 550, 564-65, 530 A.2d 1260, 1267 (App. Div. 1987). However, the sworn statements did not become part of the record and thus, were outweighed by deference accorded trial judges on review. *Id.*

34 *Daniels*, 219 N.J. Super. at 563, 530 A.2d at 1267.

35 *Daniels*, 118 N.J. at 58, 570 A.2d at 420. The defendant obtained a stay of both the fine and imprisonment. *Id.*

36 *Id.* Because the original order did not contain all of the requisite information under N.J. Ct. R. 1:10-1, a supplemental order was mandated. *Daniels*, 219 N.J. Super. at 562, 530 A.2d at 1266. In the second order, Judge Lechner described the contemnor's behavior as " 'expressions of disrespect,' including 'shaking his head, laughing, and rolling his eyes and head to express his disapproval and scorn.' " *Id.*

37 *See* N.J. Ct. R. 2:10-4. New Jersey Court Rule 2:10-4 provides: "[e]very summary conviction by a court for contempt shall be reviewable on the law and the facts. The appellate court shall render such judgment and order for enforcement thereof as it deems just under the circumstances." *Id.*

which affirmed the determination of contempt, but vacated the sentence of imprisonment.[38] Judge Michels, writing for the court, noted that the harm suffered by the judiciary in this matter was not sufficient to warrant imprisonment.[39] Because of the important due process implications raised on appeal, the New Jersey Supreme Court granted the defendant's petition for certification[40] and his appeal as of right pursuant to New Jersey Court Rule 2:2-1(a)(2).[41] The New Jersey Supreme Court affirmed the ruling of the appellate court and held that the defendant's conduct constituted contempt, but that he was not afforded due process.[42]

Although the summary contempt power boasts deep roots in the Anglo-American judicial system, its common law history is clouded.[43] Recognition of this judicial feature as a weapon to maintain order and dignity in the courtroom is found in Blackstone's *Commentaries*.[44] Toward the end of the 18th Century, the contempt power was subjected to close scrutiny. This was principally due to arbitrary judicial exercise of the contempt power.[45] Overwhelming sentiment calling for restraint led Congress to pass an act regulating the exercise of summary contempt power.[46] These restrictive measures were met with judicial resistance.[47]

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38 *See In re* Daniels, 219 N.J. Super. 550, 592, 530 A.2d 1260, 1282 (App. Div. 1987). The appellate court rejected the defendant's claim that a good faith motive converted contempt from direct to indirect. *Id.* at 572-73, 530 A.2d at 1272. The court further found no procedural irregularities except for the custodial sentence. *Id.* at 567, 530 A.2d at 1269.

39 *Id.* at 592, 530 A.2d at 1282.

40 *See In re* Daniels, 109 N.J. 496, 537 A.2d 1287 (1987).

41 *See* N.J. CT. R. 2:2-1(a)(2). This Rule regarding appealable determinations provides, "in cases where, and with regard to those issues as to which, there is a dissent in the appellate division. . . ." *Id.*

42 *Id.* at 70-74, 570 A.2d at 426-28.

43 *See In re* Fairlawn Educ. Ass'n, 63 N.J. 112, 114, 305 A.2d 72, 73 (1973).

44 4 W. Blackstone, Commentaries 124-26. The rationale proffered by early courts for the summary power was one of punishment for the disturbance of public justice. *See* Note, *supra* note 5, at 554.

45 *See In re* Buehrer, 50 N.J. 501, 514, 236 A.2d 592, 599 (1967). In fact, several judges were impeached because of their unfettered use of summary power to deal with out-of-court comments on judicial decisions. *Id.*

46 Crimes and Criminal Procedure: Contempts, ch. 99, § 1, 4 Stat. 487 (1831) (current version at 18 U.S.C. §§ 401,402 (1976)). This statute first outlined offenses which are triable summarily, including misbehavior in the actual presence of the court, misbehavior of an officer in his official duty, and violation of a court order. *Id.* The New Jersey legislature has adopted similar provisions in N.J. STAT. ANN. § 2A:10-1 (1987).

47 *See* Comment, *supra* note 2, at 177.

