

# Civil Contempt and the Rational Contemnor<sup>†</sup>

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## INTRODUCTION

Under the doctrine of civil contempt, a judge can order a person summarily jailed for refusing to comply with a court order.<sup>1</sup> Unlike criminal contempt sanctions, which are designed to punish the contemnor for disobeying the court, civil contempt sanctions are designed to coerce the contemnor into complying with the court's mandate.<sup>2</sup> The jailed civil contemnor, therefore, will be released if he obeys the order or if compliance is no longer possible.<sup>3</sup> This aspect of civil contempt has given rise to the concept that an imprisoned civil contemnor carries the keys to his own cell.<sup>4</sup> Since he initially could have chosen to obey the court order, and since at any time he can comply and be released, each day the contemnor spends in jail is considered "a day voluntarily spent in custody in preference to compliance on that day."<sup>5</sup>

Because civil contempt sanctions are not considered punishment, they do not trigger many of the constitutional protections that accompany sanctions for criminal contempt or other criminal offenses. The civil contemnor has no right to the presentation or cross-examination of witnesses or even to a trial, but simply is entitled to notice and a hearing before the same judge whose order he disobeyed.<sup>6</sup> Incarceration for civil contempt can continue as long as the contemnor is able to comply, but refuses to do so. The civil contemnor thus might be jailed for a very long time, even though he never has been convicted of, or even charged with, a crime. Regardless of the term, however, imprisonment for civil contempt cannot be considered cruel and unusual punishment, because the incarceration is deemed to be coercive rather than punitive.<sup>7</sup> Under the same rationale, imprisonment for civil contempt cannot

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1. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911); RONALD L. GOLDFARB, *THE CONTEMPT POWER* 59-61, 293 (1963).

2. *Gompers*, 221 U.S. at 441-42.

3. Contemnors will be referred to as "he" and judges will be referred to as "she" throughout this Article. Although both contemnors and judges obviously may be from either sex, assigning a different pronoun to each may help to reduce ambiguity.

4. *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902) (holding that civil contemnors "carry the keys of their prison in their own pockets"). For a well-reasoned criticism of the talismanic use of this phrase, see GOLDFARB, *supra* note 1, at 59-61 (describing the phrase as a legal cliché which does not reflect the reality of the contemnor's situation).

5. *Ochoa v. United States*, 819 F.2d 366, 371 (2d Cir. 1987).

6. See Daniel B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 243 (1971).

7. *Ingraham v. Wright*, 430 U.S. 651, 667-78 (1977), *United States v. Dien*, 598 F.2d 743 (2d Cir. 1979); see also *Spallone v. United States*, 487 U.S. 1251, 1257 (1988). While the sanction at issue in *Spallone* was a fine, rather than imprisonment, the Court indicated that the Cruel and Unusual

trigger the constitutional prohibition against double jeopardy.<sup>8</sup> A contemnor therefore can serve two consecutive jail terms—one for civil and one for criminal contempt—for the same act of noncompliance.<sup>9</sup>

The limited procedural rights of a civil contemnor are based on the notion that the civil contempt sanction is coercive. For this reason, some courts have held that it is impermissible to hold an individual for civil contempt once it is clear that the contemnor never will comply with the court order. These courts reason that, once jail has lost its coercive effect, continued incarceration is purely punitive and requires the increased procedural protections of criminal contempt. Incarceration for civil contempt thus must cease once the court determines that there is no realistic possibility of compliance or coercion in the future.

This “no realistic possibility of compliance” (“NRPC”) standard is hard to administer in practice. Courts have listed criteria to consider in determining whether or not a contemnor can be coerced, but these factors provide limited guidance at best and often are inconsistent with the rationale underlying the NRPC doctrine. The difficulties of applying the NRPC standard have been recognized by courts, and a recent Supreme Court case, *Hicks v. Feiock*,<sup>10</sup> casts doubt on whether a judge is required to release a contemnor who cannot be coerced. Some courts, however, still apply the NRPC doctrine, and it is clear that a judge may choose, at her discretion, to free a contemnor who cannot be compelled to comply with a court order.

This Article argues that the foundation of the civil contempt doctrine—and thus the premise underlying the NRPC and related doctrines—is seriously flawed. Civil contempt is grounded in the idea that an individual who is jailed for disobeying a court order can be coerced into compliance by continued incarceration. In most cases, however, a rational individual faced with a court order never will comply after serving a period of incarceration. He either will comply immediately or not at all. Moreover, the factors that might lead an individual to comply after a period of incarceration are quite different from those suggested by current legal doctrine. In general, belated compliance will occur only where an individual lacks perfect information at the time of his original decision to disobey the court order.

A better awareness of why incarcerated contemnors may decide to comply with a court's order will help judges to determine whether a particular contemnor is likely to be coercible. Knowing whether a contemnor can be swayed is useful both under the NRPC standard and in the application of a judge's discretionary power to free a jailed contemnor. More importantly, the idea that with perfect information a rational contemnor, once jailed, will never comply suggests sweeping changes in the structure of civil contempt

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8. See *Yates v. United States*, 355 U.S. 66, 74 (1957) (finding that the same act can give rise to civil and criminal contempt sanctions without offending double jeopardy); see also *United States v. Hughcy*, 571 F.2d 111, 114-16 (2d Cir. 1978) (holding that there was no double jeopardy problem where a criminal contemnor's prior incarceration was for civil contempt arising from the same act).

9. *Ochoa*, 819 F.2d at 369-72. No credit is given towards a criminal contempt sentence for time spent in jail for civil contempt because it would undermine the coercive effect of civil contempt sanctions. *Id.*

10. *Hicks*, 485 U.S. 624 (1988).

sanctions. It might be desirable, for example, to eliminate entirely the judge's discretion to free an incarcerated contemnor and, instead, to sentence civil contemnors to fixed jail terms with a right to purge the sanctions by complying with the court order.

The argument in this Article that rational contemnors will testify immediately or not at all is based upon an economic model of civil contempt that is presented in Part III. The background necessary for understanding the model is set forth in Part I and Part II. Part I briefly explains the legal principles surrounding civil contempt and discusses some of the reasons individuals may be reluctant to comply with a court order. Part II discusses the NRPC doctrine and the factors judges currently use to determine if a jailed civil contemnor cannot be coerced and thus must be released. Part II also reviews common criticisms of the NRPC doctrine and considers the impact of the Supreme Court case, *Hicks v. Feiock*, on the doctrine.

Part III uses a simple economic model to show that under certain assumptions a rational contemnor will comply right away or not at all and then considers those conditions under which a contemnor will comply after incarceration. Part IV discusses the implications of the analysis in Part III for reform of the civil contempt sanctioning structure.

## I. THE CIVIL CONTEMPT SANCTION

### A. Overview

Judges have broad authority to issue sanctions for contempts of court.<sup>11</sup> A wide range of conduct is sanctionable since any act of disobedience or disrespect toward the court, or any obstruction of the judicial process, can be considered contempt.<sup>12</sup> Contempts of court include, for example, disrupting a trial,<sup>13</sup> insulting a judge,<sup>14</sup> violating an injunction or restraining order,<sup>15</sup>

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11. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1026 (1993) (noting the lack of meaningful constraints on the power of courts to impose contempt sanctions). Judges can order many types of sanctions in civil contempt cases. See Dobbs, *supra* note 6, at 267-82. Imprisonment and fines are the sanctions used most commonly. *Id.* at 267. This Article uses the term "sanction" to refer to imprisonment.

12. GOLDFARB, *supra* note 1, at 1, 13; Dobbs, *supra* note 6, at 185-225 (discussing the multitude of acts or omissions that can constitute contempt of court).

13. See, e.g., *United States v. Seale*, 461 F.2d 345, 350-51 (7th Cir. 1972) (holding the defendant in contempt when his repeated objections to his own attorney and attempts to represent himself resulted in a mistrial).

14. See, e.g., *United States v. Schiffer*, 351 F.2d 91, 93-94 (6th Cir. 1965) (holding an attorney in contempt for accusing the judge of suppressing evidence and conducting a "star chamber proceeding"), *cert. denied*, 384 U.S. 1003 (1966).

15. See, e.g., *United States v. United Mine Workers*, 330 U.S. 258 (1947) (holding union and union president in contempt for violating a temporary restraining order).

refusing to obey a court order to testify before a grand jury,<sup>16</sup> and refusing to reveal the whereabouts of a minor child in violation of a court order.<sup>17</sup>

This Article focuses on contempts resulting from a refusal to obey a court order. A judge may impose two types of sanctions for refusing to obey a court order. First, the judge may impose civil contempt sanctions to coerce the contemnor into obeying her order. Second, the judge may impose criminal contempt sanctions to punish the contemnor for disobeying her order.

If the judge's goal is to induce compliance, she must give the contemnor an incentive to obey the court order. Civil contempt, therefore, requires imposing an indeterminate or conditional sanction—one that ends if the contemnor complies.<sup>18</sup> Criminal contempt, on the other hand, requires a determinate or unconditional sanction—one that is unaffected by any future actions of the contemnor.<sup>19</sup>

Whether a contempt sanction is punitive or coercive determines the procedures that a contemnor receives. Punitive criminal contempt sanctions require most of the constitutional safeguards of criminal trials,<sup>20</sup> while coercive civil contempt sanctions trigger far fewer procedural protections.<sup>21</sup> A civil contemnor may be jailed for a very long time despite never having been convicted of a crime.<sup>22</sup> Although in a few cases, the length of possible incarceration is limited by statute,<sup>23</sup> in general the civil contempt sanction is limited only by the length of the proceeding underlying the order. This can vary greatly. A witness who refuses to testify at trial, for example, only can be held in civil contempt until the trial ends and thus is likely to be jailed only for a short time. Maximum civil incarceration for a parent who refuses

16. See, e.g., *In re Grand Jury Proceedings of Dec.*, 1989 (Freligh), 903 F.2d 1167, 1168 (7th Cir. 1990) [hereinafter *In re Freligh* 1]; *United States v. Jones*, 880 F.2d 987, 988 (7th Cir. 1989); *In re Grand Jury Proceedings (Doe)*, 862 F.2d 430, 431 (2d Cir. 1988) [hereinafter *In re Doe*]; *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 422 (3d Cir. 1979) [hereinafter *In re Braun*]; *In re Grand Jury Subpoena 87-2 (MIA) (Constant)*, 691 F. Supp. 1400, 1401 (S.D. Fla. 1988) [hereinafter *In re Constant*].

17. See, e.g., *Baltimore City Dep't of Social Serv. v. Bouknight*, 493 U.S. 549 (1990) (refusing to disclose to authorities the location of a minor child who was under supervision of a state social services agency); *Morgan v. Foretich*, 564 A.2d 1 (D.C. App. 1989) (discussing a mother's refusal to allow visitation by the child's father or reveal whereabouts of the child in violation of custody order).

18. *Hicks v. Feiock*, 485 U.S. 624, 633 (1988).

19. *Id.*; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911).

20. *Hicks*, 485 U.S. at 633-34; see also *Dobbs*, *supra* note 6, at 235, 240-42.

21. See *Hicks*, 485 U.S. at 638; *Dobbs*, *supra* note 6, at 235, 242. A civil contemnor is entitled to notice and a hearing. *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1127 (3d Cir. 1990). In addition, he must be given sufficient time to prepare a defense. *In re Grand Jury (Bruno)*, 545 F.2d 385 (3d Cir. 1976) [hereinafter *In re Bruno*]. For a discussion of the procedural protections given to civil contemnors and the need for reform in this area, see *Dudley*, *supra* note 11, at 1067-98.

22. See *GOLDFARB*, *supra* note 1, at 61 (noting that punishment for civil contempt potentially is unlimited). The period of incarceration can last for years, as in the cases of Elizabeth Morgan and Jacqueline Bouknight. Morgan spent 25 months in jail for civil contempt for refusing to reveal the whereabouts of her child in violation of a court order until Congress passed a law to free her. See Barton Gellman, *Elizabeth Morgan Freed After 759 Days in Jail; Daughter's Whereabouts Remains a Secret*, WASH. POST, Sept. 27, 1989, at 1. Bouknight, who remains in custody, has been jailed for more than five years for refusing to disclose the location of her child, whom police suspect she abused or killed. See ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE 174-79* (1991) (describing Bouknight's case and labeling her incarceration for civil contempt as the longest in the history of the state of Maryland). For a discussion on the limits of the period of incarceration for civil contempt, see *infra* part I.B.

23. For a discussion of statutory limits, see *infra* part I.B.3.

to reveal the whereabouts of her child in violation of a visitation order, on the other hand, may last until the child reaches the age of majority.

A civil contemnor can avoid sanctions if he can show that it is impossible to comply with the court order.<sup>24</sup> For example, a person cannot be held in civil contempt for failing to produce documents that are not in his control.<sup>25</sup> Similarly, an insolvent individual cannot be held in civil contempt for failing to pay a judgment.<sup>26</sup> The burden, however, is placed on the contemnor to show he cannot obey the court order,<sup>27</sup> and courts generally reject such claims absent compelling evidence that compliance is impossible.<sup>28</sup>

In rare cases, a civil contemnor can escape sanctions if a court finds there is "just cause" for disobeying the court order.<sup>29</sup> Indeed, statutes that define civil contempt often explicitly provide that an individual can be sanctioned only if he disobeyed the court order without just cause.<sup>30</sup> The statutes usually do not define just cause, but instead leave the determination to the courts.<sup>31</sup> Courts in turn have construed the term very narrowly, both by limiting the circumstances that can give rise to just cause and by placing the burden of proof on the contemnor.<sup>32</sup>

Courts interpreting the just cause provision in the federal recalcitrant witness statute, for example, have suggested few situations where it could be met. Those situations occur where the secrecy of the grand jury is compromised,<sup>33</sup> where there is a valid constitutional objection to questions

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24. *United States v. Rylander*, 460 U.S. 752, 757 (1983), *cert. denied*, 467 U.S. 1209 (1984); *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir.), *cert. denied*, 113 S. Ct. 66 (1992); *see also Hicks*, 485 U.S. at 638 n.9 (noting how previous Court opinions have recognized defense of inability to comply).

25. *Rylander*, 460 U.S. at 757.

