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## Disobedience And Coercive Contempt Confinement: The Terminally Stubborn Contemnor

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# DISOBEDIENCE AND COERCIVE CONTEMPT CONFINEMENT: THE TERMINALLY STUBBORN CONTEMNOR

DOUG RENDLEMAN\*

## INTRODUCTION

Cora and Fred were divorced after having been married only three years. Communication had broken down completely; the dominant emotion was fury. Cora was pregnant when Judge Row granted the divorce. Four months after the divorce, Cora gave birth to a daughter, Heather. Bitter custody litigation began two years later. Judge Row grants Fred unsupervised custody of Heather for one weekend each month. Cora does not produce Heather.

This article examines coercive contempt confinement growing out of Cora's violation of Judge Row's order to produce Heather. Its purpose is to test coercive contempt confinement in the crucible of disobedience. A preliminary inquiry examines the process developed by courts to prevent erroneous orders that lead to coercive confinement. The principal inquiry is the way the system responds when a contemnor engages the judge in the form of civil disobedience I call "terminal stubbornness." When her time comes round the terminally stubborn contemnor will be released without obedience. Why capitulate to the recalcitrant? How should the legal system structure its surrender?<sup>1</sup>

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1. See O. FISS & D. RENDLEMAN, *INJUNCTIONS* 1084 (2d ed. 1984). This article continues the discussion of mythical Cassandra and Penelope begun in *Injunctions*, Chapter 13. This article attempts to answer and to clarify questions raised in that discussion. Some answers and clarification emerged from my assistance with judicial and legislative efforts to secure Dr. Elizabeth Morgan's release. My commentary in the *Legal Times* on September 12, 1988, began my participation in Dr. Morgan's case. D. Rendleman, *Coercion Stops, Cruelty Begins; Enough is Enough: Set Dr. Morgan Free*, *Legal Times*, Sept. 12, 1988, at 19. In this article I have drawn on my statements before the House Committee on the District of Columbia's subcommittee on Judiciary and Education on May 23, 1989 concerning H.R. 2136 and H.R. 2296, as well as from my testimony to the Senate's Committee on Governmental Affairs's subcommittee on General Services, Federalism, and the District of Columbia on July 21, 1989 concerning S. 1163 and H.R. 2136. See *Hearings on H.R. 2136 Before the District of Columbia's Subcomm. on Judiciary and Education*, 101st Cong., 1st Sess. 59-109 (1989) (statement of Doug Rendleman); *Hearings on S. 1163 Before the Subcomm. on General Services, Federalism, and the District of Columbia*, 101st Cong., 1st Sess. 21-25 (1989) (statement of Doug Rendleman). In the fall of 1989, President Bush's signature on the legislation that emerged from this process freed Dr. Elizabeth Morgan. Act of Sept. 23, 1989, Pub. L. No. 101-97, 1989 U.S. Code & Admin. News (103 Stat.) 633.

## BACKGROUND OF COERCIVE CONTEMPT

The example above is based on Dr. Elizabeth Morgan's legendary incarceration.<sup>2</sup> The charge of an adult molesting a child points to a crucial social issue with intractable legal consequences. The contention that a child has been molested or abused is difficult to prove particularly in a forum that the contemnor and her sympathizers charge is male-dominated and too ready to disbelieve credible evidence or to deny that a problem exists.<sup>3</sup>

In addition, domestic litigation concerning child abuse and custody issues often involves furious litigants pursuing quests for vengeance, their domestic wars exacerbated by lawyers and the adversary system into scorched earth tactics and overkill.<sup>4</sup> An Australian study found that more litigants breach family court orders than in "any other court of civil jurisdiction."<sup>5</sup> The losing spouse in contested matrimonial litigation is often a "bitter and resentful person" whose "hatred and hostility" means that "a firm determination to disobey the order frequently develops."<sup>6</sup>

Intense feelings lead litigants to flout court orders. The observer cannot tell whether a sexist conspiracy of denial and dissimulation has wrongfully martyred the disobedient person or whether common garden hostility and resentment are spiraling downward toward a worse denouement than anyone desires. The Australian study, observing that separate acts of disobedience are part of a larger imbroglio, counsels prudence; judges should eschew contempt measures except as a "last resort."<sup>7</sup>

Judge Row's hypothetical dilemma above involved contempt measures, but judges may prefer damages litigation to solve domestic hostilities. Suppose Fred exited the family home too rapidly to remember his grandfather's 1873 three-dollar gold coin; litigation ensues.<sup>8</sup> Fred seeks damages or the coin. A damage judgment in a tort action for conversion leads to an enforcement mechanism. Typically, the judge will enter a money judgment for the "value" of the coin, \$1500.<sup>9</sup>

Fred, the judgment creditor, will collect the money judgment from Cora's general assets through judgment lien, execution, or garnishment. The authorities will sell Cora's other property and turn the proceeds over to Fred. If Cora has no property or if her property is exempt under state law,

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2. See Harmer, *Limiting Incarceration for Civil Contempt in Child Custody Cases*, 4 B.Y.U. J. PUB. L. 239 (1990).

3. See *Baltimore City Dept. of Social Serv. v. Bouknight*, 110 S. Ct. 900 (1990) (involving investigation of intra-family violence); *King v. Department of Social & Health Serv.*, 110 Wash. 2d 793, 795, 756 P.2d 1303, 1306 (1988) (noting abuse suffered by children of parents jailed for contempt because of parents' refusal to reveal location of son).

4. See *In re Marriage of Greene*, 711 S.W.2d 557, 565 (Mo. Ct. App. 1986).

5. *Chesterman & Waters, Contempt and the Disobedying Spouse*, 8 U.N.S.W. L.J. 106, 107 (1985).

6. *Id.* at 115.

7. *Id.* at 136.

8. See *Moody v. Smith*, 899 F.2d 383, 384 (5th Cir. 1990).

9. See *id.* at 386.

Fred's judgment will remain unsatisfied until it is paid or until the statute of limitations runs. The money judgment collection process is impersonal, and Cora herself owes no duty of obedience. Confining Cora to collect an unpaid civil money judgment would be interdicted as debt imprisonment.<sup>10</sup> If Fred's judgment is for an unintended tort or contract or based on a debt between the warring spouses, Cora may file bankruptcy and discharge the debt completely, thereby avoiding paying the debt from her earnings after bankruptcy.<sup>11</sup>

Historically, the legal system was divided into artificial categories called legal and equitable, legal tried to juries and leading to money damages, equitable tried to judges without juries leading to personal orders enforced through contempt. The legal system developed mechanisms to shunt litigants toward damage remedies. Some areas are exclusively equitable; others are in the concurrent jurisdiction of law and equity where the principle shunting mechanism was a rule that denied a claimant a personal or equitable order unless her injury was irreparable with damages, also stated as unless damages are inadequate.<sup>12</sup> The inadequacy prerequisite has declined to the point where one bold researcher has proclaimed it dead.<sup>13</sup>

Two differences remain: in "equity" actions leading to personal orders, the judge both finds the facts and applies the law, and in the end, he may use personal or contempt remedies. Family law, the subject of Cora's travails, remains exclusively equitable. Before deciding the factual and remedial issues in family law, the judge will not ask the irreparability question used under concurrent law and equity to sort legal from equitable.

The coin controversy quickly is converted from a "legal" action for damages or replevin into an equity proceeding where the plaintiff seeks a personal order. The coin is too small and easy to conceal for an officer with a writ of replevin to find. Because a family heirloom is "unique," sentimental impairment has occurred. If Fred wants Grampa's coin, not Cora's money, then Judge Row may find that Fred's damages would be difficult or impossible to compute and that money damages are inadequate before entering a personal order telling Cora to produce the coin.<sup>14</sup> Her noncompliance may trigger a personal enforcement mechanism, coercive contempt.

The inadequacy prerequisite never did serve well as a principle of containment where containment was really needed. Perhaps its "demise"

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10. See, e.g., *United States ex rel. Thom v. Jenkins*, 760 F.2d 736 (7th Cir. 1985) (holding that incarceration of defendant with ability to pay debt may continue indefinitely, but cannot last forever). Supplemental proceedings to enforce the judgment may lead to confinement if the judge finds that the judgment debtor is able to pay and she refuses to pay.

11. Bankruptcy Code §523 (1990).

12. See Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981).

13. Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 692 (1990).

14. See *id.* at 705-07.

will lead us to develop discrete policies and rules for personal orders and injunctions and to grapple directly with the enforcement problems that preventive, individualized relief creates.

A personal order to Cora to produce Heather (or the coin) raises the stakes for Cora. Judge Row may confine Cora to "enforce" the personal order; but he may base that coercive confinement on an incorrect factfinding. In contrast if incorrect factfinding leads to an erroneous money judgment against Cora, Cora as judgment debtor may lose assets, but not liberty.

The subject is power. The power of benevolent government on the one hand to advance its citizens' interests as defined by positive law. The government power is a specialized kind: judicial power to grant personal orders that require litigants' conduct and to imprison recalcitrant litigants to encourage them to comply with the orders. Personal orders, particularly injunctions, are the modern court system's great engine of positive government. In an efficient and legitimate government, victors in lawsuits are entitled to a remedy measured by the substantive right the defendant impaired. Injunctions are preventive and individualized remedies to protect citizens' rights that judges cannot compensate with money. The federal civil rights injunction moved injunctions from the disreputable realm of protecting enterprise against labor into an era in which judges routinely enjoin to desegregate schools, to reform prisons and mental hospitals, and to protect the environment.<sup>15</sup>

On the other hand is the power of individualism and the human spirit. The spirit of autonomy is coupled with skepticism about whether judges' orders are always correct and entitled to respect, whether the government can ameliorate every problem, and whether a government with that much strength and hubris creates more risks of abuse than it is worth. A society committed to preserving individualism and autonomy recognizes a strain of resistance to authority. "We remember the martyrs who preferred to die rather than live as apostates with more favor than the government officials who administered the Roman Empire."<sup>16</sup>

If a judge, to enable a victor to enjoy his rights, orders the loser to do something, the losing litigant retains some power, the power to decide whether to cooperate or to gum up the works using a variety of methods: foot dragging, feigned misunderstandings, requests for clarifications, obfuscation, delay, demands for a series of small concessions, recalcitrance, more delay, and finally disobedience. Cora has not obeyed. So we enter the positivist Hobbesian world where the question is less "What is the rule?" than "What happens to me if I don't?"

We also learn about the difference between formal power and moral power. Disobedience is a technique available to people who are out of the

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15. O. FISS, *The Triumph of "Brown"*, in *THE CIVIL RIGHTS INJUNCTION* 1-6 (1978) (tracing history and evolution of civil injunction).

16. O. FISS & D. RENDLEMAN, *supra* note 1, at 1105-06.

loop of formal power. The temporal rules let the authorities exact sanctions for disobedience. The law's claim has to rest on something more than its agents' ability to coerce. When government authorities are inflexible, the terminally stubborn person may teach them that weakness is strength. For legitimacy and principle have often subordinated and even replaced the trappings of formal power.<sup>17</sup>

#### COERCIVE CONTEMPT: DO THE ENDS WARRANT THE MEANS?

The possibility that the loser will be recalcitrant haunts the decision to order conduct in the first place. On one hand, the judge may not express approbation at leaving the victor's substantive right hostage to the loser's obduracy. On the other hand is the question: is this substantive right worth enough to the plaintiff and the system to justify putting the screws down on the loser?

If an uncooperative loser declines to obey a personal order, the legal system hands the judge three tools, all labeled contempt, to use.<sup>18</sup> Two respond to past violation. First, criminal contempt is available to the judge to punish someone who disobeys. Second, if the defendant's violation has injured plaintiff, the judge may award plaintiff compensatory contempt, money to compensate for loss.

Coercive contempt, the principal subject here, is the third form of contempt.<sup>19</sup> Coercive contempt is a judicial threat to alter a violator's incentives to comply with lawful orders and to answer proper questions. The judge, in an effort to obtain from the loser the conduct the winner is entitled to, tells the contemnor to obey "or else." If contemnor's obedience is not forthcoming, the judge may exercise his "or else" option.