In 1952, the United States Supreme Court in *Sacher v. United States*[48] held that the trial judge's authority to summarily punish contempt occurring in the court's presence is not extinguished when adjudication is delayed until after a trial.[49] In *Sacher*, several defendants and defense counsel were adjudged guilty of contempt for behavior exhibited during the trial.[50] The contemnors claimed that delay in adjudication converts a summarily-vulnerable contempt into one requiring notice and hearing.[51] Justice Jackson, writing for the Court, maintained that "summary" is not the equivalent of "instant."[52] According to the *Sacher* Court, the primary consideration was efficiency in the trial process.[53] The Court determined that if in the trial judge's opinion the trial's circumstances require delayed contempt judgment, the power to punish absent procedural safeguards remains preserved.[54]

Although drawing heavily on federal precedent, New Jersey has developed its own law of contempt.[55] In *In re Carton*,[56] the

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48 343 U.S. 1 (1952). The case involved the trial of eleven communist leaders who were charged with violating the Smith Act. *See* Dennis v. United States, 341 U.S. 494 (1951). *Sacher* is a prime example of early federal contempt law because it thoroughly capsulized prior decisions, such as *In re* Oliver, 333 U.S. 257 (1948); Cooke v. United States, 267 U.S. 517 (1925); *Ex Parte* Terry, 128 U.S. 289 (1888).

49 *Sacher*, 343 U.S. at 11.

50 *Id.* at 3.

51 *Id.* at 7. The petitioners alleged:

> [T]hat this power of summary punishment expired by reason of two circumstances: (1) that the trial judge awaited completion of the trial, or which time its progress could no longer be obstructed and hence, it is said, summary action had become unnecessary; and (2) that he included in the certificate a charge that the contemptuous instances were the result of agreement between counsel which, if it existed, was not made in his presence. Therefore, it is argued that petitioners could not be convicted or sentenced except after notice, time for preparation of a defense, and hearing, probably before another judge, as provided in Rule 12(b).

Id.

52 *Id.* at 11. The term summary refers to the procedure which dismisses the formality and delay which results from service of process, conducting hearings, discovering evidence, and all other formalities of an ordinary trial. *Id.* at 9.

53 *Id.* at 10.

54 *See id.* at 11. Since the conduct occurred in the presence of the court, additional inquiries designed to unveil the truth were unnecessary and inefficient. *See* Note, *supra* note 5 at 557.

55 *In re* Daniels, 219 N.J. Super. 550, 583-84, 530 A.2d 1260, 1277 (1987). New Jersey courts have described the reach of summary contempt power in more expansive terms than the federal courts, "[but] it is important not to overstate the magnitude of the differences between the federal and New Jersey standards for contempt." *Id.* at 550, 594, 530 A.2d 1260, 1283 (1987) (Skillman, J., dissenting) (citations omitted).

56 48 N.J. 9, 222 A.2d 92 (1966).

New Jersey Supreme Court vacated a judgment of imprisonment and fine for contempt because of the erroneous nature of the trial court's order.[57] The attorney contemnor was held in contempt for his refusal to sign a pre-trial order which he believed did not adequately reflect his client's position.[58]

The court's opinion in *Carton* is significant for its articulation of the *mens rea* requirement.[59] Chief Justice Weintraub posited that the contumacious conduct must be accompanied by a willfulness capable of being assessed by the trial judge.[60] To this evaluation, the contemnor is permitted to offer rebuttal evidence.[61] The court continued that although a good faith motive may not excuse willful disobedience, it may be a mitigating factor in determining whether prosecution is necessary.[62] The *Carton* Court further aligned itself with post-*Sacher* federal cases recognizing necessity, as well as presence in court, as a precondition to summary contempt power.[63]

Fourteen years after *Carton*, the New Jersey Supreme Court in *In re Yengo*[64] tackled the vast due process implications inherent in summary process.[65] The *Yengo* Court addressed the issue of whether an attorney with an inexcused absence during a trial can be cited with direct contempt, justifying summary disposition.[66] Here, the New Jersey Supreme Court deviated from federal precedent and held that unexplained absence or tardiness accompanied by an inadequate excuse constitutes direct contempt.[67] The *Yengo* Court reasoned that because the proffered explanation for absence was frivolous, in essence, both absence and excuse oc-

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57 *Id.* at 24, 222 A.2d at 100.

58 *Id.* at 14, 222 A.2d at 94.

