

GAMES CIVIL CONTEMNORS PLAY

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I. INTRODUCTION	795
II. DEVELOPING A TWO-PERIOD MODEL	801
A. <i>Preferences</i>	801
1. Three Outcomes	801
2. Preferences of Witnesses	801
3. Preferences of Judges	806
4. Preferences in the Models	810
B. <i>A Two-Period Model of Civil Contempt</i>	810
1. Classifying Witnesses and Judges.....	810
2. Two-Period Model with Perfect Information .	811
a. Stubborn Witness, Tough Judge.....	814
b. Stubborn Witness, Lenient Judge	815
c. Weak Witness, Tough Judge.....	816
d. Weak Witness, Lenient Judge	817
3. Two-Period Model with Imperfect	
Information	818
4. Concealing Preferences	820
5. Implications and Limitations of the Model ..	824
III. RESTRUCTURING CIVIL CONTEMPT SANCTIONS.....	825
A. <i>Releasing Contemnors under Current Law</i>	825
B. <i>Threats and Credibility</i>	828
C. <i>An Alternative Approach</i>	828
IV. CHOOSING AN OPTIMAL TERM FOR CIVIL CONTEMPT	
SANCTIONS	829
A. <i>Structure of the Model</i>	829
B. <i>A Numerical Example</i>	831
C. <i>Results of the Model</i>	833
V. CONCLUSION	834

I. INTRODUCTION

A person who willfully disobeys a court order can be sanctioned for civil contempt. Such a sanction is imposed to coerce the contemnor into obeying the order. Where the sanction is im-

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prisonment, civil contemnors are said to carry the keys to their cells in their own pockets.¹ The reason is simple: a contemnor initially can avoid jail by complying with the order and, if jailed, still can comply at any time and be released.²

The civil contemnor, however, is not the only one who can unlock the door.³ The judge must decide whether to imprison the non-complying contemnor.⁴ Moreover, the judge can order his release at any time during imprisonment.⁵ This is most likely to occur when the judge believes the sanction is no longer coer-

1. The metaphor that civil contemnors "carry the keys of their prison in their own pockets" generally is credited to the court in *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902). See, e.g., RONALD L. GOLDFARB, *THE CONTEMPT POWER* 58-59 (1963) (implying that the phrase originated in *Nevitt*); Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 237 (1971) (citing to *Nevitt* as the source of the phrase); Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 803 (1943) (same).

2. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 442 (1911); see also *Shillitani v. United States*, 384 U.S. 364, 368 (1966) (stating that if the civil contemnors in that case "had chosen to obey the order they would not have faced jail").

Since a civil contempt sanction is designed to coerce the contemnor into complying with a court order, it must be conditional or indeterminate. That is, it must end if the contemnor complies. *Hicks v. Feiock*, 485 U.S. 624, 633 (1988). In contrast, a criminal contempt sanction is designed to punish the contemnor for disobeying a court order and thus must be determinate or unconditional. Such a sanction is not affected by any future action by the contemnor. *Id.* at 633-35.

3. Throughout this Article, judges will be referred to as "she" and witnesses-contemnors will be referred to as "he." Obviously judges and witnesses may be of either gender. Using a different gender to represent each, however, makes it easier to follow the game-theoretic models of civil contempt presented here. See DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* 10 n.2 (1990) [hereinafter *GAME THEORY*] (describing how use of both genders is especially helpful when writing in the area of game theory).

4. See *In re Cueto*, 443 F. Supp. 857, 863 (S.D.N.Y. 1978) (stating that a judge has "wide latitude" in determining both whether initially to order a civil contemnor incarcerated and, if so, the length of incarceration). The judge can refuse to grant a prosecutor's request to jail a civil contemnor. See *United States v. Buck*, 84 Cr. 200-CSH, 1987 U.S. Dist. LEXIS 6927 at *4-*7 (denying government's motion to imprison for civil contempt defendants who refused to obey court orders to provide handwriting exemplars); see also *In re Grand Jury Proceedings (Mallory)*, 797 F.2d 906, 907 (10th Cir. 1986) (explaining that trial court has discretion to grant a motion to jail for civil contempt a recalcitrant federal grand jury witness).

5. See, e.g., *In re Grand Jury Proceedings Empanelled May, 1988 (Frelich)*, 894 F.2d 881, 885 (7th Cir. 1989) (stating that a judge may release early a jailed contemnor on equity grounds); *In re Archuleta*, 446 F. Supp. 69, 70 (S.D.N.Y. 1978) (recognizing court's discretion to release an incarcerated civil contemnor at any time); *In re Cueto*, 443 F. Supp. 857, 863 (S.D.N.Y. 1978) (stating that a judge has the discretion to release a non-complying civil contemnor for whatever rational considerations appeal to the judge). For a discussion of the judge's discretion in the context of 28 U.S.C. § 1826, the federal recalcitrant witness statute, see *In re Parrish*, 782 F.2d 325, 328 (2d Cir. 1986) (rejecting the government's contention that the statute limits the judge's broad discretion to release at any time an imprisoned witness who refuses to testify); see also *In re Grand Jury Proceedings (Mallory)*, 797 F.2d 906, 907 (10th Cir. 1986) (stating that § 1826 leaves to the trial court's discretion the denial or grant of motion for civil contempt).

cive because the witness never will comply.⁶ The judge, therefore, as well as the contemnor, carries a set of cell keys.

Both the judge and the witness would prefer that the other party open the door. The judge wants the contemnor to free himself by complying with the court order. The contemnor wants the judge to release him even though he has not complied. These opposing goals can produce interesting strategic choices for both parties.

Suppose, for example, that a judge orders a witness to testify before a federal grand jury, but the witness has strong reasons for not wanting to comply.⁷ The witness now must decide whether to comply with the court order. If he testifies he will go free. If he refuses to testify the result is uncertain. The judge may either order him jailed, hoping to coerce him to testify, or let him go free on the belief that he is uncoercible.⁸ The outcome reached depends on the choices made by both the witness and the judge.⁹ The choices, in turn, will depend on the preference orderings of the parties.

Every reluctant witness's first preference is to not testify and not go to jail. Witnesses differ, however, regarding their ranking of the remaining two outcomes. Some "stubborn" witnesses would go to jail rather than testify, while other "weak" witnesses would testify rather than go to jail.

6. See, e.g., *Simkin v. United States*, 715 F.2d 34, 36 (2d Cir. 1983); *In re Grand Jury Subpoena 87-2 (MIA) (Constant)*, 691 F. Supp. 1400, 1401 (S.D. Fla. 1988); *In re Ford*, 615 F. Supp. 259, 262 (S.D.N.Y. 1985); *In re Thomas*, 614 F. Supp. 983 (S.D.N.Y. 1985); *In re Parish*, 613 F. Supp. 356, 357 (S.D.N.Y. 1985), *aff'd*, 782 F.2d 325 (2d Cir. 1986); *In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985) (mem.); *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-18-188, 1985 WL 1977, at 3* (S.D.N.Y. June 27, 1985); *In re Dohrn*, 560 F. Supp. 179, 181 (S.D.N.Y. 1983); *Catena v. Seidl*, 343 A.2d 744, 746-47 (N.J. 1975); see also *United States v. Wheeler*, 952 F.2d 326, 327 n.4 (9th Cir. 1991) (noting that the district court had ordered civil contemnor released after finding that incarceration had lost its coercive effect); *Northeast Women's Center Inc. v. McMonagle*, 939 F.2d 57, 61 (3d Cir. 1991) (same); *United States v. Esposito*, 834 F.2d 272, 273 (2d Cir. 1987) (same).

7. For a discussion of some of the reasons why a witness may not want to testify, see *infra* pp. 804-05.

8. Or the judge may initially jail but later release the witness, even though she legally can confine him for a longer period of time. In any case, the judge may free the witness for other reasons, such as for equitable or humane considerations. See *In re Thornton*, 560 F. Supp. 183, 186 (S.D.N.Y. 1983) (stating that the court has the "inherent power to modify or withhold a contempt citation and release a witness due to humane considerations"); see also *In re Cueto*, 443 F. Supp. 857, 863 (S.D.N.Y. 1978) (releasing for humane reasons after ten months incarceration recalcitrant witnesses who had refused to testify due to religious beliefs).

9. See THOMAS SCHELLING, CHOICE AND CONSEQUENCES 214 (1984) (noting that in game theory there "is no independently 'best' choice that one can make" because a player's best choice depends on what action the other players take).

Every judge's first preference is that the witness talk and not be jailed. Judges will differ, however, in their ranking of the other outcomes. Some "lenient" judges would prefer to release a witness who will not comply, while other "tough" judges would prefer to send the noncomplying witness to jail.

Bluffing may arise where a "weak" witness comes before a "lenient" judge. Suppose, for example, that a "weak" witness thinks that the judge would release him if the judge believed that he could not be coerced to testify. Although the witness actually would rather testify than go to prison, he might pretend to be intractable to convince the "lenient" judge to release him. Similarly, a "lenient" judge might pretend that she would be willing to let a witness remain in jail forever if he refuses to comply with a court order. Such bluffing can lead *both* parties to end up with their *worst* outcome: the witness refusing to testify and the judge sending the witness to jail.

This scenario is strategically much like the game of Chicken depicted in the classic film *REBEL WITHOUT A CAUSE*.¹⁰ Early in the film, James Dean and a rival simultaneously drive stolen cars toward a cliff. The first person to jump from his car is the loser or "chicken." In the film, Dean's rival is the first to attempt to jump to safety, but he snares his jacket sleeve on the car door handle and drives off the cliff to his death. Dean jumps free, but the tragic outcome of the contest makes everyone a loser.¹¹

In game theory,¹² the game of Chicken is commonly illustrated by a strategic form game¹³ of the following sort:¹⁴

10. *REBEL WITHOUT A CAUSE* (Warner Bros. 1955) [hereinafter *REBEL*]. For an excellent description of the game of Chicken, see ERIC RASMUSEN, *GAMES AND INFORMATION* 73-74 (1989). Rasmusen points out that the continuous game depicted in the movie differs from the classic, one-shot version of the game. *Id.* at 81. The idea that civil contempt may be analogous to Chicken is discussed briefly in OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 1104-05 (2d ed. 1984); Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 206-08 (1991).

11. *REBEL*, *supra* note 10, at Laserdisc Track 7, Side 1. For a more recent film depiction of Chicken, see *FOOTLOOSE* (Paramount 1984) at Laserdisc Track 4, Side 1 (depicting two tractors driving at each other with hero Kevin Bacon "winning" when shoelace snags and prevents him from jumping).

12. Game theory is the formal study of rational decision-making where "two or more individuals have a choice to make, preferences regarding the actions, and some knowledge of the choice available to each." SCHELLING, *supra* note 9, at 213.

13. Another name for the strategic form is the normal form. See *GAME THEORY*, *supra* note 3, at 10. This form uses a series of columns and rows to indicate the strategy combinations and corresponding payoffs available to each player in the game. *Id.* at 10-11. For a general description of strategic form games, see *id.* at 10-13; RASMUSEN, *supra* note 10, at 43-45.

		Player 2	
		Drive	Jump
Player 1	Drive	-5,-5	3,0
	Jump	0,3	1,1

The player jumping to safety last wins the admiration of his peers and lives to tell about it. Thus, the best result for each player is to choose Drive while the opponent chooses Jump. In the above matrix, this is represented by a utility of 3 for the player choosing Drive and 0 for the player choosing Jump. The second best result for each player is to jump at the same time as the opponent. The match is then a draw. In the matrix this results in a utility of 1 for each player. The third-best result for each player is to jump first and be declared a coward or "chicken." Here this is represented by a utility of 0.¹⁵ The worst result for each player occurs when neither is willing to jump first. In that case, both will drive off the cliff to their death. This is represented in the matrix by a utility of -5 for each player. Even though both parties would prefer any other outcome, this disastrous result easily can occur from each party seeking his best outcome.