In our examples, Judge Row's coercive contempt threats will take the form of threats to imprison Cora.<sup>20</sup> Judges employ coercive confinement as a last resort to secure the conduct to which the law says the winner is entitled. In the alternative, a judge may choose to use daily fines for coercive contempt.

There are several ways to avoid coercive confinement. The contemnor may comply. In theory coercive confinement is indeterminate; contemnor controls whether and how long she will be confined, because if she obeys, the judge will stop or not start the coercion. The familiar slogan about coercive confinement catches this quality: "You have the keys to the jail in your pocket."<sup>21</sup>

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17. Cf. D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 242-58 (1986).

18. See O. FISS & D. RENDLEMAN, *supra* note 1, at 837; Rendleman, *How to Enforce an Injunction*, 10 LITIGATION 23 (1983).

19. See O. FISS & D. RENDLEMAN, *supra* note 1, at 1004-07.

20. Coercive contempt may also consist of judicial threats to fine contemnors, typically a set amount for each day of disobedience. Staged daily fines may be more or less coercive than confinement. Compare *Dickinson v. United States*, 763 F.2d 84, 88 (2d Cir. 1985) (finding fine more coercive than confinement given current imprisonment of contemnor) with *In re Griffin*, 677 F. Supp. 26, 28-29 (D. Me. 1988) (holding fine less coercive than confinement).

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

Coercive confinement may terminate without obedience. Plaintiff may cease to need contemnor's obedience. In our example, the authorities may find Heather. No one may need contemnor to comply; if someone seeks their testimony, the action may reach judgment or the grand jury term may end without it.<sup>22</sup> Nothing may remain to coerce; for example striking public employees were coerced to return to work, but when they were fired, the measure lost capacity to coerce.<sup>23</sup>

Coercive confinement has an awesome potential for abuse. Power to imprison is concentrated in a single trial judge. The usual checks against abuse that precede criminal imprisonment, including a grand jury indictment, prosecutorial discretion, a jury trial for a sentence of greater than six months, the presumption of innocence, proof beyond a reasonable doubt, and the opportunity for an executive pardon, are absent before coercive confinement begins. Contemnor is entitled to a civil form of notice and hearing only.<sup>24</sup> In contrast to criminal procedure, the judge may close the coercive contempt hearing and seal the record.<sup>25</sup> Criminal sentences are for definite periods. But, in theory, if the coerced individual does not cooperate, coercive confinement may never end.<sup>26</sup>

To examine procedural protections against incorrect coercive confinements, we turn to the following scene in the courtroom. After Judge Row grants Fred custody, Fred subpoenas Cora to produce Heather in court. She enters the courtroom without the child and testifies that when she left her home that morning, a large man with a ski mask that covered his head took Heather at gunpoint and fled so quickly she is unable to describe him or his car. Judge Row disbelieves her, finds her in contempt, and orders her jailed until she tells the truth.

The abduction variation will be developed to show the consequences for contemnors of incorrect factfinding. Cora's testimony that a ski-masked man snatched Heather seems farfetched; but similar things have occurred in human experience. Judge Row decides Cora was lying; he orders her confined to coerce her to produce Heather. Cora's tale, however, turns out to be merely unlikely but not untrue.

Because it is impossible for her to obey Judge Row's order, Cora begins coercive confinement. Cora's confinement is not only indefinite, but also

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22. See, e.g., *Shillitani v. United States*, 384 U.S. 364, 365 (1966) (vacating contempt judgment because of expiration of grand jury terms); *Danning v. Lavine*, 572 F.2d 1386, 1390 (9th Cir. 1978) (holding that defendant could not be held as a recalcitrant witness after default judgment had been entered for trustee in bankruptcy); *In re Richard*, 373 N.W.2d 429, 431 (S.D. 1985) (holding that trial court lacked jurisdiction to issue order forbidding defense attorney from seeing witness incarcerated for contempt before grand jury after grand jury had issued indictment without witness' testimony).

23. *United States v. PATCO*, 525 F. Supp. 820, 823 (E.D. Mich. 1981).

24. See *Apel, Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U.L. REV. 491, 505 (1989) (discussing lack of procedural safeguards in civil contempt cases); Harmer, *supra* note 2, at 254-56.

25. See *Morgan v. Foretich*, 521 A.2d 248, 253 (D.C. 1987).

26. See Harmer, *supra* note 2, at 256.

interminable. We can note two consequences. First, a government official has promulgated an impossible order and will imprison someone who is unable to comply. We recoil from the contradiction of imprisoning someone to force her to do the impossible.<sup>27</sup>

Second, on a more mundane level, because Cora cannot comply with Judge Row's order to produce Heather, we may recharacterize her imprisonment as criminal contempt with an unlimited criminal sentence imposed after civil procedure. Will Cora be imprisoned forever to coerce her to do something that, in fact, is not within her power?<sup>28</sup> "How can the prisoner being tortured for secrets that he really does not know persuade his captors that he does not know them?"<sup>29</sup>

What principles of containment exist to prevent the debacle of potentially endless coercive confinement of Cora based on Judge Row's incorrect factfindings? Are these principles consistent with plaintiff's substantive interest? Do they preserve respect for court orders and the particular judge's credibility? Can judges administer the principles fairly and without an excessive burden on the process? Is there any way for the judge, if he realizes his error, to back down gracefully?

The Supreme Court developed safety valves in bankruptcy turnover proceedings in which the debtor is coerced to turn property over to the bankruptcy estate to distribute to creditors.<sup>30</sup> The order to Cora to produce Heather resembles, for present purposes, an order to a bankrupt retail proprietor to turn over or to account for inventory.

The first task exists in the initial adjudication: to determine the burden of proof and to decide whether to develop presumptions. The choice is between a preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. The proponent's burden of proof may be crucial; for example in the recent *Morgan* contempt, the trial judge found the evidence even, in equipoise, a clear signal that a more rigorous burden of proof might have affected his decision to confine.<sup>31</sup>

The "elements" leading to coercive confinement for breach of an order to turn over property are the same as Judge Row found against Cora, except we substitute a person for property. The contemnor either possesses

27. See *Maggio v. Zeitz*, 333 U.S. 56, 72 (1948) (noting that jailing someone for omitting an act the individual is powerless to do would make contempt proceedings purely punitive); J. RAWLS, A THEORY OF JUSTICE 237-39 (1971).

28. See O. FISS & D. RENDLEMAN, *supra* note 1, at 1085-97 (discussing contempt cases involving professed inability to comply).

29. T. SCHELLING, THE STRATEGY OF CONFLICT 115 (1960).

30. See *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) (holding that bankruptcy trustee seeking turnover order has burden of establishing by clear and convincing evidence that defendant is in possession of property); *Oreil v. Russell*, 278 U.S. 358, 362 (1929) (right to turnover order must be supported by clear and convincing evidence). Compare *Grand Jury Subpoena Duces Tecum v. United States*, 868 F.2d 1014, 1016 (8th Cir. 1989) (holding that government did not have burden of proving, at contempt hearing for violation of enforcement order for recipient to produce documents, that recipient possessed documents).

31. *Morgan v. Foretich*, 521 A.2d 248, 253 (D.C. 1987).



or knows where something is and refuses to deliver it or tell where it is. The plaintiff's burden of proof, the Supreme Court held, is clear and convincing evidence.<sup>32</sup>

The Court first reasoned by analogy in the turnover decisions; fraud requires clear and convincing evidence, and a turnover order is related to fraud. The clear and convincing standard, Justice Jackson added, tells the judge to reject "questionable experiment[s] in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement."<sup>33</sup> Jackson's reasoning is more satisfactory; because contemnor's liberty is in jeopardy, a more rigorous burden of proof is appropriate to reduce the risk of erroneous confinement.<sup>34</sup> A preponderance standard is too flimsy to protect individual liberty.

On the other hand the Court rejected Justice Black's view that plaintiff must prove the prerequisites for coercive confinement beyond a reasonable doubt.<sup>35</sup> Coercive confinement's "punishment" exists, the majority said, because the contemnor declines to obey. The judge may err and the contemnor may suffer; "but the conscience of judges in weighing the evidence under a clear perception of the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other."<sup>36</sup>

The masked man who took Heather left Cora unable to obey Judge Row's order. Contemnor's inability to comply is an affirmative defense to coercive contempt; the contemnor bears the burden of proof on the issue.<sup>37</sup> A presumption in bankruptcy court turnover proceedings created a similar practical effect. Proof that the contemnor possessed property earlier led the judge to presume continued possession unless contemnor explained the way that possession stopped.<sup>38</sup> Both the burden of proof and the presumption are grounded on the contemnor's access to the evidence and the need to overcome the contemnor's incentive not to disclose it.

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32. See *Oriel v. Russell*, 278 U.S. 358, 362 (1929); *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948).

33. *Maggio*, 333 U.S. at 67.

34. *Id.* at 64. See C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 341 (2d ed. 1972); R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.3 (3d ed. 1986).

35. *Maggio*, 333 U.S. at 78. See REPORT OF THE COMMITTEE ON CONTEMPT OF COURT ¶¶ 10, 22, 73, 75 [hereinafter PHILLIMORE REPORT] (copy on file with author) (presented to Parliament Dec. 1974) (recommending abolishing difference between civil and criminal contempt and advising application of "beyond a reasonable doubt" standard of proof for both civil and criminal contempt).

36. *Oriel*, 278 U.S. at 364.

37. See *Drake v. National Bank of Commerce*, 168 Va. 230, 239, 190 S.E. 302, 306 (1937).

38. See *In re Luma Camera Serv., Inc.*, 157 F.2d 951, 953 (2d Cir. 1946), *rev'd sub nom.* *Maggio v. Zeitz*, 333 U.S. 56 (1948).

What if Cora stays in jail for eight months and then, persisting in her original story, petitions the court to be released?<sup>39</sup> Judge Row may conclude that Cora's kidnapping tale sounds less cockamamie now. What effect does his original disbelief have? What force does a presumption retain?

Judge Jerome Frank wrote a turnover opinion that affirmed a bankrupt debtor's coercive confinement based on the presumption of continued possession. Judge Frank assumed that the debtor-contemnor had sold the property and spent the proceeds. In reality, however, the contemnor had not denied evidence of possession because that denial would have admitted issuing a false financial statement and invited a criminal prosecution.<sup>40</sup> "Although we know that [contemnor] cannot comply with the order," Judge Frank observed, "we must keep a straight face and pretend that he can, and must thus affirm orders which first direct [him] to do an impossibility, and then punish him for refusal to perform it."<sup>41</sup> And to what effect? Criminal punishment with neither a jury nor proof beyond a reasonable doubt.<sup>42</sup> The fairest reading of Judge Frank's opinion is that, to invite reversal, he overstated the conclusions that precedent forced him to reach.

The Supreme Court accepted Judge Frank's apparent invitation. First, the Court told trial judges to administer the presumption of continued possession through consideration of individual factors, not to evaluate the presumption coldly and impersonally. Trial judges should consider: How much time had passed? Is the property fungible, perishable, salable, or consumable? Is the bankrupt thrifty or a "fast-living adventurer"?<sup>43</sup>

The second issue is: when the contemnor later seeks release, what effect does the judge's earlier decision to confine her have? Judge Frank, recognizing that *res judicata* perpetuated error, said that the initial decision to confine the contemnor was preclusive later when the contemnor sought release; this, Frank charged, confirmed the theory that two wrongs make a right.<sup>44</sup>

The Supreme Court overlooked Judge Frank's unsubtle hint; the Court incorrectly accorded the original coercive confinement decision preclusive effect, safe from later reexamination.<sup>45</sup> To see the error in the Court's

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39. See *Drake*, 168 Va. at 239, 190 S.E. at 306 (holding that conclusion by trial court on evidence of contempt stands upon same plane as jury verdict); see also O. FISS & D. RENDLEMAN, *supra* note 1, at 1086-97 (discussing cases of disbelief of ability to comply).

