BYU Law Review

Volume 2011 | Issue 5 Article 4

12-1-2011

Creditors' Contempt

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ABSTRACT

This Article takes a fresh look at the power of courts and creditors to force debtors to repay their obligations through in personam collection techniques. Variously known as "debtor's examinations," "turnover orders," "citations to discover assets," "supplementary proceedings," "proceedings supplementary," and "proceedings in aid of execution," in personam remedies force the debtor, under threat of the court's contempt authority, to turn over money or property directly to a creditor. Because the exercise of the court's contempt authority can result in a debtor's imprisonment, in personam techniques have long been regarded as a critical but potentially very coercive arrow in a debt collector's quiver.

Recently, the Federal Trade Commission and others have endorsed major changes to a debt collection system labeled as "broken." These reform proposals, however, have overlooked key problems in in personam proceedings, where excessive creditor leverage and insufficient protection of debtors' procedural rights risk validating a view that the judicial system is functioning as creditors' private collection arm.

Following the transfer of power to a newly established Bureau of Consumer Financial Protection, this Article resurrects a subject that has received virtually no attention in the scholarly literature for over a decade. It analyzes the particular features of in personam proceedings and debtor behavior that contribute to a longstanding imbalance in the leverage asserted by creditors over debtors. The Article recommends specific changes to the way courts conduct in personam proceedings to

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ensure that the in terrorem effects of these remedies do not upend important social policies, including the protection of exempt property and the adjudicative fairness of the collection process.

Debt collection is a fundamental component of the consumer credit system. The strength and legitimacy of its procedures, however, depend on maintaining a difficult balance between the state's and creditors' interest in rigorous judgment enforcement and debtors' interest in imposing reasonable limitations on the coerciveness of debt collection.

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I. INTRODUCTION

Times were tough for Melanie Vargas. Having recently separated from her husband of seven years, Melanie was having difficulty adjusting to a reduced household income and a leaner budget. Forced to rely more heavily on credit cards, she devoted an increasing percentage of her income to servicing her debt, which had ballooned recently due to the application of a default interest rate and various late fees.

To Melanie, creditors' debt collection efforts seemed unrelenting. Collectors called at least ten times every day. The daily mail was brimming with letters stamped with phrases like "Final Notice" or "Past Due." Feeling powerless about her financial situation and frustrated by the holier-than-thou tone of debt collectors in their admonitions and settlement offers, Melanie grew numb. Craving some peace, she eventually changed her home phone number and began forwarding her mail to a post office box.[1] She felt embarrassed that everyone from the babysitter to the postman knew she was having trouble making ends meet.

Meanwhile, one of Melanie's creditors charged off[2] the debt and sold it at a fraction[3] of its face value to a debt buyer, who purchased

1. It is not unusual for debtors to fail to respond to creditors' efforts to reach them through phone and the mail. *See* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J., Nov. 29, 2010, at A1 (citing CEO of debt buyer Encore Capital Group, Inc., who asserts that only six percent of the company's debtors respond to dunning letters, and only eighteen percent respond to phone calls).

2. At any stage of the collection process, a creditor may "write" or "charge" off a debt for tax and accounting purposes, either because the debt is uncollectible or because no payment has been received for a certain period of time. ROBERT J. HOBBS, FAIR DEBT COLLECTION § 1.5.12, at 14 (6th ed. 2008).

3. *See, e.g.*, JONATHAN SHELDON, CAROLYN CARTER & CHI CHI WU, COLLECTION ACTIONS: DEFENDING CONSUMERS AND THEIR ASSETS, § 1.4.1, at 4 (1st ed. 2008)

distressed debt[4] at high volumes and used both legal and extralegal (nonlitigation) methods to extract payments from borrowers.

The debt buyer's law firm filed an action against Melanie in small claims court, and since Melanie did not show up to the court hearing, the firm obtained a default judgment[5] against her for $2,300. The court attempted to serve Melanie via certified mail, but, on her more stressful days, Melanie refused to accept certified mail: it almost always meant bad news.

One day in February, another summons from the court arrived. It informed Melanie that the debt buyer had instituted an in personam[6] debt collection action against her. Melanie was required to go to court, answer questions about her bank account, and disclose what other assets she owned. She was required to bring various financial records with her.

Melanie did not go to court. Unaware that her debt had been sold and that the debt buyer had recovered a default judgment against her, Melanie did not recognize the plaintiff's name on the summons. Also, aside from some traffic violations during her teenage years, Melanie's experience with the legal system was limited. She assumed she could not really improve the situation by going to court. With no paid vacation days, too, she knew that a court trip would require her to forfeit half a day's pay. This was too steep a price, given Melanie's tight budget.[7]

(reporting that certain debt buyers purchase defaulted accounts for approximately 2 to 5.3 cents a dollar).

4. Distressed debt refers to loans on which debtors have defaulted. *See* Silver-Greenberg, *supra* note 1, at A1.

5. Default judgments against debtors are very common. *See, e.g.*, FEDERAL TRADE COMMISSION, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010) [hereinafter FTC] (estimating that sixty to ninety-five percent of debt collection lawsuits result in a default judgment).

6. The terminology of in personam debt collection remedies varies significantly from state to state. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-1402 (2008) ("supplementary proceedings"); OHIO REV. CODE. ANN. § 2333 (West 2010) ("proceedings in aid of execution"); TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)(1) (West 2005) ("turn over" orders); Merkel v. Keller, No. 102239, 2010 WL 2670846, at *2 (Kan. Ct. App. June 25, 2010) ("judgment-debtor examination"); IND. R. TRIAL P. 69(E) ("proceedings supplemental to execution").

7. Creditors and consumer advocates disagree about the causes of debtors' low participation rate in collection proceedings. While consumer advocates cite as contributing factors improper service (i.e., "sewer service"), the incomprehensibility of communications from the court, debtors' fears about the legal system, lack of access to counsel, work and family constraints, and a lack of transportation, creditors contend that debtors opt not to participate

Two weeks later, Melanie was served personally at her apartment with a letter from the court. The court had issued a rule to show cause[8]—a document instructing Melanie to appear in court and explain why she should not be held in contempt.[9] Melanie ignored this notice, too. One week later, the court issued a body attachment writ.[10] The court, pursuant to its contempt authority, had authorized local law enforcement officials to arrest Melanie for failing to show up to court. She was asked to surrender herself to the local authorities and post bond, a portion of which would be turned over to the creditor in satisfaction of its judgment.[11]

Alarmed at how the situation had escalated, Melanie called her parents, explaining the situation and asking for a loan. Since her parents could only afford to lend her a few dollars, Melanie scrounged up the rest by selling some gold jewelry and taking out a payday loan—a loan with a 350% annual percentage rate.[12] She

after concluding that defending against a valid debt would be futile. *See* FTC, *supra* note 5, at 7**.** "Sewer service" occurs when a process server fails to serve the consumer but falsely asserts that he has successfully done so. *Id*. at 8. This act of falsifying an affidavit of service is called "sewer service" because it is akin to the process server throwing the documents "down the sewer". *Id*. at 8 n.22.

8. A rule to show cause may also be known as an "order to show cause" or a "show-cause order." *E.g.*, *Merkel*, 2010 WL 2670846, at *2.

9. *See, e.g.*, 20A BRENT A. OLSON, MINNESOTA BUSINESS LAW DESKBOOK § 39:7 (2010-2011 ed.) ("If the judgment debtor fails to appear in violation of the subpoena or the order in supplementary proceedings, an Order to Show Cause why he should not be held in contempt of court should be obtained ex parte and served on the judgment debtor.").