In the traditional game of Chicken, each player ranks the outcomes in the same order. In addition, the traditional game is one of *perfect information*; that is, each player knows how the other player ranks each of the outcomes. However, in the civil contempt game discussed in this article, it is assumed that judges and witnesses vary in their preferences. Judges may be lenient or tough; witnesses may be weak or stubborn. More important, a judge may not know which type of witness she is attempting to coerce into testifying, and a witness may not know which type of judge he is facing. Thus civil contempt is analyzed best as a game of *imperfect information*, where one of the players (or both) is un-

14. The precise numbers assigned to each outcome in the game shown in this matrix are arbitrary. A game is defined as Chicken if, for each player, $U_{DJ} > U_{JJ} > U_{JD} > U_{DD}$ where U_{DJ} represents the utility of (Drive, Jump), U_{JJ} represents the utility of (Jump, Jump), U_{JD} represents the utility of (Jump, Drive), and U_{DD} represents the utility of (Drive, Drive).

15. These preference orderings reflect the classic version of the game. It is possible, however, that losing the game of Chicken may be preferred to not playing at all. In *REBEL*, James Dean realized that the game was foolish to play, but he felt great peer pressure to take part. Presumably Dean believed that it would be better to play the game and lose than to refuse to play once challenged. Avoiding the rivalry that led to the challenge, however, would have been an even better result. Just prior to the contest, Dean suggests to his rival that it is foolish to engage in the contest. See *REBEL*, *supra* note 10, at Laserdisc. Track 7, Side 1.

certain as to how the other ranks the outcomes.¹⁶ This makes the analysis of the game both more difficult and more interesting.

Game theory is particularly suited to the analysis of civil contempt because the optimal choices made by each party depend on the decisions made by the other party.¹⁷ This article develops a simple two-period model in which a witness has been ordered by a judge to testify before a federal grand jury.¹⁸ The witness initially must decide whether to testify. If the witness chooses to testify, he does not commit civil contempt and must go free. If, however, the witness chooses not to testify, then the judge must decide whether to jail the witness. In the two-period model, once the witness is jailed he cannot be released.

In reality, of course, after a witness is incarcerated he might be released either because he decides to testify or because the judge decides that further incarceration would be undesirable. While the two-period model does not capture this complexity, it nevertheless permits a useful exploration of the civil contempt problem.

16. As used in this article a game of perfect information refers to one where each player knows the preference orderings of the other player. A game of imperfect information refers here to a game where one or both of the players is operating under uncertainty as to the preference orderings of the other player. This latter situation is sometimes referred to as a game of incomplete information. See GAME THEORY, *supra* note 3, at 87. A formal distinction sometimes is made between the terms incomplete and imperfect information. *Id.* at n.23. The distinction, however, would not affect the analysis here. See *id.* (using the terms interchangeably and noting that the distinction is "arcane and of little significance for applications").

For more formal definitions of these and other related terms, see DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 399-400 (1990) [hereinafter MICROECONOMIC THEORY]; RASMUSEN, *supra* note 10, at 51.

17. See RASMUSEN, *supra* note 10, at 21-22 (explaining that game theory is used to model the behavior "of individuals who are conscious that their actions affect each other"). The suggestion that game theory would be useful to analyze coercive civil contempt is briefly discussed in FISS & RENDLEMAN, *supra* note 10, at 1004-12; Rendleman, *supra* note 10. Game theory has been applied to other areas of the law. See, e.g., Richard Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992) (evidence); Marcel Kahan, *Games, Lies and Securities Fraud*, 67 N.Y.U. L. REV. 750 (1992) (securities fraud); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1990) (contracts); Stuart S. Nagel & Marian Neef, *Bargaining, Decision Theory and Equilibrium Models* (pts. 1 & 2), 51 IND. L.J. 987 (1976), 52 IND. L.J. 1 (1976); John S. Wiley, Jr., *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556 (1987) (antitrust). For an excellent analysis of the propriety of using a game-theoretic approach to analyze legal problems, see Ian Ayres, *Playing Games With the Law*, 42 STAN. L. REV. 1291, 1294-95; 1315-17 (1990) (reviewing Rasmusen's book); see also LEA BRILMAYER, *CONFLICTS OF LAWS* 155-60 (1991) (suggesting use of game theory to analyze conflicts of law issues).

18. The term "period" refers to the number of decisions made in the model. In the two-period model in this article, the judge and the witness each make one decision.

The two-period model is first analyzed under conditions of perfect information, and then under conditions of imperfect information. The analysis shows that the current system of indeterminate civil contempt sanctions, where judges and witnesses both have "keys to the cell," may lead to bluffing and inefficient results. This article suggests that this system should be replaced with one where civil contemnors are sentenced to fixed jail terms with purge clauses. This sanctioning structure would allow the witness to be released if he complies, while eliminating the judge's discretion to release him if he does not comply.

After the two-period model has been developed, the final section of this article develops a simple model for choosing the optimal length of incarceration for civil contemnors if fixed sentences with purge clauses are adopted as civil contempt sanctions. The model demonstrates how the ideal term depends both on society's view of social welfare and on the likely preferences of the recalcitrant witness. While by no means conclusive, the model still illustrates how these factors should be considered when determining an optimal sanctioning structure for civil contempt.

II. DEVELOPING A TWO-PERIOD MODEL

A. *Preferences*

1. *Three outcomes*

The model is based on the simple scenario described above involving a judge and a witness. The judge orders the witness to testify before a federal grand jury. The witness has strong reasons for not wanting to do so. If the witness chooses to testify he is not jailed. If the witness refuses to testify the judge must decide whether to jail him for civil contempt or instead allow him to go free.

The three possible outcomes to this situation and the terms used to refer to them are as follows:¹⁹

- a. *Testify*. The witness testifies and goes free.
- b. *Refuse/Jail*. The witness refuses to testify and is jailed.
- c. *Refuse/Free*. The witness refuses to testify and goes free.

2. *Preferences of Witnesses*

The first choice of every reluctant witness is *Refuse/Free*. This result allows the witness to avoid the harm of testifying without

19. A fourth outcome, where the witness testifies and is jailed, is omitted here because the judge legally cannot jail the witness if he testifies.

suffering the costs of imprisonment. Witnesses differ, however, in their preference ordering of *Testify* and *Refuse/Jail* according to the relative harm they expect to suffer from testifying and from jail.

Going to jail has high costs.²⁰ Possible physical harm, loss of liberty and privacy, cramped quarters and poor food make jail a miserable place.²¹ Incarceration often leads to monetary losses from lost wages and, perhaps, lost employment.²² Other harms arise from separation from friends and family and from the social stigma of incarceration.²³

These costs make jail unattractive to anyone. Nevertheless some individuals may be better equipped to withstand a period of imprisonment than others. For example, an unattached reporter whose newspaper-employer continues his salary while he is in jail will suffer less of a financial burden from incarceration than a self-employed individual with several dependents. Similarly, a healthy individual may suffer fewer medical problems from incarceration than an individual with an illness.²⁴ For whatever reason, some individuals are just better than others at

20. See Joseph F. Sullivan, *After 20 Months in Jail, Reputed Mobster Talks*, N.Y. TIMES, April 23, 1991, at 29 (describing jailed civil contemnor's claim that continued confinement was adversely affecting his physical and mental health); Francis Wilkinson, *Witchhunting in Hattiesburg*, AM. LAW., May 1988, at 104, 109 (describing civil contemnor's depression which resulted from continued incarceration); see also Doug Rendleman, *Coercion Stops, Cruelty Begins; Enough is Enough: Set Dr. Morgan Free*, LEGAL TIMES, Sept. 12, 1988, at 19 (describing how everyone lost by Morgan's incarceration, including Morgan, her child, her ex-husband, and the taxpayers).

21. See John Elson, *A Hard Case of Contempt; Elizabeth Morgan: Mother Courage or a Paranoid Liar*, TIME, Sept. 18, 1989, at 66 (reporting on civil contemnor Elizabeth Morgan's description of jail as a fairly miserable place). Morgan did not have a high regard for the food in prison either. *Id.* The poor quality of the diet in jail even may lead to (or exacerbate) health problems for the witness. See *In re Dickenson*, 763 F.2d 84, 87 (2d Cir. 1985) (discussing concerns expressed by diabetic recalcitrant witness that a lack of both proper diet and medical care in prison led to daily fears of a medical emergency and a steady deterioration in his health).

22. See Elson, *supra* note 21; John E. Smith, *Dr. Morgan Walks, Beneficiary of Limit on Jailing for Civil Contempt*, WASH. TIMES, Sept. 26, 1989, at A1 (stating that business debts incurred from her incarceration likely would prevent Morgan from reopening her private medical practice).

23. See *In re Grand Jury Feb. 1987 Term* (Griffin), 677 F. Supp. 26, 28 (D. Me. 1988) (stating that the difficulty of being separated from his family would increase the coercive effect of incarceration on jailed recalcitrant witness); see also *In re Thornton*, 560 F. Supp. 183, 186 (S.D.N.Y. 1983) (describing plea by jailed recalcitrant witness for release because she was the mother of a young child).

24. See *In re Grand Jury Feb. 1987 Term* (Griffin), 677 F. Supp. 26, 28 (D. Me. 1988) (describing claim of jailed recalcitrant witness that he suffered more from incarceration than did others who did not have a similar medical condition); see also *In re Dickenson*, 763 F.2d 84, 87 (2d Cir. 1985) (describing claims of diabetic contemnor that his health was worsening from continued incarceration).

coping with the physical, financial, and psychological hardship of imprisonment.²⁵

The expected period of confinement is also important. The civil contempt sanction is designed to force compliance with a court order, so it must be lifted when compliance is no longer possible.²⁶ For example, a witness who is imprisoned for civil contempt for refusing to testify at a trial must be freed at the conclusion of the trial.²⁷ If the trial is of short duration, the witness will spend little time in jail.²⁸ On the other hand, a witness imprisoned for refusing to testify before a lengthy federal grand jury may be jailed for a much longer period, since confinement can continue for the life of the grand jury up to a statutory maximum of eighteen months.²⁹ Confinement may extend even longer in

25. Compare for example the cases of Elizabeth Morgan and Karen Newsome. Both women had alleged that their ex-husbands had sexually molested their respective daughters, and thus refused to obey court orders to surrender or to reveal the locations of their children. Both were jailed for civil contempt and could have been held until they complied or their child reached the age of majority. Morgan never complied and was able to withstand 25 months incarceration for civil contempt before a law was passed requiring her release. See Barton Gellman, *Morgan Insists She'll Keep Daughter Hidden; Foretich Seeks Help From Government*, WASH. POST, Sept. 26, 1989, at A1 (reporting on Morgan's resolve and willingness to stay in jail rather than allow her ex-husband to have court ordered visitation rights with her child). Newsome, however, was only able to endure six weeks confinement. See Wilkinson, *supra* note 20 (describing Newsome's depression from incarceration and decision to "play ball" and surrender her children).

26. *Shillitani v. United States*, 384 U.S. 364, 371-72 (1966) (finding that a court has no authority to continue incarceration of civil contemnor when there is no further opportunity for contemnor to purge himself). Confinement for civil contempt thus must cease once the proceeding underlying the court's order is ended. See, e.g., *id.* (requiring release at expiration of grand jury term of witness who refused to testify).

27. See, e.g., *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980) (stating that witness jailed for refusing to testify at trial must be released when trial ends); *United States v. Hughey*, 571 F.2d 111, 115 (2d Cir. 1978) (describing release at end of trial of witness imprisoned for civil contempt).

28. See, e.g., *United States v. Berardelli*, 565 F.2d 24, 27 (2d Cir. 1977) (witness released after five days in jail); *Hughey*, 571 F.2d at 113 (released after four days in jail).

29. Under the federal recalcitrant witness statute, a grand jury witness who refuses to testify can be jailed for civil contempt for the lesser of 18 months or the life of the grand jury. 28 U.S.C.A. § 1826(a) (West Supp. 1993). Some recalcitrant witnesses have been held for civil contempt for the maximum period allowed. See, e.g., *Ochoa v. United States*, 819 F.2d 366, 367-68 (2d Cir. 1987) (reporting witness held 18 months); *Sanchez v. Meese*, 807 F.2d 601 (7th Cir. 1986) (reporting witness held 17 months); *United States v. Gracia*, 755 F.2d 984, 986-987 (2d Cir. 1985) (reporting witnesses held for 17 and 18 months, respectively). If a recalcitrant witness refuses to testify before successive grand juries investigating the same matter, he only can be jailed for a total of 18 months. See *United States v. Jones*, 880 F.2d 987, 988 (7th Cir. 1989) (stating aggregate period of confinement is limited to 18 months even when successive grand juries are involved); see also *In re Grand Jury Proceedings (Andrews)*, 469 F. Supp 171, 175 (E.D. Mich. 1979) (holding that a recalcitrant grand jury witness never can be imprisoned for civil contempt for longer than 18 months for refusing to testify about a particular subject regardless of the number of grand juries involved).

some state and local grand jury proceedings if there is no such statutory limitation on the length of imprisonment.³⁰

In addition to the period of incarceration for civil contempt, noncomplying witnesses may be sentenced to a fixed term in jail for criminal contempt.³¹ Thus, the expected costs for a witness of refusing to testify include both the expected confinement for civil contempt and any further confinement for criminal contempt.

