STARS

The Pegasus Review: UCF Undergraduate Research Journal

Volume 12 | Issue 2 Article 1

2020

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Andrew E. Weiner
University of Central Florida, andrewweiner@knights.ucf.edu

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Cover Page Footnote

Please note that following entry is an edited essay of a larger work that was previously published through the Burnett Honors Collage in May of 2019; these edits have been implemented to allow for the ease of the reader and to fit within the parameters of the URJ.

Vol. 12.2: 1-6

URJ

THE PEGASUS REVIEW:
UNIVERSITY OF CENTRAL FLORIDA
UNDERGRADUATE RESEARCH JOURNAL

Published
February 8th, 2020

Post-Judgment Recovery and its Effectuation on the Contemporary Debtors' Prison: A Treble Analysis on Collections Law in the State of Florida

By: Andrew E. Weiner
Faculty Mentor: Mr. David Slaughter
UCF Department of Legal Studies

ABSTRACT: This paper will analyze the conflict between creditors' inherent right for satisfaction of their outstanding monetary judgments and the difficulties that debtors confront in satisfying the outstanding award levied against them. To establish the theory that the civil justice system has "resuscitated" the antebellum debtors' prison and infringed upon principles of civil liberties, this paper will examine evidence in a three-pronged analysis of economics, history, and a reflection on the American legal systems.

KEYWORDS: Florida Collections Law; Debt Collection; Judgment Recovery

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INTRODUCTION

Filing a lawsuit, regardless of its aim, is to formally "declare war" against another party for the legal right to act, or not to act, in a specific circumstance. The courts exist to determine which party deserves more justice than the other. As a branch of our tripartite government, the courts decide what is best for society. But what if our court system fails to serve our society's best interests? It is incumbent upon those who are subjugated by the injustice to denounce said injustice because it is one of the many rights conferred to us by the Constitution. In the scope of collections law, particularly post-judgment matters, there lurks an injustice which allows for individuals to be incarcerated for the nonpayment of debt. Given the wealth of authorities who have addressed the issue ad nauseum, one would believe that a proper solution has been attained—sadly, we have not yet found one. Here we will discuss, in a two-part analysis, where we derived the laws and principles that allowed debtor incarceration to happen and the inherent issues with legal systems.

I. HISTORICAL NARRATIVE OF THE ANTEBELLUM DEBTORS' PRISON OF ENGLAND AND THE CONVEYANCE OF COMMON LAW TO THE CONTEMPORARY AMERICAN CIVIL LEGAL SYSTEM

To demonstrate how the "contemporary debtors' prison" has ridden on the coattails of the bygone debtors' prison, it is pertinent to understand historical precedent. As America's debtor prisons have evolved from English Common Law and its punitive systems of remuneration, it is significant to mention the underpinnings of such a system. Imprisonment for debt is not a historical oddity. It is a lengthy tale beginning in the Medieval Period. The recognition of imprisonment for debt in formal English law in the Industrial Age was also the product of purpose-driven aims for mitigating civil grievances. *See* C. Fane, *Esq., Observations on the Proposed Abolition of Imprisonment for Debt on Mesne Process; Shewing Its Probable Effects in Disabling Creditors from Forcing Their Debtors into Bankruptcy, Trust-deeds, or Compositions.* London: S. Sweet, Law Bookseller and Publisher pg. 16 (1838). As the English author and philanthropist Dr. Samuel Johnson has aptly put:

> Surely, he whose debtor has perished in prison, although he may acquit himself of deliberate murder, must at least have his mind clouded with discontent, when he considers how much another has suffered from him; when he thinks on the wife bewailing her husband, or the children begging the bread which their father would have earned. If there are any made so obdurate by avarice or cruelty as to revolve these consequences without dread or pity, I must leave them to be awakened by some other power; for I write only to human beings. Johnson, Idler No. 38 (January 6, 1759).

Those who survived their terms of incarceration recollected a life in squalor, where the stench of feces and the decay of human flesh loomed through their dark cells wrought of pitted iron and reinforced with muted colored stone. Their treatment within that institution was comparable to that of feral animals whose confiners would induce living terror by sheer brutality and starvation. Wardens regarded these indigent debtors as indistinguishable from those imprisoned for "true" crimes, and many of these debtors were forced to interact with these inmates or even housed in single cells alongside them.

