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# Limiting Incarceration for Civil Contempt in Child Custody Cases

David J. Harmer\*

“[T]he present manner of exercising contempt power may do more to degrade and impugn the dignity of the judiciary than the very conduct which constitutes the contempt.”<sup>1</sup>

## INTRODUCTION

United States Senator Orrin G. Hatch (R-Utah) and Representative Frank Wolf (R-Va.) are not the first to identify, nor is Dr. Elizabeth Morgan the first to experience, injustice in the application of the contempt power. However, these three individuals—two legislators and one contemnor—are among the few ever to have wrought significant change in the law of contempt. On September 23, 1989, Congress passed and sent to the President Public Law No. 101-97,<sup>2</sup> which limits imprisonment for civil contempt in child custody cases in the District of Columbia to one year.<sup>3</sup> Based on bills introduced by Hatch and Wolf in response to Dr. Morgan’s plight,<sup>4</sup> this measure serves as a model for reform in the forty-eight states lacking similar limits.<sup>5</sup>

On August 26, 1987, Dr. Morgan was held in contempt of court for defying a District of Columbia Superior Court order to deliver her

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1. E. DANGEL, *Preface to NATIONAL LAWYERS' MANUAL, Contempt* (1939).

2. Public Law No. 101-97, 103 Stat. 633 (1989), is reproduced in Appendix I.

3. The one-year limitation is not absolute; see *infra* section IV of this article.

4. Representative Wolf's bill, H.R. 2136, is reproduced in Appendix II. Senator Hatch's bill, S. 1163, is reproduced in Appendix III. They are discussed *infra* in section IV of this article.

5. Wisconsin and California already limit incarceration for contempt. Wisconsin has abolished the civil/criminal distinction and limits incarceration for any contempt to six months. California treats all contempts as misdemeanors, the trials of which require due process protections not always available to civil contemnors in other jurisdictions, and limits incarceration for contempt to one year. See *infra* section V-B of this article.

five-year-old daughter Hilary to Dr. Eric Foretich, her ex-husband, for two weeks of unsupervised visitation.<sup>6</sup> Morgan had repeatedly accused Foretich of sexually abusing Hilary. Foretich denied any misconduct. Although Morgan's allegations were substantiated by several child psychologists and pediatricians who had examined Hilary, she was unable to prove them in court.<sup>7</sup> Hers was a Hobson's choice: either surrender her daughter to a man she was convinced had repeatedly sexually abused the girl or face indefinite imprisonment. Morgan chose the latter. Having abandoned her home, her medical practice, and her freedom, she endured over two years in jail. Had Congress not acted, she would, in all likelihood, remain there still.<sup>8</sup>

Numerous notes and articles have considered issues raised by application of the contempt power in child *support* cases;<sup>9</sup> but hardly any have discussed the much more interesting and troublesome questions surrounding the use of civil contempt in child *custody* cases.<sup>10</sup> This article attempts to fill that void by reviewing the dangers of the contempt power, examining Dr. Morgan's experience as an illustration of them, and describing the recent reform enacted in response to her case. It urges Congress to make the reform permanent, broadening it to include all civil contempt, and urges other jurisdictions to adopt similar reforms.

## I. THE CONTEMPT POWER

### A. *The Source of the Contempt Power*

#### 1. *Statutory authority for the contempt power*

Contempt is:

an act of disobedience or disrespect toward a judicial or legislative

6. *Morgan Ordered To Let Ex-Husband Visit Child; Doctor Faces Fine, Jail for Noncompliance*, Washington Post, Aug. 27, 1987, at C6, col. 1.

7. *But see Morgan v. Foretich*, 846 F.2d 941, 943-44 (4th Cir. 1988) (the district court improperly excluded "highly relevant" evidence of similar sexual abuse suffered by Heather, Foretich's daughter by his second marriage). *See generally infra* section III of this article.

8. *See infra* sections III and IV of this article.

9. *See, e.g., Recent Developments—Domestic Relations: Enforcement of Child Support Obligations Through Civil Contempt*, 6 AM. J. TRIAL ADVOC. 347 (1982); Maidment, *The Law of Contempt and Family Law*, 13 FAM. LAW 127 (1983); Note, *The Contempt Statutes: At Odds With Domestic Enforcement?*, 29 S.D.L. REV. 164 (1983); Note, *Florida's Use of Contempt Proceedings to Enforce Child Support Arrearages: Imprisonment for Debt?*, 12 STEYSON L. REV. 526 (1983); Turner, *Contempt and Punishment for Non-Support*, 36 JUV. & FAM. CT. J. 87 (1985).

10. The best, and perhaps only, comprehensive discussion is found in Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U.L. REV. 491 (1989).

body of government, or interference with its orderly process, for which a summary punishment is usually exacted. In a broader, more general view, it is a power assumed by governmental bodies to coerce cooperation, and punish criticism or interference, even of a causally indirect nature.<sup>11</sup>

Congress has specifically authorized the exercise of contempt power by the federal courts. In fact, Congress has granted federal judges virtually unbridled discretion over certain kinds of contempt:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.<sup>12</sup>

Note the absence of statutory limits on the amount of the fine or the duration of the imprisonment. Note also the statute's vagueness. "Disobedience" may be easily defined, but "misbehavior" and "resistance" are vague terms subject to inconsistent and arbitrary interpretation.

A more specific procedure governs the prosecution of contumacious acts which are also criminal offenses:

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.<sup>13</sup>

However, the judiciary may deal with other contempts without further statutory constraint: "all other cases of contempt not specifically em-

11. R. GOLDFARB, *THE CONTEMPT POWER* 1 (1963); see also 17 AM. JUR. 2D *Contempt* § 3 (1964).

12. 18 U.S.C. § 401 (1982).

13. 18 U.S.C. § 402 (1982). Section 3691 provides that when an action charged as contempt also constitutes a criminal offense, the accused has the right to a trial by jury, "which shall conform as near as may be to the practice in other criminal cases." 18 U.S.C. § 3691 (1982). The right does not apply to "contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful . . . order" entered in suits brought by or on behalf of the United States. *Id.*

braced in this section may be punished in conformity to the prevailing usages at law."<sup>14</sup> Many state legislatures have granted their courts similar authority.<sup>15</sup>

## 2. *Non-statutory authority for the contempt power*

Despite that long leash, many courts claim the right to exercise the contempt power, regardless of whether the legislature so authorizes them. The Supreme Court maintains that the contempt power is inherent in the judiciary and independent of the Legislature. This view dates back at least to 1812.<sup>16</sup> As early as 1874 the Court said:

The power to punish for contempts is inherent in all courts . . . . The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by [an act of Congress]. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution may perhaps, be a matter of doubt . . . ."<sup>17</sup>

The opinion goes on to acknowledge congressional authority over the federal circuit and district courts.<sup>18</sup> However, a few years later the Court appeared to assert on behalf of at least the circuit courts that "[t]he power to punish for contempts is inherent in the nature and constitution of a court. It is a power not derived from any statute . . . ." <sup>19</sup> The Court accepts legislation which recognizes and enforces the contempt power,<sup>20</sup> but might not accept legislation which limits it.<sup>21</sup>

That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United

14. 18 U.S.C. § 402 (1982).

15. See Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 222 (1971).

16. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

17. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874).

18. *Id.*

19. *Ex parte Terry*, 128 U.S. 289, 303 (1888) (citation omitted).

20. See *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894):

From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority . . . .

*Id.* at 489.

21. The power to punish for contempts is inherent in *all* courts. The "general and inherent authority [to exercise contempt powers], of whatever nature, does not need any statutory grant of power, and is not subject to statutory restrictions." *United States v. Shipp*, 203 U.S. 563, 566 (1906).

States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.<sup>22</sup>

Courts have "inherent power" not only "to enforce compliance with their lawful orders,"<sup>23</sup> but to enforce compliance with their arguably *unlawful* orders.<sup>24</sup> One federal court declared, "[T]his inherent authority over contempt is rooted in the common law and has been recognized in this country since early Colonial times."<sup>25</sup> The court went on to say that "it is doubtful that Congress could constitutionally wholly deprive a United States District Court of this power. . . ."<sup>26</sup>

Legislative attempts to restrict the contempt power have occasionally been challenged.<sup>27</sup> In 1971, the Kentucky Supreme Court declared unconstitutional a statute limiting punishment for contempt.<sup>28</sup> The same court later reaffirmed its inherent power without considering the constitutionality of a successor statute.<sup>29</sup> Ohio courts also claim contempt authority independent of state statute under their inherent powers.<sup>30</sup> Other state courts claim inherent authority as well.<sup>31</sup>

"The power to punish for contempts is inherent in all courts," says one treatise.<sup>32</sup>

[T]his power exists by force of the constitution itself as an inherent power. *If* this proposition be true and respected, then no other power can control its exercise. The only question that can possibly arise is, whether the matter or conduct alleged is contempt, and to determine this, the court cannot be governed by statutory definitions or classifications.<sup>33</sup>

22. *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 65-66 (1924).

23. *Shillitani v. United States*, 384 U.S. 364, 370 (1966).

24. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 293-94 (1947).

25. *In re Williams*, 306 F. Supp. 617, 619 (D.D.C. 1969).

26. *Id.*

27. *See Martineau, Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 679-80 (1981).

28. *Arnett v. Meade*, 462 S.W.2d 940, 948 (Ky. 1971).

29. *Hardin v. Summitt*, 627 S.W.2d 580, 582 (Ky. 1982); *see also* *Leathers, Civil Procedure*, 71 KY. L.J. 395, 409-410 (1982-83).

30. *Zakany v. Zakany*, 9 Ohio St. 3d 192, 459 N.E.2d 870 (1984).

31. *See, e.g., Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982).

32. I W. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES § 64, at 219 (1913).

33. *Id.*, § 65, at 231 (emphasis added).

That's a big "if," but the author, like most courts, simply assumes the truth of the proposition. Even though the treatise dates from before World War I, its rationale, or lack thereof, remains widely accepted. The extent to which the current Supreme Court will accept legislative limitations on the contempt power is not certain, but it has recently reaffirmed that "it is long settled that courts possess inherent authority to initiate contempt proceedings."<sup>34</sup>

### 3. *Rationale for the contempt power*

The American courts have created for themselves a body of legal authority which it is claimed gives to them the inherent right, in the absence of a limitation placed upon them by the power which created them, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass or obstruct the court in the discharge of its duties. This doctrine has been asserted in all its rigor by the courts. It is founded upon the principle that this power is coequal with the existence of the courts, and as necessary as the right of self-protection,—that it is a necessary incident to the execution of the powers conferred upon the courts, and is necessary to maintain its dignity if not its very existence. *It exists independently of statutes.*<sup>35</sup>

This attitude is as weak in foundation as it is long in history. The contempt power is "less unassailable than unquestioned."<sup>36</sup> The inherence of the power is usually explained by recourse to well-established precedent<sup>37</sup>—which proves to be tautological since the precedents cited ordinarily make the identical claim without justification. Contempt proceedings are undoubtedly efficient, but "[c]onsiderations of efficiency pale when compared to the possibility that a judge may abuse the power and infringe on fundamental notions of fairness through procedural due process. If a procedure is efficient, but inherently unfair, it cannot be rationalized as an acceptable method of dealing with undesirable behavior."<sup>38</sup>

The only justification courts have offered for the contempt power is its presumed necessity. It is among "the powers which cannot be dispensed with in a court, because [it is] necessary to the exercise of all others."<sup>39</sup> It is "essential to the preservation of order in judicial pro-

34. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987).

35. E. DANGEL, NATIONAL LAWYERS' MANUAL, *Contempt* 19b (1939).

36. R. GOLDFARB, *supra* note 11, at 4.

37. *See, e.g., Young*, 481 U.S. at 793, 795 n.7.

38. Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 577 (1987); *see also infra* section II of this article.

39. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

ceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice."<sup>40</sup> It "aris[es] from necessity" and is "implied, because it is necessary to the exercise of all other powers."<sup>41</sup> "The power of contempt which a judge *must* have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court, is most important and *indispensable*."<sup>42</sup> "[T]he necessities of the administration of justice require such summary dealing with obstructions to it."<sup>43</sup> "Courts *cannot* be at the mercy of another branch" in initiating contempt proceedings.<sup>44</sup>

Although many courts and commentators have uncritically accepted "the firmly established view that contempt powers are a necessary and inherent element of judicial power," modern research finds them neither inherent nor necessary.<sup>45</sup> All courts in civil law countries, and some inferior courts in the United States and Britain, lack the contempt power; yet they survive.<sup>46</sup> Obviously, then, it is something less than essential to the very existence of every court. The contempt power may be helpful, convenient, and efficient; but in a republic whose constitution grants limited powers to the government, the government's convenience is insufficient justification, without more, for an unbridled use of the contempt power by the judiciary.

### B. *The History of the Contempt Power*

What is the source of this inherent power to punish for contempt? The judiciary always refers to the common law and asserts that the power to protect itself from criticism is essential to its power to exist and function properly. The power of contempt was never given to the court by the people, by constitutional delegation or otherwise, nor did it come from the early Common Law.<sup>47</sup>

Evidence of something closely resembling the contempt power ap-

40. *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873). See also *Ex parte Terry*, 128 U.S. 289, 302, 303 (1888); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821); *In re Savin*, 131 U.S. 267, 274 (1889); *Eilenbecker v. District Court*, 134 U.S. 31, 36, 37 (1889); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 489 (1894); and *In re Debs*, 158 U.S. 564, 595-56 (1895).

41. *Ex parte Terry*, 128 U.S. at 303 (citation omitted).

42. *Cooke v. United States*, 267 U.S. 517, 539 (1925) (emphasis added).

43. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

44. *Young*, 481 U.S. at 793, 796 (emphasis added).