40. See Schwartz, *Turnover and Contempt Proceedings in the Light of the History of Maggio v. Zeitz*, 5 UCLA L. REV. 75, 78 (1958).

41. *In re Luma*, 157 F.2d at 954.

42. See *id.* at 953 (discussing effect of presumption of continued possession).

43. *Maggio v. Zeitz*, 333 U.S. 56, 66 (1948).

44. *In re Luma*, 157 F.2d at 954; see also *Oriel v. Russell*, 278 U.S. 358, 363 (1929) (holding that only evidence that can be heard on petition of turnover order is evidence of newly arisen disability).

45. *Maggio*, 333 U.S. at 68-69. This was incorrect because normally only final judgments receive full preclusive effect; the more flexible law of the case doctrine governs separate phases of the same lawsuit. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1980) (discussing finality

approach, one need only examine the dilemma of Cora, who told an unlikely truth that Judge Row disbelieved. Following an approach that accords the original decision literal issue preclusive effect, if Cora repeats the story of the ski-masked kidnapper ten months later, Judge Row will repeat his disbelief.<sup>46</sup> Judge Row's initial error leads to indefinite imprisonment for Cora.

Should Judge Row keep Cora in coercive confinement to vindicate an erroneous order? That would carry respect for court orders a little too far. The trial judge may have changed his mind about the original factfinding. The plaintiff may either be using civil process to punish contemnor or he may decide to employ the leverage from confinement to bargain for concessions he is not entitled to.

These considerations may have affected Justice Jackson. For like a careful mountain climber, he left handholds for the trial judge who has gone too far out on the cliff of coercive confinement to grasp to find his way back. The process must focus on the contemnor's obedience rather than the contemnor. And each time the matter is heard, the judge must focus on the contemnor's ability to comply at present.<sup>47</sup>

Following Justice Jackson's approach, Cora may petition for release ten months later and repeat her kidnapping story. Judge Row may believe her testimony even though he previously thought she was lying. The earlier finding in the hearing leading to confinement that Cora was able to comply is preclusive only on the date of that hearing.<sup>48</sup>

The reasoning is persuasive, up to a point. A confined contemnor may obey the order because of the loss of freedom and discomfort. However, contemnor may disdain to comply and following "a reasonable interval of time [that] has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the [contemnor's] inability to obey the order, he has always been released."<sup>49</sup> "The shadow of the prison gates" coupled with contemnor's believable denial that present compliance is possible may "convince the court that his is not a wilful disobedience which will yield to coercion."<sup>50</sup> Judges may, however, persist

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of judgments); Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1 (noting that law of the case reflects view that separate phases of same lawsuit should be consistent with each other).

The Supreme Court had already declined to base civil contempt on an incorrect order. See *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947) (stating that "[t]he right to remedial relief falls with an injunction which events prove was erroneously issued").

46. See *Maggio*, 333 U.S. at 71, 75 (holding that original finding in contempt proceedings has preclusive effect).

47. See *id.* at 63, 64; see also *Grand Jury Subpoena Duces Tecum v. United States*, 868 F.2d 1014, 1016 (8th Cir. 1989) (holding that defendant who was ordered to produce invoices but who did not assert nonpossession in enforcement hearing may, under *Maggio*, raise present inability to comply at contempt hearing).

48. See *Maggio*, 333 U.S. at 70-72, 73-76.

49. *In re Epstein*, 206 F. 568, 570 (1913). See *Maggio*, 333 U.S. at 72 (quoting *Epstein*).

50. *Maggio*, 333 U.S. at 76; see also *In re Bar-Craft Dresses, Inc.*, 101 F. Supp. 921,

in disbelief, particularly if contemnor's tale is incredible.<sup>51</sup>

Justice Jackson has shown Judge Row how to return from the precarious cliff. Judge Row rejected Cora's evidence that Heather was abducted. Ten months later Judge Row can attenuate his earlier finding's *res judicata* effect and decide that Cora is currently unable to obey. Is limiting *res judicata* a pretext for Judge Row to admit surreptitiously that the factfinding he originally based Cora's confinement on was incorrect? Or, to introduce the second variation, will the safety valve for factual error turn into a ruse that the lying or terminally stubborn contemnor will use to avoid obedience?

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A second variation on Cora's disobedience is more complex. Suppose that Cora opposes granting unsupervised custody of Heather to Fred on the ground that she knows he has sexually molested the infant. Judge Row finds that Cora has not proved her charges and grants Fred unsupervised custody. Cora reasserts her belief that the child is in danger from her father, refuses to produce her, and declines to answer questions about where Heather is except to say that she is safe and healing. Judge Row finds Cora in contempt and orders her jailed until she tells where the child is.

Normally disputes about a noncustodial parent's access to children are subject to compromises about location and length of visitation. As Dr. Elizabeth Morgan's protracted coercive confinement revealed, however, the question of whether a mother should grant unsupervised custody to a person she fears will molest the child is not amenable to communication, reason, negotiation, division, and compromise.<sup>52</sup>

Judge Row has ordered Cora confined until she produces Heather or tells where she is. Fred is interested in enjoying his substantive right, as promulgated by Judge Row, to unsupervised custody of Heather. Judge Row would like Fred to enjoy the rights guaranteed him under the substantive law. Furthermore, the judge is concerned about the credibility of the court in future lawsuits and in public respect for court orders.

Cora declines to obey, instead refusing to answer a question. If Judge Row had ordered Cora to produce the three-dollar coin and if she denies ability to produce, either honestly or dishonestly, then the judge may disbelieve her and confine her to coerce; later when she petitions for release, the judge may escape through Justice Jackson's safety valve: articulate present belief and terminate coercive confinement. The mute contemnor who disdains either to dissemble or to tell the truth, diminishes the chance

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922 (S.D.N.Y. 1952) (stating that imprisonment dissipates presumption that contemnor has possession of property ordered to be surrendered); *In re Luma Camera Serv., Inc.*, 84 F. Supp. 839 (S.D.N.Y. 1949) (noting importance of fact that great period of time had elapsed since turnover order in deciding on present inability to comply).

51. See *Maggio*, 333 U.S. at 75-76; *Lopiparo v. United States*, 216 F.2d 87, 91 (8th Cir. 1954), cert. denied, 348 U.S. 916 (1955); *In re Cal. Motors, Inc.*, 122 F. Supp. 885, 887 (E.D.N.Y. 1954); *In re Sussman*, 85 F. Supp. 570 (S.D.N.Y. 1949); *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 739 (7th Cir. 1985).

52. See Harmer, *supra* note 2, at 256-69.

for the judge to reconsider factfinding.<sup>53</sup> If a contemnor declines even to answer, the judge cannot use that safety valve.

Cora, though able, simply refuses to obey because she considers the consequences of disobedience less serious than the consequences of obedience. One possibility is for her to obey. Each dawn, of course, brings the chance that Cora will change her mind sometime during that day and effect release. Coercive confinement theoretically lasts until contemnor obeys or forever, potentially as long as contemnor's lifetime.<sup>54</sup> Cora will be released when Heather reaches her age of majority.

As Cora settles into her cell, let us speculate, eliminate some possibilities, and mention some refinements that we cannot eliminate. Judge Row has done his best to communicate the threat. There was no asterisk in his voice that revealed lack of commitment to stay the course. The authorities will not find Heather. Fred will not abandon his quest for custody. Heather will not reach her age of majority.

At the outset Cora is self-disciplined; she tells herself that even though she knows where Heather is and can comply, she prefers the consequences of disobedience over what she, rightly or wrongly, views as tragedy for Heather and craven capitulation for herself. Her firmly held prediction that Fred will molest Heather may be inaccurate, but it is based on some evidence and she maintains it. If she is wrong about Fred, he may suffer economic, social, and psychological harm or injury from the spiteful charges. In the beginning we should assume contemnor is rational: after a certain amount of confinement contemnor will value future liberty more than obedience and saving face.<sup>55</sup> If the judge appears to be firm, contemnor will decide that obedience is a lesser evil than continued incarceration and to advance her own best interests, contemnor will obey.<sup>56</sup>

Like all assumptions, the assumption that contemnor is rational is not always warranted.<sup>57</sup> Several possibilities cannot be ruled out. Does Cora think that Fred and Judge Row lack resolve and will back down? Is Cora sentient enough to understand Judge Row's threat and to dislike the prospect of jail? Cora may travel by dim light or her path may be lit by demons' torches that the rest of us do not see; she may not apprehend Judge Row's order; she may seek punishment for deeply seated reasons. Heather may be

53. See *Maggio*, 333 U.S. at 75 (stating that contemnor who stands mute does not meet issue of inability to comply).

54. See *Uphaus v. Wyman*, 360 U.S. 72, 82 (1959); *Penfield Co. v. S.E.C.*, 330 U.S. 585, 594 (1947); *In re Nevitt*, 117 F. 448, 449 (8th Cir. 1902); *Culver City v. Superior Court*, 38 Cal. 2d 535, 241 P.2d 258 (1952); *City of Vernon v. Superior Court*, 38 Cal. 2d 512, 241 P.2d 245 (1952); see also Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 801, 802 (1943); Comment, *Equity-Contempt-Duration of Imprisonment*, 36 MICH. L. REV. 1016, 1018 (1938).

55. See *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985).

56. See *In re Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988) (holding that confinement must continue as long as judge is satisfied that coercive sanction might produce intended result).

57. See *In re Martin-Trigona*, 590 F. Supp. 87, 88 n.2 (D. Conn. 1984) (discussing contemnor's history of ad hominem attacks on judges).

dead; and Cora may have plenty of reasons to remain silent. Prolonged incarceration has a corrosive effect on the human psyche; we cannot assume that Cora is immune. One final ominous possibility. Fred may know Cora well enough to predict that she will disobey the order; and he may use the confinement, not to coerce her, but for revenge.

Contemnor's confinement theoretically is self-imposed; she need only comply and coercion never starts or ends. As one court stated: "If [contemnor] chooses to abide by the result of the adjudication and obey the order . . . [the contemnor] need not face jail. If, however, [the contemnor] continues to disobey, we find on this record no constitutional objection to the exercise of the traditional remedy of contempt to secure compliance."<sup>58</sup>

Consider Judge Black's assessment of coercive contempt:

The law will not bargain with anybody to let its courts be defied for a specific term of imprisonment. There are many persons who would gladly purchase the honors of martyrdom in a popular cause at almost any given price, while others are deterred by a mere show of punishment. Each is detained until he finds himself willing to conform. This is merciful to the submissive, and not too severe upon the refractory.<sup>59</sup>

#### COERCIVE VS. PUNITIVE CONFINEMENT

One contemnor, after several years confinement, asserted "I am the only one that is being made to comply with the laws, and if others can break the laws, then so can I."<sup>60</sup> This contemnor, whose three appeals are reported,<sup>61</sup> inspired a student notewriter to observe "it is evident that the purposes of justice will be served best by keeping such persons as defendant under lock and key. She may well spend her life in confinement, unless her attitude changes."<sup>62</sup>

The notewriter confused coercing to achieve compliance with punishing disobedience through criminal contempt. He or she assumed that the au-

58. *Uphaus v. Wyman*, 360 U.S. 72, 82 (1959).

59. *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902) (quoting Judge Black). See *Uphaus*, 360 U.S. at 81-82 (holding contempt order valid where contemnor stated his intention not to produce documents); *McCrone v. United States*, 307 U.S. 61, 63 (1939) (discussing contempt order for refusal to answer questions during testimony concerning tax liability of another); *People ex rel. Valenti v. McCloskey*, 6 N.Y.2d 390, 393, 160 N.E.2d 647, 650, 189 N.Y.S.2d 898, 899 (1959) (discussing contemnor's failure to testify); *People ex rel. Feldman v. Warden*, 46 A.D.2d 256, 258-59, 362 N.Y.S.2d 171, 173-74 (1974) (finding that appellant willfully refused to comply with order even though she had ability to do so and affirming judgment of contempt), *aff'd*, 36 N.Y.2d 846, 331 N.E.2d 691, 370 N.Y.S.2d 913 (1975).