59 *Id.* at 19-20, 222 A.2d at 97-98. The court recognized that this element must be proven beyond a reasonable doubt. *Id.*

60 *Id.*

61 *Id.* No matter how obvious the guilt, the alleged contemnor must be afforded the opportunity to produce evidence as to his state of mind. *Id.*

62 *Id.* at 25, 222 A.2d at 101.

63 *Id.* at 21, 222 A.2d at 98-99.

64 84 N.J. 111, 417 A.2d 533 (1980).

65 *Id.*

66 *Id.* at 115, 417 A.2d at 536. The attorney went on an unexpected trip to Bermuda during the trial without notifying the court. *Id.* at 118, 417 A.2d at 537.

67 *Id.* at 124, 417 A.2d at 540-41 (citing *In re* Clawans, 69 N.J. Super. 373, 174 A.2d 367 (App. Div. 1961), *certif. denied*, 36 N.J. 296, 177 A.2d 340 (1962), *cert. denied*, 370 U.S. 905 (1962)). The majority view is that an unexcused absence cannot constitute contempt in the presence of the court. *Id.* "The rationale is that, although the absence or late arrival of an attorney can be perceived directly by the court, the conclusion that the absence is inexcusable requires reference to facts not immediately within the court's perception." *Id.* at 124-25, 417 A.2d at 541.

curred in the presence of the court.[68] Therefore, the majority continued that a finding of direct contempt was appropriate.[69]

Addressing the contemnor's constitutional claims, the majority noted that the obstruction of trial continuity created a need for immediate disposition and punishment.[70] This need, the *Yengo* court stressed, far outweighed any procedural safeguards provided by notice and hearing.[71]

In *In re Stanley*,[72] the New Jersey Supreme Court addressed the unique implications associated with professional contempt.[73] In *Stanley*, an attorney was cited for contempt due to his vituperative attitude before the court.[74] In its determination, the trial court referred to the American Bar Association's Code of Professional Responsibility[75] and filed a report with the Ethics Committee.[76] On *de novo* review the appellate division affirmed.[77] The New Jersey Supreme Court, on appeal, adopted the recommendations of the Disciplinary Review Board and ordered public reprimand.[78] The court explained that the purpose justifying attorney discipline is to guard the public from attorneys not meeting the standards of competence for members of the bar.[79]

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68 *Id.* at 126-27, 417 A.2d at 542. The court continued that "[w]here there is a good faith excuse, although another judge may find it to be inadequate the predominant consideration should be enhancement of procedural due process for the alleged contemnor. The offense should be treated as an indirect contempt." *Id.* at 128, 417 A.2d at 542-43.

69 *Id.* at 126-27, 417 A.2d at 542.

70 *Id.* at 127, 417 A.2d. at 542.

71 *See id.* In his concurrence, Justice Handler argued that the contemnor has an absolute right to be informed of the charge and the opportunity to tender exculpatory evidence. Justice Handler further recognized the contemnor's right to appellate review as a judicial failsafe to correct trial court abuse. *Id.* at 135, 417 A.2d at 546 (Handler, J., concurring). New Jersey also provides for appellate *de novo* review. *Id.*

72 102 N.J. 244, 507 A.2d 1168 (1986).

73 *Id. See* Sacher v. United States, 343 U.S. 1 (1952). There the Court noted the obvious conflict between attorneys' duty to zealously protect their clients' rights and the need to maintain order in the court. *Id.* at 12-13. In recognition of this fine line, Justice Jackson stressed that the Court would "[n]ot equate contempt with courage or insult with independence." *Id.*

74 *Stanley*, 102 N.J. at 248, 507 A.2d at 1170. The trial judge asserted that the attorney pointed his finger, made faces, laughed and directed long withering stares at the court. *Id.* at 247, 507 A.2d at 1170.

75 *Id.* at 244, 507 A.2d 1168. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR1-102(A)(1,5), DR7-106(C)(6) (1979).

76 *Stanley*, 102 N.J. at 251, 507 A.2d at 1172.

77 *Id.*

78 *Id.* at 253-54, 507 A.2d at 1173-74.

79 *Id.* at 253, 507 A.2d at 1173. *See In re* Templeton, 99 N.J. 365, 374, 492 A.2d 1001, 1006 (1985); *In re* Goldstaub, 90 N.J. 1, 5, 446 A.2d 1192, 1194 (1982).