Despite the high costs of incarceration, some witnesses refuse to testify because the costs of doing so are even higher.³² Some witnesses may fear for their physical safety or for the safety of their family.³³ Others may have strong religious, moral, or polit-

30. See, e.g., *Catena v. Seidl*, 343 A.2d 744, 746-47 (N.J. 1975) (ordering the release of a civil contemnor who had been jailed for five years for refusing to testify before a government anti-crime commission about the activities of a suspected organized crime family); Joseph F. Sullivan, *After 20 months in Jail, Reputed Mobster Talks*, N.Y. TIMES, April 28, 1991, at 29 (stating that civil contemnor had spent 20 months in jail for refusing to testify before state grand jury investigating organized crime).

Other state proceedings may last even longer. See Marcia Coyle, *A Question of Contempt*, NAT'L L.J., Oct. 30, 1989, at 1 (describing cases of Elizabeth Morgan and Jacqueline Bouknight). Morgan was jailed for 25 months for refusing to reveal the whereabouts of her daughter in violation of a court order which gave her ex-husband the right to have unsupervised visits with the child. Morgan conceivably could have been held for over a dozen years, until her child reached the age of majority. Instead she was released after 25 months when Congress passed a bill limiting retroactively the maximum period of incarceration permitted in child custody cases in the District of Columbia. See Felicity Barringer, *Prison Releases a Defiant Mother*, N.Y. TIMES, Sept. 26, 1989, at A1, 18; see generally Randal S. White, *Civil Contempt and Congressional Interference in the Case of Morgan v. Forelich*, 95 DICK. L. REV. 353 (1991) (describing the Morgan case and the unique legislative action which led to her release). Jacqueline Bouknight was incarcerated in Maryland in 1988 for refusing to reveal the location of her minor child. *Id.* at 376-77. As of this date, Bouknight has not complied and remains jailed. See Kate Shatzkin, *Booknight Case Tests Limits of Contempt*, BALTIMORE SUN, Feb. 12, 1995, at F1.

31. See, e.g., *Ochoa v. United States*, 819 F.2d 366 (2d Cir. 1987) (affirming four-year sentence for criminal contempt for grand jury witness who already had spent 17 months in jail for civil contempt for same refusal to testify); *Sanchez v. Meese*, 807 F.2d 601 (7th Cir. 1986) (affirming a similar sentence under similar circumstances); *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985) (affirming four-month sentence for criminal contempt following 17 months incarceration for civil contempt).

32. The possible costs include loss of life. See, e.g., Sheryl Stolberg, *Some Crime Witnesses Pay High Price for Civic Duty*, L.A. TIMES, Aug. 30, 1992, at A1 (reporting cases of witnesses who were killed to prevent their testimony); see also Andrea Ford, *Simpson Case Tipster Jailed After Refusing to Talk to Grand Jury*, L.A. TIMES, Sept. 8, 1994, at B3 (reporting that recalcitrant grand jury witness jailed for civil contempt had refused to testify due to alleged fears for his life).

33. Concern for their own safety or that of others appears to be the most frequently cited reason given by grand jury witnesses for refusing to testify. See, e.g., *In re Grand Jury Proceedings Empanelled May 1988* (Freligh), 894 F.2d 881, 882 (7th Cir. 1989) (fear for own life and that of family members); *In re Grand Jury Proceedings* (Doe), 862 F.2d 430, 431 (2d Cir. 1988) (fear for safety of family and self); *United States v. Esposito*, 834 F.2d 272, 273 (2d Cir. 1987) (fear for own safety); *In re Crededio*, 759 F.2d 589, 591 (7th Cir. 1985) (fear for safety of family and self); *United States v. Gracia*, 755 F.2d 984, 987 (2d Cir. 1985) (fear of reprisals against family living in Cuba); *Simkin v. United States*, 715

ical convictions that make testifying more costly than going to jail.³⁴ Still others may refuse to testify out of loyalty to their confederates³⁵ or because of fear of criminal prosecution.³⁶

F.2d 34, 36 (2d Cir. 1983) (fear for own safety and that of relatives); *In re* Grand Jury Investigation (Braun), 600 F.2d 420, 422 (3d Cir. 1979) (fear of retribution against family and self); *United States v. Dien*, 598 F.2d 743 (2d Cir. 1979) (fear of reprisal against family and self); *In re* Grand Jury Proceedings (Doe), 790 F. Supp. 422, 425 (E.D.N.Y. 1992) (mem.) (fear for safety of family); *In re* Grand Jury Subpoena 87-2 (MIA) (Constant), 691 F. Supp. 1400, 1401 (S.D. Fla. 1988) (mem.) (fear for safety of family); *In re* Grand Jury Feb. 1987 Term (Griffin), 677 F. Supp. 26, 28 (D. Me. 1988) (fear for own health and safety); *In re* Cantazaro, 663 F. Supp. 1, 2 (D.D.C. 1985) (fear for own and family's safety); Ford, *supra* note 32, at B3 (fear for own life). Similar reasons have been given by civil contemnors for their noncompliance in other contexts. *See, e.g.*, *Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. App. 1988) (citing contemnor's fear that her child would be sexually abused if she revealed the child's location and allowed court-ordered visitation by the child's father).

34. *See, e.g.*, *In re* Crededio, 759 F.2d 589 (7th Cir. 1985) (moral principles); *Simkin v. United States*, 715 F.2d 34, 36 (2d Cir. 1983) (religious beliefs); *In re* Ford, 615 F. Supp. 259 (S.D.N.Y. 1985) (political convictions); *In re* Thomas, 614 F. Supp. 983 (S.D.N.Y. 1985) (political convictions); *In re* Parish, 613 F. Supp. 356 (S.D.N.Y. 1985) (political convictions), *aff'd*, 782 F.2d 325 (2d Cir. 1986); *In re* Jean-Baptiste, No. M-11-188 (PKL), 1985 WL 1863, at *3 (S.D.N.Y. July 5, 1985) (political convictions); *In re* Clay, No. M-18-188, 1985 WL 1977, at *3 (S.D.N.Y. June 27, 1985) (political convictions). *See also* 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 moral and political reasons given by supporter of animal rights movement in explaining his willingness to be jailed rather than testify before grand jury).

35. *See Guilty Plea by Reputed Boss Frees 11 Held in a Mob Case*, N.Y. TIMES, Jan. 18, 1992, at A1, 8 (describing release of eleven prospective witnesses who had remained in jail for nine months for refusing to testify against relatives and associates); *see also In re* Cocilovo, 618 F. Supp. 1378, 1382 (S.D.N.Y. 1985) (describing as one of the strongest reasons a witness may have for not testifying "the almost universal repugnance to being a 'rat' or traitor to one's associates").

36. Of course it would be rare for a witness to refuse to testify out of fear criminal prosecution. A person cannot be compelled to testify when doing so would violate the Fifth Amendment privilege against self-incrimination. Thus, a witness whose testimony is self-incriminating generally must be given some grant of immunity from prosecution before he can be held in civil contempt for noncompliance. *See, e.g.*, *United States v. Meeks*, 642 F.2d 733 (5th Cir. 1981) (vacating civil contempt order on the grounds that the contemnor could not comply without sacrificing his constitutional privilege against self-incrimination). In some circumstances, however, a witness can be jailed for refusing to comply with a court order, despite the government's refusal to give the witness immunity. *See* ELLEN ALDERMAN & CAROLYN KENNEDY, IN OUR DEFENSE 169-79 (describing the case of Jacqueline Bouknight). Bouknight was ordered to produce or reveal to the court the location of her infant son, who was under state supervision. At the time of the court order, the state suspected that Bouknight had killed her child and wanted to prosecute her if she did. *Id.* at 174-77. The state refused to give her immunity from prosecution in exchange for her compliance. *Id.* at 177. The Supreme Court refused to find the contempt order violated Bouknight's privilege against self-incrimination, but did not decide explicitly whether any testimony associated with her production of her child later could be used against her. *See* *Baltimore City Dept. of Social Servs. v. Bouknight*, 493 U.S. 549 (1990). Bouknight's continued refusal to comply in the absence of immunity, however, may reflect a fear that the state will be able to use her testimony to charge her with a crime. *See* ALDERMAN & KENNEDY, *supra*, at 174-77 (describing the assertions of Bouknight's attorneys that under the circumstances her fear of making a statement that could link her to a crime was substantial and reasonable).

3. Preferences of Judges

The first choice of every judge is *Testify*. This result allows the judge to obtain the social benefits of the testimony, while avoiding the social costs associated with imprisoning the witness. Judges differ, however, in their preference orderings of *Refuse/Jail* and *Refuse/Free*.

It may seem counterintuitive that a judge would prefer to free a person who disobeyed her court order to testify, and it would be rare to find a judge who never would jail a civil contemnor. Some judges, however, may not want to jail (or may wish to release early) a witness in a particular case. This is most likely to occur when the judge is convinced that the witness never will comply with the order.³⁷ In such a case, the judge might consider the sanction punitive rather than coercive and thus inappropriate for civil contempt.³⁸ The judge also might believe that, because the witness never will testify, jail has few potential social benefits to offset its high social costs.³⁹

A judge may be more inclined to want to release a witness where she is sympathetic with his reasons for refusing to obey the court order to testify. An innocent bystander who will not testify because of a genuine fear of retaliation probably provides a com-

37. See, e.g., *In re Grand Jury Subpoena 87-2 (Mia)* (Constant), 691 F. Supp. 1400, 1401 (S.D. Fla. 1988); *In re Cocilovo*, 618 F. Supp. 1378 (S.D.N.Y. 1985); *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 Parish*, 613 F. Supp. 356, 357 (S.D.N.Y. 1985), *aff'd*, 782 F.2d 325 (2d Cir. 1986); *In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985) (mem.); *In re Michael Esposito*, No. M-11-188 (PKL) WL at *5 (S.D.N.Y. Jan. 30, 1986); *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-18-188, 1985 WL 1977, at *3 (S.D.N.Y. June 27, 1985); *Catena v. Seidl*, 343 A.2d 744, 746-47 (N.J. 1975); see also *In re Dickenson*, 763 F.2d 84 (2d Cir. 1985) (affirming decision of district court judge to end incarceration of recalcitrant witness on the grounds he would not be coerced); *Japenga*, *supra* note 34 (reporting the release of jailed animal rights supporter due to court's finding that he never would be coerced by jail into testifying).