26. *Wellington*, 950 F.2d at 1529; *Keegan v. Lawrence*, 778 F. Supp. 523, 526 (S.D. Fla. 1991).

27. *See Rylander*, 460 U.S. at 757 (holding that once it is shown that the contemnor has violated a court order, the burden of production shifts to the contemnor to show inability to comply); *see also Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1481 (9th Cir. 1992) (noting that the contemnor bears the burden of showing present inability to comply with the court order).

28. *See, e.g., Wellington*, 950 F.2d at 1529-30 (rejecting the contemnor's claim that he was insolvent and unable to pay the amount due under the disgorgement order). Occasionally a contemnor can produce sufficient proof. *See Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 935 (2d Cir. 1992) (accepting the attorney's claim that he was unable to comply with the court order to produce documents since he had been discharged from the case and the documents no longer were in his control).

29. While there is some common law support for this defense, it more frequently is associated with statutory contempt provisions.

30. The federal statute governing recalcitrant witnesses, for example, specifically authorizes incarceration of those witnesses who refuse to testify "without just cause." 28 U.S.C. § 1826(a) (1983).

31. *See In re Grand Jury Proceedings Empanelled May, 1988 (Freligh)*, 894 F.2d 881, 884 (7th Cir. 1989) [hereinafter *In re Freligh I*] (noting that neither 28 U.S.C. § 1826(a) nor its legislative history define "just cause").

32. *United States v. Handler*, 476 F.2d 709, 713 (2d Cir. 1973). Moreover, even when the contemnor makes a showing of just cause, the government may be able to rebut it easily. *See id.* (citing *In re Vericker*, 446 F.2d 244 (2d Cir. 1971)) (suggesting government generally can overcome a challenge on immunity grounds by making a modest showing that the questions are proper).

33. *In re Grand Jury (Mallory)*, 797 F.2d 906 (10th Cir. 1986) (holding that just cause to refuse to testify was established when the secrecy of a grand jury proceeding was jeopardized by the unauthorized presence of a reporter). Mere unsubstantiated fears that the secrecy of the grand jury might be compromised are not sufficient. *See In re Grand Jury Proceedings (Lahey)*, 914 F.2d 1372, 1375 (9th Cir. 1990) (finding that a prisoner's generalized fear that others might discover that he testified before the grand jury was insufficient to establish just cause).

asked,<sup>34</sup> where the questions asked were outside the scope of the witness' immunity, where<sup>35</sup> the prosecutor promised a witness that he would not have to testify as part of a plea agreement,<sup>36</sup> or where the contemnor was not given enough time to prepare for the hearing.<sup>37</sup>

One circuit also has suggested that in some circumstances the duress defense may be available for the civil contemnor.<sup>38</sup> In *In re Grand Jury Proceedings of December, 1989* (Freligh II),<sup>39</sup> the Seventh Circuit stated that a civil contemnor can be excused from complying on duress grounds if he can show that he is unable to act freely due to an overwhelming fear of palpable danger.<sup>40</sup> The contemnor must present very strong evidence of the actual danger and show that his will was overcome by it. In *Freligh II*, however, the court found that the contemnor's claim was not supported.<sup>41</sup> Since no case in the circuit has met the court's stringent standards for the defense, it seems likely that cases successfully raising it will be extremely rare.<sup>42</sup> Moreover, no other jurisdiction has adopted the defense.<sup>43</sup>

Necessity has also been unsuccessful as a defense to civil contempt sanctions. In *Morgan v. Foretich*,<sup>44</sup> for example, Morgan refused to obey a court order to produce her daughter on the grounds that her ex-husband sexually abused the child in prior visitations. The judge who issued the order was unconvinced that the abuse had occurred and ordered her jailed for civil contempt. On appeal she argued that it was necessary to disobey the court order to avoid the greater evil of child abuse.<sup>45</sup> The court rejected her argument, reasoning that civil contempt would be meaningless if a contemnor

34. This could occur, for example, when the government's questions are based on information obtained from an illegal wiretap. See *Gelbard v. United States*, 408 U.S. 41 (1972).

35. *Handler*, 476 F.2d at 714.

36. *In re Grand Jury Proceedings* (Nudo), No. 89-35403, 1989 WL 80485 (9th Cir. 1989).

37. See *In re Brnno*, 545 F.2d 385 (3d Cir. 1976) (finding that 15 minutes was insufficient time to prepare the defense for a hearing at which the individual faced possible incarceration of 18 months).

38. See *In re Freligh I*, 903 F.2d 1167 (7th Cir. 1990); *In re Freligh I*, 894 F.2d 881 (7th Cir. 1989). The court previously suggested that duress may be a defense to a charge of criminal contempt. See *United States v. Patrick*, 542 F.2d 381, 386-88 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

39. *Freligh II*, 903 F.2d at 1167.

40. *Id.* Fear itself is not a sufficient reason for not complying. *Id.* at 1170-71. Instead, the contemnor must be so overcome by a sense of palpable impending danger that he is unable to comply and purge himself of contempt. *Id.*; see also *Freligh I*, 894 F.2d at 883 (distinguishing fear and duress as "the difference between vague unsubstantiated fears and a palpable imminent danger").

41. The contemnor's only "proof" consisted of two letters that he wrote to the judge expressing an undefined fear of reprisals. *In re Freligh II*, 903 F.2d at 1170. The court held that the contemnor not only "failed to demonstrate a palpable imminent danger, but has not even demonstrated a reasonable fear." *Id.*

42. See Stuart Mass, Note, *The Dilemma of the Intimidated Witness in Federal Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program*, 50 FORDHAM L. REV. 582, 603-09 (1982) (noting the difficulty of proving the duress defense in an intimidated witness context).

43. The Second Circuit explicitly rejected the defense. See *In re Doe*, 862 F.2d 430, 432 (2d Cir. 1988) (holding that duress is not a defense to civil contempt). One commentator has proposed allowing the defense for intimidated innocent witnesses who refuse to testify. Mass, *supra* note 42, at 599-604.

44. *Morgan*, 546 A.2d 407 (D.C. App. 1988), cert. denied, 488 U.S. 1007 (1990).

45. *Id.* at 411.

could evade sanctions whenever he took a different view from the court regarding the harm produced by not complying.<sup>46</sup>

### B. Limitations on Civil Contempt Sanctions

Although a judge has broad discretion in fashioning civil contempt sanctions, there are some limits on the length of time for which a civil contemnor can be jailed. Some of these have been suggested earlier. This section will give a more detailed discussion of the current law regarding the limits on civil contempt sanctions.

#### 1. Validity of the Underlying Order

Civil contempt sanctions are imposed to coerce compliance with a court order. Once a court order is declared invalid, compliance no longer is required,<sup>47</sup> and a civil contemnor jailed for disobeying such an order must be released.<sup>48</sup>

#### 2. Length of the Underlying Proceeding

A civil contemnor cannot be kept in jail for civil contempt if he no longer can purge himself of contempt.<sup>49</sup> Thus his jail term is limited to the duration of the proceeding underlying the contempt order.<sup>50</sup>

The fact that the maximum length of incarceration for civil contempt varies with the length of the proceeding rather than the harm caused by the

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46. *Id.* During a subsequent appeal, the court ordered Morgan released on the grounds that there was no realistic possibility that further incarceration would induce her to comply. *Morgan*, 564 A.2d at 1. The order was vacated when the appellate court agreed to rehear the case en banc. *Id.* at 20. Before a rehearing could take place, however, Congress passed a law which resulted in Morgan's release. See D.C. CODE ANN. § 11-741 (1981 & Supp. 1993); see also Felicity Barringer, *Prison Releases a Defiant Mother*, N.Y. TIMES, Sept. 26, 1989, at A18; Gellman, *supra* note 22.

47. See *United States v. United Mine Workers*, 330 U.S. 258, 294-95 (1947); *In re Timmons*, 607 F.2d 120, 124 (5th Cir. 1979). While this is the prevailing law, the wisdom of it has not been accepted universally. See *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1348-50 (3d Cir. 1976) (Garth, J., concurring). In *Latrobe*, the concurring justice was concerned about the effect of this rule in cases where the contemnors had conducted strikes in violation of a court order later deemed invalid. He argued that, in some cases, the public interest necessitates that civil contempt sanctions survive. *Id.* at 1350. He thus was "severely troubled" by the doctrine that civil contempt sanctions always end when the underlying order is held to be invalid. *Id.* at 1348.

48. The same is not true for the criminal contemnor. Criminal contempt sanctions are imposed to punish a contemnor for having defied judicial authority. If an individual believes that a court order is invalid, he is entitled to appeal the order, but he must obey it until it is overturned. *Maness v. Meyers*, 419 U.S. 448, 449 (1975). A criminal contemnor's failure to do so undermines respect for the court. Thus, convictions for criminal contempt will be upheld even if the appeal is successful and the contempt order is ruled invalid. *Id.* at 459-60; *United Mine Workers*, 330 U.S. at 294; *Timmons*, 607 F.2d at 120, 124.

49. See *Shillitani v. United States*, 384 U.S. 364, 371-72 (1966) (requiring release at the expiration of the grand jury term of a witness jailed for refusing to testify since there was no further opportunity for contemnor to purge himself and rationale for incarceration no longer existed).

50. See, e.g., *id.*; *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980) (stating that incarceration for civil contempt for refusing to testify at a trial cannot extend beyond the end of the trial). The released civil contemnor, however, still can be prosecuted and separately imprisoned for criminal contempt arising from the same act. See *infra* text accompanying notes 8-9.

noncompliance or the moral culpability of the contemnor can have odd results. Suppose a gang member is called to testify at the trial of another member of his gang who killed an innocent person in a drive-by shooting. If the gang member refuses to testify, he only can be jailed for civil contempt until the trial ends—typically a few days. Thus he may be released quickly, even though a murderer may go free as a result of his refusal.<sup>51</sup>

Now consider a college student who is asked to testify before a grand jury investigating the activities of her animal-rights-activist roommate in connection with the illegal freeing of laboratory animals by an anti-animal-experimentation group. If the student believes that it would be immoral to testify against her friend, she can be held in civil contempt for the length of the grand jury, or for as long as eighteen months.<sup>52</sup> The college student, therefore, will be subject to a much longer jail term for civil contempt for her refusal to testify than will the gang member, even though both the harm caused by her defiance and her moral culpability seem much less.<sup>53</sup>

### 3. Statutory Limits

Although civil contempt sanctions generally can extend for the length of the underlying proceeding, for some conduct the maximum term of incarceration is limited by statute. The Federal Recalcitrant Witness Statute, for example, places an eighteen-month ceiling on incarceration for civil contempt for witnesses who refuse to testify at trial or before a federal grand jury.<sup>54</sup> Wisconsin limits incarceration for acts of civil contempt to six months,<sup>55</sup> while California sets the limit at one year.<sup>56</sup> Most states have not adopted any statutory limits on the civil contempt sanction.<sup>57</sup> Even where statutory

51. Situations where indictments are dismissed with prejudice because a witness refuses to testify after a jury has been empaneled—and double jeopardy has attached—do occur. See, e.g., *United States v. Berardelli*, 565 F.2d 24, 26-27 (2d Cir. 1977). In *Berardelli*, a witness under indictment agreed to cooperate with the government and testified before several grand juries. The government then indicted others based primarily on Berardelli's anticipated trial testimony. After a jury was empaneled and the trial had begun, Berardelli refused to testify and was jailed for civil contempt. The indictments against others had to be dismissed when the government could not persuade Berardelli to comply.

52. This example is not implausible. See Ann Japenga, *When the Feds Locked Up Jonathon Paul for Refusing to Testify, the Animal Rights Movement Gained an Accidental Hero*, L.A. TIMES, May 10, 1993, at E1 (describing an animal rights supporter jailed for five months for refusing to give information which might lead to the discovery of the whereabouts of his former roommate who was wanted for questioning by the authorities).

53. Both contemnors, of course, still can be prosecuted and sentenced for criminal contempt.

54. 28 U.S.C.A. § 1826 (West Supp. 1993).

55. WIS. STAT. ANN. § 785.04(1)(b) (West 1981). See generally Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981) (giving a detailed analysis of the statutory limits in Wisconsin). For a review of Wisconsin contempt statutes prior to the enactment of § 785.04 and the confusion such statutes engendered, see Steven M. Gloe, Comment, *Contempt of Court: Some Considerations for Reform*, 1975 WIS. L. REV. 1117 (1975).

56. CAL. PENAL CODE § 19.2 (West Supp. 1993).

57. For a brief period of time there was a statutory limit of one year on civil contempt in child custody cases in the District of Columbia. D.C. CODE ANN. § 11-741(b)(1) (Supp. 1993). The law setting such limits was passed by Congress in response to the Elizabeth Morgan case. See Maureen Dowd, *Bush Signs Bill to Release a Mother*, N.Y. TIMES, Sept. 24, 1989, at A22 (reporting that sponsors of the bill stated that it specifically was tailored to free Morgan). At the time that it was passed, Dr. Morgan had been jailed for 25 months for refusing to disclose the whereabouts of her daughter in violation of a child custody order which gave her ex-husband visitation rights. Critics of the bill claimed



limits on the sanction have been enacted, they do not protect the released civil contemnor from prosecution and imprisonment for criminal contempt arising from the same contemptuous act. They only limit the maximum period of possible confinement for civil contempt.

#### 4. No Realistic Possibility of Coercion

Some civil contemnors will never comply with a court order even though it is possible for them to do so.<sup>58</sup> These "uncoercible" contemnors usually have very strong reasons for refusing to comply with the court order.<sup>59</sup> If the contemnor believes that he has more to lose by complying than he does by going to jail, he cannot be coerced into obeying the court order.

In some cases, religious convictions may lead the contemnor to defy the court order.<sup>60</sup> Members of the Branch Davidian sect at Waco, Texas, for example, resisted an army of federal officers to follow the commands of David Koresh, the man they believed was the Messiah. It seems probable that, if ordered to testify against him or fellow sect members, they would refuse to do so.