45. See Comment, *The Role of Due Process in Summary Contempt Proceedings*, 68 IOWA L. REV. 177 (1982).

46. R. GOLDFARB, *supra* note 11, at 2, 23.

47. E. DANGEL, *supra* note 35, at 19c (citations omitted).



pears in the writings of the Emperor Justinian, the religious rules of the ancient Roman Popes, and the Theodosian Code.<sup>48</sup> The contempt power appeared in England by about the twelfth century, and it was well-established by the fourteenth.<sup>49</sup> Neither the people nor their legislators had any part in its establishment; rather, it "evolved from the divine law of kings," which emphasized "obedience, cooperation, and respect."<sup>50</sup> The courts adopted the power "less as adjuncts to the king than to protect their own dignity and supremacy."<sup>51</sup> The duty to respect the king expanded into a duty to respect his representatives, including the courts; to flaunt their orders was to flaunt the king himself. After all, he acted through them. The court of equity even used his seal.<sup>52</sup>

The Judiciary Act of 1789 gave federal courts the same contempt powers that English courts had at common law.<sup>53</sup> American courts relied on shaky authority in determining what those powers were.

The present law of contempt in this country has been founded . . . upon the statements of Blackstone in his Commentaries and Sir John Eardley-Wilmot in *King v. Almon* which concerned a contempt by publication. Oddly enough, neither of these authorities forms a legal precedent, for the opinion of Justice . . . Wilmot was never delivered, as the case was dismissed because of technical difficulties. It also appears that in all probability the statements made by Blackstone merely represented the views of Judge Wilmot, and thus it may be said that the present scope of the summary power is due almost exclusively to the opinion of one man.<sup>54</sup>

Nevertheless,

[b]y the twentieth century, the law of Wilmot had, like fine wine, aged to the point of unquestioning respect. English courts adopted the *Almon* decision, cited it, and extended it beyond even Wilmot's probable intent.

The sometimes blind inheritance of common law in American legal attitudes bore this *Almon*-phenomenon of England to the United States, where it was early inculcated as a rule of law.<sup>55</sup>

The broad contempt powers claimed by American courts originated

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48. R. GOLDFARB, *supra* note 11, at 10.

49. J. FOX, *THE HISTORY OF CONTEMPT OF COURT* 1 (1972).

50. R. GOLDFARB, *supra* note 11, at 11.

51. *Id.*

52. *Id.* at 12.

53. *Green v. United States*, 356 U.S. 165, 169 (1958).

54. THOMAS, *PROBLEMS OF CONTEMPT OF COURT* 5 (1934), *quoted in* R. GOLDFARB, *supra* note 11, at 19.

55. R. GOLDFARB, *supra* note 11, at 19.

with the monarch and migrated on a misunderstanding. “[H]istorical assumptions regarding the procedure for punishment of contempt of court were ill-founded,” Justice Frankfurter acknowledged, but that “hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions.”<sup>56</sup>

### C. *Distinctions Between Criminal and Civil Contempt*

Justice Frankfurter’s observation would be less troubling if all contemnors were created equal. Unfortunately, however, they are not. Civil contemnors do not receive the same constitutional protections as criminal contemnors.<sup>57</sup> Yet civil contempt retains an undeniably punitive aspect; after all, civil and criminal contemnors go to the same jails. The Supreme Court has acknowledged as much: “Contempts are neither wholly civil nor altogether criminal.”<sup>58</sup> Endeavoring nonetheless to draw a distinction, the Court stated:

It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. 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.<sup>59</sup>

So far, so good; but if the matter could be disposed of that easily, it would not be in the Court. Some contemnors face remedial and punitive measures simultaneously: “It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison.”<sup>60</sup> However, the Court viewed the conflict as more apparent than real. Incarceration for civil contempt may look punitive, but it is actually remedial.

[I]mprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order . . . mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court’s order.<sup>61</sup>

56. *Green v. United States*, 356 U.S. at 189 (Frankfurter, J., concurring).

57. See *infra* section II-C of this article.

58. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911).

59. *Id.*

60. *Id.* at 441-42.

61. *Id.* at 442.

In other words, a civil contemnor is not being punished, but persuaded. The court fines or imprisons her not to penalize her for past misconduct, but to coerce present or future compliance with its order for the benefit of the other party. The court gives the recalcitrant contemnor the choice of obeying its order or suffering a penalty which continues until she relents.

Thus, refusal "to do an act commanded," if "remedied by imprisonment until the party performs the required act," is civil contempt; "doing an act forbidden," if "punished by imprisonment for a definite term," is criminal contempt.<sup>62</sup> The Court found this distinction "sound in principle," and claimed that it "generally, if not universally, affords a test by which to determine the character of the punishment."<sup>63</sup>

Unfortunately the test has not proven satisfactory because it relies more on the nature of the punishment than on the nature of the conduct. Particular conduct can still constitute both civil and criminal contempt,<sup>64</sup> and the "blurred distinction" between civil and criminal contempt causes "considerable confusion."<sup>65</sup> The Court tried unsuccessfully to clarify the distinction and eliminate the confusion in *Hicks ex rel. Feiock v. Feiock*,<sup>66</sup> its "first modern attempt . . . to enunciate a useful test that courts can apply uniformly."<sup>67</sup> Under *Hicks*, "the character of the relief that the proceeding will afford" determines the kind of contempt committed and thus the kind of protections required; "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires . . ." <sup>68</sup> Imprisonment is punitive (criminal) if for a fixed term, remedial (civil) if it lasts only until the contemnor obeys the order. A fine is punitive if paid to the court, remedial if paid to the complainant or if avoidable upon compliance with the order.<sup>69</sup> Under this basically circular analysis, the type of procedure required depends on the sanction imposed—but imposition of the sanction comes at the end of the proceeding.<sup>70</sup> The Court puts the cart before the horse.

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62. *Id.* at 443.

63. *Id.*

64. See *United States v. United Mine Workers of Am.*, 330 U.S. 258, 299 (1947).

65. Mascolo, *Procedural Due Process and the Reasonable Doubt Standard Of Proof In Civil Contempt Proceedings*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 245, 253 (1988).

66. 485 U.S. 624 (1988).

67. Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and its Role in Child Support Enforcement: Hicks v. Feiock*, 22 CREIGHTON L. REV. 163 (1988).

68. *Hicks*, 485 U.S. at 631-32.

69. *Id.* at 633.

70. See, e.g., Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 683-84 (1981).

## II. THE DANGERS OF EXERCISING CONTEMPT POWERS

In summary, federal and state statutes define disobedient and contumacious conduct in extremely broad terms and grant the courts virtually unbridled discretion to punish it. Even so, courts claim an inherent and independent contempt power immune from legislative control. This "potent weapon"<sup>71</sup> originated not from the people, through constitutional or legislative processes, but from the authority of the king. Well did Justice Black characterize this power as an "anomaly."<sup>72</sup> Civil contemnors are particularly vulnerable, since they do not receive the same due process protections as criminal contemnors. Moreover, to make their theoretically nonpunitive penalty persuasive, their imprisonment or fine is indefinite, enduring until they submit. These facts raise troubling questions about a judge's ability to abuse the contempt power.

### A. Examples of Questionable Use of the Contempt Power

The contempt power's dangers are not merely hypothetical. Most practicing attorneys have a favorite story regarding the contempt power in the hands of a short-fused judge. For example, during a trial in the Common Pleas Court in Philadelphia, the judge ruled against the assistant district attorney. "I don't believe this," the attorney made the mistake of saying. The judge promptly put her in custody and fined her \$1,000.<sup>73</sup>

Criminal defendants are not the only ones subject to the judge's wrath. Spectators have also been held in contempt for trivial offenses such as failing to rise for the judge.<sup>74</sup> More than one thin-skinned judge has held individuals in contempt for insulting the judge out of his presence.<sup>75</sup> One can imagine, then, the reaction when a contemnor insults

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71. *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

72. *Green v. United States*, 356 U.S. at 193 (Black, J., dissenting).

73. *She Wasn't Showing Contempt—She Was Trying Her Best to Conceal It*, *STUDENT LAW.*, Sept. 1984, at 13.

74. *In re Chase*, 468 F.2d 128 (7th Cir. 1972) (criminal defendant; an excellent dissent questions the appropriateness of the contempt conviction); *United States v. Abascal*, 509 F.2d 752 (9th Cir.), cert. denied, 422 U.S. 1027 (1975) (criminal defendant; served two weeks of a 90-day contempt sentence); *United States ex rel. Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969) (two spectators held in contempt; court of appeals upheld the finding of contempt but said that the 2.5 and 4 hours, respectively, which contemnors had already spent in custody was punishment enough). See generally Annotation, *Failure to Rise in Federal Courtroom as Constituting Criminal Contempt*, 27 A.L.R. FED. 915 (1976).

75. *Brutkiewicz v. State*, 280 Ala. 218, 191 So. 2d 222 (1966) (assistant district attorney uttered profanity against a circuit court judge when the court was in recess and the judge had left the courtroom); *Boydston v. State*, 259 So. 2d 707 (Miss. 1972) (an unidentified person asked the judge's opponent in the election, who was standing in a hallway outside the courtroom, what was

the judge *in his presence*.<sup>76</sup>

While such cases may seem as unthreatening as they are amusing, they illustrate the genuine dangers of the contempt power. Other cases have been more serious. In one, a civil rights activist was sentenced to four months in jail by a state trial judge who had become personally involved in the proceeding.<sup>77</sup> In the not-too-distant past, courts routinely used their contempt power to muzzle the press, notwithstanding the first amendment.<sup>78</sup> Warning reporters of the dangers of contempt has kept some authors collecting royalties through several editions.<sup>79</sup> Earlier in this century, organized labor bore the brunt of the contempt power.<sup>80</sup> Although classes of contemnors have changed, the nature of the power has not.

### B. *The Likelihood of Judicial Bias*

Some contemnors invite, and indeed merit, abuse of the court's discretion. One such individual was a criminal defendant named Richard Mayberry, who, in representing himself, uttered the following intemperate remarks:

The Court:	You will get a fair trial.
Mr. Mayberry:	It doesn't appear that I am going to get one the way you are overruling all our motions and that, and being like a hatchet man for the State.

happening inside; for replying "Everything but justice," the judge's opponent was convicted of constructive contempt). These and similar cases are reported in Annotation, *Oral Communications Insulting to Particular State Judge, Made to Third Party Out of Judge's Physical Presence, as Criminal Contempt*, 30 A.L.R. 4TH 155 (1984).

76. See, e.g., *Losavio v. District Court*, 182 Colo. 180, 512 P.2d 266 (1973) (district attorney told probation officer, "it must be nice to have him in your corner;" although the judge didn't hear the remark, the probation officer immediately informed the judge, and the court summarily used its contempt power); *In re Buckley*, 10 Cal. 3d 237, 110 Cal. Rptr. 121 (1973), *cert. denied*, 418 U.S. 910 (1974) (the statement "[t]his court obviously doesn't want to apply the law" resulted in five days in jail and a \$500 fine; upheld on appeal. The court distinguished the case from *In re Little*, 404 U.S. 553 (1972), in which the Supreme Court overturned the contempt conviction of a petitioner who called the court biased and said that it had prejudged his case.). See generally Annotation, *Attorney's Addressing Allegedly Insulting Remarks to Court During Course of Trial as Contempt*, 68 A.L.R. 3D 273 (1976). For some especially amusing examples, see Kilgarlin and Ozmun, *Contempt of Court in Texas—What You Shouldn't Say to the Judge*, 38 BAYLOR L. REV. 291, 326-28 (1986).

77. *Johnson v. Mississippi*, 403 U.S. 212 (1971).

78. R. GOLDFARB, *supra* note 11, at 7; see also L. YANKWICH, *IT'S LIBEL OR CONTEMPT IF YOU PRINT IT* (1950).

79. See, e.g., P. ASHLEY, *SAY IT SAFELY: LEGAL LIMITS IN PUBLISHING, RADIO, AND TELEVISION* (5th ed. 1976).

80. See, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. at 442; *United States v. United Mine Workers of Am.*, 330 U.S. at 299.

- The Court: This side bar is over.
- Mr. Mayberry: Wait a minute, Your Honor.
- The Court: It is over.
- Mr. Mayberry: You dirty sonofabitch.
- . . . .
- Mr. Codispoti: Are you trying to protect the prison authorities, Your Honor? Is that your reason?
- The Court: You are out of order, Mr. Codispoti. I don't want any outbursts like that again. This is a court of justice. You don't know how to ask questions.
- Mr. Mayberry: Possibly Your Honor doesn't know how to rule on them.
- The Court: You keep quiet.
- Mr. Mayberry: You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions.
- The Court: Are you through?
- . . . .
- Mr. Mayberry: Now, I'm going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself.
- . . . .
- Mr. Mayberry: I ask Your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?
- . . . .
- Mr. Mayberry: You're a judge first. What are you working for? The prison authorities, you bum?
- Mr. Livingston: I have a motion pending before Your Honor.
- The Court: I would suggest—
- Mr. Mayberry: Go to hell. I don't give a good God damn what you suggest, you stumbling dog.<sup>81</sup>

Not surprisingly, the jury returned a guilty verdict. Prior to imposing sentence on the verdict, the judge sentenced Mr. Mayberry to eleven to twenty-two years for various criminal contempts.<sup>82</sup> The Supreme Court vacated and remanded, concluding that the Due Process Clause of the fourteenth amendment required that Mayberry receive a public trial "before a judge other than the one reviled."<sup>83</sup> Curiously, the Court suggested that the judge should have punished the contempts immediately

81. *Mayberry v. Pennsylvania*, 400 U.S. 455, 456-58 (1971).

82. *Id.* Mr. Mayberry's reaction is not recorded.

83. *Id.*

and summarily.<sup>84</sup> Evidently the Due Process Clause more easily permits punishment in the heat of the moment than upon sober reflection.

