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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

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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

[T]he revelations of Abe (Kid Twist) Reles kept public attention focused on organized crime . . . . Information from Reles led to convictions in a half dozen previously unsolved gangland slayings . . . .

*The career of informer Reles was cut short on November 12, 1941, following his fatal plunge while in protective custody from a sixth-story window at the Half Moon Hotel in Coney Island. The chief beneficiary of his death, curiously enough, was Albert Anastasia; as then Brooklyn District Attorney William O'Dwyer noted, a "perfect" murder case against him "went out the window with Reles." The debate over how Reles happened to fall with six policemen guarding him raged on for years. For Valachi, however, it was not much of a mystery. "I never met anybody," he says, "who thought Abe went out that window because he wanted to."**

INTRODUCTION

Accounts of witnesses in criminal prosecutions meeting with violent death are not restricted to sensational depictions in commercial publications.[1] For example, a United States Department of Justice Report indicates that between 1974 and 1978 prosecution witnesses accounted for nearly ten percent of all murders known to be attributable to organized crime.[2] Although witnesses in any criminal prosecution

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* P. Maas, The Valachi Papers 180-81 (1969).

1. *See, e.g.*, United States v. Mastrangelo, 662 F.2d 946, 949 (2d Cir. 1981); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978); LaTona v. United States, 449 F.2d 121, 122 n.2 (8th Cir. 1971); Goldstock & Coenen, *Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear*, 65 Cornell L. Rev. 127, 206-08 (1980); *cf.* Swanner v. United States, 406 F.2d 716, 717 (5th Cir. 1969)(witness's house bombed prior to grand jury questioning despite government protection).

2. U.S. Dep't of Justice, Report of the Witness Security Program Review Committee 8 (Draft 1978), *reprinted in Witness Protection Program: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 277 (1978) [hereinafter cited as *1978 Witness Protection Hearings*]. "The following are typical recent cases involving murder of witnesses, none of whom were in the Witness Security Program: *Bompensiero, Frank:* Murdered February 22, 1977, while scheduled to appear before a Federal grand jury in Los Angeles concerning extortion in the pornography business. *Bowen, Harold:* Murdered February 22, 1977. It is believed that Bowen upset the organized crime community when he testified before a Federal grand jury on a theft charge which involved a member of a criminal organization. *Delia, Ellen:* Shot to death February 17, 1977, in Sacramento, California, where she had gone to give testimony concerning fraud and misuse of Federal and state funds in the operation of East Los Angeles

may experience fear, the level of intimidation rises dramatically in organized crime prosecutions, especially those involving violence-related crimes such as loan-sharking and extortion.[3]

Public awareness of the potential danger to prospective witnesses,[4] as well as specific threats against potential witnesses and their families,[5] frequently account for the refusal of individuals to testify at criminal proceedings.[6] Succumbing to this duress may have the initial effect of reducing or eliminating the prospective witness's fear of reprisals, but it also places him in jeopardy of being held in civil[7] or criminal contempt.[8]

Community Projects. *Delman, Gerald*: Shot by an unknown assailant two days after being subpoenaed and two weeks prior to scheduled testimony in a gambling case in Las Vegas, Nevada. *Ota, Stanley*: Shot to death November 17, 1976 in a public housing project . . . [following] widespread rumors that the crime syndicate had ordered his death because of the possibility of his cooperation with government authorities. *Gretch, Anthony*: Gunned down February 14, 1975. He had turned state's evidence in a gangland killing of Louis Mariani in 1963. *Giancana, Samuel*: Murdered in his Oak Park, Illinois home on June 19, 1975, prior to a federal grand jury hearing. *Rand, Tamara*: Shot in the head November 9, 1975. Rand was a San Diego realtor. After being cheated in several potentially lucrative real estate transactions, Rand began compiling evidence for a judicial retaliation. *Wellman, Alan E. and his wife Renate*: Murdered December 15, 1975, in their Sherman Oaks, California home. [Alan] Wellman was scheduled to testify in a Federal court in Philadelphia in January 1976. *Dubeck, John and wife*: Murdered in courtyard of their Las Vegas apartment complex March 19, 1974. Dubeck was scheduled to testify the following week against several organized crime figures. *Fucillo, Joseph*: Shot and killed October 17, 1974. Fucillo had testified against two major organized crime figures." *Id.* at 8-9, *reprinted in 1978 Witness Protection Hearings, supra*, at 277-78.

3. Goldstock & Coenen, *supra* note 1, at 207 & nn. 474-75.

4. *See, e.g.*, United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978); LaTona v. United States, 449 F.2d 121, 122 n.2 (8th Cir. 1971).

5. *See, e.g.*, United States v. Patrick, 542 F.2d 381, 387 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); People v. Clinton, 42 A.D.2d 815, 815, 346 N.Y.S.2d 345, 346 (1973).

6. *See Invasions of Privacy: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. pt. 3, at 1158 (1965) (statement of Att'y Gen. Nicholas deB. Katzenbach) [hereinafter cited as *Invasions of Privacy*]; Goldstock & Coenen, *supra* note 1, at 206-08.

7. 28 U.S.C. § 1826(a) (1976). Section 1826(a) provides that "[w]henever a witness in any proceeding before . . . any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, . . . the court, upon such refusal, . . . may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—(1) the court proceeding, or (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months." *Id.* The primary purpose of civil contempt is to coerce the recalcitrant witness to testify. *In re* Grand Jury Investigation, 600 F.2d 420, 423 (3d Cir. 1979). The contemnor may purge himself of civil contempt at any time by agreeing to testify and, thus, holds "the keys of [his] prison in [his] own pockets." *In re* Nevitt, 117 F. 448, 461 (8th Cir.

Intimidated witnesses who refuse to testify often raise the defense of duress as an excuse for their conduct.[9] The rationale behind the duress defense is that responsibility cannot be ascribed to a person who commits a forbidden act under complusion.[10] At common law,

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1902). Civil contempt is distinguished from criminal contempt, *see infra* note 8, by the purpose of the punishment imposed. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

8. 18 U.S.C. § 401 (1976). Section 401 empowers a federal court, at its discretion, to punish by fine or imprisonment contempts of its authority, including "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." *Id.* § 401(3). When a witness refuses to obey a lawful court order to testify before a grand jury, he may be indicted for criminal contempt pursuant to § 401(3). *See, e.g.*, United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977) (per curiam); United States v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975). The Federal Rules of Criminal Procedure provide for summary disposition of criminal contempts committed in the presence of the court. Fed. R. Crim. P. 42(a). Acts constituting criminal contempt committed out of court require a hearing upon notice to the defendant. *Id.* 42(b). The defendant is entitled to a jury trial "in any case in which an act of Congress so provides." *Id.* Criminal contempt may be punished by imprisonment or fine, but not both. *In re* Osborne, 344 F.2d 611, 616 (9th Cir. 1965); 18 U.S.C. § 401 (1976). Congress has left the length of imprisonment to the discretion of the courts, without prescribing a maximum penalty. Frank v. United States, 395 U.S. 147, 149 (1969); *see* 18 U.S.C. § 401 (1976). A court may not, however, impose a prison sentence in excess of six months when the contemnor has not been given the option of a jury trial. Frank v. United States, 395 U.S. 147, 150 (1969). The purpose behind criminal contempt proceedings is to vindicate the authority of the court by "punish[ing] acts that are contumacious or disrespectful of the court." *In re* Grand Jury Investigation, 600 F.2d 420, 422-23 (3d Cir. 1979). Unlike civil contempt, the ability of the contemnor to purge himself of contempt is entirely within the discretion of the court. Brown v. United States, 359 U.S. 41, 50-52 (1959), *overruled on other grounds*, Harris v. United States, 382 U.S. 162, 167 (1965); United States v. De Simone, 267 F.2d 741, 747 (2d Cir.), *cert. denied*, 361 U.S. 827 (1959). For a further discussion of the distinctions between criminal and civil contempt, see 3 C. Wright, Federal Practice and Procedure § 704 (1969).

9. *See, e.g.*, United States v. Gravel, 605 F.2d 750, 752 (5th Cir. 1979); United States v. Patrick, 542 F.2d 381, 386 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); United States v. Cabrera, 440 F. Supp. 605, 606 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1370 (2d Cir. 1978).

10. United States v. Hearst, 563 F.2d 1331, 1335 n.1 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978); Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 313 (1957). This rationale is embodied in the requirement that the duress be of sufficient force that a person of ordinary firmness could not have resisted it. *See, e.g.*, United States v. Bailey, 585 F.2d 1087, 1097 (D.C. Cir. 1978), *rev'd on other grounds*, 444 U.S. 394 (1980); United States v. McClain, 531 F.2d 431, 438 (9th Cir.), *cert. denied*, 429 U.S. 835 (1976). The commentators disagree as to whether the compulsion must completely strip the actor of his free will. *Compare* Newman & Weitzer, *supra*, at 313 (must show compulsion deprived actor of his free will), *with* W. LaFave & A. Scott, Criminal Law § 49, at 374 (1972) (crime justified by avoidance of greater harm although actor has the mental state which the crime requires).

duress is a defense to any crime except murder.[11] Yet, the Supreme Court has indicated in dictum that fear is not a legal excuse from testifying.[12] Perhaps as a result of this statement, no reported federal decision exists wherein duress has been successfully utilized as a defense to contempt of court.[13]

Without a duress defense, the intimidated witness must either testify and face potential reprisals by the accused, or not testify and face the contempt powers of the court. The government has attempted to

