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# Compensatory Contempt to Collect Money

Doug Rendleman
*Washington and Lee University School of Law*, rendlemand@wlu.edu

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DOUG RENDLEMAN*

This Article examines three lawsuits that raise basic questions about contempt and its relation to analogous doctrines. The more precise issue it analyzes is when to substitute compensatory contempt for the usual devices that creditors use to search for and capture debtors' assets. The judgment collection system is creaky and hard to operate, partly because it protects debtors and third parties and partly because it retains esoteric distinctions, hypertechnical refinements, and archaic mannerisms. Thus, creditors resort to lesser known but more expeditious equitable devices like compensatory contempt. Before examining the lawsuits, the Article will develop some

## BACKGROUND.

Judges possess two primary tools to enforce private rights: money judgments and injunctions. In the main, judgments and injunctions are enforced differently. Judgment creditors use writs of execution to collect judgments from debtors' property without involving the debtors personally. On the other hand, defendants who are enjoined are constrained to comport their conduct to the injunction's dictates; and if they disdain to obey, judges fine and imprison to coerce them to conform. Observers thus say the law acts in rem, equity in personam. The foregoing legal and equitable roles, however, may be reversed.[1] Equity creditors may use legal devices such as execution to collect money from equitable defendants. When execution, the legal remedy, proves to be inadequate, the judgment creditor may summon the debtor to an interrogatory or supplementary proceeding or file a creditor's bill; and the judge may enter personal orders, for example, to coerce testimony and conveyances or to enjoin transfers.[2]

If a plaintiff's damage remedy is inadequate, the judge enjoins to allow the plaintiff to enjoy the rights in fact. When judges order defendants to do or refrain from doing something, they may use coercive contempt to secure the fruits of victory for the plaintiff. When, however, a defendant violates an injunction or other order, the judge, finding that it is too late to coerce obedience, has two retrospective remedies. The first is criminal contempt to punish the defendant and to vindicate the public interest in seeing that court orders are obeyed. The second is compensatory

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* Professor of Law, College of William and Mary. The author thanks Jean Wyant and Neil Berkhoff for helping him with this article.

1. *See generally* Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 37, 106 (1915).
2. V. COUNTRYMAN, CASES & MATERIALS ON DEBTOR AND CREDITOR 86-108 (1974).

contempt, the subject of this study. Compensatory contempt salvages something for the plaintiff by awarding the money originally concluded to have been inadequate. The judge attempts to formulate a money remedy for the plaintiff around the central irony that if money had been a satisfactory remedy, he would not have enjoined in the first place.

The choice between compensatory contempt and creditor process involves general issues about collecting money judgments, preventing imprisonment for civil debt, and protecting third parties from creditor process. The choice of collection devices also raises issues about enforcing orders in regulatory and structural litigation; and it tests how strongly we believe in the substantive basis of these orders. Comparing enforcement techniques forces us to encounter again the conundrum: when will judges conclude that money is inadequate and order conduct? Imperfect performance by lawyers conceals answers to the foregoing and interposes questions about holding clients to counsel's decisions. More fundamentally, this Article asks basic questions about judicial power; for throughout these lawsuits the limited government model competes with the archetype of judicial power as a roving commission to improve society by righting wrongs.

An inevitable tension courses through contempt decisions. How much power does the legislature possess to control contempt? Should judges construe the federal contempt statute strictly, accepting its historical background[3] and restrictive language?[4] Or faced with actual injustice, should the judge construe the statute liberally, searching for implied or inchoate orders, constructive custody, and anticipatory breach? This is the view Chief Justice Fuller attacked when he was quoted as having said: "Brother B would codify all laws in an act of two sections: 1st, all people must be good; 2d, courts of equity are hereby given full power and authority to enforce the provisions of this act."[5]

All three lawsuits involve the relation between trial and appellate courts. Normally, if a successful trial court plaintiff secures a money judgment and defendant appeals, defendant posts a supersedeas bond. When the judge approves the bond, he stays execution. This stay stops the plaintiff from enforcing the judgment against defendant's assets.[6] If the

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3. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 HARV. L. REV. 1010 (1924).