Sometimes the judge, rather than the defendant or counsel, needs to be restrained:

The Court: Motion denied. Proceed.  
 Mr. Offutt: I object to Your Honor yelling at me and raising your voice like that.  
 The Court: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth.<sup>85</sup>

The trial record from which the above exchange was taken revealed numerous manifestations of "an attitude which hardly reflected the restraints of conventional judicial demeanor."<sup>86</sup> The Supreme Court reversed Offutt's conviction of contempt and remanded the case for hearing before a different judge because the original judge had "become personally embroiled."<sup>87</sup>

The magnitude of a contempt sentence may indicate that a judge has become too personally involved.<sup>88</sup> The judge should recuse herself if her bias would preclude an impartial hearing.<sup>89</sup> In general, however, we must hope that judges are capable of dealing fairly with criticism, because a judge who is subjected to disrespect is not necessarily disqualified.<sup>90</sup> In fact, instant summary punishment of direct contempt, even if it emotionally involves the judge, is still allowed.<sup>91</sup> Recusal is permissible but certainly not required:

The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge . . . is not al-

84. *Id.* at 463-64. *But see* Taylor v. Hayes, 418 U.S. 488, 497-99 (1974).

85. Offutt v. United States, 348 U.S. 11, 16 n.2 (1954).

86. *Id.* at 12.

87. *Id.* at 17. A crotchety Justice Minton dissented, arguing that the contemnor in this "piddling case" had been found guilty and that his punishment (two days) was suitable. *Id.* at 18.

88. Taylor v. Hayes, 418 U.S. 488 (1974) (four-and-a-half year sentence).

89. Annotation, *Due Process Clause of Fourteenth Amendment as Requiring Disqualification of State or Local Judge From Participation in Particular Litigation—Supreme Court Cases*, 89 L. ED. 2D 1066 (1988); Annotation, *Disqualification of Judge in State Proceedings to Punish Contempt Against or Involving Himself in Open Court and in His Actual Presence*, 37 A.L.R. 4TH 1004 (1985); Annotation, *Disqualification of Judge in Proceedings to Punish Contempt Against or Involving Himself or Court of Which He Is a Member*, 64 A.L.R. 2D 600 (1959).

90. Sacher v. United States, 343 U.S. 1, *reh'g denied*, 343 U.S. 931 (1952); Ungar v. Sarafite, 376 U.S. 575, *reh'g denied*, 377 U.S. 925 (1964); *cf.* Annotation, *Construction of Provision in Federal Criminal Procedure Rule 42(b) That if Contempt Charges Involve Disrespect to or Criticism of Judge, He is Disqualified From Presiding at Trial or Hearing Except With Defendant's Consent*, 3 A.L.R. FED. 420 (1970).

91. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

ways possible. . . . [W]here conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.<sup>92</sup>

The Supreme Court has stated that courts should “be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.”<sup>93</sup> That is easier said than done. Even judges are human; contumacious conduct directed against them inevitably breeds resentment. Impartiality may be an unrealistic goal for a judge who becomes, in effect, a party to the case. Yet in most contempt proceedings, the very judge against whom the contempt was committed acts as accuser, lawmaker, prosecutor, judge, jury, and disciplinarian.<sup>94</sup> Other offenses are “referred to an independent fact finding tribunal, so that the human emotions of vindictiveness or resentment might play no part in the consideration of the question of guilt.”<sup>95</sup> But contempt is different.

“Since the judge has been given the authority to control all the other participants in the court, there is no one immediately available to control him if he acts improperly or arbitrarily.”<sup>96</sup> Appellate courts, therefore, bear “special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed.”<sup>97</sup> Appellate review, however, is not a sufficient check against judicial bias. Courts of appeal tend to treat trial court contempt convictions with great deference. For example, the ninth circuit does not consider whether the alleged contemnor’s conduct was truly contemptuous; it merely asks whether the judge has abused her discretion<sup>98</sup>—which discretion, as we have seen, is broad indeed. “History is philosophy teaching by example. From what judges have attempted and have done in times past . . . we may draw some pretty shrewd conclusions as to what, if unchecked, they may attempt, and

92. *Cooke v. United States*, 267 U.S. 517, 539 (1925).

93. *Brown v. United States*, 356 U.S. 148, 153 (1958).

94. *Green v. United States*, 356 U.S. at 198 (Black, J., dissenting). The same is true in Canada: “[T]here is nothing in the existing law to prevent the judge, at whom the contempt was directed, from presiding over the determination of the accused contemnor’s guilt.” R. Martin, *Several Steps Backward: The Law Reform Commission of Canada and Contempt of Court*, 21 U. OF W. ONTARIO L. REV., 307, 310 (1983).

95. E. DANGEL, *supra* note 35, at 19b.

96. N. DORSEN & L. FRIEDMAN, *DISORDER IN THE COURT; REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT* 205 (1973).

97. *Green v. United States*, 356 U.S. at 188.

98. *In re Gustafson*, 650 F.2d 1017, 1021-22 (9th Cir. 1981).



may do, in times present."<sup>99</sup>

The great majority of judges are individuals of restraint and balance. But relying on human nature is a poor substitute for procedural protections. Unfortunately, such protections are lacking.

### C. *Absence of Protections*

The Constitution provides significant procedural protections to criminal defendants.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .<sup>100</sup>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>101</sup>

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.<sup>102</sup>

These protections apply partially to criminal contempt but do not apply at all to civil contempt.

As previously noted, statutory definitions of contempt are broad and vague, and judicial definitions are broader. It is difficult to determine in advance precisely what conduct will be held to constitute contempt. Even so, punishment for contumacious conduct can be severe. For example, one can be imprisoned for disobeying a court order to comply with a certain statute even if the statute itself does not authorize imprisonment for its violation.<sup>103</sup> Under the Federal Rules of Criminal Procedure a judge may punish contempts which he sees or hears, or which occur in his presence, summarily and immediately.<sup>104</sup> In other instances the criminal contemnor must be afforded notice and a hearing.<sup>105</sup>

99. J. CAMPBELL, RICHARD HILDRETH, ED., ATROCIOUS JUDGES, LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION, *Introduction* 35 (Hildreth, ed. 1856).

100. U.S. CONST. art. III, § 2, cl. 3.

101. U.S. CONST. amend. VI.

102. U.S. CONST. amend. VIII.

103. Annotation, *Propriety of Imprisonment Under 18 USCS Section 401(3) for Contempt of Court Order Requiring Compliance With Statute Not Authorizing Imprisonment for its Violation*, 41 A.L.R. FED. 900 (1979).

104. FED. R. CRIM. P. 42(a).

105. FED. R. CRIM. P. 42(b); see also Annotation, *Supreme Court's Views as to Right to Trial by Jury in Contempt Proceedings*, 45 L. ED. 2D 815 (1976).

For decades the Supreme Court insisted that no right of trial by jury attached to proceedings for contempt. The Due Process Clause was held inapplicable.<sup>106</sup> In 1968, however, the Court determined that serious criminal contempts, meaning those punished by over six months' incarceration, were crimes in every fundamental respect; thus the jury trial provisions of the Constitution applied.<sup>107</sup>

[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power.<sup>108</sup>

Criminal contemnors have long received other constitutional protections as well. They are presumed innocent; their guilt must be proven beyond a reasonable doubt; they need not testify against themselves; they receive notice of the charges against them and an opportunity to respond; they may employ counsel; they may call witnesses; and they have the right to a public trial at which an unbiased judge presides.<sup>109</sup>

Civil contemnors lack most of these protections. They need not receive an indictment or jury trial.<sup>110</sup> Their guilt need not be proven beyond a reasonable doubt.<sup>111</sup> When a lesser standard of proof applies, the civil contemnor's "incarceration hinges on . . . a standard of proof that does not satisfy criminal due process requirements."<sup>112</sup> Moreover, since "an indeterminate sentence is ordinarily imposed," a civil contemnor "can theoretically remain in jail as long as he obdurately refuses to promise to behave."<sup>113</sup> Although the contemnor "is entitled to a due process hearing, the constitutional and procedural protections for defendants in criminal trials, even the lesser requirements for criminal contempt, are not constitutionally required in civil contempt."<sup>114</sup> As

106. See, e.g., *Eilenbecker v. District Court*, 134 U.S. 31, 36 (1890); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 489 (1894); *Gompers v. United States*, 233 U.S. 604, 610-11 (1914); *Green v. United States*, 356 U.S. 165, 183-87 (1958).

107. *Bloom v. Illinois*, 391 U.S. 194, 198 (1968).

108. *Id.* at 202.

109. *Id.* at 205.

110. *Shillitani v. United States*, 384 U.S. 364, 365 (1966); *Universal City Studios, Inc. v. New York Broadway Int'l Corp.*, 705 F.2d 94, 97 (2d Cir. 1983).

111. At present three different standards of proof are used in civil contempt cases: preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. *Mascolo, Procedural Due Process and the Reasonable Doubt Standard Of Proof In Civil Contempt Proceedings*, 14 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 245, 260-62 (1988).

112. *Id.* at 281.

113. *N. DORSEN & L. FRIEDMAN, supra note 96*, at 104.

114. *Id.*

long as the judge believes that continued imprisonment retains some possibility of coercing compliance, the civil contemnor can be incarcerated indefinitely. In such a circumstance, the artificial distinction between punitive incarceration for criminal contempt and remedial or coercive incarceration for civil contempt becomes meaningless. A civil contemnor with a principled reason for disobedience may end up being subjected to a much harsher penalty than a criminal contemnor.

Of course courts need the ability to maintain order in their proceedings and to enforce their judgments. The contempt power is probably the most practical means to these ends. But since civil contemnors lack many of the protections extended to criminal contemnors and other criminal defendants, the civil contempt power must be exercised with temperance and moderation. It clearly permits judicial abuse; thus, given the civil contemnor's unlimited penalties, any abuse constitutes a serious threat to her property and liberty.

Suppose a party were ordered to take an action she found so morally repugnant that she simply could not comply. Contrary to the cliché, such a contemnor would not have the "jailhouse keys in her own hands."<sup>115</sup> Compliance would not be a realistic option for her. Suppose further that the contemnor is a party to a bitter divorce. The court has awarded custody of the couple's five-year-old girl to the mother but has given unsupervised visitation rights to the father. The girl has displayed both physical and psychological symptoms of sexual abuse. The father heatedly denies any misconduct, but significant evidence points to him as the abuser. Some of this evidence is excluded from court; the remainder is insufficient to meet legal standards of proof. Unpersuaded, the judge orders the mother to produce the child and allow an unsupervised two-week visitation.

Under such circumstances, would any mother worthy of the title produce her child?

Would any court worthy of the title keep her in prison for over two years for refusing to do so?

### III. AN ILLUSTRATION: THE ELIZABETH MORGAN CASE

#### A. *Background*

Educated at Harvard, Yale, and Oxford, a successful plastic surgeon with a flourishing practice, author of four books and numerous columns, Dr. Jean Elizabeth Morgan shared a Washington, D.C., jail with drug dealers, prostitutes, and street criminals for two years and one month. Never convicted of or even charged with a crime, she was

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115. *In re Nevitt*, 117 F.2d 448, 461 (8th Cir. 1902).

imprisoned for civil contempt. Her offense: refusing to produce her five-year-old daughter Hilary. District of Columbia Superior Court Judge Herbert B. Dixon, Jr., had awarded Hilary's father two weeks of unsupervised visitation. Morgan refused to allow it because, she alleged, the father had repeatedly subjected Hilary to sexual abuse. Rather than expose her daughter to the danger of more, Morgan sent Hilary into hiding and then went to jail while a \$5,000-per-day fine mounted. Along with her liberty, Morgan lost her medical practice and her home. It took an Act of Congress to secure her release.

In January 1982, Dr. Morgan flew to Haiti with Dr. Eric A. Foretich, an oral surgeon from McLean, Virginia. There Foretich obtained a Haitian divorce from his second wife and married Morgan, his third. Seven months later, Morgan left him; like his second wife, she accused him of ill temper and violence. On August 21, 1982, a week after their separation, Morgan gave birth to Hilary. In November, 1982, she got a Haitian divorce. The following spring Morgan and Foretich sued each other for custody of Hilary in the District of Columbia Superior Court.<sup>116</sup> Thus began a legal battle of remarkable breadth, expense, and acrimony. Within five years, their file had become the largest the District of Columbia Court of Appeals had ever seen in a custody case,<sup>117</sup> and their legal bills had totaled over \$2 million.<sup>118</sup>

In November 1983, the court awarded custody to Morgan and visitation rights to Foretich.<sup>119</sup> What happened thereafter is, to put it mildly, a matter of some dispute. According to Foretich:

From the age of one month she [Hilary] was placed in day care until well into the evening. At six months, she was taken to a psychiatrist to shore up her mother's contention that a young child should have no independent visitation with her father. Since then, her mother has taken her to a succession of therapists in an endeavor to find a professional to assist in her goal of limiting my role in Hilary's life.<sup>120</sup>

Why would Morgan want to do that? "She flat-out used me. I was nothing more than a sperm bank to her. I was discardable."<sup>121</sup>

Morgan, on the other hand, accused Foretich and his parents of sexually abusing Hilary almost from infancy.<sup>122</sup> Strong evidence sup-

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116. Washington Post, April 25, 1988, at A1, col. 1.

