Beyond Contempt: Obligors to Injunctions

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Beyond Contempt: Obligors to Injunctions

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In determining whether a person must conform his conduct to an injunction, contempt courts face interesting and challenging issues of continuing concern. The courts articulate the guiding principle with relative ease: the contemnor has no obligation to obey whenever the reach of contempt exceeds the grasp of the relevant injunction.1 But their conclusions often dismay the perceptive observer.2 Traditional analysis has produced this situation by expounding conclusory doctrine without giving sufficient consideration to the salient facts of cases, proper procedural principles, or underlying social realities. Moreover, doctrinal complexity continually leads courts astray, causing them to exonerate those they should hold in contempt and hold in contempt those they should absolve. Most importantly, few issues present more crucial problems concerning the role of the courts in the total scheme of governmental control of private conduct. This article intends to examine existing doctrine and reveal its inadequacies in order to foster both productive analysis and fair results. In addition, the arti-

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cle will endeavor to posit a frame of reference based on separation of powers broad enough to encompass the major obligor issues.

I. Introduction

A. A Hypothetical Obligor Problem

P, an imaginary injunction plaintiff, resides in a pastoral jurisdiction where he owns a commercial apple orchard. D enters P's property daily and filches an apple. Because the price of security guards is high, P consults his attorney who considers several alternatives. To prosecute D criminally would be unprofitable because neither P nor his attorney would be compensated. An action in trover compelling D to return the property would be fruitless because D has eaten or sold the apples. A suit in trespass to recover damages from D would not be worth the costs of litigation and would not prevent D from continuing to steal apples and pay for them in court. Accordingly, P chooses to sue for an injunction forbidding D from taking P's apples or setting foot on P's land. The court grants an appropriate order which a deputy sheriff serves on D personally. If D violates the injunction, P will request that the court hold D in contempt.

P tends his fields in peace until E, an employee of D, begins to steal apples. When P asks the court to hold E in contempt, the judge may be piqued that D and E are avoiding the outstanding order by proxy, but noting that courts give relief only against parties and that E was not a party to the injunction he does not find E in contempt. P must sue E separately. The judge willingly grants another injunction naming both D and E, but he observes that requiring a second injunction instead of contempt allows E one free bite.

When D hires F to continue pilfering P's orchard, P understands that he must seek yet another injunction. But the judge worries that, if D and others like him can flout judicial decrees and frustrate P's relief by employing additional help, the courts will not be able to maintain control in a society that relies on voluntary compliance with judicial orders. He decides, therefore, to enjoin D and his "agents," a large group not named in the lawsuit but connected with D economically. The judge considers this injunction a reasonable development, for he will be able to establish the "agent" nexus by conventional legal doctrine in future contempt proceedings. Furthermore, the "agent" category deals realistically with business and corporate associations and is
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responsive to procedural reality, because D will adequately represent the persons who do his work under his directions.

The next day D's friend G steals an apple that subsequently appears for sale in D's store. On P's motion, the judge enjoins "D, his agents, those aiding and abetting or assisting D, D's associates and confederates, those combined with D, conspiring with D or, in concert or participation with D." This order creates a larger group of unnamed potential contemnors that has no concrete and continuing relationship to D or his interests. Thus, to assume that D represents this amorphous, unformed amalgam is less conducive of procedural fairness. Also, the relationship will be more difficult to ascertain under traditional analysis. When M, a new thief, steals apples, the court will have to develop connecting abstractions like "privity" or "legal identity" to justify and explain the nexus and a severing abstraction "independent" to express the lack of any sufficient association. Perforce, inquiry tends to focus more on whether M violated the injunction and less on his connection with D.

The judge, although skeptical about his power and ability, remains concerned about the prestige of the courts in the community and P's plight. Consequently, he articulates a new policy; people must respect the court, and to vindicate itself, the court must punish disrespect. When X, a complete stranger to the community, helps himself to an apple, the judge enjoins "all persons with notice of this injunction" and orders the injunction posted on the property. When D, E, F, and G go into business selling aged apple juice on G's property, the judge enjoins them, "their successors and assigns, and all persons" from using the property to traffic in apple juice. And, when P's employees join the Federation of Apple Pickers, strike, and picket the property, the judge enjoins "John Doe, Richard Roe, and all members of FAP" from picketing. These orders may protect P fully, but they sacrifice reasoned obligor analysis because their wording attenuates the relational and connecting abstractions and obviates any procedural fairness gained through representation of a common interest.

Five years pass. W walks past D's orchard and reads the posted injunction but nevertheless picks an apple. Everyone forgets the apple juice incident, and Z buys G's property, having been told nothing about the injunction. A and B, who are new employees of P, form a new FAP local and begin to picket. E, no longer employed by D, succumbs to the impulse to take an apple. A newly frustrated P brings all five before the judge to show cause why they should not be held in
contempt of court. The judge will discover precedent to support holding each in contempt. E, D's ex-agent, has the best chance to be released, primarily because he is no longer an agent of D. Although W and Z had no part whatsoever in the earlier litigation, the court may find W in contempt on a "violator with notice" theory and Z on an in rem theory. The legal situation of the pickets A and B is not so clear.

B. Obligor Terminology

An injunction is a court order requiring a person to do something or forbidding a person from doing something. It contains "what" language delimiting conduct and "who" language referring to persons, the latter creating the obligor issue. Courts have frequently discussed this who-must-obey problem under either a parties-nonparties or a bound-not bound rubric. Neither concept has adequately performed its analytical task.

The party-nonparty dichotomy assumes a conclusion and fails to face the obligor issue. A party who is served with process, litigates unsuccessfully, and is named in an injunction undoubtedly must conform his behavior to the injunction. But additional persons, because of group membership or related individual conduct, pose a risk to the injunction plaintiff. If the injunction imposes a duty, then these persons are realistically parties to it. But to refer to these persons either as parties in the conventional sense or as "bound nonparties" hampers analysis. They are "parties" to the injunction because they must either obey it or be subjected to contempt; but they are not "parties" because they were not served, did not litigate and are not named. To rectify this discrepancy, this article will refer to persons who are not named parties but who may be held guilty of contempt as potential contemnors, classifying as parties only those persons actually named in the injunction.

The term "bound" subsumes several discrete concepts. First, to be "bound" may mean that a person is subject to criminal sanctions; it may coincide with the obligation shared by all to obey the criminal law. "Bound" may refer to a person who is subject to contempt, the object of the present inquiry. A "bound" person in the collateral-es-

3. F. MAITLAND, EQUITY 9 (2d ed. 1936).
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toppel-issue-preclusion sense denotes one sufficiently related to litigation to have lost the opportunity to relitigate. While the reasoning and policy of issue preclusion are relevant to the obligor inquiry, contempt may expose the potential contemnor to more than merely litigative constraints. "Bound" also may describe the situation of a person peculiarly subject to an injunction because the plaintiff can name that person as an additional party and preclude him from relitigating some or all of the issues in the original decree. A person truly constrained to obey an injunction does not receive this second chance. "Bound" in the precedent sense may describe the status of a decided legal issue the courts will not reexamine. But, as usually conceived, precedent only binds courts; people in the society at large who ignore "the vaster sanctions of conscience" may also ignore stare decisis until an equity court personalizes it into an injunction with effective sanctions.5 To secure full and effective relief, plaintiff needs an order which "binds" all persons who may frustrate the right asserted.6 Because the word "bound" is so broad, however, this article will refer to the person who is not named in the injunction but who will, upon violation, be punished for contempt as an "obligor." The word "violation" itself connotes more than its legal effect. In the present context, whenever a potential contemnor "breaches," "violates," or "disobeys" an outstanding injunction, he has merely acted contrary to the order. Unless the potential contemnor is also an obligor, he may ignore the injunction with impunity. This last consideration creates the obligor issue: whether one who "violates" an injunction is subject to contempt because he was under an obligation to obey that injunction.

II. The Difficulties of Traditional Obligor Doctrine

A. Hampering Vocabulary

As has already been suggested, the obligor issue is burdened with an inadequate vocabulary. The most common terms are the relational nouns, terms that describe a relationship with a named defendant considered sufficient to establish the obligor nexus. This group includes the term "agent" and its synonyms, including "servants,"

"associates," "conspirators," "confederates," "successors in interest" or simply "successors," "assigns," and "nominees." Many relational nouns can be converted into verbs or gerunds like "aiding and abetting," "associating," and "confederating." When these relational nouns are so converted, they begin to describe the conduct forbidden, the "what" of the injunction, as well as the "who" relationship.

Another terminological set consists of connection concepts, the primary ones being "legally identified," "represented," and "privity." Under federal rule 65(d), one who, with notice, breaches an injunction "in active concert or participation" with a named defendant may be held in contempt. "Active concert" describes conduct within a particular relationship, thus placing obligor terminology under the rule onto a continuum ranging from relational terms and sliding into relational-conduct terms.

Difficulties may arise when older terms are employed to interpret present rules. For example, in *Regal Knitwear Co. v. NLRB*, the Supreme Court, concluding that rule 65(d) adopted common law reasoning, incorporated previous analysis into rule 65(d). The Court stated that the rule explicitly obligated several groups to obey: named defendants, others identified in interest with defendants, and those in privity with defendants or represented or controlled by defendants. But the Court employed the traditional category "aiders and abetters" to classify nonparty defendants held in contempt. The Court did not examine the obligor issue under the specific language of the rule, nor did it clearly resolve the issue according to the language of the injunction under consideration. Another court has held that potential contemnors listed in rule 65(d) "are bound whether named or not." These opinions suggest that the obligor issue may be decided with phraseology found in either the general or common law, the rule, or the language of the injunction.

Many terms in the obligor-creating vocabulary are opaque and amorphous. For example, "associate" and "concert" may mean almost anything. Contempt courts borrow terms like "successors and

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9. *Le Touneau Co. v. NLRB*, 150 F.2d 1012, 1013 (5th Cir. 1945).
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assigns," "successors in interest,"11 and "nominee"12 from other branches of legal analysis. When added to injunctions this language creates uncertainty and doubt. In addition to being borrowed and vague, the words "conspiring"13 and "aiding and abetting"14 unfortunately connote opprobrium. These very different articulations might have some independent meaning when used in separate contexts, but the courts often employ them interchangeably and conceal that meaning by repeating the same ideas under different appellations.15 Additional features which lead to difficulty are superabundant dicta,16 overstated results/17 and conclusions that conceal the facts.18 Moreover, ambiguous usage exacerbates the hardship of dealing with opaque and porous terminology.

"Privity," a concept not mentioned in the operative rule, deserves special criticism. It appears to be an undefined relational noun,

11. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 16-17 (1945) (Stone, J., dissenting); Swetland v. Curry, 188 F.2d 841, 842 (6th Cir. 1951); Lucy v. Adams, 224 F. Supp. 79, 81 (N.D. Ala. 1963), aff'd sub nom. McCorvey v. Lucy, 328 F.2d 892 (5th Cir. 1964) (per curiam); United Gilpin Corp. v. Wilmore, 100 Colo. 453, 457, 68 P.2d 34, 35-36 (1937).
14. Reich v. United States, 239 F.2d 134, 137 (1st Cir. 1956), cert. denied, 352 U.S. 1004 (1957). The vagueness of the term "aiding and abetting" is illustrated by Kirby v. San Francisco Sav. & Loan Soc'y, 95 Cal. App. 757, 273 P. 609 (1928), in which a wife enjoined her husband from emptying their joint account. A copy of the injunction was served on the contemnor savings and loan, which nevertheless paid the husband. The court held the savings and loan in contempt for aiding and abetting. Id. at 760-61, 273 P. at 610. See also Fansteel Metallurgical Corp. v. Iron Workers Lodge 66, 295 Ill. App. 323, 14 N.E.2d 991 (1938), cert. denied, 306 U.S. 642 (1939).
15. See, e.g., Chanel Indus., Inc. v. Pierre Marche, Inc., 199 F. Supp. 748 (E.D. Mo. 1961). The court could easily have solved the case by simply stating that those who, knowing of an injunction, breach it in "active concert or participation" with a named defendant may be held in contempt. Instead the court indulged in such extended doctrinal fireworks that it is difficult to determine what it was in fact attempting to do. See also W.B. Conkey Co. v. Russell, 111 F. 417 (C.C.D. Ind. 1901).
18. See United States v. Schine, 260 F.2d 552, 557 (2d Cir. 1958), cert. denied, 358 U.S. 934 (1959); Reich v. United States, 239 F.2d 134, 138 (1st Cir. 1956), cert. denied, 352 U.S. 1004 (1957); Day v. United States, 19 F.2d 21, 22 (7th Cir. 1927); Dobbs, supra note 2, at 254.

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attempts to define it having produced meaningless circumlocutions.\textsuperscript{19} Courts have employed “privity” as a shorthand for nonparty obligors,\textsuperscript{20} as a synonym for active concert or participation,\textsuperscript{21} or as the touchstone for the entire obligor inquiry.\textsuperscript{22} In any case, it represents a devoid and destitute conclusion which tends to create rather than dispel misunderstanding and neither explains past or present results nor provides any basis for predicting the result in future cases. The proper course of analysis eschews “privity” altogether.\textsuperscript{23} With an adequate vocabulary, the obligor issue might develop rational doctrine; but with terms like “privity,” doctrine degenerates into circular conclusions and barren abstractions.

The common obligor-negating terms are “independent interest” or “independent activity.” Courts generally absolve contemners who violate independently of the named party for their own benefit.\textsuperscript{24} These words are as imprecise as the obligor creating terms and enable courts to create, with a little verbal agility, a benefit to a named defendant or a coextensive defendant-contemnor interest. This defendant benefit or identity of interest may then bridge the obligor issue, manipulating the independent interest test into a conclusion.\textsuperscript{26} So expanded, the independent interest test may be offensive to due process. The key to procedural protection in contempt is the extent to which the named defendant represented the contemnor at the injunction stage. Agents commonly become obligors because courts infer representation from identical interest. To infer identity of interest and representation from defendant benefit alone, however, leaves the defendant benefit or coextensive interest test vulnerable to due process attack, because neither the contemnor nor his interest received a day in court.


\textsuperscript{22} Crane Boom Life Guard Co. v. Saf-T-Boom Corp., 362 F.2d 317, 322 (8th Cir. 1966); Baltz v. The Fair, 178 F. Supp. 691, 694 (N.D. Ill. 1959); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.13, at 65-110 (2d ed. 1974).