60. *Tegtmeyer v. Tegtmeyer*, 306 Ill. App. 169, 178-79, 28 N.E.2d 303, 307 (1940), *cert. denied*, 313 U.S. 568 (1941).

61. *Tegtmeyer v. Tegtmeyer*, 314 Ill. App. 16, 40 N.E.2d 767, *cert. denied*, 317 U.S. 689 (1942); *Tegtmeyer v. Tegtmeyer*, 306 Ill. App. 169, 28 N.E.2d 303 (1940), *cert. denied*, 313 U.S. 568 (1941); *Tegtmeyer v. Tegtmeyer*, 292 Ill. App. 434, 11 N.E.2d 657 (1937).

62. Comment, *supra* note 54, at 1018.

thorities might continue to imprison the contemnor to punish her even though she initially had been confined after mere civil procedure. Because of contemnor's exacerbated recalcitrance, the notewriter's confusion of punitive with coercive purpose seems almost invited error. But after a cooler reflection, coercion, it becomes apparent, went awry. The authorities may punish a defiant contemnor, but they should announce it in advance and use criminal procedure.<sup>63</sup> Prolonged ineffective coercive confinement without criminal procedural protection undercuts public respect for the judicial process. Everyone loses, plaintiff, defendant, the court system, and the taxpayer.<sup>64</sup>

How may we prevent these debacles? Should we attempt to do so? Releasing contemnors without obedience thwarts plaintiffs' rights and diminishes judicial credibility. Have we abandoned the winning plaintiff's right to enjoy his substantive entitlement? May release erode the judge's ability to use coercive orders credibly and effectively in the future? Does release undermine public respect for the law and the judicial process? Is that too high a price?

We can state the basis for negative answers in at least two ways. First, in an imperfect world, courts protect winning litigants' rights imperfectly. Second, sometimes other interests are more important than litigants' substantive rights and the legal system favors those interests.

Several analogies exist to show how policymakers have developed doctrines that cut off a claimant's remedy for a violation. Clear examples show the law refusing to help a creditor owed a just debt. If the creditor neglects to file a lawsuit in time, the statute of limitations will bar the creditor from suing successfully to obtain a judgment. Even if the creditor's debt is embodied in a court judgment, passage of the statutory period will bar the creditor from collecting a legally recognized debt from a deadbeat's assets.<sup>65</sup>

The exemption statutes are a second example. Even if a creditor who is owed a just debt has reduced that debt to judgment, the exemption statutes say that the judgment debtor may withhold a minimum of property.

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63. See *United States v. Morales*, 566 F.2d 402, 409 (2d Cir. 1977) (stating that court should first determine feasibility of coercing testimony through imposition of civil contempt sanctions before resorting to criminal sanctions); *United States v. Berardelli*, 565 F.2d 24, 26 (2d Cir. 1977) (affirming conviction for criminal contempt); *United States v. De Simone*, 267 F.2d 741, 747 (2d Cir.) (noting that criminal contempt sentence approached outer limits of court's discretion), *cert. denied*, 361 U.S. 827 (1959); *Watkins v. Howard*, 441 F. Supp. 486, 488 (E.D. Wis. 1977) (holding that it was no error to treat refusal to answer questions while testifying as criminal rather than civil contempt and that it was no error to utilize summary criminal proceedings); *In re Farr*, 64 Cal. App. 3d 605, 614, 134 Cal. Rptr. 595, 600 (1976) (holding that criminal contempt proceeding was properly brought subsequent to coercive proceedings).

64. See Harmer, *supra* note 2, at 267.

65. See VA. CODE ANN. § 8.01-251 (1990) (barring creditor from collecting debt after 20 years); N.Y. CIV. PROC. L. & R. § 5014 (McKinney 1990) (barring creditor from collecting after ten years); GA. CODE ANN. § 9-12-60 (1990) (barring creditor from collecting debt after seven years).

A debtor with less than the minimum of exempt property may avoid paying creditors anything.<sup>66</sup>

Legislatures passed statutes of limitations and exemption statutes for policy reasons that supersede the creditor's right to collect just debts. Statutes of limitations protect the court system from stale evidence that policymakers fear will be unreliable; in addition the statutes provide certainty and repose for people who rely on things continuing as they are. Exemption statutes leave debtors with a minimum cushion of property available for them and their families. The statutes of limitations and exemptions are available to debtors even when the policies do not apply.

We will return to Cora whom we left confined to coerce her to do something she implacably refuses to do. Even if we eliminate the possibility of obedience, contemnors may become uncoercible and be released. How can Judge Row's order coercing Cora lose coercive power? The United Kingdom's influential Phillimore report recommended abandoning *sine die* coercive confinement committals for fixed terms: "Obstinate contemnors have to be released eventually, despite non-compliance."<sup>67</sup> An Australian study agreeing that the primary purpose of coercing swallows an element of deterrence, nevertheless, suggested an upper limit on coercive confinement to deal with a contemnor who "resolutely refuses" to obey and is "prepared to make a martyr" of herself rather than obeying.<sup>68</sup>

Two principles of containment limit coercive contempt confinement to prevent indefinite imprisonment.<sup>69</sup> First, a judge may hold that the coercive goal is unreachable and terminate confinement. Second, the legislature can cap coercive confinement so that it ends after a time certain.

#### THE JUDICIARY AND COERCIVE CONFINEMENT

The first principle of containment, that a judge may hold that the coercive goal is unreachable and terminate confinement, is a judicially

66. See Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779 (1974) (defining exempted property as that which, by statute, may not be subjected to legal proceeding to satisfy creditor's claim).

A debtor has two other ways to avoid contractual obligations than waiting out the statute of limitations and claiming exemptions. First, a judge will relieve her from contractual obligations if performance turns out to be impossible or impracticable. G. PALMER, *THE LAW OF RESTITUTION* Ch. 7 (1978). Second, she can file for bankruptcy, discharge her obligation to pay a just debt, and enjoy her fresh start.

67. PHILLIMORE REPORT, *supra* note 35, at 74.

68. Chesterman & Waters, *supra* note 5, at 120.

69. Compare Apel, *supra* note 24, at 521-26 (arguing that contemnors should be able to argue necessity to be released from coercive contempt confinement) with *Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988) (rejecting necessity defense in contempt proceedings), *cert. denied*, 109 S. Ct. 790 (1989). Professor Apel offers the following definition of necessity: contemnor believes in good faith that disobedience is necessary to protect the child. *Id.* at 521-22. Even though the District of Columbia court of appeals rejected the necessity defense in contempt, contemnors might consider interposing it as an alternative to the theories discussed below.



developed doctrine. Coercive confinement may lose its power to coerce and the uncoercible person should be released. The courts reason that coercive confinement should not be transformed into a criminal punishment that was imposed without criminal procedure.<sup>70</sup> How can the judge and plaintiff tell whether coercion will fail? When should the judge subordinate his credibility, the plaintiff's substantive rights, and public respect for courts?

Most of the long distance contemnors who appear in the recent reported decisions have violated orders to testify. Immunity often overcomes the witness's privilege against self-incrimination. Contemnor, knowing the answer, refuses to respond satisfactorily.<sup>71</sup> The judge orders contemnor into coercive confinement until a satisfactory answer is forthcoming. Some long distance contemnors have asserted a testimonial privilege; after the judge rejects the privilege, they persist in adhering to its policy.<sup>72</sup> Some contemnors without more refuse to answer.<sup>73</sup>

After a time the confined long distance contemnors petition to be released.<sup>74</sup> There is, they assert, no realistic possibility or no substantial likelihood that additional confinement will coerce; thus the confinement's character has transmogrified from coercive to punitive, and due process compels release.<sup>75</sup>

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70. See O. FISS & D. RENDLEMAN, *supra* note 1, at 1097-1107 (discussing cases where court has reasoned that coercive confinement has been transformed into criminal punishment without criminal procedure); *Lambert v. Montana*, 545 F.2d 87 (1976) (holding that continued confinement resulting from contempt order raises serious federal constitutional concerns); *In re Farr*, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974) (holding that point at which contempt commitment ceases to serve coercive purpose it becomes punitive in character and becomes subject to statutory maximum sentence); *Catena v. Seidl*, 343 A.2d 744, 68 N.J. 224 (1975) (stating that coercive contempt order cannot be used to punish contemnor for past refusal to comply); Comment, *Contempt: Civil Contempt Order May Not Include Absolute Sentence*, 47 MINN. L. REV. 907, 913-14 (1963) (noting that imprisonment of contemnor may reach point where it becomes more punitive than coercive); Comment, *Incarceration for Civil Contempt: An Asserted Eighth Amendment Challenge Faces a Semantical Defense*, 11 SAN DIEGO L. REV. 1026 (1974) (noting constitutional attack on potentially indefinite confinement for civil contempt as cruel and unusual punishment); see also Note, *Due Process in Civil Contempt Proceedings: A Comparison with Juvenile and Mental Incompetency Requirements*, 44 FORDHAM L. REV. 1029 (1976) (noting need to evaluate due process afforded to civil contemnor).

71. See, e.g., *Morgan v. Foretich*, 564 A.2d 1, 2 (D.C. App. 1989) (finding confinement no longer coercive but punitive where contemnor persisted in refusal to comply); *Lambert v. Montana*, 545 F.2d 87, 88 (1976) (noting that contemnor knew identity of perpetrator but refused to disclose information); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 66, 99 Cal. Rptr. 342, 345 (1971) (noting contemnor's refusal to answer questions at trial).

72. See *In re Cueto*, 443 F. Supp. 857, 860 (S.D.N.Y. 1978).

73. See, e.g., *Lambert v. Montana*, 545 F.2d 87, 88 (9th Cir. 1976); *Morgan v. Foretich*, 564 A.2d 1, 2 (D.C. App. 1989); *Catena v. Seidl*, 68 N.J. 224, 247, 343 A.2d 744, 746 (1975).

74. Many are habeas corpus petitions. See *Morgan v. Foretich*, 564 A.2d 1, 3 (D.C. App. 1989) (merging habeas corpus petition with domestic relations lawsuit).

75. See 28 U.S.C. § 1826 (1988) (limiting term of coercive confinement to eighteen months). Most of the federal decisions on terminating coercive confinement were decided under this statute. But see *Lambert v. Montana*, 545 F.2d 87, 89 (9th Cir. 1976) (holding that continued coercive confinement under Montana statute raised important federal constitutional issues).

Felicitously stated: "recalcitrance then results in imprisonment, but *real* recalcitrance results in release."<sup>76</sup>

Some kind of safety valve is needed to set a cut off; this should avoid the extreme of protracted, perhaps indefinite, ineffective confinement without criminal procedure. The safety valve also must steer clear of the other extreme; it should protect winning litigants' rights and prevent the public perception that court orders are not worth the paper they are written on.

The reported opinions expose the peril of administering any standard. From the point of view of developing precedent, the decisions are unsatisfactory. Some of the things trial judges and appellate courts say about releasing and declining to release long distance contemnors follow.

If civil coercive confinement loses its ability to coerce, it becomes punitive or criminal punishment imposed after civil procedure, and the judge will order the authorities to release contemnor.<sup>77</sup> The line between coercion and punishment is not bright, but fine and difficult to discern.<sup>78</sup> Contemnor has the burden of proof, both of persuasion and production, to convince the judge that there is no realistic possibility that further confinement will coerce.<sup>79</sup> The decisions are factual; each involves one person's discrete confinement and will power. The judge's factfinding is predictive, not historical.<sup>80</sup>

The judge's decision must be individualized.<sup>81</sup> Individualized decisions mean two things. First, the decisions have reduced precedential value because they are discrete to a particular contemnor. Second, the judge may not continue to confine this contemnor to deter future disobedience or to encourage other potential and actual contemnors to obey.<sup>82</sup> The judge's

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76. *Apel*, *supra* note 24, at 525.