117. Washington Post, Aug. 28, 1988, at C6, col. 4. Morgan's attorney said it looked more like a file for a federal antitrust action. *Id.*

118. Washington Post, April 25, 1988, at A1, col. 1.

119. *Id.*

120. Foretich, *My Daughter Hilary*, Washington Post, April 30, 1989, at C8, col. 2.

121. Inquiry, USA Today, July 24, 1989, at 12A, col. 1.

122. Washington Post, Aug. 27, 1987, at C6, col. 1.

ported her accusation.<sup>123</sup> The United States Court of Appeals for the Fourth Circuit declared: "There appears to be little doubt but that Hilary has been subjected to a startling condition. Testimony of the doctors and other witnesses was sufficient to justify a finding that Hilary has been sexually abused."<sup>124</sup> Hilary demonstrated both physical and psychological symptoms of abuse, including suicidal tendencies. In a letter to Foretich dated May 27, 1987, Mary L. Froning, Psy.D., of the Chesapeake Institute—Hilary's psychotherapist for the twenty months preceding her hiding—wrote:

It is my opinion that Hilary is currently suicidal because she believes she is worthless. This feeling of worthlessness is based on the fact that although she has told many people that she was sexually abused by her father and that she does not want to have visits with her father, she has been continually forced into visits which she considers frightening situations.<sup>125</sup>

Hilary also displayed other psychological symptoms of abuse. The *Washington Post* reported that Hilary had been recorded on videotape "talk[ing] repeatedly about grilling and eating her baby doll. 'Turn the burner on her,' she instructed her mother."<sup>126</sup> When told after a hiatus that paternal visits would resume, Hilary reportedly shrieked and began sobbing.<sup>127</sup> Morgan's fiance, Judge Paul R. Michel, testified before Judge Dixon that he had helped drive Hilary to the court-ordered visits. "I counseled her to obey the orders of this court," he said, "and I don't regret anything more than doing that."<sup>128</sup> Judge Michel would not lightly advocate disobedience of a court order; he sits on the United States Court of Appeals for the Federal Circuit.<sup>129</sup>

Foretich's public statements did little to help his cause. Responding to the charge that numerous specialists had diagnosed sexual abuse, Foretich claimed that Morgan's expert witnesses were "complete, utter phonies or they're incompetent. She picked the bottom of the barrel."<sup>130</sup> Actually, eleven individuals (including a psychologist, a gynecologist, a pediatrician, and a police officer) diagnosed Hilary as sexually abused.<sup>131</sup> Unlike Foretich, the United States Court of Appeals for the

123. See *Morgan v. Foretich*, 846 F.2d 941, 942-46 (4th Cir. 1988).

124. *Id.* at 947.

125. 135 CONG. REC. S10814 (daily ed. Sept. 7, 1989) (statement of Senator Armstrong); see also *N.Y. Times*, Nov. 14, 1987, at A1, col. 5.

126. *Washington Post*, April 25, 1988, at A1, col. 1.

127. *N.Y. Times*, Nov. 14, 1987, at A1, col. 5.

128. *Washington Post*, Dec. 14, 1988, at D1, col. 2.

129. *Id.*

130. *Inquiry*, *USA Today*, July 24, 1989, at 12A, col. 1.

131. 135 CONG. REC. S10815 (daily ed. Sept. 7, 1989) (statement of Senator Armstrong).

Fourth Circuit considered these specialists competent to testify.<sup>132</sup> One was Dr. Dennis Harrison, "who had been qualified as an expert in psychology and child abuse and who had spent over one hundred hours examining and working with Hilary Foretich."<sup>133</sup> Another was Dr. Charles Shubin, "a pediatrician who was qualified as an expert in the field of child sexual abuse."<sup>134</sup>

Heather, Foretich's daughter by his second wife, sustained injuries similar to Hilary's. To the concerns about those injuries, Foretich replied that his second wife had "been trying to brainwash Heather."<sup>135</sup> Again, the fourth circuit had a different opinion:

At trial, plaintiffs [Dr. Morgan and Hilary] sought to introduce testimony by Dr. Charles Shubin . . . Dr. Shubin . . . was prepared to testify that both girls had suffered sexual injuries and that the mechanism of injury was essentially the same in both cases. Plaintiffs also had numerous other professionals and lay witnesses who were prepared to testify that Heather had been sexually abused during visitation periods with the defendants.<sup>136</sup>

The fourth circuit held that the district court abused its discretion by excluding evidence of Heather's abuse.<sup>137</sup> Not only was this evidence admissible, it was "highly relevant to disputed issues in this case."<sup>138</sup> Indeed, it was

essential in that it tended to identify the defendants as the perpetrators of the crime against Hilary since only the defendants had access to both girls. No other piece of evidence could have had a comparable probative impact as to the identity of Hilary's assailants. This evidence also negated several defenses raised by the defendants: Hilary's injuries were caused by Dr. Morgan; were fabricated by Dr. Morgan; or were caused by self-infliction.<sup>139</sup>

Thus, Morgan seemed to have ample ground for suspicion.

On the other hand, Foretich, whom even a sympathetic columnist identified as "clearly a mess of a man," maintained his innocence and passed several lie detector tests.<sup>140</sup> One of three psychologists who examined Foretich said that his test results suggested "sexual ideation

132. *Morgan v. Foretich*, 846 F.2d at 943-44.

133. *Id.* at 948.

134. *Id.* at 943.

135. Inquiry, USA Today, July 24, 1989, at 12A, col. 1.

136. *Morgan v. Foretich*, 846 F.2d at 943-44.

137. *Id.* at 942.

138. *Id.* at 944.

139. *Id.*

140. *Morganatic Marriage*, TRB From Washington, The New Republic, July 31, 1989, at

with young girls," but the other two found no problems.<sup>141</sup> Judge Dixon found that Hilary enjoyed her visits with Foretich,<sup>142</sup> and implicitly accused Morgan not only of inconsistency in her testimony but also of going to any length and indulging in theatrics.<sup>143</sup> Morgan appeared to have an agenda beyond protecting Hilary. She had written, "I am utterly convinced that when a little child is taken from its loving mother, even for visitation, it may lose its natural protector and its security. Men are all very well, but nature didn't make men for rearing little children."<sup>144</sup> Morgan also accused Foretich of offenses other than child abuse, including drug dealing; unproven, these only drew attention to inconsistencies in her own story—which she had paid a media consultant to publicize.<sup>145</sup>

In federal court, neither party won suits accusing the other of abuse. Morgan won on appeal—the Fourth Circuit instructed the district court to admit the evidence discussed above—but the case could not proceed without Hilary, whose return Morgan would not risk.<sup>146</sup> In the District of Columbia Superior Court, Morgan retained custody, but Foretich retained his rights to visitation. The proceedings were almost as mysterious as they were voluminous. Noting that Morgan had been sent to jail without a public hearing, the *New York Times* complained that it was "impossible to detail all the charges, since the case is currently under seal and reporters have been barred from the courtroom."<sup>147</sup> "Because the proceedings have been closed," said Stephen H. Sachs, the former attorney general of Maryland, who represented Morgan, "the public cannot know the strength of Elizabeth Morgan's case."<sup>148</sup> Of course, the public could not know the strength of Foretich's defense either.

Thus it is hard to know which party—if either—is telling the truth. But two things are certain: first, Hilary strenuously resisted going to her father; second, she showed clear signs of sexual abuse.

Judge Dixon held a hearing on Morgan's allegations of sexual abuse in November 1985. In August 1986, he held another hearing which lasted twelve days and ended with Morgan going to jail. After

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141. Washington Post, April 25, 1988, at A1, col. 1.

142. Washington Post, Aug. 29, 1987, at B3, col. 1.

143. Washington Post, April 25, 1988, at A1, col. 1.

144. From the last chapter of her book *CUSTODY*, quoted in the Washington Post, April 25, 1988, at A1, col. 1.

145. Washington Post, April 25, 1988, at A1, col. 1.

146. See *Morgan v. Foretich*, 846 F.2d 941.

147. N.Y. Times, Nov. 14, 1987 at A1, col. 5; see also Washington Post, Aug. 27, 1987, at C6, col. 1.

148. Washington Post, Aug. 29, 1987, at B3, col. 1.

three days the District of Columbia Court of Appeals ordered her release. In February 1987, she went to jail again; again she was released after three days, agreeing to allow *supervised* visits.<sup>149</sup> In April 1987, Judge Dixon ordered *unsupervised weekend* visits. Hilary went; Morgan alleged that she was abused again. Hilary's court-appointed guardian, attorney Linda Holman, stated that the child's mental and emotional health was jeopardized.<sup>150</sup> On July 16, 1987, Hilary's therapist wrote:

Dear Dr. Morgan:

I am writing to you to express my concern over Hilary's continuing to be compelled to undergo unsupervised visits with her father. I am fully aware of the legal issues that you face should you not comply with Court-ordered visitation. However, in my role as Hilary's therapist, I must reiterate my position that for her physical and emotional safety she should not be continually placed in the jeopardy that these visits place her.

Hilary's emotional health has suffered tremendously in recent weeks, but particularly since her disclosure to Detective Williams of recent abuse. This is understandable given the fact that not only did that not protect her but has now exposed her to even more abuse because of her father's anger for the perceived betrayal . . . .

I understand that you have attempted to remain neutral concerning the visits and Hilary's father's abusive behavior toward her. However, this too is having a bad effect on Hilary, who has become even more hopeless and depressed as her feelings remain invalidated by you. . . .

I empathize with the dilemma you face to meet both your legal and maternal responsibilities. I just wanted to make clear the risks for Hilary.

Sincerely,  
Mary L. Froning, Psy.D.,  
Staff Psychologist.<sup>151</sup>

In August 1987, Judge Dixon ordered an unsupervised two-week visit.<sup>152</sup> There Morgan drew the line.

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149. Washington Post, April 25, 1988, at A1, col. 1; Lewis, *The Limits of Law*, N.Y. Times, Dec. 22, 1988, at A23, col. 1; Morgan v. Foretich, 521 A.2d 248 (D.C. 1987); Morgan v. Foretich, 528 A.2d 425 (D.C. 1987).

150. Washington Post, April 25, 1988, at A1, col. 1.

151. The entire letter is reprinted in 135 CONG. REC. S10815 (daily ed. Sept. 7, 1989) (statement of Senator Armstrong).

152. Washington Post, Aug. 27, 1987, at C6, col. 1; Washington Post, April 25, 1988, at A1, col. 1.



### B. *Finding of Contempt and Incarceration*

On August 26, 1987, in a partly closed hearing, Judge Dixon found Elizabeth Morgan in contempt for failing to obey his August 21 order to produce Hilary. He imposed a fine of \$5,000 per day and sentenced her to prison until she complied.<sup>153</sup> On August 28, 1987, Morgan appeared again before Judge Dixon. She did not wish to break the law, her attorney argued, but she had to protect her daughter; she was convinced that further unsupervised visits would result in further abuse. The judge stated that the issue of visitation had already been decided and asked where Hilary was. "I'm not going to answer that," Morgan calmly replied.<sup>154</sup> Judge Dixon then instructed the District of Columbia police to find Hilary, after which the U.S. Marshals took Morgan from the courtroom to the jail.<sup>155</sup> The Supreme Court later denied an application for a stay.<sup>156</sup>

After five months, Morgan was still in jail, vowing to remain until Hilary turned eighteen, if necessary.<sup>157</sup> After eight months the *Washington Post* reported that a habeas corpus petition had proved unfruitful, and "[t]he stalemate, whose most obvious victim is the child, remains unbroken."<sup>158</sup> Morgan likened herself to Galileo. "I know that I am right, and I know that I'm sane," she said. "I know that if the facts were known everybody would know it."<sup>159</sup>

After twelve months, Morgan's incarceration was reported to be the longest ever in such a case.<sup>160</sup> A Harvard law professor said she followed in the tradition of Gandhi and Martin Luther King. An unidentified District of Columbia Superior Court judge said that the mere threat of jail usually coerced compliance; if not, a week or two in jail did the trick. But an entire year for civil contempt! Researchers said that most other long-term civil contemnors were Mafiosi and Puerto Rican radicals. Lawyers said that some courts had developed a rule of thumb that if incarceration for civil contempt hadn't worked after about six months, it wasn't going to work at all. Morgan said, "My surgical residency was a lot harder."<sup>161</sup> And the second year of imprisonment

153. *Washington Post*, Aug. 27, 1987, at C6, col. 1; see *Morgan v. Foretich*, 546 A.2d 407 (D.C. 1988), cert. denied, 109 S. Ct. 790 (1989), and *Morgan v. Foretich*, 564 A.2d 1 (D.C. 1989).

154. *Washington Post*, Aug. 29, 1987, at B3, col. 1.

155. *Id.*

156. *Morgan v. Foretich*, 483 U.S. 1053 (1987).

157. *USA Today*, Jan. 29, 1988, at 2A, col. 1.

158. *Washington Post*, April 25, 1988, at A1, col. 1.

159. *Id.*

160. *Washington Post*, Aug. 28, 1988, at C1, col. 1 (final ed.).

161. *Id.*

began.

After fourteen months, the *Washington Post* reported that the custody battle “has increasingly taken the character of a dispute between Morgan and the judge.”<sup>162</sup> Steve Sachs made an impassioned appeal before Judge Dixon:

If 14 months doesn't slake the thirst for vindication, then I say to the court and I say to the corporation counsel . . . ‘Prosecute her. Prosecute her!’

If Elizabeth Morgan is to be punished, let's do it the old-fashioned way: with a trial and a jury of her peers and a presumption of innocence.

Yes, vindicate the authority of the law. But there's a difference between vindication and vindictiveness.<sup>163</sup>

His argument was to no avail.

After fifteen months, Morgan remained unbending. “I know that I have done the right thing,” she said.<sup>164</sup> Appearing in court on December 13, 1988, for the first time since her imprisonment, she refused to compromise and refused to bring Hilary back.<sup>165</sup> At a hearing the following day, all seemed to agree that if Morgan would never relent the coercion would be punitive and thus impermissible. “Analysts say that most defendants never test the outer limits of confinement under civil contempt,” reported the *Washington Post*, “either because they submit to the court's authority or because their case becomes moot.”<sup>166</sup> Morgan was testing—and arguably stretching—those limits. Foretich's attorney bristled at suggestions that Morgan had been denied due process, though, charging that she “blithely—blithely—[threw] away the presumption of innocence” in accusing his client of sexual abuse.<sup>167</sup>

On December 15, 1988, Judge Dixon issued his ruling. This case has “tried my very existence and gnawed at me as a human being,” he said, but “the coercion has only just begun”<sup>168</sup>—a phrase he uttered three times.<sup>169</sup> Judge Dixon emphasized that the imprisonment was intended to enforce his order, not to punish Morgan for disobedience.<sup>170</sup> “It is more probable than not that Dr. Morgan believes she can undermine court orders . . . by the mere allegation of such an offense as

162. *Washington Post*, Nov. 2, 1988, at D1, col. 1 (final ed.).