During the eighteenth and nineteenth centuries, the population of incarcerated debtors was around ten-thousand per annum and their numbers rose to become more than half the total incarcerated population of England. *See* Stephen Ware, *A 20th Century Debate About Imprisonment for Debt,* 54 Am. J. of Leg. Hist. 351, (July 2014). Social and political attention rose as reformists and philosophers mounted an offensive against this "aberration" by virtue of moral and Christian religious platforms. These activists reinterpreted debtors' financial weaknesses as pitiful rather than punishable. Moreover, they believed that the current state of affairs produced the "decadence" of society, which fostered the greed of those who benefited from debtors' ignoble station. This position was also influenced by the recognition that human beings should be treated with due fairness given the bounds set by Christian philosophy.

That dogma inspired the reformists to argue that the human *soul* is a precious item—they reasoned that the soul was an item of immeasurable value, so no quantifiable monetary value justified its shackling. From a more secular perspective, reformists further reasoned that incarcerating debtors was simply poor execution of law and that those incarcerated for debt were the consequence of financial "misfortune" rather than "malfeasance." Under that standing law, both circumstances were deemed equally culpable due to the vague perception of what constituted criminality. Proponents for debtor incarceration reasoned that mishandling the property of others was a form of "notorious conduct," since one party

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caused a loss to another, and losing money implies some sort of wrongdoing. *See* Gustav Peebles, *Washing Away the Sins of Debt: The Nineteenth-Century Eradication of the Debtors' Prison*, 55 Comparative Studies in Society and History 701–724 (2013).

The reformists aimed to construct a system that would enable the courts to determine the culpability debtors faced and to practice it with impartiality. Categorizing acts of fraud from "grievous culpability, the grievous from the mitigated culpability, and this last from perfect innocence" allowed for the dividing line between true criminals and simple debtors to be drawn. This division curtailed repugnant abuses to the system, like the filing of fraudulent debt claims against innocent parties and sloppy fact-finding in unjustly expedited trials. *See* Beccaria, Cesare, *On Crimes and Punishments and other Writings,* Bellamy, R., ed. Cambridge: Cambridge University Press. CrossRef, 90 (1995). Eventually, by the mid-to-late nineteenth century, English law caught up with popular demands that recognized the injustice so abhorred by the English citizenry. The Bankruptcy Act of 1869 cauterized the wounds that bled the life and liberty of the populace, stating in section four of its decree that "no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money," unless "fraudulent" grounds exist for nonpayment. *See* WALLACE THODAY, *IMPRISONMENT BY JUSTICES FOR NON PAYMENT OF MONEY*, 5 (1936).

Simultaneously, across the Atlantic, a budding nation also grappled with the institutional management of debtors. The practice of debtor imprisonment did not halt at the borders of England, as its colonial progeny embraced it as well. The development of debtors' prison in the United States, which relied upon the selfsame objectives and societal strife as its English counterpart, played an intriguing ideological role in the development of American civil law. Federally abolished in the first third of the nineteenth century, debtor relief came more than three decades earlier than in England. *See* House Report, *Abolish imprisonment for debt,* 22nd Congress, 1st Session, January 17, 1832. Prior to that enactment, almost all the states failed to recognize the civil liberties of the debtor and struggled to determine a humane means for addressing indebtedness. It was by the precedent setting of New York legislators that the first official round of debtor rights were addressed statutorily. The rest of the states followed suit shortly thereafter. See New York State Legislature, *An act to abolish imprisonment for debt, and to punish fraudulent debtors*, April 26, 1831.

During the active state of the former debtors' prison, Pennsylvania particularly comes to the fore when discussing collections laws. This state is unique in that it was affected most by English law largely due to the scope of its economy. Upon becoming a large mercantile hub at around the time of the pre-revolutionary era, during the late seventeenth century, it was no surprise that its development of creditor-debtor law arose as a response to the demands of a booming economy. Merchants and lenders commonly faced delinquent accounts in commercial and consumer settings when serving the needs of their community. In response to these unsatisfied and disgruntled creditors, Pennsylvania's general assembly enacted statutes to coerce debtors into compliance and to determine terms of incarceration for debt. These statutes later inspired the other American colonies seeking the redress of civil financial wrongs. Yet, even with these early collections laws, Pennsylvania recognized the impracticality of perpetually detaining debtors since they would offer little to no utility while incarcerated. Therefore, to address the aim of actually recompensing the creditor, Pennsylvania law provided the debtor the opportunity to free himself and be released unto society under a contract for indentured servitude. (Shaiman, S. Laurence, *The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law*, 4 The American Journal of Legal History, 207-212 (1960.)) This act of freeing the debtor, for the sake of debt restitution, could be considered the forerunner of the "purge" in contempt cases in contemporary courts.