4. 18 U.S.C. § 401 (1976).

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

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

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

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

5. Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 510 (1898).

6. FED. R. CIV. P. 62(d); FED. R. APP. P. 8(a).

appellate court affirms, the plaintiff may recover from the bond.[7] An injunction in favor of a successful plaintiff, however, will not be stayed automatically when defendant appeals. Injunctions are suspended only if either the trial or appellate court orders them stayed or the appellate court grants an appellate injunction. Either court may condition the stay on a bond. Unstayed injunctions continue to be effective; if the trial judge refuses to enjoin and plaintiff appeals without securing a stay or injunction, defendant may do what plaintiff sought to prevent.[8]

## I. *Berry v. Midtown Service Corp.*

Our first lawsuit grew out of a judgment for plaintiff in a wrongful death action. Defendant was granted a twenty day stay of execution to decide whether to appeal. During the stay, defendant "denuded itself of substantially all its assets by transferring them to various affiliated corporations."[9] The court of appeals held that the conduct of the debtor and the transferees was not contempt: under the federal contempt statute a judgment debtor who succeeds in staying execution without posting bond and then, during the period of the stay, transfers all assets does not commit contempt that would lead to a compensatory award for the damages that plaintiff sustained.[10] There was no injunction, the judgment debtor did not stipulate anything, and the stay that restrained the creditor did not implicitly order the debtor to keep enough assets to satisfy the judgment. The court strictly construed the federal contempt statute, which allows a judge to punish "misconduct" that occurs in or close to the courtroom but restricts out-of-court contempt to violations of "any lawful writ, process, order, rule, decree, or command,"[11] to mean that unless specific property was dissipated "a party must have violated an express court order before he can be punished for contempt. . . ."[12] The *Berry* court, rejecting more liberal constructions of the New York contempt statute[13] in favor of legislative control,[14] refused to convert a trial judge's necessary power to maintain order in a courtroom into a roving commission to punish out-of-court misconduct.

Admittedly, the judgment debtor's transfers hindered the plaintiff's efforts to collect the judgment. The creditor has two other remedies: she could have demanded a supersedeas bond; and she may yet pursue the

7. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2905 (1973).

8. FED. R. CIV. P. 62(c); FED. R. APP. P. 8; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2904 (1973).

9. Berry v. Midtown Serv. Corp., 104 F.2d 107, 109 (2d Cir.), *cert. granted*, 308 U.S. 536, *dismissed per stipulation of counsel*, 308 U.S. 629 (1939).

10. Berry v. Midtown Serv. Corp., 104 F.2d 107 (2d Cir. 1939).

11. 18 U.S.C. § 401(3) (1976).

12. Berry v. Midtown Serv. Corp., 104 F.2d 107, 110 (2d Cir. 1939).

13. N.Y. JUD. LAW § 773 (McKinney Supp. 1979).

14. Berry v. Midtown Serv. Corp., 104 F.2d 107, 109 (2d Cir. 1939).

assets as fraudulent conveyances.[15] Having neglected to obtain supersedeas, however, plaintiff finds contempt to be a "sharper, swifter remedy" than fraudulent conveyance, particularly if the court uses coercive imprisonment to collect the compensatory award.[16] The *Berry* court wisely precluded the judgment creditor from converting the money judgment into a compensatory contempt award.

## II. THE GREEN VALLEY CREAMERY

Let's examine how well the *Berry* result wears in litigation to carry out governmental policies. The first controversy to review is the marathon Parker contempt. Howard Parker and Green Valley Creamery fought the New Deal's Agricultural Marketing legislation, which required Parker to pay the government quite a bit of money, to the last ditch. The trial judge enjoined Green Valley Creamery to comply and ordered Parker to pay all the money then owed and thereafter due. The appellate court stayed the trial judge's order but required Parker to deposit the amount assertedly due into the district court's registry to abide the final result. Instead of depositing the money, Parker siphoned milk through another company, Stuart Milk. Stuart Milk skimmed off the excess before returning the milk to Green Valley. This disabled Green Valley from depositing the money. When the court of appeals held that the government won the litigation, Green Valley filed voluntary bankruptcy.