Nonreligious ethical convictions can be equally strong. A reporter who is ordered to reveal a confidential source might believe that he could not in good conscience violate the trust that was placed in him, and thus might feel compelled to disobey the order.<sup>61</sup> Dedicated political activists often believe that it would be immoral to provide information which could lead to the arrest of fellow activists, or to the disruption of an organization to which they are committed.<sup>62</sup>

that it was fashioned to apply to her case, and disapproved of Congressional interference in an ongoing court case. *See, e.g., Contempt for the Court*, WASH. TIMES, Sept. 28, 1989, at F2 (calling the statute a private relief bill passed for Morgan which compromises the inherent powers of the judiciary); Sandra Torry, *D.C. Judges Assail Congressional Intervention in Morgan Case*, WASH. POST, Sept. 28, 1989, at C1 (noting judicial disapproval of both Congressional action for a specific individual and interference in an unresolved court case); *Dr. Morgan Is Freed*, WASH. POST, Sept. 27, 1989, at A30 (stating that Congress undermined judicial authority by its intervention in the Morgan case). The critics apparently were correct that it was a private bill of relief. The law, which applied retroactively to Morgan, had a sunset provision so that it only was to remain in effect for 18 months. Later, a bill was proposed to permanently extend the law. *See* D.C. CODE ANN. § 11-741(b)(1); Daniel Klaidman, *Morgan Law*, LEGAL TIMES, Mar. 18, 1991, at 7 (noting provisions proposed). The bill was not enacted.

58. "Able to comply" simply means that they do not meet the narrow legal standard of "inability to comply." For a discussion of the defense of inability to comply, see *supra* text accompanying notes 24-28.

59. *See* GOLDFARB, *supra* note 1, at 60-61 (noting that an adamant contemnor's conduct often is the result of strong moral principles).

60. *See In re Cueto*, 443 F. Supp. 857, 859, 864 (S.D.N.Y. 1978) (noting that contemnors had been jailed for 10 months after refusing to testify on the grounds that it would impair their ability to function as lay ministers).

61. *See In re Farr*, 36 Cal. App. 3d 577, 581 (1974) (noting that a newspaper reporter was jailed for 45 days for civil contempt for refusing to reveal the identity of a source).

62. *See, e.g.,* Ochoa v. United States, 819 F.2d 366 (2d Cir. 1987) (describing a contemnor's refusal to testify about terrorist bombings allegedly committed by a group of anti-Castro activists); *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985); *United States v. Rosado*, 728 F.2d 89 (2d Cir. 1984) (noting the contemnor's repeated refusal to testify about terrorist bombings of a group supporting the Puerto Rican independence movement); *In re Archuleta*, 446 F. Supp. 68 (S.D.N.Y. 1978); *see also* Japenga, *supra* note 52 (reporting a contemnor's refusal to testify about the animal rights movement or other activists).

In other cases, the contemnor's fear for his own personal safety or that of others can lead to noncompliance.<sup>63</sup> An innocent bystander, for example, might witness a murder committed by a member of an organized crime syndicate. He might so fear reprisals that he refuses to testify before a grand jury investigating the crime.<sup>64</sup> Members of the crime syndicate may have threatened the witness or his family with serious harm,<sup>65</sup> or the witness may know of others who were murdered after agreeing to testify.<sup>66</sup> The witness thus is faced with a dilemma. He can testify and risk serious injury to himself or his family, or he can refuse to talk and risk going to jail. If the potential danger from the crime syndicate is great, the witness may believe that jail is his only option.<sup>67</sup>

Some courts have held that an individual may not be subjected to civil contempt sanctions if there is no realistic possibility he will comply.<sup>68</sup> These courts reasoned that the sole justification for allowing civil contempt sanctions to be imposed with few procedural safeguards is that the sanctions are coercive rather than punitive. If the contemnor never will comply, then

63. It is not surprising, for example, that witnesses to crimes may not wish to testify for fear for their safety. Newspaper articles frequently document stories of intimidated witnesses who were injured or killed to prevent them from testifying. *See, e.g.,* Sheryl Stolberg, *Some Crime Witnesses Pay High Price for Civic Duty*, L.A. TIMES, Aug. 30, 1992, at A1 (describing cases of witnesses who were murdered before they could testify at trial); *Why Was a Good Kid Killed?*, L.A. TIMES, Aug. 22, 1992, at B7 (commenting on the murder of a boy who testified about a gang-related shooting). Between April 1992 and March 1993, six articles appeared in the *L.A. Times* regarding the problem of witness intimidation. The number of witnesses who refuse to testify is likely to grow, particularly in the area of gang-related crime. *See* Gebe Martinez, *Witnesses to Gang Shooting Keeping Mum*, L.A. TIMES, Apr. 22, 1992, at B1 (noting that the police hit a "wall of silence" in an investigation of gang-related crimes); Stolberg, *supra* (noting the severity of the witness intimidation problem in gang-related prosecutions).

64. Fear of reprisals frequently is offered by recalcitrant witnesses as the reason for not testifying. *See, e.g.,* *United States v. Esposito*, 834 F.2d 272, 273 (2d Cir. 1987) (discussing witnesses fearing for their own safety); *Gracia*, 755 F.2d at 987 (fearing reprisals against family); *Simkin v. United States*, 715 F.2d 34, 36 (2d Cir. 1983) (fearing for own safety and that of relatives); *In re Braun*, 600 F.2d 420, 422 (3d Cir. 1979) (fearing retribution against family and self); *In re Constant*, 691 F. Supp. 1400, 1401 (S.D. Fla. 1988) (fearing for safety of family).

65. *See, e.g.,* Mark I. Pinsky, *Judge Keeps Murder Case Witness in Jail*, L.A. TIMES, Oct. 14, 1992, at B5 (describing how a witness failed to return to court after receiving threats that her children would be killed if she continued to testify); Stolberg, *supra* note 63 (describing threats made against witnesses and their families).

66. Sometimes, however, a witness will testify despite such fears. In a recent case in Los Angeles, a young boy was murdered after agreeing to testify against the alleged triggerman in a drive-by killing. *See* Vicki Torres, *Family's Pride Turns to Tears After Young Witness Is Slain*, L.A. TIMES, Aug. 21, 1992, at B1. After the boy's death, three friends who had also witnessed the drive-by shooting agreed to testify. *See* Vicki Torres, *3 Young Witnesses Learn the Price of Courage*, L.A. TIMES, Mar. 12, 1993, at A1.

67. In assessing the risk associated with testifying, the witness might factor in the possibility of entering a witness protection program. The existence of such programs, however, often does little to ameliorate a witness' concerns. It may not be an option for a particular witness. *See* Stolberg, *supra* note 63 (describing the shortage of resources for protecting witnesses and the difficulty of getting into such programs). Moreover, even when available, such programs often are ineffective in ensuring witness safety. *See also* Mass, *supra* note 42, at 587-88 (noting shortcomings of the program, including breaches of the witness' security).

68. This doctrine largely can be traced back to several cases in the mid-1970's. *See* *Lambert v. Montana*, 545 F.2d 87, 89-91 (9th Cir. 1976); *In re Farr*, 36 Cal. App. 3d 577, 584 (1977); *Catena v. Seidl*, 343 A.2d 744, 746-47 (N.J. 1975) (per curiam). It became more widely used after the Second Circuit held that an individualized determination of whether confinement had lost its coercive impact must be made, even where there was a statutory limit on incarceration that had not yet been reached. *See* *Simkin*, 715 F.2d at 37.

incarceration cannot have a coercive effect and the sanction takes on the character of a criminal penalty. Since the contemnor has been incarcerated without the constitutional safeguards that accompany criminal contempt proceedings, due process<sup>69</sup> or equitable considerations<sup>70</sup> require that he be released. The uncoercible contemnor, of course, still can be jailed for criminal contempt so long as he receives the broader procedural protections which accompany criminal contempt sanctions.

Adopting a rule that a civil contemnor can be confined only so long as he can be coerced suggests that a judge in fact can determine who can be coerced. Under this NRPC standard, if a judge knows from the outset that an individual will never comply with a court order, she presumably cannot issue the order in the first place. In addition, the NRPC standard requires a judge to review periodically contemnors who are currently incarcerated to ensure that they still might be persuaded to comply. If the judge determines that there is "no realistic possibility," or "no substantial likelihood" of compliance, then she must release the contemnor.<sup>71</sup>

Not surprisingly, courts have found it difficult to determine whether a sanction imposed for civil contempt continues to have a coercive effect,<sup>72</sup> and a recent Supreme Court case, *Hicks v. Feiock*<sup>73</sup> may have thrown into question the continued viability of the rule that judges must release incarcerated civil contemnors if there is no substantial likelihood of compliance. Part II of this Article will examine more closely the factors used to determine if a contemnor will comply in the future and the controversy surrounding the NRPC doctrine.

## II. COERCION, PUNISHMENT AND THE CIVIL CONTEMPT SANCTION

### A. The Uncoercible Contemnor

The NRPC doctrine assumes that courts can make reasonable predictions about whether or not a contemnor can be coerced into complying with a court

69. Due process requires that the incarceration be reasonably related to the purpose for which the prisoner was confined. See *Jackson v. Indiana*, 406 U.S. 715 (1972). Some courts have held that this aspect of the Due Process Clause applies to civil contempt. See, e.g., *Lambert*, 545 F.2d at 89-91. Thus, if incarceration for civil contempt cannot have a coercive effect, it no longer is reasonably related to the purpose for which it was imposed. *Id.*

70. See *In re Cueto*, 443 F. Supp. 857, 862-65 (S.D.N.Y. 1978) (releasing "uncoercible contemnors" on humane and equitable grounds); see also *In re Freligh I*, 894 F.2d 881, 885 (7th Cir. 1989) (suggesting equity concerns may persuade a judge to release a civil contemnor).

71. Courts have used several phrases to refer to the standard used to determine if continued incarceration will be coercive, or cause the contemnor to comply. See, e.g., *Simkin*, 715 F.2d at 38 ("no realistic possibility"); *Lambert*, 545 F.2d at 90 ("no substantial likelihood"); *Farr*, 36 Cal. App. 3d at 584 ("absence of substantial likelihood"). The term "no realistic possibility of compliance," or "NRPC," is used in this Article as representative of all of these phrases.

72. See, e.g., *In re Freligh II*, 903 F.2d 1167, 1170-71 (7th Cir. 1990) (stating that trying to draw a line between coercion and punishment is "often a fool's errand"); *United States v. Jones*, 880 F.2d 987, 989 (7th Cir. 1989) (characterizing attempts to discern those recalcitrant witnesses who would never testify as "speculative at best and time-consuming and pointless at worst"); *In re Braun*, 600 F.2d 420, 425 (3d Cir. 1979) (noting that the point where incarceration for civil contempt becomes punitive is not readily discernible).

73. *Hicks*, 485 U.S. 624 (1988).

order. Under the doctrine, the judge is required to look at the specific facts and circumstances surrounding each case to predict what the contemnor will do—or will refuse to do—in the future.<sup>74</sup>

Judges sometimes must base their predictions on little evidence other than the contemnor's own assertions that he will never obey the order.<sup>75</sup> Contemnors, however, often make threats which they do not carry out.<sup>76</sup> As a result, courts are skeptical of relying entirely on the contemnor's statements.<sup>77</sup> Thus, while a contemnor's assertion that he will never comply may be a necessary condition for release, it rarely will be sufficient.<sup>78</sup> Courts may consider the opinions of third parties as to the likelihood of compliance, but such statements alone will not be adequate proof that a contemnor cannot be coerced.<sup>79</sup>

Judges also will examine the stated reasons for noncompliance and will assess the depth of the contemnor's belief. Commonly professed reasons for

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74. See *Simkin*, 715 F.2d at 38-39 (finding that a judge must predict whether, under all the circumstances, there is a realistic possibility that an individual contemnor will comply); *Catena v. Seidl*, 68 N.J. 224, 229 (N.J. 1975) (per curiam) (stating that each case must be decided on the basis of an independent evaluation of the particular facts); see also *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984) (per curiam) (noting that in determining whether incarceration has ceased to be coercive, a court must make a difficult prediction regarding the contemnor's future behavior).

75. See, e.g., *In re Grand Jury Proceedings* (Howald), 877 F.2d 849 (11th Cir. 1989) (per curiam) [hereinafter *In re Howald*]; *In re Grand Jury* Feb. 1987 Term (Griffin), 677 F. Supp. 26, 28 (D. Me. 1988) (mem.) [hereinafter *In re Griffin*]; *United States v. Salerno*, 632 F. Supp. 529 (S.D.N.Y. 1986), cert. denied, 493 U.S. 811 (1989).

76. See *Freligh II*, 903 F.2d at 1170-71 (noting that "all recalcitrant witnesses vehemently insist that they will never talk"); *In re Parrish*, 782 F.2d 325, 328 (2d Cir. 1986) (stating that continued imprisonment may alter a contemnor's prediction that he never will comply); *In re Cueto*, 443 F. Supp. 857, 862 (S.D.N.Y. 1978) (noting that experience indicates contemnors do not always act upon threats to refuse to testify).

77. See *In re Grand Jury*, 851 F.2d 499, 502 (1st Cir. 1988) (per curiam) (stating that a court need not accept a witness' statement that he would never testify as satisfying the burden of showing no realistic possibility of compliance); *Parrish*, 782 F.2d at 327-28 (finding that the judge's belief rather than that of the contemnor regarding future compliance is the determinative factor); *Catena*, 68 N.J. at 229 (noting that a witness' insistence that he will never testify does not automatically show that confinement will not have a coercive effect).

78. See, e.g., *Howald*, 877 F.2d at 850-51 (refusing to find confinement coercive on the basis of the contemnor's affidavit stating that he never would testify and oral statements that he feared for his safety); *Griffin*, 677 F. Supp. at 28 (finding a one-page affidavit containing the contemnor's bald assertions that he will never testify insufficient to show that continued confinement will no longer be coercive); *Salerno*, 632 F. Supp. at 531 (refusing to release a contemnor when the only evidence of continued noncompliance was the contemnor's assertion that he never would testify). Some judges have expressed concern that, were this a sufficient condition of release, it would undermine totally the civil contempt doctrine. See *In re Braun*, 600 F.2d 420, 425 (3d Cir. 1979) (stating that it would eviscerate the civil contempt power if a contemnor could secure his release by asserting he never would comply). In some rare circumstances, however, a court may find a witness' own statement sufficient. See *In re Constant*, 691 F. Supp. 1400 (S.D. Fla. 1988) (mem.) (releasing an innocent witness after three months of incarceration based on his own assertions that he feared reprisals and never would testify); see also *Sanchez*, 725 F.2d at 31 (noting that a judge may accept the contemnor's avowal never to testify as sufficient proof that he never will be coerced).