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11. W. LaFave & A. Scott, *supra* note 10, at 374 (1972) (duress defense available "unless [the] crime consists of intentionally killing an innocent third person"); *e.g.*, R.I. Recreation Center, Inc. v. Aetna Casualty & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949) ("It appears to be established . . . that although coercion or necessity will never excuse taking the life of an innocent person, it will excuse lesser crimes."); Thomas v. State, 246 Ga. 484, 486, 272 S.E.2d 68, 70 (1980) ("[the] common law approach [is that] one should die himself before killing an innocent victim"). The duress defense has been codified in thirty-two states. *See* 1979 Ala. Acts 1163; Alaska Stat. § 11.81.440 (1980); Ariz. Rev. Stat. Ann. § 13-412 (1978); Ark. Stat. Ann. § 41-208 (1977); Cal. Penal Code § 26(seven) (West Supp. 1981); Colo. Rev. Stat. § 18-1-708 (1978); Conn. Gen. Stat. § 53a-14 (1981); Del. Code Ann. tit. 11, § 431 (1981); Ga. Code Ann. § 26-906 (1977); Hawaii Rev. Stat. § 702-231 (1976 & Supp. 1980); Idaho Code § 18-201(4) (1979); Ill. Ann. Stat. ch. 38, § 7-11 (Smith-Hurd 1972); Ind. Code Ann. § 35-41-3-8 (Burns 1979); Iowa Code Ann. § 704.10 (West 1979); Kan. Stat. Ann. § 21-3209 (1974); Ky. Rev. Stat. Ann. § 501.090 (Bobbs-Merrill 1975); La. Rev. Stat. Ann. § 14:18(6) (West 1974); Me. Rev. Stat. Ann. tit. 17A, § 103-A (1981); Minn. Stat. Ann. § 609.08 (West 1964); Mo. Ann. Stat. § 562.071 (Vernon 1979); Mont. Code Ann. § 45-2-212 (1981); Nev. Rev. Stat. § 194.010(8) (1979); N.J. Stat. Ann. § 2C:2-9 (West 1980); N.Y. Penal Law § 40.00 (McKinney 1975); N.D. Cent. Code § 12.1-05-10 (1976); Or. Rev. Stat. § 161.270 (1979); 18 Pa. Cons. Stat. Ann. § 309 (Purdon 1973); S.D. Codified Laws Ann. § 22-5-1 (1979); Tex. Penal Code Ann. § 8.05 (Vernon 1974); Utah Code Ann. § 76-2-302 (1978); Wash. Rev. Code Ann. § 9A.16.060 (1977); Wis. Stat. Ann. § 939.46 (West 1958). Twelve of these thirty-two states give no indication that the defense cannot be used for murder. *See* Alaska Stat. § 11.81.440 (1980); Ark. Stat. Ann. § 41-208 (1977); Colo. Rev. Stat. § 18-1-708 (1978); Conn. Gen. Stat. § 53a-14 (1981); Hawaii Rev. Stat. § 702-231 (1976 & Supp. 1980); Ind. Code Ann. § 35-41-3-8 (Burns 1979); N.Y. Penal Law § 40.00 (McKinney 1975); N.D. Cent. Code § 12.1-05-10 (1976); 18 Pa. Cons. Stat. Ann. § 309 (Purdon 1973); S.D. Codified Laws Ann. § 22-5-1 (1979); Tex. Penal Code Ann. § 8.05 (Vernon 1974); Utah Code Ann. § 76-2-302 (1978). An additional two states provide that the duress defense can be used to reduce a charge of murder to manslaughter. N.J. Stat. Ann. § 2C:2-9(b) (West 1980); Wis. Stat. Ann. § 939.46(1) (West 1958). For an analysis of the twenty statutes codifying the duress defense as of 1960, see Model Penal Code § 2.09 comment 1, at 2-4 (Tent. Draft No. 10, 1960).

12. Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).

13. *See, e.g., In re* Farrell, 611 F.2d 923, 925 (1st Cir. 1979) (defense not recognized); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978) (defense not recognized); United States v. Patrick, 542 F.2d 381, 386, 388 (7th Cir. 1976) (defense recognized, but denied on the facts), *cert. denied*, 430 U.S. 931 (1977); Taylor v. United States, 509 F.2d 1349, 1350 (5th Cir. 1975) (defense not recognized); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973) (defense not recognized); United States v. Cabrera, 440 F. Supp. 605, 606 (S.D.N.Y. 1977) (defense recognized, but its benefit negated by the broad cross-examination permitted), *aff'd mem.*, 578 F.2d 1370 (2d Cir. 1978).

ameliorate this problem by creating the Witness Protection Program.[14] The purpose of the program is to protect government witnesses and their families[15] by relocating the participants and providing them with new identities.[16]

Participation in the Witness Protection Program, however, requires the witness to voluntarily relinquish his fundamental constitutional rights of privacy and personal autonomy,[17] freedom of association,[18]

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14. *Witness Security Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 2 (1980) [hereinafter cited as *1980 Witness Security Hearings*]. The Witness Protection Program was created by the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified, in part, in scattered sections of 18 & 28 U.S.C.). Authorization for the Program is reprinted at 18 U.S.C. prec. § 3481 (1976).

15. *1980 Witness Security Hearings, supra* note 14, at 2. Entry into the program is authorized by the Office of Enforcement Operations of the Criminal Division of the Department of Justice. *Id.* at 317. The Department requires that the testimony of the witness be important to a case involving organized criminal activity, and that the witness's life would be placed in jeopardy because of the testimony. *Id.*. Organized crime is broadly defined for purposes of the Witness Protection Program and may include, for example, cases involving public corruption or narcotics. *See 1978 Witness Protection Hearings, supra* note 2, at 84. "The program was designed originally to combat organized crime. Over the years it became involved in white-collar crime, political crime, State cases, and most importantly, the innocent victim of the crime." *1980 Witness Security Hearings, supra* note 14, at 192. Responsibility for providing "for the health, safety, and welfare of Government witnesses and their families" is entrusted to the United States Marshals Service. 28 C.F.R. § 0.111(c) (1980).

16. *See 1980 Witness Security Hearings, supra* note 14, at 2. "The program provides a variety of services to its participants, depending on each individual case. These services include temporary protection, relocation, establishing a new identity, providing documentation to support the new identity, and limited financial and employment assistance." *Id.*

17. The Supreme Court has held that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." Griswold v. Connecticut, 381 U.S. 479, 483 (1965); *see* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972). The right to privacy consists of two interrelated strands. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnotes omitted). Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion), *overruled on other grounds*, Katz v. United States, 389 U.S. 347 (1967); *accord* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966). The very nature of the Witness Protection Program necessitates substantial interference by the United States Marshals Service into the personal lives of the participants. *See 1980 Witness Security Hearings, supra* note 14, at 30, 86-87. Restrictions are placed on the decision-making process regarding personal affairs. *Id.* at 86-87. Perhaps the most obvious relinquishment of privacy and personal autonomy is the requirement that all witnesses have a legal name change. *Id.* at 245; U.S. Dep't of Justice, Justice Department Order OBD 2110.2: Witness Protection and Maintenance Policy and Procedures (Jan. 10, 1975), *reprinted in 1978 Witness Protection Hearings, supra* note 2, at 137.

18. Freedom of association is protected by the first amendment. Elfbrandt v. Russell, 384 U.S. 11, 18 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964). The right may be abridged only to the extent that it is abused, such as by

freedom of travel[19] and liberty.[20] Additionally, the effectiveness of the program has come under attack.[21] A 1980 inquiry by the United States Senate Permanent Subcommittee on Investigations identified numerous problems facing participants in the Witness Protection Program.[22] The principal problems uncovered include: false promises made by law enforcement agents and prosecutors,[23] breaches of the

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assembling to incite violence or crime. De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937). When the right is abridged the restrictions must not "sweep unnecessarily broadly and thereby invade the area of protected freedoms." Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); *see* NAACP v. Button, 371 U.S. 415, 438 (1963). The security needs of the Witness Protection Program require its participants to relinquish their freedom of association despite the absence of its abuse. *See 1980 Witness Security Hearings, supra* note 14, at 134. They are prohibited from associating with anyone who could cause their identities to be revealed. This could well include relatives and close friends. *Id.*

19. "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law . . . . Freedom of movement is basic in our scheme of values." Kent v. Dulles, 357 U.S. 116, 125-26 (1958); *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974); Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). For security purposes, the Witness Protection Program restricts the movements of its participants. *See* Doe v. Civiletti, 635 F.2d 88, 92 (2d Cir. 1980); *1980 Witness Security Hearings, supra* note 14, at 136. They cannot travel to any location where it is likely that they will be recognized. *Id.*

20. Although the constitutional right of liberty has not been delimited, some of its components have been defined. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These include the right "to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* The ability of the participant in the Witness Protection Program to engage in the common occupations of life is limited. When, for example, a successful businessman is uprooted, he generally cannot reestablish himself in a similar career because the program cannot provide the necessary employment and credit background under the witness's new identity. *See 1980 Witness Security Hearings, supra* note 14, at 29, 53, 108. This problem is exacerbated by the program's lack of adequate employment assistance for relocated witnesses. *Id.* at 7. The witness's pursuit of happiness is further hampered by the problems of forced relocation and the shortcomings of the program in terms of assisting the witness in reestablishing his life under a new identity. *Id.* at 18; *see infra* notes 25-29 and accompanying text.

21. For a compilation of newspaper articles depicting shortcomings of the program, see *1978 Witness Protection Hearings, supra* note 2, at 155-61, 165-69, 179-80 (discussing alleged mob payoffs for information concerning the locations of protected witnesses, the disappearance of files on protected witnesses, and allegations that the government casts aside protected witnesses once they are no longer useful).

22. *1980 Witness Security Hearings, supra* note 14, at 7.

23. *Id.* at 7, 64, 66. All promises made to a witness are recorded in a written memorandum of understanding. *See 1978 Witness Protection Hearings, supra* note 2, at 230-51. The document, however, is not considered to be binding. *See 1980 Witness Security Hearings, supra* note 14, at 7. The courts have found that they do not have subject matter jurisdiction over the claims of disgruntled participants in the program, *see, e.g.*, Doe v. Civiletti, 635 F.2d 88, 93 (2d Cir. 1980); McFarland v. United

witness's security,[24] late and ineffectual documentation of the witness's new identity,[25] inadequate employment assistance,[26] failure to provide adequate financing or credit,[27] insensitivity to the witness's trauma and problems,[28] and lack of an effective procedure for filing complaints about the program.[29]

Thus, the dilemma of the intimidated witness consists of a choice among three unappealing alternatives. One option is to testify without protection and take the chance that the threatened reprisals will not be carried out.[30] Alternatively, the witness may choose to participate in the Witness Protection Program despite its shortcomings[31] and the attendant relinquishment of fundamental constitutional rights.[32] Finally, he may refuse to testify and face the contempt powers of the court without the benefit of the duress defense.[33]

The dilemma is especially onerous for the prospective witness who has no involvement with criminal activity, such as the innocent bystander, the victim, or those only tangentially involved with criminal syndicates. This type of witness, which will be referred to in this Note as the innocent witness, should be distinguished from the witness who has brought the dilemma upon himself by virtue of his voluntary association with an organized criminal subculture.[34] In the case of the innocent witness, the dilemma is exacerbated by the inability of the Witness Protection Program to address the needs of honest, law-abiding citizens.[35] The program simply was not structured for wit-

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States, No. 45-81C (Ct. Cl. July 28, 1981) (order available on Lexis, Genfed library, Ct. Cl. file); Moon v. United States, No. 682-80C, (Ct. Cl. May 22, 1981) (order available on Lexis, Genfed library, Ct. Cl. file), and that they do not have the power to order specific performance by the United States of its contractual obligations. *See, e.g.*, Doe v. Civiletti, 635 F.2d 88, 89 (2d Cir. 1980); Moon v. United States, No. 682-80C (Ct. Cl. May 22, 1981) (order available on Lexis, Genfed library, Ct. Cl. file).