163. *Id.*

164. *Washington Post*, Dec. 14, 1988, at D1, col. 2.

165. *Id.*

166. *Washington Post*, Dec. 15, 1988, at B3, col. 1.

167. *Id.*

168. *N.Y. Times*, Dec. 16, 1988, at D20, col. 4 (city ed.).

169. *Washington Post*, Dec. 16, 1988, at A1, col. 1.

170. *N.Y. Times*, Dec. 16, 1988, at D20, col. 4 (city ed.).

repulsive as child abuse," the judge said.<sup>171</sup> He added, "It could be a month, it could be a year, it could be more than that" before he would be convinced that she would not relent.<sup>172</sup> Morgan prepared to spend a second consecutive Christmas in jail, "appear[ing] certain to exceed the sixteen months in jail that previously marked the record for civil contempt of court in a reported case," said the *Washington Post*.<sup>173</sup>

Incidentally, that ruling followed the hearing at which Judge Michel testified.<sup>174</sup> Foretich responded to Judge Michel's poignant testimony, characteristically, by filing a complaint charging him with official misconduct.<sup>175</sup> Morgan's attorneys, meanwhile, argued that because the custody and contempt hearings were held in secret, her due process rights had been violated. On January 9, 1989, the Supreme Court declined to hear the matter.<sup>176</sup>

After Morgan had been in jail twenty months, Foretich publicly proposed a compromise. He asked to:

1. See Elizabeth Morgan released from confinement. I would then drop my request . . . for termination of her parental rights.

2. Have Hilary hospitalized to ascertain her physical, emotional and psychiatric status. After this evaluation process, she would be placed in a foster home where both parents would have supervised visitation.

3. Participate (as I stated before the D.C. Court of Appeals in April 1988) in a multi-disciplinary evaluation of all parties. . . . The members of this team could be picked by Hilary's attorney, or they could be selected by the American Psychiatric Association and/or the American Psychological Association. I would abide by their decision.

4. Let Hilary's attorney appoint a well-credentialed and respected psychiatrist to review the records and testify to the present psychiatric state of Elizabeth Morgan, if she is no longer willing to participate in this approach. Hilary would be evaluated by a similarly competent child psychiatrist; if the child psychiatrist finds that it would be in Hilary's best interest that I give up visitation, I would do so, although it would be extremely painful to me.<sup>177</sup>

However, there were conditions. The proposal was "[p]redicated upon Hilary's return and placement with the appropriate authorities."<sup>178</sup>

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171. *Washington Post*, Dec. 16, 1988, at A1, col. 1.

172. *Id.*

173. *Id.*

174. *See supra* notes 128-29 and accompanying text.

175. *Washington Post*, Jan. 10, 1989, at D3, col. 1.

176. *Morgan v. Foretich*, 109 S. Ct. 790 (1989); *Washington Post*, Jan. 10, 1989, at D3, col.

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177. Foretich, *My Daughter Hilary*, *Washington Post*, April 30, 1989, at C8, col. 1.

178. *Id.*

Having endured twenty months in jail to keep Hilary *away* from the authorities, Morgan was not about to turn her over to them on the basis of a promise from Foretich. On June 8, 1989, Morgan, Foretich, and the mediators met in a jury room. All emerged unscathed, but no resolution resulted.<sup>179</sup>

After nearly twenty-one months, Sachs argued before a three-judge panel of the District of Columbia Court of Appeals that since Morgan could never be forced into compliance, her incarceration was punitive and thus constitutionally impermissible.<sup>180</sup> While that court's decision was pending, "[t]he stakes were raised dramatically . . . in the twenty-one month test of wills between Elizabeth Morgan and D.C. Superior Court Judge Herbert B. Dixon Jr. when Robert M. Morgan, an assistant U.S. attorney, joined his older sister in open defiance of the court."<sup>181</sup> Judge Dixon asked Robert Morgan for the location of his parents, who disappeared the same month as Hilary. Robert Morgan responded:

"Your honor, I have appeared before most of the judges of this court, and I have the greatest respect for its jurisdiction," Morgan said, "but I respectfully decline to answer that, or any other question which could lead to the discovery of my niece or further harm to her."

"As an order of the court, under pain or penalty of contempt, answer the question, Mr. Morgan," Dixon said.

"My answer is the same," Morgan replied, softly but firmly.

The courtroom fell silent as that line was crossed . . . .<sup>182</sup>

Robert Morgan disobeyed twenty-six direct orders to answer questions. Although Judge Dixon did not incarcerate Morgan, he reminded him that he could, and ordered him to report any change of address or employment.<sup>183</sup> Having risked not only his job but professional discipline as well, Robert Morgan was placed on indefinite administrative leave. The entire United States Attorney's Office had already recused itself from any prosecution which might arise out of *Morgan v. Foretich*.<sup>184</sup>

After almost twenty-two months, on June 19, 1989, Judge Dixon issued a finding that Morgan might yet relent.<sup>185</sup> The *Washington Post* noted that Representative Wolf's bill to limit incarceration for civil con-

179. *Washington Post*, June 9, 1989, at B3, col. 1.

180. *Washington Post*, May 25, 1989, at B3, col. 1; *see Morgan v. Foretich*, 564 A.2d 1 (D.C. 1989).

181. *Washington Post*, June 10, 1989, at A1, col. 1.

182. *Id.*

183. *Id.*

184. *Washington Post*, June 14, 1989, at D1, col. 5.

185. *Washington Post*, June 20, 1989, at A1, col. 4; *see Morgan v. Foretich*, 564 A.2d 1 (D.C. 1989).

tempt (*see infra* section IV) was progressing through the House, and added:

Last week, moreover, the appeals court reversed Dixon's use of his contempt power in an unrelated case.

Although that case concerned criminal, not civil, contempt, the appeals court used broad language to admonish Dixon that "the Supreme Court has taken special pains to emphasize that courts should exercise great restraint in using the contempt power."<sup>186</sup>

### C. *Public Outcry*

Judge Dixon's judgment was questioned long before that rebuke. Morgan had become "one of the best-known female prisoners in the country, and something of a cause celebre among mothers who have claimed that their children have been abused by noncustodial fathers."<sup>187</sup> Outraged that "the woman has been jailed without a trial, without being found guilty of any crime, for a year," one columnist wrote:

She is not the first, nor will she be the last, child whose mother believes she has been sexually abused by the noncustodial parent. This is the only case, however, at least around these parts, where the mother has done a year of time for contempt, where litigation has gone on for so long, where a child has been forced into hiding, and where the livelihoods of both parents have been jeopardized if not destroyed. Other parents and other judges, quite obviously, have figured out less destructive ways of handling these cases.<sup>188</sup>

"Not a single person has benefited from the heavy-handed handling of this case," the columnist fumed. "Dixon ignored evidence he didn't want to hear, then tossed the key away on a mother trying to protect her child."<sup>189</sup>

A professor of law who worked for Morgan's release issued a more judicious criticism:

Coercive contempt concentrates in the judge's hands the state's power to deprive a citizen of liberty without the usual checks from a prosecuting attorney, a grand jury, and a jury. Judge Dixon's initial fact-finding, that Dr. Morgan's charge of abuse was not proved, is precarious and potentially incorrect; the cost of an incorrect prediction is

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186. *Morgan*, 564 A.2d 1, 7 (D.C. 1989).

187. Judy Mann, *The Heavy-Handed Judge*, Washington Post, Aug. 26, 1988, at C3, col. 4.

188. *Id.*

189. *Id.*

high, perhaps as high as a child's twisted and tormented psyche.<sup>190</sup>

Even if Dr. Morgan's story were false, the incarceration had done Foretich no good. Everyone was losing: Morgan, Hilary, the taxpayers. But what if the story were true? Either way, civil contempt "focuses state power in a way that makes us uncomfortable and sometimes produces results that appear outrageous."<sup>191</sup>

The result certainly appeared outrageous to the National Organization for Women and Friends of Elizabeth Morgan. The two groups held a joint rally after Dr. Morgan had been in jail fifteen months. Alice Monroe, coordinator of Friends of Elizabeth Morgan, reported to the crowd that Judge Dixon had found the evidence "in equipoise," and asked: "[If] you thought you had a 50-50 chance of being raped on the way to the movie, would you go?"<sup>192</sup> Columnist Anthony Lewis attended one of the hearings in which Morgan sought to prove that she could not be coerced. "I found myself disturbed as I seldom have been by a legal proceeding," he wrote.<sup>193</sup> Morgan described the six-foot-wide cell she shared, the showers and toilet open to view, the blaring music, and explained that she endured such conditions because Hilary "begged me to hide her."<sup>194</sup> "Suppose the evidence, partially heard, was 'in equipoise' on sexual abuse," Lewis argued. "Even that made unsupervised visits too grave a risk."<sup>195</sup>

One snide writer called Morgan "the thinking woman's Tawana Brawley" and explained the controversy thus: "Morgan, a super-achiever who had previously failed at nothing in her life, and also something of a self-dramatizer, was humiliated and bitter" because of her brief and unsuccessful marriage to Foretich.<sup>196</sup> Far more common was the attitude of Mary McGrory, who wrote: "It takes more than a hunger for melodrama and vengeance to explain why Elizabeth Morgan stays in jail." This woman "had it all: a lucrative practice as a plastic surgeon, a fine house in Northwest, a new and distinguished fiance." She abandoned it all only because "jail is better than the hell of imagining what was happening to her daughter."<sup>197</sup> McGrory ob-

190. Rendleman, *Enough Is Enough: Set Dr. Morgan Free*, *Legal Times*, Sept. 12, 1988, at 1, col. 1.

191. *Id.*

192. Groner, *Morgan's Friends Demonstrate Their Contempt for Court*, *Legal Times*, Dec. 5, 1988, at 2, col. 1.

193. Lewis, *Judgment of Solomon*, *N.Y. Times*, Dec. 15, 1988, at A39, col. 1.

194. *Id.*

195. *Id.*

196. *Morganatic Marriage*, TRB from Washington, *The New Republic*, July 31, 1989, at 4.

197. McGrory, *Morgan's Choice*, *Washington Post*, Dec. 15, 1988, at A2, col. 5.

jected to the exclusion of much relevant evidence, including a "harrowing passage" in which Heather describes "what 'Daddy' did to Hilary in the course of a weekend visit."<sup>198</sup> Even after such evidence was excluded, Judge Dixon's own statement that the evidence of abuse was in equipoise "makes his order for unsupervised visits incomprehensible," said McGrory.<sup>199</sup>

"It is a story that will not leave my mind," Lewis began a second column.<sup>200</sup> "[B]y now the imprisonment is lowering public respect for law. Relentless disregard of humane concerns is never good for the law."<sup>201</sup> Even the *Washington Post* editorialized, "[T]he judge has long since proved his point. Why is he continuing to make an example of Dr. Morgan?" Her continued imprisonment "serves no purpose."<sup>202</sup>

After nearly twenty-three months of incarceration, Morgan reiterated her intention to stay in jail until Hilary turned eighteen. "I gave up my daughter. I gave up my family. I barely see them. I gave up my fiance. We wanted to get married. I gave up my practice. But, in exchange, I wanted God to protect my child, and He's made it possible."<sup>203</sup> As columnists and talk show hosts around the country featured the Elizabeth Morgan story, it became apparent that judicial insensitivity to child abuse victims and protective parents was perhaps the rule rather than the exception. "There are many mothers before me who have done this," said Morgan, lamenting "case after case in this country of judges who don't believe."<sup>204</sup> Attorneys at the National Center on Women and Family Law claimed to have represented several clients in Morgan's position.<sup>205</sup> Women in other jurisdictions have also been incarcerated under similar circumstances.<sup>206</sup>

A 1979 study estimated that one female child in five is sexually abused. Most incidents of abuse are not reported; those that are reported rarely result in convictions.<sup>207</sup> While Morgan remained in an overcrowded jail "with no room for murderers, rapists and robbers," wrote one columnist, a tragically high percentage of children are sexually abused each year—in most cases, by a close relative.<sup>208</sup> Morgan

198. *Id.*

199. *Id.*

200. Lewis, *The Limits of Law*, N.Y. Times, Dec. 22, 1988, at A23, col. 1.

201. *Id.*

202. *The Elizabeth Morgan Stalemate*, Washington Post, Jan. 26, 1989, at A24, col. 1.

203. Inquiry, USA Today, July 24, 1989, at 12A, col. 1.

204. *Id.*

205. Washington Post, Aug. 28, 1988, at C1, col. 1 (final ed.).

206. Washington Post, May 22, 1989, at D1, col. 1.

207. *Morgan v. Foretich*, 846 F.2d at 943 (citation omitted).

208. Reynolds, *Sometimes a Mother Must Defy the Law*, USA Today, Sept. 8, 1989, at 13A, col. 4.

had become a "national symbol of mothers protecting incest victims."<sup>209</sup> Letters and phone calls demanding action began pouring into Congress.

#### IV. CONGRESSIONAL RESPONSE

##### A. *Bills Introduced*

###### 1. *H.R. 2136*

On April 26, 1989, Representative Frank R. Wolf (R-Va.) introduced H.R. 2136, a bill

to amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in a child custody case in the Superior Court of the District of Columbia and to provide for expedited appeal procedures to the District of Columbia Court of Appeals for individuals found in civil contempt in such a case.<sup>210</sup>

Senator Orrin G. Hatch (R-Utah) introduced S. 1163, a similar bill, on June 13, 1989.<sup>211</sup> Wolf's bill limited incarceration to eighteen months; Hatch's bill limited incarceration to twelve months. Both bills were inspired by Dr. Elizabeth Morgan's plight, and both were retroactive to January 1, 1987, in order to cover her. However, neither was a private bill to release only her. Both bills would have applied to anyone similarly situated in the District of Columbia. The bills were limited to the District of Columbia because Congress has no authority to limit the contempt power of state courts, and child custody actions are not brought in the federal courts.