79. See *Grand Jury*, 851 F.2d at 502 (finding an FBI agent's statement that immunized subjects of grand jury investigation are unlikely to testify was insufficient evidence that a particular contemnor would not testify). While testimony of a third party alone does not appear to be sufficient, a court may consider it as additional evidence that a contemnor never will comply. See *In re Dohrn*, 560 F. Supp. 179, 180 (S.D.N.Y. 1983) (mem.) (relying on the testimony of attorneys that the contemnor's views were intractable to the point of fanaticism as further proof that continued incarceration would not be coercive).

noncompliance include religious beliefs,<sup>80</sup> moral or political convictions,<sup>81</sup> fear of harm to oneself,<sup>82</sup> fear of criminal prosecution,<sup>83</sup> and fear that compliance will endanger a loved one.<sup>84</sup> If properly applied, the key factor under the NRPC standard should be the strength of the contemnor's belief, not whether the belief is justified.<sup>85</sup> Strongly-held moral or political beliefs thus have secured the contemnor's release, even if those beliefs were at odds with the law.<sup>86</sup> Similarly, contemnors have been released even when their motives for disobedience were selfish or ignoble.<sup>87</sup>

Some judges seem to consider, at least *sub rosa*, the moral character and culpability of the contemnor, as well as the depth of his convictions. These judges appear reluctant to release contemnors who are suspected of involvement in terrorist activities,<sup>88</sup> membership in organized crime families,<sup>89</sup> or

80. See, e.g., *Simkin v. United States*, 715 F.2d 34, 36 (2d Cir. 1983); *Cueto*, 443 F. Supp. at 859-60.

81. See, e.g., *Parrish*, 782 F.2d 325 (commitment to the "Black Liberation Movement"); *In re Crededio*, 759 F.2d 589 (7th Cir. 1985) (moral principles); *Japenga*, *supra* note 52 (belief that the grand jury system was being used to destroy environmental and animal rights activism).

82. See, e.g., *In re Freligh I*, 894 F.2d 881 (7th Cir. 1989); *In re Doe*, 862 F.2d 430 (2d Cir. 1988) (per curiam); *Crededio*, 759 F.2d at 589.

83. Consider, for example, the case of Jacqueline Bouknight, who has remained in jail for civil contempt since 1988. Bouknight was ordered jailed when she refused to obey a court order to produce her son or reveal his whereabouts. The state suspected Bouknight of homicide in her son's disappearance, and refused to give her immunity from prosecution. The Supreme Court subsequently rejected Bouknight's argument that holding her in contempt, absent a grant of immunity, violated her right against self-incrimination. See *Baltimore City Dep't of Social Serv. v. Bouknight*, 493 U.S. 549 (1990). This means that if Bouknight had killed her son and testified to that fact, her testimony could be used against her in a prosecution for homicide. If, however, she did not testify, she could continue to be held in civil contempt, but only until her child would have reached the age of majority. As of this date, she still refuses to testify and remains incarcerated.

84. See, e.g., *Freligh I*, 894 F.2d at 881 (fearing for the lives of family members); *Doe*, 862 F.2d at 430 (fearing for safety of family); *Crededio*, 759 F.2d at 593 (fearing for the safety of family); *Morgan v. Foretich*, 564 A.2d 1, 5 (D.C. App. 1989) (fearing that a child will suffer sexual abuse).

85. See *Catena v. Seidl*, 343 A.2d 744, 747 (N.J. 1975) (per curiam) (stating that a court should only consider whether there was a substantial likelihood that the contemnor would comply and not judge whether the reasons for noncompliance were "good or bad").

86. Courts, for example, have released a number of self-styled "grand jury resisters" who refused to testify before a grand jury due to a belief that grand juries are used to effect political persecutions. See, e.g., *In re Ford*, 615 F. Supp. 259 (S.D.N.Y. 1985); *In re Thomas*, 614 F. Supp. 983 (S.D.N.Y. 1985); *In re Jean-Baptiste*, No. M-11-188 (PKL), 1985 WL 1863, at \*3 (S.D.N.Y. July 5, 1985); *In re Clay*, No. M-11-188, 1985 WL 1977, at \*3 (S.D.N.Y. June 27, 1985); see also *In re Dohrn*, 560 F. Supp. 179 (S.D.N.Y. 1981) (witness believed deeply that the grand jury was being used as an instrument of political persecution); *Japenga*, *supra* note 52 (witness believed that the grand jury system was being used to destroy environmental and animal rights activism). Other contemnors have been freed who refused to cooperate with law enforcement agencies. See, e.g., *United States v. Buck*, No. 84 Cr. 200-CSH, 1987 U.S. Dist. LEXIS 6927 at \*4, \*7 (S.D.N.Y. July 31, 1987) (ordering release after finding that contemnors would not be coerced into giving handwriting exemplars given their dedication to the "non-collaboration" movement).

87. See *In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985) (mem.) (obtaining the fruits of illegal activities); *Catena*, 343 A.2d at 747 (adhering to organized crime's code of silence); see also *In re Parish*, 613 F. Supp. 356, 357 (S.D.N.Y. 1985), *aff'd*, 782 F.2d 325 (2d Cir. 1986) (furthering friendships with political activists).

88. See, e.g., *In re Archuleta*, 446 F. Supp. 68 (S.D.N.Y. 1978) (mem.) (refusing to release an alleged member of a terrorist group who had been jailed for 11 months for refusing to testify about the group's activities).

89. See, e.g., *United States v. Salerno*, 632 F. Supp. 529 (S.D.N.Y. 1986), *cert. denied*, 493 U.S. 811 (1989) (finding that the contemnor's confinement was still coercive even though an organized crime figure had not complied during his six-month incarceration). In one case, an alleged member of an

involvement in other criminal activity.<sup>90</sup> Such considerations, however, have no bearing on whether a contemnor can be coerced.<sup>91</sup> Nonetheless, perceptions of the contemnor's bad character or complicity in illegal activity appear to drive judges in some cases to find that continued confinement is still coercive.<sup>92</sup>

Judges rarely release contemnors who assert fear of reprisal against themselves or their family as the reason for their noncompliance.<sup>93</sup> Some judges insist that fear of harm is *never* a valid reason for not testifying because "the public has a right to every man's evidence."<sup>94</sup> But the public has a right to every man's evidence in *every* civil contempt case, not just those involving a fear of harm. All civil contemnors have violated a legal duty to comply with a court order. Moreover, under the NRPC doctrine, the proper inquiry simply is whether there is a realistic possibility that the contemnor will comply, not whether the contemnor has a duty to comply.<sup>95</sup>

Nonetheless, judges appear more willing to release contemnors for religious or political beliefs than for fear of harm. One possible explanation may be that in many cases, the contemnor cannot prove sufficiently a basis for his fear.<sup>96</sup> Often, there is little evidence to substantiate allegations of "fear of harm" beyond the contemnor's bare assertions that he has received threats, or

organized crime hierarchy jailed for civil contempt eventually was released on the grounds that there was no substantial likelihood he would comply due to his adherence to an oath of silence. He only was released, however, after serving five years. *Catena*, 343 A.2d at 747.

90. See, e.g., *In re Rosahn*, 551 F. Supp. 505, 508 (S.D.N.Y. 1982) (mem.). In *Rosahn*, the contemnor had been jailed for refusing to provide the grand jury with fingerprints, handwriting samples, and hair samples. Despite persistent refusals to comply over 12 months of incarceration, and numerous affidavits and testimonials from others supporting her contentions, the judge refused to release her. In reaching her decision, the judge appeared to be influenced strongly by the contemnor's suspected involvement in the criminal activity under investigation and the need for the subpoenaed evidence. *Id.*; see also *supra* note 83 (describing the case of Jacqueline Bouknight).

91. See *In re Jean-Baptiste*, No. M-11-188 (PKL) 1985 WL 1863, at \*4 n.5 (S.D.N.Y. July 5, 1985) (stating that the contemnor's unsavory character had no bearing on whether he was likely to comply).

92. It is difficult to explain otherwise the long-term incarceration of *Catena*, see *supra* note 87, and Bouknight, see *supra* note 83. *Catena* was imprisoned for civil contempt for five years before being released without ever having testified. *Catena*, 343 A.2d at 747. Bouknight is still incarcerated for civil contempt, despite the fact that she has been jailed—and silent—for five years. See *supra* note 83; see also *In re Constant*, 691 F. Supp. 1400, 1402 (S.D. Fla. 1988) (mem.) (implying that a released civil contemnor might not have been freed if he had refused to testify in order to protect wrongdoers).

93. In many cases, the contemnor cannot sufficiently prove a basis for his fear. See, e.g., *In re Freligh II*, 903 F.2d 1167, 1170 (7th Cir. 1990); *In re Crededio*, 759 F.2d 589, 593 (7th Cir. 1985). Innocent witnesses may have a better chance at successfully raising this defense. See *Constant*, 691 F. Supp. 1400 (innocent witness released after three-month incarceration for civil contempt). But see Pinsky, *supra* note 65 (innocent witness to murder who received threats against her family was jailed for contempt after failing to return to testify at trial). In the latter case, the contemnor refused to continue her testimony at trial after gang members made threats against her children. In justifying her incarceration, the prosecutor stated that he understood her safety concerns, but that her testimony was critical to his case. *Id.* After 18 days in jail, the witness agreed to testify, but was jailed as a material witness to insure her testimony. *Id.*

94. *Crededio*, 759 F.2d at 593 n.2; see also *In re Griffin*, 677 F. Supp. 26 (D. Me. 1988) (stating that threat to self or family is not a valid justification for not testifying).

95. Some courts do not allow a duress defense based on fear of harm, but do allow evidence of such fear to be used to show that there is no realistic possibility of coercion. See, e.g., *In re Doe*, 862 F.2d 430, 432 (2d Cir. 1988) (per curiam); *In re Grand Jury Proceedings*, 790 F. Supp. 422 (E.D.N.Y. 1992) (mem.).

96. See, e.g., *In re Freligh II*, 903 F.2d 1167, 1170 (7th Cir. 1990); *Crededio*, 759 F.2d at 593.

that he has a fear of those against whom he would testify.<sup>97</sup> Judges thus may not believe the contemnor has a genuine fear of harm. In addition, judges may be reluctant to release contemnors on the basis of such evidence out of a concern that every contemnor potentially could raise such a defense.

It may be easier to prove that a person has deep political convictions or religious beliefs.<sup>98</sup> Evidence of past participation in group activities or of group support before or during incarceration may convince a court that a contemnor's alleged beliefs are genuine.<sup>99</sup> The difference in release rates thus may have more to do with the plausibility of the contemnor's story than the court's belief as to whether there is a duty to comply.

Some weight also seems to be given to the length of time that the contemnor already has been jailed.<sup>100</sup> This factor, however, has been used to support both release and further incarceration of the contemnor.<sup>101</sup> Some judges believe that the longer the contemnor has been jailed without complying, the less likely it is that he will comply in the future. These judges view the time spent in jail as reflecting the contemnor's resolve not to relent.<sup>102</sup> One judge, for example, suggested that no reasonable likelihood of compliance was indicated by the fact that the contemnor had already been incarcerated for civil contempt for a period far longer than the maximum sentence for criminal contempt.<sup>103</sup> More often, though, judges believe that the coercive effect of incarceration increases with time, so that the longer a civil contemnor is jailed the more likely it is that he will comply.<sup>104</sup>

Judges also consider the age and health of the imprisoned contemnor to determine if he can be coerced.<sup>105</sup> As with the time already spent in jail,

97. See, e.g., *Crededio*, 759 F.2d at 593 (rejecting as unsupported and purely speculative contemnor's assertions that he feared for his own and his family's safety due to grand jury leaks).

98. See, e.g., *In re Cueto*, 443 F. Supp. 857, 864 (S.D.N.Y. 1978) (noting that the Episcopal Church hierarchy accepted contemnors as being "proper church officials duly engaged in the work of the church").

99. See, e.g., *In re Ford*, 615 F. Supp. 259, 261-62 (S.D.N.Y. 1985) (using the contemnor's history of involvement with "grand jury resisters" and support received from the group to find that the contemnor would not be coerced); *In re Thomas*, 614 F. Supp. 983, 984 (S.D.N.Y. 1985) (finding that support of organized political group made it unlikely that contemnor would testify).

100. Sometimes the length of time can outweigh both the necessity of the testimony and the unsympathetic nature of a contemnor. See, e.g., *Catena v. Seidl*, 343 A.2d 744 (N.J. 1975) (releasing contemnor after five years incarceration, despite suspicions that he was protecting members of organized crime family); see also *In re Braun*, 600 F.2d 420, 425 n.17 (3d Cir. 1979) (noting that the length of Catena's incarceration likely tipped scales in favor of his release). At least one court, however, has held that time spent in jail for civil contempt will not by itself turn a coercive sanction into one which is only punitive. *King v. Dep't of Social and Health Serv.*, 110 Wash. 2d 793, 799 (1988).

101. Compare *Braun*, 600 F.2d at 428 (characterizing three months imprisonment as a "relatively" short time) with *In re Constant*, 691 F. Supp. 1400 (S.D. Fla. 1988) (releasing contemnor after three months).

102. See *Constant*, 691 F. Supp. at 1402 (three months incarceration without compliance reinforced court's conclusion that witness would never testify); see also *Lambert v. Montana*, 545 F.2d 87, 90 (9th Cir. 1976) (finding it unlikely that contemnor would relent since he had maintained his silence during 16 months of incarceration).

103. See *Lambert*, 545 F.2d at 91 (holding that 16 months confinement for civil contempt appeared excessive in view of six-month maximum for criminal contempt).

104. See, e.g., *Braun*, 600 F.2d at 428; *Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988) (stating that the delay of the contemnor's reunion with his family had an increasingly coercive effect).