10. A judge may issue either a writ of "body attachment" or a "bench warrant" following a debtor's failure to appear at an in personam proceeding. *See, e.g.*, Hi-Tech Constr. Inc. v. Ma, No. A126752, 2011 WL 664657, at *2 (Cal. Ct. App. Feb. 23, 2011) ("[The debtor] has also failed to appear at a judgment debtor's exam, resulting in the issuance of a bench warrant for his arrest."); Foster v. Precision Auto. Brake Supply, No. B181348, 2006 WL 306790, at *1 (Cal. Ct. App. Feb. 8, 2006) ("When [two defendants] did not show up [to their judgment debtor examinations], body attachments for their arrests were issued.").

11. Some courts release debtors on noncash or recognizance bonds, which do not require the debtor to post any money. Other courts, however, use cash bonds. If a debtor cannot pay the full cash bond, she will be held in jail until her court date. *See I Was Arrested and Have to Go to Court*, ILLINOISLEGALAID.ORG, http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=5403 (last visited Nov. 5, 2011).

12. "A payday loan is a small, short-term, triple-digit interest rate loan, typically in the range of $200 to $500 dollars, secured by the consumer's postdated check or debit authorization." Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564 (2010). Payday loans were originally designed to tide a consumer over until payday and be repaid in one lump sum when the consumer received her paycheck. In practice, however, a consumer is frequently unable to repay the loan so promptly. In these cases, the loan is converted into an interest-only loan that the consumer repays over a much longer period of time. *Id*. Payday loans are also known as

posted bond, which was subsequently turned over to the debt buyer in partial satisfaction of the judgment.

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Like Melanie, Steven Lipman had fallen on hard times. Steven was forced by his employer's recession-related cutbacks into an early retirement two years ago. After fifteen years of service at his old company, Steven received a pension payment of $525 per month. Unable, however, to find a part-time job to supplement his income, Steven found that his monthly earnings did not cover his expenses, which forced Steven to deplete his savings and lean heavily on credit cards. One creditor who obtained a judgment against Steven served him personally with notice of an in personam debt collection action.

Steven assumed an attorney would be too expensive, so he decided to go to court on his own. The courtroom was crowded and noisy—nothing at all like the solemn and majestic setting featured on television and in movies. Steven stood in a line of about ten other debtors, only a few of whom were represented,[13] and checked in with the clerk. After about a twenty-minute wait, the creditor's attorney called out Steven's name and guided him into the hallway outside the courtroom, where five other debtor's examinations were taking place.

The creditor's attorney asked Steven about what property he owned and the location of his bank account. Eventually, the attorney asked Steven how much money he could afford to pay each month. Steven felt flustered and was not sure what to say. Feeling embarrassed about having defaulted in the first place, Steven agreed that he could pay $80 per month until the debt was paid off.[14]

"deferred presentment," "cash advances," "deferred deposits," or "check loans." ELIZABETH RENUART & KATHLEEN E. KEEST, THE COST OF CREDIT § 7.5.5.2, at 342 (4th ed. 2009).

13. The vast majority of debtors who participate in in personam proceedings tend to be unrepresented. Telephone Interview with A. Kathleen Barauski, Esq., Norman H. Lehrer, P.C. (Dec. 15, 2010) (noting that only about five to ten percent of debtors have attorneys).

14. Depending on local practice, either the creditor's attorney or the judge might conduct a debtor's examination, which, according to legal aid attorneys, can impose significant pressure on debtors to agree to pay a certain amount of money every month in repayment of the debt. Telephone Interview with Larry Smith, Managing Attorney, Prairie State Legal Services (Sept. 29, 2010) (noting that many debtors who are the subjects of debtor's examinations are unsophisticated, have never been to court previously, and feel pressure to enter into payment plans because, among other things, they want to "escape" the examinations). In an Indiana case subsequently overturned for violating Indiana's prohibition

Steven, unfortunately, could not pay $80 per month. He was on a fixed income, and he counted pennies to try to make ends meet. The summons from the court was complex, and he had not noticed that it included examples of exempt property—various assets insulated from creditors' collection efforts. The list included pension income, Social Security payments, a certain percentage of wage payments, veterans' benefits, unemployment compensation, workers' compensation, alimony and child support, and some personal property.[15] Had Steven asserted his exemptions, he would not have had to forfeit any of his money or property.

The creditor's attorney did not tell him about the exemptions, and the judge never raised the issue.[16] The judge incorporated the agreement in a court order. The order warned Steven that a failure

against imprisonment for ordinary debts, the examination proceeded as follows:

> **The Court:** So we're here today for you to explain what you're going to do to pay this off.
> **Mr. Button:** I can't.
> **The Court:** Okay, but you're going to.
> **Mr. Button:** I can't do it.
> **The Court:** Okay, Mr. Button.
> **Mr. Button:** Yes, Ma'am.
> **The Court:** For some reason we're not communicating. Alright, you're not hearing me for some reason. I am telling you that, yes, you will. You're going to tell me how you're going to go about doing that. And I'm not going to accept I cannot, and if the next words out of your mouth are I cannot, Mr. Button, then you'll set [sic] with Mr. Glenn at the Sheriff's Department until you find a way that, yes, you can. So what kind of payments can you make to pay this down?
> **Mr. Button:** Five dollars ($5.00) a month.
> **The Court:** Five dollars ($5.00) a month is—I'm going to be an old woman before this is ever paid off.
> **Mr. Button:** That's what I can afford, Ma'am. I live on Social Security Disability. I've got to pay my rent and my lights and my gas.
> **The Court:** I'm going to order you pay twenty-five dollars ($25.00) a month until this is paid off. I'm going to show that we are to come back March 12, at 1 o'clock, at which time Miss James is going to tell me that she has already received fifty dollars ($50.00) towards this. Okay.
> **Mr. Button:** Yeah.
> **The Court:** Good luck to you, Mr. Button.

Button v. James, 909 N.E.2d 1007, 1008 (Ind. Ct. App. 2009).

15. *See* SHELDON ET AL., *supra* note 3, app. F at 421–54 (summarizing each state's exemption laws).

16. Unless debtors affirmatively assert their exemption rights, judges may feel uncomfortable raising the topic. Otherwise, judges may be perceived as serving as debtors' advocates—not as disinterested adjudicators. Telephone Interview with the Hon. Paul M. Fullerton, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit (Dec. 3, 2010).

to pay the monthly amount could result in a contempt of court citation and possible imprisonment.[17]

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Debtors as a whole repay the vast majority of their debts on time, without the need for creditors to resort to any collection activity.[18] When, however, debtors default, creditors (particularly unsecured creditors) must seek recourse expeditiously. Unlike secured creditors, who can foreclose on or repossess collateral in the event of a debtor's default, unsecured creditors (from credit card companies to tort victims to veterinarians) operate without much of a net. Unsecured creditors lend to debtors on the strength of debtors' repayment promises alone. If a debtor defaults on a debt owed to an unsecured creditor, the creditor—due to the relatively high cost of formal litigation—is likely to try to extract payment first through extralegal (nonlitigation) attempts, including dunning[19] phone calls and letters.[20]

If extralegal debt collection efforts prove unsuccessful, an unsecured creditor must enlist in state law's "race of the diligent"[21] and compete against other unsecured creditors for a stake in the

17. In some states, it is legal for judges to exercise their contempt authority to imprison a "can-pay" debtor for failing to turn over money or property to a creditor. *See* Vt. Nat'l Bank v. Taylor, 445 A.2d 1122, 1124 (N.H. 1982). Other states, however, have concluded that this practice violates states' prohibitions on imprisonment for debt. *See In re* Byrom, 316 S.W.3d 787, 791 (Tex. Ct. App. 2010) (in habeas proceeding, holding unconstitutional a contempt order requiring independent executor of estate to pay $85,000 into court registry or be jailed for contempt).

18. MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 590 (5th ed. 2009) ("Most consumers pay their debts. Indeed, statistics reveal that only about two-to-three percent of the amount of credit extended to consumers becomes delinquent.").

19. "Duns" refer to collectors' preliminary contacts with consumers. *See* HOBBS, *supra* note 2, § 1.5.1, at 4. These include form letters and phone calls. *Id.* Dunning letters and calls tend to increase over time in severity of tone and expense to the collectors. *Id.*

20. *See, e.g.*, DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 12:1 (2008–2009 ed.).

21. State court collection law is considered a "race of the diligent" because unsecured creditors must rush to the courthouse, obtain a judgment, and then pursue collection remedies before other collectors exhaust the debtor's assets. *See* NATHALIE MARTIN & OCEAN TAMA, INSIDE BANKRUPTCY LAW: WHAT MATTERS AND WHY 11 (2008). Creditors who come late to the scene risk collecting nothing. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS & CREDITORS 99 (5th ed. 2006) ("The state collection system is based on the one-at-a-time race of the diligent that effectively pits every creditor against both the debtor and every other creditor who is trying to press the debtor for repayment.").

debtor's property. After obtaining a judgment against the debtor,[22] an unsecured creditor has two basic ways of attempting to satisfy its claim. Initially, the creditor may bring an in rem action ("execution"[23]) against the debtor. Alternatively (or, depending on state law,[24] in addition to execution), the creditor may pursue an in personam remedy.

In an in rem action—or "execution"—the judgment creditor, with the help of law enforcement officials (typically a sheriff), physically or constructively[25] seizes the debtor's unencumbered,[26] nonexempt[27] property, sells it, and applies the sale proceeds to its judgment. In rem judgment enforcement is considered "cumbersome" and inefficient,[28] since the creditor, lacking information about the debtor's physical property, may not know where to look for the debtor's assets.[29]

22. While a creditor must ordinarily obtain a judgment before making formal collection attempts, a creditor, in exceptional circumstances, may seek prejudgment attachment. STEVE H. NICKLES & DAVID G. EPSTEIN, DEBTOR-CREDITOR: CREDITOR REMEDIES AND DEBTOR RIGHTS UNDER STATE AND NON-BANKRUPTCY FEDERAL LAW 222 (3d ed. 2009).

23. The term "execution" may generally describe any process that carries into effect a court's judgment. JAMES J. BROWN, JUDGMENT ENFORCEMENT PRACTICE AND LITIGATION § 9.02[C], at 9–8 (3d ed. 2011); Charles C. Kline, *Collection Pursuant to Florida's Supplementary Proceedings in Aid of Execution*, 25 U. MIAMI L. REV. 596, 598 (1971). In this context, however, "execution" refers to a creditor's application for a writ of *fieri facias*, the ordinary writ used in the modern era to enforce a money judgment. *See, e.g.*, NICKLES & EPSTEIN, *supra* note 22, at 127.

24. *See infra* Part IV.B.

25. A sheriff may constructively or symbolically levy on property when, for example, the property is too bulky or cumbersome to seize physically. *See, e.g.*, Gilbank v. Benton, 50 P.2d 815, 817 (Cal. Dist. Ct. App. 1935) (authorizing constructive seizure of heavy machinery and equipment set in a concrete floor or embedded in brick).

26. "Unencumbered" property refers to property unburdened by a creditor's security interest. *See* BLACK'S LAW DICTIONARY 1335–1338, 1666 (9th ed. 2009).

27. "Nonexempt" property refers to property that is not subject to any federal or state exemptions. State and federal exemptions "exclude a wide variety of income and property from seizure by creditors." *See, e.g.*, SHELDON ET AL., *supra* note 3, § 12.2.1, at 239. A debtor, however, may voluntarily forfeit exempt property to a creditor. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1055.

28. 1 DAN B. DOBBS, LAW OF REMEDIES § 1.4, at 16 (2d ed. 1993).

29. *See infra* note 103 and accompanying text; *see also* WILLIAM H. BROWN, THE LAW OF DEBTORS AND CREDITORS § 6:56 (2010) ("[I]f the sheriff is unable easily to locate property, he will not normally serve as a detective for the judgment creditor."); Whitford, *supra* note 27, at 1053 n.16 ("Most state statutes suggest that once a writ is delivered to a sheriff, the latter will search for leviable property. However, it is well known that today it is the creditor who must find the property and lead the sheriff to it.").

At early common law, the legal system developed another method of debt collection, one that sought to eliminate various deficiencies[30] in the in rem collection process. In personam debt collection remedies (variously known as "debtor's examinations," "turnover orders," "citations to discover assets," "supplementary proceedings," "proceedings supplementary," and "proceedings in aid of execution")[31] allow a creditor to shift much of the onus of collection to the debtor. A creditor utilizing in personam remedies can—in lieu of (or as a supplement to)[32] seizing the debtor's property—ask judges to summon debtors to court for various purposes that assist the creditor in debt collection. While in rem debt collection relies on a sheriff's physical seizure of nonexempt, unencumbered property, in personam debt collection methods force debtors to turn over money or property to creditors directly. Court orders are enforced through the court's contempt authority,[33] which judges generally exercise in this context through threats of imprisonment.[34] In personam judgment collection is very popular with creditors, primarily because these remedies can be very effective.[35] Indeed, collectors' aggressive and frequent use of in personam remedies has caused some to liken the judgment enforcement system to a collection arm of creditors.[36]

Primarily because the effectiveness of in personam debt collection relies on its enforcement mechanism—threats of depriving debtors of their liberty—debtors have sought protection from creditors' collection efforts by invoking various constitutional law arguments. Some debtors have successfully argued that the exercise of a court's contempt authority to enforce private debts is the functional

30. *See infra* Part III.A.

31. See sources cited *supra* note 6.

32. *See infra* Part IV.B.

33. DOBBS, *supra* note 28, at 16.

34. BROWN, *supra* note 29, § 6:58, at 6-218 ("The majority of states refuse to impose compensatory fines on the debtor who is in contempt . . . .") (citing WILLIAM D. HAWKLAND & PIERRE R. LOISEAUX, DEBTOR-CREDITOR RELATIONS 107 (2d ed. 1979)).

35. *See, e.g.*, Bradley J.B. Toben & Elizabeth A. Toben, *Using Turnover Relief to Reach the Nonexempt Paycheck*, 40 BAYLOR L. REV. 195, 197 (1988) ("In destroying old conceptual barriers and readjusting the balance of debtor-creditor relations, the turnover statute [an example of an in personam remedy] is nothing short of an unmitigated boon for judgment creditors.").

36. *See* Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STAR TRIB. (Minneapolis), June 6, 2010, at 1A.

equivalent of imprisonment for debt default,[37] which, with some significant caveats,[38] is illegal in every state.[39] In these cases, courts have ruled that since the state may not imprison a debtor for failing to pay a debt, a court likewise may not use its contempt authority to threaten to incarcerate a debtor for failing to turn over money or property to a creditor in an in personam debt collection action.[40]

Academics and other commentators, moreover, have long argued that civil contemnors[41] (like debtors imprisoned under the court's contempt authority) are entitled to more substantial due process protections.[42] In addition, beginning in the 1970s, many litigants have successfully argued that all debtors participating in postjudgment proceedings are entitled to meaningful procedural due process protections (including notice of their exemption rights).[43]

A fundamental premise of modern debt collection law is that, although creditors are entitled to repayment, the exercise of excessive leverage by creditors over debtors can contribute to procedural and substantive unfairness as well as social dysfunction.[44] These risks are acute in a competitive collection system that rewards speed and

37. *See* Carter v. Grace Whitney Props., 939 N.E.2d 630, 635–36 (Ind. Ct. App. 2010) (holding that money judgments are generally enforced by execution, and that all forms of contempt are generally unavailable to enforce a money judgment); *In re* Byrom, 316 S.W.3d 787, 791 (Tex. Ct. App. 2010) (same).