Concerning punishment, the court stressed that it must conform to the level of misconduct.[80]

Sensing a need for guidance, the New Jersey Supreme Court in *In re Daniels*[81] sought to define the parameters of due process as existing in the law of contempt.[82] The court began its analysis by articulating that summary contempt proceedings do not afford the contemnor all of the due-process requirements.[83] The court rejected the defendant's claim that the right to counsel limits exercise of the summary contempt power.[84] The attorney-contemnor insisted that no person may be jailed for an offense if denied the right to counsel.[85] The unanimous court responded that contempt proceedings have historically been characterized as "*sui generis*,—neither civil actions nor prosecutions for offenses."[86] Moreover, the court determined that due process does not require extending the sixth amendment right to counsel, especially where the contemnor is an experienced trial attorney.[87]

Employing a sliding scale approach,[88] the *Daniels* Court observed that as the need for reliability and the importance of the interest involved increase, so do the due process rights afforded the contemnor.[89] The court next addressed the potential for error and bias inherent in summary contempt proceedings.[90] In a systematic approach, the justices determined that the greater the risk of mistake and personal embroilment, the greater the demand for procedural safeguards.[91] The court posited that when the alleged contemptuous behavior consists of non-verbal gestures, the record on review may not adequately reveal the con-

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80 *Stanley*, 102 N.J. at 253-54, 507 A.2d at 1173 (citing *In re* Nigohosian, 88 N.J. 308, 315, 442 A.2d 1007, 1011 (1982)). The *Stanley* court suggested that in assessing punishment all relevant factors should be taken into consideration. *Id.*

81 118 N.J. 51, 570 A.2d 416 (1990).

82 *Id.* at 63, 570 A.2d at 423. Despite its attempt to methodize, the court noted that due process is a " 'dynamic concept' . . . and its 'sense of fairness cannot be imprisoned in a crystal.' " *Id.* (quoting Callen v. Sherman's, Inc., 92 N.J. 114, 134, 136, 455 A.2d 1102, 1112 (1983)).

83 *Id.* at 62, 570 A.2d at 423.

84 *Id.* at 62-63, 570 A.2d at 422-23.

85 *Id.* (citing Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)).

86 *Id.* at 63, 570 A.2d at 423 (quoting Myers v. United States, 264 U.S. 95 (1924)). *See* Kuhns, *supra* note 5, at 41. *Contra* Bloom v. Illinois, 391 U.S. 194, 201 (1968)("criminal contempt is a crime in every fundamental respect. . ."). *Id.*

87 *Daniels*, 118 N.J. at 63, 570 A.2d at 423.

88 *See* Mathews v. Eldridge, 424 U.S. 319 (1976). *See supra* note 14 and accompanying text.

89 *Daniels*, 118 N.J. at 64, 570 A.2d at 423.

90 *Id.* at 64, 570 A.2d at 423.

91 *Id.*

tempt.[92] The justices recommended that trial courts evaluate the record and determine whether supplemental fact-finding would clarify less graphic conduct.[93] Another factor increasing the need for reliability, the court commented, arises when the trial judge becomes the target of insult.[94] Underlying this is the recognition that inherent in due process is the right to be heard before a fair and unprejudiced tribunal.[95] If the behavior is personally directed, the court posited, the trial court must determine whether a loss of objectivity warrants reference to another judge.[96] Although the court found no indication of bias in Judge Lechner's actions, it suggested referral to a detached judge as the better future practice.[97]

In conjunction with its heightened standard of reliability, the court next considered whether the punishment charged accorded with the procedures employed.[98] To its formula, the court added that the magnitude of the individual interest involved would work to expand procedural safeguards.[99] The court noted that the loss of liberty is only surpassed by the loss of life as the most intense deprivation an individual may suffer.[100] Comparing the two possible punishments of fine or imprisonment, the court observed that the latter necessarily involved more drastic consequences including the damage to reputation and possible subjection to violence while incarcerated.[101] Continuing the analysis, the justices rejected the economic/efficiency justification of the summary contempt power when custodial sentencing is contemplated.[102] The faster/cheaper rationale was found to be trifling compared to the abandonment of a right such as liberty.[103]

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92 *Id.* Agreeing with the dissenting member of the appellate division, the court determined that ambiguities in the record prevented a clear understanding of what had occurred. *Id.* Therefore, unreliability was heightened. *Id.* For further discussion of non-verbal contempt, *see* Dobbs, *supra* note 1, at 200-04 (1971).