105. *Catena v. Seidl*, 343 A.2d 744, 747 (N.J. 1975) (per curiam). In *Catena* the 73-year-old contemnor refused to comply for five years, despite warnings by his physician that further incarceration

judges have used age and health to support both release<sup>106</sup> and continued incarceration of the contemnor.<sup>107</sup>

The importance of the information sought by the court order is another factor used to determine whether a contemnor is uncoercible. Judges are more willing to release a contemnor when the evidence sought is of diminished importance, or is otherwise available,<sup>108</sup> than when it is considered essential.<sup>109</sup>

At least one judge has considered a contemnor's prior willingness to suffer incarceration rather than inform on others as evidence that the contemnor will carry out his current threat never to acquiesce.<sup>110</sup> Other judges, however, have given little or no weight to the contemnor's history of not testifying.<sup>111</sup>

Where a contemnor belongs to a political or religious group, some judges consider whether other members of the group have proved to be "uncoercible".<sup>112</sup> Persistent refusals to comply by other group members thus may be

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would endanger his heart condition. The court considered his continued refusal to testify, given his advanced age and deteriorating health, as evidence that he would not be coerced by further confinement. *Id.* Judges may also factor in the availability of medical care at the contemnor's place of confinement. *Cf. In re Grand Jury Investigation (Buonacure)*, 412 F. Supp. 904, 906-08 (E.D. Pa. 1976) (refusing to release jailed contemnor who alleged poor health since any medical problems could be addressed at federal medical facility in which he was confined).

106. *See Catena*, 343 A.2d at 747; *see also In re Dickenson*, 763 F.2d 84 (2d Cir. 1985) (implying imprisoned diabetic contemnor's persistent refusal to testify despite deteriorating health indicative of his resolve never to comply).

107. *See Braun*, 600 F.2d at 428 (finding that advanced age and poor health could increase coercive impact of imprisonment); *Catena*, 343 A.2d at 750 (Schreiber, J., dissenting) (arguing that age and deteriorating health could make the contemnor more likely to comply). Judges apparently believe that the threat of continued confinement may convince the aged or sick contemnor that if he does not comply, he may not survive unless he is released from jail. Under this rationale, the aged or sick contemnor may be more likely to relent than one who is young and healthy. *But see id.* at 747 (noting that aged contemnor in poor health maintained silence for five years while vowing to be carried out of jail "feet first" rather than testify).

108. *See In re Dohm*, 560 F. Supp. 179, 181-83 (S.D.N.Y. 1983) (releasing contemnor where importance of handwriting exemplar was extremely questionable and government possessed similar evidence).

109. *See In re Martin-Trigona*, 590 F. Supp. 87, 91 (D. Conn. 1984) (using the fact that information was needed and otherwise unavailable to find confinement had not lost its coercive effect); *In re Rosahn*, 551 F. Supp. 505, 508-09 (S.D.N.Y. 1982) (refusing to release a contemnor when evidence sought was necessary and could not be obtained from other sources); *see also In re Archuleta*, 446 F. Supp. 68, 69 (S.D.N.Y. 1978) (unwilling to free contemnor who may have "possibly invaluable" information regarding unsolved murders).

110. *See In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985) (finding no realistic possibility of compliance where contemnor previously spent 10 years in jail rather than become an informer). Generally, however, evidence of past refusals to cooperate with the government which occurred outside of any incarceration for contempt are accorded little weight. *See Braun*, 600 F.2d at 428 (finding history of non-cooperation with the government insufficient to show imprisoned contemnor will not comply in the future).

111. *See United States v. Jones*, 880 F.2d 987 (7th Cir. 1989) (ignoring a contemnor's prior eight-month incarceration for refusing to testify about same matter before another grand jury); *Rosahn*, 551 F. Supp. at 505 (ignoring a contemnor's prior incarceration for civil contempt during which she did not relent).

112. *See, e.g., In re Ford*, 615 F. Supp. 259, 261-62 (S.D.N.Y. 1985) (finding the contemnor unlikely to testify given the "wall of silence" erected by an organized group of "grand jury resisters" to which he belonged); *United States v. Buck*, No. 84 Cr. 200-CSH, 1987 U.S. Dist. LEXIS 6927 at \*4 (S.D.N.Y. July 31, 1987) (finding persuasive the fact that other individuals associated with the same cause had not been coerced into compliance by jail).



viewed as evidence that the individual contemnor at issue similarly will not be coerced.

Where the civil contempt sanction is issued pursuant to a statute, judges may look at whether the statute limits the time that a civil contemnor may be incarcerated. If the statute limits incarceration, many judges are reluctant, absent unusual circumstances, to release the contemnor earlier.<sup>113</sup> Other courts have held that while a judge can consider the statutory limit as one factor in determining whether a civil contempt sanction has become punitive, it alone cannot be dispositive.<sup>114</sup> This latter approach is more consistent with the policy underlying the NRPC doctrine.<sup>115</sup>

### *B. Dissatisfaction with the NRPC Doctrine*

The NRPC doctrine frequently has been the subject of judicial dissatisfaction.<sup>116</sup> Judges have criticized the speculative nature of the determination,<sup>117</sup> and the difficulty of deciding which contemnors were truly uncoercible.<sup>118</sup> The doctrine also has been attacked as a time-consuming<sup>119</sup> and fruitless endeavor.<sup>120</sup>

The primary criticism leveled at the NRPC doctrine, however, has been that a proper application of the doctrine rewards a contemnor's defiance. The more disrespectful and recalcitrant the contemnor, the less likely he will comply and the more likely that he will be released early from confinement.<sup>121</sup> Judges have viewed this as giving relief to the contemnors who are the least

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113. See, e.g., *Braun*, 600 F.2d at 425-27 (indicating reluctance to release a civil contemnor before 18-month statutory limit).

114. See, e.g., *In re Cocilovo*, 618 F. Supp. 1378, 1380 (S.D.N.Y. 1985) (stating that *Simkin* requires an individual determination of coercive effect of continued incarceration despite the statutory limit); *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983) (remanding the case because the district court relied on the statutory limit rather than on an individual assessment of whether incarceration for civil contempt had become punitive); see also *In re Parrish*, 782 F.2d 325, 328 (2d Cir. 1986) (holding that a court is not required to confine a contemnor for the statutory maximum because the judge retains discretion to determine point at which confinement is no longer coercive).

115. See Mary Beth Downey, *Civil Contempt and the Federal Grand Jury*, 13 NEW ENGLAND J. CRIM. & CIV. CONFINEMENT 69, 83-84 (1987) (noting that due process requires an individualized assessment of whether continued confinement is likely to coerce the particular contemnor); see also *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984) (holding that courts have broad discretion to determine that confinement is no longer coercive, even though the contemnor has been jailed for less than the statutory maximum).

116. See *In re Clay*, No. M-11-188, 1985 WL 1977, at \*3 (S.D.N.Y. June 27, 1985) (characterizing *Simkins*—and thus the NRPC doctrine—as “wrongly decided”).

117. See, e.g., *United States v. Jones*, 880 F.2d 987, 989 (7th Cir. 1989) (labelling the requirement that district courts predict the future behavior of civil contemnors as an exercise in futility).

118. See, e.g., *id.* (suggesting that judges cannot make such a determination absent the benefit of a crystal ball); *In re Braun*, 600 F.2d 420, 425 (3d Cir. 1979) (stating that the point at which incarceration for civil contempt becomes punitive is not easily discernible); *In re Thornton*, 560 F. Supp. 183, 185 (S.D.N.Y. 1983) (stating that “it would require a crystal ball in most cases” to determine whether continued incarceration would cause a contemnor to comply).

119. *Jones*, 880 F.2d at 989; see also *In re Rosahn*, 551 F. Supp. 505, 508 (S.D.N.Y. 1982) (arguing that contemnors would flood the courts with claims and hamper the administration of justice if allowed to raise secure release by claiming they could not be coerced).

120. *Jones*, 880 F.2d at 989.

121. See *In re Clay*, No. M-11-188, 1985 WL 1977, at \*3 (S.D.N.Y. June 27, 1985).

deserving of it.<sup>122</sup> They argue that the rule encourages resistance and disobedience of court orders.<sup>123</sup>

Letting the most stubborn contemnors out, however, is inherent in the NRPC standard. The real objection of judges to the NRPC thus appears to be with the standard itself, and the release of defiant contemnors that results from properly applying it. This may explain why judges state that they are applying the NRPC test, but then rely on unrelated factors such as the strength of the evidence sought and the moral culpability of the contemnor to find an incarcerated contemnor is likely to be coerced.<sup>124</sup> While these factors may be relevant for determining the proper level of criminal contempt sanctions, where the purpose is to punish the contemnor's disobedience, they are not relevant to determining civil contempt sanctions or applying the NRPC doctrine.

### C. Hicks v. Feiock

A recent Supreme Court case, *Hicks v. Feiock*<sup>125</sup> cast doubt on the continued viability of the NRPC doctrine. *Hicks* did not address directly the issue of early release of a civil contemnor, but focused on the problem of distinguishing between civil and criminal contempt.<sup>126</sup> Prior to *Hicks*, many appellate courts focused on the purpose for which the contemnor was being sanctioned to determine which type of contempt was at issue.<sup>127</sup> If the purpose was coercive, the sanction was civil and the contemnor was not entitled to the full set of procedural protections awarded to a criminal defendant.

The focus on the purpose underlying the contempt sanction caused many problems. Courts reviewing contempt orders often had to try to guess in the absence of a clear record whether a judge had imposed the sanctions to punish or to coerce, and thus whether the proceedings were constitutionally adequate.<sup>128</sup> Often the judge's words at the hearing and those in the order gave rise to conflicting interpretations, and sometimes the judge had both purposes in mind. Even when the primary purpose was to change the

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122. See *In re Cocilovo*, 618 F. Supp. 1378, 1380 (S.D.N.Y. 1985) (arguing doctrine only benefits those who persistently refuse to cooperate); *Clay*, 1985 WL 1977, at \*3 (finding doctrine creates a double standard of justice for "a special class of contemnors least entitled to relief").

123. See *Clay*, 1985 WL 1977, at \*2 (arguing that the doctrine encourages disobedience of court orders to testify); *In re Thornton*, 560 F. Supp. 183, 185 (S.D.N.Y. 1983) (stating that the release of a witness who refused to testify would frustrate the purpose of the recalcitrant witness statute and encourage noncompliance); see also *Cocilovo*, 618 F. Supp. at 1380 (arguing doctrine completely undermines coercive power of § 1826); *Rosahn*, 551 F. Supp. at 508 (rejecting doctrine on the grounds it would result in claims by nearly all contemnors).

124. See *In re Crededio*, 759 F.2d 589, 594 (7th Cir. 1985) (Posner, J., dissenting) (noting that in applying the NRPC standard the judge disregarded the contemnor's determination not to testify because he did not want to encourage contempt).

125. *Hicks*, 485 U.S. 624 (1988).

126. *Id.*

127. This test was set out in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911). See also *GOLDFARB*, *supra* note 1, at 56-57; *Dobbs*, *supra* note 6, at 235 (stating that classification is usually based upon purpose for which sanction is imposed).

128. See *Hicks*, 485 U.S. at 633 (characterizing attempts to determine subjective intent of state statutes or courts as unseemly and improper).

contemnor's behavior, the judge still may have believed that the contemnor should be punished to uphold the authority of the court.<sup>129</sup>

In light of these difficulties, the Court in *Hicks* rejected looking retrospectively at the judge's subjective purpose for imposing the sanction in order to classify the contempt sanction as civil or criminal. Instead, the Court stated that the classification should be determined by focusing on the nature of the remedy imposed. If the sentence is indeterminate, so that the contemnor could be released by complying with a court order, the sanction is presumed to be civil. If the sentence is determinate, so that the contemnor cannot avoid further sanctions by changing his behavior, then the sanction is presumed to be criminal.<sup>130</sup>

Although the *Hicks* court did not address directly the NRPC doctrine, it appears to have undermined its importance. At least one court has read *Hicks* as, in effect, abolishing the NRPC doctrine. The Seventh Circuit has stated that, in light of *Hicks*, whether there is realistic likelihood that the contemnor will comply "is no longer a litigable issue in a civil contempt proceeding."<sup>131</sup> The Seventh Circuit reasoned that *Hicks* required examining only the effect of the actual sanction imposed, not the purpose of imposing the sanction. Thus, the court found, the only relevant inquiries are whether the sanction imposed was conditional so that the contemnor could end it by complying and whether the contemnor is able to comply.<sup>132</sup>

The NRPC doctrine, however, still may have some viability. The Seventh Circuit did not directly overrule its prior cases applying the doctrine.<sup>133</sup> Moreover, the court noted that, even under *Hicks*, a duress defense would be available in cases where the person was too frightened to talk and that, even in the absence of duress, a civil contempt sanction could be terminated under the court's equitable and discretionary powers.

In addition, a few post-*Hicks* courts have released civil contemnors under the NRPC doctrine.<sup>134</sup> Some of these cases may be attributed to unawareness by the particular court of the implications of *Hicks*. This is not implausible,

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129. *Id.* at 631. The Court saw the problem of overlapping purposes as creating difficulties for states in trying to determine if the state proceedings would be upheld as constitutional by federal courts.

130. *Id.* at 637.

131. *In re Freligh I*, 894 F.2d 881, 885 (7th Cir. 1989); see also *United States v. Jones*, 880 F.2d 987, 989 (7th Cir. 1989).

132. See *Freligh I*, 894 F.2d at 885; see also *SEC v. Simpson*, 885 F.2d 390, 395 (7th Cir. 1989) (characterizing *Hicks* as distinguishing civil from criminal contempt based on the nature of the sanction).

133. See *Freligh I*, 894 F.2d at 886 (refusing to decide if anything survives of the doctrine); *Jones*, 880 F.2d at 989 (finding it unnecessary to overrule an earlier case applying the doctrine).