24. *1980 Witness Security Hearings*, *supra* note 14, at 7, 26-27.

25. *Id.* at 7, 17, 66-67, 89.

26. *Id.* at 7, 67-68.

27. *Id.* at 7, 17, 66-67.

28. *Id.* at 7, 69, 93.

29. *Id.* at 7, 23.

30. *See supra* notes 2-3 and accompanying text.

31. *See supra* notes 21-29 and accompanying text.

32. *See supra* notes 17-20 and accompanying text.

33. *See, e.g.*, *In re* Farrell, 611 F.2d 923, 925 (1st Cir. 1979); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978); Taylor v. United States, 509 F.2d 1349, 1350 (5th Cir. 1975); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973). The refusal of a witness to testify should generally go a long way toward ensuring that he will not be the victim of reprisals. There can be no guarantees, however, that he will not be perceived by organized crime as a continuing threat because of the incriminating information he possesses.

34. *See infra* notes 146-52 and accompanying text.

35. *See, e.g.*, *1980 Witness Security Hearings*, *supra* note 14, at 255 (statement of Howard Safir, Assistant Director for Operations, U.S. Marshals Service). "When [the program] was originally constructed it was designed primarily for those people who

nesses not directly involved in criminal activity.[36] Indeed, Congress apparently did not contemplate the possibility that an innocent witness could be compelled, by the contempt powers of a court, to testify in the face of overriding fear.[37]

This Note contends that the innocent witness in federal organized crime prosecutions should be permitted to utilize the duress defense against charges of contempt for refusal to testify,[38] regardless of whether the witness has rejected an opportunity to participate in the Witness Protection Program.[39] The universal disfavor of the defense in the federal courts emanates from an excessive and undue reliance[40]

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were involved in criminal activity and it is not structured for noncriminal people. . . . [W]e cannot make a person whole again. . . . [A]ny private citizen who would come into this program . . . would find considerable trauma because we cannot replace his house, we cannot replace his car, we cannot replace his credit background. Those are the things that the program does not have the capability to do." *Id.*

36. *Id.*

37. *See 1980 Witness Security Hearings*, *supra* note 14, at 255 (statement of Sen. Nunn). Senator Nunn stated that the Witness Protection Program was not the only alternative for the cooperating citizen who inadvertently had come upon incriminating information against organized crime. He indicated that "[t]hey can do nothing. They do not have to cooperate at all. They can continue to overlook the criminal activity that they could otherwise testify to." *Id.*

38. Although the duress defense is generally thought of as a defense to crimes, *see supra* note 11 and accompanying text, the defense should be available for civil, as well as criminal contempt. *Cf.* United States v. Gravel, 605 F.2d 750, 752 (5th Cir. 1979) (finding it unnecessary to determine whether duress applies to a civil contempt charge). In the civil context, proof that the elements of the defense are present should constitute a showing that the refusal to testify was not "without just cause," as required by 28 U.S.C. § 1826(a) (1976). *See infra* notes 132-34 and accompanying text. The distinction between civil and criminal contempt is not always clearly demarcated and their purposes often overlap. *See* Compers v. Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911); *supra* notes 7-8. "Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and to punitive measures." United States v. United Mine Workers, 330 U.S. 258, 298-99 (1947) (footnote omitted). In the federal courts, a refusal to obey a court order to testify can result in civil or criminal contempt interchangeably. *See id.*; 18 U.S.C. § 401 (1976); 28 U.S.C. § 1826(a) (1976). Moreover, permitting the duress defense only for criminal contempt would create an anomolous situation. If this were to occur, a court could simply resort to the use of civil contempt to punish a witness when the criminal contempt alternative was removed by the duress defense. This would clearly be unconscionable.

39. *See infra* notes 115-18 and accompanying text. The Fifth Circuit has held that even if the defense were available, it could not be utilized by a defendant who had turned down an offer of government protection. United States v. Gravel, 605 F.2d 750, 752 (5th Cir. 1979).

40. *See In re* Farrell, 611 F.2d 923, 924-25 (1st Cir. 1979); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978); Dupuy v. United States, 518 F.2d 1295, 1295 (9th Cir. 1975); Taylor v. United States, 509 F.2d 1349, 1350 (5th Cir. 1975); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); LaTona v. United States, 449 F.2d 121, 122 (8th Cir. 1971). The Seventh Circuit has allowed the defense, but

on mere dictum in a 1961 Supreme Court decision.[41] The counterbalancing considerations posed by the dilemma of the innocent witness necessitates a reevaluation of the heretofore categorical denial of the duress defense.[42]

It is further contended that forcing an individual to choose between the relinquishment of constitutional rights attendant to participation in the Witness Protection Program, or facing possible incarceration for contempt stripped of the duress defense, imposes an unconstitutional burden on the witness's prerogative to retain those fundamental rights that he does not voluntarily choose to relinquish. The Note concludes with a discussion of procedural problems that would be generated by the allowance of the duress defense for contempt. It suggests that these problems could be eliminated through the use of *in camera* hearings that would be recorded with the transcript sealed. Such proceedings would permit the witness to account for his recalcitrance in an atmosphere of confidentiality.

I. The Duress Defense in the Federal Courts

Congress has not expressly addressed the availability of affirmative defenses, such as the duress defense, in federal criminal statutes.[43] Consequently, the federal judiciary has inherited the task of determining the law in this area.[44]

A. *The Elements of the Defense*

The classic formulation of the duress defense in federal criminal proceedings is contained in a 1935 decision, *Shannon v. United States*:[45]

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strictly construed its elements, thus limiting its usefulness. United States v. Patrick, 542 F.2d 381, 386-88 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). Decisions in the Second Circuit are unclear on the availability of the defense. *Compare* United States v. Cabrera, 440 F. Supp. 605, 606 (S.D.N.Y. 1977) (allowing the defense, but permitting cross-examination that severely limited its usefulness), *aff'd mem.*, 578 F.2d 1370 (2d Cir. 1978), *with* United States v. Handler, 476 F.2d 709, 712 (2d Cir. 1973) (dictum repeating, with apparent approval, an unreported lower court statement that fear was not a legal excuse for refusing to testify).

41. Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).

42. 8 J. Wigmore, Evidence § 2192, at 74 n.6 (J. McNaughton rev. ed. 1961) (criticizing mechanical application of the rule that the public has a right to every man's evidence); *see* Gibb v. Hansen, 286 N.W.2d 180, 188 (Iowa 1979) (employing a balancing test); *cf.* Martin v. United States, 517 F.2d 906, 908 (8th Cir.) (criticizing the harshness of the *Piemonte* decision), *cert. denied*, 423 U.S. 856 (1975).

43. Comment, *The Constitutionality of Criminal Affirmative Defenses: Duress and Coercion*, 11 U.S.F. L. Rev. 123, 154-55 (1976).

44. *Id.* at 155.

45. 76 F.2d 490 (10th Cir. 1935). *See generally* 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.16 (3rd ed. 1977) (standard jury instruction on duress utilizing elements of *Shannon*).

> Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion . . . .[46]

Thus, the requirements of the duress defense in the federal courts are:

1) the threat must be of death or serious bodily harm;[47]
2) the threat must be such that a person of ordinary firmness would have been unable to resist it;[48]
3) there must have been no reasonable, legal alternative to succumbing to the duress;[49] and
4) the threat must be of immediate harm.[50]

The elements of the duress defense have been applied in varying form.[51] A controversy has centered around the immediacy requirement, which has received inconsistent treatment by courts[52] and legislatures,[53] and editorial attack by commentators.[54]

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46. 76 F.2d at 493. The terms duress and coercion are occasionally used interchangeably. United States v. Michelson, 559 F.2d 567, 569 n.3 (9th Cir. 1977); *see, e.g.*, United States v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); United States v. Hearst, 563 F.2d 1331, 1335 n.1 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978). The common law, however, makes a distinction between the defenses of duress and necessity. United States v. Bailey, 444 U.S. 394, 409 (1980). The duress defense applies when threats of harm are received from other human beings. *Id.* at 409-10. The defense of necessity is invoked when the forces of nature render an otherwise illegal course of conduct the lesser of two evils. *Id.* at 410. Nonetheless, modern cases have tended to blur the common-law distinction between the two defenses. *Id.*

47. *E.g.*, United States v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); United States v. Nickels, 502 F.2d 1173, 1177 (7th Cir. 1974), *cert. denied*, 426 U.S. 911 (1976). The term serious bodily harm has not been defined. Generally, the question whether the threatened harm is sufficiently serious must be answered in relation to the second requirement of the duress defense. *See* cases cited *infra* note 48.

48. United States v. Bailey, 585 F.2d 1087, 1097 (D.C. Cir. 1978), *rev'd on other grounds*, 444 U.S. 394 (1980); *see* United States v. McClain, 531 F.2d 431, 438 (9th Cir.), *cert. denied*, 429 U.S. 835 (1976).

49. *E.g.*, United States v. Gravel, 605 F.2d 750, 752-53 (5th Cir. 1979); United States v. Michelson, 559 F.2d 567, 569 (9th Cir. 1977).

50. *E.g.*, United States v. Atencio, 586 F.2d 744, 746 (9th Cir. 1978); United States v. Patrick, 542 F.2d 381, 388 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

51. *See, e.g.*, Model Penal Code § 2.09 comments 1-2 (Tent. Draft No. 10,1960); W. LaFave & A. Scott, *supra* note 10, § 49, at 374-79; Newman & Weitzer, *supra* note 10, at 319-26.