93 *Daniels*, 118 N.J. at 68, 570 A.2d at 425.

94 *Id.* at 64-65, 570 A.2d at 423.

95 *Id.* at 73, 570 A.2d at 428.

96 *Daniels*, 118 N.J. at 68, 570 A.2d at 425. *See, e.g.*, Offut v. United States, 348 U.S. 11 (1954) (trial judge was not permitted to hear matter due to loss of impartiality).

97 *Daniels*, 118 N.J. at 73, 570 A.2d at 428.

98 *Id.* at 65, 570 A.2d at 424.

99 *Id.* at 64, 570 A.2d at 423.

100 *Id.* at 65, 570 A.2d at 424.

101 *Id.* The court also recognized the particular impact incarceration would have on an officer of the court, such as an attorney. *Id.*

102 *Id.* at 65-66, 570 A.2d at 424.

103 *Id.* The court viewed economics as "not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting free-

Applying the general procedural principles, the justices proposed several guidelines to aid the issue at bar and future analysis of contempt.[104] The *Daniels* Court recommended immediate assessment by the trial judge of the gravity of misconduct.[105] If the misconduct rises to the level of contempt, the court posited that the trial judge must determine whether summary adjudication is necessary to maintain order and dignity.[106] Furthermore, the court asserted that courts must determine whether the record contains sufficient facts which describe the misconduct.[107] The justices, next, explained that if the misconduct involves a personal confrontation, the court should consider the need for an unbiased judge.[108] Finally, the court advanced that if there is a threat of imprisonment and no immediacy is needed, a formal charging process with an unbiased judge should be instituted.[109] Applying these guidelines, the court agreed that Mr. Daniels' behavior was clearly contemptuous.[110] In reaching its conclusion, the court asserted that the conduct occurred in the presence of the judge and was "if not 'an open threat to the orderly procedure of the court, . . . a flagrant defiance of the person and presence of the judge before the public.' "[111]

The court addressed the defendant's argument that lawyers who get excited over unfavorable rulings do not necessarily intend to obstruct justice.[112] In this regard, the justices espoused the federal minimum standard.[113] The court continued that the actor must have known or should reasonably have been aware that his voluntary action was wrongful.[114] In the present case the court acknowledged the prior warning issued Mr. Daniels and found it rather dispositive on the question of intent.[115] Further,

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dom and other basic human rights of incalculable value." *Id.* (quoting Green v. United States, 356 U.S. 165, 216 (1958) (Black, J., dissenting)).

104 *Id.* at 67-68, 570 A.2d at 425.

105 *Id.* at 67, 570 A.2d at 425. The justices recognized that a certain measure of discretion must be maintained in the trial judge. *Id.* at 66, 570 A.2d at 424.

106 *Id.* at 67, 570 A.2d at 425. Here, the court reaffirmed the necessity rationale. *Id.* The court commented that summary disposition must be accompanied by some sense of immediacy. *Id.* at 61-62, 570 A.2d at 422.

107 *Id.* at 68, 570 A.2d at 425.

108 *Id.*

109 *Id.*

110 *Id.* at 69-70, 570 A.2d at 426. The court found the attorney's gestures to constitute a direct threat to orderly administration. *Id.*

111 *Id.* at 69, 570 A.2d at 426.

112 *Id.*

113 *Id.*

114 *Id.* (quoting *In re* Dellinger, 461 F.2d 389, 400 (7th Cir. 1972)).