134. See, e.g., *United States v. Wheeler*, 952 F.2d 326, 327 n.4 (9th Cir. 1991) (noting that the district court had released the contemnor after determining that incarceration had lost its coercive effect and citing to a case which used the NRPC doctrine); *Northeast Women's Ctr. Inc. v. McMonagle*, 939 F.2d 57, 61 (3d Cir. 1991) (noting that the district court judge had released the contemnor after determining that incarceration was no longer coercive); *In re Constant*, 691 F. Supp. 1400 (S.D. Fla. 1988) (releasing the contemnor because there was no realistic possibility that he could be coerced by continued confinement); see *Japenga*, *supra* note 52 (describing how a court released a supporter of animal rights movements since there was no realistic possibility he would agree to testify). Other courts have applied the NRPC doctrine, but found the particular contemnor did not meet the standards for release. See, e.g., *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 66 (1992); *In re Doe*, 862 F.2d 430, 432 (2d Cir. 1988).

since, despite the language of *Hicks*, some courts still refer to the "purpose of the sanction" test when classifying a contempt sanction as civil or criminal.<sup>135</sup> Since *Hicks* did not directly address the issue, some courts may believe that the *Hicks* decision did not affect the NRPC standard and that the doctrine remains good law.

Another explanation for the continued application of the NRPC test, however, lies in the difference between what a judge has the discretion to do and what she is required to do. A judge has great discretion regarding the fashioning and imposition of civil contempt sanctions. Since she can choose not to incarcerate a contemnor in the first place, it stands to reason that she similarly can choose to release him, for whatever reason, at any time. *Hicks* would not affect this aspect of the judge's equitable power; a judge still *may* use her discretion to release a civil contemnor because he will never comply with the court order or, indeed, for any other reason.<sup>136</sup> After *Hicks*, however, it is unclear if a judge is *required* to release a civil contemnor who she believes cannot be coerced, so long as the contemnor still can obtain release by his own compliance.<sup>137</sup>

### III. COERCION AND THE RATIONAL CONTEMNOR

#### A. Reasons Incarcerated Contemnors May Not Comply

The view that the civil contempt sanction is coercive rather than punitive is based on the premise that a jailed civil contemnor might be pressured into complying with the court order. Indeed, under the NRPC doctrine, it would be impermissible to hold an individual under a civil contempt sanction if he could not be pressured to obey the court order, and even under *Hicks* the disparate treatment of civil and criminal contemnors is based on the view that civil contemnors hold the keys to their own cells.<sup>138</sup>

Under plausible assumptions, however, a rational contemnor *never* will comply with a court order once he has been jailed.<sup>139</sup> The reason is straightforward. If a contemnor refuses to comply with a court order he will suffer a loss in welfare from the sanctions imposed by the court. The contemnor will compare that loss in welfare with the loss he will suffer if he obeys the court

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135. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992) (stating that the test for determining whether a contempt sanction is criminal or civil is the purpose for which the sanction is imposed); *United States v. Ayers*, 866 F.2d 571, 573-74 (2d Cir. 1989) (using both the purpose of the sanction and the absence of a purge clause to classify a contempt sanction as criminal rather than civil).

136. See *Freligh I*, 894 F.2d at 885 (suggesting that a judge might wish to release an uncoercible contemnor on equity grounds).

137. It could be argued that *Hicks* still requires an intent to coerce rather than punish, but holds that such an intent can be found by examining the structure of the sanction itself. This appears to be the position of the *Hicks* dissent. See *Hicks v. Feiock*, 485 U.S. 624, 646-47 (1988) (O'Connor, J., dissenting). It also is not certain how the majority would decide a case where there existed strong evidence of a punitive intent for the sanction, but an indeterminate sentence had been imposed.

138. *Id.* at 633 (citing *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).

139. The term rational is used here to mean that the person will attempt to maximize his von Neumann-Morgenstern expected utility. For a discussion of the calculation, use, and limitations of von Neumann-Morgenstern utilities, see DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 74-123 (1990).

order. If the contemnor will suffer a greater loss from obeying the order than he will from the court sanctions, he will refuse to obey the order. If the contemnor will suffer a greater loss from the court sanctions than he will from obeying the court order, he will obey the court order immediately. An individual *never* will choose to serve some jail time and then comply with the court order because he then would suffer *both* the loss in welfare from complying with the order and the loss in welfare from incarceration.

A simple numerical example may be useful. Suppose that a witness is ordered to testify before a federal grand jury and that if he refuses to testify he will be jailed for civil contempt until he does so, up to the statutory limit of 18 months.<sup>140</sup> Suppose further that the witness will suffer a harm of 4 units of welfare for each month he is incarcerated,<sup>141</sup> so that if he never testifies he will suffer a loss of 72 units of welfare. If the witness's expected loss in welfare from testifying is greater than 72, the witness will not testify. If the individual's loss in welfare from testifying is less than 72, the witness will testify at once. A rational individual who suffers a loss in welfare of 60 from testifying, for example, will comply immediately. If instead he testifies after serving 2 months in jail, he will suffer a greater loss of 68.<sup>142</sup>

This result holds true even if, as some courts contend, the longer an individual spends in jail the more he dislikes serving another day.<sup>143</sup> Incarceration might become more costly over time for a number of reasons. Perhaps the contemnor's family can withstand a loss of the incarcerated contemnor's income for a short time without much hardship, but once the family's savings is gone, each additional day leads to a great financial burden. Or perhaps a contemnor's important relationships, both personal and business, can withstand a short stay in prison, but not a longer one.<sup>144</sup>

Even if the *additional* cost of serving a day in jail is increasing, however, once any portion of a civil contempt sanction is served the *total* harm the contemnor will suffer from the remaining sanction is reduced. Each day that the contemnor serves in jail *decreases* the remaining sanction that he faces and gives him less reason to comply.

In the above example involving the grand jury witness, the idea that the cost of jail increases with time could be represented by assuming the witness will suffer a harm of 2 units of welfare for the first 6 months he is incarcerated and then 5 units for each of the next 12 months, leaving the total cost of

140. 18 U.S.C. § 1826(a) (setting an 18-month limit on the maximum period of time for confinement of recalcitrant witnesses).

141. The welfare or utility numbers used here are chosen arbitrarily and are designed to show the relative strength of the preferences of the contemnor. They are measured on a cardinal scale, and thus are invariant to a positive linear transformation. For a discussion of how such "von Neumann-Morgenstern" utilities are constructed, and the differences between cardinal, ordinal, and ratio measures of utility, see ANATOL RAPOPORT, *TWO-PERSON GAME THEORY* 24-38 (1973).

142. *Id.* The contemnor will suffer a loss of 4 units of welfare for each month he is incarcerated and 60 units of welfare when he complies. Thus, his total welfare loss is  $(2 \times 4) + 60 = 68$ . He therefore would be better off complying immediately since he would avoid the additional costs of incarceration.

143. See *supra* text accompanying note 104.

144. *In re Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988) (finding separation from family would cause incarceration to have an increasingly persuasive effect on the contemnor).

incarceration at 72.<sup>145</sup> After the witness has served 6 months the cost of continuing to defy the order is only 60 so the individual is less likely to comply than at the beginning of his incarceration, even though the cost of each additional month in jail has increased.

It is also possible that the burden of serving another day in jail decreases over time, as some courts<sup>146</sup> and commentators<sup>147</sup> contend. Much of the harm of a jail sentence may be front-loaded—even a short jail term entails enormous stigma and disruption of the contemnor's personal and financial relationships. A contemnor obviously would not belatedly comply if the costs per day of jail decline over time.<sup>148</sup>

The fact that a contemnor should comply either immediately or not at all generally is not changed by factors traditionally considered by courts in applying the NRPC test. For example, courts sometimes have released contemnors who are so committed to their beliefs that they will never obey a court order which requires betraying them. Contemnors released on this basis have included animal rights activists,<sup>149</sup> "grand jury resisters,"<sup>150</sup> and religious workers.<sup>151</sup> The courts in these cases probably were correct that a civil contempt order would have been ineffective in pressuring these contemnors to comply,<sup>152</sup> since the contemnors appeared to believe that the harm from compliance was greater than the harm from incarceration. But, the same can be said for any contemnor who has chosen jail instead of obeying a court order.

No matter how strong or weak a contemnor's apparent reasons for defiance, it will be optimal for the contemnor to comply immediately or not at all. The same is true for other factors that courts have used to predict whether or not a contemnor can be coerced, such as the contemnor's age and health.<sup>153</sup> The costs of compliance alone are always less than the costs of compliance plus jail.

145.  $(6 \times 2) + (12 \times 5) = 72$ .

146. See *supra* text accompanying notes 101-02.

147. See, e.g., Note, *Contempt: Civil Contempt Order May Not Include Absolute Sentence*, 47 MINN. L. REV. 907, 913 (1963) (stating the probability of a jailed contemnor complying with a court order may become "increasingly remote as the time spent in jail increases"); Note, *Procedures for Trying Contempts in the Federal Courts*, 73 HARV. L. REV. 353, 358 (1959) (finding that, once jailed, the likelihood of the contemnor complying becomes increasingly small); see also Note, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 132 (1965) (finding that time spent in jail may indicate that further confinement of the contemnor will be futile).

148. Suppose, for example, that the grand jury witness will suffer harm of 6 units of welfare for the first 6 months of incarceration and then 3 units for each of the next 12 months. Suppose further that the witness has already been incarcerated 6 months. At the beginning of his jail term, his total cost of refusing to comply was 72. Now, the total cost is only 36. The individual is less likely to comply than at the beginning of his incarceration, so he will remain in jail.

149. See Japenga, *supra* note 52 (noting release of supporter of animal rights movement after five months incarceration).

150. See, e.g., *In re Ford*, 615 F. Supp. 259 (S.D.N.Y. 1985); *In re Thomas*, 614 F. Supp. 983 (S.D.N.Y. 1985); *In re Clay*, No. M-11-188, 1985 WL 1977 (S.D.N.Y. June 27, 1985).

151. See, e.g., *In re Cueto*, 443 F. Supp. 857 (S.D.N.Y. 1978).

152. Not all judges adhere to this view. See *supra* text accompanying notes 88-92.

153. The state of a contemnor's health may be relevant, however, if it changes in ways that the contemnor did not anticipate at the time he made his decision not to comply. For a discussion of conditions under which a contemnor may reassess the costs of incarceration, see discussion *infra* Part III.B.1.

Some contemnors, of course, do comply after a period of incarceration. The remainder of this Part will explain why.

### *B. Four Reasons Incarcerated Contemnors May Comply*

The conclusion that a rational contemnor will either comply with a court order immediately or not at all depends on four assumptions about the contemnor's knowledge at the time of his original decision regarding whether to comply. Those assumptions are that *after he is jailed*:

- 1) his assessment of how much harm per day he will suffer from incarceration does not change;
- 2) his assessment of his will to withstand the harm he will suffer from incarceration does not change;
- 3) his assessment of the harm he will suffer if he obeys the court order does not change; and
- 4) his assessment of how long he will be incarcerated if he does not comply does not change.

The conditions under which each of these assumptions might not apply are examined below.

#### 1. Reassessing the Costs of Jail

If an individual underestimates how much he will suffer from being incarcerated, he may choose to defy a court order even though the actual costs of jail exceed those of compliance. After he has been jailed and learns the true costs of incarceration, he may decide to comply with the court order.

Consider the case of the grand jury witness discussed previously. Suppose that, prior to incarceration, the witness believed that he would suffer a harm of 4 units of welfare per month in jail for 18 months and that the cost of testifying was 80. The witness will not testify because the total cost of jail is 72, which is less than the cost of compliance.

Suppose that after serving 1 month in jail the witness discovers that he actually is suffering a harm of 6 units of welfare each month. At this point he realizes that he will lose 102 units of welfare over the additional 17 months that he will remain in jail if he continues his defiance. Since this loss is greater than the harm from complying with the court order, the contemnor will testify. The key to this result is that the witness's evaluation of the costs of jail changed. If the witness had known initially that he would have suffered a harm of 6 units per month from jail he would have complied immediately.

An individual could misjudge either the unpleasantness of jail itself or the harm to an individual's personal and business relationships caused by imprisonment. An individual who underestimates the former is likely to learn of his mistake very quickly—it does not take long to learn about the poor quality of prison beds and food, or the humiliation and lack of privacy of prison life. Thus, we should expect individuals who have underestimated these costs to comply shortly after they are incarcerated. Indeed, they may

capitulate almost immediately.<sup>154</sup> An individual who has never been incarcerated is particularly likely to misguess the costs of prison.

A mistake about the social costs of jail may take somewhat more time to become apparent. Nevertheless, an individual is likely to know within a few months the impact of incarceration on his relationship with friends, family, and business associates.

In some cases, the initial decision to go to jail rather than comply may have been influenced by the support of the contemnor's social group. When this support unexpectedly wanes the contemnor's will to resist the court order may fail. Consider, for example, the case of a political activist who is ordered by a court to give information to a grand jury investigating the activities of the group to which he belongs. The witness will be praised by his fellow activists if he refuses to testify and, once jailed, may be lauded as a "martyr."<sup>155</sup> The harm from incarceration also may be offset by the attention that the contemnor receives from the media. This may change after several weeks in prison. Press coverage may end and the contemnor's fellow activists may focus their attention elsewhere. Now the harm from incarceration may loom larger and the witness may decide to comply.

An individual also may *overestimate* the costs of prison and comply with a court order when he would have been better off not to have done so. But these cases will not be reported because the person will not have committed contempt.

## 2. Reassessing the Will to Withstand the Harm from Incarceration

A "weak will" might lead an individual imprisoned for defying a court order to decide later to comply even though he rationally knows at the time that the costs of compliance are greater than the costs of incarceration.<sup>156</sup> The idea is that the contemnor is aware that he would minimize his total harm by refusing to comply with the court order. Nonetheless, his immediate desire to

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154. This may explain, for example, why the mayor of Birmingham, Alabama decided to obey a court order to produce documents after serving only one day in jail. The mayor was ordered to turn over records to a grand jury, but refused on the grounds that the investigation was racially motivated. *See With 700 Supporters Rallying Round, Birmingham Mayor Goes to Prison*, N.Y. TIMES, Jan. 24, 1992, at A12 [hereinafter *Mayor Goes to Prison*]. He was jailed when his attempts to get his sentence stayed failed. *Id.* The day after he began serving his sentence, he agreed to comply and was released. *See Birmingham Mayor Relents and Is Released*, N.Y. TIMES, Jan. 26, 1992, at A14. He refused to tell reporters why he relented, stating only that jail had "not been great fun." *Id.* The mayor's apparent distaste for jail is made all the more evident by the fact that he only was required to be jailed on weekends, and his place of incarceration was a minimum security federal prison. *See Mayor Goes to Prison*, *supra*.