\textsuperscript{23} See Ex parte Davis, 470 S.W.2d 647, 649 (Tex. 1971).

\textsuperscript{24} Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945); Note, supra note 19, at 724-25.

\textsuperscript{25} See Environmental Defense Fund, Inc. v. EPA, 485 F.2d 780, 784 n.2 (D.C. Cir. 1973); Dobbs, supra note 2, at 254.
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The courts may employ the independent interest test merely to express the conclusion that contemnor lacks a sufficient connection with the defendant to be held in contempt. For example, want of active concert may indicate an independent interest. But, if taken seriously, the independent interest concept may insert an additional and unnecessary issue into contempt. The contemnor may be required to disprove defendant benefit and to demonstrate a separate benefit to himself. Such a consequence makes the independent interest test an unsatisfactory alternative to the equally inadequate obligor-creating vocabulary. Since the ultimate question should be simply whether contemnor with defendant knowingly violated the injunction in "active concert or participation," he should only be required to negate the charged participatory nexus between the defendant and himself.

The independent interest test does provide some valuable services. It helps decide extravagant contempt cases like those involving nonparty violation of a twenty-five- or fifty-five-year-old injunction and contemnor violation of a fourteen-year-old injunction. Many independent interest cases arise when plaintiff chooses injunction defendants imprudently and attempts to correct the error by charging the correct person in contempt, alleges an insufficient defendant-contemnor connection, or brings contempt on an untenable theory. Thus, the independent interest test trims out expansive theories that would abolish the obligor limitation. It may serve, therefore, as a safety valve and a viable alternative to problematic vocabulary.

27. See, e.g., United Pharmacal Corp. v. United States, 306 F.2d 515, 517 (1st Cir. 1962); Kean v. Hurley, 179 F.2d 888, 891-92 (8th Cir. 1950); Trotter v. Debnam, 24 N.C. App. 351, 361-62, 210 S.E.2d 551, 555 (1975); Ex parte Davis, 470 S.W.2d 647 (Tex. 1971).
29. Swetland v. Curry, 188 F.2d 841 (6th Cir. 1951).
32. In re Reese, 107 F. 942, 947 (8th Cir. 1901) (contempt for knowingly obstructing the course of justice); Berger v. Superior Court, 175 Cal. 719, 720, 167 P. 143, 144 (1917) (actual knowledge of injunction enough).
34. See, e.g., Proie Bros., Inc. v. Proie, 323 F. Supp. 503 (W.D. Pa. 1971); Ex parte State ex rel. Higdon, 162 Ala. 181, 50 So. 143 (1909); Boyd v. State, 19 Neb. 128, 26 N.W. 925 (1886); Acequia Del Llano v. Acequia De Las Joyas Del Llano Frio, 25 N.M.
Other factors arguably offset the evil of linguistic ambiguity. Many legal terms defy definition, and law reasons by factual example within the imprecise matrix of terminology. Ambiguous terminology allows the law to adapt to a changing social environment without giving the appearance of radical change. Vague formulas, moreover, sometimes produce salutary results by allowing a court to attain justice in an individual case and justify its holding with precedent. The courts, by arriving at pigeonhole conclusions, may develop intelligible and desirable patterns of decision, but no verbal formula can provide a solution for a vast number of factual situations. The effect of any chosen articulation must be to highlight the crucial issues and produce acceptable results. Courts must employ principles that guide but do not compel decision against which they may identify and examine the important factual considerations in a case. If they affix a label after examining the facts and doctrine, their verbal conclusions become shorthand for analysis already undertaken. If the conclusions thus short-circuit the decisionmaking process, the reader may wrongfully conclude that the courts have reconciled facts and doctrine. The solemn imprecations of obligor terminology then become cliche and platitude with little fixed meaning, expressing a conclusion without launching an inquiry. When it uses words like "privity," the law exists only in relation to itself without a reference point in the concrete world. It affixes legal relevance to factual situations for unstated reasons; and, except in extreme cases, it makes future results unpredictable on the basis of past decisions, depriving attorneys of precedent as an argumentative technique. When the law has no principles, principled decisions are rare; decisionmaking is left in "the death clutch of doctrine." 

B. Useless Distinctions

Contempt law contains a number of distinctions. If the contemptuous acts occur in the court's presence, contempt is direct; if they take place out of court, contempt is indirect. In accordance with the variety of sanctions imposed, contempt may be either civil or criminal: if the sanction is punitive, the contempt is criminal; if the...
sanction is either coercive or remedial, the contempt is civil. Because each distinction involves different variables, both direct and indirect contempt may be either civil or criminal contempt.37

Courts identify both the type of contempt and the sanction because basic differences supposedly flow from each classification. But the distinctions are too abstract to create anything but confusion. Using the generic term “contempt” to accomplish a wide range of tasks causes the major difficulties. Courts and litigants assume that, because the word “contempt” arises throughout, the doctrine remains constant, ignoring the factual and policy differences arising in dissimilar situations. Also, the dearth of contempt cases precludes the development of professional or judicial expertise and leads to analytical mishaps and unjust results.38 The distinctions are obscured further because few practical or policy reasons distinguish the classifications. One commentator has concluded that the distinctions are circular and unrelated either to the facts of individual cases or to sound public policy.39

Identifying particular acts asserted to constitute contempt, separating contempt into factual categories, and promulgating rules corresponding to each category would accomplish a great deal. Employing this technique, courts might divide contempts into trial disruption, violation of an injunction, refusal to respond to a subpoena, and so on. At the very least, this classification would prevent the refinements of one category from mingling unnecessarily with another. Contempt for refusing civil discovery would not be governed by doctrine designed to punish breaches of gag orders; instead, the questions of proper contempt procedure, appropriate sanction, appealability, and ambit of appellate inquiry would turn on discovery’s discrete prob-

37. Some examples will elucidate the bewildering array of abstract distinctions. A newspaper publishes evidence inadmissible in a forthcoming criminal trial; a fine would be a criminal sanction for an indirect contempt. A lawyer or litigant disrupts a trial; a jail term would be a criminal sanction for direct contempt. When defendant continues to infringe a patent in violation of an injunction and the judge imposes a fine equal to the patentee’s lost profits, the contempt is indirect and the sanction civil-remedial. If a witness declines to answer a question after an objection is overruled and the judge sends him to jail until he answers, the witness is guilty of direct contempt and the judge imposes a civil-remedial sanction. A judge tells striking teachers that the next time they violate the injunction, he will send each of them to jail for a fixed term; the teachers committed indirect contempt and the judge imposed a civil-coercive sanction.


39. See Dobbs, supra note 2, at 282.
lems. If they followed this functional analysis, courts might deemphasize the nonfunctional abstract categories and could select appropriate doctrine from other categories while discarding the inappropriate.

Obligor issues occur exclusively in injunction contempt. This type of contempt is almost always indirect because the contemnor violates the injunction outside the court's presence. Courts apply the same obligor analysis regardless of sanction so that obligor analysis is not usually hindered by any abstract remedy classification. Problems arise when other types of contempt doctrines invade injunction contempt analysis, replace relevant doctrine, and overpower the potential contemnor categories. This difficulty is particularly acute in the context of direct contempts like court disruption because the contempt power in that case is not limited to parties and defined groups of potential contemnors. Before discussing obligor issues, courts must define injunction contempts to distinguish other types of contempts; they may transplant analogies from disparate categories, but they should examine the policy of each carefully.

C. Contemnor's Procedural Plight

Obligor-related issues may arise at several procedural junctures. In injunction litigation, the plaintiff may request to join additional defendants; a nonparty may either contest joinder or move to intervene. Persons may contest the size of a defendant class. After hearing the evidence, the judge may refuse to enjoin all named defendants. After an order is entered, parties may move to modify it or to be relieved from obligations under it. Outsiders may seek to intervene even after trial court judgment. Procedural possibilities are limited only by counsel's imagination. For this reason the obligor issue should not be confused with the liability issue. The liability issue concerns the conduct of named defendants and whether they may be enjoined under substantive law. The obligor issue involves the fate of a person neither served with nor named in the injunction. Because of the uncertain status of potential contemnors, definitively adjudicating the

40. But see International Business Machs. Corp. v. United States, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974), in which the question appears to be: should the centaur ride in the livestock car or the passenger car?


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obligor issue is difficult at the injunction stage. Courts passing on injunctive relief, therefore, often disdain to define the outer boundaries of contempt and do not allow named parties to argue the obligor status of a potential contemnor. When an obligor question does exist, a party may ask the court to modify or construe the order, but an unnamed potential contemnor moving to modify or construe faces two problems. On one hand, the court may deny him standing to litigate the issue; on the other, the plaintiff may join him as a named defendant. If the potential contemnor is joined, he possesses the requisite interest to contest his obligation; but, because he is a party, the liability issue will conclusively determine his obligor status. Thus, as a practical matter, decisions directly considering the obligor issue only occur in contempt.

The court, when passing on contempt, deals with several factual and legal issues. The factual questions are notice and violation. Normally a nonparty who had no notice of an injunction will not be held in contempt. Courts may manipulate the notice issue, sometimes reading it strictly and at other times almost abolishing it. Violation issues include not merely the question whether the contemnor's conduct was contrary to the injunction but also difficult problems con-

46. Compare Regal Knitwear v. NLRB, 324 U.S. 9 (1945), with Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). In Regal, "successors" were named and Regal attempted to argue future purchaser's rights; the Court did not disapprove the language. In Golden State, the purchaser was joined; the Court ruled on the liability and obligor issues.
cerning contemnor's intent to disobey and ability to comply. 49 The two legal issues are the validity of the injunction under substantive law and the right of contemnor to assert the substantive issue. In deciding criminal contempts, courts often apply the collateral bar rule which prescribes that, because contempt collaterally attacks the underlying injunction and because preserving respect for the judiciary is an important policy consideration, a contemnor is precluded from asailing on substantive grounds the injunction he has violated. 50 The court may simultaneously affirm contempt and reverse the contemned injunction, 51 punishing the contemnor for doing something he apparently had a right to do. Courts, therefore, frequently ignore the rule in criminal contempt cases; 52 they should banish it from civil contempt completely. 53

Because of the collateral bar rule, courts have good reason to construe the obligor issue strictly. 54 A nonparty contemnor received no opportunity to litigate the injunction issues: injustice would result if he were held in contempt without a day in court. Courts have two proper avenues to follow in dealing with nonparty contempts. They may refuse to punish a nonparty under the injunction, 55 remitting the plaintiff to a second injunction that names the contemnor defendant. 56

49. Dobbs, supra note 2, at 261-67; Note, supra note 47, at 520-24. Frequently the violation question is impossible to separate from the obligor issue. For example, if the "what is forbidden" part of the decree interdicts "aiding and abetting" violation, then for contempt the prosecution need prove only aiding and abetting. See, e.g., McCourtney v. United States, 291 F. 497, 500 (8th Cir. 1923); United States v. Taliaferro, 290 F. 214, 218 (W.D. Va. 1922), aff'd, 290 F. 906, 908 (4th Cir. 1923); cf. Minerich v. United States, 29 F.2d 565 (6th Cir. 1928), cert. denied, 279 U.S. 843 (1929). Courts also infer that if the contemnor violated the injunction, he had to be an aider of the named defendant. Cf. Day v. United States, 19 F.2d 21 (7th Cir. 1927). This analytical device evades the obligor issue completely.


54. Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930).

55. Note, supra note 19, at 726.
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dant. As an injunction defendant, the contemnor receives an opportunity to litigate the substantive issues at the risk of becoming a named obligor. Courts may also refuse to invoke the collateral bar rule in the nonparty contempt so contemnor may argue the substantive impropriety of the injunction as a defense, providing him a day in court at the risk of being held in contempt.

Courts have, however, applied the collateral bar rule to nonparty contemnors. In *Reich v. United States*, the district court granted a default injunction forbidding the defendants from distributing "orgone energy accumulators." Upon learning of the decree, a Dr. Silvert moved to intervene. The court denied his motion because it concluded that Dr. Silvert would not be "bound" by the injunction unless he acted in concert with the named defendants. When Dr. Silvert was subsequently charged with contempt for distributing the machine, the court interposed the collateral bar rule to preclude reexamination of the earlier injunction. In Dr. Silvert's case, the default, the denial of intervention, and the collateral bar rule combined to bury any stray notions that everyone is entitled to a "day in court" before punishment for contempt.

From a conceptual viewpoint, the collateral bar rule should insulate only the "what" question—whether the injunction is proper under substantive law—and leave a contemnor free to litigate the "who" or obligor part of the decree in contempt. This observation suggests an analogy between the questions of jurisdiction and obligation. The equity decree may validly oblige parties and certain unnamed potential contemnors, but any unnamed contemnor charged with contempt may argue that, as to him, the injunction is void. Thus, neither the language of the injunction nor the phrasing of federal rule

58. 239 F.2d 134 (1st Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957).
61. *In re Lennon*, 166 U.S. 548 (1897) (collateral attack; plenary examination of party question); *Swetland v. Curry*, 188 F.2d 841, 843 (6th Cir. 1951); *Kean v. Hurley*, 175 F.2d 880, 891-92 (8th Cir. 1950); *In re Reese*, 107 F. 942, 946 (8th Cir. 1901).
65(d) would determine conclusively whether a contemnor is an obligor. The contemnor’s obligation to obey, like jurisdiction over the contemnor’s person, would be subject to plenary examination in contempt. This result seems appropriate for two reasons: the obligor issue is difficult to confront except in contempt, and courts usually employ jurisdictional analysis to decide whether a person is an obligor. In any case, the court will nevertheless assume several other issues against the contemnor. Normally, the injunction will be held proper under substantive law. The contemnor knew of the order and violated it, obviating the factual questions of notice and breach. Furthermore, the judge thought enough of the problem originally to enjoin someone, and the conduct of the contemnor, at a minimum, was enjoinable. The defendant stands before the court a conscious recusant who seeks to be exonerated on a procedural technicality. Even if the court allows him to question his obligor status, the contemnor’s position is not to be envied.