115 *Id.* at 69-70, 570 A.2d at 426.

the court rejected the defendant's contention that he was deprived his right of allocution.[116] Although the trial judge did not afford the right of defense until after the defendant was found in contempt, the supreme court found no procedural irregularity.[117]

Although understanding the defendant's obvious dismay with the adverse ruling, the court stressed that disrespectful behavior cannot be condoned.[118] The court stated, however, that before imprisoning the contemnor, the individual must be afforded due process protections along with the assurance that the factfinding is reliable.[119] Further, as a practical matter, the court commented that the jailing of an attorney cannot realistically serve to prevent demoralization of judicial authority.[120] Since the trial court had already terminated the proceedings, the court continued that necessity was not even a factor in assessing appropriate punishment.[121] Although the court commented that conclusion of a trial will not necessarily limit summary powers, it may be a factor in deciding the procedures to be applied.[122] Moreover, the court pointed out that because the case at bar had been terminated and it involved imprisonment, the summary procedure failed to afford Mr. Daniels' due process of law.[123]

Furthermore, the court reiterated some basic contempt propositions.[124] The court opined that if the contempt occurs mid-trial, the contemnor should be given notice of his behavior.[125] Later, the court determined the contemnor may explain his mis-

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116 *Id.* at 69, 570 A.2d at 426. The United States Supreme Court has recognized that it is customary to afford the right of allocution to an alleged contemnor. *See* Groppi v. Leslie, 404 U.S. 496 (1972). The right to allocution is basically the right to make a statement prior to sentencing concerning one's culpability. *See* Kuhns, *supra* note 5, at 55.

117 *Daniels*, 118 N.J. at 69, 570 A. 2d at 426. The court recognized the regularity of the procedures, namely that Mr. Daniels was informed of the charge against him and was entitled to present evidence in his favor. *Id.* The justices agreed with the appellate division's reasoning that the attorney's guilt was not actually assessed until after he had defended himself. *Id.* (citing *In re* Buehrer, 50 N.J. 501, 516, 236 A.2d 592, 600 (1967) (for proposition that an alleged contemnor is entitled to a presumption of innocence).

118 *Id.* at 70, 570 A.2d at 426. *See In re* DeMarco, 224 N.J. Super. 105, 123, 539 A.2d 1230, 1240 (App. Div. 1988) (attorney conduct held contemptuous and not justified as a reaction to trial court's possibly erroneous ruling).

119 *Daniels*, 118 N.J. at 70, 570 A.2d at 426.

120 *Id.* at 70, 570 A.2d at 426 (citing Cooke v. United States, 267 U.S. 517, 536 (1925)).

121 *Id.* at 71, 570 A.2d at 426.

122 *Id.* (citing United States v. Lumumba, 741 F.2d 12, 16 (2d Cir. 1984)).

123 *Id.*

124 *Id.* at 72, 570 A.2d at 427.

125 *Id.*

conduct.[126] The court further posited that when adjudication is necessary and loss of liberty is contemplated, the case should be referred to another judge unless this would jeopardize trial continuity.[127] The court advanced that a referred adjudication would be heard on the basis of a supplemented record and other relevant evidence.[128] The court noted in such a non-summary context, the right to counsel would be afforded.[129] In contempt cases where detachment of the judge is questionable, the court added that the contemnor should have a hearing before a different judge.[130]

Finally, the court concluded that the appellate court's decision should be affirmed.[131] The court based its determination on several factors.[132] First, the court reasoned that the trial judge was detached from the case.[133] Second, the court noted that the trial judge afforded the contemnor his procedural process right to be heard.[134] Although the court emphasized that they would have preferred that another judge hear the matter, the court was satisfied the appellate court adequately examined the findings of fact and the record to sustain the action.[135]

Admirably, the New Jersey Supreme Court in *Daniels* has attempted to capsulize and clarify an amorphous area of the law. As a result, the court elucidated previous shortcomings relating to certain facets of contempt proceedings. A prime example is the observation that the efficiency rationale championed in *Sacher v. United States*[136] pales in comparison to fundamental notions of fairness.[137] Such a determination will inevitably reduce the immense possibility for abuse innate in all summary contempt proceedings. Through application of a sliding scale approach, the *Daniels* Court has equipped subsequent courts with a systematic technique for evaluating due process claims.[138] Most markedly,

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126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.* at 73, 570 A.2d at 428.
131 *Id.* at 74, 570 A.2d at 428.
132 *Id.* at 73, 570 A.2d at 428.
133 *Id.*
134 *Id.*
135 *Id.*
136 343 U.S. 1, 10 (1952).
137 *Daniels*, 118 N.J. at 65-66, 570 A.2d at 424 (citing Green v. United States, 356 U.S. 165, 216 (1958)).
138 *See id.* at 64, 570 A.2d at 423.

the court emphasized the value of reliability.[139] For multiple reasons, the court required trial courts to maintain adequate records sufficiently reflecting the behavior and surrounding circumstances. Such an obligation may serve as a deterrent for misuse of the summary power. Even an overly temperamental judge will have to exercise restraint in questionable contempt cases in view of the duty of clarity imposed by *Daniels*. Moreover, a lucid record detailing surrounding circumstances will better protect the contemnor on appellate review.