38. See *Simkin v. United States*, 715 F.2d 34, 36 (2d Cir. 1983).

39. Some judges have held that a civil contemnor cannot be incarcerated if there is no realistic possibility that he will comply with the court order in the future. See Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 IND. L.J. 723, 731-33 (1994). These judges have based their decisions on the distinctions between civil and criminal contempt, and on due process considerations. *Id.* at 732-33. Such judges reason that the sole basis for imposing civil contempt sanctions is to coerce the contemnor into compliance. *Id.* at 732. Once it becomes clear that the contemnor never will comply, jail will not have a coercive effect and the sanction takes on the purely punitive character of a criminal contempt sanction. *Id.* at 733. The jailed civil contemnor, however, has not been afforded the constitutional protections associated with criminal contempt sanctions. Thus, once a judge determines that the contemnor cannot be coerced, she must order him released since further incarceration would violate due process. *Id.*

pling case for release.⁴⁰ An innocent person who believes it is morally wrong to betray the confidence of a friend also may evoke a judge's sympathy.⁴¹ In cases like these it is reasonable to believe that a judge might order an early release or refuse to jail the witness initially.⁴²

Nevertheless, in most cases judges probably choose to jail, or to decline to release early, individuals who refuse to obey their court orders to testify.⁴³ Often the judge believes that incarceration

40. See *In re Grand Jury Subpoena 87-2 (Mia)* (Constant), 691 F. Supp. 1400, 1401 (S.D. Fla. 1988) (releasing "young, sincere and believable" witness who had been jailed for three months for refusing to testify before a grand jury). The witness in *Constant* had insisted that his testimony would result in retaliation against his family by the targets of the grand jury probe. *Id.* The judge was persuaded that the fear was "genuine," that the motivation for not testifying was "an earnest desire" by the witness to protect his family, and that the witness never would testify. *Id.* at 1402. Of course judges have sequestered or kept secret the identity of jurors in some criminal cases due to fear for their safety. See Catherine Gewirtz, *Jurors May Lose Anonymity in Two Judges' Courtrooms*, L.A. TIMES, Sept. 7, 1994, at B3 (describing policy of several judges to withhold the identity of jurors in all criminal cases); see also Catherine Gewirtz, *Challenge to Anonymity of Jurors Rejected*, L.A. TIMES, Sept. 1, 1994 at B1, B4 (detailing one judge's reasons for keeping the names of jurors secret in every criminal case). It is not implausible to believe that such judges might be sympathetic to the fears of innocent witnesses.

41. Cf. Japenga, *supra* note 34 (describing incarceration of civil contemnor Jonathon Paul and his subsequent release from jail). Paul, a supporter of the animal rights movement, was ordered to testify before a grand jury investigating a break-in at a research laboratory. While Paul was not a suspect in the break-in, he had roomed briefly with a member of a militant animal rights group which claimed responsibility for it. After Paul refused to provide the grand jury with any information regarding other activists, a judge ordered him jailed for civil contempt. He was freed five months later without ever having testified. The judge could have let Paul remain jailed for much longer, however, because the grand jury had not expired yet. Instead she chose to release him.

42. This is especially true if the judge believes that incarceration will not induce the witness to comply with the court order. See, e.g., *In re Grand Jury Subpoena 87-2 (MIA)* (Constant), 691 F. Supp. 1400, 1402 (S.D. Fla. 1988) (releasing recalcitrant witness who was innocent of any wrongdoing and who judge determined never would testify). Innocent witnesses have been freed, however, even when the judge is not certain that the witness will continue to refuse to testify. See *In re Cueto*, 443 F. Supp. 857, 864 (S.D.N.Y. 1978) (releasing for "humane considerations" church workers jailed for civil contempt when there was no evidence they were engaged in wrongdoing or involved in the criminal activities about which they refused to testify). Of course not all judges are willing to release witnesses even when they are certain that the witness is innocent of any wrongdoing. See Mark I. Pinsky, *Judge Keeps Murder Case Witness in Jail*, L.A. TIMES, Oct. 14, 1992, at B5 (describing incarceration of young mother for refusing to testify about a drive-by shooting she had witnessed).

43. See e.g., *In re Grand Jury Proceedings of December 1989 (Freligh)*, 903 F.2d 1167 (7th Cir. 1990); *United States v. Jones*, 880 F.2d 987 (7th Cir. 1989); *In re Grand Jury Proceedings (Howald)*, 877 F.2d 849 (11th Cir. 1989) (per curiam); *In re Grand Jury*, 851 F.2d 499 (1st Cir. 1988) (per curiam); *Ochoa v. United States*, 819 F.2d 366 (2d Cir. 1987); *Sanchez v. Meese*, 807 F.2d 601 (7th Cir. 1986); *In re Crededio*, 759 F.2d 589 (7th Cir. 1985); *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420 (3d Cir. 1979); *United States v. Dien*, 598 F.2d 743 (2d Cir. 1979); *In re Grand Jury Feb. 1987 Term (Griffin)*, 677 F. Supp. 26 (D. Me. 1988) (mem.); *In re Cantazaro*, 663 F. Supp. 1 (D.D.C. 1985); *United States v. Salerno*, 632 F. Supp. 529 (S.D.N.Y. 1986); *In re Jabbar*, 560 F. Supp. 186 (S.D.N.Y. 1983); *In re Archuleta*, 446 F. Supp. 68 (S.D.N.Y. 1978).

tion will have the desired coercive effect and persuade the witness to comply.⁴⁴ When the likelihood of compliance is uncertain, the judge is more likely to jail the witness if the social value of the testimony is high. A judge thus is more likely to incarcerate the only witness to a murder than one of several witnesses to a breach of the peace.⁴⁵

Even where the judge believes that the likelihood of compliance is small or nonexistent, however, she may prefer to jail the witness.⁴⁶ The judge may not believe or may have little sympathy for a particular witness's alleged fears.⁴⁷ Skepticism is particularly

44. This belief generally will be incorrect, however, since under plausible assumptions a rational witness never will testify once he has been jailed. *See* Beres, *supra* note 39, at 742-51 (discussing reasons why a rational civil contemnor either will comply immediately with a court order or not at all). In deciding whether to testify, the rational witness will compare the costs to him of testifying and of jail. If he will suffer a greater loss of welfare from testifying, he will refuse to do so and will risk jail. If instead he will suffer a greater loss of welfare from jail, then he will testify immediately. Except in limited circumstances, a recalcitrant witness will not choose to serve a period of time in jail and then testify because he will suffer both the loss in welfare from jail and from testifying. This combined loss in welfare generally will be greater than the loss from either testifying or jail alone. *See id.* at 742-45. There are a few circumstances under which an incarcerated witness later might comply upon learning new information after he has been incarcerated. *See id.* at 745-55. The reasons for such belated compliance, however, usually are not considered by the courts. *Id.* at 756.

45. *See, e.g.,* Pinsky, *supra* note 42 (reporting that young mother was jailed for civil contempt for refusing to testify because her testimony was crucial to prosecute a homicide to which she was the only witness); *see also* *Guilty Plea by Reputed Boss Frees 11 Held in a Mob Case*, N.Y. TIMES, Jan. 18, 1992, at A1 (describing how eleven grand jury witnesses were jailed for up to nine months for refusing to testify because their testimony was crucial to securing the conviction of a reputed organized crime leader). The judge may consider the social benefits so high that she continues to incarcerate a witness who has agreed to testify to ensure the witness in fact will appear in court and do so. *See* Pinsky, *supra* note 42 (reporting how judge lifted a contempt order issued against a material witness to a murder but continued to incarcerate the witness under the rubric of protective custody because "society has a right to be protected" and the witness earlier had failed to appear).

46. This certainly appears to be true in Jacqueline Bouknight's case. *See supra* notes 30, 36. It seems improbable that continued incarceration will have a coercive effect on Bouknight. She has remained silent—and jailed—for seven years, and might face a homicide charge and even longer imprisonment if she ever testifies. Moreover, assuming she acted rationally, at the time of her initial refusal she already had calculated the costs of testifying (and possibly incriminating herself) as outweighing the costs of jail. *See* Beres, *supra* note 39, at 742-45. Since she later lost her appeal to the Supreme Court, any reassessment of the period of incarceration which might cause her to relent already would have occurred. *Id.* at 748-51. It thus does not seem plausible that Bouknight will choose to testify in the future. Nonetheless, she remains incarcerated.

47. Even in cases involving innocent witnesses, judges may believe that there are relatively few instances where the witnesses should legitimately fear for their lives. *Cf.* Vicki Torres, *3 Young Murder Witnesses Learn the Price of Courage*, L.A. TIMES, Mar. 12, 1993, at A1 (noting comments of district attorney that very few witnesses in gang-related cases need to fear for their lives); Vicki Torres, *Family's Pride Turns to Tears After Young Witness is Slain*, L.A. TIMES, Aug. 21, 1992, at B1 (describing comment of police officer that during 25 years of experience he was only aware of "a couple of times a person was shot, or injured").

likely if the witness is implicated in the criminal activity about which he had been ordered to provide information.⁴⁸ The judge may believe that any concern that the witness has for his own safety or that of his friends and family is a self-induced wound.⁴⁹ Even when the judge is sympathetic to the witness's plight, she nonetheless may incarcerate him to uphold the court's authority.⁵⁰ If she fails to incarcerate one witness who refuses to obey her orders, other witnesses might not obey her orders in the future.⁵¹

Finally, a judge might jail a witness in order to punish him. This is especially likely if the judge believes that the contemnor has committed some other crime for which the government is unable to convict him.⁵² Or the judge simply might want to punish the witness for refusing to obey the court order. Of course, it is improper to impose civil contempt sanctions solely for punitive

48. Cf. 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, 602 (1982) (noting that the duress defense could not be raised by recalcitrant witnesses who voluntarily associated with organized crime figures about whom they were ordered to testify because they have "brought this coercion upon themselves"). One court has suggested, however, that duress may be a defense to civil contempt if the contemnor presents very strong evidence he was overcome by a palpable, imminent danger. See *In re Grand Jury Proceedings of December 1989 (Freligh)*, 903 F.2d 1167, 1170-71 (7th Cir. 1990) (stating that the defense might be available but holding it was not met in this case). Given the difficulty of proving the defense, and the belief in witness protection programs, it seems unlikely that witnesses who are involved with the criminal activity being investigated will be able to meet it. See Mass, *supra* at 594-95 (noting that the defense never has been raised successfully by a recalcitrant witness).

49. See *In re Grand Jury Proceedings (Lahey)*, 914 F.2d 1372, 1375 (9th Cir. 1990) (explaining that the more vicious or sophisticated the criminal enterprise the greater the possible danger to those who are involved with it and agree to testify about it).

50. Cf. Pinsky, *supra* note 42 (reporting judge's description of woman whom he had incarcerated for civil contempt as "basically an innocent citizen, a victim herself").

51. See Rendleman, *supra* note 20 (stating that if a judge does not carry out the threat to jail a civil contemnor she may lose credibility in future cases); see also *In re Clay*, No. M-11-183, 1985 WL 1977 at *2 (S.D.N.Y. June 27, 1985) (stating that doctrine requiring release of civil contemnors in cases where there was no realistic possibility of coercion encourages contemnors to disobey court orders); *In re Thornton*, 560 F. Supp. 183, 185 (S.D.N.Y. 1983) (stating that release of witness who refused to testify encourages others to refuse to comply).

52. This may explain the lengthy incarceration of Jacqueline Bouknight. See *supra* notes 36, 46. The authorities apparently have refused to give Bouknight immunity from prosecution because they suspect that she killed her son and need her testimony to prove it. Because she has refused to produce the child or to disclose his whereabouts, however, there is no evidence to charge her with any crime connected to his disappearance. At this point, it is highly improbable that Bouknight ever will comply with the court order. See *supra* note 46. Thus her incarceration hardly can be deemed "coercive." Nonetheless she remains imprisoned. It appears likely she will remain confined for as long as it is legally possible to do so.

reasons.⁵³ Criminal contempt is the appropriate method of punishing an individual for noncompliance with a court order.⁵⁴ Nevertheless, so long as the contemnor is able to comply and be released, the punitive motives of the judge imposing the civil contempt sanction are not likely to be scrutinized closely.⁵⁵

4. *Preferences in the Models*

The previous two sections explained why all judges and witnesses do not have the same preferences. In the models that follow witnesses are classified according to whether they would choose to testify rather than go to jail and judges are classified according to whether they would choose to incarcerate a witness who refuses to testify.

B. *A Two-Period Model of Civil Contempt*

1. *Classifying Witnesses and Judges*

The model assumes that a judge has ordered an unwilling witness to testify before a grand jury. The witness must decide

53. See Rendleman, *supra* note 10, at 198 (stating that authorities should not imprison defiant contemnor for punitive purposes unless they have given him the constitutional protections of criminal contempt). The judge, however, can have as one of her reasons for issuing civil contempt sanctions vindication of the court's authority. See *Hicks v. Feiock*, 485 U.S. 624, 635 (1988).