155. *See, e.g., In re Ford*, 615 F. Supp. 259, 262 (S.D.N.Y. 1985) (holding no realistic possibility that contemnor would comply in light of the support he received from other resisters and his status as a hero to the cause); *In re Jean-Baptiste*, No. M-11-188 (PKL), 1985 WL 1863 at \*3 (S.D.N.Y. July 5, 1985) (holding no realistic possibility of coercion due to "conspiracy of silence" among contemnors and individual's belief that he was a crusader for a cause); *In re Clay*, No. M-11-188, 1985 WL 1977 at \*4 (S.D.N.Y. June 27, 1985) (holding no likelihood "grand jury resister" would comply in light of commitment to cause and spiritual support received from defiance of other incarcerated group members).

156. For a general discussion of weakness of will, see JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 36-37, 45-48 (1989). Lawrence Solum suggested to me the idea of a weak-willed contemnor.



be freed from jail is so strong that he capitulates to the court's commands. His weakness of will prevents him from taking what he knows is the best action.<sup>157</sup> The contemnor thus is like the smoker who is unable to quit or the overeater who is unable to stick to a diet.<sup>158</sup> In each case, the individual knows what action would improve his overall well-being, but weakness of will prevents him from taking the action.

The witness who complies due to a weak will is different from the imprisoned witness who complies after reassessing the harm from jail. If a witness reassesses the harm from jail, he complies because he rationally believes, after learning what jail is like, that incarceration is worse than compliance. In contrast, the witness who suffers from weakness of will still rationally believes that compliance is worse than incarceration, but complies anyway because at that particular moment he no longer can withstand jail.

Note that if an individual knows that he will collapse under the pressure of incarceration he will factor this information into his initial calculation and will comply immediately. An individual, therefore, only will comply because of a weak will after he is incarcerated if he originally overestimated his ability to withstand the rigors of prison. In most cases, as with learning the true costs of jail, it seems likely that an imprisoned civil contemnor will learn that he has a weak will within a relatively short period of time after being jailed.

### 3. Reassessing the Harm from Compliance

An individual who initially refuses to obey a court order might change his mind if the costs of compliance decline after he is jailed. An individual who refuses to testify because of threats made against him, for example, might decide to comply if he later is persuaded that he would be safe in a witness protection program.<sup>159</sup>

In the grand jury hypothetical above, assume that a threatened witness refused to testify because he believed that the harm of complying was 100 and that the cost of jail was 4 per month for 18 months for a total of 72. After 2 months in jail, the government offers him entry into a witness protection program that will reduce the costs of compliance to 50. Since the costs of staying in jail an additional 16 months are 64, he now will choose to testify. Note that the timing of the government offer is crucial. If, in this example, the government instead made its offer after the witness has spent 6 months in jail, he would refuse to comply because the cost of staying in jail an extra 12 months would be only 48.

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157. See *id.* at 47 (defining weakness of will as "the inability to do what, all things considered, one believes one should do").

158. See *id.* at 36, 44-45 (giving examples of behavior which show weakness of will).

159. In many cases, individuals are offered entry into a witness protection program at the time they are ordered to testify. Government officials in some cases, however, may offer entry into such a program at a later time—or may change the terms of an original offer of protection—if they are convinced that the contemnor will not talk otherwise.

#### 4. Reassessing the Period of Incarceration

An individual might refuse to obey a court order because he believes that, due to some event, he may be freed after serving only a short period of time. The most likely event is a successful challenge to the contempt sanction on appeal. If the appeal is unsuccessful, the individual will reassess the costs of continued incarceration and may decide at this point to comply.<sup>160</sup> The choices facing a contemnor who may be released due to an appeal can be illustrated by the decision tree in Figure 1 below.

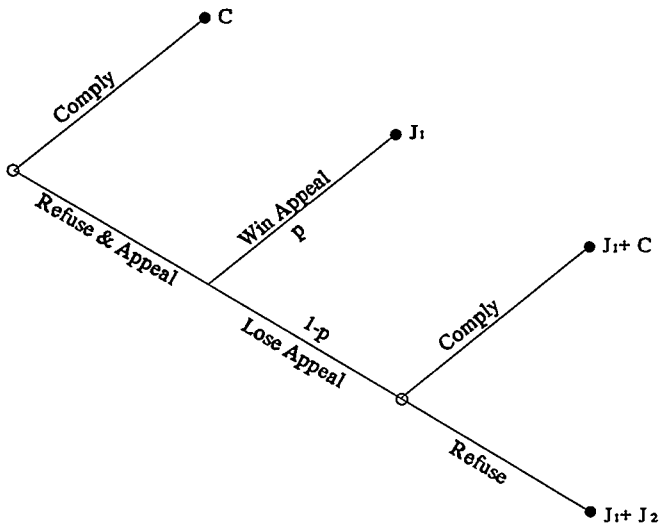


Figure 1

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160. Consider, for example, the case of reputed organized crime figure Anthony Accetturo. See Joseph F. Sullivan, *After 20 Months in Jail, Reputed Mobster Talks*, N.Y. TIMES, Apr. 28, 1991, at A29. Accetturo spent 20 months in jail for civil contempt for refusing to testify before a grand jury. During this time he insisted that he would never comply. Shortly after the judge rejected an appeal and indicated that Accetturo's incarceration had not yet begun to be coercive—much less punitive—he agreed to comply. *Id.*

The goal of the witness is to minimize his total harm. He can suffer harm in two ways. First, he may be hurt by obeying the court order to testify. This is represented by  $C$ . Second, he may be hurt by serving time in jail before or after his appeal is decided. The loss from incarceration from the time of his initial refusal until his appeal is decided is represented by  $J_1$ . The loss from incarceration after his appeal is decided is represented by  $J_2$ . The probability of winning the appeal is represented by  $p$ , so the probability of losing is  $1-p$ .

The open circles in Figure 1 represent decision points for the witness. The witness first must decide whether to comply immediately, or to refuse and appeal the court order.<sup>161</sup> If he complies, he will be released and suffer a loss of  $C$  from testifying. If he refuses and wins his appeal, he will not be required to testify, but will suffer a loss of  $J_1$  from being jailed until his appeal was decided. If he refuses and loses his appeal, he will face a second decision. He may belatedly testify in which case he will suffer a loss of  $J_1$  from being jailed until his appeal was decided plus a loss of  $C$  from testifying. Alternatively, he may continue to refuse to testify in which case he will suffer a loss of  $J_1$  from being jailed until his appeal was decided, plus a loss of  $J_2$  from his continued incarceration.

Table 1 below shows the witness' three possible strategies<sup>162</sup> and the results or payoffs associated with each.

TABLE 1

<i>Strategy</i>	<i>Payoff</i>
Comply Immediately {Comply}	$C$
Refuse Initially, Comply if Appeal Fails {Refuse, Comply}	$J_1 + (1-p)C$
Refuse Initially, Refuse if Appeal Fails {Refuse, Refuse}	$J_1 + (1-p)J_2$

The witness will choose the strategy which minimizes his expected total harm. This will depend on the values for  $C$ ,  $J_1$ ,  $J_2$ , and  $p$ .

A numerical example may help illustrate the impact of these factors. Assume that, in the grand jury hypothetical discussed earlier, the witness can appeal the contempt order on the grounds that he has just cause for refusing to testify. Assume further that the cost of jail is 4 per month. If there was no opportunity to overturn the contempt order on appeal, then if the witness

161. For simplicity it will be assumed that the costs of appeal are zero. This may be fairly realistic where the costs of appeal are born by a third party, such as when a criminal's expenses are paid by his gang, an activist's expenses are paid by a political defense fund, or a reporter's expenses are paid by his newspaper. It also may be reasonably accurate where the costs of appeal are negligible when compared to the costs of incarceration or compliance. Since it is assumed here that there are no costs to appealing the order, the witness always will appeal if he chooses not to comply. The basic results of the argument would be unchanged if court costs were included in the analysis.

162. A strategy is a blueprint which tells the contemnor the action to take in every possible circumstance. See ERIC RASMUSEN, GAMES AND INFORMATION 24 (1989).

refuses to testify he will serve 18 months and suffer a cost of 72. Thus, the witness would testify if and only if the cost of doing so is less than 72. On the other hand, if the witness might win his freedom on appeal, he may refuse to testify even if the cost of compliance is less than 72.

Suppose, for example, that the appeal will be decided in 6 months, there is an 80% chance of success ( $p = .8$ ), and the harm from complying ( $C$ ) is 40. The witness potentially faces two decisions. He first must decide whether to testify immediately or to refuse and be incarcerated for 6 months while he appeals. He cannot make this decision, however, until he determines what he will do if his appeal fails.

In this example, if he complies after his appeal fails, he will suffer a loss of 24 from the 6 months of incarceration already served ( $J_1$ ) plus a loss of 40 from testifying, for a total harm of 64. If he remains defiant after his appeal fails, he will suffer a loss of 24 from the 6 months he has already served plus a loss of 48 from the additional 12 months ( $J_2$ ), so he will be jailed for a total loss of 72. Thus, he will choose to comply if his appeal fails.

The witness now must decide whether to comply initially. If he complies at once, he will suffer a loss of 40 from testifying. If he initially refuses, he will win his appeal 80% of the time and suffer a loss of 24, and he will lose his appeal 20% of the time and suffer a loss of 64.<sup>163</sup> Thus, his expected loss from initially refusing to comply is 32.<sup>164</sup> Since this is less than his loss from complying he will gamble on winning the appeal and disobey the court order.

This result can be calculated directly from Table 1 as shown in Table 2 below.

TABLE 2

<i>Strategy</i>	<i>Payoff</i>	<i>Value</i>
{Comply}	$C$	40
{Refuse, Comply}	$J_1 + (1-p)C$	$24 + (.2 \times 40) = 32$
{Refuse, Refuse}	$J_1 + (1-p)J_2$	$24 + (.2 \times 48) = 33.6$

As can be seen, the strategy that minimizes the expected loss for the witness where  $C$  is 40 is {Refuse, Comply}. It can be demonstrated that the optimal strategy for the witness in this example is: {Comply} if  $C \leq 30$ , {Refuse, Comply} if  $30 < C \leq 48$ , and {Refuse, Refuse} if  $C > 48$ .<sup>165</sup> By comparison,

163. As shown in the previous paragraph, the witness can minimize his loss after losing his appeal by testifying.

164.  $(.8 \times 24) + (.2 \times 64) = 32$ .

165. The contemnor will choose {Comply} when  $C \leq J_1 + (1-p)C$  and  $C \leq J_1 + (1-p)J_2$ . Thus, the contemnor will choose {Comply} when  $C \leq 24 + .2C$  and  $C \leq 24 + .2(48)$ , or when  $C \leq 30$ . The contemnor will choose {Refuse, Comply} when  $J_1 + (1-p)C \leq J_1 + (1-p)J_2$ . Thus the contemnor will choose {Refuse, Comply} when  $24 + .2C \leq 24 + .2(48)$ , or when  $30 \leq C \leq 48$ . When  $C > 48$ , the

when there was no opportunity to appeal the optimal strategy for the witness was: {Comply} if  $C \leq 72$  and {Refuse} if  $C > 72$ . Table 3 shows the witness's preferences for the general case.

TABLE 3

<i>Witness will prefer</i>	<i>Over</i>	<i>If and only if</i>
{Comply}	{Refuse, Comply}	$C \leq J_1/p$
{Comply}	{Refuse, Refuse}	$C \leq J_1 + (1-p)J_2$
{Refuse, Comply}	{Refuse, Refuse}	$C \leq J_2$

### *C. Other Factors That May Influence a Contemnor's Decision*

#### 1. Increasing and Decreasing Harm from Incarceration

It was shown earlier that where a contemnor only can be released by complying with the court order, the contemnor will compare the *total* costs of incarceration with the costs of obeying the order and then either obey immediately or not at all. If the total costs are constant, it does not matter whether the costs of an additional day of incarceration are increasing or decreasing. This no longer is true, though, if there is a possibility that the contemnor can be released without testifying.

Consider again the example discussed previously, where a grand jury witness ordered to testify has a viable option to appeal the court order. Recall that the harm from incarceration was a constant 4 per month for 18 months for a total harm of 72. The harm from incarceration for the 6 month period before the appeal was decided was 24 ( $J_1$ ) and the harm from continued incarceration for the 12 months after the appeal was 48 ( $J_2$ ).

If total harm remains constant at 72, increasing marginal harm from incarceration can be reflected by letting the harm from the first 6 months be 2 per month so that  $J_1$  equals 12 and the harm from the second 12 months be 5 per month so that  $J_2$  equals 60. Under these circumstances, the optimal strategy for the witness is {Comply} if  $C \leq 15$ , {Refuse, Comply} if  $15 < C \leq 60$ , and {Refuse, Refuse} if  $C > 60$ .

For a constant total harm, if harm per month of incarceration increases over time, the witness is less likely to comply initially and more likely to comply belatedly if his appeal fails. The intuition is simple: if the costs of incarceration are smaller prior to an appeal and larger after the appeal, the cost of taking the chance of winning on appeal is reduced, but the cost of refusing to testify if the appeal fails is higher. Conversely, if the harm per month of

incarceration decreases over time, the witness is more likely to comply initially and less likely to comply belatedly if his appeal fails.<sup>166</sup>

## 2. Bluffing

An incarcerated contemnor might also hope to be released by persuading the judge that he will never comply. A judge might release a stubborn contemnor under the NRPC doctrine or at her own discretion. If a judge is more likely to release a contemnor who cannot be coerced, the incarcerated contemnor has a strong motivation to appear as though he will never comply with the court order. On the other hand, a judge also may wish to appear stubborn. If a judge can persuade a contemnor that she will never order his release, the contemnor may be more likely to comply with the court order.<sup>167</sup> Thus, so long as a judge has the discretion to release a contemnor on the grounds that he cannot be coerced, both the judge and contemnor have a good reason to feign an unshakable resolve.

False hope that a bluffing strategy would succeed may result in a contemnor refusing to comply with a court order even though he will actually suffer more harm from incarceration than he would have suffered if he had complied. Similarly, an incorrect belief by a judge that a contemnor is bluffing may lead a judge to keep the contemnor in jail even though she would prefer to release him if she knew he would never comply. The optimal strategy for the judge and the contemnor where the opportunity for bluffing exists is quite complex and requires a game-theoretic analysis which is beyond the scope of this paper. The important point here is that current legal standards encourage such deception.