52. *Compare* United States v. Atencio, 586 F.2d 744, 745-47 (9th Cir. 1978) (immediacy of danger not sufficiently shown where defendant had been shot at and there was a contract out on his life), *and* United States v. Patrick, 542 F.2d 381, 388 (7th Cir. 1976) (defendant failed to show the requisite immediacy despite demonstrating a reasonable apprehension of injury), *cert. denied*, 430 U.S. 931 (1977), *and* People v. Lo Cicero, 71 Cal. 2d 1186, 1190, 80 Cal. Rptr. 913, 916, 459 P.2d 241, 244 (1969) (en banc) (imminent violence is essential to the duress defense), *with* Hall

The policy behind the immediacy requirement is that one must take advantage of any opportunity to escape or seek police assistance against the threatened harm.[55] Thus, to be immediate, the perceived danger must be unavoidable and presently threatened;[56] threats of future harm are insufficient.[57] This strict interpretation of the immediacy requirement has been criticized as illogical:

> To say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the "duressed" is in the future, for if it were in the present it would no longer be a danger or a threat but would be an accomplished harm.[58]

In line with this reasoning, one state court has implicitly held that a perjurer could be excused if at the time of her false testimony she believed that there was impending danger to her life, regardless of whether it was actually imminent or not.[59] In another perjury case, an English court widened the ambit of the duress defense by holding

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Hall v. State, 136 Fla. 644, 684, 187 So. 392, 409 (1939) (duress was sufficiently immediate if the defendant believed there was impending danger to her life), *and* People v. Unger, 33 Ill. App. 3d 770, 775, 338 N.E.2d 442, 446 (1975) ("gun to the head immediacy" is not required), *aff'd*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977), *and* R. v. Hudson, [1971] 2 All E.R. 244, 246-47 (Crim. App.) (threat of future harm is sufficient so long as it is effective on the mind of the defendant at the time of the offense).

53. Nineteen of the thirty-two states that have codified the duress defense have expressly incorporated an immediacy requirement. 1979 Ala. Acts 1163; Ariz. Rev. Stat. Ann. § 13-412(A) (1978); Conn. Gen. Stat. § 53a-14 (1981); Ga. Code Ann. § 26-906 (1977); Ill. Ann. Stat. ch. 38, § 7-11(a) (Smith-Hurd 1972); Ind. Code Ann. § 35-41-3-8(a) (Burns 1979); Iowa Code Ann. § 704.10 (West 1979); Kan. Stat. Ann. § 21-3209(1) (1974); La. Rev. Stat. Ann. § 14:18(6) (West 1974); Me. Rev. Stat. Ann. tit. 17A, § 103-A(1) (1981); Minn. Stat. Ann. § 609.08 (West 1964); Mo. Ann. Stat. § 562.071(1) (Vernon 1979); Mont. Code Ann. § 45-2-212 (1981); N.Y. Penal Law § 40.00(2) (McKinney 1975); N.D. Cent. Code § 12.1-05-10(1) (1976); Tex. Penal Code Ann. § 8.05(a) (Vernon 1974); Utah Code Ann. § 76-2-302(1) (1978); Wash. Rev. Code Ann. § 9A.16.060(1)(a) (1977); Wis. Stat. Ann. § 939.46(1) (West 1958). Two of the states only require immediacy for felonies. Ind. Code Ann. § 35-41-3-8(a) (Burns 1979); N.D. Cent. Code § 12.1-05-10(1) (1976).

54. Model Penal Code § 2.09 comment 2, at 7-8 (Tent. Draft No. 10, 1960); Newman & Weitzer, *supra* note 10, at 328.

55. *See, e.g.*, United States v. Gravel, 605 F.2d 750, 752 (5th Cir. 1979) (duress defense not available when defendant had turned down an offer of government protection); Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935) (denying defense because "appellants had full opportunity to cease their participation in the offense and if necessary seek protection from the officers of the law").

56. *See supra* notes 49-50 and accompanying text.

57. *See, e.g.*, People v. Davis, 16 Ill. App. 3d 846, 848, 306 N.E.2d 897, 898 (1974) ("A threat of future injury is not enough to excuse a criminal act."); State v. Milum, 213 Kan. 581, 582, 516 P.2d 984, 985 (1973) (similar language).

58. Newman & Weitzer, *supra* note 10, at 328.

59. Hall v. State, 136 Fla. 644, 684, 187 So. 392, 409 (1939); *id.* at 689, 187 So. at 411 (Buford, J., dissenting); Newman & Weitzer, *supra* note 10, at 320.

that a threat of future harm is sufficient so long as it is effective on the mind of the defendant at the time of the offense.[60] In fact, a number of states,[61] as well as the Model Penal Code,[62] have completely eliminated the immediacy requirement from their definition of duress. Nonetheless, the requirement remains intact in the federal courts.[63]

When the defendant has otherwise met the elements of the duress defense, he may still be prevented from utilizing it. A common-law rule precludes the use of the defense by an individual who negligently, recklessly or intentionally places himself in a situation where it is probable that he will be subject to duress to commit an illegal act.[64] For example, an individual who joins a criminal subculture and takes a vow of silence has willfully placed himself in a situation where it is probable, if called upon as a witness, that he will be under duress to commit the offense of contempt when ordered by a judge to break his

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60. R. v. Hudson, [1971] 2 All E.R. 244, 246-47 (Crim. App.) (threats are "likely to be no less compelling, because their execution could not be effected in the court room, if they could be carried out in the streets . . . the same night").

61. *See* 1979 Ala. Acts 1163; Alaska Stat. § 11.81.440 (1980); Ark. Stat. Ann. § 41-208 (1977); Cal. Penal Code § 26(seven) (West Supp. 1981); Colo. Rev. Stat. § 18-1-708 (1978); Del. Code Ann. tit. 11, § 431 (1974); Hawaii Rev. Stat. § 702-231 (1976 & Supp. 1980); Idaho Code § 18-201(4) (1979); Ky. Rev. Stat. Ann. § 501.090 (Bobbs-Merrill 1975); Nev. Rev. Stat. § 194.010(8) (1979); N.J. Stat. Ann. § 2C:2-9 (West 1980); Or. Rev. Stat. § 161.270 (1979); 18 Pa. Cons. Stat. Ann. § 309 (Purdon 1973); S.D. Codified Laws Ann. § 22-5-1 (1979).

62. Model Penal Code § 2.09 (1962).

63. *E.g.*, United States v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); United States v. Atencio, 586 F.2d 744, 746 (9th Cir. 1978); United States v. Hearst, 563 F.2d 1331, 1335 n.1 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978); United States v. Patrick, 542 F.2d 381, 388 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

64. People v. Rodriquez, 30 Ill. App. 3d 118, 120, 332 N.E.2d 194, 196 (1975); State v. McKinney, 19 Wash. App. 23, 25, 573 P.2d 820, 821 (1978); W. LaFave & A. Scott, *supra* note 10, § 49, at 376; Newman & Weitzer, *supra* note 10, at 321. "The defense [of duress] is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged." Model Penal Code § 2.09(2) (1962). Of the thirty-two states that have codified the duress defense, twenty-one have incorporated this common-law exception. *See* 1979 Ala. Acts 1163; Alaska Stat. § 11.81.440(b) (1980); Ariz. Rev. Stat. Ann. § 13.412(B) (1978); Ark. Stat. Ann. § 41-208(2) (1977); Colo. Rev. Stat. § 18-1-708 (1978); Conn. Gen. Stat. § 53a-14 (1981); Del. Code Ann. tit. 11, § 431(b) (1979); Hawaii Rev. Stat. § 702-231(2) (1976 & Supp. 1980); Ind. Code Ann. § 35-41-3-8(b)(1) (Burns 1979); Kan. Stat. Ann. § 21-3209(2) (1974); Ky. Rev. Stat. Ann. § 501.090(2) (Bobbs-Merrill 1975); Me. Rev. Stat. Ann. tit. 17A, § 103-A(3)(B) (1981); Mo. Ann. Stat. § 562.071(2)(2) (Vernon 1979); N.J. Stat. Ann. § 2C:2-9(b) (West 1980); N.Y. Penal Law § 40.00(2) (McKinney 1975); N.D. Cent. Code § 12.1-05-10(2) (1976); Or. Rev. Stat. § 161.270(2) (1979); 18 Pa. Cons. Stat. Ann. § 309(b) (Purdon 1973); Tex. Penal Code Ann. § 8.05(d) (Vernon 1974); Utah Code Ann. § 76-2-302(2) (1978); Wash. Rev. Code Ann. § 9A.16.060(3) (1977).

vow.[65] When such evidence is brought to light, the rule would preclude utilization of the duress defense. This common-law exception has been explicitly recognized by at least one federal court.[66] Clearly, the defense should not be available when evidence indicates that the defendant has conducted himself in such a manner.

B. *The Availability of the Duress Defense for Contempt*

The duress defense has been considered available for the following federal offenses: treason,[67] bank robbery,[68] misappropriation of bank funds,[69] various narcotics related offenses,[70] prison escape,[71] unlawful possession of firearms,[72] forgery of military passes,[73] perjury,[74] sale of stolen goods,[75] and failure to appear for trial.[76] The defense has never

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65. Members of organized criminal subcultures adhere to a compulsory code of silence, known as "omerta" in Sicilian crime families, that precludes them, at the risk of death, from informing or testifying against their fellow criminals. *See* 1 L. Radzinowitz & M. Wolfgang, Crime and Justice: The Criminal in Society 335-36 (1971); E. Reid, Mafia 40-47 (1952). "A form of compulsory *omerta* is inflicted upon people who have become involved with criminals through greed and are forced into compromises and arrangements. The . . . principle is simply this: 'Talk, and you die! Keep your mouth shut and we will take care of you and your family!' " *Id.* at 41. The code of silence is present in all organized criminal subcultures. "It is the universal code of the underworld, the inner government of the outlaw—whether he be criminal, patriotic, revolutionary or delinquent." G. Tyler, Organized Crime in America 332 (1967).

66. United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979); *cf. In re* Certain Proceedings Before 1959 Grand Jury, 212 F. Supp. 823, 826-27 (N.D. Ill. 1963) (court rejected fear as a mitigating factor when the defendant had been the cause of his own plight).

67. *E.g.*, Kawakita v. United States, 343 U.S. 717, 735 (1952); United States v. Vigol, 2 U.S. 301, 302, 2 Dall. 346, 347 (1795); Respublica v. McCarty, 2 U.S. 75, 76, 2 Dall. 86, 87-88 (1781); D'Aquino v. United States, 192 F.2d 338, 357-59 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952).

68. *E.g.*, United States v. Campbell, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); United States v. Hearst, 563 F.2d 1331, 1335 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978).