The ability to purge oneself, in the context of the civil judicial rules of procedure, is to free oneself of judicial contempt by exonerating the contemnor, the one who acted willfully and wantonly disobedient, of the consequences of one's actions. An Order for Contempt is levied against an individual who fails to abide by the mandates of the court. See 38.28, Fla. Stat. (2018). This procedure is based on the redeeming act that the contemnor demonstrates, specifically by apologizing for disobedience and providing rectification of the issue at contention in the contempt order. (See Fla. Fam. Law R. Proc. 12.615(e) (2019), which demonstrates a general nature of the ability to purge.) The purge is the figurative key to the contemnor's cell, as it is one of the final legal remedies available for those who are subject to a civil contempt charge.

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The action of purge is an aside from the order of contempt. The purge is not applicable for those without the actual contempt order granted by the presiding judge in a trial. Like many of the foundational laws that have been derived from the English, the American legal system also adopted the Contempt of Court from Common Law's procedural rules. This adoption allowed for a fluidity which enabled substantive laws to be ingrained within the court system via procedural facilitators. Hence, procedural and substantive law go hand-in-hand. Procedural law concerns "the means and method to apply and enforce those duties and rights," as determined by the "Due Process" clause of the Fifth Amendment, and applied to the states by the Fourteenth Amendment. *See Hall v. State*, 823 So. 2d 757 (Fla. 2002) (definition), U.S. Const. amend. V (Due Processes scope) and U.S. Const. amend. XIV (applicability to the State).

Inversely, substantive law is defined by the Florida Supreme Court as the "part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." *See Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730 (Fla. 1991). Given those definitions, the Order for Contempt lies within the procedural side of the law. Furthermore, the Contempt of Court Order is a tool wielded to obtain a particular aim in all aspects of law—to induce compliance and mitigate disorder. Substantive law does not regulate the system itself but merely establishes the boundaries of law. The contempt order enables the furtherance of law because it exists as a means for the application of law within the court system itself. It can be viewed as analogous to theory of a particular branch of study (substantive law) and that of the actual practice of that study (procedural law).

II. THE JUXTAPOSITION OF CONTEMPORARILY CIVIL RENUMERATION AND CRIMINAL PUNISHMENT IN THE AMERICAN LEGAL SYSTEM AND THEIR DICHOTOMOUS OBJECTIVES

It is widely recognized within the field of law that the aims of civil and criminal courts are perpendicular to one another. Civil courts aim to provide financial reconciliation to the party who faced a wrongdoing, to return them to a station similar to that which existed prior to the wrongdoing. Criminal courts historically have imposed a retributivist agenda, i.e., the criminal courts seek redress for committed wrongs not by compensation (civil agenda), but by means of institutional retribution. Retribution appeals to the most innate satisfactions of man's character—redemption via the eye-for-an-eye or violence begets violence approach. *See* Bronsteen, J., Buccafusco, C., & Masur, J., *Happiness and Punishment,* 76 U. Chi. L. Rev. 1071 (2009). In the context of collections law, the agendas of both civil and criminal courts are not clearly defined.

In a civil legal matter, if the wronged party merited justice, the courts would valuate the harm and quantify it in dollars. In a criminal case, the courts would value the harm by the wrongdoer and quantify justice as a period of time that the wrongdoer must endure incarceration. These are generalities, but they are representative of the purpose of these systems in our society. So, why is it that if a debtor in our modern society fails to satisfy a judgment, they would face incarceration? Is it not counterintuitive given the basic foundations of these systems? Why legitimize compromises in civil liberties—the unalienable right to be free from incarceration for debt—for the sake of procedural compliance? One need not compromise in this limited circumstance in postjudgment recovery.

Since the abolishment of the debtors' prisons, American law has plainly stated that no individual shall be subject to incarceration for debt. (See above, Roman numeral number two of this analysis for particular references in history.) Although the procedural mechanism, like the contempt of court, exists to promote justice for one party, it is at the expense of another's liberty. There is no appropriate incarceration in the circumstance of collections, regardless of the delay in repayment that the creditor might face. Incarceration should be reserved for criminal punishments, not those who are indebted and subject to the contempt of court.