77. *See, e.g., In re Howald*, 877 F.2d 849, 850 (11th Cir. 1989); *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 31 (2d Cir. 1981); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 423-24 (3d Cir. 1979).

78. *See In re Pantojas*, 639 F.2d 822, 825 (1st Cir. 1980); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 425 (3d Cir. 1979); *King v. Department of Social and Health Serv.*, 110 Wash. 2d 793, 756 P.2d 1303 (1988).

79. *See In re Howald*, 877 F.2d 849, 850 (11th Cir. 1989); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *see also In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 425 (3d Cir. 1979); *King*, 110 Wash. 2d at 756.

80. *See In re Parrish*, 782 F.2d 325, 327 (2d Cir. 1986) (discussing nature of judge's factfinding in dealing with asserted terminal stubbornness). The judge must gauge the likelihood that contemnor's disobedience will continue indefinitely, because there is no prospect that contemnor will obey. This differs from usual judicial factfinding which involves retrospective determination of historical fact. This type of factfinding also differs from two kinds of factfinding predictions: prospective determinations of future facts (for example, what future medical expense will accrue) and future hypothetical factfinding (for example, profits that would have occurred except for the breach). *Id.*

81. *See In re Howald*, 877 F.2d at 850 (stating that court must make individualized determination of possible future compliance); *Simkin*, 715 F.2d at 38 (2d Cir. 1983) (noting individualized and predictive nature of judge's determination in contempt proceeding); *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984) (noting broad discretion in trial judge to determine whether contempt confinement has lost its coercive effect).

82. *See Simkin*, 715 F.2d at 38.

appearance of firmness affects a particular contempt: for contemnor's "realization that the Court is not inclined to relent is also likely to cause him to reevaluate his course and decide to end this wasteful hiatus in his own best interests."<sup>83</sup> If, however, judges seek to advance the goals of punishing disrespect for courts and court orders and to encourage contemnors and others to obey future orders, criminal contempt is, at least in theory, available.<sup>84</sup>

The second point, in the writer's view, probably is cut too fine. The primary purpose of coercive contempt is to achieve obedience to a particular order and to benefit the successful party. Punishing past breaches with criminal contempt induces future obedience by both the offender and potential offenders. Coercive confinement "implicitly, if not explicitly, also contains a subsidiary element of punishment for defiance of the court's authority."<sup>85</sup>

Coercive confinement's secondary or implicit effect of structuring future incentives in other disputes, while it cannot be the intended purpose or the primary goal, nevertheless cannot be ignored.

The contemnor's self-serving testimony will support her contention that she will never relent. This evidence will be relevant; but for a self-respecting judiciary it is perforce less than dispositive.<sup>86</sup> The judge may reject "as decisive a contemnor's avowed intention never to testify."<sup>87</sup> If contemnor states present intent never to comply, the judge may decide that further confinement may change contemnor's mind. The issue for the judge to decide is not whether contemnor believes then that she will never obey, but whether the trial judge believes there is no realistic possibility.<sup>88</sup> Family and friends, health professionals, including mental health professionals, as well as spiritual counselors may corroborate contemnor.<sup>89</sup>

Other factors bear on the decision. Courts have mentioned contemnor's age apparently because actuarially a period of confinement is a bigger proportion of an elderly person's remaining years.<sup>90</sup> Bad or frail health may

83. *In re Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988).

84. See *In re Ford*, 615 F. Supp. 259, 262 (S.D.N.Y. 1985) (criticizing *Simkin* as emasculating the civil contempt sanction); *In re Cocilovo*, 618 F. Supp. 1378, 1380 (S.D.N.Y. 1985) (same); *In re Parish*, 613 F. Supp. 356 (S.D.N.Y. 1985) (noting that *Simkin* negates and complicates civil contempt proceedings), *aff'd*, 782 F.2d 325 (2d Cir. 1986).

85. *Chesterman & Waters*, *supra* note 5, at 109.

86. See *Morgan v. Foretich*, 564 A.2d 1, 4-5 (D.C. App. 1989).

87. *In re Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988); see also *In re Parrish*, 782 F.2d 325, 327 (2d Cir. 1986); *In re Howald*, 877 F.2d 849, 850 (11th Cir. 1989).

88. See *In re Parrish*, 782 F.2d at 327-28; *Simkin*, 715 F.2d at 37; *United States v. Salerno*, 632 F. Supp. 529, 531 (S.D.N.Y. 1986); *King v. Department of Social and Health Serv.*, 110 Wash. 793, 804, 756 P.2d 1303, 1309-10 (1988).

89. See *Morgan*, 564 A.2d at 3 (noting testimony by friends and professionals regarding contemnor's resolve to stay in jail and refuse compliance).

90. See *Catena v. Seidl*, 68 N.J. 224, 229-30, 343 A.2d 744, 747 (1975) (noting contemnor's advanced age and failing health as considerations in ordering contemnor's release).

According to press reports a 77 year old grandmother-contemnor, who was confined in

support the judge's decision to release a contemnor,<sup>91</sup> apparently because confinement of the infirm generates sympathy. But medical evidence will not always lead to release.<sup>92</sup>

How long contemnor has been confined is important for the same reasons as age and health, and also because in a blunt fashion, judges conclude that past patience lets a factfinder infer future patience. Each month that passes strengthens contemnor's claim that she is "unable" to obey.<sup>93</sup> Another court, however, read the duration's auguries differently and concluded that time spent in prison increases contemnor's "desire for freedom and concomitantly the willingness to testify."<sup>94</sup>

The reason contemnor states for noncompliance probably affects the court's decision. Although one contemnor unsuccessfully claimed "motherhood" as a basis to release her,<sup>95</sup> Cora interposes a mother's love for her little daughter and fear that the child will be molested to explain her disobedience.<sup>96</sup> Cora bases her noncompliance on a higher law of motherhood: because the court system is infected with male bias against women and children, she will protect the child because the judicial authorities will not.

A contemnor who bases resistance on an established moral principle may win sympathy, even though her conduct may misplace, exaggerate, or distort that principle. Long distance contemnors frequently ground disobedience on ideology.<sup>97</sup> Sometimes coercive confinement focuses media attention on contemnor as a victim, communicates contemnor's determination, if not militancy, and confers the mantle of martyrdom. Contemnor may draw support from others of similar ideological bent who view the contemnor as a hero or martyr.<sup>98</sup> More strikes have been won than broken, it is the author's observation, because judges jailed union leaders. Supporters

a custody dispute to coerce her to tell where her daughter and granddaughters were, was released after eight days behind bars failed to break her silence. *Addenda*, Wash. Post, Sept. 19, 1990, at A7.

91. See, e.g., *In re Griffin*, 677 F. Supp. 26, 28 (D. Me. 1988); *Catena*, 68 N.J. at 229-30, 343 A.2d at 747.

92. See, e.g., *In re Dickinson*, 763 F.2d 84, 86, 88 (2d Cir. 1985) (noting that contemnor was diabetic, but basing release on other factors).

93. See, e.g., *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985).

94. *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 428 (3d Cir. 1979); see also *In re Cantazaro*, 663 F. Supp. 1, 2 (D.D.C. 1985) (quoting *Braun*).

95. See *In re Thornton*, 560 F. Supp. 183, 186 (S.D.N.Y. 1983); see also *In re Griffin*, 677 F. Supp. at 26 (denying contemnor's argument based on diabetic condition and desire to see family).

96. See, e.g., *Morgan v. Foretich*, 564 A.2d 1, 3 (D.C. App. 1989).

97. See, e.g., *In re Parrish*, 782 F.2d 325 (2d Cir. 1986) (Black Liberation Movement); *In re Ford*, 615 F. Supp. 259 (S.D.N.Y. 1985) (political activist, "grand jury resisters"); *In re Parish*, 613 F. Supp. 356 (S.D.N.Y. 1985) (Sunrise Collective); *In re Dohrn*, 560 F. Supp. 179 (S.D.N.Y. 1983) (Weather Underground); *In re Richard*, 375 N.W.2d 429 (S.D. 1985) (involving traditional Indian values).

98. See, e.g., *In re Dohrn*, 560 F. Supp. at 180 n.4.

may conduct sophisticated campaigns to achieve contemnor's release.<sup>99</sup> Friends of Elizabeth Morgan, for example, organized a newsletter with a mailing list of 15,000.

One court stated candidly that if contemnor adhered to an "established moral principle," it might attenuate his stay.<sup>100</sup> Another judge said that the moral principle test is "incapable of practical application."<sup>101</sup> Contemnors' zeal in professing their causes may exceed trial judges' skepticism about their sincerity, but the trial judge has the last, or next to last, word. Judges have expressed reservations. Contemnors who claim principle as a basis for silence "are usually co-conspirators attempting to conceal their own criminal involvement."<sup>102</sup> The contemnor's path may be lighted by an ignoble desire "to obtain the fruits of his friends' criminal activity."<sup>103</sup> Religious protestations are either a "sham" or extend beyond legal protection.<sup>104</sup> "While Saint Jeanne was canonized for what she did," one doubting trial judge reminded a contemnor, "probably most modern philosophers regard her as deranged."<sup>105</sup>

An unsympathetic contemnor may present a sympathetic basis for release. A member of organized crime who is protecting accomplices is a most rational long distance contemnor. One such contemnor previously has served ten years rather than inform.<sup>106</sup> A contemnor's patience in the face of lengthy unsuccessful coercion may demonstrate adherence to "organized crime's oath of silence."<sup>107</sup> To put it another way, "[c]ement walls are better than cement boots."<sup>108</sup> Can a judge who senses this stand passively by when the authorities may be exploiting contemnor's mindset to incarcerate him without having proved that he violated a criminal statute?<sup>109</sup> One judge

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99. See *id.* (discussing sophisticated letter writing campaign in support of contemnor's release); *In re Cueto*, 443 F. Supp. 857, 860 (S.D.N.Y. 1978) (acknowledging substantial number of Episcopal officials seeking contemnors' release).

100. *In re Farr*, 36 Cal. App. 3d 577, 584, 111 Cal. Rptr. 649, 653 (1974).

101. *Catena v. Seidl*, 68 N.J. 224, 229 n.1, 343 A.2d 744, 747 n.1 (1975). But see *In re Cueto*, 443 F. Supp. at 862.

102. *In re Dohrn*, 560 F. Supp. at 180 n.4.

103. *In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985).

104. See *id.*; *In re Cueto*, 443 F. Supp. 857 (S.D.N.Y. 1978).

105. *In re Jabbar*, 560 F. Supp. 186, 188 n.1 (S.D.N.Y. 1983).

106. See *In re Papadakis*, 613 F. Supp. 109 (S.D.N.Y. 1985).

107. *Catena v. Seidl*, 343 A.2d 744, 747 (1975). See Comment, *supra* note 54, at 1033 n.28, 1039 n.65.