D. Confusion of Issues

Contempt distinctions are medieval in technicality, creating issues that lie close together and absorb analysis from each other and from other types of contempt. The obligor issue itself is peculiarly arcane and presents many opportunities for misdirected scrutiny. Analytical precision, however, remains fundamentally important, because the issue must be identified correctly and formulated carefully with reference to both the doctrinal structure and the procedural posture of the case. Decisions must reject inapplicable analogies from other categories of contempt and select appropriate analogies with caution. Unless it formulates issues precisely and marshals doctrine carefully, a court’s analysis will bog down in uncritical metaphysics.

_Baltz v. The Fair_ exemplifies the difficulties and injustices created by defective analysis. Baltz sued The Fair for infringement of a patent on certain spring-suspended hobby horses. Rich, the hobby horse manufacturer, filed an answer and became a party defendant. The court granted an injunction prohibiting “Rich Industries, Inc.

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65. 178 F. Supp. 691 (N.D. Ill. 1959), aff’d, 279 F.2d 899 (7th Cir. 1960).
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and The Fair, their associates, directors, officers, attorneys, clerks, agents, servants, workmen, representatives, confederates, privies, successors and all persons, firms, and corporations claiming by, through or under them, or in active concert or participation with them, or under their authority” from “selling or offering to sell” any hobby horses embodying plaintiff's inventions “except under license from the plaintiffs.” The Fair sold infringing hobby horses manufactured by De Luxe and was charged with contempt. The court stated that “the basic issue to be resolved is whether the respondents (The Fair) . . . are within the scope of the decree and injunction.” It reasoned that the original infringement suit could not adjudicate the rights of the present infringers and that infringement should not be considered in contempt. It seemed concerned that the parties had not had their day in court. Holding that contemnors were “not in privity with the defendants either by relationship or by behavior,” the court dismissed.

The court failed to recognize that the liability of The Fair presented no obligor issue. The Fair had been named defendant and enjoined from selling unlicensed horses embodying plaintiff's patented invention. The court simply lost sight of the relevant liability issue, whether a named and enjoined party, The Fair, violated the injunction. To decide the contempt, the court hypothesized a substitute order enjoining The Fair from selling infringing horses manufactured by Rich. It held that The Fair could not be found in contempt unless it sold infringing horses manufactured by Rich or Rich’s privy, or perhaps horses identical to those made by Rich. Applying the holding to the actual injunction indicates that the court restricted the obligor category excessively by holding that a named and enjoined defendant is in contempt only if it violates the injunction with all other named and enjoined defendants.

A similar case, United States Playing Card Co. v. Spalding, involved an injunction binding the named defendant and the “manufacturer.” The court held that the “manufacturer” could not be an obligor unless he acted with the named defendant. Spalding, therefore, demonstrates that an unnamed potential contemnor who severs his

66. Id. at 693.
67. Id.
68. Id. at 694.
69. Id.
70. 92 F. 368 (S.D.N.Y. 1899).
71. Id. at 368-69.
connection with the named defendant is not in contempt for ignoring an injunction. Such a result clearly allows disguised continuances of the enjoined conduct. Nothing justifies either the *Spalding* or the *Baltz* holding. In each the named defendants received an opportunity to litigate the injunction and must have expected to be obligated to obey. The court's concern about The Fair's day in court is absurd. Named defendants should be held in contempt if they violate the injunction.

The *Baltz* court understandably hesitated to decide technical patent infringement in contempt. The Fair sold horses not previously held to infringe plaintiff's patent, and normally, in patent injunction contempt, patent validity and infringement are insulated from attack by either the collateral bar rule or res judicata. But if a defendant produces a "different" device, the court must decide the infringement issue in contempt. Litigants are entitled to decisions on actual rather than bogus issues. When courts ask the wrong question, a correct result becomes aleatoric. Instead of responding to the violation issue, the *Baltz* court decided a phantom obligor issue, and decided it incorrectly at that, clearly displaying the error in converting a violation issue into an obligor issue.

Even when courts address the proper issue, they sometimes generate confusion by responding to issues posed by the litigants that are not truly presented by the case. A series of cases arising out of National Labor Relations Board decisions concerning whether a successor enterprise is liable for its predecessor's unfair labor practices presented this problem to the Supreme Court. Early court decisions and Labor Board policy forbade remedial orders under the National Labor Relations Act against bona fide successors, primarily because the successor had never engaged in the practice. But, if the Board found that a successor was the predecessor continuing in disguise, it would

76. Section 10(c) of the Act provides that remedial orders "to effectuate the policies of this Act" may be entered upon a finding that "any person named in the complaint has engaged in . . . any such unfair labor practice." 29 U.S.C. § 160(c) (1970).
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hold the successor liable for the unfair labor practices. The NLRB ex-
pressed this doctrine in orders against "successors and assigns" and
construed it under traditional obligor doctrine. In Regal Knitwear Co.
v. NLRB,\textsuperscript{77} the Supreme Court supported this policy by refusing to de-
lete the term "successor" in a Board order, holding that a successor in
"active concert" with its predecessor might be an obligor.\textsuperscript{78}

In 1967, the Board switched courses in Perma Vinyl Corp.,\textsuperscript{79}
where it decided that a bona fide successor may be required to remedy
the predecessor's unfair labor practice if it had received notice and an
opportunity to be heard at the unfair labor practice hearing.\textsuperscript{80} The de-
cision emphasized protecting wronged employees under the Act; only
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and Perma Vinyl's remedial purpose, but it also responded to a bogus obligor issue. The successor, Golden State, argued that Regal Knitwear barred courts from enforcing Labor Board orders against bona fide successors. Regal Knitwear did preclude enforcement against bona fide nonparty successors, but Golden State, which had notice and an opportunity to participate, was a party. The only question should have been whether Golden State, as a party, was liable under substantive law. Instead of dismissing the obligor issue as irrelevant, the Court asserted that Regal Knitwear left open the bona fide successor question and proceeded to hold that rule 65(d) did not preclude "judicial enforcement of the Board order entered against the bona fide successor in this case." The Court addressed an issue not presented by the case because it failed to identify and formulate the relevant liability issue. The Court even referred to the "privity" between buyer and seller and other dubious types of injunctions to support its misplaced conclusions. As an alternative holding on the obligor issue, the Court supplied the last part of a correct decision. It held that Golden State could be required to remedy the unfair labor practices because it had been accorded procedural safeguards. But the Court did not realize that Golden State was indeed a party, and that this status obviated the obligor issue, leaving only the issue of Golden State's substantive liability. While Golden State may be good labor law, its injunction holding is unnecessary and unfortunate, and quite possibly will be harmful to subsequent analysis.

III. The Agent Obligor

The apple-picking hypothetical suggested that the first and most facile extension of the obligor class beyond named defendants might be to include agents of the injunction defendant. Although obligor doctrine is distended and convoluted in the business-agency cases, it nevertheless approaches some coherence in them for several reasons. The basic fact patterns recur frequently; agency doctrine is more intelligible than other obligor doctrine; plaintiffs and contemnors are drawn from the same social classes and are relatively equal in prestige; and judges are more likely to share sympathy and background with business contemnors than with other groups of contemnors. Two

84. Id. at 179.  
85. Id.  
86. Id. at 180.
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venerable cases, *In re Lennon* and *Alemite Manufacturing Co. v. Staff*, explicate much of what is present-day agent-obligor doctrine. *Lennon* remains authoritative because it is the last contempt case in which the Supreme Court faced the obligor issue. Learned Hand's cogent reasoning sustains the influence of *Alemite*; the opinion's language and the court's attitude set the pattern for decision under rule 65(d) and foreshadowed the tone of many later cases. Neither holding, however, can be easily reconciled with the facts underlying it.

*Lennon*’s contempt appeal grew out of an inter-railroad lawsuit. The Toledo, Ann Arbor & North Michigan Railway sued several Ohio and Michigan lines, charging that the defendants were refusing to forward plaintiff’s freight because the plaintiff employed nonunion engineers. The court issued an injunction requiring “the defendants, their officers, agents, servants, and employees” to accept and carry plaintiff’s freight. *Lennon*, an engineer for one of the defendant lines, refused to haul one of plaintiff’s cars. A copy of the injunction was handed to Lennon by one of his employer’s agents, but Lennon, purporting to resign, delayed the train for five hours until a union officer informed him that he should proceed with the run and haul plaintiff’s car. Lennon was charged with contempt and convicted.

Certain language in the Supreme Court’s opinion upholding the contempt conviction has led some to conclude that the obligor issue in *Lennon* turned on notice. The Court stated that “to render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have actually been served with a copy of it, as long as he appears to have had actual notice.” Taken out of context, this statement would eliminate any requirement that a legal or factual connection exist between the named defendant and an obligor. But the Court apparently grounded the quoted language on the assumption that the injunction bound defendants and their agents, and that the contemnor or “person” mentioned would have to be an agent of one of the defendants before contempt would be proper. Otherwise the Court would not have been obligated to find that Lennon had not in fact quit his job, his purported resignation having been made in bad faith. Indeed,

87. 166 U.S. 548 (1897).
88. 42 F.2d 832 (2d Cir. 1930).
90. 166 U.S. at 554.
91. Id. at 557.
the lower court had exonerated three employees who quit rather than haul Ann Arbor's cars. It holding that agents of a corporation are bound by a decree against the corporation. It must be assumed that Lennon's employment relation or agency formed the basis for the ultimate decision.

In deciding whether an unnamed violator of an injunction is an obligor, courts must steer carefully. On one hand, narrow construction would allow the defendant to frustrate the decree by continuing the enjoined activity through a straw man. On the other hand, liberalizing contempt may result in convicting a person who had no real "day in court." Employees named only as agents become obligors to the employer's injunction on the following theory: because the agent, in the course of his employment, acts to benefit the employer, the latter will certainly represent the agent's interest adequately. This theory assumes both that agency produces identity of interest and that legal representation flows from the agency relationship. An agency nexus may in fact encourage the court to assume identical interests and adequate representation erroneously and avoid the difficult task of analyzing the separate interests. Whenever the employee's interest is opposed to or even separate from the employer's, holding the employee in contempt may deny him an opportunity to litigate.

If the courts are willing to assume identical interests and representation from an agency relationship, plaintiffs may secure easy relief by suing a sham defendant. In Lennon competition must have ex-

92. 54 F. at 756.
93. Id. at 750. On habeas corpus, the Sixth Circuit held against Lennon on an "aiding and assisting after notice" theory. Ex parte Lennon, 64 F. 320, 323 (6th Cir. 1894).
94. See Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930).
95. Note, supra note 19, at 721. An additional reason for this result is that it is not practical to serve and name "several thousand employees." Toledo, A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 746, 750 (N.D. Ohio 1893).
96. Note, Contempt Proceedings Against Persons Not Named in an Injunction, 46 Harv. L. Rev. 1311, 1315-16 (1933). In a case factually similar to Lennon, Teamster Local 523 v. Keystone Freight Lines, 123 F.2d 326 (10th Cir. 1941), a plaintiff carrier sued forty connecting carriers and obtained an order compelling the defendants and their employees to carry its freight. The district court refused to grant the union's petition to intervene. On the union's appeal, the court found that the facts disclosed a strike against the plaintiff and union contracts permitting defendant's employees to refuse to handle a struck carrier's freight. The court held that, because of the conflict in interest between the named defendants and their employees, the employee's interests were not truly represented by the employer. It allowed intervention, concluding that employees were "the real [parties] in interest" and necessary parties to any action to compel defendant carriers to forward plaintiff's freight. Id. at 329-30.
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isted between railroads, but the labor conflicts of the period created obdurate and unremitting hostility between railroads and rail unions. The Lennon injunction was granted upon application and does not appear to have been vigorously defended. One group of defendant's agents, management personnel, enforced the injunction against another group of agents, the union trainmen. Lennon learned of the order through one of defendant's superintendents, while another superintendent signed the affidavit charging Lennon with disobeying the injunction. The observer may permissibly infer that the employer and the employees had separate, if not hostile, interests and that the agency relationship failed to produce meaningful representation for Lennon in the injunction proceeding.

In Alemite, plaintiff sued John, Joseph, Louis, and Samuel Staff, as partners trading as Staff Brothers Company, charging them with patent infringement. John swore that "the business was his alone," and the court dismissed Joseph, Louis, and Samuel, who were not served. It found infringement and issued an order prohibiting John, "his agents, employees, associates and confederates" from infringing or "aiding or abetting or in any way contributing to the infringement." Joseph left the Staff firm, went into business for himself, infringed plaintiff's patent, was held in contempt, and appealed.

The Second Circuit reversed, holding that the lower court lacked the power to hold Joseph Staff in contempt, because, at the time of the infringement, he was neither an agent nor legally identified with named defendants. The court reasoned that punishment for contempt without a "day in court" would offend due process. It argued that equitable jurisdiction is limited to "those over whom [the court] gets personal service," and that "no court can make a decree which will bind anyone but a party." So long as Joseph infringed the patent independently of the named defendant, he was free to ignore the injunction.

From the plaintiff's perspective, the Alemite decision allows the named defendant's brother, former business associate, and alleged co-

98. Id. at 751, 757.
99. 42 F.2d at 832.
100. Id. at 832-33.
101. Id. at 832.
102. Id. at 833.
defendant to carry on enjoined activity with impunity. To halt this interference, plaintiff must begin a separate lawsuit and prove his substantive case again, even though the first injunction purported to interdict all of defendant's agents. Apparently the injunction affected only agents of the business of the named defendant. Hence, Alemite frustrated plaintiff's relief because it enabled the defendant to continue the enjoined conduct in disguise.\textsuperscript{103}

Several arguments may be made in defense of Alemite. Unless the contemnor has had an opportunity to litigate in the underlying injunction suit, it does seem to violate notions of due process to hold him in contempt. But in the contempt context, due process really means adequate representation. In accordance with this reasoning, it might be useful to speculate whether Lennon or Joseph Staff received better representation in the underlying injunction case.\textsuperscript{104} Any such due process argument clearly does not reconcile Alemite with Lennon.