Philosophically speaking, one may reason that because the judgment is the official acknowledgment of a debt, any prior litigation is simply a matter at issue. Following this logic, any debt existing prior to the judgment is not a legally recognized debt, ergo there can be no legal punishment for failing to satisfy. Therefore, if a contempt charge was issued and pursued for failure to produce requested documentation pre-judgment, then civil liberties would not be infringed. In this circumstance, the consequences of the contempt are not based on an officially recognized debt, but rather serve as an avenue for compliance from the party subject to the contempt. On the other hand, if a (final) money judgment is rendered and the contempt is pursued with the possibility of incarceration, the debtor would be imprisoned. This imprisonment would constitute a breach of the debtor's

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civil liberties since that is an actual debt subject to actual legal consequences. A debt without a judgment would be a debt with no legal means for recovery, with the exception of contacting the debtor via telephonic or written means, i.e., dunning (demand) letters. Moreover, dissatisfaction for the incarceration for debts has been hotly debated in the areas of family and criminal law. These cases, like those relating to failures in not paying child support monies, or repaying the courts for criminal fines and costs, are separate, related issues, but not directly within the scope of this analysis. *See Andrews v. Walton*, 428 So. 2d 663 (1983) (incarceration for willful nonpayment of child support) and *Bearden v. Ga.*, 461 U.S. 660 (1983) (criminal court incarceration for failure to pay fine or fee). Children, when the financial supporter fails to remit monetary support, will face undue hardship. Therefore, children's wellbeing supersedes the interests of the supporter since solely the children's "best interest" is considered in court's determinations of law. *See Fla. Dep't of Children & Families v. X. X. G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (best interest determination wielded throughout all matters that involve a child).

When discussing situations like *Bearden*, one must consider that the debt at issue, i.e., the fines or fees imposed by the courts, are sourced from criminal wrongdoing. Unlike the civil counterpart discussed, the criminal wrongdoer did not face unintended misfortune. Criminals breached a tacitly ingrained covenant, by virtue of their membership in their community, to remain free from illicit action. By breaching that implied covenant, the wrongdoer has degraded the social utility of that community and hence done a wrong to all members. This criminal also harms that community's economic utility, as the members are forced to pay the costs of the trial.

It is not unreasonable to impose a dual approach to punishment in this circumstance—that is, courts should incarcerate the criminal to mitigate further societal harm and require restitution for the harm caused to the community. In other words, given retributivism's ideals, if an individual causes harm to others, they must recompense in every manner available to make the punishment suitable for the crime. For the civil wrongdoer, compared to the previous criminal wrongdoer, punishing the debtor via imprisonment, following the principles of retributivism, is an excessive punishment that does not fit the harm done to society. Even if a civil claim has criminal underpinnings, like the civil trial of Orenthal James Simpson, the criminal courts, not the civil legal system, exert institutional punishment—the circumstance must be worthy of bifurcating its criminal and civil natures. *See Goldman v. Simpson,* 72 Cal. Rptr. 3d 729, 731, (Cal. App. 2d Dist. 2008).

Although the issues of domestic relations and criminal court are related to the focus of "pure" civil incarceration, they are not directly appropriate for the philosophies proposed. These circumstances present additional variables for consideration (children for family law and society for criminal law) that are more important than the inequities that the wrongdoer faces. In terms of valuation, by way of utilitarian ideals, the collective's wellbeing is prioritized over the wellbeing of the individual. The civil, post-judgment circumstance discussed differs from the former in that it has no truly justifiable basis aside from causing inequitable harm to the unfortunate.

SUMMATION

The failure to repay debts and its relation to civil imprisonment is a questionable matter. It has been widely accepted that no one individual or entity has a legal obligation to repay their debts, but strictly a moral or ethical obligation. However, by allowing post-judgment pathways to imprisonment, the civil system undermines itself, as the objectives of the criminal courts are melded into the objectives of our civil courts. Unless fraud is found, whether a debtor is insolvent, legally ignorant, or willfully disobedient in post-judgment proceedings, the principles of freedom should be prioritized over the desires of the civilly vengeful. Debtors are not criminals, and they do not deserve the actuality of imprisonment, as this punishment is reserved for those who are contraveners of the law.

Imprisonment is not the only means for inducement. There exist many avenues for creditors to obtain the records (or a debtor's compliance) by more passive and humane means, like requesting the production of evidence from alternative sources, invoking bankruptcy or using one of the varied execution actions available rather than strictly pursuing the debtor to exhaustion. Levying imprisonment in civil post-judgment proceedings is not only against the plainly written laws of our nation, but it is a feeble and primitive method to resolve an issue that has been debated to exhaustion for over three centuries. If our modern society is still incapable of comprehending the fundamental principles vested in every one of us, then little hope will exist for change in the realm of collections law.

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