38. SHELDON ET AL., *supra* note 3, § 12.10, at 347 (describing that many state prohibitions on imprisonment for debt make an exception for fraud, tort, abscondment, enforcement of familial support obligations, and fines). *See, e.g.*, FLA. CONST. art. I, § 11 ("No person shall be imprisoned for debt, except in cases of fraud.").

39. *See* SHELDON ET AL., *supra* note 3, § 12.10, at 346–47. Although the U.S. Constitution does not itself prohibit imprisonment for debt, BROWN, *supra* note 23, at 5–58, a federal statute provides that no federal court may imprison a person for debt in any state in which imprisonment for debt has been abolished. 28 U.S.C. § 2007(a) (2006).

40. *Carter*, 939 N.E.2d at 635 (noting that because parties may enforce obligations to pay a fixed sum of money through execution, all forms of contempt are generally unavailable to enforce a monetary obligation); *Byrom*, 316 S.W.3d at 792 (in habeas proceeding, holding unconstitutional a contempt order requiring independent executor of estate to pay $85,000 into court registry or be jailed for contempt).

41. The Supreme Court distinguishes between "criminal" and "civil" contempt. *See, e.g.*, Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1031 (1993). In a case of criminal contempt, the court will impose a punitive sanction like a fixed fine or jail sentence. *Id.* Civil contempt sanctions, in contrast, are imposed for coercive or compensatory reasons. *Id.*

42. *See, e.g.*, *id.* at 1081–96; Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 391 (2006).

43. SHELDON ET AL., *supra* note 3, § 12.3.2, at 252–53.

44. *See infra* notes 158–159 and accompanying text.

aggressiveness, especially when a debtor's assets are insufficient to cover all of her creditors' claims.

This Article argues that in spite of debtors' meaningful successes in the constitutional law arena, the balance of power in the in personam debt collection context remains markedly and adversely skewed toward creditors. It examines several factors that contribute to this imbalance: (1) a dissonance between the "extraordinary"[45] coercive power of in personam debt collection and the ability of creditors in many states to institute these proceedings against undeniably ordinary debtors; (2) debtors' passivity and failure to participate in the debt collection process generally; and (3) debtors' lack of sophistication—a factor that contributes to pro se debtors' failure to assert available exemptions. While some of these factors likewise complicate creditors' exercise of other debt collection remedies, this Article focuses specifically on in personam actions, which—because of their potential threat to debtors' liberty—trigger the most palpable physical, psychological, and coercive consequences.

In an attempt to promote a more equitable balance between debtors' and creditors' rights—a balance more consistent with the normative goals of modern debt collection law—this Article recommends that legislators and policymakers adopt several changes to in personam debt collection. It suggests that (1) judges be required to review every in-court payment plan or out-of-court settlement and ensure that debtors are not forfeiting any exempt property unwittingly or involuntarily, and that (2) courts be prohibited from turning over to creditors bond money used to secure debtors' attendance at contempt hearings—a common practice that likely violates states' prohibitions on imprisonment for debt default. These proposals are necessary to curtail in personam proceedings' in terrorem effects[46]—the externalities of a debt collection process gone awry.

Debt collection—a critical feature of any market-based consumer credit system—is necessarily coercive: it relies on a system of credible threats to extract payments from debtors. The state has a significant

45. Albert E. Jenner, Jr., Philip W. Tone & Arthur M. Martin, *Historical and Practice Notes*, *in* SMITH–HURD ILLINOIS ANNOTATED STATUTES, ch.110, ¶ 2–1402, 860, 864 (1983).

46. Throughout the Article, I explore how in personam debt collection actions, which conflate civil and criminal liability, can result in excessive coercion by creditors.

political, economic, and didactic interest in enforcing courts' adjudications of private contract disputes. As Professor Lynn Lopucki has observed, unless a creditor's judgment can be enforced, liability is "merely symbolic,"[47] a status that risks undermining the legitimacy of the legal system and increasing the cost of credit.

Currently, however, certain features of in personam proceedings raise significant normative concerns about how creditors use courts and law enforcement officials to enforce judgments. Because in personam proceedings involve the potential deployment of law enforcement, courts and policymakers must closely guard debtors' due process rights and ensure that chronic disparities in sophistication levels between debtors and creditors do not unjustifiably affect the substantive outcome of collection disputes.

This Article considers the power asymmetries between debtors and creditors in the in personam debt collection context and suggests ways to remedy defects in this system. This discussion is particularly timely, since insidious problems in the debt collection system—compounded by a weak economy and the recent entry of aggressive debt buyers—have yielded meaningful suggestions about ways to improve the debt collection process.[48] As this Article explains, however, proposed reforms do not address a chronic imbalance in the leverage exercised by creditors over debtors during an in personam debt collection proceeding. This Article fills in that critical gap in the conversation.

This Article proceeds in four parts. Part II explores the origins of in personam debt collection actions and describes how these proceedings eliminated various defects in the traditional in rem collection remedy of execution. Part III describes how modern in personam remedies operate in practice and highlights several factors that contribute to asymmetry in bargaining power between debtors and creditors. Part IV describes how excessive creditor leverage in in personam debt collection actions—exacerbated by a problem I label as "contempt confusion"—contributes to harms that modern debt collection law seeks to curtail. This Part also describes current

47. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996) ("To hold a defendant liable is to enter a money judgment against the defendant. Unless that judgment can be enforced, liability is merely symbolic.").

48. *See, e.g.*, S. 3888, 111th Cong. (2010); FTC, *supra* note 5; Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 272–85 (2011).

proposals to reform the debt collection system and observes that none of these proposals directly addresses clear problems with the operation of debtor's examinations, supplementary proceedings, and other in personam proceedings. For this reason, I recommend two critical reforms to help establish a fairer bargaining relationship between debtors and creditors in in personam proceedings. Part V concludes.

II. INTRODUCTION TO IN PERSONAM DEBT COLLECTION ACTIONS

It is difficult to study the modern in personam debt collection system without analyzing its origins—an inquiry that yields meaningful insights about the intended goals of these proceedings. In this section, I discuss why in personam remedies were considered important innovations in the law of debt collection.

A. The Common Law Predecessors of Modern In Personam Collection Actions: Creditors' Bills

Necessity has proven the mother of invention in the legal arena. In the area of creditors' rights, the laws of debt collection have evolved throughout history to accommodate creditors' interest in satisfying claims in the face of changing economies and evolving forms of wealth.

At early common law, creditors' primary remedy was execution,[49] a means by which creditors, through the use of various writs,[50] could

49. 2 ABRAHAM CLARK FREEMAN, A TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES, AND OF PROCEEDINGS IN AID AND RESTRAINT THEREOF § 392, at 2144 (1888) ("The ordinary method for enforcing a judgment for money is by levy and sale of the property of the defendant.").