69. United States v. Stevison, 471 F.2d 143, 146-47 (7th Cir. 1972), *cert. denied*, 411 U.S. 950 (1973).

70. *E.g.*, United States v. McClain, 531 F.2d 431, 438 (9th Cir.), *cert. denied*, 429 U.S. 835 (1976); United States v. Gordon, 526 F.2d 406, 407-08 (9th Cir. 1975).

71. *E.g.*, United States v. Bailey, 444 U.S. 394, 415 n.11 (1980); United States v. Michelson, 559 F.2d 567, 568-69 (9th Cir. 1977).

72. United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979).

73. United States v. Birch, 470 F.2d 808, 812-13 (4th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

74. *E.g.*, United States v. Ciambrone, 601 F.2d 616, 626-27 (2d Cir. 1979); United States v. Nickels, 502 F.2d 1173, 1177 (7th Cir. 1974), *cert. denied*, 426 U.S. 911 (1976).

75. United States v. Saettele, 585 F.2d 307, 309 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

76. United States v. Atencio, 586 F.2d 744, 746-47 (9th Cir. 1978).

been successfully utilized, however, in any reported decision regarding contempt of court for a refusal to testify. Of the eight circuits that have addressed the issue, six have explicitly held the defense to be unavailable as a matter of law;[77] one has given conflicting signals as to the availability of the defense;[78] and one has clearly indicated that the defense is available, but denied it on the facts of the case.[79]

The primary source of authority for cases denying or severely restricting the defense has been the 1961 Supreme Court decision in *Piemonte v. United States*.[80] In *Piemonte*, the petitioner challenged his conviction for contempt emanating from a refusal to testify. Although under a grant of immunity, Piemonte refused to answer questions posed to him by a grand jury on the ground that the answers would tend to incriminate him.[81] The district court entered an order directing Piemonte to show cause why he should not be held in criminal contempt.[82] At the subsequent hearing, the only reason Piemonte offered for refusing to testify was fear for his own safety and that of his wife and children.[83] The district judge rejected this excuse and sentenced Piemonte to eighteen months for criminal contempt.[84] The Seventh Circuit Court of Appeals affirmed the district court, holding that fear of underworld retaliation could not excuse a witness from his obligation to testify.[85]

In the Supreme Court, Piemonte sought reversal of his contempt conviction on the grounds that the order directing him to testify lacked sufficient clarity[86] and that the grant of immunity issued by the

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77. *In re* Farrell, 611 F.2d 923, 924-25 (1st Cir. 1979); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978); Dupuy v. United States, 518 F.2d 1295, 1295 (9th Cir. 1975); Taylor v. United States, 509 F.2d 1349, 1350 (5th Cir. 1975); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973); LaTona v. United States, 449 F.2d 121, 122 (8th Cir. 1971).

78. *Compare* United States v. Cabrera, 440 F. Supp. 605, 606-07 (S.D.N.Y. 1977) (allowing the defense, but permitting cross-examination severely limiting its usefulness), *aff'd mem.*, 578 F.2d 1370 (2d Cir. 1978), *with* United States v. Handler, 476 F.2d 709, 712 (2d Cir. 1973) (dictum repeating, with apparent approval, an unreported lower court statement that fear was not a legal excuse for refusing to testify).

79. United States v. Patrick, 542 F.2d 381, 386-88 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

80. 367 U.S. 556 (1961).

81. *In re* Certain Proceedings Before 1959 Grand Jury, 212 F. Supp. 823, 824 (N.D. Ill. 1963).

82. *Id.* at 825.

83. *Id.*

84. *Id.*

85. Piemonte v. United States, 276 F.2d 148, 150 (7th Cir. 1960), *aff'd on other grounds*, 367 U.S. 556 (1961). Interestingly, the Seventh Circuit stands alone today in its clear position that the duress defense can be utilized for such a refusal to testify, provided sufficient evidence is introduced to support the defense. United States v. Patrick, 542 F.2d 381, 386 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

86. Piemonte v. United States, 367 U.S. 556, 560 (1961).

district judge was null and void.[87] He did not urge the duress defense as a ground for reversal.[88] Justice Frankfurter, however, addressed the issue in dictum, which, in a footnote to the majority opinion, asserted that fear was not a valid excuse from testifying.[89]

Justice Frankfurter compared Piemonte to the innocent witness by indicating that "fear of reprisal offers an immunized prisoner no more dispensation from testifying than it does any innocent bystander without a record."[90] *Piemonte*, however, should be distinguished from the case of an innocent witness who can meet the requirements of the duress defense. Armando Piemonte was not an innocent witness. He was serving a six-year sentence for the sale and possession of heroin, and he was called to testify before a grand jury inquiring into narcotics offenses.[91] Moreover, it is not likely that Justice Frankfurter intended to deny categorically the future utilization of the duress defense for all classes of witnesses without examination of counterbalancing considerations.[92]

At the core of the *Piemonte* dictum is the concept that every citizen has a duty to give testimony and to aid in the enforcement of the law.[93] The Court bolstered its reasoning with a citation to Wigmore[94] and a restatement of the ancient phrase: "[T]he public has a right to every man's evidence."[95] A further reading of Wigmore, however, reveals a distaste for the mechanical application of this rule.[96] Wigmore decries as unjustifiable a state case affirming the contempt conviction of a woman who refused to testify because of death threats against her and her family.[97] His dissatisfaction with the decision stemmed from the fact that it paid "no attention at all to the question whether a witness so threatened is entitled to some protection, or at least to some consideration, before compelling testimony."[98] Nonetheless, the federal courts have generally applied the

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87. *Id.* at 561.
88. *Id.* at 559 n.2.
89. *Id.*
90. *Id.*
91. *Id.* at 556.
92. In Mapp v. Ohio, 367 U.S. 643 (1961), decided the same year as *Piemonte*, Justice Frankfurter joined in the dissenting opinion of Justice Harlan that objected vigorously to the Court's ruling on an issue, which although raised, was subordinate to the pivotal issue of the case. 367 U.S. at 672-73. The issue was "briefed not at all and argued only extremely tangentially." *Id.* at 676. Of course, in *Piemonte*, the availability of the duress defense was neither raised, briefed nor argued. Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).
93. 367 U.S. at 559 n.2.
94. *Id.* at 559 n.2 (citing 8 J. Wigmore, Evidence § 2192, at 64 (3d ed. 1940)).
95. *Id.*
96. *See* 8 J. Wigmore, *supra* note 42, § 2192, at 74 n.6.
97. *Id.* (discussing Harmon v. State, 59 Okla. Crim. 267, 60 P.2d 404 (1936)).
98. *Id.*

policy of the *Piemonte* footnote dictum in a mechanical fashion, without discussing the countervailing considerations posed by the innocent witness.[99]

It would appear, however, that some federal courts may be retreating from the use of the *Piemonte* dictum as an absolute bar to the duress defense for contempt. In *United States v. Patrick*,[100] the Seventh Circuit recognized the availability of the defense for contempt.[101] The court, however, denied the defense on the facts of the case[102] and appeared to be extending itself to reach a result in line with the policy of *Piemonte*.

In *Patrick*, the witness's fear was prompted by several visits to his home by the defendant. During these visits, the defendant made various threats to Patrick's daughter such as "there is going to be a lot of heartache for all of you," and "[e]ither I see your father before my case goes to trial or you are all going to suffer."[103] In addition, the defendant had made visits to the home of Patrick's ex-wife, daughter and aunts, where he also made threats.[104] Further, Patrick presented evidence that the defendant had a reputation for being a dangerous killer.[105] Despite this testimony, the court stated that he could not be excused from testifying "based on [these] few vague threats of reprisal."[106]

In *United States v. Cabrera*,[107] a district court in the Second Circuit allowed the defense, but simultaneously refused to limit cross-examination of the defendant.[108] Thus, if Cabrera took the stand to assert his defense, the government would have been permitted to cross-examine him concerning the murder he witnessed. The basis for allow-

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99. *E.g.*, *In re* Farrell, 611 F.2d 923, 925 (1st Cir. 1979); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978); Taylor v. United States, 509 F.2d 1349, 1350 (5th Cir. 1975); *In re* Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973).

100. 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

101. *Id.* at 386.

102. *Id.* at 388.

103. *Id.* at 387.

104. *Id.*

105. *Id.* at 387 n.7.

106. *Id.* at 388. A careful defendant is likely to frame threats made to witnesses in vague terms to reduce the likelihood of being convicted of tampering with a witness, in violation of 18 U.S.C. § 1503 (1976). For example, in United States v. Mastrangelo, 662 F.2d 946 (2d Cir. 1981), the defendant cautioned a government witness against identifying him before the grand jury. *Id.* at 948-49. The defendant's warning contained phrases such as: " 'You know what I mean Jim it's for your own good' "; " 'So let's do it the right way' "; and " 'that's it, case closed.' " *Id.* at 949. Although the defendant's words did not contain an explicit threat, he was indicted for "knowingly and corruptly endeavoring to influence the due administration of justice, 18 U.S.C. § 1503." *Id.* at 947 (footnote omitted). While on his way to the courthouse to testify against the defendant, the threatened witness was shot to death. *Id.* at 949.

107. 440 F. Supp. 605 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1370 (2d Cir. 1978).

108. *Id.* at 606-07.

ing this cross-examination was the theory that Cabrera's presence or absence at the scene of the murder was "clearly material to the truth or falsity of claims that threats had been made to Cabrera, as well as to the reasonableness of his fear of injury."[109] Although admitting that it had placed the defendant in a "Catch 22" situation,[110] the court pointed to the policy of *Piemonte* as a justification.[111]

A recent decision by the Fifth Circuit Court of Appeals[112] evidences a possible softening in its established line of holdings that fear for personal and family safety is not a defense to contempt of court.[113] After stating that "[i]t [was] not necessary that we decide whether duress can never be invoked in a contempt case,"[114] the court went on to deny the defense because the defendant had turned down an offer of government protection.[115]

The state courts have similarly exhibited a general reluctance to allow the duress defense for contempt of court.[116] The policy behind their decisions has been in conformity with *Piemonte*,[117] and at least one state court has cited *Piemonte* and its progeny in the federal courts.[118] The Supreme Court of Iowa, however, has refused to foreclose the possibility of successful utilization of the defense for refusal to testify.[119] This court has adopted a balancing test, "weigh-

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109. *Id.* at 606.

110. *Id.*

111. The viability of the duress defense for contempt in the Second Circuit is clouded by its decision in United States v. Handler, 476 F.2d 709 (2d Cir. 1973). In *Handler*, the circuit court implicitly approved the district judge's rejection of fear as a legal excuse from testifying, although the issue was not presented on appeal. *Id.* at 712.