54. See *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 442-43 (1911) (holding that imprisonment for civil contempt is imposed to coerce the contemnor to comply with a court order, while imprisonment for criminal contempt is imposed solely to punish the contemnor); see also Earl C. Dudley, Jr., *Getting Beyond the Civil Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1031-32 (explaining that a punitive sanction is classified as criminal contempt while a coercive sanction is deemed civil contempt); Rendleman, *supra* note 10, at 189 (stating that "criminal contempt is available to the judge to punish someone who disobeys" a court order). The difference is not just semantics. A criminal contemnor receives most of the procedural protections given to other criminal defendants. See *Hicks v. Feiock*, 485 U.S. 624, 632, 637 (1988) (stating that criminal contempt sanctions cannot be imposed unless the contemnor receives federal constitutional procedural protections); see also Dobbs, *supra* note 1, at 235, 242-43. A civil contemnor, on the other hand, is entitled to few such constitutional safeguards. *Id.*

55. This is especially true if the judge does not reveal that her sole reason for jailing the contemnor is punitive or if she has both punitive and coercive motives. See *Hicks v. Feiock*, 485 U.S. 624 (1988) (stating that both criminal and civil contempt sanctions have punitive aspects); *Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947) (finding an unconditional penalty to be criminal in nature because it is "solely and exclusively punitive in character"). The court in *Hicks* stated that the distinction between civil and criminal contempt turns on the nature of the relief, and not the purpose for which it was imposed. *Id.* at 635-37. Thus, if a conditional sentence is imposed where the contemnor can purge himself by complying with the court order, the sanction will be classified as civil contempt. *Id.* at 633. This enables the judge to assign a larger punishment than could be assigned by using criminal contempt alone, because the contemnor subsequently can be charged and separately sanctioned for criminal contempt arising from the same act of disobedience.

whether to obey the court order and testify. As explained earlier, the three possible outcomes are:

- a. *Testify*. The witness testifies and goes free.
- b. *Refuse/Jail*. The witness refuses to testify and is jailed.
- c. *Refuse/Free*. The witness refuses to testify and goes free.

These outcomes will be represented, at times, by the letters 'T,' 'RJ,' and 'RF,' respectively.

Every reluctant witness's first preference is *Refuse/Free*. Witnesses differ, however, in their ranking of the remaining two outcomes. Witnesses who prefer *Refuse/Jail* to *Testify* will be called "stubborn" (W_s). Witnesses who prefer *Testify* to *Refuse/Jail* will be called "weak" (W_w).

Every judge's first preference is *Testify*. Judges differ, however, in their ranking of the remaining two outcomes. Judges who prefer *Refuse/Jail* to *Refuse/Free* will be called "tough" (J_T). Judges who prefer *Refuse/Free* to *Refuse/Jail* will be called "lenient" (J_L).

The value of each outcome to a witness or judge can be represented numerically on a "utility scale," with higher numbers indicating a greater value or utility.⁵⁶ A utility of 2 will be assigned to each party's best outcome, 1 to the second-best outcome and 0 to the worst outcome. Table 1 summarizes the preferences of each type of witness and judge.⁵⁷

TABLE 1

	Stubborn Witness	Weak Witness	Tough Judge	Lenient Judge
Preferences	RF>RJ>T	RF>T>RJ	T>RJ>RF	T>RF>RJ
U_{RF}	2	2	0	1
U_{RJ}	1	0	1	0
U_T	0	1	2	2

2. Two-Period Model with Perfect Information

Each of the two types of judges can face two types of witnesses, so four different pairings or games are possible: {Stubborn Witness, Tough Judge}, {Stubborn Witness, Lenient Judge}, {Weak

56. These are von Neumann-Morgenstern utilities. The von Neumann-Morgenstern utilities used here are chosen arbitrarily and are designed to show the relative strength of the preferences of the witness and judge. They are measured on a cardinal scale, and thus are invariant to a positive linear transformation. For a discussion of the calculation, use, and limitations of von-Neumann-Morgenstern utilities, see MICROECONOMIC THEORY, *supra* note 16, at 71-81; ANATOL RAPOPORT, TWO PERSON GAME THEORY 24-38 (1966).

57. In the table, U_{RF} represents the utility of *Refuse/Free*, U_{RJ} represents the utility of *Refuse/Jail* and U_T represents the utility of *Testify*.

Witness, Tough Judge}, and {Weak Witness, Lenient Judge}. In this section it is assumed that witnesses and judges have perfect information: each witness knows what type of judge he faces and each judge knows what type of witness she faces.⁵⁸ The effect of imperfect information will be examined later.⁵⁹

Each of these games can be represented in the strategic form that was used in part I to represent the game of Chicken. The matrix below, for example, depicts {Stubborn Witness, Tough Judge} in strategic form:

		<i>Tough Judge</i>	
		Free	Jail
<i>Stubborn Witness</i>	Testify	0,2	—
	Refuse	2,0	1,1

Stubborn Witness moves first. If he chooses *Testify* he will obtain a utility of 0. If he chooses *Refuse*, he will obtain a utility of 2 if Tough Judge frees him or a utility of 1 if she jails him. In either case, Stubborn Witness is better off refusing than if he testifies. Tough Judge now must decide whether to jail Stubborn Witness. The utility of 1 that Tough Judge obtains by jailing Stubborn Witness is greater than the utility of 0 the judge gets by letting him go free. Thus Tough Judge will jail Stubborn Witness. The final outcome then is *Refuse/Jail*.⁶⁰

As this example makes clear, however, the strategic form of a game does not indicate in what order the parties make their decisions.⁶¹ In the civil contempt context the timing of moves is important for understanding the strategies of the judge and witness. It is more useful, therefore, to represent the games in this article in extensive form.⁶²

58. In the two-period model, only the knowledge of the witness is important. The judge's decision never depends on what type of witness she is facing because she moves last. In a model with a greater number of periods, however, the judge's knowledge also is important.

59. See *infra* part II.B.3.

60. No utilities are assigned to the outcome *Testify/Jail* because that result cannot occur.

61. See RASMUSEN, *supra* note 10, at 43-48 (indicating that a game's order of moves and information structure is "often obscured" in the strategic form); see also Ayres, *supra* note 17, at 1300 (explaining that the strategic form suppresses the dynamic nature of a game).

62. See Ayres, *supra* note 17, at 1299 (stating that the extensive form can indicate the sequential nature of a game). The extensive form uses a tree-like structure composed of nodes and lines to depict the sequence of decisions. Each node represents a decision point where one of the parties must make a choice among actions. The nodes are labelled with the name of the party in control of the corresponding decision. Lines emanate from

The extensive forms of each game are shown in Figures 1-4. In each game the open circles represent decision points for the witness and judge, with letters in the circles indicating which party controls that decision point.⁶³ The small solid circles represent outcomes, with the pair of numbers next to each representing payoffs, or the expected utility for each player for that outcome. The first number in each pair represents the expected utility received by the witness, while the second represents that received by the judge. The Nash equilibrium point in each game is marked with an asterisk.⁶⁴

each node to indicate the alternative choices available to the deciding party. The result is a series of "branches" from which one can trace a path of decisions leading to an "end node" for each outcome. The payoffs associated with each outcome are indicated in parentheses next to the end nodes. *See id.* (describing extensive form representation); *see also* GAME THEORY, *supra* note 3, at 13-21 (giving examples of extensive form games). Extensive form games sometimes are referred to as decision trees. *See, e.g.*, EDWIN MANSFIELD, STATISTICS FOR BUSINESS AND ECONOMICS 652-53 (4th ed. 1991); MICHAEL D. RESNIK, CHOICES 17-19, 122 (1989).

In addition to illustrating the timing of actions, the extensive form also describes differences in information that individuals may possess when making a decision. GAME THEORY, *supra* note 3, at 13. Conveying the information available to the party at a decision point is important for modelling situations of imperfect information. Ayres, *supra* note 17, at 1301-04. Thus, use of the extensive form is necessary for depicting the two-period model of civil contempt with imperfect information depicted in this article. *See infra* part II.B.3.

63. As indicated previously, W_w represents Weak Witness; W_s represents Stubborn Witness; J_L represents Lenient Judge; and J_T represents Tough Judge.

64. The term Nash equilibrium refers to a strategy combination where no player has an incentive to deviate from his own strategy, given that the other players do not deviate from their strategies. RASMUSEN, *supra* note 10, at 33.

a. *Stubborn Witness, Tough Judge*

Stubborn Witness always refuses to testify because testifying is his worst result. Tough Judge will send him to jail. The witness and the judge each receive a utility of 1, their second best outcome.

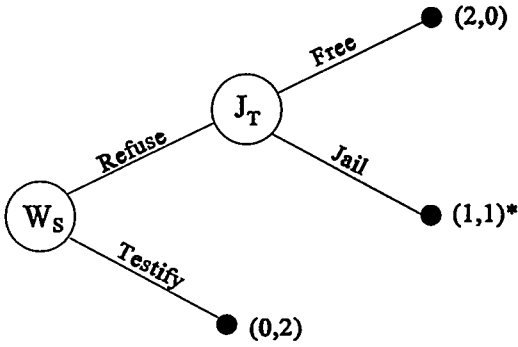


FIGURE 1. STUBBORN WITNESS, TOUGH JUDGE

b. *Stubborn Witness, Lenient Judge*

Stubborn Witness refuses to testify but Lenient Judge does not send him to jail. The witness receives a utility of 2, his best outcome. The judge receives a utility of 1, her second best outcome.

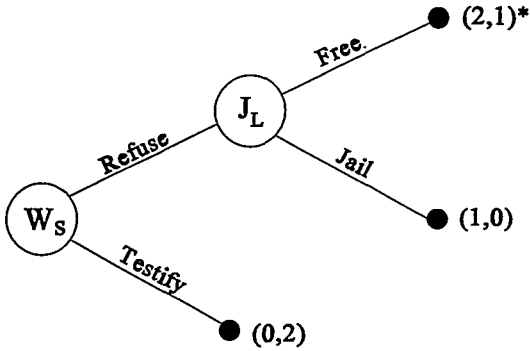


FIGURE 2. STUBBORN WITNESS, LENIENT JUDGE

c. *Weak Witness, Tough Judge*

Weak Witness would testify rather than go to jail. He knows that if he refuses to testify Tough Judge will jail him so Weak Witness testifies. The witness receives a utility of 1, his second best outcome. The judge receives a utility of 2, her best outcome.

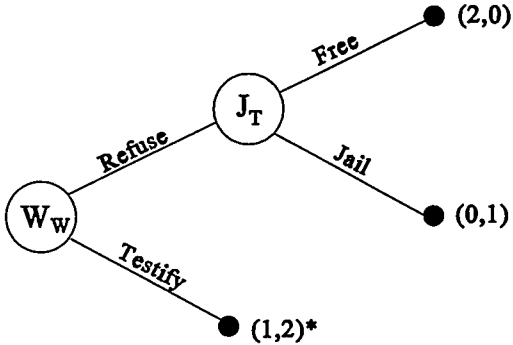


FIGURE 3. WEAK WITNESS, TOUGH JUDGE

d. *Weak Witness, Lenient Judge*

Weak Witness will refuse to testify because he knows that Lenient Judge will not imprison him. The witness achieves a utility of 2, his best outcome. The judge receives a utility of 1, her second best outcome.

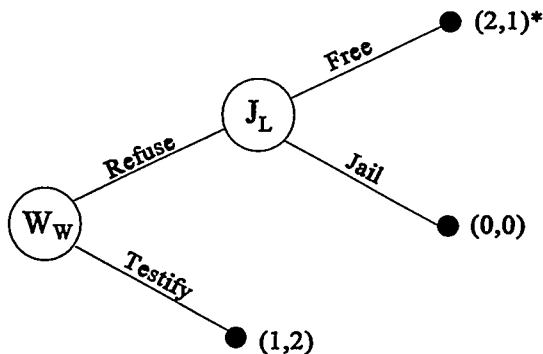


FIGURE 4. WEAK WITNESS, LENIENT JUDGE

The results of the four different two-period games with perfect information are summarized in Table 2.

TABLE 2

Witness	Stubborn	Stubborn	Weak	Weak
Judge	Tough	Lenient	Tough	Lenient
Result	<i>Refuse/Jail</i>	<i>Refuse/Free</i>	Testify	Refuse/Free
Utility of Judge	1	1	2	1
Utility of Witness	1	2	1	2

Both types of witnesses obtain their first best outcome when they face Lenient Judge and their second best outcome when they face Tough Judge. On the other hand, Tough Judge obtains her first-best outcome when she faces Weak Witness and her second-best result when she faces Stubborn Witness. Lenient Judge never obtains her first-best outcome because Stubborn Witness never testifies and Weak Witness knows that Lenient Judge will not jail him if he refuses to testify. Lenient Judge obtains her second-best outcome by letting either witness go free. These re-

sults change, however, if the game is one of imperfect information.