The court further endeavored to reduce the potential for prejudice by creating a failsafe in the face of personal embroilment.[140] Although the court dictates an assessment of objectivity, this burden is vested with the very target of insult, the trial court.[141] Perhaps the court should have proposed a scheme providing for some independent review of possible bias.[142] Historically, a critical limitation has been placed on the concept of personal embroilment. That is, the doctrine only applies when the trial judge delays citation or adjudication until completion of the trial.[143] Therefore, the *Daniels* personal insult safeguard offers no protection to the contemnor who is immediately punished.

The *Daniels* decision, however, does offer extensive guidance on the element of intent of the contemnor.[144] Appellate courts generally do not require explanation by the trial court of the legal standard employed to appraise intent.[145] The *Daniels* Court furnished both trial and appellate courts with a uniform standard of review.[146] Thus, the courts must utilize the objective/subjective measure of willfulness.[147] Despite this articulation, a formal hearing would best determine the intentions of the alleged con-

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139 *Id.*

140 *Id.* at 68, 570 A.2d at 425.

141 *Id.* The terms "judge" and "court" are interchangeable, therefore, "contempt of the one is contempt of the other." *Id.* (citing Sacher v. United States, 343 U.S. 1, 12 (1952)).

142 *See* Note, *supra* note 5, at 578-79. A large measure of deference to the trial court will often provide little procedural protection to the alleged contemnor. *Id.*

143 *Id.* at 579.

144 *Daniels*, 118 N.J. at 69, 570 A.2d at 426.

145 *See* Kuhns, *supra* note 5, at 70.

146 *Daniels*, 118 N.J. at 69, 570 A.2d at 426.

147 *Id.* (citing *In re* Dellinger, 461 F.2d 389, 400 (7th Cir. 1972)). Specifically, the court provided that "[w]ith respect to the question of intent, 'the minimum standard is one of a voluntary action known by the actor to be wrongful or one that he reasonably should have been aware was wrongful,'" *Id.*

temnor.[148] It has been suggested that a demonstration of good faith motive should negate a contempt charge for disruptive behavior.[149] If such a rationale were adopted, an independent hearing on the issue of intent would be warranted. This separate determination would be necessary to check feigned claims of good faith.

The New Jersey Supreme Court has surpassed the United States Supreme Court on the issue of due process protection in custodial sentencing.[150] Predictably, the *Daniels* Court emerges as the stalwart protector of due process rights, by magnifying an attorney-contemnor's rights when liberty is threatened. By affording additional precautions, the court not only protects the basic human right of liberty, but creates a check on abuse. Despite the restriction on the personal embroilment doctrine, the *Daniels* Court provides for reference to a detached judge when confinement is mandated.[151] This safeguard is not limited to citations and punishments imposed at the completion of the trial.[152] Hence, *Daniels* depicts a wide range of constitutional rights, not previously contemplated under New Jersey contempt law.

In clarifying the procedures attendant summary resolutions, perhaps the court should have more thoroughly addressed the often criticized appellate review.[153] Traditionally, appellate review has been deemed the most prominent safeguard.[154] This view is based upon the absence of certain procedural rights at the adjudicatory phase.[155] The *Daniels* Court acquiesced in the general view that appellate *de novo* review functions as a judicial failsafe against due process diminishment.[156] Although the court

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148 *See* Comment, *supra* note 2, at 193.

149 *Id. Contra In re* Carton, 48 N.J. 9, 25, 222 A.2d 92, 101 (1966) (good motive does not excuse willful disobedience).

150 The *Daniels* Court extended the due process rights of a custodially sentenced contemnor under Codospoti v. Pennsylvania, 418 U.S. 506 (1974) and Cheff v. Schachenberg, 384 U.S. 373 (1966). See *supra* note 73 and accompanying text.