108. Courtesy of Teaneck, New Jersey native, Fred Schauer.

109. Fear of retaliation, threats, or risk do not justify refusal to answer and are not defenses to coercive contempt. See *In re Crededio*, 759 F.2d 589 (7th Cir. 1985) (finding unpersuasive defendants' fear of retaliation); *In re Griffin*, 677 F. Supp. 26, 28-29 (D. Me. 1988) (stating that asserted threat against witness is not legal justification for refusal to testify); *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1978) (asserting that allowance of reprisal defense would undermine civil contempt statute); *United States v. Doe*, 862 F.2d 430, 432 (1988) (duress, fear of reprisal, is not a basis to decline to answer but a circumstance to consider in deciding whether coercion will be effective), citing *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); see also Note, *The Dilemma of the Intimidated Witness In Federal*

thought not; releasing the most rational contemnor has "the perverse result of creating a special, more lenient standard for that class of contemnor most committed to defying the court's order and thus least entitled to relief."<sup>110</sup>

The plaintiff's need for contemnor to comply, while not relevant to the issues, appears to affect some decisions. How significant is the goal of coercion? The judge may coerce less to achieve compliance with "relatively minor" order.<sup>111</sup> If the authorities already have, for example, contemnor's spontaneous handwriting exemplars, the judge is likely to mention that to buttress a decision that she is, in any event, uncoercible.<sup>112</sup> Time changes things. If contemnor is confined to coerce evidence, such as where a fugitive is, the passage of time may render the evidence stale.<sup>113</sup> And after several months the authorities have had an opportunity to learn the evidence from other sources.<sup>114</sup>

The judge will consider many factors including the length of time contemnor has been confined and the contemnor's statements and behavior. But the judge lacks "rules" and may not even have reliable rules of thumb. For no single factor is dispositive of any one claim to be uncoercible.<sup>115</sup> The legal standard confers vast discretion on the trial judge as initial decisionmaker who observed witness's demeanor and otherwise developed a feel for the issues.<sup>116</sup> The judge's discretion on both procedure and merits, one court said, is "virtually unreviewable."<sup>117</sup> The judge relying on "prior observations" may even decline to conduct a factual hearing.<sup>118</sup> A trial judge who clearly has lost patience with contemnor may be tempted to avoid futile confrontations by undermining both the appearance of legitimacy and the administration of decisions on individual petitions.<sup>119</sup>

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*Organized Crime Prosecutions: Choosing Among the Fear of Reprisals, the Contempt Powers of the Court, and the Witness Protection Program*, 50 *FORDHAM L. REV.* 582 (1982) (arguing fear of retaliation or reprisal should be defense to coercive contempt).

But see *In re Freligh*, 894 F.2d 881, 882-83 (7th Cir. 1990) (creating important qualification). A contemnor's genuine and reasonable fear that criminals will retaliate against him or his family is enough of a potential "just cause" to decline to answer to qualify him for an evidentiary hearing where he may adduce testimony to inform coercive contempt's "equitable character." *Id.*

110. *In re Ford*, 615 F. Supp. 259, 262 (S.D.N.Y. 1985).

111. See *King v. Department of Social and Health Serv.*, 110 Wash. 2d 793, 804, 756 P.2d 1303, 1310 (1988) (asserting, in dicta, that extended confinement for refusal to comply with minor order is abuse of discretion).

112. See *In re Dohrn*, 560 F. Supp. 179, 182 (S.D.N.Y. 1983).

113. See *In re Cueto*, 443 F. Supp. 857, 864 (S.D.N.Y. 1978).

114. See *id.* at 864.

115. See *King v. Department of Social and Health Serv.*, 110 Wash. 2d at 793.

116. See *In re Howald*, 877 F.2d 849, 850 (11th Cir. 1989).

117. *United States v. Doe*, 862 F.2d 430, 432 (2d Cir. 1988) (quoting *Simkin v. United States*, 715 F.2d 34, 38 (2d Cir. 1983)).

118. See *United States v. Salerno*, 632 F. Supp. 529, 531 n.3 (S.D.N.Y. 1986).

119. See *In re Martin-Trigona*, 590 F. Supp. 87, 89 (D. Conn. 1984) (refusing to allow contemnor hearing due to belief that hearing is only delay tactic).

Trial judges state the general rules as prefaces to statements of their discretion and draft holdings narrowly enough to make them distinguishable in the future.<sup>120</sup> Appellate courts in their turn find ways to decide individual appeals without creating coherent precedent; they erect even more cryptic signposts.<sup>121</sup> Statutes and the contemnor's confinement qualify appellate detachment with an accelerated decisionmaking schedule.<sup>122</sup>

Two salient features run through the appellate decisions: lengthy re-statements of the trial judge's latitude and complex discussions of the scope of review.<sup>123</sup> The trial judge's broad discretion followed by the necessarily tolerant review create more decisions that do not guide future decisionmakers to results.<sup>124</sup>

Releasing contemnors under the "rules" and process outlined above has not escaped criticism. One trial judge wrote that the terminal stubbornness doctrine coupled with "virtually unreviewable discretion" in section 1826 contempts leads judges to release contemnors routinely after six months, undermines grand jury investigations, "emasculate[s] an act of Congress," and creates an "administrative nightmare." The proper inquiry, he argued, is coercive purpose and ability to comply, not effect, not "the strength of the contemnor's intransigence." In short the contemnor's certain knowledge that authorities will confine him for eighteen months to secure obedience will coerce better than an unstable terminal stubbornness doctrine usually leading to release after six months.<sup>125</sup>

#### THE GAME OF COERCIVE CONFINEMENT

Some view the judicial doctrines on claims of uncoercibility in coercive confinement as a way to seek succor for virtue in distress. Others insist that a pigheaded recalcitrant be forced to obey. Between these partisan extremes exists a balanced way to analyze long distance coercive confinement. A discussion of terminal stubbornness as strategic bargaining in the frame of reference of game theory provides some perspective.<sup>126</sup>

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120. See *In re Cueto*, 443 F. Supp. 857, 861-64 (S.D.N.Y. 1978) (distinguishing several state and federal cases).

121. See *In re Howald*, 877 F.2d 849, 851 (11th Cir. 1989); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *King v. Department of Social and Health Serv.*, 110 Wash. 793, 756 P.2d 1303 (1988).

122. See 28 U.S.C. § 1826(b) (1988) (stating that appeal from order of confinement must be disposed of within thirty days).

123. See, e.g., *Morgan v. Foretich*, 564 A.2d 1, 4-9 (D.C. App. 1989).

124. The *Morgan* case has less precedential value than most cases. The three-judge panel opinion consists of an elaborate review of scope of review and the evidence, a mysterious concurrence, and a vigorous dissent. The opinion was forthwith vacated for consideration by the whole court. Congress passed a statute that applied to the contemnor and led to her release before the whole court considered the appeal. See *supra* note 1.

125. See *In re Cocilovo*, 618 F. Supp. 1378, 1382-83 (S.D.N.Y. 1985) (asserting that a six month threat of imprisonment is too little to effectively garner contemnor's testimony).

126. See O. FISS & D. RENDLEMAN, *supra* note 1, at 1004-12, 1104-07 (discussing game theory in context of coercive contempt).

The principal players are the judge and the contemnor. Coercive confinement is negotiation with conduct substituted for threats. The judge's conduct consists of imposing the confinement on contemnor to seek a concession, obedience. Each day contemnor is confined is one of a series of small coercions that are consecutive and perhaps continuous; each demonstrates the threat of more by lending it plausibility. The cliché that contemnor has the jailhouse keys in her pocket communicates to her the message that the judge has relinquished the initiative to her. The judge's statement plus the confinement lets contemnor predict what will happen next and coordinate her conduct with that prediction.

"Chicken is a universal form of adversary engagement."<sup>127</sup> In chicken each player uses her willingness to suffer injury or risk to communicate resolve to the other to convince the other to yield.<sup>128</sup> Chicken is found less frequently in the legal structure than in less law-laden environments like the relations between belligerent nations and street gangs.

Expressing aggression by saying, in effect, "I'll suffer until you say 'uncle'" instead of "fighting" is a passive-active form of chicken that is available to confined contemnors.<sup>129</sup> Accordingly, we do find confined contemnors threatening to stay in jail, for example, until a particular judge ceases to preside.<sup>130</sup> Perhaps more likely to succeed was the contemnor who raised the stakes of strategic bargaining by fasting in jail, observing, "I realize it will ultimately result in death."<sup>131</sup>

The contemnor's terminal stubbornness is an invitation to play chicken that the judge cannot refuse, a way for contemnor to relinquish the initiative back to the judge. She takes the keys from her pocket and throws them out the window. "To serve a larger goal, I am willing to endure incarceration until you relent or tragedy occurs. You are the only one who is able to prevent the tragedy."

Contemnor invests her life in giving public force to her convictions. Long confinement forces us to respect the inner strength that leads to the patience and to project that strength forward. Contemnor uses the strength of her resolve not to obey, to clarify her unyielding will. Protracted confinement has two further effects: it goes a long ways towards vindicating the sanctity of the law, and it strengthens, or at least does not erode, the credibility of the judge.

For almost everyone, at some point along the continuum of continued confinement, coercion stops and cruelty begins. Different people have different thresholds.<sup>132</sup> Contemnor's terminal stubbornness may allow the

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127. T. SCHELLING, *ARMS AND INFLUENCE* 116 (1966).

128. See T. SCHELLING, *supra* note 29, at 139 n.17; T. SCHELLING, *supra* note 127, at 42 n.5.

129. O. FISS & D. RENDLEMAN, *supra* note 1, at 1107.

130. See *In re Martin-Trigona*, 590 F. Supp. 87, 88-89 (D. Conn. 1984).

131. *In re Richard*, 373 N.W.2d 429, 433 (S.D. 1985). See *Sanchez v. United States*, 725 F.2d 29 (2d Cir. 1984).

132. Compare Comment, *Equity-Contempt-Duration of Imprisonment*, 36 MICH. L. REV.



judge to say, in effect, "At first we thought you would capitulate, but now we know otherwise."

Our zeal to achieve plaintiffs' rights through coercive contempt carries with it, as the game of chicken should reveal, an imposing potential for abuse. Our system usually checks state power to deprive a citizen of liberty by filtering it through several official bodies: a legislature passes a criminal statute that defines punishable misconduct and sets a maximum period of confinement, a prosecuting attorney decides to move forward, a jury concludes unanimously that the authorities proved the misconduct beyond a reasonable doubt. Coercive confinement concentrates that state power in one judge who finds the facts and formulates predictions based on clear and convincing evidence. As each day of coercive confinement ends, the contemnor's day was identical to her fellow inmate's who has been convicted of a crime.

Because the doctrine that converts coercive confinement exists, more contemnors will be terminally stubborn. If there were no doctrine leading to release, more contemnors would obey. Confining a civil litigant without a jury trial and other criminal protection is expensive; lengthy unsuccessful imprisonment may create an aura of moral opprobrium. When can we conclude from futile past confinement that further confinement will be just as futile? When is it safe to say that contemnor's stubbornness is truly terminal, not a bluff or a pose? Has the judge who frees a contemnor without her obedience lost a game of chicken? Would one more day of confinement lead to compliance?

Interdeterminate decisionmaking through coercion and resistance is a form of crisis negotiation that may careen tragically awry. Ambiguity lurks in every human communication, particularly in nonverbal communication through threats and measures. The judicial system lacks a face saving way of showing doubt, changing its mind, retreating, backing down, or capitulating. Our attention focuses on the judge and individual responsibility in the judicial hierarchy.

A less benign possibility is that either the judge or the plaintiff may sense in a terminally stubborn contemnor an opportunity to use her resistance to convert coercion to punishment. Contemnor disobeys or resists; her disobedience begets anger, which becomes in turn revenge cloaked in supposed coercion. Defiance and retaliation develop a showdown dynamic that supplants the original controversy.

Absent a limit imposed from outside the judicial system, a contemnor may remain incarcerated for "perhaps even several years."<sup>133</sup> Dr. Morgan had entered her third year of confinement, unrelieved by a judiciary unwilling or unable to correct its own mistakes, when Congress passed legislation that led to her release.

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1016, 1018 (1938) (advocating continued confinement for rest of life) with *In re Cueto*, 443 F. Supp. 857, 864 (S.D.N.Y. 1978) (advocating continued confinement for six months "in situations of this kind").

133. *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985).