50. These writs took one of four forms: *elegit, capias ad satisfaciendum, fieri facias,* and *levari facias.* A writ of *elegit* resulted in the transfer of the debtor's personal property to his creditor at an appraised price. DAVID G. EPSTEIN & JONATHAN M. LANDERS, DEBTORS AND CREDITORS: CASES AND MATERIALS 96 (1978). If the personal property was insufficient to satisfy the creditor's judgment, the writ of *elegit* provided for the assignment to the creditor of one-half of the debtor's land, which the creditor could use and enjoy (as a "tenant by elegit") until the debt was satisfied. *Id.*; 3 JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 316 n.1 (1906); David Gray Carlson, *Critique of Money Judgment Part One: Liens on New York Real Property*, 82 ST. JOHN'S L. REV. 1291, 1304 n.46 (2008). *Capias ad satisfaciendum* (frequently abbreviated *"ca sa"*) required the local sheriff to arrest a judgment debtor and keep him imprisoned until the debt was paid. EPSTEIN & LANDERS, *supra*. The writ of *fieri facias* (or *"fi fa"*) allowed the creditor to seize and sell tangible personal property. DAVID G. EPSTEIN, DEBTOR-CREDITOR RELATIONS: TEACHING MATERIALS 152 (1973). The writ of *levari facias* allowed the creditor to collect

satisfy judgments by pursuing debtors' physical assets. In a rural community, execution—an in rem remedy—largely satisfied creditors' needs, since the debtor's wealth, consisting primarily of real estate and chattels, was tangible and transparent.[51]

As debtors (including corporate debtors[52]) began to possess more intangible assets, however, execution writs frequently proved inadequate in satisfying creditors' claims.[53] Execution writs were issued by courts of law,[54] which did not have the authority to reach intangible property or a debtor's equitable interests in property (e.g., stock certificates, insurance policies, or debts owed to the debtor).[55]

In response to creditors' need to reach new forms of property, chancery courts (courts of equity) developed an "equitable counterpart" to execution: the creditor's bill.[56] A creditor who was unable to satisfy his judgment through execution could file a separate action in a chancery court requesting, among other things, that the debtor turn over his equitable assets to the creditor.[57] The assets were subsequently sold, and the proceeds were used to help satisfy the creditor's judgment.[58]

The creditor's bill also served many auxiliary functions that helped creditors enforce their judgments. A creditor's bill could be used for discovery. The judgment creditor, for example, could examine the debtor and third parties in an attempt to locate assets.[59] To thwart debtors' attempts to fraudulently convey property to friends or family, a creditor could request an injunction prohibiting a

rents from the debtor's property or seize the property itself. *Id*.

51. *See, e.g.*, Isadore H. Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 COLUM. L. REV. 1007, 1007 (1935) (describing the proceeds of execution sales as likely sufficient to satisfy the "great part of money judgments . . . in a rural or semi-rural community where everyone was acquainted with the affairs of everyone else").

52. *See, e.g.*, Stefan A. Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 178 (1957).

53. *See, e.g.*, EPSTEIN & LANDERS, *supra* note 50, at 108.

54. *E.g.*, EPSTEIN, *supra* note 50, at 152.

55. *See, e.g.*, Stephens v. Cady, 55 U.S. 528, 531–32 (holding that a copyright, which has no corporeal, tangible existence, cannot be seized via execution); Doreen J. Gridley, *The Immunity of Intangible Assets From a Writ of Execution: Must We Forgive Our Debtors?*, 28 IND. L. REV. 755, 758–61 (1994); Riesenfeld, *supra* note 52, at 178.

56. *E.g.*, EPSTEIN, *supra* note 50, at 153. The creditor's bill was also known as a creditor's suit. *Id*.

57. *E.g.*, *id*.

58. *E.g.*, *id*.

59. *E.g.*, *id*.

debtor from disposing of or encumbering property.[60] To prevent dissipation of value or to facilitate collection efforts, a creditor could apply for the appointment of a receiver, who could collect the debtor's money and manage the debtor's property.[61]

Although they helped creditors reach intangible assets and equitable interests, creditors' bills were inefficient collection tools.[62] Before the merger of law and equity, a creditor interested in using a creditor's bill had to bring two separate actions: the first, in a court of law, and the second, in a court of equity.[63]

Initially, a creditor had to obtain a judgment in a court of law and attempt to satisfy the judgment through execution.[64] If the execution writ was returned *nulla bona* (indicating that the debtor had insufficient tangible assets to satisfy the judgment or that sufficient assets could not be located), a creditor could progress to the next step by applying for a creditor's bill in a court of equity.[65]

Bringing two actions was expensive and time-consuming.[66] Even if a creditor knew, for example, that the debtor had no executable property, a creditor would first have to obtain a judgment in a court of law and attempt execution.[67]

In a partial attempt to streamline this process, as part of the merger of law and equity, states in the mid-nineteenth century enacted in personam remedies (frequently referred to as "supplementary proceedings").[68] Following the adoption of these

60. *E.g.*, *id.*

61. *See, e.g.*, *id.*

62. *See, e.g.*, Cohen, *supra* note 51, at 1013 (noting that although the creditor's bill was "available to almost every judgment creditor," the remedy "involved him in Jarndyce's disease." "Jarndyce" refers to an interminable fictional court case in Chancery in Charles Dickens' *Bleak House*.).

63. Walter H. Moses, *Enforcement of Judgments Against Hidden Assets*, 1951 U. ILL. L.F. 73, 75 ("[T]he creditors' bill has one very serious disadvantage; it is a suit separate and distinct from the one in which the judgment was obtained, with all the expense and delay which that entails.").

64. *See, e.g.*, DAVID G. EPSTEIN, JONATHAN M. LANDERS & STEVE H. NICKLES, DEBTORS AND CREDITORS: CASES AND MATERIALS 58–59 (3d ed. 1987).

65. *See, e.g.*, *id.*

66. Moses, *supra* note 63, at 75.

67. *See, e.g.*, Riesenfeld, *supra* note 52, at 179–81; Gridley, *supra* note 55, at 763–64 (describing as an unjust "waiting period" the requirement that a judgment creditor seeking to reach a judgment debtor's intangible property must first attempt to satisfy the judgment through a writ of execution).

68. Riesenfeld, *supra* note 52, at 180–81 (citing N.Y. CODE CIV. PROC. Reported Completed, § 853 ff (1850); IOWA CODE § 1953 ff (1851); IOWA CODE § 3391 ff (1860)).

statutes, a judgment creditor interested in attaching the debtor's intangible assets or equitable interests no longer had to bring two separate actions—one at law and the other, at equity.[69] Instead, after recovering a judgment and attempting execution, the creditor could then apply to the same court for (1) a subpoena directing the debtor to appear and answer questions about his assets and their location, (2) an injunction prohibiting the transfer of the debtor's assets, and/or (3) an order instructing the debtor to turn over to the creditor one or more intangible assets or equitable interests.[70]

B. The Risk of Imprisonment in In Personam Actions

While creditors' bills and in personam remedies were necessary innovations in the law of debt collection, they differ dramatically from writs of execution, creditors' traditional means of collection. Execution is an in rem remedy: it involves the physical or constructive seizure of property,[71] which is subsequently sold to help satisfy the creditor's judgment.[72]

In rem enforcement of judgments has been described as inefficient and cumbersome,[73] since (1) the state must notify the debtor, (2) an execution sale must meet specific procedural requirements, (3) buyers will generally not pay full price unless it is clear that they can receive unencumbered title, and (4) issues of priority among several judgment creditors can complicate and delay the distribution of proceeds.[74] A debtor cannot "disobey" an in rem command, which does not direct the debtor to do anything.[75]

While similar complications arise in in personam cases,[76] in personam remedies partially alleviate the creditor's burden by forcing the debtor to play a meaningful role in the debt collection process. In personam remedies require a debtor to appear in court, share

69. *See, e.g.*, EPSTEIN ET AL., *supra* note 64, at 60 (citing Mitchell v. Godsey, 53 N.E.2d 150, 154 (Ind. 1944) for the proposition that supplemental proceedings are "a continuation of the creditor's original action against the debtor").

70. BROWN, *supra* note 29, § 6:58.

71. *See supra* note 25 and accompanying text.

72. DOBBS, *supra* note 28, § 1.4, at 15.

73. *Id.* at 16.