3. *Two-Period Model with Imperfect Information*

The analysis in the preceding section assumed that perfect information existed in each game. This section will reexamine these same four games on the assumption of imperfect information: that is, where the witnesses do not know which type of judge they face and the judges do not know which type of witness they face.⁶⁵

For a stubborn witness, imperfect information does not change the outcome. Since testifying is the worst result for him, he will refuse to testify no matter what type of judge he faces. For a weak witness, however, imperfect information changes the analysis significantly. Figure 5 shows the situation facing a weak witness under imperfect information.

65. The information available to judges matters only in a model which has more than two periods. See *supra* note 58.

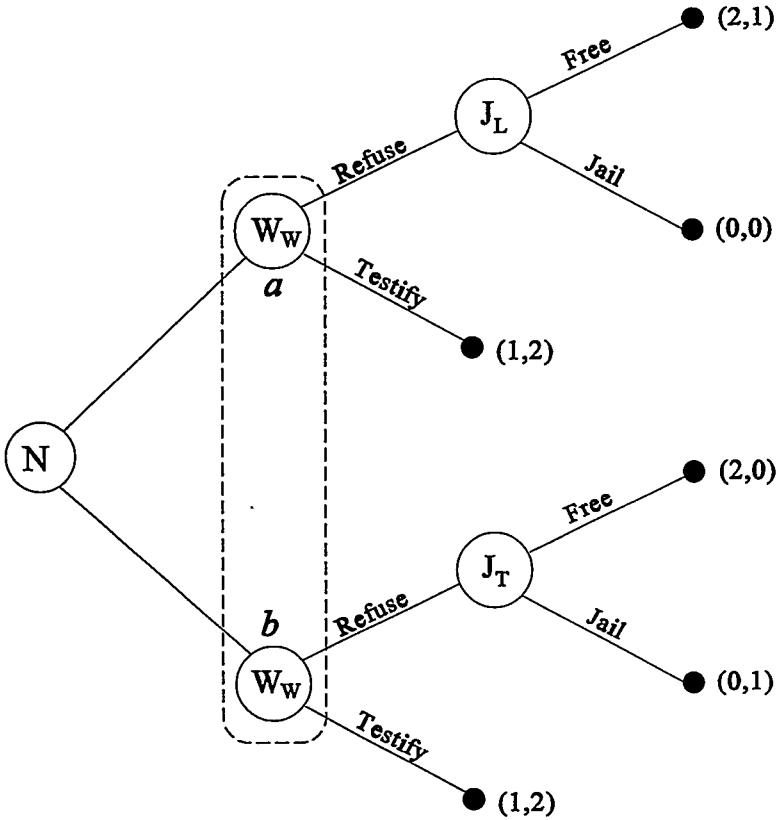


FIGURE 5. IMPERFECT INFORMATION. WEAK WITNESS

In Figure 5, the type of judge that Weak Witness faces is a matter of chance. This is reflected in the figure by letting the first move be made by random chance or 'Nature,' represented by the letter 'N.'⁶⁶ If Weak Witness is lucky and faces Lenient Judge, he will be at decision point or node *a*.⁶⁷ If Weak Witness is unlucky and faces Tough Judge he will be at node *b*. As demonstrated in the previous section of this article, Weak Witness would choose *Refuse* if he knows he faces Lenient Judge and choose *Tes*

66. "Nature is a non-player who takes random actions at specified points in the game with specified probabilities" and does not receive any payoffs. RASMUSEN, *supra* note 10, at 22 (emphasis omitted). Nature also can be referred to as Chance. See, e.g., RAPOPORT, *supra* note 56, at 19-22, 62.

67. A node is a point in the game where either Nature or a player takes an action or where the game ends. RASMUSEN, *supra* note 10, at 45.

tify if he knows he faces Tough Judge.⁶⁸ Under imperfect information, however, Weak Witness does not know which type of judge he faces; that is, he does not know if he is at node *a* or node *b*. This is shown on Figure 5 by the dashed line surrounding nodes *a* and *b*. Nodes *a* and *b* therefore are Weak Witness' *information set*: he knows that he is on one of the nodes in the information set, but he is not sure on which of them he actually is.⁶⁹

The decision of Weak Witness under imperfect information will depend both on his subjective assessment of the probability that he faces a particular type of judge and on the relative value or utility he attaches to the three possible outcomes. Suppose, for example, that Weak Witness believes there is a 70% chance that he will face Lenient Judge and a 30% chance that he will face Tough Judge. Suppose further that Weak Witness attaches the utilities shown in Figure 5 to the various outcomes, so that *Testify* has a utility of 1, *Refuse/Free* has a utility of 2 and *Refuse/Jail* has a utility of 0.

If Weak Witness chooses *Testify*, he will obtain a utility of 1 no matter which type of judge he faces. If, on the other hand, he chooses *Refuse*, he will obtain outcome *Refuse/Free* for a utility of 2 whenever he is at node *a* and obtain outcome *Refuse/Jail* for a utility of 0 whenever he is at node *b*. Since there is a 70% chance Weak Witness is at node *a* and a 30% chance he is at node *b*, his expected utility is 1.4 if he chooses *Refuse*.⁷⁰ On these probabilities and utilities, then, Weak Witness will refuse to obey the court order to testify since this will maximize his expected utility.

More generally, if *p* is the probability of node *b*, $(1 - p)$ is the probability of node *a* and the utility of *Refuse/Free*, *Refuse/Jail*, and *Testify* are U_{RF} , U_{RJ} , and U_T , respectively, then a witness should choose *Testify* whenever $U_T \geq pU_{RJ} + (1 - p)U_{RF}$.

4. Concealing Preferences

In the game with perfect information, Weak Witness never obeys the court orders of Lenient Judge because he knows that the judge will not sanction him if he disobeys. In the model of imperfect information, however, witnesses do not know which type of judge they face. Thus Weak Witness may obey the order

68. See *supra* pp. 816-18.

69. "[A player's] information set . . . at any particular point of the game is the set of different nodes in the game tree that he knows might be the actual node, but between which he cannot distinguish by direct observation." RASMUSEN, *supra* note 10, at 48.

70. Expected Utility of Refuse = $U_R = pU_{RJ} + (1 - p)U_{RF} = (.7 \times 2) + (.3 \times 0) = 1.4$.

of Lenient Judge because he thinks the judge may be Tough. Similarly, Weak Witness may disobey the order of Tough Judge because he thinks the judge may be Lenient.

Lenient Judge can improve her utility if she can convince Weak Witness that she is Tough and induce him to obey the order. She can attempt to persuade Weak Witness that she will punish him if he disobeys her order by maintaining a stern demeanor in court or by orally assuring the witness that she means business. However, such "jawboning" is unlikely to be successful unless the judge sometimes carries out her threats.⁷¹ Otherwise, the witness (or more likely the witness's lawyer) may learn about the judge's past record for "leniency" and her tendency to make idle threats.⁷² Thus Lenient Judge may choose to punish a noncomplying witness to enhance her reputation for toughness even though, if the case were looked at in isolation, she would prefer to let the witness go free.

How often Lenient Judge should impose sanctions to maximize her utility will depend upon the mix of stubborn and weak witnesses she is likely to face. If, for example, most of the witnesses she is likely to face are stubborn, then Lenient Judge may never wish to apply sanctions for noncompliance because her loss in utility from punishing the many stubborn witnesses will not be offset by her gain in utility from inducing a few weak witnesses to comply. On the other hand, if most of the witnesses that Lenient Judge is likely to face are weak, then a reputation for toughness is likely to induce many witnesses to comply. In that case, the judge's gain in utility from increased compliance now is likely to be greater than the loss in utility from sanctioning the small number of stubborn witnesses. Lenient Judge's best strategy also will depend on the relative utility she gives to avoiding the imposition of sanctions and inducing compliance with the court order.⁷³

71. See Rendleman, *supra* note 20, at 19 (stating that a judge who is not willing to carry out a threat to jail a contemnor may be unable to coerce that contemnor and may lose credibility in future cases).

72. The judge's actual record of jailing or freeing witnesses who refuse to obey an order to testify probably will not be known because there often is no formal opinion or other record issued in civil contempt cases. However, some information regarding a judge's tendency to be lenient or tough might be discerned if there are any published opinions or other sources discussing cases where the judge has faced a recalcitrant witness. More importantly, the legal community is likely to know the judge's reputation regarding civil contemnors.

73. If, for example, the judge placed a high value on the testimony of the witness, she would be more willing to accept some witnesses going to jail in order to obtain the testi-

A numerical example may help explain how a Lenient Judge might choose her strategy. Assume that the utility schedules are the same as used earlier: Weak Witnesses value the outcomes *Refuse/Free*, *Testify* and *Refuse/Jail* at 2, 1 and 0 respectively, while Lenient Judge values the outcomes *Testify*, *Refuse/Free* and *Refuse/Jail* at 2, 1 and 0 respectively.⁷⁴ Assume further that Lenient Judge knows the utility schedules of stubborn and weak witnesses (and they know her utility schedule). Lenient Judge also knows that 70% of the witnesses she faces are weak and that 30% are stubborn, but she does not know the type of any particular witness.⁷⁵

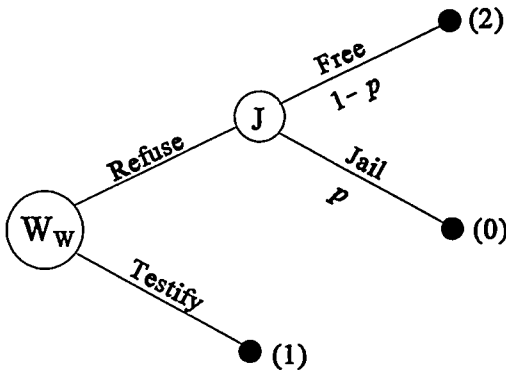


FIGURE 6. DECISION TREE FOR WEAK WITNESS

mony. This might be reflected in a utility schedule where the utility of testifying or $U_T = 6$, the utility of refusing and going free or $U_{RF} = 1$, and the utility of refusing and going to jail or $U_{RJ} = 0$. On the other hand, if the judge placed a high value on avoiding sending people to jail, then she would be reluctant to impose such a sanction even if a tough reputation would induce more testimony. This might be reflected in a utility schedule where the utility of testifying or $U_T = 6$, the utility of refusing and going free or $U_{RF} = 5$, and the utility of refusing and going to jail or $U_{RJ} = 0$.

74. The preferences of Stubborn Witnesses are irrelevant, so long as $U_{RJ} > U_T$.

75. In reality it is likely to be difficult for a judge to determine what type of witness she is facing. Unlike judges, most witnesses are not likely to develop a reputation for being weak or stubborn. In many cases the witness will be facing for the first time a court order to testify. In other cases there will be no formal opinion or record available to the judge of earlier instances where the witness has been ordered to testify. This is particularly true in cases where the witness previously has testified immediately rather than risk jail. For a discussion of the difficulties judges face in trying to determine which civil contemnors are "uncoercible" or stubborn, see Beres, *supra* note 39, at 733-39 (describing criteria judges use in trying to determine when there is no realistic possibility that a contemnor will comply with a court order in the future).

The decision tree in Figure 6 shows the choice facing a weak witness where p is the probability that the judge will imprison witnesses who refuse to testify. The value p will be called the judge's "enforcement level." Witnesses are assumed to know the enforcement level at the time they must decide whether to comply with the court order. The judge wants to choose the enforcement level that maximizes her expected utility.