H.R. 2136 was scheduled for a hearing before the Subcommittee on Judiciary and Education of the Committee on the District of Columbia on May 23, 1989. Foretich's attorney, of course, criticized the bill, but groups fighting child abuse praised it, hoping that it would inspire similar reforms in the states and prevent other people from facing Morgan's dilemma.<sup>212</sup> Several experts testified at the hearing, including Ronald Goldfarb, Doug Rendleman, and Robert Martineau.<sup>213</sup> All had at least minor suggestions for improvement in the bill, but all agreed that the contempt power should be limited. Goldfarb worried about the separation of powers; the pardon is an executive power, he argued, and this bill looked like a pardon for Elizabeth Morgan. But

209. Mann, *Resolving a Contemptible Issue*, Washington Post, May 5, 1989, at C3, col. 4.

210. H.R. 2136, 101st Cong., 1st Sess., 135 CONG. REC. H1427 (1989).

211. S. 1163, 101st Cong., 1st Sess., 135 CONG. REC. S6532 (1989).

212. Torry, *Dr. Morgan's Freedom May Lie in Bill to Limit Contempt Stays*, Washington Post, May 22, 1989, at D1, col. 1.

213. See *supra* notes 11 (Goldfarb), 27 (Martineau), and 190 (Rendleman).



Rendleman, who discussed the potential for abuse of the contempt power and favored curbing it, was supportive. Martineau, who helped draft a 1980 Wisconsin statute limiting incarceration for contempt to only six months, reported that the limit resulted in no detectable increase in defiance of court orders. Representative Wolf also testified in favor of the bill, expressing concern that Morgan had been jailed longer than some violent criminals. Replying to critics of the bill, Wolf said that it would not be fair to change the law prospectively only and leave Morgan unprotected.<sup>214</sup>

Shortly thereafter, Representative Wolf published a defense of his bill in *Roll Call*, the unofficial newspaper of Capitol Hill. He wrote:

I believe that in cases such as this the interests of the child are paramount. We must think of the child first . . . . I do not believe that a child who is denied the care of either of her parents is being well served.<sup>215</sup>

Keeping Morgan in jail, he continued, would not help find Hilary. If Morgan had not submitted to the court order after eighteen months, she was simply not going to.

A system which punishes a child by allowing a parent who has been convicted of no crime to be imprisoned indefinitely—longer than many drug dealers, burglars, and armed robbers—without producing compliance, does not serve the interests of the child involved or of the parents involved. The law needs to be corrected and my legislation is a solid starting point.<sup>216</sup>

## 2. S. 1163

On June 13, 1989, Senator Hatch introduced his bill, S. 1163. Seeking co-sponsors, he circulated a letter to all senators which argued:

In disputes where one parent refuses to produce the child for the other and the court invokes its civil contempt power to incarcerate the recalcitrant parent, the child is indefinitely deprived of both parents.

One such parent is Dr. Elizabeth Morgan, who has now spent 22 months in jail. Hers is a Hobson's choice: either surrender her daughter to someone she believes sexually abused the child or stay in

214. Torrey, *Bill to Limit Civil Contempt Sentence Debated in Shadow of Jailed Doctor*, Washington Post, May 24, 1989, at B3, col. 1.

215. Wolf, *Elizabeth Morgan Case: What Can Congress Do?* *Roll Call* (the Newspaper of Congress), May 29-June 4, 1989; reprinted in 135 CONG. REC. H3244 (Daily ed. June 27, 1989). This argument is disingenuous; the bill is designed to protect contemnors, not their children. Children may benefit incidentally, but they may not. Morgan's release notwithstanding, Hilary remains without the direct care of either parent.

216. *Id.*

jail indefinitely. I am not taking sides in the Morgan-Foretich dispute. I believe, however, that under such circumstances a mother's sense of protectiveness should not be punished forever. Regardless of the merits of Morgan's particular case, present D.C. law regarding civil contempt does not take into account unique concerns arising in child custody cases.

Mothers in other jurisdictions have also been imprisoned under the contempt power for refusing to send their children to court-ordered visitations with ex-husbands accused of sexual abuse. The bill I introduce today simply places a 12-month cap on imprisonment for contempt in such cases in the District of Columbia. Its effect on the administration of justice will be negligible, but the limited changes applicable to child custody cases would afford necessary protection not only to parents but to children, who are the real losers in such cases.<sup>217</sup>

Senator Hatch presented an extensive statement along with the bill. After outlining some of the dangers of the contempt power, he emphasized the inappropriateness of using civil contempt for punitive purposes. Citing *Shillitani v. United States*,<sup>218</sup> he said:

Once it is clear that the civil contempt sanction will not coerce a recalcitrant individual, that sanction must be removed. The failure to do so constitutes a deprivation of liberty or property without due process. That is, the coercive sanction is transmuted into a punitive sanction at the point coercion can no longer fairly be said to be possible and, therefore, the contemnor is entitled to further procedural protections before the sanction can continue.<sup>219</sup>

Senator Hatch argued that this point had been reached already in Elizabeth Morgan's case.

Her medical practice has disappeared, along with her home and other assets, and she is now the longest-residing female prisoner at the D.C. Detention Center. *She has nothing left to lose.* She insists that she will never comply with the court order, an assertion to which her adamantness thus far lends credence. There is no indication that continued imprisonment will change her mind. *She appears immune to the coercive authority of the court.*<sup>220</sup>

Senator Hatch noted that nobody in the District of Columbia had ever served as long for civil contempt. "In a jurisdiction perpetually releas-

217. *Dear Colleague* letter from Senator Orrin G. Hatch (June 13, 1989). Again, the intention to protect children is laudable, but the bill really protects parents.

218. 384 U.S. 364, 371-72 (1966).

219. 135 CONG. REC. S1163 (daily ed. June 13, 1989) at 4.

220. *Id.* at 4-5 (emphasis added).

ing those apprehended on drug busts and sweeps because the jails lack room for them, scarce jail space could be better used."<sup>221</sup> He then referred to Dixon's questioning of Robert Morgan<sup>222</sup> and protested:

The specter is now raised of the court incarcerating Dr. Morgan's brother for civil contempt as a means of increasing the pressure on Dr. Morgan herself. If this happens, I suppose the judge could feel free to jail Dr. Morgan's relatives *seriatim* over the next 12 years before determining she will not be coerced. Enough is enough.<sup>223</sup>

Turning to the merits of his bill, Senator Hatch noted that California limits imprisonment for contempt to twelve months; Wisconsin limits it to six months; under 28 U.S.C. § 1826, uncooperative witnesses may not be incarcerated longer than eighteen months; and the Supreme Court has prohibited incarcerating criminal contemnors longer than six months, unless they receive or waive a jury trial.<sup>224</sup> Surely similar protection for civil contemnors was appropriate. "The bill I introduce today simply recognizes that after a year continued imprisonment is unlikely to coerce a contemnor in a child custody case to comply."<sup>225</sup>

Senator Hatch next observed that evidence of child sexual abuse may be sufficient to convince a well-trained physician or therapist but insufficient to convince a court. In such a case, when the parent of the abused child refuses to submit to court-ordered demands to allow the alleged abuser access to the child, many courts are sentencing the recalcitrant parent, which is typically the mother, to contempt. Some mothers have gone underground rather than submit to the court, and taken the child with them. Others have gone to prison rather than risk endangering their children.<sup>226</sup>

Limiting incarceration for civil contempt in such cases, he concluded, was "a prudent and needed step."<sup>227</sup>

## B. Committee Action

### 1. H.R. 2136

In the House of Representatives, the Committee on the District of Columbia amended H.R. 2136 heavily. The amended bill provided:

221. *Id.* at 4.

222. See *supra* note 181 and accompanying text.

223. 135 CONG. REC. S1163 (daily ed. June 13, 1989) at 6.

224. *Id.* at 9, 11.

225. *Id.* at 10.

226. *Id.* at 12.

227. *Id.*

(b)(1) [No] individual may be imprisoned for more than 12 consecutive months for civil contempt . . . for disobedience of an order or for contempt committed in the presence of the court.

(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to subsection (c) may be imprisoned until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt . . . .

(c)(1) An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order . . . who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time [within a year of imprisonment] . . . .

(2) The trial of an individual prosecuted for criminal contempt pursuant to this subsection—

(A) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

(B) shall, upon the request of the individual, be a trial by jury; and

(C) may not be conducted before the judge who imprisoned the individual for disobedience of an order . . . .<sup>228</sup>

Conspicuous by its absence was any restriction limiting the bill to child custody cases. It applied to all cases without regard to subject matter. "Although the amendments to the District of Columbia Code in this legislation would affect Dr. Morgan's incarceration," said the Committee, "H.R. 2136 is not intended to provide a per se legislative remedy for her. It is intended to correct a problem in the present law."<sup>229</sup> On June 20, 1989, the full Committee favorably reported H.R. 2136, as amended, by a vote of 9 to 1.

Meanwhile, *Morgan v. Foretich* was progressing in the media, if not in the courts. Appearing on Cable News Network on June 27, 1989, Foretich offered to abandon his visitation rights if Hilary was returned to the area. Morgan, by then imprisoned for twenty-two months, counseled Foretich to admit his wrong, apologize for it, and seek help.<sup>230</sup>

228. H.R. REP. NO. 98, 101st Cong., 1st Sess. 1-2 (1989).

229. *Id.* at 3.

230. Washington Times, June 28, 1989, at A2, col. 1.

## 2. S. 1163

On July 21, 1989, the Senate Subcommittee on General Services, Federalism and the District of Columbia held a hearing on S. 1163.<sup>231</sup> A Maryland judge testified from experience that in "99.9%" of the cases the mere threat of incarceration coerced compliance. Though concerned about limitations on judicial authority, he conceded that a long enough limit, such as twelve months, should protect contemnors without unduly restricting judicial prerogatives.<sup>232</sup> Professor Rendleman testified that lack of a statutory cap allowed "arbitrariness, capriciousness, harshness, [and] futile imprisonments."<sup>233</sup> He noted similar limits in other areas of law, such as statutes of limitation and debtor exemption statutes.<sup>234</sup> Given that Supreme Court decisions already require the release of a civil contemnor whose continued incarceration would be punitive, Rendleman rhetorically asked, why should the legislature impose a specific cap? Because, he answered:

Judicial decisionmaking is usually not effective at specific line-drawing. The judicially developed rules are imprecise. Lawyers cannot be sure what evidence to present or how to argue the issues. Trial judges are left at large about how to decide. The standard for appellate review extends a lot of deference to the trial judge's discretion.

In short the judicial doctrines commit too much unchecked power to a single fallible trial judge. Nothing guarantees that an individual trial judge will be convinced. The decision ends up depending on the particular judge's subjective choice.<sup>235</sup>

On the distinctions between H.R. 2136 as amended and S. 1163, Professor Rendleman testified:

The H.R. 2136 procedure for the transition from coercive to criminal contempt is difficult to understand and will be cumbersome to effect. It will, I predict, not be utilized frequently and will mean an effective cap of 12 months. Perhaps the wiser course is for Congress to decide when to terminate coercive contempt and eliminate the technicality. S. 1163 chooses this course. This is the approach Congress took in Section 1826, the recalcitrant witness statute.<sup>236</sup>

Witnesses noted that since the District of Columbia Code did not dis-

231. S. REP. NO. 104, 101st Cong., 1st Sess. 3 (1989).

232. *Id.* at 4.

233. *Id.*

234. *Hearings on S. 1163 Before the Subcomm. on General Services, Federalism, and the District of Columbia, 101st Cong, 1st Sess. 3 (1989)* (statement of Doug Rendleman, Professor of Law).

235. *Id.* at 3.

236. *Id.* at 5.

tinguish between criminal and civil contempts, S. 1163 would actually cap incarceration for all contempts. Senator Hatch testified that that was not his intention and agreed to technical amendments which would rectify the error in drafting.<sup>237</sup>

At the hearing, the subcommittee polled out S. 1163 by a vote of 5 to 0. On July 26, 1989, the full Committee on Governmental Affairs held a markup. Senator Jim Sasser (D-Tenn.), Chairman of the Subcommittee, offered a technical amendment with Senator Hatch's approval to clarify that the cap applied only to civil and not to criminal contempt.<sup>238</sup> The committee intentionally avoided the amended H.R. 2136 approach, preferring a strict one-year cap, without exceptions.<sup>239</sup> The committee also accepted Senator Hatch's preference for a bill limited to the child custody context.<sup>240</sup> Senator Levin announced that he might offer an amendment on the Senate floor which would make the provisions of S. 1163 automatically expire after three years and would direct the Judiciary Committee to consider, during that time, whether the limit ought to apply to all categories of contempt and to all federal courts.<sup>241</sup> The full committee reported the bill favorably by a vote of 14 to 0.<sup>242</sup>

In response, a *Washington Times* editorial charged: "Although the measure at first blush seems neutral, everyone on the Hill knows that it is designed to free Dr. Elizabeth Morgan . . . ." <sup>243</sup> "Congress," observed the *Times*, "having invited itself into the quagmire of the Morgan case, now wants to treat a legal proceeding as a political event. That can only create a basis for politicizing future cases in the District." Obviously the writer hadn't spoken to anyone directly involved with the bill. "Dr. Morgan may be right," the *Times* conceded. "If so, her best course would be to press her charges in court and seek legal permission to deny Dr. Foretich visitation rights."<sup>244</sup> The editorial failed to point out that that was precisely what Morgan had already done.