74. *Id.*

75. *Id.*

76. *See, e.g.*, Cadle Co. v. Satrap, 302 A.D.2d 381, 381 (N.Y. App. Div. 2003) (holding that the lower court had to first resolve whether debtor's wife had interest in the car before the debtor's car could be turned over to a creditor).

copies of certain documents with the creditor,[77] answer questions about the location of assets, and turn over nonexempt property directly to creditors.[78]

A debtor summoned to participate in an in personam proceeding, a remedy that functions as a combination of discovery and collection, may face contempt sanctions—and the possibility of imprisonment—for one of two basic reasons: (1) failure to pay a creditor or turn over property to a creditor (which I will refer to as "nonpayment contempt"), a sanction associated with the collection feature of in personam proceedings, or (2) failure to appear in court or otherwise supply information to the court and/or creditor (which I will refer to as "nonappearance contempt"), a sanction associated with the discovery feature of in personam remedies. In either case, if a court concludes that a debtor is capable of compliance (i.e., capable of paying the creditor or supplying certain information to the creditor), the debtor can be held in civil contempt.[79] As a civil contemnor who "holds the key" to her own jail cell,[80] the debtor may be fined[81] or imprisoned until she complies with the court's directive.[82] A debtor can purge herself of nonappearance contempt by physically appearing at the courthouse and truthfully answering

77. A creditor may ask the debtor to bring certain documents to the in personam proceeding, including, for example, paycheck stubs, bank statements, tax returns, and automobile insurance cards. *See, e.g.*, JAMES W. ACKERMAN & GREGORY P. SGRO, HOW TO GET RESULTS IN COLLECTION OF DELINQUENT DEBTS IN ILLINOIS 47 (1997).

78. As I later discuss, however, the coercive qualities of in personam proceedings put pressure on debtors to sacrifice exempt assets to creditors. *See infra* Part III.C.2.

79. In any contempt action, a person may not be imprisoned or sanctioned if she is incapable of complying with the court order. United States v. Rylander, 460 U.S. 752, 757 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question . . . . Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.") (citations and emphasis omitted); George v. Beard, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003) ("Before an offender can be confined solely for nonpayment of financial obligations he or she must be given an opportunity to establish inability to pay.").

80. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902) (explaining that civil contemnors "carry the keys of their prison in their own pockets").

81. *See, e.g.*, Cadle Co. v. Lobingier, 50 S.W.3d 662 (Tex. Crim. App. 2001) (subjecting judgment debtor who failed to comply with turnover order to a $500-per-day fine and period of incarceration). *But see* DOBBS, *supra* note 28, at 13–14 (explaining that most states refuse to impose compensatory fines on a debtor who is in contempt).

82. *See, e.g.*, Chadwick v. Janecka, 312 F.3d 597, 613 (3d Cir. 2002) ("[W]e cannot disturb the state courts' decision that there is no federal constitutional bar to Mr. Chadwick's indefinite confinement for civil contempt so long as he retains the ability to comply with the order requiring him to pay over the money at issue.").

questions about her assets and their location. In contrast, a debtor can purge herself of nonpayment contempt only by turning over specific money or property to a creditor.

Whether law enforcement officials actually arrest debtors for failing to comply with either type of directive depends on factors that vary significantly from state to state, and even from county to county. The law of the state, local practices,[83] creditor policies,[84] attorney aggressiveness,[85] and a judge's predilections[86] can all potentially affect whether or not the court issues a body attachment writ, and whether or not police officers will arrest the debtor.

Any effective debt collection technique relies on coercion: the ability of a creditor to make credible threats to extract payment from debtors. The "extraordinary" nature of in personam debt collection, however, derives from its enforcement mechanism. Courts presiding over in personam actions compel debtors to show up in court and provide information about their assets[87] or to turn over money or property to creditors by threatening to deprive debtors of their liberty. Because debtors' freedom is at stake, constitutional law has long served as the primary source of debtor-protection efforts in the in personam collection context.[88]

Because in personam remedies trigger the potential deployment of law enforcement, their contours must be closely patrolled. This coercive function gives an in personam remedy its teeth, and is part of the remedy's appeal to creditors.[89] For as long as in personam remedies have existed, however, commentators have described this shift in bargaining power as potentially problematic, a topic this Article explores in the following section.

83. Telephone Interview with Beverly Yang, Staff Attorney, Land of Lincoln Legal Assistance Found. (Oct. 5, 2010).

84. Lucette Lagnado, *Medical Seizures: Hospitals Try Extreme Measures to Collect Their Overdue Debts: Patients Who Skip Hearings on Bills are Arrested; It's a 'Body Attachment*,' WALL ST. J., Oct. 30, 2003, at A1.

85. Yang, *supra* note 83.

86. Lagnado, *supra* note 84, at A1.

87. *See, e.g.*, MINN. STAT. § 550.011 (2009).

88. *See supra* Part I.

89. *See, e.g.*, Toben & Toben, *supra* note 35, at 197.

III. FACTORS COMPLICATING IN PERSONAM DEBT COLLECTION

A. In Personam Debt Collection as an "Extraordinary" Remedy

An in personam remedy—coupled with the threat of enforcement through the court's contempt authority—may be the only recourse a creditor has against a debtor who is able to pay a judgment but refuses to do so. A creditor may use a debtor's examination or a turnover order against a debtor for important and legitimate reasons: to uncover the location of intangible assets, or to force a recalcitrant debtor to forfeit assets, using the judge's contempt authority as a critical nuclear option. O.J. Simpson,[90] familial support obligors,[91] and fraud defendants[92] have all been the subjects of in personam debt collection actions.

Creditors and commentators have long acknowledged, however, that in personam debt collection actions—proceedings that utilize the state's power of imprisonment to help enforce private debts—are inherently coercive. In 1886, an author of a treatise on supplementary proceedings remarked that creditors "often resorted to [these remedies] where it is evident that the judgment debtor has no property, but merely as an experiment to try to frighten or harass him to pay something on the judgment or otherwise."[93] More recently, Illinois attorneys described citations to discover assets as an "extraordinary remedy" that should not be used as a "club to . . . bludgeon a judgment debtor into settlement of judgments or decrees which he is without property to pay," nor "used to deal with assets which are known to the judgment creditor and can be reached by ordinary means of enforcing a judgment."[94] Elizabeth Toben and Professor Bradley Toben have observed that in personam remedies have "readjust[ed] the balance of debtor-creditor relations,"

90. *Simpson Must Turn Over Heisman, $500,000 in Valuables*, CNN.COM (March 27, 1997), http://edition.cnn.com/US/9703/27/simpson.order/index.html.

91. *See, e.g.*, *In re* Marriage of Pope-Clifton, 823 N.E.2d 607 (Ill. App. Ct. 2005) (following civil contempt finding against husband for failure to pay child support, divorced wife filed citation to discover assets, resulting in freezing of husband's credit union assets).

92. *See, e.g.*, Ohi-Rail v. Barnett, No. 09-JE-18, 2010 WL 1328524, at *1 (Ohio Ct. App. 2010).

93. DANIEL S. RIDDLE & E. FITCH BULLARD, THE LAW AND PRACTICE IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION, at v (3d ed. 1886).

94. Jenner et. al, *supra* note 45, § 2-1402.

resulting in "nothing short of an unmitigated boon for judgment creditors."[95]

In the sections that follow, this Article discusses specific debtor behaviors and characteristics of modern in personam proceedings that increase the risk of excessive creditor leverage: (1) The ability of creditors in many states to institute in personam actions against any debtor, regardless of her ability to satisfy the judgment; (2) the high volume and informality of these proceedings; and (3) debtors' passivity, debtors' lack of sophistication, and lapses in key procedural protections, including, for example, the failure of courts to adequately inform debtors about their exemption rights.