An unspoken policy to encourage labor mobility and economic freedom might justify the Alemite result. Stated legally, the term agent in an injunction could mean, not that all present agents are bound forever, but merely that the agents are bound so long as they continue to be agents. An agent enjoined as an agent may associate the forbidden conduct with his acts as employee of the named defendant and may not anticipate a contempt charge when he is no longer employed.\textsuperscript{105} But allowing persons knowingly to infringe patents hardly enhances freedom in the marketplace. Requiring a patentee to sue each employee of an infringer separately will unnecessarily burden both the plaintiff and the court system. Once the infringement issue is settled, the adjudication should bind all those reasonably connected with it.\textsuperscript{106}

Alemite was decided before the Federal Rules of Civil Procedure were promulgated, and its result may be narrower than rule 65(d) compels. The rule establishes three classes of obligors: "the parties to the action," apparently referring to named parties; "their (the enjoined party's) officers, agents, servants, employees and attorneys," obligors defined by some sort of relationship with the enjoined party;

\textsuperscript{103} See Note, 9 N.C.L. REV. 210, 211-12 (1931).
\textsuperscript{104} O. Fiss, \textit{supra} note 4, at 637.
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and "those persons in active concert or participation with them," obligors defined by some notion of conspiratorial conduct. The present discussion has concentrated on the second group. But the Alemite opinion may be interpreted as combining the second and third group, requiring that an agent be in active concert or participation with the parties named and enjoined before contempt may lie. This prescription would be more restrictive than a literal reading of rule 65(d), for, under the rule, conduct in active concert defines a separate class of obligors and does not limit the effect of an injunction on agents. Courts have a wealth of obligor theories to draw on besides agency; plaintiffs need not suffer because of those who create shams to perpetuate the enjoined conduct. Nevertheless, if courts follow Alemite carefully, disguised continuances escape contempt.

Plaintiff's proper course of strategy is to enjoin all persons and business entities reasonably connected with his grievance. If he names only businesses, the injunction will become impossible to enforce if the entity ceases to exist. Former agents no longer have an enjoined principal with which they can be in concert and, under the rationale of Alemite, will be exonerated. Because the reincorporation or multiple incorporation game is easy to play and unformed, non-existent corporations cannot be enjoined, plaintiff must enjoin people rather than paper entities. But enjoining people fails to alleviate all of plaintiff's problems. Most courts will require that he first show a reasonable and provable connection between the defendant and the

107. Fed. R. Civ. P. 65(d); see Harvey v. Bettis, 35 F.2d 349, 350 (9th Cir. 1929); In re Reese, 107 F. 942, 945 (8th Cir. 1901).
110. See, e.g., Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).
112. Cf. United States v. Christie Indus., Inc., 465 F.2d 1000 (3d Cir. 1971). The government appears, however, to have been successful against the individual defendant for violations in his own name.
enjoined conduct.\textsuperscript{113} Moreover, joining all those conceivably liable creates complexity and delay,\textsuperscript{114} and, except with a shorthand device like agency, suing and enjoining all the employees of a large corporation becomes physically impossible.\textsuperscript{115} But, so long as \textit{Alemite} is followed, an injunction against "agents" provides an enormous loophole permitting these potential contemnors to sever the business connection and continue the enjoined conduct.\textsuperscript{116} Partly because of \textit{Alemite}, therefore, the contempt solution to the disguised continuation of an enjoined business activity problem vacillates between the agency and active concert theories, leaving the law in a complex and confusing state and encouraging bad doctrine.\textsuperscript{117} This analytical morass has treated both plaintiffs and contemnors unjustly,\textsuperscript{118} and has not provided definitive answers to basic questions.

This confusion produces particularly unfortunate results in the context of statutory schemes regulating business. Because the government must prove a statutory violation before it is entitled to an injunction, the injunctive litigation merely personalizes the statute without calling forth sanctions. Having already had "one free bite," the defendant may obtain many more by continuing the enjoined activity in disguise, structuring his business affairs to stay one step ahead of contempt. More of these shams grow out of copyright or patent infringement cases. When an injunction prohibits a defendant from infringing plaintiff's patent or copyright and plaintiff charges contempt, the defendant attempts to demonstrate that his activity lies beyond the ambit of plaintiff's injunction. It is especially ironic to observe contempt evaded under technical contempt doctrine when the plaintiff seeks compensatory damages in civil-remedial contempt. The request to be compensated in contempt is practically and remedially identical to an independent suit for infringement. The statutory infringement standard is strict;\textsuperscript{119} the contempt standard should be similarly strict. In a

\textsuperscript{113} \textit{See}, e.g., \textit{SEC v. Coffey}, 493 F.2d 1304, 1310 (6th Cir. 1974).
\textsuperscript{114} \textit{Cf. Computer Searching Service Corp. v. Ryan, 439 F.2d 6, 9 (2d Cir. 1971)}.
\textsuperscript{115} \textit{Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.}, 54 F. 746, 750 (N.D. Ohio 1893).
\textsuperscript{116} \textit{6 L. Loss, Securities Regulation} 4113-14 (Supp., 2d ed. 1969).
second infringement action, plaintiff would be entitled to rely on is­
ssue preclusion; he should be entitled to a similar remedy in con­
tempt for infringement. A functional, issue-preclusion analysis in
these contempt cases would help courts attain better results.

The underlying injunctions in agency cases are equity’s servile
workhorses, supporting the important functions of business regula­
tion and patent-copyright protection. The disguised continuance is­
issues are correspondingly vital to effective regulatory and protective
schemes. The Lennon and Alemite decisions, however, promulgated
unfortunate doctrine that adversely affects these schemes, because
they failed to examine the pragmatic issues raised by the factual en­
vironment in each case.

IV. Obligors Beyond Agency

Injunctions often control conduct at points of social friction; the
observer may trace a history of social fissures through the issues in in­
junction cases. When dominant groups seek to impose their will on an
implacable minority, injunctions are often coupled with criminal
sanctions. Because the minority may be large enough to be represent­
ed on a criminal jury, the majority may resort to equitable authority to
remedy the criminal law’s supposed defects. Equity became a com­
mon tool of social control in the states throughout the late 1800’s and
into the 20th century. The dominant classes used injunctions to sup­
press labor organizations whereas injunctions today are periodically issued against dissent and dissenters.

When a judge, as a member of the majority group, grants an in­
junction to carry out a social policy, the judge, because of that class,
its customs and inclinations, is likely to be sympathetic to the plaintiff
and the social policy and unsympathetic to the defendants and poten­
tial contemnors. In many recent injunction cases, the defendants

121. See Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); In re Lennon, 166 U.S. 548 (1897); McCourtney v. United States, 291 F. 497 (8th Cir. 1923). See generally F. FRANKFURTER & N. GREENE, THE LABoR INJUNCTION (1930).
123. See, e.g., Sembry v. Land, 127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. de­
are fractious and outspoken change-seekers. Judges are seldom members of these social groups, and the resulting social and political hiatus between judge and defendant may, therefore, affect the result on the obligor issue. Specific rules may constrain personal predilection, but the obligor doctrine is confused enough to permit a judge to decide a case on political bias while cloaking the outcome in appropriate legal phraseology.

Obligor doctrine failed to develop until the late 19th century, because, until that time, courts had insisted that only formal parties were obligated to obey injunctions. As the scope of injunctive relief broadened, defendants began to frustrate relief by performing the enjoined act through another. Courts responded by extending the obligatio to obey beyond parties. They accomplished this task through two legal theories, the Seaward principle and the in rem injunction, creating an expanded doctrine difficult to confine within rational and intelligible bounds.


126. Sedler, Dombrowski in the Wake of Younger: The View from Without & Within, 1972 WIS. L. REV. 1, 10-11, 57. See also A. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND 367 (1920).

127. But see Thornton, supra note 124, at 260 (“[T]hose who say [that courts shape results to the litigants] should be forthwith drummed out of the law schools and public life, and off courts.”)

128. See Haines, supra note 124, at 142.

Equity does not serve only to paper over cracks in a repressive society. Another of its original functions was to extend redress to the poor who could not secure justice in the common law courts. See F. MATTLAND, supra note 3, at 5-6; Dunbar, Government by Injunction, 15 L.Q. REV. 347, 359 (1897). The underdog could evade his immediate repressor and address his grievance directly to the king's conscience. Courts continue to perform this vital equity function, see, e.g., Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), aff'd on rehearing, 461 F.2d 1171 (5th Cir. 1972), especially in the area of race relations. See, e.g., Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965). But whenever, in a rare case, a violator in these circumstances is brought before a contempt court, the judge treats the contemnor with uncharacteristically sedulous caution. See, e.g., Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974); United States v. Barnett, 346 F.2d 99 (5th Cir. 1965).

129. Fellows v. Fellows, 4 Johns, Ch. 24 (N.Y. Ch. 1819); Iveson v. Harris, 32 Eng. Rep. 102, 104 (Ch. 1802); Gadd v. Worrall, 145 Eng. Rep. 965 (Ex. 1795).
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A. The Seaward Contempt

One expansive theory of contempt originated out of dicta in Sea­ward v. Patterson. The trial court ordered Patterson to cease conducting boxing matches. In contempt Patterson asserted that Murray, a nonparty, violated the injunction. Murray, who was also charged with contempt, argued in defense that the court had no jurisdiction to hold a violating nonparty in contempt. The court upheld Murray's contempt conviction, concluding that he was the moving force behind the boxing and had been "aiding and abetting" the proscribed activity.

The court proceeded further to deny Murray's defense that non­parties are not obligated to obey. It agreed that prior cases correctly refused to hold a breaching nonparty in contempt but argued that those cases did not deal with contemnors who "assist" a breach. The court announced the existence of two kinds of contempt, one where the court holds a party to the original injunction in contempt for the benefit of the injunction plaintiff, and the other where a non­party "obstruct[s] the course of justice" and is held in contempt lest the "order of the Court" be "contumaciously set at naught . . . ." The statement may be nothing more than a rationale for holding non­party "aiders and abetters" in contempt. On the other hand, the opinion does suggest that a nonparty acting independently of parties to violate an injunction may still be found guilty of contempt because he obstructed the administration of justice. So interpreted, Seaward ex­tirpates all boundaries on the obligation to obey.

An American court quickly acknowledged the Seaward concept. In In re Reese the plaintiffs, who obtained an injunction forbidding a strike, "intentionally and studiously avoided making [contemnor Reese] a party." The court found that Reese subsequently acted contrary to the injunction independently, "without any relation to or connection with the defendants." Plaintiff argued that Reese's con­tempt should be affirmed because he obstructed the administration of justice by violating an order that he knew others were enjoined from

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130. [1897] 2 Ch. 545 (C.A.).
131. Id. at 554.
132. Id. at 555.
133. Id. at 555-56.
134. 107 F. 942 (8th Cir. 1901).
135. Id. at 947.
136. Id. at 943-44.
breaching. The court absolved Reese because he had been charged as a party with violating the injunction, but it suggested that Reese might have been convicted of contempt for obstructing the course of justice, if that sort of contempt had been alleged. The court discussed Seaward at length, quoted it, and seemed to adopt its obstruction-of-justice theory of contempt.

The social, economic, and institutional reasons for accepting Seaward contempt are easy to identify. When people who oppose a majority social policy are diffuse but united by unrelenting zeal, the majority always finds it difficult to enforce that policy. It may, therefore, resort to injunctions to attempt to carry out the policy. Non-agent, independent violators, however, complicate enforcement under conventional agency or active concert doctrine. Seaward contempt allows the court to extend the benefits of injunctive control over a more widespread group, expanding the reach of contempt from the realms of agency and active participants to all knowing violators. In practical terms, it arms equity with an effective weapon against strikes and demonstrations.

Strong institutional pressures impel courts toward Seaward contempt. The public generally believes that the law ought to be obeyed; decisionmakers view with repugnance the spectacle of people setting their decisions "at naught." The judge who constructs doctrinal mechanisms to impose sanctions on a minority that frustrates a majority

137. Id. at 945.
138. Id. at 948.
139. Id. at 945, 948.
140. The court said:
   It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order. Such contempts, however, are totally different offenses from those which the parties to the case commit when they disobey a direct order made in a case for the benefit of the complainant. The one is an offense against the majesty and dignity of the law. The other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court. The power to punish for contempt is not limited to cases of disobedience by parties to the suit of some express command or rule against them, but . . . is co-extensive with the necessity for maintaining the authority and dignity of the court.

Id. at 945.
policy and flouts a judicial decree will receive general approbation. That *Seaward* contempt supplies just such a doctrinal mechanism accounts for its allure.¹⁴¹ But it sacrifices procedural protections to social exigency and almost destroys the distinction between litigation and legislation. It also creates doctrinal difficulties because it borrows inapplicable rationales from other categories of contempt and it overgeneralizes from a reason for criminal contempt.

The direct contempt power advances the important goal of maintaining order in the courtroom and the decision process, whereas indirect contempt enforces previously decided equitable issues. Many different considerations flow from each of the contempt types, but the obligor issue appears in both, albeit in somewhat different ways. Parties may create most disruption because of their emotional involvement in litigation, but courtroom observers are also potential troublemakers. Thus, the judge's direct contempt power cannot be usefully limited to parties to the lawsuit but must be expanded to cover any potential courtroom mischief. Direct contempt, therefore, obliges everyone to be orderly before the judge; otherwise he could not maintain order. Decisions have undergirded courtroom or decorum contempt reasoning with the appealing phrase "respect for the court." The analytical hazard and the fallacy of *Seaward* contempt is that it transplants respect for the courts, a serviceable policy, from decorum contempts into enforcement contempts.¹⁴² When respect for the court becomes an all-purpose rationale for enforcement contempt, injunctions prescribe general rules of conduct, and the court undertakes political rulemaking, normally the exclusive province of the legislature. Courts must draw a line between enforcement contempts limited to parties and obligors and direct contempts which are not so limited. The intermediate category of contempts that *Seaward* denominated "obstruction of the court's process" merges the decorum and enforcement categories and complicates this distinguishing process.¹⁴³

*United States v. Shipp*¹⁴⁴ illustrates the difficulties. In *Shipp*, the

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¹⁴¹ See, e.g., Comment, The Law, the Mob, and Desegregation, 47 CALIF. L. REV. 126, 136-37 (1959); Note, supra note 105, at 376 n.105; Note, Contempt by Strangers to a Federal Court Decree, 43 VA. L. REV. 1204, 1207 (1957); Note, Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts, 65 YALE L.J. 630, 639 (1956). But see Note, supra note 47, at 525; Note, supra note 19, at 735.


¹⁴³ See Dobbs, supra note 2, at 189-94.