Senator Hatch pushed to get the full Senate to pass his bill before the August recess. Several senators, however, including the majority leader, had qualms. Senators Levin and Sasser worked out a compro-

237. S. REP. NO. 104, 101st Cong., 1st Sess. 4-5 (1989).

238. *Id.* at 5.

239. *Id.* at 8.

240. *Id.* at 4, 9.

241. *Id.* at 10.

242. *Id.* at 9.

243. *Elizabeth Morgan and the 'New' Court*, *Washington Times*, Aug. 2, 1989, at F2, col.

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244. *Id.*

mise including an eighteen-month sunset.<sup>245</sup> The bill was further amended to require the Senate Judiciary and Governmental Affairs Committees to study civil contempt in both District of Columbia and federal courts and report back to the Senate by September 1, 1990.<sup>246</sup> On September 7, 1989, the Senate approved an amended H.R. 2136, in lieu of S. 1163, by unanimous consent.<sup>247</sup>

### C. *Public Law No. 101-97*

On September 20, 1989, the District of Columbia Court of Appeals, sitting en banc, heard oral arguments in Morgan's appeal from Judge Dixon's ruling keeping her imprisoned.<sup>248</sup> However, after forty-nine motions, fifteen appeals, and four full oral arguments before the court of appeals, Congress was not going to wait any longer.<sup>249</sup> That night, the House of Representatives concurred in the Senate amendments conforming H.R. 2136 to S. 1163 and adding minor amendments.<sup>250</sup> The Senate concurred in the House amendments, passing the bill by unanimous consent shortly after midnight on September 22, 1989.<sup>251</sup> The *Washington Post* reported strong lobbying for the bill from sources as diverse as Charles W. Colson of Prison Fellowship Ministries, former Democratic Party Chairman Robert Strauss, billionaire H. Ross Perot, various feminist groups, Alice Monroe, Glennie Rohelie, and the 15,000 other Friends of Elizabeth Morgan.<sup>252</sup>

President Bush signed the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 into law on Saturday, September 23, 1989. The law limits incarceration for civil contempt in child custody proceedings in District of Columbia courts to twelve months.<sup>253</sup> After six months the contemnor can be prosecuted for criminal contempt for continuing disobedience of the order.<sup>254</sup> A contemnor may be held up to eighteen months pending prosecution for criminal contempt.<sup>255</sup> The Committee on Governmental Affairs of the Senate and

245. 135 CONG. REC. S10811 (daily ed. Sept. 7, 1989) (statement of Senator Levin).

246. *Id.*

247. 135 CONG. REC. S10820 (daily ed. Sept. 7, 1989).

248. *Washington Post*, Sept. 21, 1989, at D1, col. 6; *see also* *Morgan v. Foretich*, 564 A.2d 1 (D.C. 1989).

249. *Washington Post*, Sept. 23, 1989, at A1, col. 1.

250. *Washington Post*, Sept. 21, 1989, at D1, col. 6; 135 CONG. REC. H5788 (daily ed. Sept. 20, 1989).

251. *Washington Post*, Sept. 23, 1989, at A1, col. 1; 135 CONG. REC. S11704 (daily ed. Sept. 22, 1989).

252. *Id.*

253. Pub. L. No. 101-97, §§ 2(a), 2(b), 103 Stat. 633 (1989).

254. *Id.*

255. *Id.*

the Committee on the District of Columbia of the House of Representatives are to study civil contempt in the District of Columbia courts.<sup>256</sup> The Committee on the Judiciary of the Senate is to study civil contempt in the federal courts.<sup>257</sup> The Senate Committees are to report by September 1, 1990, and recommend changes to existing law.<sup>258</sup> The law became effective upon enactment and expires after eighteen months.<sup>259</sup>

On September 25, 1989—two years and one month after entering—Dr. Elizabeth Morgan left the District of Columbia jail. Accompanied by her fiancé, Judge Paul Michel, she hugged her brother and expressed gratitude for her release.<sup>260</sup> Of course, the legal battles are not over. Hilary remains subject to Judge Dixon's authority. Judge Dixon could conceivably cite Morgan for criminal contempt. Foretich sued for defamation—an action which Morgan welcomed, since it will allow her to present evidence in an open trial by jury.<sup>261</sup> But the indefinite, unlimited incarceration is over.

#### D. *Judicial Response to the Congressional Action*

Predictably, the very judges who had allowed the situation to deteriorate to the point where congressional action was required were quick to denounce the congressional action. "D.C. Superior Court judges expressed outrage yesterday that Congress had poached on judicial turf," reported the *Washington Post*. The judges considered the new law a "terrible and dangerous precedent," "frightening," an example of "private justice." "Hard cases make bad law," said one<sup>262</sup>—an observation which applies to the judiciary's handling of the matter more accurately than to Congress's. Replied Harvard Law Professor Laurence H. Tribe: "I think they are up the constitutional creek without a paddle . . . . I can appreciate the judges' anger, but I don't think they have a constitutional leg to stand on."<sup>263</sup> Tribe could have quoted the Supreme Court:

[O]ver the years in the federal system there has been a recurring necessity to set aside punishments for criminal contempt as either unauthorized by statute or too harsh. This course of events demonstrates

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256. *Id.* at § 4(a)(1).

257. *Id.* at § 4(a)(2).

258. *Id.* at § 4(b).

259. *Id.* at § 5.

260. Gellman, *Elizabeth Morgan Freed After 759 Days in Jail*, *Washington Post*, Sept. 26, 1989, at A1, col. 1.

261. *Id.*

262. *Washington Post*, Sept. 28, 1989, at C1, col. 2.

263. *Id.*



the unwisdom of vesting the judiciary with completely untrammelled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse.<sup>264</sup>

## V. IMPLICATIONS FOR BROADER REFORM

### A. *Previous Proposals*

For years before Congress acted, numerous commentators had recommended limiting the contempt power. One urged judges to apply the reasonable doubt standard of proof to civil contempt proceedings.<sup>265</sup> Another proposed abolishing the distinction between civil and criminal contempt altogether, as Wisconsin has done.<sup>266</sup> Another proposed statutory limitations on civil contempt in "the spirit of due process."<sup>267</sup> Such limits would leave courts free to maintain order by summarily punishing direct contempts. But others argued that even summary punishment for direct contempt should be limited.<sup>268</sup> Some went so far as to recommend abolition of summary contempt altogether.<sup>269</sup> The Law Reform Commission of Canada recommended that contemnors receive the same procedural protections as other defendants and suggested a maximum punishment of two years imprisonment.<sup>270</sup> Ronald Goldfarb proposed replacing the general power of contempt with a statutory offense called "misdemeanor to government," to be "applied as all other criminal laws, consistent with guaranteed rights of criminal procedure."<sup>271</sup>

### B. *Extend to Other Jurisdictions and Other Contexts*

Despite numerous recommendations, actual reforms were rare. Thus, even though the District of Columbia Civil Contempt Imprisonment Limitation Act was extremely limited—affecting only civil contempt in child custody cases in the District of Columbia, for eighteen months—it represented a significant step in the right direction. Now it

264. *Bloom v. Illinois*, 391 U.S. 194, 206-07 (1968) (citations omitted).

265. Mascolo, *Procedural Due Process And The Reasonable Doubt Standard of Proof In Civil Contempt Proceedings*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, 245, 274-98 (1988).

266. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 687-705 (1981).

267. Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and its Role in Child Support Enforcement: Hicks v. Feiock*, 22 CREIGHTON L. REV. 163, 185 (1988).

268. See, e.g., Comment, *The Role of Due Process in Summary Contempt Proceedings*, 68 IOWA L. REV. 177, 194 (1982).

269. N. DORSEN & L. FRIEDMAN, *supra* note 96, at 219.

270. R. Martin, *supra* note 94, at 310.

271. R. GOLDFARB, *supra* note 11, at 301-03.

is time to take further steps. If incarceration for civil contempt ought to be limited in District of Columbia courts, it ought to be limited in all courts. If it ought to be limited in child custody cases, it ought to be limited in all cases. If it ought to be limited for eighteen months, it ought to be limited permanently.

Elizabeth Morgan is not the only protective parent convicted of contempt; mothers and fathers in other jurisdictions have faced the same dilemma she did.<sup>272</sup> While the District of Columbia courts may have been unusually heavy-handed in allowing Morgan's incarceration to continue so long, nothing prevents courts in other jurisdictions from making similar mistakes. Child custody is not the only context within which abuse of the civil contempt power can occur; civil contemnors in other kinds of cases are equally at risk. And there is certainly nothing unique about the next eighteen months.

Wisconsin has limited incarceration for all kinds of contempt to six months.<sup>273</sup> California has limited incarceration for all kinds of contempt to twelve months.<sup>274</sup> Other states should follow their example.

The Supreme Court already has held that the Constitution requires a jury trial to incarcerate a criminal contemnor for more than six months.<sup>275</sup> Recognizing the punitive aspects of civil contempt, it should apply the same rule to civil contemnors.

### C. Arguments Against Reform

Dr. Morgan won a great deal of sympathy because she appeared to be a protective parent. What if the contemnor were a less sympathetic figure—for example, an abusive parent? Opponents of reform cite the case of Jacqueline Bouknight, a Baltimore woman incarcerated for contempt for refusing to produce her son Maurice. Born in October

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272. Note, *supra* note 267 at 183 n.195; see also Washington Post, Aug. 28, 1988, at C1, col. 1 (final ed.), and Washington Post, May 22, 1989, at D1, col. 1. In one case, a father in Nevada refused to return his two children to the mother in South Carolina when a child psychologist found that the oldest was experiencing trauma at the prospect of returning. Both children appeared neglected, exhibiting symptoms of mistreatment including improper nourishment. A Nevada court gave the father temporary custody, but the South Carolina court found the father in contempt and ordered him to produce the children or go to jail. *Curlee v. Howle*, 277 S.C. 377, 287 S.E.2d 915 (1982); see 35 S.C.L. REV. 118, 119-20 n.81 (1983).

273. WIS. STAT. ANN. § 785.04 (West 1981); Martineau, *supra* note 266.

274. CAL. PENAL CODE § 19a (West Supp. 1990). California's Constitution guarantees the right to trial by jury for all criminal offenses above the level of infraction; this includes contempt, which is considered a misdemeanor. *Mitchell v. Superior Court*, 43 Cal. 3d 107, 729 P.2d 212, 232 Cal. Rptr. 900 (1987). A long line of California cases considers all contempt proceedings criminal. In *Re Feiock*, 180 Cal. App. 3d 649, 653 (1986); Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and its Role in Child Support Enforcement: Hicks v. Feiock*, 22 CREIGHTON L. REV. at 177.

275. See *supra* notes 107-08 and accompanying text.

of 1986, Maurice suffered a broken thigh, a broken shoulder, a broken arm, and a damaged spinal cord before he was four months old—all the result of maternal abuse. He was placed in foster care, but a judge returned him to his mother. Shortly thereafter he disappeared. Social workers assigned to monitor the boy could not find him at home. A homicide investigation produced no leads, but authorities fear the boy is dead.<sup>276</sup>

Opponents of reform argue that limiting incarceration for civil contempt would require authorities to eventually release Bouknight. Actually, the Civil Contempt Imprisonment Limitation Act would not release Bouknight, even if she lived in the District of Columbia. The law applies only to child custody disputes arising in the family division of the Superior Court, not to those where the state finds abuse and has reason to remove the child from the home.<sup>277</sup> Even if the new law did apply to Bouknight, she could still be charged with criminal contempt for her continuing violation of the order to produce her son.<sup>278</sup>

Of course, an across-the-board cap could free Bouknight—and many others. As noted during Elizabeth Morgan's lengthy incarceration, the few civil contemnors who had served as long as she had were organized crime figures, terrorists, and other undesirables. While we are understandably reluctant to set such individuals free, crimes should be punished as such—not through the vehicle of contempt. If Bouknight has committed a crime, charge her with it. Give her a trial and, if convicted, a sentence. Otherwise, the state has no business leaving her incarcerated indefinitely for civil contempt.

Penalties for civil contempt are designed to coerce compliance not for the court's own benefit, but for the benefit of a third party. If civil contempt were limited, the party for whose benefit the penalty is imposed would lose leverage and perhaps be unable to obtain in fact what he had won in court. For example, Morgan is out of jail, but Hilary remains in hiding. How do we know she is safe? Hasn't Foretich been deprived of the last connection to his daughter?

True, we don't know Hilary's condition or whereabouts.<sup>279</sup> But we didn't know during Morgan's incarceration, either. Keeping Morgan in jail did nothing to help Foretich realize his rights under the court order. A limit on incarceration for civil contempt may hinder opposing civil litigants. But so do statutes of limitation, debtor exemption

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276. *Keeping Quiet*, 75 A.B.A.J. 32, 32-34 (Sept. 1989); see also *Baltimore City Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 900 (1990).

277. S. REP. NO. 104, 101st Cong., 1st Sess. 7 (1989).

278. Pub. L. No. 101-97, §§ 2(a), 2(b), 103 Stat. 633 (1989).

279. *But see*, AFTERWORD, *infra*.

statutes, and other devices through which the law, recognizing that it cannot remedy every wrong, in essence says, "Enough is enough." The opponent of a civil contemnor rarely suffers more than the victim of a violent crime, yet criminal defendants receive numerous protections, including statutory limits on the length of their incarceration. Surely such protections are appropriate for civil contemnors.

## VI. CONCLUSION

State legislatures should limit incarceration for civil contempt. Except for its restriction to child custody cases, the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 serves as a useful model. Under the Act courts retain fully their present criminal contempt powers, including the ability to summarily punish criminal contempts committed in their presence. Courts also retain the civil contempt power, but may not incarcerate civil contemnors longer than one year. A contemnor who ought to be incarcerated longer can be; but he must be charged with criminal contempt for his continuing violation of a court order, and thus receive various protections not presently afforded to civil contemnors.