112. United States v. Gravel, 605 F.2d 750 (5th Cir. 1979).

113. United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977) (per curiam); United States v. Leyva, 513 F.2d 774, 780 (5th Cir. 1975); Taylor v. United States, 509 F.2d 1349, 1350 (5th Cir. 1975) (adopting the reasoning of LaTona v. United States, 449 F.2d 121, 122 (8th Cir. 1971)).

114. United States v. Gravel, 605 F.2d 750, 752 (5th Cir. 1979).

115. *Id.* at 752. The court rejected the defendant's contention that the protection would be "ineffective." *Id.* Their lack of compassion was prompted by society's powerful interest in a witness's knowledge of a matter under investigation. *Id.* (citing Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961)).

116. *E.g.*, State v. Ferguson, 119 Ariz. 55, 57-58, 579 P.2d 559, 561-62 (1978) (en banc); People v. Carradine, 52 Ill. 2d 231, 234, 287 N.E.2d 670, 672 (1972); State v. Sanchez, 89 N.M. 673, 677, 556 P.2d 359, 363 (1976); People v. Clinton, 42 A.D.2d 815, 815, 346 N.Y.S.2d 345, 346 (1973).

117. *See, e.g.*, State v. Ferguson, 119 Ariz. 55, 57-58, 579 P.2d 559, 561-62 (1978) (en banc) (dangerous conditions for government witnesses in prison do not change the law of contempt); People v. Carradine, 52 Ill. 2d 231, 234, 287 N.E.2d 670, 672 (1972) (crime will not be rooted out unless citizens who witness it cooperate before the bar of justice); People v. Clinton, 42 A.D.2d 815, 815, 346 N.Y.S.2d 345, 346 (1973) ("every person owes a duty to the State to testify and may be compelled to do so").

118. Gibb v. Hansen, 286 N.W.2d 180, 187-88 (Iowa 1979).

119. *Id.* at 188.

ing the likelihood and magnitude of reprisal against the actual need for the evidence at trial."[120]

The emergence of this balancing test, and the recent federal cases that have refrained from interpreting *Piemonte* as an absolute bar to the defense, provide a positive signal that the courts may be integrating the harsh realities of "life in the streets" with their application of judicial precedents. Recently, the Second Circuit Court of Appeals did just that in a case involving a notorious organization of narcotics distributors.[121] On the eve of the trial, a potential witness had been murdered.[122] A threat also was reportedly made against the life of another witness in protective custody.[123] Concerned for the safety of the jurors, the trial judge ordered that their identities remain anonymous.[124] The decision was upheld as comporting with the judge's obligation to protect the jury.[125] In recognizing the grave responsibilities of the trial judge, the court noted that "[a]ppellate judges, from the comparative security of their ivory towers, are not burdened . . . with the responsibility of providing for the protection of the jurors, witnesses, and counsel."[126]

II. Extending the Duress Defense to the Innocent Witness

As part of a statutory scheme to eradicate criminal syndicates, Congress enacted the Organized Crime Control Act of 1970.[127] In recognition of the problem of recalcitrant witnesses in organized crime prosecutions, Congress included section 1826(a) of Title 28 of the United States Code,[128] which provides civil contempt penalties for witnesses who refuse to testify.[129] Incarceration for contempt may

120. *Id.* The balancing test adopted by the Iowa Supreme Court is preferable to the categorical denial of the duress defense. If used in the federal courts, however, witnesses could still be coerced to relinquish their constitutional rights through participation in the Witness Protection Program. This would occur when the "likelihood and magnitude of reprisal" was outweighed by "the actual need for the evidence at trial." *Id.* Such a finding would occur with disturbing frequency if the federal courts were to follow the reasoning of the Ninth Circuit in *In re* Michaelson, 511 F.2d 882, 891 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975). In *Michaelson*, the court stated that "the discomfort *any* witness has in testifying against his wishes about matters within his knowledge, cannot outweigh the court's interest in getting the facts necessary to make a reasoned and informed decision." *Id.* (emphasis in original).

121. United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

122. *Id.* at 137 n.7.

123. *Id.* at 136.

124. *Id.* at 133.

125. *Id.* at 141.

126. *Id.* at 137.

127. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified, in part, in scattered sections of 18 & 28 U.S.C.).

128. *Id.* tit. III (codified at 28 U.S.C. § 1826(a) (1976)).

129. *Id.*

not exceed the life of the court proceeding or the term of the grand jury, including extensions.[130] In no event, however, may the period of confinement exceed eighteen months.[131]

In enacting this statute, Congress did not address the availability of the duress defense, either in the statute[132] or its legislative history.[133] The drafters did provide, however, that a refusal to testify would only constitute contempt when it was "without just cause."[134] A reasonable construction of the statute is that defenses recognized at common law could constitute "just cause" for refusal to testify. Inasmuch as the duress defense has long been recognized for serious criminal offenses other than murder,[135] it should logically qualify as just cause for a refusal to testify. Such a construction would comport with the ancient and oft-repeated rule of statutory construction that requires penal statutes to be strictly construed against the government and in favor of the party on whom a statutory penalty is sought to be imposed.[136]

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130. *Id.*

131. *Id.*

132. *See id.*

133. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970); S. Rep. No. 617, 91st Cong., 1st Sess. (1969); *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on S.30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *1970 Organized Crime Hearings*].

134. 28 U.S.C. § 1826(a) (1976).

135. *See supra* note 11 and accompanying text.

136. United States v. Wiltberger, 18 U.S. 35, 44, 5 Wheat. 76, 93 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."); *see* United States v. Enmons, 410 U.S. 396, 411 (1973); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955); 3 C. Sands, Sutherland's Statutes and Statutory Construction § 59.03, at 6-7 (4th ed. 1974). Section 1826(a) should be construed as a penal statute. Generally, when the primary purpose of a statute is enforced by a fine or imprisonment, it is construed as penal. *Id.* § 59.01, at 1. In determining whether a statute is penal or nonpenal, courts look to its purpose. Trop v. Dulles, 356 U.S. 86, 96 (1958). "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal." *Id.* (footnote omitted). Although the technical purpose of a civil contempt statute is to coerce testimony, and not to punish, the purposes of civil and criminal contempt tend to overlap. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911). A refusal to obey a federal court order to testify can result in civil or criminal contempt interchangeably. *See* 18 U.S.C. § 401 (1976); 28 U.S.C. § 1826(a) (1976). The federal courts have considered the availability of the duress defense for refusal to testify without discussing whether the witness had been cited for civil or criminal contempt. *E.g., In re* Farrell, 611 F.2d 923, 925 (1st Cir. 1979) (civil contempt); United States v. Damiano, 579 F.2d 1001, 1003-04 (6th Cir. 1978)(criminal contempt). The criminal overtones of civil contempt are further illustrated by the practice, in a number of federal circuits, of conducting civil contempt proceedings in accordance with the procedures set forth in Fed. R. Crim. P. 42(b) for criminal contempt. *E.g., In re* Grand Jury Investigation, 600 F.2d 420, 423 n.7 (3d Cir. 1979); *In re* Sadin, 509 F.2d 1252, 1255 (2d Cir. 1975); United States v. Alter, 482 F.2d 1016, 1023 (9th Cir.

For example, the Supreme Court has declined to abrogate the common-law requirement of criminal intent for the theft of government property on the ground that "[s]uch a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative."[137] This reluctance was grounded in the belief that individuals should not be deprived of common-law immunities or defenses in the absence of express congressional intent to that effect.[138] Contempt of court is clearly a common-law offense, and the legislative history of section 1826(a) reflects no intent to create a new, statutory offense immune from the defenses traditionally available at common law.[139]

Furthermore, the Supreme Court has recently addressed the availability of the duress defense for federal statutory offenses.[140] The Court acknowledged the availability of the defense for federal prison escapes,[141] although it denied it on the facts.[142] In construing the applicable statute,[143] Justice Rehnquist noted that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . . and that therefore a defense of duress or coercion may well have been contemplated."[144] This line of reasoning applies equally well to the federal statutes prescribing penalties for contempt of court.

Moreover, it appears that section 1826(a) was never intended to apply to the innocent witness who refuses to testify against members of criminal syndicates due to fear of reprisals. On the contrary, the legislative history reveals that this section was "framed with an eye toward coercing members of secret syndicates to disobey their vows of silence and to cooperate in grand jury investigations."[145] Thus, application of section 1826(a) to the innocent witness without the benefit of the duress defense would exceed the coercive powers extended by Congress to the courts.

Courts that have categorically denied the availability of the duress defense for contempt may have been motivated by a reluctance to

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1973). Furthermore, in determining whether a statute is penal, the courts must look to the severity of the penalty it imposes, in addition to its purpose. Trop v. Dulles, 356 U.S. 86, 96 n.18 (1958). Under § 1826(a), the civil contemnor may be incarcerated for as long as eighteen months. 28 U.S.C. § 1826(a) (1976).

137. Morissette v. United States, 342 U.S. 246, 263 (1952).

138. *Id.*

139. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 33 (1970) ("Title III is intended to codify present civil contempt practice with respect to recalcitrant witnesses in Federal grand jury and court proceedings.").

140. United States v. Bailey, 444 U.S. 394 (1980).

141. *Id.* at 415 n.11.

142. *Id.* at 415.

143. 18 U.S.C. § 751(a) (1976).

144. 444 U.S. at 415 n.11 (footnote omitted).

145. *In re* Grand Jury Investigation, 600 F.2d 420, 425 (3d Cir. 1979); *see 1970 Organized Crime Hearings*, *supra* note 133, at 99-100 (statement of Sen. McClellan).

compromise the effectiveness of the fight against organized crime. Any such fear would be generally unjustified. The fight against organized crime can proceed apace without the power to coerce the testimony of the intimidated, innocent witness. The witnesses that are essential to the prosecution of organized crime are often heavily involved in crime and are frequently targets of the investigation or codefendants in the case at trial.[146] Their voluntary association with an organized criminal subculture places them in a position of obedience to the compulsory code of silence. Consequently, pressure will be exerted upon them to remain mute if called to testify against their partners in crime.[147] Because these witnesses have brought this coercion upon themselves, the common-law exception to the duress defense would preclude them from its utilization.[148]

Witnesses seeking to use the duress defense would not always be clearly identifiable as either an innocent witness or one who had voluntarily associated himself with a criminal subculture. The existence of witnesses who fall somewhere between these extremes complicates attempts to define the boundaries of the class of witnesses that would be eligible for the defense.[149] Witnesses in this "middle ground" should be excluded from the use of the duress defense when the court finds, as a matter of law, that they negligently or recklessly placed themselves in a position where it was probable that they would be subjected to duress.