Supreme Court stayed an execution pending a decision on a habeas corpus petition, but before the Court could make its decision, a mob lynched the prisoner. Members of the mob were convicted of contempt, although they were strangers to the stay order. The Court did not discuss the obligor issue, but rather stated that "when this court granted a stay of execution on Johnson's application it became its duty to protect him until his case should be disposed of. And when its mandate, issued for his protection, was defied, punishment of those guilty of such attempt must be awarded." Shipp's bearing on the obligor issue seems to be that anyone who interferes with the enforcement of an injunction can be guilty of contempt, rendering the direct-indirect variable irrelevant. To reconcile Shipp with the obligor issue, the observer must conclude that there are some out-of-court contempts that are not limited to obligors.

Shipp suggests that the type of violating conduct should provide more guidance to decision than it normally does. Obstruction contempts normally involve serious anti-social conduct including violence or threats of violence, whereas enforcement contempts may concern any conduct within the broad range of injunctive power. But if violent injunction breaches like that in Shipp became contempts, the obligor limitation would be foregone. Contempt, however, would not be a necessary remedy when a nonparty violently breaches an injunction, because the conduct is almost always criminal and the criminal sanction should be adequate. Thus, courts could harmlessly except violent breaches by persons outside the obligor classes from contempt.

On the other hand, doing away with the obligor limitation would be more justifiable in stay contempts than in injunction contempts because a stay acts to protect the integrity of the judicial process or the court's ability to adjudicate more than the plaintiff's right to relief. Society in general may have a great interest in plaintiff's relief, but its interest in calm, undisturbed adjudication would be a sufficient reason to require the public at large to obey a stay.

145. Three justices dissented from holding the sheriff in contempt. They argued that he had not violated the order because it was impossible for him to obey. Id. at 437-438. The Court was unanimous in holding the members of the mob in contempt.
146. Id. at 425.
148. See Dobbs, supra note 2, at 189-94.
149. Those who find the distinction strained may take comfort from United States v. United Mine Workers, 330 U.S. 258 (1947), in which Shipp is cited as precedent for affirming contempt for violation of a temporary restraining order. Id. at 292.
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The *Shipp* analogy to unlimited contempt power over in-court contempts blends in-court decorum, obstruction of process, and injunction enforcement contempt concepts and discourages courts from articulating a satisfactory distinction among them. While difficulty may lurk in distinction, this failure to distinguish ignores due process considerations because it weakens the obligor limitation. If the *Shipp* conviction based on violation of a stay order could be appropriately analyzed and classified as an “obstruction of process” direct contempt, the distinction would be maintained and the obligor limit would continue to operate in indirect enforcement contempts.

Courts must likewise apply a precise and discerning analysis to preliminary injunctions and temporary restraining orders. Many preliminary injunctions and some temporary restraining orders grant effectively final relief if they impinge on activity in progress, but these final orders also may protect the decisionmaking process. The courts must separate the orders for which it is necessary that all obey from those which only parties and obligors should obey. “Preserving the status quo” may be inappropriate rhetoric when a judge restrains a strike or demonstration in progress temporarily. Interests in limited government and due process may offset the court’s need to protect its process. Whenever preliminary or temporary injunctions deter or inhibit present conduct effectively equivalent to that which will be enjoined by the final adjudication, only parties and obligors should be compelled to obey.

Another major difficulty of *Seaward* contempt is that it overgeneralizes by focusing on disrespect, the stated object of criminal contempt, and by establishing the disrespectful as a separate class of obligors. This analysis clearly erases any obligor limits on contempt. Punishing disrespect should serve only as support for other enforcement contempt rationales and should never act alone to justify contempt. Because of due process considerations, certain classes of the disrespectful should be left beyond the ambit of contempt, and enforcement contempt limited to parties and obligors.

Curbing the respect policy, however, leads to an additional analytical difficulty. Punishing disrespect remains a policy behind some injunction enforcement contempts that endeavor to insure effective

relief for victorious litigants by means of coercive or compensatory remedial sanctions. In these situations, winners fail to achieve effective remedial relief. For example, the court may enjoin a disappointed suitor from disrupting the plaintiff's wedding but, if defendant nevertheless appears at the wedding slovenly, drunk, and disorderly, then after-the-wedding remedial contempt cannot unring the bell, mend the china, or otherwise accomplish a perfect wedding. The criminal or punitive branch of enforcement contempt would punish this refractory defendant to advance an important social policy of encouraging litigation rather than self-help. Unless people expect to reap the fruits of victory, they are unlikely to resort to the courts. That such contempt also operates to preserve respect or punish disrespect for the court is, however, merely a consequence of contempt rather than an activating policy. Court analysis must take care to prevent disrespect from becoming an all-purpose trigger for contempt, whether contempt is civil-coercive, civil-remedial, or criminal-punitive, for countervailing due process policies support the obligor boundary on enforcement contempt. The obligor limitation should not vanish to advance an interest in respect.

Additional reasons to prevent respect from becoming an independent basis for contempt grow out of the desire for democratic relations between the governed and their governors. A democratic society insists that the people in power respond to principle, but in many contempt cases principles are vague and conflicting. The disrespect principle may shift the focus of decisionmaking from abstract reasoning to the judge's personality and tend to enforce a deference that degenerates into obsequiousness. Criminal contempt presents striking instances in which a judge defines the proscribed conduct, sets the contempt process in motion, and often presides over all issues. A judge in this context may tend to lose perspective and to convert respect into revenge. Although a certain amount of respect civilizes litigants and judges alike, a respect that overwhelms skepticism and detachment is unhealthy in a democratic society.

From an analytical viewpoint, the Seaward theory expands obligors with a legal theory that ignores the "who" language in the injunction. Litigants may have the courts achieve the same effect through expansive enjoining language. Although in Scott v. Donald, decid-

152. 165 U.S. 107 (1897).
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ed in 1897, the Supreme Court expressly disapproved language obligating "all other persons," 153 beginning with In re Debs 154 in 1895, it accepted "all other persons whomsoever" obligor language for strike injunctions. 155 This wording soon became commonplace. 156 Although reported cases present relatively little evidence of cases holding knowing violators in contempt of these orders, the "all persons" language may have a broader impact than suspected. Most people obey court orders, and many employers may have broken strikes without charging anyone with contempt.

Legal countermeasures to these expansive obligor theories developed soon after their creation. In 1917, a California court 157 pointed out that, when a nonparty knew of injunctive terms, he also knew that the injunction named specific parties. It reasoned, therefore, that breach alone did not evidence obstruction of justice. 158 Judge Hand specifically rejected Seaward contempt in Alemite for two reasons. He articulated a separation of powers concept that the court "is not vested with sovereign powers to declare conduct illegal" and expounded the due process notion that injunctions may obligate only those who truly had an opportunity to litigate by either having been a party or having been adequately represented by a party. 159 In Chase National Bank v. City of Norwalk, 160 Justice Brandeis held that an injunction obligating "all persons to whom notice of the order of injunction shall come" was "clearly erroneous" because it "assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." 161

Federal rule 65(d) presumably precludes both Seaward contempt and the "all persons" language. It states that an injunction binds "only . . . parties, . . . agents . . . , and . . . persons in active concert or participation . . . ." 162 Lower court opinions 163

153. Id. at 117.
154. 158 U.S. 564 (1895).
155. See generally F. Frankfurter & N. Greene, supra note 121, at 17-19.
156. See, e.g., Day v. United States, 19 F.2d 21, 21-22 (7th Cir. 1927); American Steel & Wire Co. v. Wire Drawers Unions, 90 F. 598, 604 (N.D. Ohio 1898); F. Frankfurter & N. Greene, supra note 121, at 88-89.
159. Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930).
161. Id. at 436-37.
163. See Harrington v. Colquitt County Bd. of Educ., 449 F.2d 1616 (5th Cir. 1971)
appear to agree that "a decree purporting to bind 'all persons whosoever' or even all persons with knowledge would be a nullity under the rule."\textsuperscript{164} A Florida court held sweeping obligor theories unconstitutional as violative of due process in \textit{Alger v. Peters}.\textsuperscript{165} In \textit{Alger} the contemnors knowingly violated an injunction, but neither were agents of defendants nor in active concert with them. The court absolved them, concluding that "accepted standards of judicial procedure do not permit that these rights be taken away from them in a cause in which they had no opportunity to defend."\textsuperscript{166} Thus, according to either traditional doctrine, applicable procedural rules, or the Constitution, the obligation to obey an injunction exists only for obligors: parties, agents of parties, and associates-confederates of parties.\textsuperscript{167}

Despite this compendium of authority, the \textit{Seaward} theory and the "all persons" order possess continuing vitality. The Norris-LaGuardia Act\textsuperscript{168} and the changing temper of the times have disallowed the private employer's strike injunction, but similar emotional and unstructured problems arise currently in education and civil rights disputes.\textsuperscript{169} Courts continue to grant "all persons" injunctions\textsuperscript{170} and make statements to the effect that all knowing violators will be punished for contempt.\textsuperscript{171} The 1960 Civil Rights Act\textsuperscript{172} even articulates the \textit{Seaward} theory, defining as a misdemeanor the willful use of force or threats of force to impede or interfere with the exercise of rights or

\textsuperscript{164} Note, \textit{supra} note 19, at 736.
\textsuperscript{165} 88 So. 2d 903 (Fla. 1956).
\textsuperscript{166} \textit{Id.} at 908.
\textsuperscript{169} Note, \textit{supra} note 47, at 516; Note, \textit{supra} note 19, at 735; Note, \textit{supra} note 147, at 1306-07; see Note, \textit{Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts}, 65 \textit{Yale L.J.} 630 (1956).
\textsuperscript{172} 18 U.S.C. \S 1509 (1970).
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the performance of duties under a federal court order.\textsuperscript{173} States have enacted statutes\textsuperscript{174} that are equally troublesome because they incorporate the entire realm of equitable power into a criminal statute. The enacting legislatures in these instances have decided simply to abandon their lawmaking function to courts that are willing to grant injunctions and prosecutors who are willing to prosecute them. Only a few prosecutions have been brought under the federal statute so far, but violent resistance to desegregation orders has not subsided.\textsuperscript{175} The \underline{Seaward} theory and the pressures that brought it into prominence create a brooding potential to expand the obligation to obey injunctions to the public in general.

\underline{Seaward} contempt and “all persons” injunctions are just two of the many available responses to social disorder. Some problems are too large to enjoin, because “it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee’s army during the late civil war.”\textsuperscript{176} Public authority can only respond to insurrection with troops or marshals. Moreover, violent conduct normally violates a criminal statute, and the authorities may charge the resisters with assault, trespass, or breach of the peace. Absent violent conduct, the authorities may tolerate a certain amount of troublemaking. If nondefendants frustrate relief, then, as an alternative to \underline{Seaward} contempt, the authorities might seek a second injunction naming the new troublemakers as party defendants.\textsuperscript{177}

\textsuperscript{173} The Act provides:

\texttt{Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.}

\texttt{No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.}

\textit{Id.}

\textsuperscript{174} \texttt{IOWA CODE \S 723.1 (1973) (interference with the administration of justice); cf. State v. Graham, 203 N.W.2d 600, 603 (Iowa 1973).}

\textsuperscript{175} See United States v. Fruit, 507 F.2d 194 (6th Cir. 1974); United States v. Hayes, 444 F.2d 472 (5th Cir. 1971); Rosecrans v. United States, 378 F.2d 561 (5th Cir. 1967).

\textsuperscript{176} \textit{In re Debs}, 158 U.S. 564, 597 (1895).

\textsuperscript{177} \textit{See, e.g., Augustus v. School Bd., 507 F.2d 152 (5th Cir. 1975); Faubus v. United States, 254 F.2d 797, 806-07 (8th Cir. 1958); Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957); Mims v. Duvall County School Bd., 350 F. Supp. 553, 554 (M.D. Fla. 1972).}
This procedure may preclude instantaneous enforcement of injunctions, but three factors point toward using the second injunction instead of contempt: the troublemaker was not a party to the first injunction, he acted independently of those enjoined, and his conduct was not criminal. Fairness requires the authorities to seek a second injunction.178

Professor Fiss questions the propriety of a second injunction, noting that the "ancillary" proceedings are frequently ex parte, that the part of the original injunction forbidding specific conduct remains supported by the collateral bar rule, and that granting the injunction is a mere "formality."179 He appears to conclude that "the obstruction-of-justice concept has emerged in a new form," the second injunction being "nothing more than a device or technique to give the obstructor a 'second chance' and not rooted in any deep sense of fairness."180 Certainly a second chance is better than no chance. Combining ex parte procedure with the collateral bar rule may be unfair, but that unfairness is no argument for accepting the greater injustice of holding nonparties in contempt. Even an ex parte second suit has symbolic functions. The trappings of the litigation process individualize the defendant and isolate his conduct. After the personalized injunction is served, the defendant is more likely either to obey or to move to dissolve. An ex parte second injunction may, therefore, be conceived as an adjudication within the province of the enjoining court in contrast to nonparty contempt under a Seaward theory or "all persons" injunction that is imposed impersonally and appears more "legislative" in nature.181

A second injunction providing both notice to the troublemaker and an opportunity to be heard advances additional values. The adversary system legitimizes the second injunction; and allowing the troublemaker to present his arguments before being enjoined increas-

178. But see Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1030 (1965) ("[O]ne who knowingly prevents a party from carrying out the decree . . . has no independent claim which he is entitled to litigate. His actions evidence a disrespect not only for the plaintiff's rights but for the authority of the court, and contempt would therefore seem warranted.").


180. O. Fiss, supra note 4, at 629.

181. Dunbar, supra note 128, at 362; Note, Strike Injunctions, 8 HARV. L. REV. 227, 228 (1894).
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...the chances that he will respect the injunction. Furthermore, an adversary proceeding lessens the possibility of incorrect or overreaching decisions. This alternative to an "all persons" injunction may fail to attain all of plaintiff's objectives, but it does so to protect the valid interests of defendants and society. It and other alternatives should permanently replace the obligor-expanding Seaward concept and all of its related doctrine.

B. In Rem Injunctions

The in rem injunction was the prohibition movement's gift to equity; it allowed the courts to stretch legal theory so that they might accomplish social and political goals. The in rem theory enforced an injunction restraining "all persons" from using designated premises for illegal conduct in contempt against a nonparty violator ignorant of the injunction.