The most common abuses of the contempt power probably result not in long-term incarceration, but in short-term incarceration. Contemnors who spend a few hours or days in jail are far more common than those who spend months or years. Ultimately, no matter how the contempt power is limited, a great deal of discretion must remain in the hands of the individual judge. A cap on incarceration for civil contempt may not sufficiently restrain an intemperate judge in all cases; but it will at least prevent the most egregious abuses of the contempt power.

## AFTERWORD

Hilary was discovered in New Zealand in February 1990. She had been cared for since her disappearance by her maternal grandparents, William and Antonia Morgan. As Dr. Elizabeth Morgan had repeatedly insisted, she was safe and in good health.

The contempt power played a key role in Hilary's discovery as well as in her disappearance. Eric Foretich obtained a court order requiring a British Broadcasting Corporation producer in London to testify. Under threat of incarceration for contempt, the producer disclosed information concerning Hilary's whereabouts. Hilary had arrived in Plymouth, England, in September 1987. Her grandparents rented a flat there and enrolled her in Beechfield College, a private girls' school. The headmistress, Pat Holness, said that Hilary appeared well-adjusted and happy, and that her grandparents "doted on her." She left

the school in the summer of 1988.<sup>280</sup> On February 23, 1990, Constable Paul Hughes of the Christchurch, New Zealand, police, announced that Hilary had been located there.<sup>281</sup>

Immediately upon Hilary's discovery, Eric Foretich flew to New Zealand intending to bring her back to the United States.<sup>282</sup> A New Zealand family court, however, ordered Foretich not to contact Hilary. The court awarded the grandparents temporary custody on February 23, 1990, and confiscated their passports.<sup>283</sup> Hilary's grandfather warned that he would call the police if Foretich tried to contact Hilary.<sup>284</sup> "Certainly we're going to do what we need to do to rescue my daughter," said Foretich. Replied Elizabeth Morgan: "He has hunted her down like an animal. She does not want to see him, and he knows that."<sup>285</sup>

Dr. Morgan was unable to leave the United States immediately, her passport having been confiscated in the proceedings which led to her incarceration.<sup>286</sup> However, she spoke with Hilary for the first time in two years on Sunday, February 25, 1990, by telephone.<sup>287</sup> Judge Dixon soon ruled that releasing Morgan's passport would be in Hilary's best interest. The District of Columbia Court of Appeals agreed and on March 2, 1990, returned the passport seized three-and-a-half years earlier.<sup>288</sup> On March 5, 1990, Dr. Morgan arrived in New Zealand and met with her attorneys. She requested that the media respect her privacy and refused to discuss when or how she would meet Hilary.<sup>289</sup>

As of this writing, Hilary remains enrolled at Selwyn House, a private school for girls. Perhaps the best summary of her situation appeared in a cartoon printed in the *Los Angeles Times*. In it, a small and solitary girl carrying a suitcase flees from a crowd of rabid reporters, their mouths wide open, cameras and microphones protruding from the pack like quills from a porcupine.<sup>290</sup> Mothers of other students at Selwyn House clearly resent the intrusive reporters, as do the other citizens of Christchurch. According to the *Los Angeles Times*:

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280. San Francisco Chronicle, Feb. 24, 1990, at A1, col. 4.

281. *Id.*

282. San Francisco Chronicle, Feb. 26, 1990, at A3, col. 1.

283. San Francisco Chronicle, Feb. 24, 1990, at A1, col. 4; Los Angeles Times, Mar. 6, 1990, at E1, col. 2.

284. San Francisco Chronicle, Feb. 27, 1990, at A3, col. 1.

285. *Id.*

286. San Francisco Chronicle, Feb. 26, 1990, at A3, col. 1.

287. San Francisco Chronicle, Feb. 27, at A3, col. 1.

288. Los Angeles Times, Mar. 3, 1990, at A2, col. 1.

289. San Francisco Chronicle, Mar. 6, 1990, at A6, col. 4.

290. Los Angeles Times, Mar. 4, 1990, at E2, col. 1.

The comment that seemed to resonate the most with the public came Wednesday night [February 28, 1990] at a rock concert here [in Christchurch], when Elton John dedicated a song, "Sacrifice," to Hilary.

From a piano top, he lamented that she was being "surrounded by the worst type of media," and urged the public to "run the bastards out of town."

His comment—and the roar of approval from the audience—were broadcast Thursday night as the lead item on New Zealand's network news.<sup>291</sup>

Patrick D. Mahony, New Zealand's chief family court judge, ordered participants not to speak to the media and warned the media not to disclose family court proceedings. Mediation efforts will precede a formal hearing. The court has appointed an attorney, Isabell Mitchell, to represent Hilary.<sup>292</sup>

Dr. Morgan hopes to live with Hilary in New Zealand and return to her career in plastic surgery.<sup>293</sup>

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291. Los Angeles Times, Mar. 6, 1990, at E4, col. 6.

292. *Id.*

293. San Francisco Chronicle, Mar. 27, 1990, at A8, col. 1.

## APPENDIX I

Public Law No. 101-97

101st Congress

An Act

To amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in the course of a child custody case in the courts of the District of Columbia, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Civil Contempt Imprisonment Limitation Act of 1989".

### SEC. 2. LIMITATION ON TERM OF INCARCERATION IMPOSED FOR CIVIL CONTEMPT IN CHILD CUSTODY CASES.

(a) SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.—Section 11-944 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) Subject to the limitation described in subsection (b), and in addition"; and

(2) by adding at the end the following new subsection:

"(b)(1) In any proceeding for custody of a minor child conducted in the family Division of the Superior Court under paragraph (1) or (4) of section 11-1101, no individual may be imprisoned for civil contempt for more than 12 months (except as provided in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.

"(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to paragraph (3) may continue to be imprisoned for civil contempt until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power described in subsection (a).

“(3)(A) An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order in a proceeding described in paragraph (1) who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of such individual’s imprisonment, except that an individual so imprisoned as of the date of the enactment of this subsection may be prosecuted under this subsection at any time during the 90-day period that begins on the date of the enactment of this subsection.

“(B) The trial of an individual prosecuted for criminal contempt pursuant to this paragraph—

“(i) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

“(ii) shall, upon the request of the individual, be a trial by jury; and

“(iii) may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a).”

(b) DISTRICT OF COLUMBIA COURT OF APPEALS.—Section 11-741 of the District of Columbia Code is amended—

(1) by striking “In addition” and inserting “(a) Subject to the limitation described in subsection (b), and in addition”, and

(2) by adding at the end the following new subsection:

“(b)(1) In the hearing of an appeal from an order of the Superior court of the District of Columbia regarding the custody of a minor child conducted in the Family Division of the Superior Court under paragraph (1) or (4) of section 11-1101, no individual may be imprisoned for civil contempt for more than 12 months (except as provided in paragraph (2)), pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.

“(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to paragraph (3) may continue to be imprisoned for civil contempt until the completion of such individual’s trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power described in subsection (a).

“(3)(A) An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order in a proceeding described in paragraph (1) who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of



such individual's imprisonment, except that an individual so imprisoned as of the date of the enactment of this subsection may be prosecuted under this subsection at any time during the 90-day period that begins on the date of the enactment of this subsection.

“(B) The trial of an individual prosecuted for criminal contempt pursuant to this paragraph—

“(i) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

“(ii) shall, upon the request of the individual, be a trial by jury, and

“(iii) may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a).”.

### **SEC. 3. EXPEDITED APPEALS PROCESS FOR INDIVIDUALS INCARCERATED FOR CONTEMPT IN CHILD CUSTODY CASES.**

Section 11-721 of the District of Columbia Code is amended by adding at the end the following new subsection:

“(f) The District of Columbia Court of Appeals shall hear an appeal from an order of the Superior Court of the District of Columbia holding an individual in contempt and imposing the sanction of imprisonment on such individual in the course of a case for custody of a minor child not later than 60 days after such individual in the course of a case for custody of a minor child not later than 60 days after such individual requests that an appeal be taken from that order.”.

### **SEC. 4. REPORTS ON CIVIL CONTEMPT PROCEDURES.**

(a) **IN GENERAL.**—(1) The Committee on Governmental Affairs of the Senate, together with the Committee on the District of Columbia of the House of Representatives, shall conduct a study of current law and procedures with respect to civil contempt in the courts of the District of Columbia.

(2) The Committee on the Judiciary of the Senate shall conduct a study of current law and procedures with respect to civil contempt in the courts of the United States.

(b) **SUBMISSION OF REPORTS.**—Not later than September 1, 1990, the Committees on Governmental Affairs and the Judiciary of the Senate shall each submit a report on the study conducted by each Committee under subsection (a), and shall include in such report any recommendations regarding changes in current law.

**SEC. 5. EFFECTIVE DATE.**

The amendments made by sections 2 and 3 shall apply with respect to any individual imprisoned before the expiration of the 18-month period that begins on the date of the enactment of this Act for disobedience of an order or for contempt committed in the presence of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

Approved September 23, 1989.

## APPENDIX II

H.R. 2136

101ST CONGRESS

1ST SESSION

A BILL

To amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in a child custody case in the Superior Court of the District of Columbia and to provide for expedited appeal procedures to the District of Columbia Court of Appeals for individuals found in civil contempt in such a case.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "District of Columbia Civil Contempt Imprisonment Limitation Act of 1989".

**SEC. 2. LIMITATION ON TERM OF INCARCERATION IMPOSED FOR CIVIL CONTEMPT.**

(a) SUPERIOR COURT OF THE DISTRICT OF COLUMBIA.—Section 11-944 of the District of Columbia Code is amended—

- (1) by striking "In addition" and inserting "(a) In addition"; and
- (2) by adding at the end the following new subsections:

"(b)(1) Except as provided in paragraph (2), no individual may be imprisoned for more than 12 consecutive months for civil contempt pursuant to the contempt power described in subsection (a) for disobedience of an order or for contempt committed in the presence of the court.

"(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to subsection (c) may be imprisoned until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power described in subsection (a).

- "(c)(1) An individual imprisoned for 6 consecutive months for civil

contempt for disobedience of an order pursuant to subsection (a) who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of such individual's imprisonment, except that an individual so imprisoned as of the date of the enactment of this subsection may be prosecuted under this subsection at any time during the 90-day period that begins on the date of the enactment of this subsection.

“(2) The trial of an individual prosecuted for criminal contempt pursuant to this subsection—

“(A) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

“(B) shall, upon the request of the individual, be a trial by jury; and

“(C) may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a).”.

(b) DISTRICT OF COLUMBIA COURT OF APPEALS.—Section 11-741 of the District of Columbia Code is amended—

(1) by striking “In addition” and inserting “(a) In addition”; and  
(2) by adding at the end the following new subsections:

“(b)(1) Except as provided in paragraph (2), no individual may be imprisoned for more than 12 consecutive months for civil contempt pursuant to the contempt power described in subsection (a) for disobedience of an order or for contempt committed in the presence of the court.

“(2) Notwithstanding the provisions of paragraph (1), an individual who is charged with criminal contempt pursuant to subsection (c) may be imprisoned until the completion of such individual's trial for criminal contempt, except that in no case may such an individual be imprisoned for more than 18 consecutive months for civil contempt pursuant to the contempt power described in subsection (a).

“(c)(1) An individual imprisoned for 6 consecutive months for civil contempt for disobedience of an order pursuant to subsection (a) who continues to disobey such order may be prosecuted for criminal contempt for disobedience of such order at any time before the expiration of the 12-month period that begins on the first day of such individual's imprisonment, except that an individual so imprisoned as of the date of the enactment of this subsection may be prosecuted under this subsection at any time during the 90-day period that begins on the date of the enactment of this subsection.

“(2) The trial of an individual prosecuted for criminal contempt pursuant to this subsection—

“(A) shall begin not later than 90 days after the date on which such individual is charged with criminal contempt;

“(B) shall, upon the request of the individual, be a trial by jury, and

“(C) may not be conducted before the judge who imprisoned the individual for disobedience of an order pursuant to subsection (a).”.

### **SEC. 3. EFFECTIVE DATE.**

The amendments made by this Act shall take effect on the date of the enactment of this Act.

## APPENDIX III

S. 1163

101ST CONGRESS

1ST SESSION

A BILL

To amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in a child custody case in the Superior Court of the District of Columbia and to provide for expedited appeal procedures to the District of Columbia Court of Appeals for individuals found in civil contempt in such a case.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. LIMITATION ON TERMS OF INCARCERATION IMPOSED FOR CONTEMPT IN CHILD CUSTODY CASES.**

(a) SUPERIOR COURT.—Section 11-944 of the District of Columbia Code is amended—

(1) by striking “In addition” and inserting “(a) Subject to the limitation described in subsection (b), and in addition”; and

(2) by adding at the end the following new subsection:

“(b) In any proceeding for custody of a minor child conducted in the family Division of the Superior Court under section 11-1101(1), no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.”.

(b) DISTRICT OF COLUMBIA COURT OF APPEALS.—Section 11-741 of the District of Columbia Code is amended—

(1) by striking “In addition” and inserting “(a) Subject to the limitation described in subsection (b), and in addition”; and

(2) by adding at the end the following new subsection:

“(b) In the hearing of an appeal from an order of the Superior court of the District of Columbia regarding the custody of a minor

child, no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.

## **SEC. 2. EXPEDITED APPEALS PROCESS FOR INDIVIDUALS INCARCERATED FOR CONTEMPT IN CHILD CUSTODY CASES.**

Section 11-721 of the District of Columbia Code is amended by adding at the end the following new subsection:

“(f) The District of Columbia Court of Appeals shall hear an appeal from an order of the Superior Court of the District of Columbia holding an individual in contempt and imposing the sanction of imprisonment on such individual in the course of a case for custody of a minor child not later than 60 days after such individual requests that an appeal be taken from that order.”.

## **SEC. 3. EFFECTIVE DATE.**

The amendments made by this Act shall apply with respect to individuals imprisoned for disobedience of an order or for contempt committed in the presence of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals in the course of a case for custody of a minor child on or after January 1, 1987.