The government proceeded against Parker for contempt. Contempt was refused for two reasons: Stuart Milk was not a party, and the government was thinking about coercive rather than compensatory contempt. Judge Magruder rescued the government case at this stage by suggesting that the contempt remedy be compensatory contempt, a monetary fine payable to the government.[17]

Something had to be done. Parker had churned the assets sufficiently to disable Green Valley from paying; and then he argued that this success exonerated him from contempt. Without a compensatory award, Judge Magruder said, coercive imprisonment "would be ridiculously ineffective as a remedial process, for it is idle to put Parker in jail to make him cause Green Valley to do something it is no longer capable of doing."[18] Moreover, jailing Parker until a money award was paid would, if he was unable to pay, be imprisonment to collect a civil debt. Judge Magruder did suggest, however, that the trial judge might imprison Parker to coerce payment of a compensatory award. History records that the government

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15. Berry v. Midtown Serv. Corp., 104 F.2d 107, 111 (2d Cir. 1939).

16. 1 G. GLENN, FRAUDULENT CONVEYANCES AND PERFERENCES § 74a (rev. ed. 1940). *See also* Note, *Transfer of Assets Pending Stay of Execution as Contempt of Court*, 49 YALE L.J. 580, 581 (1940).

17. Parker v. United States, 126 F.2d 370 (1st Cir. 1942).

18. *Id.*

took the good judge's advice.[19] The trial judge entered a compensatory award. Parker evaded the compensatory award and escaped from coercive imprisonment by filing individual bankruptcy and successfully discharging the compensatory award.[20]

In addition to misplacing compensatory contempt, the government failed to pursue standard creditors' remedies, particularly in the separate voluntary bankruptcies of Green Valley Creamery and Howard Parker. As Judge Magruder strongly hints,[21] the way Green Valley-Parker used Stuart Milk to skim the government's money off the milk meant that the government very likely could recover the money. Perhaps Stuart Milk held the money as constructive trustee for the government.[22] The government could not use contempt against Stuart Milk, a nonparty, but an action to impress the property with a constructive trust and to order Stuart Milk and responsible officers, such as Parker, to pay was clearly available.[23] The government, however, probably did not need a constructive trust remedy but only to measure by defendants' gain; thus it could have sued Stuart Milk and Parker for money had and received.[24]

As Judge Magruder also hinted, Green Valley Creamery's creditors may have been able to recover the money from Stuart Milk as a fraudulent

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19. Parker v. United States, 135 F.2d 54 (1st Cir. 1943), *cert. denied*, 320 U.S. 737 (1943).