The in rem injunction had several salient features that combined to frustrate obligor limitations. It was a vital tool of the temperance movement, a prime example of a cultural majority imposing its values upon an unwilling and uncooperative minority. The liquor injunction was statutory equity enforced under public nuisance doctrines. Because illicit businesses died and were reborn overnight, the courts had to find means to prevent defendants from circumventing relief through disguised continuances. Plaintiffs, who found proving that a nonparty violator knew of the breached injunction inconvenient, employed the in rem injunction which replaced actual knowledge with constructive notice and obviated many enforcement difficulties.

185. See Silvers v. Traverse, 82 Iowa 52, 47 N.W. 888 (1891). See generally Eldred, supra note 122.
187. Black, supra note 184, at 412.
188. See Silvers v. Traverse, 82 Iowa 52, 53, 47 N.W. 888, 889 (1891).
tempt attracted a substantial judicial following and appeared even where conventional contempt would have been successful.

The in rem injunction possesses respectable legal antecedents. In the 19th century, one who interfered with property in the custody of a receiver might be held in contempt. Few bankrupts resort to receivership today, most preferring Bankruptcy Act remedies, and the descendant of this receivership doctrine is a recognized but little used component of contemporary bankruptcy practice. At the date of bankruptcy, the bankrupt's property comes into the court's custody. A party may obtain an injunction forbidding “all persons” from interfering with the property; one who interferes with the property may be held in civil contempt even though he lacked knowledge of the order. Although this doctrine closely parallels the “all persons” injunction, two important differences serve to diffuse criticism: the order refers not to conduct but to property in custodia legis, and the contempt employed is civil-remedial, obliging the contemnor only to disgorge that property. Present bankruptcy law apparently deemphasizes or rejects extravagant injunction-contempt theories and limits its own doctrine to stays of lien enforcement that do not occur in the bankruptcy court.

Equity also performs duties analogous to in rem contempt to control the title to property, imputing constructive notice from land

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189. Dermedy v. Jackson, 147 Iowa 620, 622, 125 N.W. 228, 229 (1910); State v. Porter, 76 Kan. 411, 413-14, 91 P. 1073, 1074 (1907), noted in 21 HARV. L. REV. 220 (1908); Chaffin v. Robinson, 187 Tenn. 125, 130-31, 213 S.W.2d 32, 34-35 (1948); State v. Terry, 99 Wash. 1, 4, 168 P. 513, 514 (1917). See also Hill v. United States, 33 F.2d 489, 491 (8th Cir. 1929) (in rem argued, actual knowledge held established by circumstantial evidence).


191. 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1336, at 936, 932 (5th ed. 1941).


193. Cherry v. Insull Util. Insvs., Inc., 58 F.2d 1022, 1027 (N.D. Ill.), rev'd on other grounds sub nom. Guaranty Trust Co. v. Fentress, 61 F.2d 329 (7th Cir. 1932); In re Reese, 107 F. 942, 946-47 (8th Cir. 1901).

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records, *lis pendens*, and judgment dockets.¹⁹⁵ In addition, successors to an enjoined defendant's office or title are commonly held obligors to existent injunctions.¹⁹⁶ Existing doctrines, therefore, were sufficiently malleable during Prohibition to enable the courts to forge the in rem injunction.

These injunctions did have limitations. Courts always granted them pursuant to a statute declaring the enjoined activity contrary to law and providing for injunctive relief;¹⁹⁷ the injunction merely personalized existing law. Also, its underlying theory necessitated certain technicalities. To obligate a successor, the injunction had to include an "all persons" clause; an order enjoining a named defendant could be ignored with impunity by a knowing buyer of the property.¹⁹⁸ And, because it relied on constructive notice, the in rem injunction only prevailed against purchasers of the property. An agent of the named defendant who was hired after the injunction and violated it without actual knowledge escaped contempt.¹⁹⁹ Finally, the courts, evidently realizing that they were dealing with an extraordinary doctrine, handled contempt for breach of an in rem injunction with extreme caution.²⁰⁰

The in rem concept has, nevertheless, been exposed to continuous and fundamental criticism. An early writer argued that the lack of actual notice should have invalidated any contempt arising out of an in rem order.²⁰¹ Another commented that the liquor nuisance statutes seemed "to delegate to courts of equity the power to make criminal law."²⁰² These criticisms recognize that the in rem analogy is inapposite to the critical obligor issue. A true in rem proceeding merely adjudicates present rights in property, whereas an injunction regulates future conduct with the sanctions of criminal punishment. Receivership

¹⁹⁵. Garfein v. McInnis, 248 N.Y. 261, 266, 162 N.E. 73, 74 (1928); Silvers v. Traverse, 82 Iowa 52, 53, 47 N.W. 888, 889 (1891); Note, *supra* note 19, at 729.
¹⁹⁶. Rivera v. Lawton, 35 F.2d 823, 825 (1st Cir. 1929); Skinner v. Ashford, 131 Neb. 338, 340, 268 N.W. 81, 82 (1936); Crucia v. Behrman, 147 La. 144, 149, 84 So. 525, 527 (1920).
contempt supplies no relevant precedent. The receiver's custody is in fact the court's custody; \(^{203}\) interference with the property more properly constitutes contempt for hampering the court's function and process than contempt for violating an injunction. Professor Dobbs consequently condemned the in rem contempt as "overkill" and "massive retaliation" that is "wholly unnecessary and undesirable." \(^{204}\)

The successor rationale supporting the in rem injunction lost whatever force it had when the successor notion itself faded in Regal Knitwear, in which the Supreme Court announced that the injunctive term "successors and assigns" could not embrace any nonparties except those in an employment relation or in active concert or participation with the defendant. \(^{205}\) Furthermore, any holding that an unknowing and independent violator is an obligor to an in rem injunction would be palpably improper under federal rule 65(d), which requires both actual notice and "active concert or participation" before a non-employee-nonparty may be held in contempt. \(^{206}\) Logic, fairness, and applicable law require that courts confront disguised continuances directly and pragmatically and establish both knowledge and active concert or participation as a basis for contempt. If property involved in the "nuisance" was sold, courts must undertake the burdensome task of determining whether the sale transaction was a sham or a bona fide conveyance not designed to frustrate equitable relief before deciding contempt. \(^{207}\)

To announce the demise of the in rem injunction would, however, be premature. Federal courts, despite this plethora of contrary authority, continue to recognize the in rem concept in a variety of circumstances. \(^{208}\) A passage in Golden State came perilously close to endorsing in rem injunctions. \(^{209}\) Because, as was argued above, the

\(^{203}\) In re Reese, 107 F. 942, 947 (8th Cir. 1901); 1 W. Collier, Collier on Bankruptcy \^ 2.62 [1], at 329 (14th ed. 1974); Dunbar, supra note 128, at 365.

\(^{204}\) Dobbs, supra note 2, at 258.


\(^{206}\) Fed. R. Civ. P. 65(d); see Dobbs, supra note 2, at 259; Note, supra note 19, at 736.


\(^{209}\) See 414 U.S. at 179 ("This [constructive knowledge] principle has not been limited to in rem . . . proceedings.").
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successor received notice and a hearing, no obligor issue should have arisen in *Golden State*. The language, therefore, has no relation to any presumed obligor issue in *Golden State*. And, because the case turns ultimately on the National Labor Relations Act's purpose of protecting employees' right to organize, the language should not apply in other spheres. But in mushy over-conceptual areas, dicta has a way of developing into precedent; Supreme Court dicta poses an even more imposing threat to reasoned decision, because the Court deals with injunction-procedural issues infrequently.

A revival of the in rem liquor nuisance injunction is not anticipated. The temper of the times forbids it. But a modern opportunity for the in rem concept lurks in obscenity. Many analogies link prohibition to present day antismut campaigns. Both produce compromise-evading conflicts, because they involve commonly purchased commodities considered harmful by powerful groups in the dominant classes. In each, the dominant group has attempted to protect the putative consumer from base impulses by preventing sales. A few distinguishing features do appear. In contrast to habitual reading of sexually oriented material, prolonged and extreme consumption of liquor has an obvious deleterious physiological effect. And, while the state has a legitimate interest in regulating all aspects of the liquor business, the first amendment forbids it from treading upon nonobscene reading matter or otherwise protected free expression. But obscenity injunctions contain the seeds of in rem orders that flower into contempt. 210 Renewed prosecutorial vigor in the criminal courts has followed a liberalized standard for conviction. 211 Because *Jenkins v. Georgia* 212 engendered confusion about the jury's proper decision-making role 213 and juries no longer convict obscenity defendants automatically, prosecutors may, as during prohibition, channel their energies into equitable public nuisance actions. The reported cases do reveal nascent in rem contempt. If the authorities discover obscene paraphernalia on commercial property, the courts often close the business for one year 214 or even indefinitely. While the property is closed,
the injunction may forbid the proprietor from selling books or run­ning motion pictures. Finally, the orders commonly prohibit "any person" from operating the business or obligate "the defendant and all other persons." Many states have held the statutory foundations for these particular injunctions unconstitutional. Perhaps the public nuisance approach "is simply too blunt an instrument of regulation for the sensitive area of first amendment freedoms." The liquor-obscenity analogy may be invalidated, but the social pressure to drive out the peddlers of obscenity persists. Those who desire to extirpate obscenity appear to be activated by the same impulses that spurred the prohibitionists. When identical social exigencies have existed, the courts have molded equity and the obligor doctrine to accommodate majority goals. Hopefully they will not repeat the blunders of the liquor nuisance era and will effectively outlaw the in rem injunction.

C. United States v. Hall

In the apple-picking hypothetical, the judge devised a means of thoroughly effectuating plaintiff's relief by posting notice of the injunction on the property and holding in contempt all violators who observed the notice. This method of broadening the obligor class was the subject of recent Fifth Circuit attention in United States v. Hall. In that case, a district judge entered a desegregation decree pairing two Jacksonville, Florida high schools to equalize white and black enrollment and retained jurisdiction. When the consolidated school opened, racial unrest and violence broke out, compelling the authorities to close the school temporarily. Later the superintendent of schools and the sheriff applied for injunctive relief, alleging that black adult outsiders, including Eric Hall, "had caused or abetted the unrest and remanded, 413 U.S. 913 (1974), rev'd, 287 So. 2d 496 (1973), cert. denied, 417 U.S. 911 (1974).


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and violence." 220 The district judge, without serving notice, issued an order that same day, providing in part that "no person shall enter any building of the school or go upon the school's grounds." 221 It granted exceptions for students, employees, parents, law enforcement officials, those with business obligations, and those with prior permission of the school officials. The order also stated that anyone having notice of the order would be subject to criminal contempt for violation of any of its terms. Hall was not a party to the underlying lawsuit, nor did the order join him as a party. Following the court's decree, the Jacksonville sheriff served Hall and six others with copies of the order. Four days later Hall went on school grounds "for the purpose of violating the . . . order," 222 was arrested by a marshal and found guilty of criminal contempt.

Hall's argument on appeal was straightforward. Relying on the common law holdings in Alemite and Chase National Bank v. City of Norwalk 223 and the language of rule 65(d), he contended that a non-party who violated an injunction in pursuance of his own independent interests could not be convicted of contempt. The court rejected this argument on both counts. It first distinguished Alemite and Chase National Bank on the grounds that in neither case did the activities of outsiders interfere with either plaintiff's right to relief or the defendant's duty to provide that relief, whereas Hall's conduct both threatened the plaintiff school children's right to an integrated school and impeded the defendant school district's discharge of its constitutional obligation to desegregate. The panel appeared most concerned that Hall's actions "imperiled the court's fundamental power to make a binding adjudication between the parties properly before it." 224 It argued that the court had the power to punish such a person with contempt in order to preserve that power. To support this contention, it relied on the case of United States v. United Mine Workers 225 in which the Supreme Court had upheld contempt convictions of the union and its leaders for leading a strike after a district court had enjoined all strike activity. There the Court had reasoned that the lower court had the power to issue a preliminary order prohibiting the strike in order to

220. 472 F.2d at 262.
221. Id.
222. Id. at 263.
224. 472 F.2d at 265.
determine whether it had any jurisdiction to enjoin the strike permanently. The Fifth Circuit panel considered the Hall situation at least equivalent in effect to Mine Workers; in order to enforce a desegregation order effectively, the district court had the power to hold in contempt a person who interfered with the implementation of that order. The court also analogized its "school order" to the in rem injunction. Just as the in rem court must protect the property involved in its adjudication, so must the desegregation court preserve the necessary environment for useful integration.

The panel again mustered several arguments to deny Hall's appeal based on rule 65(d). It asserted that, rather than creating absolute limits to the obligor category, the rule codified the common law and, therefore, did not preclude the district court from issuing an order designed to protect its ability to provide effective relief. It refused to hold that a court could bind the whole world to a "school order," resting Hall's conviction on the fact that he received notice. And it justified the fact that Hall had not been given a hearing by construing the injunction as a temporary restraining order, for which rule 65(b) requires no hearing. Because Hall had violated the order within four days of its entry, the order had not outlived the ten-day limit on restraining orders provided by rule 65(b). The Hall contempt conviction consequently withstood all attacks, and the Fifth Circuit affirmed the district court in full.

The Hall opinion contains several meritorious qualities. The court attacked the obligor problem directly, stated the issues clearly, and met Hall's arguments with logic, precedent, and policy. It abstained from conclusory reasoning and scrupulously avoided doctrinal pitfalls, refusing even to search for "privity." In rejecting the notion that an injunction court can bind the world at large, it deflated at least one equity cliche. Furthermore, strong policy considerations seem to support the panel's reasoning. Desegregation orders are fragile; success often depends on broad-based cooperation. District judges in the Fifth Circuit have made difficult and courageous decisions, exercising broad and flexible remedial powers without much outside assistance or support. Thus, the Hall expansion of contempt might reflect the institutional posture of these courts as administrators as well as arbiters of school desegregation and may indeed be read as limited to desegregation cases.