The enforcement level has no impact on the decision of a stubborn witness because testifying always is worse than jail for him. A weak witness, on the other hand, will testify if the enforcement level is high enough to make the expected utility loss from the chance of imprisonment greater than the expected utility gain from avoiding testifying.⁷⁶ If weak witnesses have identical utility functions, then all weak witnesses will refuse to testify if the enforcement level is below a certain probability and all will agree to testify if the enforcement level is above that probability.⁷⁷ In this example, the enforcement level must be greater than or equal to .5 to induce Weak Witness to testify.⁷⁸

An enforcement level greater than zero, but less than the level needed to induce Weak Witnesses to comply always is suboptimal because it does not increase the number of witnesses who testify, but does increase the number of witnesses who are incarcerated. Thus the judge obtains more of her worst outcomes (*Refuse/Jail*) without increasing the number of her first-best outcomes. An enforcement level higher than the level needed to make Weak Witnesses comply always is suboptimal for similar reasons. It does

76. A witness will choose to testify if $U_T \geq pU_{RJ} + (1 - p)U_{RF}$. Solving for p , a witness will testify if $p \geq (U_T - U_{RF}) / (U_{RJ} - U_{RF})$, where $0 \leq p \leq 1$.

77. In reality, of course, witnesses are not either weak or stubborn, but fall along a continuum in their willingness to risk incarceration to avoid testifying. In general, a witness will be better off either testifying immediately or not at all. See Beres, *supra* note 39, at 742-44. Under certain conditions, however, a witness might choose to testify after some period of incarceration. For a discussion of these conditions, see *id.* at 745-55.

Incorporating heterogeneous utility functions into the analysis of part II of the present article to reflect a continuum of witness types would add complexity but would not change the nature of the conclusions. In part IV of this article, *infra*, the impact of witnesses with differing degrees of weakness or stubbornness is discussed.

78. This witness's utility from testifying is 1. Suppose $p = .5$. If the witness refuses to testify, he will be imprisoned half the time for a utility of 0 and he will go free half the time for a utility of 2. Thus his expected utility from refusing is $[(.5 \times 0) + (.5 \times 2)] = 1$. Thus where $p = .5$ the witness gets the same expected utility from testifying as from refusing to testify. So long as the utility from obeying the court order is as high as or higher than refusing, the witness will obey.

This result can also be obtained using the formula given *supra* at note 76. A witness will choose to testify if $p \geq (U_T - U_{RF}) / (U_{RJ} - U_{RF})$, where $0 \leq p \leq 1$. Here $U_T = 1$, $U_{RF} = 2$, and $U_{RJ} = 0$, so $p \geq (1 - 2) / (0 - 2)$ or $p \geq .5$.

not increase the number of witnesses who choose to testify, but it does increase the number of Stubborn Witnesses who are incarcerated.

Thus, the utility-maximizing enforcement level for Lenient Judge will be either zero, or the minimum enforcement level needed to induce weak witnesses to comply with the court order. If the judge chooses an enforcement level of zero, she will persuade no witnesses to testify, but she also will avoid her worst outcome of sending a refusing witness to jail. If the judge chooses the minimum enforcement level needed to induce weak witnesses to testify she will enjoy an increase in utility from these witnesses, but she will suffer a reduction in utility from incarcerating stubborn witnesses. Which enforcement level of these two produces a higher utility depends on the number of weak and stubborn witnesses and the judge's utility from each outcome.

5. *Implications and Limitations of the Model*

The real world is much more complex, of course, than suggested by this simple model. Witnesses do not have complete knowledge of how often a judge will imprison a witness who refuses to testify. In addition, witnesses are not just of two types, stubborn and weak, but have many different levels of intractability. Judges also are not either tough or lenient but have a range of views about the desirability of imprisoning individuals who resist their order. Moreover, a judge's attitude towards a noncomplying witness is likely to vary from case to case.⁷⁹

Perhaps most important, the models presented so far assume that the game ends after the judge makes her decision whether to incarcerate the witness. In reality, however, the game is far from over. The witness who is incarcerated for civil contempt still has the power to free himself by complying with the court order. In addition, the judge still retains the power to free the witness whether or not the witness testifies.

The ability of each party to change his or her mind at any time may not, however, make it more likely that an optimal result will be reached. Indeed, under these conditions a lenient judge may be more likely to pretend to be tough in the hopes that she can

79. A judge may be more likely to resist incarcerating an innocent bystander to a crime who reasonably fears reprisals if he testifies and whose testimony is not essential, than a member of an organized crime syndicate who refuses to give crucial testimony about the activities of his associates.

persuade the witness to comply. Similarly, a weak witness may continue to pretend to be intractable in the hopes that the judge will release him. If a lenient judge and a weak witness each persist in bluffing, then each gets their worst result: *Refuse/Jail*.

Important elements of this bluffing problem are captured even by the simple two-period model with imperfect information presented here. Both judges and witnesses may have strong motives for misrepresenting their true beliefs. The model presented in the preceding section showed that it may be in the self-interest of judges to incarcerate witnesses who they would rather not jail to develop a "tough" reputation. Jailing such recalcitrant witnesses is inefficient: both the judges and the stubborn witnesses would be better off if the sanction were not imposed. The inability of judges to identify which witnesses could be coerced into compliance and which could not be coerced, however, made it necessary to imprison some uncoercible witnesses to induce other witnesses to testify.

So long as it is impossible to identify which witnesses can be coerced into compliance and which are intractable, it is impossible to design a system which both induces witnesses who can be coerced into testifying and frees those witness who cannot be coerced. Nevertheless, it may be possible to design a system that comes closer to this ideal than the present one under which both parties have "keys to the cell" and an incentive to misrepresent their preferences. One promising approach would be to replace the current system of indeterminate civil contempt sanctions with one in which contemnors are given a fixed sentence with a purge clause. Such a system is discussed in parts III and IV of this article.

III. RESTRUCTURING CIVIL CONTEMPT SANCTIONS

A. *Releasing Contemnors under Current Law*

Jail time served for civil contempt is often a waste of societal resources. It causes misery to the imprisoned individual and his family and it is expensive for the government. Unlike criminal sanctions, it serves no retributive purpose; rather it is designed solely to induce an individual to comply with a court order. Yet when imposed against an uncoercible witness its purpose is completely frustrated. However, the fact that the civil contempt sanction often leads to waste does not mean it is useless. Some system

of sanctions clearly is required to persuade reluctant witnesses (and other potential contemnors) that they should obey the judge's orders.

The current system imprisons witnesses until they agree to testify or until the judge frees them. There are three main reasons that a judge might free a witness who still has not complied with a court order to testify. Each of these reasons, however, is problematic.

First, a judge might free a witness who refuses to testify because the underlying court proceeding has ended. In this case the witness must be released immediately because there no longer is a valid reason for keeping him in jail.⁸⁰ If the trial or grand jury is over, the witness cannot comply with a court order to testify. The witness can be held, however, for criminal contempt (with a fixed sentence) for previously having disobeyed the order to testify.⁸¹

The effect of this rule is to make the maximum sanction for refusing to testify vary with the length of the proceeding rather than with the importance of the testimony or the culpability of the witness. The sole witness to a murder may serve just a week or two in jail if the murder trial lasts only this long, while a minor witness in a complex fraud case being investigated by a federal grand jury may be incarcerated for up to eighteen months. It is true that a criminal contempt sanction can be used to punish the murder witness who refused to testify, but that is also true of the witness in the fraud case.

Second, a judge might free a witness because she believes that the witness never will comply with the court order.⁸² The avowed purpose of civil contempt is to compel obedience with a court order, not to punish. If the witness cannot be coerced, continued incarceration would be solely punitive. Thus the uncoercible contemnor should be released; he should be punished, if at all, under criminal contempt statutes.⁸³

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

81. See, e.g., *Ochoa v. United States*, 819 F.2d 366 (2d Cir. 1987); *Sanchez v. Meese*, 807 F.2d 601 (7th Cir. 1986); *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985).

82. See *supra* p. 806.

83. It is unclear whether judges who release "uncoercible" contemnors are required to free them or merely have the discretionary power to do so. Some courts adopted the rule that a civil contemnor had to be released (or never jailed) if it was determined that there was no realistic possibility that he later would comply. See *Beres*, *supra* note 39, at 732 (discussing the "no realistic possibility of compliance" doctrine). However, the Supreme

This basis for release, however, encourages all witnesses to claim that they are intractable. It is difficult or impossible for the judge to separate the truly stubborn from the posers. Moreover, the most intractable contemnors are likely to be career criminals and members of extremist organizations. It is problematic to free these individuals while jailing innocent bystanders who refuse to testify because of fear for their safety or that of others.

Finally, the judge might free a witness for equitable or "humane considerations."⁸⁴ A judge is most likely to free a contemnor for humane considerations when the judge sympathizes with the contemnor's plight. All else being equal,⁸⁵ individuals who disobey court orders for reasons of principle or innocent witnesses who refuse to testify because of fear for their own safety are more likely to be released under this rationale than organized crime figures who refuse to testify against their associates. Humane considerations generally are invoked only after the contemnor has already served a period of time in jail.⁸⁶ Judges may take into account the suffering caused by imprisonment and release ill or elderly contemnors. Even if the judge believes these contemnors may be coerced by additional prison time, she may think that the human costs of continued incarceration outweigh the value of compelling compliance.

It may be desirable for a judge to take into account a contemnor's plight in determining whether to release him, but it is less clear that she should do this on an *ad hoc* basis after the individual has been incarcerated. Not only does it consume judicial resources because the judge must make periodic assessments about each incarcerated contemnor, but it encourages witnesses to exaggerate their illnesses, family troubles, and other problems to obtain release.

Court in *Hicks v. Feiock*, 485 U.S. 624 (1988) appears to have undermined this doctrine. See Beres, *supra* note 39, at 740-42 (discussing doubt cast on continued viability of doctrine by the *Hicks* court and subsequent interpretations of the opinion). Even if they are not required to do so, judges still have the discretion to order the release of a contemnor who never will comply. See *id.* at 742.

84. See *In re Cueto*, 443 F. Supp. 857, 862-65 (S.D.N.Y. 1978) (ordering release of recalcitrant witnesses on humane and equitable grounds).

85. This includes the degree of stubbornness with respect to not testifying.

86. See, e.g., *Cueto*, 443 F. Supp. at 862 (ordering the release of church workers for humane considerations as they already had served ten months in jail for refusing to testify).

B. *Threats and Credibility*

If a judge has decided that she will imprison a witness until he complies with a court order to testify, both the judge and the witness will benefit if the judge can persuade the witness that she will not change her mind. The judge will benefit from an increased chance that the witness will comply with her original order. The witness will benefit if he was planning to refuse to testify in the hope that the judge would not jail him. Knowing that the judge will jail him if he refuses to testify, the witness may decide to comply with the court order.

However, under current law it is difficult for the judge to make credible a threat that she never will release the witness unless he complies.⁸⁷ Even a judge who will not jail a noncomplying witness is likely to tell the witness that he will be jailed to encourage compliance. Because all judges threaten witnesses with incarceration, but not all carry out their threats, little weight may be given to the judge's assertions.

C. *An Alternative Approach*

Giving the judge the ability to make credible threats may require modifying the current structure of civil contempt sanctions. For example, the system of indeterminate commitment could be replaced with a system of fixed terms with purge clauses. Under this approach the judge would make an irrevocable commitment to incarcerate a witness for a fixed period of time if the witness does not comply with the court order, but would provide that if the witness does comply with the court order he will be released.⁸⁸

Such a rule leaves the contemnor with "keys to his own cell" but takes away the keys from the judge.⁸⁹ A witness contemnat-

87. For a general discussion of the difficulties of making credible threats, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 21-52 (1980).

88. Despite the seeming "determinate" nature of this contempt sanction, it still would not be considered criminal in nature. The critical feature that determines whether a contempt sanction is civil or criminal is whether the contemnor can avoid it altogether or purge himself of it by complying with the court order. See *Hicks v. Feiock*, 485 U.S. 624, 635 n.7 (1988). A determinate sentence which contains a purge clause thus will be considered a civil contempt sanction. *Id.* at 634, 640; see also *Shillitani v. United States*, 384 U.S. 364, 370 n.6 (1966) (noting that the court in a civil contempt proceeding may impose a determinate sentence that includes a purge mechanism); *United States v. Ayer*, 866 F.2d 571, 574 (2d Cir. 1989) (explaining that the absence of a purge clause was the most important factor in determining that the remedy at issue was for criminal contempt).