20. Parker v. United States, 153 F.2d 66 (1st Cir. 1946).

21. Parker v. United States, 126 F.2d 370, 377-78 (1st Cir. 1942).

22. RESTATEMENT OF RESTITUTION § 168(2) (1936).

23. RESTATEMENT OF RESTITUTION § 160, comment e, (1936).

24. Klass v. Twin City Fed. Sav. & Loan Ass'n, 291 Minn. 68, 190 N.W. 2d 493 (1971) (money paid to defendant by a third person belongs to plaintiff). A plaintiff has two similar remedies. First, the plaintiff may sue to recover money that the defendant has received from a third party and that in good conscience belongs to the plaintiff, seeking a money judgment measured by the defendant's gain. Second, the plaintiff may ask the judge to hold that the defendant retains the money as a constructive trustee. The money received action comports better with the prohibition against debt imprisonment than the constructive trust action. A constructive trust is an equitable remedy to assure specie recovery. Before a judge will impose a constructive trust, a plaintiff must show that the trust res exists; then the judge will order the defendant in personam to convey it. The judge may enforce the order to convey with contempt in the form of coercive imprisonment. RESTATEMENT OF RESTITUTION § 160, comment i, comment e (1936). These features coordinate constructive trusts with the idea that using coercive contempt to enforce an equitable order to pay money violates the prohibition against debt imprisonment. The judge cannot imprison contemnor to coerce the impossible, for example, to pay money the contemnor no longer possesses or controls. Knaus v. Knaus, 387 Pa. 370, 127 A.2d 669 (1956). The judge can imprison contemnor to obtain a specific, existing item, for example a constructive trust res, without imprisoning for a civil debt. *Ex parte* Ridgley, 261 Mich. 42, 245 N.W. 803 (1932); Carnahan v. Carnahan, 143 Mich. 390, 107 N.W. 73, 75 (1906). But imprisoning contemnor to enforce an order directing payment of a certain amount to a creditor incarcerates to collect a civil debt. Potter v. Wilson, 609 P.2d 1278 (Okla. 1980); Kidd v. Virginia Safe Deposit & Trust Corp., 113 Va. 612, 75 S.E. 145 (1912); 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 239 at 414 n.67 (rev. ed. 1940). Writers use the term constructive trust when they need only ask for measurement by defendant's gain. *See, e.g.*, Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 376-82 (1978). Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 290 n.54 (1979). This overstatement is harmless unless someone imprisons a defendant to execute a nonexistent constructive trust res. Similarly, for reasons given above, Judge Magruder erred when he suggested coercive imprisonment to collect compensatory contempt from Parker. Unless the government showed that the money actually existed, an order requiring Parker to pay enforced with coercive imprisonment would imprison Parker for a civil debt. *But cf.* White v. Wadhams, 211 Mich. 658, 179 N.W. 245 (1920) (coercive contempt approved [incorrectly] to collect money spent).

conveyance.[25] The master found and the court accepted that Parker and Stuart Milk disabled Green Valley from paying to hinder and delay the government's efforts to collect from Green Valley.[26] The conveyances were intended to and did diminish Green Valley's assets so that it was unable to pay the government. The transactions between Green Valley and Stuart Milk possess several fraudulent appearing aspects: a defendant conveyed for inadequate consideration during a lawsuit; the conveyance left the defendant without enough assets to pay the judgment; the nonparty transferee was owned and controlled by the people who controlled the defendant; and the transferee emerged with roughly the amount of the judgment.[27] In short, the transactions diminished Green Valley's assets so that it was unable to pay the judgment.[28] The government or another Green Valley creditor may have been able to recover this money from Stuart Milk in a fraudulent conveyance action under state law[29] or Green Valley's bankruptcy trustee may have recovered the sums to benefit its creditors.[30]

It is not clear why the government pursued Parker through contempt rather than following standard creditor process. The bar to contempt in *Berry* did not exist, for Parker's conduct also violated an explicit court order. By this time, the government attorneys may have allowed revenge to take precedence over self-interest. In any event, the government eventually filed a claim in Parker's bankruptcy, collected a dividend of almost $2,000, and attempted unsuccessfully to bar discharge of the remaining $20,286.58.[31] If the government had upset the Stuart Milk transfer earlier under a constructive trust, money had and received, or fraudulent conveyance theory, the author speculates that the government would have received more. Moreover, if the government had instituted involuntary bankruptcy against Parker and shown that he had conveyed fraudulently, Parker would have been stripped of his assets, yet his discharge would have been barred and he would have been exposed to criminal prosecution.[32] Perhaps bankruptcy was the better road to revenge, for contempt turned out to possess unanticipated humane attributes.

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25. Parker v. United States, 126 F.2d 370, 379 (1st Cir. 1942).

26. *Id.*

27. 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 298, 319, 339, 340 (rev. ed. 1940).

28. *Id.* at § 275.

29. In 1924 Massachusetts had adopted the Uniform Fraudulent Conveyance Act. MASS. ANN. LAWS ch. 109A §§ 1-14 (Law. Co-op. 1975). The transactions probably violated §§ 6 & 7.

30. Bankruptcy Act of 1898 § 67(d)(2)(c), (d), 11 U.S.C. 107(d)(2)(c), (d)(1976)(repealed 1979). 11 U.S.C. app. § 548 (Supp. II 1978). By the time Parker filed personal bankruptcy, the fraudulent conveyance action was apparently time barred.