This determination could be approached through consideration of various interrelated indicia of negligence. Significant factors would

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146. *See, e.g.*, United States v. Chinchic, 655 F.2d 547, 549 (4th Cir. 1981); United States v. Castleberry, 642 F.2d 1151, 1152 (9th Cir.), *cert. denied*, 101 S. Ct. 3120 (1981); United States v. Spero, 625 F.2d 779, 780-81 (8th Cir. 1980); United States v. Provenzano, 615 F.2d 37, 43 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980); *In re* Grand Jury Investigation, 600 F.2d 420, 421 (3d Cir. 1979); United States v. Watson, 599 F.2d 1149, 1151 (2d Cir. 1979); Cooper v. United States, 594 F.2d 12, 13 (4th Cir. 1979); United States v. Berardelli, 565 F.2d 24, 26-27 (2d Cir. 1977); United States v. DiNapoli, 557 F.2d 962, 964-65 (2d Cir.), *cert. denied*, 434 U.S. 858 (1977); United States v. Boffa, 513 F. Supp. 512, 513 (D. Del. 1981); Tully v. Scheu, 487 F. Supp. 404, 405 (D.N.J. 1980).

147. *See supra* note 65 and accompanying text.

148. *See supra* notes 64-66 and accompanying text.

149. This "middle ground" class of witnesses would be extremely varied. It could include: the noncriminal who places himself in a position where it is probable that he will be privy to information that would incriminate organized crime figures, such as long-time friends of organized criminals who continue their friendships after discovery of the criminal connections; the offender whose relationship to organized crime is either marginal or unknowing, such as the teenager who delivers a packet of narcotics without being aware of the affiliations of the individual procuring his services; and the purchaser of illegal services or products offered by organized crime, such as the individual who places daily bets with a bookmaker.

include: whether the witness has engaged in criminal activity,[150] the nature of the witness's relationship to the defendant[151] and the likelihood of readily ascertaining the defendant's organized crime affiliations.[152] The establishment of precedents on a case-by-case basis would gradually overcome the initial difficulty of utilizing a test to determine whether a witness in the "middle ground" was eligible for the duress defense.

III. Application of the Duress Defense

The intimidated witness seeking to utilize duress as a defense in a federal contempt proceeding is faced with various obstacles to its successful application. Of course, the elements of the defense would have to be established.[153] Generally, when the duress occurs within the context of an organized crime prosecution, there is little difficulty in establishing that the threats were of death or serious bodily injury and that a person of ordinary firmness would have been unable to resist them.[154] These elements of the defense might be inferred from

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150. The court might further ask: 1. *Is the witness a codefendant or coconspirator in the prosecution of the defendant?* An affirmative answer would create a strong presumption of negligence. 2. *Is the witness's past criminal behavior similar to the activities of organized crime?* The likelihood of negligence would increase proportionately to the similarity of the behavior. 3. *Does his criminal behavior solely consist of purchasing illegal products or services from organized crime?* The likelihood of negligence might be decreased when the witness's criminal behavior is not engaged in for profit or is seldom prosecuted, such as placing illegal bets with a bookmaker.

151. Factors would include: 1. *The duration of the relationship.* The longer the witness has known the defendant, the greater the likelihood of negligence. 2. *The purpose of the relationship.* When the witness is merely a relative or long-time friend who has never engaged in criminal activity, the likelihood of negligence might be decreased. The existence of negligence might also be diminished when the witness is an employee of the defendant, performing legitimate services such as gardening or housekeeping. 3. *What would have been the consequences had the witness terminated the relationship upon learning of the defendant's organized crime affiliations?* The likelihood of negligence might decrease in proportion to the difficulty of terminating the relationship. Such difficulty might arise in terms of creating family problems, loss of employment or fear of reprisals.

152. The court might consider: 1. *Whether the defendant is known to the public as an organized crime figure.* The likelihood of negligence would increase in proportion to the public notoriety of the defendant as an organized crime figure. 2. *The relative ease of discovering the defendant's criminal affiliations, measured with regard to the nature of the witness's relationship with the defendant.* The likelihood of negligence would decrease in situations when the defendant's occupation and life style were not indicative of criminal activity. For example, negligence would decrease when the defendant had infiltrated legitimate business enterprises and did not live visibly above the means of his professed occupation. Negligence in failing to pierce the defendant's "cover" would increase in proportion to the intimacy and duration of the witness's relationship with him.

153. *See supra* pt. I(A).

154. *See supra* notes 2-3 and accompanying text.

an offer to participate in the Witness Protection Program. Such an offer signifies a determination by the Office of Enforcement Operations of the Department of Justice that "there is a clear indication that the life of the witness is or will be in jeopardy."[155] More serious obstacles to the application of the defense are the ramifications of rejecting an opportunity to participate in the Witness Protection Program, the vagaries of the immediacy requirement and the procedural "Catch 22" of the duress defense.

A. *The Witness Protection Program and the Innocent Witness*

One requirement of the duress defense is that there must have been no reasonable, legal alternative to violating the law to avoid the threatened danger.[156] Considering the extreme danger to threatened witnesses in organized crime prosecutions,[157] the Witness Protection Program represents the only alternative to refusal to testify that might adequately address the intimidated witness's need for protection. The Fifth Circuit has explicitly held that even if the defense were available, the defendant had not brought himself within it where he had declined to accept government protection from the asserted threats.[158] Similarly, in *United States v. Patrick*,[159] the Seventh Circuit refused to instruct the jury on the duress defense partially because Patrick made no attempt to alleviate the danger his testimony might engender.[160]

Although the Witness Protection Program may successfully protect the lives of its participants, it is not a *reasonable* alternative for the innocent witness. In addition to the serious problems faced by all of its participants,[161] it must be stressed that the program lacks the capacity to address the special needs of the noncriminal witness.[162] Speaking before a Senate Subcommittee in 1980, the Assistant Director for Operations of the United States Marshals Service acknowledged that a noncriminal witness entering the program would experience considerable trauma.[163] At the same hearing, Senator Sam Nunn characterized the honest witness as a challenge to the Marshals Service, but indicated that the program was not designed for this class of wit-

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155. *1980 Witness Security Hearings*, *supra* note 14, at 317 (statement of Gerald Shur, Associate Director, Office of Enforcement Operations, Crim. Div., Dep't. of Justice).

156. *See supra* note 49 and accompanying text.

157. *See supra* notes 2-3 and accompanying text.

158. United States v. Gravel, 605 F.2d 750, 752 (5th Cir. 1979).

159. 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

160. *Id.* at 388.

161. *See supra* notes 21-29 and accompanying text.

162. *1980 Witness Security Hearings*, *supra* note 14, at 255 (statement of Howard Safir, Assistant Director for Operations, U.S. Marshals Service).

163. *Id.*

ness.[164] At least until mechanisms for dealing with an innocent witness are developed and perfected, the Witness Protection Program will remain an unreasonable alternative for the intimidated, innocent witness.

Moreover, utilizing the threat of incarceration for contempt to coerce the witness to testify and participate in the Witness Protection Program is constitutionally suspect. Such coercion places an excessive burden on his prerogative to retain all constitutional rights that he does not voluntarily choose to relinquish. As previously stated, participation in the program requires the voluntary relinquishment of the witness's rights of privacy and personal autonomy, freedom of association, freedom of travel, and liberty.[165]

As a matter of basic constitutional principle, courts indulge every reasonable presumption against waiver of fundamental constitutional rights.[166] Ordinarily, the courts require "an intentional relinquishment or abandonment of a known right or privilege" for a waiver to be effective.[167] A waiver is not voluntary when it is induced by threats that have a coercive, irresistible effect on the actor.[168] For example, parole agreements requiring the waiver of fourth amendment rights as a prerequisite to early release from prison have been struck down as unconstitutional.[169] In these cases, the only obstacle between the prisoner and his liberty is the waiver of a constitutional right.[170] The courts have found the threat of incarceration to be sufficient coercion to invalidate the resulting waivers on the ground that they were not voluntary in nature.[171]

The dilemma of the intimidated witness in federal organized crime prosecutions presents an analogous situation. By posing the threat of contempt proceedings without the protection of the duress defense, all that stands between the witness and the specter of incarceration is a waiver of his constitutional rights. Requiring innocent witnesses to participate in the Witness Protection Program or face incarceration

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164. *Id.* (statement of Sen. Nunn).

165. *See supra* notes 17-20 and accompanying text.

166. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); *see* Brookhart v. Janis, 384 U.S. 1, 4 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Hodges v. Easton, 106 U.S. 408, 412 (1882).

167. Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *quoted in* Brookhart v. Janis, 384 U.S. 1, 4 (1966).

168. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Marchibroda v. United States, 368 U.S. 487, 493 (1962).

169. Diaz v. Ward, 437 F. Supp. 678, 687 (S.D.N.Y. 1977); United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155, 1157 (W.D.N.Y. 1975).

170. *See* United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155, 1156-57 (W.D.N.Y. 1975).

171. Diaz v. Ward, 437 F. Supp. 678, 687 (S.D.N.Y. 1977); United States *ex rel.* Coleman v. Smith, 395 F. Supp. 1155, 1157 (W.D.N.Y. 1975).

for contempt of court operates as a coercive threat, and thus cannot withstand constitutional scrutiny.

It may be argued that innocent witnesses would seldom be placed in this dilemma in light of prosecutorial discretion[172] and judicial sensitivity.[173] Recognizing the excessive hardship that participation in the Witness Protection Program would pose, such officials may be reluctant to coerce the testimony of innocent witnesses. Nonetheless, the preservation of the innocent witness's constitutional rights should not depend on the equitable instincts of government officials when the elements of a valid legal defense can be met.