## CODIFICATION

A statutory cap is the second limit on coercive confinement,<sup>134</sup> judicial termination being the first. The federal recalcitrant witness statute limits coercive confinement to eighteen months or the life of the grand jury, whichever is shorter.<sup>135</sup> Two states' statutes cap coercive confinement generally—California at one year,<sup>136</sup> Wisconsin at six months.<sup>137</sup> Congress, in response to Dr. Morgan's confinement, passed a short-lived cap for coercive confinement in the District of Columbia for cases involving domestic relations and child custody.<sup>138</sup>

A statute that caps coercive confinement resembles a statute of limitations or an exemption statute. The theory is that to prevent harshness and potential arbitrariness the government will protect plaintiffs' rights by coercing contemnor this much, but no more. A cap will terminate all coercive confinements after a certain period. Even though community faith in courts depends on "some sort of authoritarian response" to violations, "when a period as long as two years has elapsed and a contemnor is still intransigent, it cannot be said that the sentence is coercive any more, because the likelihood of compliance has been shown to be extremely low."<sup>139</sup>

The legislature presumes tacitly or implicitly that after a set time passes coercive confinement ceases to perform its function and becomes a futile, destructive waste of taxpayers' funds. Imprisonment of a contemnor beyond the set period may abuse civil process because it punishes someone whom further confinement will not coerce.<sup>140</sup> In providing for a statutory cap, the legislature states that after the set time passes, the potential benefit of contemnor's obedience will be subordinated to the burden on society and the recalcitrant person. Contemnor will not be released from her duty to obey; but the authorities will be limited to other methods than coercive confinement to achieve obedience.<sup>141</sup>

The arguments against legislative caps on coercive confinement typically follow one or more of three theories. The first is a basic notion that the legislature should leave judicial business to judges. A second theory is that

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134. See *Hearings on H.R. 2136 Before the District of Columbia's Subcomm. on Judiciary and Education*, 101st Cong., 1st Sess. 59-109 (1989) (statement of Doug Rendleman); *Hearings on S. 1163 Before the Subcomm. on General Services, Federalism, and the District of Columbia*, 101st Cong., 1st Sess. 21-25 (1989) (statement of Doug Rendleman).

135. See 28 U.S.C. § 1826(a)(2) (1988).

136. See CAL. PENAL CODE § 19.2 (West 1990).

137. See WISC. STAT. ANN. § 785.04 (1)(b) (West 1989).

138. See D.C. CODE ANN. § 11-944(b) (Supp. 1990); see also Harmer, *supra* note 2, at 269-77 (providing fairly complete summary of legislative process).

139. Chesterman & Waters, *supra* note 5, at 135.

140. See *In re Grand Jury Investigation* (Braun), 600 F.2d 420, 427 (3d Cir. 1979) (asserting that civil contempt is abused if continued beyond point where further confinement will not result in testimony).

141. See *Morgan v. Fortich*, 564 A.2d 1, 12 (D.C. App. 1989).

the judicial doctrines suffice to release terminally stubborn contemnors under appropriate circumstances. A final contention is that any cap redounds to the benefit of recalcitrant contemnors and undercuts court orders and plaintiffs' rights.

In the division of business between courts and legislatures, judges usually let legislatures draw the specific lines. Examples include the age of majority, statutes of limitations, almost all tax laws affecting dependents and rate.<sup>142</sup> In the *Morgan* appeal, the District of Columbia authorities asked the court to establish a time period to limit coercive confinement. The majority and concurring opinion did not deign to mention the idea; the dissenter observed in a footnote, "This is of course a matter for the legislature."<sup>143</sup> That was a sound response.

The existing common-law rule to release uncoercable contemnors is unsatisfactory. Several reasons for legislatures to cap coercive confinement exist. Dr. Elizabeth Morgan declined to release her daughter to the child's father because she feared sexual abuse; she spent twenty-five months in a District of Columbia jail, seven months longer than a thug who refused, under grant of immunity, to identify criminals. The imprecise common-law rules delegate too much unchecked power to a lone trial judge. Lawyers representing contemnors or opposing release cannot know what kind of evidence to adduce or how to frame the issues for argument. The imprecise common-law rules leave trial judges uncertain about how to decide. There is widespread disagreement about how much coercive confinement suffices for an individual.

John Seldon's comment bears repeating: "Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is Equity. Tis all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot."<sup>144</sup> The unusually high level of subjectivity observed above leads observers to concur. Too much discretion concentrates

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142. See G. PALMER, *RESTITUTION* § 5.5 n.25 (1978). Professor Palmer argues that a court may establish a rule of thumb that a nondefaulting vendor could keep ten percent of the defaulting buyer's down payment. Answering the argument that precise rules are the legislature's function, Palmer says that "judges looked at the matter differently during the growth of the common law" and provides examples, the age of majority, the presumption of death after seven years' absence, and the rule against perpetuities. We live today in a more pervasive age of statutes. See also *United States v. Twentieth Century-Fox Film Corp.*, 882 F.2d 656, 663-64 (2d Cir. 1989) (setting absolute dollar limit on right to jury trial; petty-serious line to determine jury right for corporation charged with criminal contempt: \$100,001 is always serious, below that compare wealth and fine to determine seriousness).

143. *Morgan v. Foretich*, 564 A.2d 1, 19 n.7 (D.C. App. 1989) (dissenting opinion of Mack, J.).

144. J. SELDEN, *EQUITY TABLE-TALK* 46 (Arber ed. in English Reprints, nos. 1-7, London: 1869) O. FISS & D. RENDLEMAN, *supra* note 1, at 110 (quoting J. SELDEN, *THE TABLE-TALK OF JOHN SELDEN* (1647)).

power in a troublesome way and leads to unpredictable decisions, unequal application, and, ultimately, away from the rule of law.<sup>145</sup>

The trial judge may have ceased to be an umpire and become a participant with a personal stake in enforcement. Some trial judges are temperamentally or emotionally unprepared for the high-stakes decisionmaking involved in terminating coercive confinement; the usual checks on their error or incompetence are greatly diluted or absent.<sup>146</sup>

What results can we observe from the lack of a statutory cap on coercive confinement? Decisions that appear to be at best arbitrary and capricious and at worst harsh. Futile imprisonments that lead to unnecessary confinement that wastes the taxpayers' money and the contemnor's ability to contribute to society. Contemnors shop for judges, exacerbating the unpredictability of results. The result is a decreasing respect for the courts and the government.

The Phillimore Report argues that a fixed term of coercive confinement preserves respect for the judge and court orders. Because eventually an obstinate contemnor will be released, a "fixed [coercive contempt] term would save the appearance of a climb-down by the court and would obviate the need for an application for release and uncertainty as to the appropriate timing of it."<sup>147</sup>

Justice Clark said that a limited period of coercive confinement is the "type of sentence [that] would benefit an incorrigible witness."<sup>148</sup> Limiting coercive confinement changes the recalcitrant contemnor's calculation and may erode effective enforcement of plaintiffs' rights. The specified cap allows a contemnor to decide to be confined for the specified time instead of obeying.<sup>149</sup> Confinement's ability to coerce diminishes as the end of the specified time approaches. A specified time diminishes likelihood that a contemnor will obey within the time.<sup>150</sup>

The federal recalcitrant witness statute, passed as part of the Organized Crime Control Act of 1970, limits coercive confinement to eighteen months.<sup>151</sup> The reasoning for choosing a fixed period seems to be that potentially indefinite coercive confinement without criminal procedural protection is potentially arbitrary and harsh and perhaps futile. The fixed period diminishes the likelihood that contemnors will be punished with disguised coercion and without criminal due process.

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145. See Harmer, *supra* note 2, at 268; Lewis, *The Limits of Law*, N.Y. Times, Dec. 22, 1988, at 23, col 1; D. Rendleman, *Cruelty Begins Enough is Enough: Set Dr. Morgan Free*, Legal Times, Sept. 12, 1988, at 19.

146. Harmer, *supra* note 2, at 249-54.

147. PHILLIMORE REPORT, *supra* note 35, at ¶ 172.

148. *Shillitani v. United States*, 384 U.S. 364, 370 n.6 (1966).

149. See *Czarra v. Czarra*, 124 Ill. App. 622, 624 (1906).

150. See Note, *Coercive Contempt and the Federal Grand Jury*, 79 COLUM. L. REV. 735, 765 (1979) (discussing effect of fixed maximum confinement period on contemnor).

151. See 28 U.S.C. § 1826 (1988).

A unified approach to the entire area of contempt may be desirable.<sup>152</sup> A cap on coercive confinement is at the end of a detailed body of technical contempt lore, built on a foundation that combines statutes and judicially developed doctrine. A basic contempt statute usually exists.<sup>153</sup> A contempt statute typically defines the misconduct that can be contempt and sets criminal sanctions. Courts developed the distinction between civil and criminal contempt.<sup>154</sup> This distinction basically requires criminal procedure before criminal punishment. Within civil contempt courts distinguish between compensatory and coercive contempt.<sup>155</sup> Criminal contempt follows criminal procedure under the constitutional tests; but codification might establish procedure to adjudicate coercive and compensatory contempts.<sup>156</sup>

The legislature must choose between capping all coercive confinement and capping only contempts before a particular court or in a particular substantive area. The Wisconsin statute is general and covers all coercive contempts.<sup>157</sup> The federal recalcitrant witness statute governs only witnesses, not all litigants.<sup>158</sup> The District of Columbia legislation was limited to contempts in child custody disputes.<sup>159</sup>

A cap may be limited to a particular abuse like child custody, but it need not be limited; perhaps the wiser route is to deal with specific instances as part of the general problem. In my view, a uniform cap for all coercive contempts is more salutary. The next controversial coercive imprisonment might affect a reporter claiming a source privilege or a labor union officer. Moreover the experience under the recalcitrant witness statute means that Congress or a state legislature would be safe in using that statute as a

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152. See WISC. STAT. ANN. § 785 (West 1989) (codifying contempt powers of court); Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 687-705 (1981) (discussing comprehensive treatment of contempt in Wisconsin statutory scheme).

153. See 18 U.S.C. § 401 (1988) (allowing court to punish contempt at its discretion).

154. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-44 (1911).

155. See generally 10 LITIGATION 23 (1983).

156. See Note, *supra* note 150, at 742-44, 746-64 (discussing procedural safeguards attaching to contempt action).

Professor Apel, to support the argument for augmented procedural protection in coercive contempt, says that civil contempt is really criminal contempt, the civil-criminal distinction is a legal fiction, and coercive confinement cannot be distinguished from criminal punishment. Apel, *supra* note 24, at 523. The position taken here is that courts and legislatures should develop separate procedures for compensatory, coercive, and criminal contempt. The argument for abolishing the civil-criminal distinction ignores compensatory contempt completely. Private plaintiffs and law enforcement officials need compensatory and coercive contempt procedures to make court orders effective; compensatory and coercive contempt usually proceeds through measures short of confinement; and even if defendant is confined, obedience normally opens the jail door.

157. WISC. STAT. ANN. § 785.01 (West 1989) (defining contempt as any misconduct, disobedience, or refusal, to obey).

158. See 28 U.S.C. § 1826(a) (1988).

159. See D.C. CODE ANN. § 11-944(b) (Supp. 1990).

precedent to cap all coercive confinement, broadening the recalcitrant witness statute beyond witnesses to all coercive contemnors.<sup>160</sup>

Once a legislature has decided how broadly a statutory cap on coercive confinement should be applied, it needs to decide what the ceiling of the statutory cap should be. The recalcitrant witness statute's eighteen month period is not magic. We perforce lack experimental data on how long it takes to coerce obedience and when confinement loses coercive force. Congress appears to have chosen that yardstick because, when the Supreme Court decided *Shillitani*, eighteen months was the maximum length of a grand jury. Later Congressional debate has focused on whether eighteen months is too lengthy and whether to bar successive contempts before subsequent grand juries. In the vernacular of professional thinking, most threats to confine will be effective if the contemnor thinks that confinement will follow disobedience.<sup>161</sup> An eighteen month period of potential confinement is substantial and induces obedience; but twelve or six months as in the California and Wisconsin statutes would not hamper enforcement and judicial credibility.<sup>162</sup> Congress's choice of eighteen months for a statute dealing with organized crime may be longer than necessary; perhaps six or twelve months is a better approach. If the recalcitrant witness statute's cap of eighteen months on confinement suffices to coerce alleged participants in organized crime, a shorter cap period may be appropriate when contemnor's reasons to disobey are different—perhaps even better.<sup>163</sup>

Another way to regulate the duration of coercive confinement is to end coercive confinement after six months unless the contempt is renewed by a panel of three trial judges. The second panel may or may not include the original trial judge, although the writer favors excluding the original judge. This proposal provides a balanced, deliberative, and collegial prediction of whether continued confinement will coerce. At six months, the decision occurs when re-examination is in order.