166. Suppose, for example, that the costs of incarceration are 6 per month for the first 6 months and 3 per month for the last 12 months, so that  $J_1 = 36$  and  $J_2 = 36$ . Under these circumstances, the optimal strategy for the witness is {Comply} when  $C \leq 43.2$ , and {Refuse, Refuse} when  $C > 43.2$ . He never will choose {Refuse, Comply}. The intuition is that if the costs of incarceration are larger prior to an appeal and smaller after the appeal, the cost of taking a chance of winning on appeal is increased, but the cost of refusing to testify if the appeal fails is reduced. In these cases, it is more likely that the witness will talk immediately or not at all.

The proof of these statements is as follows. The contemnor will choose {Comply} when  $C \leq J_1 + (1-p)C$  and  $C \leq J_1 + (1-p)J_2$ . Thus he will choose {Comply} when  $C \leq 36 + .2C$  and  $C \leq 36 + .2(36)$ , or when  $C \leq 43.2$ . The contemnor will choose {Refuse, Refuse} when  $C > 43.2$ . The contemnor never will choose {Refuse, Comply}. That is because he only would choose {Refuse, Comply} over {Refuse, Refuse} when  $J_1 + (1-p)C \leq J_1 + (1-p)J_2$ , or when  $36 + .2C \leq 36 + .2(36)$ , or  $C \leq 36$ . As was shown above, however, when  $C \leq 43.2$  the contemnor always will choose {Comply} over {Refuse, Comply}.

167. See *In re Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988). In *Griffin*, the court refused to find that incarceration had lost its coercive effect, even though the contemnor already had been jailed for 11 months for refusing to testify. The court implied that by refusing to grant his release, the contemnor would be convinced that the court was not bluffing. *Id.*; see also Sullivan, *supra* note 160 (describing contemnor's compliance when judge both refused his release after 20 months incarceration and strongly implied contemnor would remain jailed for 5 or 10 more years).

### 3. Initial Noncompliance with Perfect Information

The finding that a contemnor will comply immediately or not at all is based on the assumption that the harm is less from immediate compliance than from compliance after a period of incarceration. In rare cases, however, an individual may get a positive benefit from serving some time in jail before obeying a court order, either because incarceration itself has positive benefits or because the costs of compliance will decline during the time he is incarcerated. In these circumstances an individual may plan to stay in jail for a limited period of time and then obey the court order.

An example may be useful. Suppose that a newspaper reporter is ordered to reveal a confidential source in testimony before a grand jury.<sup>168</sup> The reporter might comply immediately, comply after a period of incarceration, or never comply. If the reporter complies he will not be incarcerated, while if he never complies he will serve eighteen months in jail. His best alternative, however, might be to comply after serving some jail time.

The reason is that a short jail term may be a positive benefit for the reporter.<sup>169</sup> He may get a lot of sympathetic publicity for "toughing it out," and be praised as a "hero" or "martyr" by his friends and colleagues. The newspaper likely will continue his salary, and may offer additional financial support, such as payment of legal fees. The reporter may even boost his professional standing by writing on his first-hand experiences in jail. By contrast, if the reporter immediately complies, he may be ridiculed by his friends and associates for "informing" on his source and he may hurt his credibility with other sources.

After the reporter has been jailed for some time, however, the costs of incarceration might increase. The newspaper at some point may cut off its financial support and publicity may cease once the reporter's situation becomes "old news." Friends and supporters may visit him less often or not at all. At the same time, the costs of compliance may decrease after a period of incarceration. Once the reporter has spent some period of time in jail to protect his source, his compliance may be viewed less negatively. Other reporters may believe that it is unreasonable to expect him to continue to stay incarcerated.

The reporter's situation can be represented numerically as shown below in Table 4.

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168. This assumes there are no shield laws which protect the reporter's confidentiality. This assumption is plausible since not all jurisdictions have such laws. For example, currently there are no federal laws granting such protection from testifying. Thus, a reporter who refuses to testify before a federal grand jury can be jailed for civil contempt.

169. This is reflected in the example which follows as a negative harm from jail.

TABLE 4

<i>Month</i>	<i>Harm from Complying</i>	<i>Harm from Jail</i>	<i>Total Harm</i>
0	100	0	100
1	80	-5	75
2	65	0	65
3	55	7	62
4	50	16	66
5	46	25	71
6	43	35	78
7	41	45	86
8	40	55	95
18	—	155	155

The harm from complying immediately is 100. If the reporter testifies after serving a period in jail, however, the loss from compliance is reduced. The first month in jail reduces the harm to 80, and smaller reductions are gained by serving additional months.

The reporter gains positive utility from serving 1 month in jail because the unpleasantness of jail itself is more than offset by the publicity and praise he receives from serving as a martyr. Additional months of incarceration, however, increase the harm to the reporter. The second month in jail has a marginal cost of 5, and the cost increases gradually until after the fifth month the reporter suffers a cost of 10 for each month spent in jail.

In these circumstances the reporter's total costs are minimized by serving 3 months in jail and then testifying for a total loss of 62. This is shown graphically in Figure 2, below. Observe that the total harm curve reaches its lowest point where the reporter serves 3 months in prison.



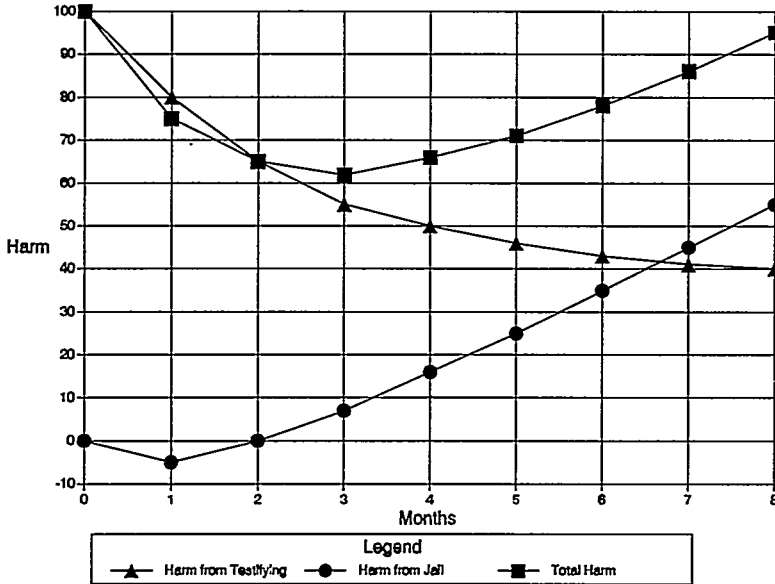


Figure 2

Although this situation is theoretically interesting, it will not occur frequently. In most cases, an individual will not receive a positive benefit when jailed, and the costs of compliance generally will not decline over time.<sup>170</sup> The rare exceptions are most likely to occur in certain classes of cases, such as those involving reporters who want to protect their sources, or activists who change their assessment of the costs of jail once removed from the support of their activist group.

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170. Many cases of recalcitrant witnesses involve individuals who do not testify because of strongly held moral, religious, or political beliefs, or persons who are members of criminal syndicates. In such cases the costs of compliance are unlikely to change. Nor are the costs of compliance likely to decrease where the witness does not testify for fear of harm to himself or others, absent a change in circumstances, such as the removal of the threat or increased protection of the witness.

#### IV. RETHINKING CIVIL CONTEMPT SANCTIONS

##### *A. The Flawed Notion of the Coercible Contemnor*

The law regarding sanctions for civil contempt is based on the assumption that the experience of being in jail is likely to coerce an incarcerated civil contemnor; that each day the pressure grows on the jailed contemnor to comply. In fact, under certain plausible assumptions an individual facing a court order will either comply immediately or never comply.

Jailed contemnors, of course, sometimes do comply. But courts have misunderstood the factors that would lead persons to comply after they have been incarcerated. Courts seem to believe that confined contemnors decide to comply because of their age, health, length of incarceration, or lack of strong reasons for not complying. Most of these factors, however, are relevant only to whether a person will comply with a court order initially.

The most likely reasons a jailed civil contemnor might decide to comply are not even considered by courts. Those reasons all involve situations where the individual learns new information after he has been confined. The contemnor may find jail is worse than expected, learn that the cost of complying is less than he thought, lose an appeal, or discover that the judge is not bluffing.<sup>171</sup>

In sum, the current structure of civil contempt sanctions is based on a flawed conception of the contemnor's decision-making process. This leads to a system of contempt sanctions which shape the potential contemnor's expected jail term in ways that are clearly undesirable.

##### *B. Social Costs of Current Law Governing Civil Contempt*

###### 1. Rewarding the "Stubborn" Contemnor

Current doctrines reward civil contemnors for their intransigence. Under the NRPC rule, judges are required to release a contemnor if they believe that there is no substantial likelihood that he can be coerced. Even where not

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171. See, e.g., Sullivan, *supra* note 160 (suggesting that contemnor's compliance after 20 months incarceration was due to the rejection of his appeal which occurred shortly before compliance); see also *Birmingham Mayor Relents and Is Released*, *supra* note 154 (noting contemnor's remark regarding unpleasantness of incarceration and compliance after one day in jail). In some cases, there may be several reasons which cause the contemnor to recalculate the costs of jail or his expected term of incarceration. The mayor of Birmingham, for example, lost his request for a stay of his contempt conviction the day before he entered jail. See *Mayor of Birmingham Is Set for Prison as Appeal Fails*, N.Y. TIMES, Jan. 23, 1992, at A14 (noting refusal of Supreme Court to stay the mayor's contempt sanction thereby ending his "last chance to avoid a prison sentence"); *Mayor Goes to Prison*, *supra* note 154 (noting jailing of mayor one day after his request for a stay of his civil contempt sanction was rejected). In addition, he may have believed before his jailing that the judge was bluffing and would not jail him due to the controversy surrounding the case. See *id.*; Ronald Smothers, *Charge Against Mayor Strikes Chord in Birmingham*, N.Y. TIMES, Jan. 20, 1992, at A12 (noting efforts of mayor to enlist national support for his view that the investigation of him was racially motivated and remarks by some that the investigation had polarized the city).

required to release a contemnor, judges may use their discretion to release a contemnor who never will comply.

The result of these rules is that the more stubborn a contemnor appears, the more likely he is to be released and thus the lower his expected jail term. Thus the hardened criminal who the judge believes can endure a long period of incarceration is more likely to be freed than the innocent intimidated witness who the judge thinks may find a long period of confinement unbearable. This shorter expected jail term encourages the criminal to defy a court order that he otherwise might obey.

These rules also can lead to the unjust confinement of the innocent witness where the court misjudges the harm to the witness from obeying the court order. The court might believe that the harm to the intimidated witness from complying is small and that the harm from incarceration is large. Suppose, however, that the witness actually is terrified by the threats against him and views the cost of obeying the court order to be enormous. Now even if he faces a large harm from jail, he will prefer incarceration since the harm is greater for compliance.

It makes little sense to present hardened criminals, fanatical terrorists, and other seemingly stubborn contemnors with a lower expected period of incarceration than other individuals. Their moral culpability may be particularly high and the social costs of keeping them incarcerated may be especially low.<sup>172</sup>

## 2. Encouraging Dishonesty

Giving a judge discretion to release an uncoercible contemnor (or requiring her to do so) provides a perverse incentive to the jailed contemnor. Since he may benefit from appearing stubborn, he has an incentive to portray himself as uncoercible, even if he intends to comply if his bluff is not successful. In addition, the fact that an individual may be able to obtain release by appearing intractable, encourages him to defy a court order initially.

One possible solution to this problem—and the related problem of rewarding the stubborn contemnor—would be for the judge to assign a fixed sentence with a purge clause. This is sometimes done under current law, but it does not solve the problem because the judge still can modify the order and release the contemnor at any time. A more effective approach would require that the judge bind herself permanently, so that the contemnor could not be released early without complying. This would eliminate bluffing problems and allow the contemnor to more accurately assess the expected term and costs of incarceration.

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172. Keeping innocent witnesses in jail is likely to destroy their family lives and their reputations and subject them to enormous personal trauma. Keeping hardened criminals in jail is likely to have lower personal costs.

### 3. Burdening Judges

The current structure of civil contempt sanctions places an unrealistic demand on a judge. First, it requires that the judge accurately predict whether or when a contemnor can be compelled to obey the court order. Second, it requires the judge to be a master of deception so that she can fool the contemnor into believing that she will never release him unless he complies with the court, even when she intends to release him if he shows that he cannot be coerced. Third, it results in an increased workload since the judge may have to review periodically her decision regarding the coercive effect of continued confinement on an incarcerated civil contemnor.<sup>173</sup>

### CONCLUSION

The analysis in this article suggests the need for broad reform of civil contempt sanctions. The current standards which require or permit a judge to release a jailed contemnor who she determines cannot be coerced are based on a flawed conception of the behavior of most jailed contemnors. Moreover, they encourage judges and contemnors to engage in bluffing and other behavior which leads to inaccurate assessments of the social costs associated with the sanctions.

Restructuring civil contempt sanctions may help solve these problems. Possible reforms include fixed sentences with purge clauses, statutory limits which are tied more to the likely harm of noncompliance and integrated civil and criminal contempt sanctions. Further research is necessary, however, to develop an optimal sanctioning scheme. A game-theoretic model that accounts for bluffing behavior and informational problems on both sides would shed more light on the decisionmaking process of individual contemnors and judges. In addition, a more careful examination of the true social costs and benefits of incarceration for civil contemnors would be helpful. Such an analysis should consider the private harm to the individual from obeying the court order and the social value accorded such harm, the social harm caused by noncompliance, the social costs of enforcing sanctions, and the likelihood of those sanctions inducing compliance.

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173. See, e.g., *In re Crededio*, 759 F.2d 589, 593 (7th Cir. 1985) (requiring the district court to evaluate periodically whether confinement of a civil contemnor was still coercive); *Keegan v. Lawrence*, 778 F. Supp. 523 (S.D. Fla. 1991) (holding that the court was required to examine periodically whether there was a reasonable likelihood that a jailed civil contemnor would comply).