89. Some judges have sentenced recalcitrant witnesses to fixed sentences with purge clauses. See, e.g., *Shillitani*, 384 U.S. at 365 (issuing sentence of two years imprisonment

ing incarceration would know at the outset that the only alternatives are to testify or to serve the stated period of incarceration.⁹⁰ Sentencing witnesses to fixed sentences with purge clauses takes away the discretion of a judge to release an uncoercible witness before the fixed term has been served, but this is a small loss given the difficulty of determining which witnesses are uncoercible and which will give in and testify.

If a system of fixed sentences with purge clauses is adopted, it will be necessary to determine the appropriate term of incarceration. The next part discusses how that term might be chosen using a simple model.

IV. CHOOSING AN OPTIMAL TERM FOR CIVIL CONTEMPT SANCTIONS

A. *Structure of the Model*

How long should witnesses who refuse to obey a court order to testify be incarcerated under a civil contempt system that uses fixed sentences with purge clauses? The answer is not obvious. A long term of incarceration increases the number of witnesses who testify, but increases the costs of incarceration for those witnesses who refuse. A short term reduces the number of witnesses who testify, but decreases the costs of incarceration for those who refuse. It is not certain, however, that short terms minimize *total* incarceration costs because as the term is reduced more witnesses refuse to testify.⁹¹

A simple model can illustrate how these factors interact. Assume the following:

a. *Witnesses.* All witnesses would rather not testify, but they vary in the intensity of their dislike for testifying. All witnesses also

with proviso of immediate release upon compliance). However, under the present system, it appears that a judge can order the witness released at any time, even if he received a fixed sentence for civil contempt. As long as the judge can later change her mind, a threat to keep the witness incarcerated for the entire fixed period unless he complies will not appear credible.

90. See, e.g., *In re Cocilovo*, 618 F. Supp. 1378, 1382 (S.D.N.Y. 1985). The court in *Cocilovo* suggested that in passing 28 U.S.C. § 1826, Congress wanted recalcitrant grand jury witnesses to be held for the maximum 18-month period permitted to create a credible threat for inducing their compliance.

91. If the only goal is to minimize incarceration costs, the penalty can be set at zero. A zero term also produces no testimony.

would rather not go to jail.⁹² Serving a month in jail causes a utility loss of 1 for each witness.⁹³

The intensity of each witness's dislike for testifying is equal to the length of time that the individual is willing to serve to avoid testifying. If, for example, a witness is willing to serve 3 months in jail to avoid testifying, then the utility of testifying for that individual is -3. Each witness will testify if the utility from testifying is equal to or greater than the utility from going to jail. For example, if the utility of testifying is -2 and the sanction for refusing to testify is 3 months in jail for a utility of -3, then the witness will testify.

b. *The Judge.* The judge wants to choose the sanction for refusing to testify that maximizes social welfare, or W .⁹⁴ Social welfare has three components: (a) the social value of the testimony to be obtained; (b) the social cost of keeping the witness who does not testify in jail; and (c) the social value assigned to the utility loss that the witness suffers from testifying or from incarceration. Thus if T is the value of the testimony, C is the social cost of jail and H is the social value of the utility loss of the witness, then the social welfare function (SWF) can be written as:

$$W = T + C + H, \text{ where } T > 0, C \leq 0, H \leq 0.$$

The first two elements of social welfare are fairly straightforward. The social value of the testimony will depend both on the significance of the case and the importance of the witness's testimony. The social cost of jail includes both the monetary cost of keeping a witness in jail and the social cost of the lost production of the imprisoned witness.⁹⁵

The social value of the utility loss suffered by a witness is the value that society puts on the loss of welfare suffered by the witness.⁹⁶ Suppose that a witness will not testify at an armed robbery trial because he does not want to implicate one of his friends. In determining social policy, a judge might not give much weight to the harm that the witness suffers from imprisonment because the

92. It is assumed that each witness dislikes jail equally. The basic results of the model would be unchanged if this assumption were weakened.

93. As in the previous model the utility numbers used here are von Neumann-Morgenstern utilities. See *supra* note 56. Thus the choice of one month in jail to represent a utility loss of one is arbitrary.

94. Of course the legislature may choose the sanction instead of the judge.

95. The cost of jail would include, for example, the loss in welfare that the friends and family of the incarcerated witness will suffer.

96. Society as used here means as represented by the judge or legislator.

judge believes that the witness has a duty to testify. Similarly, little social weight may be assigned to harm from testifying that consists of the loss of respect of the witness's criminal friends. On the other hand, substantial social weight might be given to the suffering of an innocent witness who refuses to testify because of fear for his own safety or that of his family.⁹⁷

B. A Numerical Example

a. *Witnesses.* Assume here that witnesses can be divided into ten classes of equal size based on the loss they will suffer if they testify. The utility loss from testifying that is suffered by each class is shown in Table 3.

TABLE 3

Witness	1	2	3	4	5	6	7	8	9	10
Utility from Testifying	-.1	-.2	-.3	-.5	-1	-2	-3	-6	-24	-240

Most witnesses choose to testify when threatened with contempt charges, so it seems reasonable to assume that most witnesses would be willing to serve only a short period in jail to avoid testifying. On the other hand, a small number of witness might find testifying so distasteful that they would be willing to serve very long jail terms to avoid it. Thus Table 3 shows that 50% of the witnesses would be willing to serve one month or less in jail to avoid testifying, but 10% would be willing to serve 240 months, or twenty years.

b. *Social Welfare Function.* The social value of obtaining the testimony of each class of witnesses is 40. The social cost of jail is -4

97. Consider, for example, the social weight apparently given to the suffering of Elizabeth Morgan, who was released from jail due to intense public pressure and Congressional sympathy. See White, *supra* note 30, at 370-71 (describing public support and media attention as providing the impetus for a Congressional bill to release Morgan from jail). Morgan was viewed by many as a heroic woman and martyr who gave up everything to protect her child. See Jonathon Groner, *Morgan's Friends Demonstrate Their Contempt for Court*, LEGAL TIMES, Dec. 5, 1988, at 2 (reporting description of Morgan found in newsletter published by Friends of Elizabeth Morgan, a lobbying group dedicated to securing her release from jail); see also Barton Gellman, *For Morgan Bill, a Quick Trip Through Congressional Maze*, WASH. POST, Sept. 23, 1989, at A1 (reporting how Morgan was viewed as a courageous mother sacrificing her freedom for her allegedly abused child). This characterization resulted in a great outpouring of sympathy for Morgan and public appeals for her release. See *id.* at A2 (describing aggressive lobbying campaign mounted by thousands of supporters advocating Morgan's release). The efforts to free Morgan succeeded when Congress passed a bill to free her. *Id.* (stating that Morgan's freedom "had nothing to do with any court of law" but instead resulted from the intense lobbying activity brought on her behalf).

for each month that a class of witnesses is incarcerated. The social value assigned to the loss of utility suffered by a class of witnesses is equal to the utility shown in Table 3 for a witness who testifies. The social loss is assumed to be -1 per month for a witness who is incarcerated.⁹⁸

The goal of the judge or legislator is to choose for witnesses who refuse to testify the prison term that maximizes social welfare. It turns out in this example that the optimal prison term is six months. Table 4 shows the behavior of witnesses and the calculation of social welfare for this six-month sanction.

TABLE 4

Decision of the Witness						Social Welfare			
Witness Class	Utility of Testifying	Utility of Jail	Choice	Jail Served	Utility of Witness	Value of Testimony	Cost of Jail	Cost of Harm to Witness	Total Social Cost
1	-0.1	-6	Testify	0	-0.1	40	0	-0.10	39.90
2	-0.2	-6	Testify	0	-0.2	40	0	-0.20	39.80
3	-0.3	-6	Testify	0	-0.3	40	0	-0.30	39.70
4	-0.5	-6	Testify	0	-0.5	40	0	-0.50	39.50
5	-1	-6	Testify	0	-1	40	0	-1.00	39.00
6	-2	-6	Testify	0	-2	40	0	-2.00	38.00
7	-3	-6	Testify	0	-3	40	0	-3.00	37.00
8	-6	-6	Testify	0	-6	40	0	-6.00	34.00
9	-24	-6	Refuse	6	-6	0	-24	-6.00	-30.00
10	-240	-6	Refuse	6	-6	0	-24	-6.00	-30.00

Total Social Welfare 246.9

The six-month term induces 80% of the witnesses to testify. The remaining 20% refuse to testify and are imprisoned for six months. Total social welfare is 246.9.

Six months is the optimal sanction for refusing to testify here. Shorter terms would decrease the harm to the witnesses and the cost of jail, but those gains would be more than offset by the loss in social welfare from lost testimony. Longer terms would increase the total social value from testimony, but this increase would be more than offset by increased harm to witnesses and

98. This does not mean that society is giving full weight to the loss suffered by the witness. The SWF and the individual welfare function are on completely different scales.

jail costs. Figure 7 shows the social welfare produced by various sanctions.⁹⁹

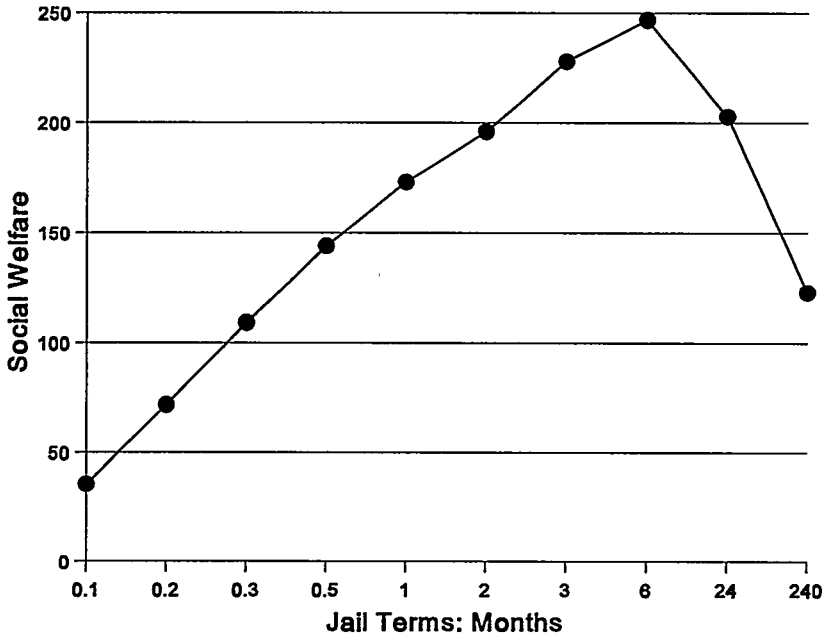


FIGURE 7. SOCIAL WELFARE OF ALTERNATIVE SANCTIONS

C. Results of the Model

The results of the model presented in this part are dependent on the specification of the types of witnesses and their utility functions and on the choice of a social welfare function. The point of the model is not to show that any particular sanction is optimal, but to show the factors that a judge or legislator might

99. The months of incarceration in Figure 7 are shown on a logarithmic scale. The information used in Figure 7 is shown in the following table:

Jail Term	0.1	0.2	0.3	0.5	1	2	3	6	24	240
Social Welfare	35	72	109	144	173	196	228	247	203	123

The only possible optimal values are those equal to the exact amount needed to get one of the groups of witnesses to testify. This is a lumpy model because only ten groups were used. Similar results would be obtained using models where the utility loss from testifying is a continuous function.

take into account in deciding what sanction to apply. Even though the particular values used in the model are arbitrary, it accurately illustrates the notion that in making a decision a judge or legislator must take into account not only her own goals for society, but the values and preferences of the individuals that she is trying to influence.

V. CONCLUSION

The simple two-period model presented in this article shows that the current system of civil contempt sanctions, which gives both judges and contemnors "keys to the cell," creates an incentive for both parties to engage in bluffing. Such bluffing may lead to inefficient results: Some contemnors who could be coerced will be freed, while others who are "uncoercible" may be jailed.

The analysis here suggests that a better approach would be to adopt a system that would take away the judge's discretion to release a non-complying civil contemnor. Such a system would have the judge sentence a civil contemnor to a determinate sentence with a purge clause. This would allow the judge to make a truly irrevocable commitment to jail the contemnor until he complies. If such a system is adopted, it will be necessary to determine the term of incarceration for civil contemnors that will maximize social welfare. In choosing the appropriate term, the decisionmaker will need to take into account both the goals of society and the values and preferences of the individual contemnors that she is trying to persuade to comply.