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160. See H.R. 2136, 101st Cong., 1st Sess. 135 CONG. REC. H1427 (1989); S. 1163, 101st Cong., 1st Sess. 135 CONG. REC. S6532 (1989) (limiting period of confinement in civil contempt cases). General H.R. 2136, which applied to all "civil contempt pursuant to the contempt power" was preferable, in my view, to S. 1163 which was specifically targeted to contempt involving custody of a minor child; the Elizabeth Morgan bill was just that, a sunset statute too narrowly drawn for other condemners.

161. See Harmer, *supra* note 2, at 274 (citing S. REP. NO. 104, 101st Cong., 1st Sess. 3 (1989)).

162. See Note, *supra* note 150, at 765-72; *Shillitani v. United States*, 384 U.S. 364 (1966) (determining that district courts lack authority to imprison contemnors for longer than the term of the grand jury).

163. See Pub. L. No. 101-97, 103 Stat. 633 (1989) (limiting incarceration for civil contempt in child custody case to twelve months and requiring studies of civil contempt procedures in United States and D.C. courts); D.C. CODE ANN. § 11-944(b) (Supp. 1990) (limiting civil contempt confinement to one year in child custody cases); see also PHILLIMORE REPORT, *supra* note 35, at ¶ 201 (recommending limiting both criminal and coercive contempt to two years). The Phillimore report cap became law in the United Kingdom. See Chesterman & Waters, *supra* note 5, at 135 (following Phillimore Report and recommending two year cap on coercive confinement for Australian courts).

If the legislature limits coercive confinement, should a judge ever release a terminally stubborn contemnor as uncoercible before the limited time expires?<sup>164</sup> A trial judge has considerable discretion about coercive tactics. A judge can end coercion if the need to coerce ceases or if nothing remains to coerce. In addition, a judge should release a contemnor when obedience is impossible, no matter when he reaches that conclusion.

One federal judge administering witnesses' capped coercive confinement let contemnors prove that they were uncoercible and should be released.<sup>165</sup> Some federal appellate court judges appear to assume in developing a standard of review that, if the legislature has limited confinement and set the point at which coercion becomes punishment at eighteen months (a reasonable point) courts should respect that statutory maximum.<sup>166</sup> This leads to the deferential review for abuse of discretion.<sup>167</sup> Under that standard, an appellate court found no abuse of discretion when a trial judge released a contemnor after seven months, eleven months short of the cap.<sup>168</sup>

The last judicial word on how a statutory cap affects the common law doctrine of releasing uncoercible contemnors occurred in an uncapped confinement, the final *Morgan* appeal. The trial judge decided to continue confinement, but the appellate majority developed a way to articulate its decision to reverse. It said the deferential appellate standards of review used to administer capped confinement existed because the legislation created a "presumption" that coercive confinement less than the statutory period did not deny due process. A more intrusive standard of review was appropriate to administer potentially unlimited confinement because the question of coercive versus punitive confinement raised due process issues. The appellate court should reverse if the trial court's decision was "clearly erroneous" or "unsupported." Wielding that standard of review, the appellate court discovered unsupported findings.<sup>169</sup>

Will the judiciary retain the ability to release uncoercible contemnors if the legislature passes a statutory cap? Sterile and soporific as the debate about standard of review is, it is the closest we have to a judicial answer.

In the writer's view, the statute capping coercive confinement ought to let a judge release an uncoercible contemnor any time. Even so, contemnors will learn that firm legislative yardsticks garner judicial respect. Before the statutory period has expired, a judge ought to be reluctant to conclude that

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164. See *Phillimore Report*, *supra* note 35, at ¶ 201 (recommending fixed two year term of coercive confinement qualified by power to review and to release before the full sentence is served).

165. See *In re Cueto*, 443 F. Supp. 857, 864-65 (S.D.N.Y. 1978) (stating that, in the teeth of eighteen month cap, six months seemed to be enough).

166. See, e.g., *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 427, n.26 (3d Cir. 1979).

167. See *supra* note 166.

168. See *In re Parrish*, 782 F.2d 325, 328 (2d Cir. 1986).

169. *Morgan v. Foretich*, 564 A.2d 1, 7-8 (D.C. App. 1989).

confinement has lost coercive force.<sup>170</sup> Appellate courts search for ways to give trial judges free rein; and a statutory cap will probably furnish a reason.

Any proposal for a statutory cap should address the fact that in exacerbated cases, unsuccessful coercive confinement has been followed by criminal contempt prosecution.<sup>171</sup> One alternative is for a statute to cap coercive confinement at six or more months, but to allow additional criminal imprisonment following criminal procedure. One proposal limited confinement to twelve months, but let the authorities follow that with criminal contempt after a quick trial, a right to a jury, and a trial before a different judge.<sup>172</sup> Proof of criminal contempt beyond a reasonable doubt is implicit in the proposal. The transition from coercive to criminal contempt should be easy to understand and operate or the authorities will not use it.<sup>173</sup>

A Columbia law review note suggested a hybrid coercive-criminal proposal which began with criminal procedure. This could lead to a period in which the contemnor could comply followed by a definite criminal sentence: "you have one week to obey; and if you don't, you are sentenced to six months."<sup>174</sup> The writer prefers a procedure to conduct coercive contempt as civil and follow coercive confinement with a criminal contempt trial before the fixed confinement period ends.

An expedited appeal from both a trial judge's initial order of coercive confinement and his decision that a contemnor is or is not uncoercible is salutary. For both the contemnor and the plaintiff, time is a perishable commodity and delay equals denial. An appeal will brand an imprimatur of vindication on correct contempts; it will promptly release a citizen who is improperly confined; and it provides what may be the first external check on the trial judge's power.

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170. See *In re Howald*, 877 F.2d 849, 850 (11th Cir. 1989); *In re Credito*, 759 F.2d 589, 591 (7th Cir. 1985); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re Grand Jury Investigation* (Braun), 600 F.2d 420, 427 (3d Cir. 1979).

171. See, e.g., *United States v. Morales*, 566 F.2d 402, 408-09 (2d Cir. 1977); *United States v. Berardelli*, 565 F.2d 34 (2d Cir. 1977); *United States v. Patrick*, 542 F.2d 381, 384, 392-92 (7th Cir. 1976); *United States v. De Simone*, 267 F.2d 741, 747 (2d Cir.), cert. denied, 361 U.S. 827 (1959); *Morgan v. Foretich*, 564 A.2d 1, 12 (D.C. App. 1989) (dicta); *In re Farr*, 64 Cal. App. 3d 605, 614, 134 Cal. Rptr. 595, 600 (1976); O. FISS & D. RENDLEMAN, *supra* note 1, at 1106. Accord, *United States v. Esposito*, 633 F. Supp. 544 (S.D.N.Y. 1986).

In *Esposito*, after two unsuccessful coercive confinements, contemnor was released as terminally stubborn only to be indicted for criminal contempt. He moved to dismiss arguing that repetitive contempt denies due process. The court decided that a civil contempt sentence does not bar a criminal prosecution. *Id.* at 545. While inability to coerce contemnor does not bar punishment, the judge may consider his fear of reprisal in setting the criminal sentence. In a footnote the judge noted that: 1) successive civil coercive contempt may infringe due process, 2) multiple criminal contempt may infringe due process, and 3) double jeopardy bars successive criminal prosecutions. *Id.* at 545 n.1.

172. See H.R. 2136, 101st Cong., 1st Sess., 135 CONG. REC. H1427 (1989) (providing for criminal contempt after limited civil contempt period).

173. See S. REP. NO. 104, 101st Cong., 1st Sess. 3 (1989) (portion from Rendleman's testimony).

174. See Note, *supra* note 154, at 772-73.



The federal recalcitrant witness statute tells the appellate court that appeals "shall be disposed of as soon as practicable, but not later than thirty days from the filing of the appeal."<sup>175</sup> From the point of view of someone wrongfully imprisoned, the requirement that the appellate court dispose of the appeal in thirty days is far better than the proposal that the appeal be heard in sixty days.<sup>176</sup> New legislation might, consistent with the recalcitrant witness statute, provide for more expedited appeals on trial judges' decisions to confine and to continue to confine.

Coercive contempt is a crucial judicial tool with an awesome potential for abuse. Accommodating effective and positive government with individual liberties is a crucial legislative function. A statutory cap that terminates confinement after a certain time is an appropriate way to limit coercive confinement.

### CONCLUSION

When judges confine to coerce compliance, a terminally stubborn contemnor may break the boundary between remedy and right. After testing the contemnor, the judicial system has usually found some way to release her. If the judge determines that the obdurate contemnor is uncoercible, the coercive contempt is transmogrified into criminal contempt imposed without criminal process and the contemnor is released.

This article responds to two broader critical questions. What kind of remedial pragmatism do you propose that stops short of tailoring plaintiff's remedy to his substantive entitlement and leaves a winning litigant out of his rightful position? Why have court decisions and statutes that incorporate disobedience into "enforcement" and allow it to prevail over substantive justice?

My answers are shaped by my views of human cussedness, judicial fallibility, and governmental inability to solve all problems, as well as the tendency of crisis to careen out of control in unpredictable directions.

Deciding lawsuits is imperfect. Error may occur. Moreover, there are limits on what courts can do, even for the impeccable claimant. At the center of our system of limited government and separated power is a dislike of unchecked power and a fear that it may be exercised in a harsh and arbitrary way. Our system respects individual autonomy, and at some point, it is willing to subordinate plaintiff's and the adjudicative system's interests.

Complex legal systems do not have many unqualified substantive rights.<sup>177</sup> Substantive rights are often stated as principled goals. The remedial stage often requires additional adaption, compromise, and mid-course correction, "the art of the possible in striving to attain" substantive rights.<sup>178</sup>

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175. 28 U.S.C. § 1826(b) (1988).

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

177. See A. BICKEL, *THE MORALITY OF CONSENT* 88 (1975).

178. Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961).

Even when the contemnor creates the crisis by recalcitrance, flexibility overcomes doctrinal absolutes. The terminal stubbornness doctrine means that judges lack an effective way of keeping their promises.<sup>179</sup> Because of human fallibility in the decisionmaking process, that is just as well. Burning bridges is usually a mistake. Sometimes judges "have to accept that the enforcement of a particular . . . order in accordance with its literal terms is a practical impossibility."<sup>180</sup>

Under the skeptical view of government power taken here, winners of lawsuits may have to be content with the least bad solution. So Judge Row may respond to Cora's terminal stubbornness by releasing her and either moving forward with criminal contempt or letting her determine whether Frank can visit Heather. In a world of lesser evils, Cora's decision to bar Frank from custody may be less undesirable than continuing, perhaps indefinitely, to confine Cora.<sup>181</sup>

Finally, has our perspective on conflict and disobedience been clouded by hierarchy, formal government, and traditional views of winning and losing? The transition from coercive to criminal contempt was not the only metamorphosis that occurred during Elizabeth Morgan's confinement: passivity became action, powerlessness became power, and, eventually, losing became winning. Witness the parallel events of the same years, 1987-1990, that brought Vaclav Havel in Czechoslovakia and Nelson Mandela in South Africa from prison to prominence, even to formal "power." Skepticism about short-term victory and defeat is propitious at a university named for two earlier civil disobedients.

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179. T. SCHELLING, *supra* note 29, at 24-28.

180. Chesterman & Waters, *supra* note 5, at 123.

181. See Apel, *supra* note 24, at 527.