151 *Daniels*, 118 N.J. at 72, 570 A.2d at 427.

152 *Id.*

153 *See* Kuhns, *supra* note 5, at 118-21.

154 *Id.* at 118-19. The appellate court's ability to check abuse should not be understated. According to a survey conducted from 1960 through 1972, 60% of the federal and state contempt cases were subsequently reversed on appeal. *See* Dorsen & Friedman, *Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct*, at 233-34 (1973).

155 *See* Kuhns, *supra* note 5, at 118-19.

156 *Daniels*, 118 N.J. at 62, 570 A.2d at 422 (citing *In re* Yengo, 84 N.J. 111, 135, 417 A.2d 533, 546 (1980)). It should be noted that some appellate courts confine

recommended an adequate record for review, it failed to address the implications found in *Sacher v. United States*,[157] namely that appellate courts may be disinclined to leaf through a verbose trial record.[158] Perhaps the court should have emphasized increased appellate scrutiny on review. The court itself recognized the intrinsic limitation of appellate review.[159] Although the appellate division in *Daniels* considered some extraneous evidence,[160] generally review is confined to the record.[161] Perhaps appellate courts, in appreciating the difficulties of transcribing a tone of voice, non-verbal gestures and surrounding circumstances, should be more willing to consider external evidence.[162] If not, then the predominant due process safeguard could become the one most subject to manipulation.

The *Daniels* decision should also be acclaimed for its instructional guidance to all lawyers. While encouraging responsible lawyering, the court evinced that theatrics and disrespect will be castigated.[163] Although the court found that an attorney's adjudication of contempt results in minimal consequence, an attorney-contemnor may suffer greatly. By nature, attorney contempt citations will result in harm to professional reputation.[164] Additionally, they may severely undermine the attorney-client relationship.[165] Further, the New Jersey Supreme Court's *Stanley* decision acknowledged that beyond contempt citation, attorneys are also subject to review by an ethics board.[166] This procedure could result in severe public reprimand and/or suspension.[167]

A dangerous issue intrinsically related to attorney-contemnor predicaments, however, was not addressed by the *Daniels* Court, that is, the consequential effect summary attorney-con-

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their inquiry to whether there has been an abuse of discretion at the trial level. *See e.g. In re* Gustafson, 650 F.2d 1017 (9th Cir. 1981).

157 343 U.S. 1, 18-20 (1952) (Black, J., dissenting).

158 *Id.* at 18 (Black, J., dissenting).

159 *See Daniels*, 118 N.J. at 57, 570 A.2d at 420. Although witnesses filed affidavits contradicting the record's illustration of defendant's conduct, the court noted that "[w]e must deal with the record as we have it." *Id.*

160 *In re* Daniels, 219 N.J. Super. 550, 564, 530 A.2d 1260, 1267-68 (App. Div. 1987).

161 *See* Note, *supra* note 5, at 580.

162 *Id.*

163 *Daniels*, 118 N.J. at 72, 570 A.2d at 427.

164 *See* Comment, *supra* note 2, at 193.

165 *Id.*

166 *See In re* Stanley, 102 N.J. 244, 507 A.2d 1168 (1986). See *supra* notes 72-80 and accompanying text.

167 *See* Comment, *supra* note 2, at 193.

tempt adjudication may have on the client's right to an impartial tribunal. Although judges are held to be paragons of objectivity, these men and women are still vulnerable to human weakness. Impartiality should not be a "given." Judicial assignment of a penalty to the client for actions of his advocate is not inconceivable. Again a need for judicial restraint is mandated. In light of such a threat to judicial neutrality, courts should require a more stringent standard of obstruction. Although the *Daniels* decision provides for immediate assessment of the level of misconduct,[168] it did not elaborate on the line between minor attorney disruption and punishable obstruction. Nonetheless, by encouraging professional responsibility and respect, perhaps *Daniels* sought to eradicate perpetual reference to the Shakespearean view of the legal profession.[169]

Doreen Ann Yanik

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168 *In re* Daniels, 118 N.J. 51, 67, 570 A.2d 417, 425 (1990).

169 "The first thing we do, let's kill all the lawyers." Shakespeare, *Henry VI*, Pt. II. Act IV. Sc. 2.