31. Parker v. United States, 153 F.2d 66, 68 (1st Cir. 1946). The government had recovered $20,000 on a supersedeas bond posted on appeal from the district court's compensatory contempt order. *Id.*

32. Bankruptcy Act of 1898 § 3(a)(1), 11 U.S.C. § 21(a)(1) (1976) (repealed 1979); Bankruptcy Act of 1898 § 14(c)(1), (4), 11 U.S.C. § 32(c)(1), (4)(1976)(repealed 1979); 18 U.S.C. § 152 (1976).

More often, however, a compensatory contempt award for violating orders to pay will prejudice the defendant. The award might evade the statute of limitations and other protections in the formal collection scheme. If the contempt creditor may use coercive imprisonment to collect the compensatory award, the award may defeat the debtor's exemptions, squeeze payment from the debtor's family and friends, and allow the contempt creditor to receive a larger percentage than the debtor's other creditors.

## III. *Griffin v. Prince Edward County*

The *Griffin* compensatory contempt grew out of opposition to a public policy more fundamental than milk marketing. After prolonged and bitter opposition to desegregating the local schools, the Prince Edward County, Virginia, Board of Supervisors ceased to operate public schools.[33] In their place, ostensibly private schools were operated for white children funded largely by tuition grants to parents. The Supreme Court affirmed a district court injunction ordering the Board to reopen the public schools.[34] The district judge, after receiving the mandate, ordered the Board to open the schools.

Plaintiffs asked the district judge to enjoin the Board from processing tuition grants for the private schools. The district judge, however, refused to enjoin the Board from paying grants for 1964-65, the coming school year. Plaintiffs filed notice of appeal and sought to accelerate the appeal, but they omitted to seek a stay or an appellate injunction forbidding the Board from disbursing the money pending the appellate decision. The Chief Judge of the court of appeals asked the Board to agree not to pay grants before the court decided the appeal. The Board refused. The same night was an eventful one: The court of appeals clerk was told that the Board refused to stipulate. The Board met, voted to enlarge the grants for the coming year, ordered the grants paid, notified white parents, and disbursed $180,000 in checks. Most of the payee-parents cashed the checks before 9 A.M. the following day.[35]

The district court and the court of appeals enjoined the Board to cease tuition grants for children in segregated public schools. The court of appeals held that the way in which the Board paid the 1964-65 grants constituted contempt, and it ordered the Board or its members to repay the money.[36] Possible creditors' remedies will be discussed before returning to contempt.

Knowing that a stay or appellate injunction would probably follow its

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33. *See generally*, B. SMITH, THEY CLOSED THEIR SCHOOLS (1965).

34. Griffin v. County School Board, 377 U.S. 218 (1964).

35. Griffin v. County School Board, 363 F.2d 206, 208 (4th Cir. 1966) (en banc), *cert. denied*, 385 U.S. 960 (1966).

36. Griffin v. County School Board, 363 F.2d 206, 212 (4th Cir. 1966).

refusal to stipulate, the Board disbursed the funds. Commentators agree that prejudgment gifts or transfers that leave defendants unable to pay judgments are fraudulent conveyances vulnerable to an action by claimants as subsequent creditors.[37] Transactions by which both transferor and transferee intend to hinder transferor's creditors are always fraudulent.[38]

Were the *Griffin* plaintiffs, black students and citizens, protected under the fraudulent conveyance act from a transfer of public money to people who were not entitled to it? The plaintiffs were the ultimate benficiaries of the funds. The original fraudulent conveyance act of 1571 condemned conveyances which injured "creditors and others," and the Virginia statute that is based upon it protects creditors and "other persons" against conveyances intended to defraud.[39] Plaintiffs may have become creditors by suing Board members for damages for dispersing money illegally and depriving them of equal protection of the law under color of an unconstitutional state law.[40]

Plaintiffs in *Griffin*, moreover, could have resorted to a taxpayers' action if they found it strained to think of themselves as creditors or "others" under the fraudulent conveyance statute. The Virginia court had held that supervisors who had been overcompensated could be enjoined from continuing the practice and required to restore the illegal payments.[41] This remedy resembles an action for money received or imposing a constructive trust on funds wrongfully paid by a trustee, and a court may order people who received the misappropriated funds to return them.[42] The white parents must have known what was in the air that evening, and the court might have ordered them to repay the money.[43]