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The argument that the uniqueness of school desegregation justifies a broadened contempt power must nevertheless fail. Central to the court's holding that rule 65(d) did not prohibit Hall's conviction was a conclusion that the draftsmen of the rule could not have foreseen the Hall situation. This observation may appear correct in the narrow context of desegregation, but with respect to a larger class of decrees that affect an entire community and excite deep passions, the court is wrong. Rule 65(d) was taken from the Clayton Act of 1914, which was directed primarily at strike injunctions. Section 19 of the Act, currently the obligor part of rule 65(d), was designed especially to prevent issuance of blanket injunctions. Its proponents were concerned that large numbers of people not be punished for breaching injunctions issued in cases to which they had not been made parties. Thus, the Clayton Act consciously rejected the "all other persons with notice" language that had pervaded federal labor injunctions and intentionally restricted the contempt power to parties, employees, and others in "active concert or participation with them." The present rule 65(d), therefore emerged from an environment quite comparable to school desegregation; in formulating the rule's statutory ancestor, Congress refused to endorse the doctrinal tactics of Hall.

The Hall court also based its decision on an analogy to the in rem injunction. Only a few comments need be added to the foregoing criticism of the in rem concept. Historically, the in rem injunction was featured most often in disguised continuance or business cases; the Hall court relies almost exclusively on bankruptcy cases for authoritative support. Any analogy to a school desegregation case is, therefore, more verbal than appropriate. Had the draftsmen of the Clayton Act intended the common law in rem injunctions to continue, they would have omitted the word "only" in the rule's provision that "every order granting an injunction . . . is binding only upon . . . the specified obligor." The Supreme Court's analysis in Regal Knit-

227. 472 F.2d at 267.
230. H.R. REP. No. 612, 62d Cong., 3d Sess. 4 (1914). For additional information about the legislative history of the Act, its provisions, and the judicial reception, see F. FRANKFURTER & N. GREENE, supra note 121.
231. FED. R. CIV. P. 65(d).
232. 472 F.2d at 267.
233. FED. R. CIV. P. 65(d),
wear originated the idea that rule 65(d) embodies common law obligor doctrine and does not negate the possibility of obligor expansion in the context of an in rem contempt. But the *Regal Knitwear* Court held that courts may not punish in contempt those who act independently of injunction defendants.\textsuperscript{234} Neither case analogy nor statutory interpretation, therefore, can sustain Hall's contempt conviction.

The procedure followed and approved in *Hall* affords another opportunity for criticism. What the court called a temporary restraining order was essentially final. It affected present or planned rather than past activity and could not have laid the foundation for further final relief, because it named no respondents. The petition had named Hall, and he was apparently accessible to service before the decision to grant the order. If formal or informal prior notice to Hall was feasible, it should have been given.\textsuperscript{235} By issuing the order ex parte and serving it on Hall as an accomplished fact, the district court exposed itself to criticism for undertaking government by fiat.

The fortuitous timing of Hall's conduct, however, enabled the court to make out a technical case for treating the injunction as a temporary restraining order. Contempt law draws no distinctions between normal injunctions and ex parte orders. With both, therefore, the collateral bar rule remains in effect to preclude a violator from contesting the substantive provisions of the order as a defense to criminal contempt.\textsuperscript{236} The court also observed that Hall neglected to challenge the order "by the orderly process of law" but rather had "resorted to conscious, wilful defiance."\textsuperscript{237} These statements imply that, as an alternative holding, the *Hall* court extended the collateral bar rule to deny attacks on the obligor issues posed by the injunction at the contempt stage, as if Hall had foregone the opportunity to challenge the injunction when he bypassed the possibility of moving to rescind the order and entered the school. This conclusion erroneously contradicts the prevailing attitude that the obligor issue is subject to plenary examination in contempt, a notion compelled by both precedent and policy.\textsuperscript{238}

Few procedural avenues appear to have been open to Hall. Only an

\textsuperscript{234} 324 U.S. at 13.


\textsuperscript{237} 472 F.2d at 267.

\textsuperscript{238} See text accompanying notes 61-62 supra.
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"adverse party" may move to modify or dissolve an order;\footnote{239} perhaps Hall became an adverse party when he was served with the order.\footnote{240} Hall could also have intervened,\footnote{241} if he had known of the proceedings. These procedural options stress ideal possibilities rather than practical certainties. Having been ignored when the injunction was granted, Hall would certainly have had serious doubts whether as movant or intervenor he would have been able to alter the injunction. He may not then have been able to bring an appeal.\footnote{242} As a practical matter, therefore, the contempt proceeding was his first appropriate opportunity to challenge the order. Consistent doctrine and procedural fairness suggest that the collateral bar rule should not have been invoked on the obligor question. If an "all persons" injunction is too broad on direct appeal,\footnote{243} then the similar "all persons" order should have been too broad in Hall's contempt appeal.

The court's assumptions about the common law theory of contempt are the most substantial defects in \textit{Hall}. Its right-duty analysis begs the critical obligor question. Anyone who breaches an injunction interferes with the defendant's duty to obey an injunction, because he frustrates the plaintiff's right to relief. The right-duty consideration is clearly inapposite; it would make all violators obligors. Proceeding on this misguided reasoning, however, the \textit{Hall} panel concludes that the district court had "jurisdiction to preserve its ability to render judgment."
\footnote{244} That courts have jurisdiction to determine jurisdiction is a familiar proposition.\footnote{245} In injunction cases, this statement generally means that a court may enjoin to preserve the status quo pending a decision whether it has jurisdiction over the subject matter; breach of that order constitutes contempt even though the court may later hold that it lacked subject matter jurisdiction.\footnote{246} The doctrine seems to have validity only to the extent that the preliminary issue is jurisdic-
tion over the subject matter and that the court has obtained personal jurisdiction over the defendant. 247 Technicalities concerning the acquisition of personal jurisdiction in injunction and contempt cases obscure these requirements. Under present equity doctrine, jurisdiction over the person is attained or obedience is mandated when the order is served or when unequivocal knowledge of the injunction is received from an authoritative source. 248 As applied in Hall, this proposition ignores the issue whether Hall was an obligor to the injunction. To conclude from an artificial, assumed conclusion of personal and subject matter jurisdiction that Hall was an obligor to the order is utterly circular. The ambit of the contempt power should be determined by a separate inquiry in contempt. The “jurisdiction to determine jurisdiction” doctrine subverts this inquiry. By employing it, the Hall opinion failed to face the obligor analysis.

The court’s concern that the district court have the power to preserve its ability to render judgement resurrects the discredited Seaward or “obstruction of justice” theory of contempt. Hall almost holds that all knowing violators are subject to contempt. Following the decision, one court has issued an injunction forbidding “John Doe, Richard Roe, and all others of like situation” from trespassing on school property. 249 All the theories and policies supporting Hall and this type of injunction are fallacious; the “school order” should be repudiated.

An examination of the alternatives available to end the mischief created by Hall strengthens the conclusion that it was inappropriate to hold him in contempt. The state could have undertaken criminal prosecution for trespass or entry onto school property. For the state, the injunctive remedy does have several distinct advantages over a criminal prosecution. 250 The police do not have to be called in immediately; the parties can negotiate with and accommodate the court as a mediator; and contempt may offer more flexible penalties. Also, the

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collateral bar rule would be in force to insulate the substantive portion of the injunction from attack in contempt, whereas a criminal defendant may challenge the constitutionality of a statute after violation.\textsuperscript{251} As another alternative, a federal prosecutor could have charged Hall with interfering with the rights and duties established by a federal court order.\textsuperscript{252} The relevant statute, however, requires proof of "willfulness, . . . , threats or force."\textsuperscript{253} Hall went on the property expressly intending to violate the order. This conduct may have satisfied the willfulness element, but Hall's purpose appears to have been civil disobedience which did not include "threats or force."\textsuperscript{254} An alternative available to the state would have been a second injunction coupled with notice to Hall, naming him as a defendant. Or, for that matter, it could have sought a better first injunction by providing notice and an opportunity to be heard. The procedural amenities would have legitimized the injunction and may have insured that it was neither erroneous nor overreaching. Naming Hall as a defendant could have personalized the order and made it more than just an ex parte criminal statute. Instead the authorities chose a "vague and pervasive injunction obtained invisibly and upon a stage darkened lest it be open to scrutiny by those affected."\textsuperscript{255} A reversal in \textit{Hall} would have encouraged the authorities to accord proper procedural protections in the future while discouraging lower courts from granting dragnet injunctions. The \textit{Hall} court, however, allowed and even endorsed these oppressive tactics. Learned Hand remonstrated that "it is by ignoring such procedural limitations that the injunction . . . may by slow steps be made to realize the worst fears of those who are jealous of its prerogative."\textsuperscript{256}

This article to this point has attempted to separate what the courts are doing from the undigested mass of conclusion and circumlocution, to uncover the true issues in the cases, and to suggest terminological and analytical solutions and policy alternatives. Most discussion of the obligor issue has concentrated on due process considerations that properly question the expansion of the obligor


\textsuperscript{252} \textit{See} 18 U.S.C. \$ 1509 (1970).

\textsuperscript{253} \textit{Id.}

\textsuperscript{254} 472 F.2d at 264.

\textsuperscript{255} \textit{Walker v. City of Birmingham, 388 U.S. 307, 346 (1967) (Brennan, J., dissenting).}

\textsuperscript{256} \textit{Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930).}
class. But due process analysis has resulted in a doctrinal quagmire because the courts have attempted to accommodate the interests of plaintiffs, contemnors, and the court system within a single analytical framework. The product has been procedural technicality, platitude, cliche, and subjective loophole. Procedural issues should not be ignored. But, as the Hall opinion demonstrates, the due process conceptual framework is too narrow to comprehend all the analytical problems and is too weak in many cases to defend the obligor limitation against competing policy considerations. The time has come to broaden the focus and introduce another principle of moderation in order to establish an obligor limitation without exception.

V. Separation of Powers: A Fresh Start

A. Introduction

Three concepts—separation of powers, federalism, and the Bill of Rights—make up the scheme of limited government. The constitutional division of governmental power into legislative, executive, and judicial departments was constructed, not to promote efficiency, but rather to prevent one department from arrogating the full panoply of governmental power.257 The theory did not seek complete segregation of function but reasoned that the departments would act as checks and balances on one another. Policy was not to be formulated and carried into effect unless at least two branches cooperated.258 The gravamen of separation of powers, therefore, precludes the excessive concentration of power in one branch of the tripartite government.

Although some feared an expansive judiciary,259 most of the founding fathers thought the legislature would prove to be the most

257. THE FEDERALIST NO. 47, at 336 (B. Wright ed. 1961) (J. Madison). "Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted." Id. at 338.

258. The magistrate in whom the whole Executive power resides cannot of himself make a law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no Executive prerogative, though they are shoots from the Executive stock; nor any Legislative function, though they may be advised with by the Legislative Councils. The entire Legislature can perform no Judiciary act; though by the joint act of two of its branches the judges may be removed from their offices; and though one of its branches is possessed of the Judicial power in the last resort. The entire Legislature again can exercise no Executive prerogative, though one of its branches constitutes the supreme Executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the Executive department.

Id.

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power hungry. The judiciary was generally perceived to pose the least actual danger.\footnote{260} It was viewed as inert and reactive, its purpose being to suppress the excesses of the legislature.\footnote{261} These forecasts were somewhat inaccurate, for in \textit{Marbury v. Madison},\footnote{262} the Supreme Court announced the “duty of the judicial department to say what the law is.”\footnote{263} Litigants thereafter restated political issues and argued them before the courts. The judicial power to say what the constitution means and to render legislation unconstitutional eventually generated expansive tendencies. But the courts controlled the boundaries of their own power, developing a complex of self-limiting doctrine inspired by the constitutional language limiting the courts to cases or controversies.\footnote{264}

The injunction, nevertheless, is a potent instrument. Most legal remedies provide litigants with money judgements which, theoretically, operate impersonally. An injunction, however, commands an unsuccessful party to perform some act or requires him to forbear from some conduct. It operates in the future and is intimately personal. For these reasons early injunctions were hedged about with redoubtable limitations: equity refused to act if there was an adequate legal remedy, declined to enjoin a crime, disdained from protecting personal rights, and interceded only on behalf of property rights.\footnote{265} But several factors combined to erode and eventually destroy these restraints. As society became more complicated, the injunction became a flexible remedial device. The courts began to use them to enforce statutory regulation, public policy, and constitutional rights. Consequently, contemporary equitable power cuts across the entire spectrum of human conduct. The traditional limitations on equity have become “equitable fictions,”\footnote{266} making government by injunction a reality.\footnote{267}

\footnote{260.} Alexander Hamilton wrote:

\textit{[The judiciary . . . has no influence over either the purse or the sword; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the Executive for the efficacy of its judgments.}}

\textbf{The Federalist No. 78, at 490 (B. Wright ed. 1961).}

\footnote{261.} \textit{Id. No. 81 at 508-09. (A. Hamilton).}

\footnote{262.} 5 U.S. (1 Cranch) 137 (1803).

\footnote{263.} \textit{Id. at 176.}

\footnote{264.} \textit{See generally P. Kauper, Constitutional Law: Cases and Materials 9-63 (1972).}

\footnote{265.} \textit{See, e.g., The Federalist No. 80, at 504 (B. Wright ed. 1961) (A. Hamilton).}

\footnote{266.} \textit{Developments in the Law—Injunctions, supra note 178, at 996.}

\footnote{267.} \textit{See Dunbar, supra note 128, at 347; Gregory, Government by Injunction, 11 Harv. L. Rev. 487 (1898).}
B. The Legislative Injunction

Commentators have frequently attributed a legislative connotation to dragnet injunctions268 but the implications of the "legislative injunction" have never been traced. Courts continue to affirm contempt against violators of "all persons" injunctions by observing that the injunction "adjudicated the rights of the entire community."269 If separation of powers reasoning is focused on the obligor analysis, the public can hopefully avoid in the future the spectacle of a marshal enforcing an ex parte, "all persons" order against a nonparty.

Certainly the obligor issue to a great extent upholds the boundary between the court's function, adjudicating specific controversies, and the legislature's function, promulgating general rules of conduct. By analyzing the procedural-functional-institutional differences between legislation and adjudication, the courts could identify their unwarranted intrusions into spheres of action reserved for the legislature. Once they discover and remove or obviate these legislative injunctions, the courts will be able to decide obligor cases with more predictability, a greater sense of fairness, and a proper respect for constitutional theory, democratic values and procedural due process.

In a democracy the popularly elected legislature exists as the primary innovator. The legislature creates the law, the executive carries it out, and the judiciary construes it. Commentators may reject the notion that judges merely find and apply the law, but the courts must, nevertheless, distinguish the legislative process from the adjudicative process. They must innovate less than legislatures because of an undeniable need for stability and predictability as well as the force of tradition and political reality.