B. *The Immediacy Requirement Revisited*

The immediacy requirement presents a much criticized, but continuing obstacle to the application of the duress defense.[174] Considering the availability of courtroom security, a recalcitrant witness would have difficulty establishing that he was in *immediate* danger of death or serious bodily harm at the moment he was put on the stand and refused to testify. No case addressing the availability of the duress defense, however, has urged the immediacy requirement to this outer limit. This indicates that courts "would not lightly require a witness to testify if [they were] convinced that death or serious bodily harm would ensue therefrom."[175] In any event, courts should adopt the rule applied in perjury cases that duress is sufficiently immediate if it is acting upon the mind of the witness at the time of his criminal behavior.[176]

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172. *See* National District Attorneys Association, National Prosecution Standards 125 (1977) (considering factors such as undue hardship to the accused, the mental state of the defendant and mitigating circumstances in determining whether prosecution is justified); F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 186 (1969) ("Obviously guilty persons may not be charged when, in the judgment of police or prosecutor, the consequences of prosecution and conviction seem unduly harmful in relation to the criminal conduct involved or the social and economic circumstances of the suspect."). *See generally* Discretionary Authority of the Prosecutor (J. Douglass ed. 1977).

173. *See* United States *ex rel.* Grand Jury Investigation v. Buonacure, 412 F. Supp. 904, 907 (E.D. Pa. 1976) ("Federal law, 28 U.S.C. § 1826, plainly contemplates a relatively broad latitude in which a district judge may exercise his discretion in deciding whether to incarcerate a recalcitrant witness."). Abuses of this discretion can be corrected on appeal. *See* United States v. Leyva, 513 F.2d 774, 780 (5th Cir. 1975) (reducing to two years a thirty-five-year sentence, to run consecutive to a twelve-year state sentence, for refusal to testify based upon fear of reprisals).

174. *See supra* notes 52-54 and accompanying text.

175. Widger v. United States, 244 F.2d 103, 106 (5th Cir. 1957).

176. *See supra* notes 59-60 and accompanying text.

C. *Untangling the "Catch 22" of the Duress Defense*

In order to successfully utilize the duress defense, the witness must first establish that threats were made against him.[177] When the threats are not anonymous[178] and are made by the defendant in the underlying criminal prosecution, the witness is placed in a position of having to give testimony implicating the defendant in the offense of tampering with a witness.[179] Naturally, the witness may infer that such testimony will give rise to the same reprisals he faced if he were to testify in the original prosecution.

Moreover, to establish that threats have been made, the witness might be required to give testimony establishing that he has incriminating information against the defendant in the original criminal prosecution. Thus, in *United States v. Cabrera*,[180] the district court allowed cross-examination into the facts of the original prosecution about which the contemnor had refused to testify.[181] The court admittedly placed the contemnor in a "Catch 22" situation requiring him to give "evidence adverse to the threateners; otherwise there could be no basis for [his] fear."[182]

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177. United States v. Bailey, 585 F.2d 1087, 1096 n.29 (D.C. Cir. 1978), *rev'd on other grounds*, 444 U.S. 394 (1980); *see* United States v. Hearst, 563 F.2d 1331, 1336 n.2 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 1000 (1978); W. LaFave & A. Scott, *supra* note 10, § 49 (1972). In the context of organized crime prosecutions, it might be argued that duress is present, absent specific threats, by virtue of a "fear born of past mobster reprisals for cooperation with law enforcement agents." Goldstock & Coenen, *supra* note 1, at 207; *see* LaTona v. United States, 449 F.2d 121, 122 n.2 (8th Cir. 1971). Hundreds of cases against organized crime are lost because key witnesses refuse to testify out of fear that they will suffer the same fate as witnesses before them. *See Invasions of Privacy*, *supra* note 6, at 1157-58 (statement of Att'y Gen. Nicholas deB. Katzenbach). Former Attorney General Nicholas deB. Katzenbach described the horror engendered by organized crime as follows: "The face of organized crime is not the face of the friendly corner bookie. It is the face of a man beaten so systematically with a baseball bat that his face was swollen to more than normal size before he reached the morgue. The face of organized crime is the face of a man tortured, who was then shot and stuffed in a post hole. It is the face of the young woman, throat cut ear to ear with a 6-inch slash running from neck to navel. It is the face of the boys, aged 10 and 11, one of whom was killed and the other maimed when a bomb exploded their automobile in Youngstown, Ohio. It is the face of the man hung from a meathook in a freezer, then tortured, then burned alive." *Id.* at 1157.

178. Naturally, when the threats are anonymous, the witness can testify as to them without implicating the maker in the offense of tampering with a witness.

179. 18 U.S.C. § 1503 (1976); *see, e.g.*, United States v. De Stefano, 476 F.2d 324, 326-27 (7th Cir. 1973); United States v. Bradwell, 388 F.2d 619, 620 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968). The penalty for tampering with a government witness is a fine of not more than $5,000, or imprisonment for not more than five years, or both. 18 U.S.C. § 1503 (1976).

180. 440 F. Supp. 605 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1370 (2d Cir. 1978).

181. *Id.* at 606.

182. *Id.*

The Fifth Circuit arrived at a suitable solution to this "Catch 22" in the case of *United States v. Gravel.*[183] The witness was cited for civil contempt and a show cause hearing was held.[184] At the hearing, the witness was permitted to describe the threats he received *in camera*, without any representative of the government present.[185] The testimony was sealed,[186] and thus the possibility of its being used at a prosecution of the defendant was removed.[187]

When the defense must be raised at a jury trial for criminal contempt,[188] however, its elements cannot be proven with the prosecution and the jury excluded. The witness's dilemma might be alleviated, to some extent, by a court ruling precluding the subsequent use of his testimony at any criminal proceeding against the defendant.[189] The witness, nonetheless, may well be justified in fearing reprisals for any disclosure of incriminating evidence to which the prosecution is privy, regardless of its inadmissibility in subsequent proceedings.[190]

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183. 605 F.2d 750 (5th Cir. 1979).

184. *Id.* at 751.

185. *Id.*

186. *Id.*

187. The utilization of the *in camera* proceeding has been accepted in a number of contexts, such as when sensitive governmental information, United States v. Lopez, 328 F. Supp. 1077, 1086 (E.D.N.Y. 1971) (confidential profiles of sociological and psychological traits of airplane hijackers), or the safety of individuals required confidentiality. Socialist Workers Party v. Attorney General, 565 F.2d 19, 23 (2d Cir. 1977) (release of identities of confidential informants to defense counsel), *cert. denied*, 436 U.S. 962 (1978); United States v. Anderson, 509 F.2d 724, 729 (9th Cir.) (same), *cert. denied*, 420 U.S. 910 (1975). At times, the safety needs of prospective jurors come into conflict with the defendant's need for meaningful voir dire. For a suggested use of *in camera* hearings to balance these needs, see A. Abromovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?*, 50 Fordham L. Rev. 30, 58-60 (1981).

188. *See* Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (a jury trial must be granted if the court imposes a sentence in excess of six months); Fed R. Crim. P. 42(b) (a jury trial must be granted where an act of Congress so provides).

189. *Cf.* United States v. Gravel, 605 F.2d 750, 751 (5th Cir. 1979) (testimony in civil contempt hearing given *in camera* and sealed).

190. Out-of-court statements that are not sealed might be admitted at a criminal trial of the defendant under several exceptions to the hearsay rule requiring the unavailability of the declarant. *See* Fed. R. Evid. 804(b). When the recalcitrant witness "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so," he will generally be ruled an unavailable witness. Fed. R. Evid. 804(a)(2); *see* United States v. Garner, 574 F.2d 1141, 1143 (4th Cir.) (holding unavailable a witness who, after being granted use immunity and threatened with contempt, equivocated concerning willingness to answer), *cert. denied*, 439 U.S. 936 (1978); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (witness held unavailable when he refused to testify despite being granted use immunity and receiving a six month sentence for contempt), *cert. denied*, 431 U.S. 914 (1977). Once the witness is declared unavailable, his hearsay statements will be admissible if the prosecutor can establish circumstantial guarantees of trustworthiness. *See* Fed. R. Evid. 804(b)(1)-(5).

The incidence of jury trials for criminal contempt might be substantially reduced by the use of an *in camera* hearing prior to the court's issuance of an order to testify.[191] The purpose of the proceeding would be to determine whether the elements of the duress defense were present. No government representative would be permitted to attend, and the testimony of the witness would be sealed.[192] It is further suggested that, in all contexts, such an *in camera* proceeding should be held prior to the time the witness's testimony is desired. This practice would decrease the incidence of delays at the subsequent trial or grand jury proceeding by providing a degree of certainty to guide the expectations and consequent actions of both the witness and the prosecution.

CONCLUSION

Efforts to eradicate organized crime are more likely to succeed if the cooperation of the public at large can be marshalled. Improvements in the Witness Protection Program are essential to procuring the testimony of private citizens. At present, however, the program does not represent a reasonable alternative for the intimidated, innocent witness.

Notwithstanding the importance of bringing organized criminals to justice, the courts will not tolerate the violation of fundamental individual rights. This protection is extended to all citizens, regardless of whether they are engaged in criminal activity. Thus, for example, the target of an organized crime investigation will walk away in the face of overwhelming evidence when he has been the victim of an illegal search.

The preservation of the constitutional rights of an intimidated, innocent witness is even more compelling. The innocent witness must not be coerced to relinquish fundamental rights and participate in the Witness Protection Program. He must not be denied the right to a

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191. Criminal contempt for refusal to testify is available as a sanction only after the recalcitrant witness has refused to obey a lawful court order to testify. 18 U.S.C. § 401(3) (1976). Thus, the grand jury can only return an indictment for criminal contempt after a judge has ordered the witness to testify. *Id.*; *see, e.g.*, United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977) (per curiam); United States v. Leyva, 513 F.2d 774, 776 (5th Cir. 1975). The judge may delay the issuance of an order to testify pending the results of an *in camera* hearing to determine whether the elements of the duress defense are met. *Cf.* Socialist Workers Party v. Attorney General, 565 F.2d 19, 23 (2d Cir. 1977) ("District courts have the inherent power to hold *in camera* proceedings . . . ."), *cert. denied*, 436 U.S. 962 (1978); United States v. Hurse, 453 F.2d 128, 130-31 (8th Cir. 1971) (discussing the inherent power of courts to hold *in camera* proceedings), *cert. denied*, 414 U.S. 908 (1973). Of course, if the judge found the elements of the duress defense to be present, the order to testify would not issue.

192. *See* United States v. Gravel, 605 F.2d 750, 751 (5th Cir. 1979).

defense long accepted at common law, which Congress has shown no intention of abolishing through its legislative powers. Judicial frustration with the endless fight against organized crime must not be vented against the innocent witness through the contempt powers of the court. "When such sanctions are imposed on the victim-witness, they result in punishing the wrong party; the wrath of the state falls on the manipulated [contemnor] or perjurer, while the primary defendant goes free."[193]

Stuart Mass

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193. Goldstock & Coenan, *supra* note 1, at 229.