The recipients may have been vulnerable to another action to repay the grants they received. The white parents who received the money might well have held as constructive trustees for the ultimate beneficiaries. A fiduciary who transfers in violation of a duty to beneficiaries will discover that the recipient takes the property subject to the beneficiaries' interest.[44] If the funds no longer existed or if an in personam order was unnecessary, the beneficiaries could have sued the recipients for money had and received, seeking a money judgment measured by defendants' gain.

The *Griffin* transfer also may be discussed by analogy to two latin-

37. Berry v. Midtown Serv. Corp., 104 F.2d 107, 111 (2d Cir. 1939); Twynes Case, 76 Eng. Rep. 809 (K.B. 1601); 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 339 (rev. ed. 1940).

38. Lipman v. Norman Packing Co., 146 Va. 461, 467, 131 S.E. 797, 798 (1926); Click v. Green, 77 Va. 827, 836-38 (1883); Henderson v. Hunton, 67 Va. (26 Gratt.) 926, 933 (1875).

39. VA. CODE § 55-80 (1974).

40. 42 U.S.C. § 1983 (1976).

41. Johnson v. Black, 103 Va. 477, 49 S.E. 633 (1905). *See* Hill, *Tort and Contract Claims Against Counties*, 7 WM. & MARY L. REV 61 (1966).

42. Jackson v. Norris, 72 Ill. 364 (1874).

43. 65 MICH. L. REV. 1490, 1501 (1967).

44. RESTATEMENT OF RESTITUTION § 168(1) (1936).

named doctrines, *lis pendens* and *in custodia legis*. In actions concerning specific, described real property, *lis pendens* means that purchasers or transferees of the property during litigation take the property subject to the result of the litigation.[45] Virginia courts, particularly federal courts, follow, or at one time followed, the idea that statutory *lis pendens* does not abolish common law *lis pendens*; and *lis pendens*, the courts said, applies even though plaintiff fails to file notice and even to personal property transferred during litigation.[46]

Property in the court's "custody" because attached, garnished, under a receiver, or in an insolvent estate is subject to the outcome of the lawsuit. Property may come into judicial custody when an action is filed, and the doctrine may operate whether there is actual or constructive notice.[47] One who interferes with property *in custodia legis* may be held in contempt.[48] The fictional custody serves the same useful purpose as *lis pendens*: it keeps a potential loser from impairing the winner's benefits. Both these doctrines produce results similar to a money received theory or deciding that the recipients held the property as constructive trustees.[49]

The court of appeals found the Board guilty of contempt, utilizing a theory resembling *in custodia legis*. The Board, fully aware of what it was doing, interfered with property in the court's custody, put the subject matter of litigation beyond the court's reach, and destroyed the appellate court's ability to afford full relief to plaintiffs. The court held that the appeal was a "process" within the terms of the federal contempt statute and that defendants' conduct set the process to naught: "the putting of the subject-matter of this litigation beyond our reach was a defiance of this court, an anticipatory resistance to its ultimate orders or process."[50]

The dissent is technically more sound. Rules and standard practice allow courts to stay conduct pending appeal and to grant appellate injunctions.[51] No operative order clearly defining the proscribed conduct and promulgated prior to the conduct forbade defendants' actions. A judge's request to stipulate is not a "lawful writ, process, order, rule,

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45. W. DE FUNIAK, HANDBOOK OF MODERN EQUITY § 92 (2d ed. 1956); Note, *Statutory Lis Pendens*, 20 IOWA L. REV. 476 (1935).

46. King v. Davis, 137 F. 222, 239 (W.D. Va. 1905), *aff'd sub nom.* Blankenship v. King, 157 F. 676 (4th Cir. 1906); Steinmann v. Clinchfield Coal Corp., 121 Va. 611, 641, 93 S.E. 684, 694 (1917).

47. Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 737 (1931); Mueller v. Nugent, 184 U.S. 1, 14 (1901).

48. Converse v. Highway Constr. Co., 107 F.2d 127, 132 (6th Cir. 1939); *In re* Coger, 340 F. Supp. 612, 616 (W.D. Va. 1972) (Virginia law).

49. Technically: (1) *in custodia legis* leads to a personal order to restore the property, Converse v. Highway Constr. Co., 107 F.2d 127 (6th Cir. 1939); (2) *lis pendens* creates a lien on the property which the plaintiff may foreclose, 20 IOWA L. REV. 476, 483 (1935); (3) money received will result in a money judgment enforcible by execution, RESTATEMENT OF RESTITUTION § 166 comment b (1936); and, (4) a judge will enter a personal order to the constructive trustee to execute the trust, by delivering the res to the plaintiff beneficiary. RESTATEMENT OF RESTITUTION § 168 (1) (1936).

50. Griffin v. County School Board, 363 F.2d 206, 211 (4th Cir. 1966).

51. FED. R. APP. P. 8(a); FED. R. CIV. P. 62(d).

decree, or command."[52] Absent an order or even an application for an order, defendants were free to dissipate the funds. The issue was whether the continuing program of tuition grants was constitutional; even after the payment, the court could adjudicate that issue.[53] The majority opinion, the dissent concluded, ignored Congress's limits on contempt and reverts to an anachronistic conception of an unlimited, inherent contempt power.[54]

The contempt remedy in *Griffin* was a compensatory award of money. Arguably, compensatory contempt should be approved when plaintiffs could have used parallel legal remedies.[55] The court of appeals' result resembles allowing a winning trial court defendant to proceed, but after the appellate court reverses, telling her to pay for the harm done to the time of judgment. Thus, observers who sympathize with a compensatory contempt award in *Griffin* might feel quite differently about a punitive remedy or about using coercive contempt to collect the award. The Board's contemptuous transfer fits some creditors' remedies and is analogous to others. Our legal system was designed, however, to protect traditional forms of property and creditors rather than people claiming entitlements to government benefits. Perhaps the courts should build on *Griffin* to develop a new law of *lis pendens-in custodia legis* to aid their power to award effective relief in "new property" and structural litigation.[56] Perhaps, finally, the court of appeals intended the compensatory award to be a second injunction and perceived it as within its equitable power to fashion a remedy to resolve the mess.[57]

On the other hand, perhaps *Berry* teaches us that compensatory contempt should not be expanded to encompass creditors' remedies.[58] These remedies have substantive and procedural limits developed over the centuries to protect debtors and third parties. Further, they are embodied in codes and decisions and are accessible to people with legal research skills. *Griffin*-style compensatory contempt may be subject to abuses such as lack of warning, violating the exemption statutes, ignoring statutes of limitations, and injuring innocent third parties. Plaintiffs, under this view, should utilize available creditor's techniques and leave compensatory contempt within its traditional bounds.

More fundamentally, *Griffin* raises the perennial question whether

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52. 18 U.S.C. § 401(3) (1976).

53. 52 IOWA L. REV. 582, 587 (1966).

54. Griffin v. County School Board, 363 F.2d 206, 215 (4th Cir. 1966).

55. 52 VA. L. REV. 1556, 1568 (1966).

56. United States v. DeLeon, 498 F.2d 1327, 1334 (7th Cir. 1974); National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (9th Cir. 1973); Environmental Defense Fund, Inc. v. E.P.A., 485 F.2d 780, 784 n.2 (D.C. Cir. 1973).

57. United States v. Tunica County School Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd per curiam*, 440 F.2d 377 (5th Cir. 1971).