In the governing process, the legislature and legislation differ from courts and adjudication in several fundamental respects. Legislation is universal law which binds the entire public, whereas adjudication resolves particular problems and, except for the limited rules of

268. See Dunbar, supra note 128, at 362. See also Note, supra note 181, at 228 ("To be obliged to wait until the injunction is violated to determine against whom it was issued ought to be enough to show that it is not an injunction at all, but in the nature of a police proclamation, putting the community in general under peril of contempt if the proclamation be disobeyed."); Dobbs, supra note 2, at 250 ("If one pierces the form of words, a decree that says no one shall trespass . . . is similar in substance to a statute.").

269. See United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972).
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res judicata and collateral estoppel, binds only the parties to the controversy. Legislatures are composed of partisan politicians presumably not detached from ongoing disputes. Judges, in contrast, purport to act rationally and to remain as detached from any dispute as is humanly possible. The legislature is not required to decide or even discuss a problem. Courts, however, respond to litigants' initiatives; if litigants present a problem, the judiciary must decide it. Legislation announces what the law shall be, operates only in the future, and leaves the past untouched. Adjudication, on the other hand, determines the existing law on prior facts and, except as the decision has precedential value, leaves the future untouched. Finally, the legislature is uninhibited in its inquiry and may find or assume facts from a variety of sources. In contrast, the limitations of due process, the adversary system, rules of party presentation, and other rules of evidence constrain courts; they cannot decide cases on judicial notice alone.

Analysis must discard several abstract distinctions between adjudication and legislation as valueless in developing the concept of a legislative injunction and determining how separation of powers limits the contempt power. Both courts and legislatures create public policy; both injunctions and statutes operate in the future; thus, superficially, all courts "legislate" by injunction. The difference between legislation as partisan politics and adjudication as detached rationality provides too general and subjective a comparison to be helpful. One might distinguish injunctions from legislation by noting that injunctions are requested by a party to a lawsuit, but this statement merely discloses the obvious: all orders that originate in courts and control conduct are injunctions. Such a circular distinction cannot help develop a separation of powers limit on courts.

Analytical tools do exist that will successfully identify legislative injunctions and determine separation of powers constraints on the contempt power. One uniform distinction between injunctions and legislation generates a simple conclusion concerning the in rem injunction. While ignorance of the law does not excuse violation, no injunction or contempt case holds that violation alone without notice of an order will support contempt. However, the constructive notice fiction that undergirds contempt for breach of an in rem injunction is distressingly similar to the idea that knowledge of the criminal law is presumed. In rem injunctions should, therefore, be recognized as judicial abrogation of legislative power and repudiated.

The courts may examine the troublesome interplay between in-
junction contempts, where the contempt power should be limited to parties and obligors, and in-court or decorum contempts, which cannot be so limited, more satisfactorily in terms of separation of powers. When courts generate policy that binds the public generally, they cross the line between legislation and adjudication. Hence, both the courts and the legislature have established the obligor limitation, codified as federal rule 65(d). Courts, however, must carry on the practical business of deciding cases, of performing the judicial function. Separation of powers, therefore, would not subject the courts to the obligor limit with respect to in-court or decorum contempts. In separation of powers terms, the distinctions between injunction and decorum contempts spring from the practical difference between policymaking and internal housekeeping. When courts make policy, only litigants and obligors must obey their orders; but the general public must cooperate with courts as decisionmaking institutions.

The separation of powers concept relates in an important sense to the specificity with which power is exercised. Narrow and precise decisions concerning individual disputes define the judicial function; the legislative sphere consists of general decisions concerning society at large. The bill of attainder clause forbids the legislature from punishing specific persons or groups. On the other hand, because the Constitution limits their role to "cases or controversies" and "judicial power," the federal courts insist that controversies before them take a specific form. Courts require adverse parties, a set of particular facts, and an actual lawsuit. This doctrine has resulted from judicial adherence to the theoretical underpinning of separation of powers and judicial recognition of the practical limits of institutional power. The final judicial resolution itself is theoretically limited to the controversy before the court. Courts effect sweeping change only because other courts follow their decision as precedent. Despite acknowledged constraints, courts persist in granting "all persons" injunctions.

273. See D. DORFS, HANDBOOK ON THE LAW OF REMEDIES 101 (1973); Dunbar, supra note 128, at 362; Gregory, supra note 267, at 511; Note, supra note 96, at 1314 n.23; Note, supra note 19, at 736. See also Chase Nat'l Bank v. City of Norwalk, 291 U.S. 431, 437 (1933).
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ration of powers analysis focuses the attention of criticism in these situations on the social goal of democratic decision-making. When a judge, at the behest of a plaintiff, compels an undefined segment of the community to conform to some order, he hampers this democratic value significantly. If the potential contemnor group is undefined, the court should realize that the dispute is insufficiently concrete for injunctive relief. Plaintiff will not be left without remedy. If the controversy is mature enough for judicial resolution, the court may justifiably remit the plaintiff to noncoercive declaratory relief. Just as the interest in "our federalism" may be strong enough to forbid injunctive relief while permitting declaratory relief, so also the interest in separation of powers may require that plaintiffs who do not know the extent of the defendant class seek declaratory relief. If the plaintiff can only identify some of those he has a grievance against, the court should limit relief to those identified. When others become known, the court should enjoin them separately. In volatile situations, sweeping injunctions may result in excruciating administrative difficulties that courts are not equipped to handle alone. They must depend on enforcement from the executive. The "all persons" injunction causes undue institutional stress and obvious damage to democratic values, costs which outweigh the benefit of full protection for the plaintiff. It must be condemned as an intrusion upon legislative prerogative and an unwieldy extension of judicial power.

Injunctions, because they are concrete and personal, are normally less permanent than statutes. Parties die; businesses fold or reorganize; litigants may modify or dissolve injunctions at any time. But an "all persons" or "all persons with notice" injunction becomes as permanent as a statute. When an injunction purports to operate

274. F. JAMES, Civil Procedure § 1.10, at 30 (1965).
279. Courts, without clearly stating reasons, have declined to hold in contempt a person who disobeys an antique "all persons" injunction. See Kean v. Hurley, 179 F.2d 888, 891-92 (8th Cir. 1950); Tosh v. West Kentucky Coal Co., 252 F. 44, 50 (6th Cir. 1918); Chisolm v. Caines, 147 F. Supp. 188, 191 (E.D.S.C. 1954). But see Chisolm v. Caines, 121 F. 397, 401, 403 (C.C.D.S.C. 1903). Separation of powers logic would have solved their problem of finding a rationale for these holdings.
in the distant future, separation of powers reasoning contends that the controversy has become too remote and hypothetical for judicial consideration. An injunction should expire with the controversy that evoked it, and contempt will be inappropriate even though the parties and enjoined conduct remain the same. Employing separation of powers logic, a court would hold that an antique "all persons" injunction is legislative and cannot support contempt. It would decide that a second injunction is plaintiff's proper remedy.

Separation of powers considerations also flow from procedural issues. To adjudicate validly, courts must provide notice, a hearing, an opportunity to confront opposing witnesses and present favorable witnesses, and a reasonable finding on the record made. Legislation also requires notice and an opportunity to be heard, but legislative notice is not personal, legislative testimony may be unsworn and unre corded, and legislative records may not include a transcript. Persons have a great interest in freedom from the constraints of injunctions and from imprisonment for contempt. Due process would appear to require courts to employ an adjudicative procedure whenever they exercise equitable powers. Courts, however, frequently uphold contempt even though the contemnor received neither notice nor an opportunity to be heard at the injunction stage. Many cases find in contempt an unnamed potential contemnor who violated an ex parte injunction. These injunctions and contempt are questionable on separation of powers grounds. These nonexistent procedures are impersonal and more legislative than adjudicative. When parties obtain an


Federal rule 25(d) produces an anomalous duration problem, providing that a successor to public office is "automatically substituted" as a party in the predecessor's lawsuits. In Lucy v. Adams, 224 F. Supp. 79 (N.D. Ala. 1963), aff'd, 328 F.2d 892 (5th Cir. 1964), the court obligated a successor to obey an injunction against his predecessor. Separation of powers would dictate that these injunctions expire sometime, but this analysis does have qualifications. In allowing statute-personalizing injunctions, for example, a legislature has rendered the official's conduct illegal and enjoineable. But it has declined to label it criminal. Contempt against a nonparty successor would be equivalent to a criminal prosecution. Separation of powers, therefore, may compel a second injunction, because the official lacked the opportunity to formulate a rule that he is accused of violating.
283. Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964).
284. See, e.g., Walker v. City of Birmingham, 388 U.S. 307, 308-09 (1967); United
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ex parte order, charge contempt against a nonparty, and invoke the collateral bar rule, the substantive and perhaps the obligor issues of an injunction are completely isolated from judicial scrutiny. A comparison of this type of contempt and statutory violations demonstrates that these injunctions even go beyond legislation in terms of procedural unfairness. One may violate a criminal statute, and, as a defense, challenge its constitutional validity; a contempt court may justify conviction on the ground that disrespect must be punished and ignore all constitutional pleas. These considerations indicate that the courts must forego all use of the ex parte injunction or else tread on troubled separation of powers ground.

Separation of powers ideals can also aid in other contexts of the obligor issue. For example, disobedience or disruption may prevent a court from functioning so that courts may need broad and flexible contempt powers that tend to go beyond the judicial function in order to carry out their appointed task. But should a judge formulate an order in private, announce that it applies to the public at large, order that a violation be prosecuted, find the facts, preclude the contemnor from contesting the order, and impose a sentence? The same contempt power that acts to benefit orderly court administration may be abused to injure the public good. Clearly at some point other values must be interposed to curb the contempt power. The separation of powers principle questions and disallows the unbridled use of this power by a single arm of the government.

The several types of contempt sanctions present another aspect of the separation of powers concern that should be considered in conjunction with the obligor issue. The separation of powers interests are strongest in criminal contempt where the sanction is fixed and intended as punitive, because the injunction becomes analogous to a criminal statute. Many contempts pose a smaller threat to the division of powers. For example, remedial civil contempt for breach of a patent, copyright, or trademark injunction mirrors an independent suit for damages.

286. But cf. In re Oliver, 452 F.2d 111, 114 (7th Cir. 1971) (collateral bar rule not invoked).
288. See Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 457 (1932); Uni-
The court does traditional judicial work, redressing a private injury with compensatory damages. And coercive civil contempt is conceptually little more than a second injunction.\textsuperscript{289} When a court tells defendants and potential contemnors that the next breach of the injunction will cost them a term in jail, the persons present, who have been accorded an opportunity to participate in the contempt hearing, become obligors. With this warning, the court expands the ambit of the obligor class without creating separation of powers difficulties.

Separation of powers reasoning may lack crystal clarity and fail to compel results in many other obligor situations, but it does prune some excesses. It adds a new dimension to the issues presented by "successor," "aider and abetter," and "active concert or participation" contempts. The key to analysis under a separation of powers rubric consists of a realistic and factual determination of the contemnor's opportunity to litigate. When the judiciary holds in contempt a person who had no such opportunity, it comes very close to combining legislative with judicial power. Likewise, courts should never presume contemnor's representation by or identification with a named defendant but should always subject these issues to a searching factual inquiry. They should remember, however, that "independent interest" is a dubious exculpatory catchphrase. Judicial power is not always prohibited and the separation of powers concern does not constrict the obligor category to named parties. The judicial function must merely remain within defined limits; a separation of powers analysis helps define those limits.

Countervailing arguments may appear that make the foregoing suggestions less persuasive. By requiring a second lawsuit, the separation of powers ideal leads to duplicative litigation, clogging an already congested court system and allowing the troublemaker one free violation. Concern with this difficulty, however, begs the critical question. If the troublemaker has had no opportunity to litigate, then the new case will not be duplicative, except for the plaintiff; and the defendant should not be guilty of contempt anyway, if he is not an obligor. A declaratory judgment or an injunction obliging someone else exists as an authoritative statement of the law emanating from a source entitled to credit. Most people will, therefore, obey these prescriptions without

\textsuperscript{289} O. Piss, supra note 4, at 763-64.
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resort to the courts. Declaring rights rather than enjoining conduct furthers the policy of using the least drastic means necessary to accomplish a desired result.\textsuperscript{290} A second lawsuit has inestimable value. The trappings of the litigation ritual have important legitimizing qualities, and the due process interests advanced by a "day in court" insure that the litigated and personalized injunction will be fairer and more conducive of obedience. Furthermore, the earlier lawsuit will possess some precedential effect on the later lawsuit. Collateral estoppel or res judicata may enable a winning litigant to shortcut relitigation of a fully litigated issue.\textsuperscript{291}

Before concluding, let us return to P's apple orchard and pause briefly to absolve the contemnors we left in limbo earlier. We exonerate the original defendant's former agent merely by citing \textit{Alemite}. Separation of powers and the legislative injunction concept interdicts the other contempts. P cannot elevate (convert) an injunction into a criminal statute by applying it to "all persons" and posting it. Nor, so long as we distinguish between statutes and injunctions, may P impute notice from a purported in rem injunction. Finally, if P seeks to govern strangers' conduct five years in the future, he must take his grievance to the legislature.

VI. Conclusion

Equity is a neutral tool that may innovate or repress. Too frequently, a present emergency justifies a doubtful extension of equitable power that bends doctrine to fit that emergency. Analysis of the obligor issues appears to involve the most malleable of these doctrines. This "looseness of thought\textsuperscript{292} has created serious injustice and threatens even more. To combat this trend, the preceding discussion has suggested that courts broaden the analytical focus in order to narrow the contempt power. The separation of powers concept, as enacted in the Constitution, requires that courts do more than umpire executive-legislative conflicts. It forces them to examine contempt power with respect to the obligor issue as one aspect of the total scheme of

\textsuperscript{290} The Court has cautioned: "The very amplitude of the contempt power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911). See also \textit{In re Oliver}, 333 U.S. 257, 274 (1948).
\textsuperscript{292} Dunbar, \textit{supra} note 128, at 338.
limited government by focusing attention on political, institutional, and procedural realities instead of bogus doctrinal phantasms. When courts decide contempt with a proper respect for contemnor's procedural rights, the legislature's policymaking perquisites, and their own institutional capabilities, they will be able to reach correct answers to the obligor question.