58. Berry v. Midtown Serv. Corp., 104 F.2d 107 (2d Cir. 1939); Note, *Transfer of Assets Pending Stay of Execution as Contempt of Court*, 49 YALE L.J. 580 (1940).

courts possess a roving commission under an inherent contempt power or whether the statutes define and limit what courts can do through contempt.[59] In the face of massive resistance, remitting the black plaintiffs to a creditor's action in state court sounds callous indeed. The court of appeals responded to an outrage that perpetuated one of the most egregious examples of a caste system and the failure of democratic theory.[60]

The proponents of compensatory contempt, however, must face the question whether the court's liberal, even specious, reading of contempt power under the statute is warranted. Old decisions that the majority read to support the roving commission view of contempt[61] may be less meaningful today in light of changes in contempt on other fronts that reveal a more structured and defined approach.[62] Also the weird and fantastic bankruptcy jurisdiction distinctions that gave rise to the *in custodia legis* theory of contempt for interfering with property in the court's "custody" have been replaced with relatively clear and accessible statutes.[63]

## IV. CONCLUSION

The strict construction-roving commission division in contempt will never be resolved. First, as *Berry*, *Parker*, and *Griffin* reveal, judicial attitudes and activism, social and legal change, and litigant's conduct will cause the issue to re-emerge in a new guise from time to time. Second, perhaps because of the policy conflicts, contempt statutes are anachronistic, incomplete, halting, and feeble. When legislatures respond in an intellectually respectable fashion to the issues that contempt raises,[64] we will need to reexamine the question whether contempt is defined or inherent. In the meantime, the author quotes Mr. Dunbar

> that no course is more dangerous than to justify the exercise of a doubtful power by the supposed necessities of a particular emergency. . . . It is no light matter that suspicion even should rest upon the judiciary of warping principles to meet the supposed exigencies of cases as to which the strongest passion of the community are aroused.[65]

The material produces more satisfactory answers to the more modest

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59. *Compare* Berry v. Midtown Serv. Corp., 104 F.2d 107 (2d Cir. 1939) *with* Griffin v. County School Board, 363 F.2d 206 (4th Cir. 1966). *Compare* 65 MICH. L. REV. 1490 (1967) *with* 52 VA. L. REV. 1556, 1567-69 (1966).

60. 52 IOWA L. REV. 582, 588 (1966); 52 VA. L. REV. 1556, 1569 (1966).

61. Lamb v. Cramer, 285 U.S. 217 (1932); Merrimack River Sav. Bank v. City of Clay Center, 219 U.S. 527 (1911).

62. *See, e.g.*, Bloom v. Illinois, 391 U.S. 194 (1968) (jury trial for serious criminal contempts).

63. Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931); Mueller v. Nugent, 184 U.S. 1 (1901); 28 U.S.C.A. § 1471 (West Supp. 1980); 11 U.S.C. app. §§ 362, 541, 549 (Supp. II 1978). *See generally* Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J. L. REF. 3, 16-17 (1978).

64. 65 MICH. L. REV. 1490, 1502 (1967); 24 WASH. & LEE L. REV. 119, 125, (1967).

65. Dunbar, *Government by Injunction*, 13 L.Q. REV. 347, 366-67 (1897).

issues. Prudence compels us to respect at least the policy behind the protections for debtors and others built into creditor process. Compensatory contempt should never be used when it will frustrate the exemption statutes, the statute of limitations, or the ban on debt imprisonment. The inadequacy prerequisite for an injunction attempts, albeit imperfectly, to channel litigants into damage actions that are easier to adjudicate, less harsh on losing defendants, and simpler to enforce. Simple bipolar actions to recover money for past misconduct produce easier decisions to enforce than complex structural reform that seeks to achieve adherence to the Constitution and government regulation. If we believe in our Constitution and in government regulation, we must formulate a unified and flexible method to enforce these interests. It must avoid the extremes of excessive leniency, which evidences an unsteady commitment to the substantive standard, and draconian harshness, which converts respect into revenge and may create sympathy for the refractory defendant. The blood of the martyrs, the Romans learned, became the seed of the church. Moreover, when the parties must live with each other after the decision, preserving harmony may be more important than all-or-nothing solutions. Judges have a duty to decide all controversies correctly, but, as comparing *Berry* with *Parker* and *Griffin* illustrates, their duty to overlook imperfect presentation is greater when structural or regulatory litigation presents public issues. In particular, we must beseech judges to maintain patience and creativity coupled with skepticism about achieving perfect solutions with blunt judicial remedies.