Many of these problems—including threats to exempt property, the informality of debt collection procedures, and debtor passivity—are present in other areas of debt collection.[96] These manifestations of weaknesses in debtor protections undoubtedly merit independent scrutiny. This Article focuses specifically on in personam proceedings, however, since the more general problems complicating many debt collection actions—coupled with specific problems in the laws and procedures governing in personam actions—raise the stakes for in personam debtors in a singular way. Because in personam proceedings threaten debtors' liberty, defects in debtor protections in this area trigger particularly dire and palpable harms.

B. An "Extraordinary" Remedy and Its Extraordinarily Ordinary Use Against Debtors

State laws governing in personam remedies fall into two general categories: (1) those that require judgment creditors[97] to unsuccessfully attempt execution before pursuing in personam

95. *See, e.g.*, Toben & Toben, *supra* note 35, at 197.

96. *See, e.g.*, David Gray Carlson, *Critique of Money Judgment Part Two: Liens On New York Personal Property*, 83 ST. JOHN'S L. REV. 43, 134–35 (2009) (describing New York law that insulates from liability banks that allow creditors to garnish accounts containing exempt funds); Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims In Arbitration and In Court*, 7 HASTINGS BUS. L.J. 77, 98–99 (2011) (describing in debt-collection arbitration study the strong relationship between a debtor's failure to appear and the creditor-claimant's likelihood of winning).

97. The term "judgment creditor" refers to a creditor who has successfully sued and recovered a judgment against a debtor (now a "judgment debtor"). Letter from the Federal Trade Commission to Senator Al Franken 4 (Aug. 16, 2010), [hereinafter FTC-Franken Letter], *available at* http://caveatemptorblog.com/wp-content/uploads/FTC-Response-to-Sen-Franken-2010.08.16.pdf.

actions ("in rem states")[98] and (2) those that allow creditors to pursue in personam debt collection actions immediately after obtaining the judgment ("in personam states").[99] For example, a judgment creditor in an in rem state must first ask the sheriff to attempt a levy on the debtor's property (e.g., a car) before the creditor may summon the debtor to court to answer questions about her income and assets in an in personam proceeding. In contrast, after an unsecured creditor in an in personam state recovers a judgment, that creditor may proceed immediately to the use of a debtor's examination or other in personam action.

The requirement in in rem states that creditors first attempt execution before instituting in personam proceedings was not—at least originally—predicated on consumer protection principles. Rather, this prerequisite is a vestige of the historic division between law and equity.[100] Before the merger of law and equity, a creditor would have to exhaust legal remedies (like execution) before seeking equitable relief (including in personam actions).[101]

Although this prerequisite is inefficient from the creditor's perspective, this inefficiency provides some indirect protection to debtors. If a creditor must first expend time and resources in an unsatisfied execution, that creditor, absent a reasonably high likelihood of payment, is more likely to abandon its collection efforts.

Professor William Whitford and others have criticized in rem states' prerequisite of an unsatisfied execution as illogical and inefficient.[102] Under this view, all states should permit creditors to

98. *See, e.g.*, IND. CODE § 34-55-8-1 (2011); MINN. STAT. § 575.02 (2010); MO. REV. STAT. § 513.380 (2010); N.H. REV. STAT. ANN. § 498:8 (2011); OHIO R. CIV. P. 69; Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 273 (1971) ("Statutes in several states forbid the use of contempt imprisonments to enforce money judgments that can be enforced in other ways.").

99. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-1402 (West 2010); MICH. COMP. LAWS § 600.6,104 (2010). Texas's turnover statute is a cross between these two general categories. Under the Texas statute, a creditor cannot seek the turnover of property that can be readily attached or levied on by ordinary legal process, but the creditor need not have actually unsuccessfully attempted execution before seeking turnover of a debtor's assets. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (West 2008).

100. Alfred F. Conard, *An Appraisal of Illinois Law on the Enforcement of Judgments*, 1951 U. ILL. L.F. 96, 108–10.

101. *See supra* notes 67–69 and accompanying text.

102. *See, e.g.*, Conard, *supra* note 100, at 108; Whitford, *supra* note 27, at 1096–97 (describing the prerequisite of an unsatisfied execution as "an unnecessary costly technicality").

seek in personam remedies independent of execution, since proceedings like debtor's examinations allow creditors to determine whether debtors, in fact, possess any leviable property. Presumably, debtors are the best source of information about their assets, and it makes sense to summon them to court to determine what property they own and where that property is located. If a creditor has insufficient knowledge about the debtor's money and property, execution may be a waste of time and resources, since creditors may not know whether it is worth it to attempt execution in the first place, or to which assets to direct the sheriff.[103]

By contrast, in an in personam state, where creditors can initiate proceedings like debtor's examinations immediately after obtaining a judgment against the debtor.[104] In these states, after a consumer defaults, many creditors (either original creditors or debt buyers) sue debtors on the underlying debt, recover judgments, and institute in personam proceedings without first determining whether or not the debtor has sufficient nonexempt assets to satisfy a potential judgment.[105] This strategy makes sense, given creditors' incentives at state law, which, depending upon the size of the lawsuit and the costs of legal process, favor speed over precision.

To maximize its chances of a recovery in state law's "race of the diligent,"[106] an unsecured creditor must rush to obtain a judgment and to perfect its lien against the debtor's property.[107] The institution of an in personam action is a quick and relatively convenient way for a creditor to stake its claim.[108] Generally, the

103. Whitford, *supra* note 27, at 1097 ("[T]he requirement is a purposeless technicality, since a sheriff will not levy under a writ unless the creditor directs him to property subject to execution"); *see also* Donna Brown, *Post Judgment Remedies Tips for Litigators from a Creditors' Rights Attorney*, 32 THE ADVOC. (Texas) 63, 64 (2005) (noting that sheriffs "appreciate receiving as much information on the judgment debtor as possible to assist them in the levy").

104. *See* sources cited *supra* note 99.

105. Telephone Interview with Alan Alop, Deputy Dir., Legal Assistance Found. of Metro. Chi. (Dec. 2, 2010); Interview with Sarah Grincewicz, Esq., The Albert Law Firm, in Chicago, Ill. (Jan. 7, 2010); *cf.* HOBBS, *supra* note 2, § 1.4.3, at 4 (stating that while a debt collector's reasonable objective is to target the relatively few delinquent consumers who can afford to repay their debts, some collectors aggressively pursue poor debtors).

106. *See* sources cited *supra* note 21.

107. Whitford, *supra* note 27, at 1066–67 (describing how state law priority rules encourage unsecured creditors, faced with an insolvent or potentially insolvent debtor, to resort to coercive execution more quickly than would be necessary if the rules did not favor the creditor who first obtains a lien in the debtor's property).

108. In Illinois, for example, a lien created through service of a citation to discover assets

service of the summons to participate in an in personam debt collection action creates a lien on the debtor's nonexempt personal property and enjoins the debtor from disposing of it.[109]

Somewhat paradoxically, it can be economical for creditors (particularly debt buyers, whose profit model relies on a fast, high-volume collection process)[110] to move quickly without taking the time to evaluate their chances of repayment. Delay in collection can result in increased litigation costs. In addition, delay can reduce a creditor's prospects of successful collection, since a debtor might experience further financial setbacks, leave the jurisdiction and more easily dodge creditor communications, declare bankruptcy,[111] or waste or transfer nonexempt assets.[112]

Since the debtor's examination functions as an independent discovery device, creditors often initiate in personam proceedings without considering a specific debtor's ability to satisfy the judgment.[113] Suing an insolvent debtor may be cheaper than determining whether she is truly incapable of repaying her creditor.[114] Moreover, even if creditors wanted to initiate a potentially time-consuming prejudgment discovery process, they generally could not do so in small claims cases.[115]

expires in six months, giving the creditor a relatively long period of time within which to enforce the lien. *See* 4A BARRY LEVENSTAM ET AL., ILL. CIV. LITIG. GUIDE § 6:11 (2009 ed.).

109. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-1402(m) (West 2010).

110. *See* Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 726 (2006) (noting how the emergence of the modern debt-buying industry has coincided with the ability of firms to purchase large portfolios of debt and then to fully exploit their technology and personnel to reach thousands of debtors each day).

111. Because of the risk that the bankruptcy trustee will avoid preferential payments, 11 U.S.C. § 547 (2006), a creditor has an interest in seeing at least 90 days elapse between the debtor's payment to that creditor and the date of the bankruptcy petition.

112. Whitford, *supra* note 27, at 1062.

113. Barauski, *supra* note 13.

114. Whitford, *supra* note 27, at 1061 n.51 ("It is not costless to a creditor to determine whether a debtor is a 'won't pay' or a 'can't pay,' and as a consequence creditors will sometimes fruitlessly harass or sue a 'can't pay' because it is cheaper than determining the debtor's true status.").

115. *See, e.g.*, IND. RULES CT., SMALL CL. 6, *available at* http://www.in.gov/judiciary/rules/small_claims/index.html ("Discovery may be had in a manner generally pursuant to the rules governing any other civil action, but only upon the approval of the court and under such limitations as may be specified. The court should grant discovery only upon notice and good cause shown and should limit such action to the necessities of the case.").

Collection lawyers also know that securing a judgment is relatively easy[116] and inexpensive, particularly because the vast majority of debt collection actions result in default judgments.[117] The late Professor Caplovitz described the initiation of a lawsuit as a riskless proposition for creditors, since "the creditor almost invariably wins, mainly because the debtor fails to show up."[118] One legal aid attorney posits that debt collection attorneys' financial incentives (i.e., their interest in maximizing litigation revenue by bringing collection actions) may explain why many debtors with only exempt assets find themselves the subjects of in personam proceedings.[119]

Creditors' incentives to sue debtors and institute in personam actions without first evaluating the likelihood of repayment inevitably result in some imprecision: debt collectors will invariably target some poor, unsophisticated, and/or judgment-proof debtors.[120] From the debtor's perspective, this can be problematic, since debtors are often ill-prepared to respond to the initiation of in personam actions.

In addition, in spite of the severity of the sanction that gives an in personam action its teeth, in personam remedies are often initiated and executed on a high-volume basis and with a striking degree of informality. For example, in an extremely busy post-judgment courtroom,[121] which, according to one estimate, issues over 40,000 body attachments a year,[122] debtor's examinations are conducted outside of the judge's presence[123] and are not memorialized through court reporting. Many—if not most—debtors are unrepresented,[124] and creditors' attorneys have no obligation to inform debtors of their

116. Interview with John N. Dore, Esq., in Chi., Ill. (Nov. 17, 2010).

117. FTC, *supra* note 5, at 7.

118. David Caplovitz, *The Husk of Puff and the Kernel of Truth: A Critique of Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 33 U. PITT. L. REV. 672, 675 (1972).

119. Yang, *supra* note 83.

120. A judgment-proof debtor is one with no nonexempt or unencumbered assets. Whitford, *supra* note 27, at 1055.

121. According to various attorneys at the CARPLS Self-Help Collection Desk, the First District Municipal Department of the Circuit Court of Cook County, Illinois is the busiest postjudgment courtroom in the country.

122. Interview with Clerk, First Dist. Mun. Dep't of the Circuit Court of Cook Cnty., Ill., in Chi., Ill. (Jan. 7, 2010).

123. Creditors' attorneys conduct the debtor's examinations in the hallway outside of the courtroom.

124. *See* Barauski, *supra* note 13.

exemption rights.[125] This combination of factors raises serious concerns about the adjudicative fairness of the in personam debt collection process.

C. Predictable Lapses in Debtors' Behavior

1. Showing up is half the battle: How debtors' absence raises the stakes

One of the most intractable problems in debt collection is the debtor's failure to participate in the legal process. Many debtors are absent at every stage of debt collection, ranging from actions on the debt (which in as many as sixty to ninety-five percent of cases result in a default judgment[126]) to collection actions like debtor's examinations.[127]

Why exactly debtors fail to participate in the debt collection process is a subject of debate and empirical uncertainty.[128] Consumer advocates cite as likely causes various factors largely outside of the debtor's control: sewer service,[129] the incomprehensibility of communications from the court, debtors' trepidation about the legal system, lack of access to legal representation, work and family constraints, and a lack of transportation.[130] Creditors, in contrast, argue that debtors' absence is, in effect, an implicit admission of liability.[131] Under this view, debtors choose not to participate in the process after concluding that defending against an action on a valid debt (or otherwise participating in the collection process) would be futile.[132]

A debtor's failure to participate in an action on her defaulted debt is problematic, since the debtor forfeits an opportunity to raise significant defenses like the expiration of the statute of limitations.[133] The consequences of a failure to participate in an in personam proceeding, however, can be even more severe. While creditors

125. Fullerton, *supra* note 16.

126. *See, e.g.*, FTC, *supra* note 5.

127. Some estimate that debtors show up to in personam debt collection actions about fifty percent of the time. Caplovitz, *supra* note 118, at 675–76.

128. FTC, *supra* note 5.

129. Sewer service occurs when a process server fails to serve the consumer but falsely asserts that he has successfully done so. FTC, *supra* note 5, at 8 n.22.

130. *Id.* at 7, 12.

131. *Id.* at 7.

132. *Id.*

133. *Id.* at iii.

benefit from the ability to combine discovery and collection in one in personam action, this combination can dramatically increase the coerciveness of these proceedings. If a debtor fails to show up at a debtor's examination and the court issues a rule to show cause,[134] the debtor may eventually be arrested or asked to surrender herself[135] to local law enforcement authorities.[136] Based on debtors' track record of passivity in the debt collection process,[137] creditors can anticipate that many debtors will fail to show up to court and that judges will issue many body attachments or bench warrants against absentee debtors.

Once a debtor is threatened with imprisonment or is actually arrested, her leverage drops markedly. Although a body attachment issued against a "no-show" debtor is an attempt to coerce compliance with the *discovery* feature of in personam proceedings, a debtor may interpret this sanction as punishment for her failure to pay a debt.[138]

Notwithstanding any possible defenses to the underlying debt, a debtor facing imprisonment is more likely to feel pressure to settle with the creditor or post bond through any available means: for example, by turning over exempt property,[139] taking out a payday loan or cash advance on her credit card,[140] or borrowing money from friends or family. As the Federal Trade Commission (FTC) has acknowledged, judgment debtors arrested for nonappearance "may be willing to pay the bail (and indirectly the judgment) using assets (such as Social Security payments) the law prohibits creditors from garnishing or otherwise obtaining to satisfy a judgment."[141]

134. A rule to show cause (also known as a "show-cause" order or an "order to show cause") is a document instructing the debtor to appear in court and explain why she should not be held in contempt.

135. Caplovitz, *supra* note 118 (explaining that debtors usually surrender themselves voluntarily to law enforcement officials).

136. Whether or not law enforcement officials actually arrest debtors for lack of compliance depends on factors that vary significantly from state to state, and even from county to county. *See supra* notes 83–86 and accompanying text.

137. *See* discussion *supra* Part III.C.1.

138. I refer to this problem as "contempt confusion." *See* discussion *infra* Part IV.B.

139. FTC-Franken letter, *supra* note 97, at 6.

140. *See, e.g.*, *Body Attachment*, FREEADVICE LEGAL FORUM (Mar. 19, 2009 8:36 AM), http://forum.freeadvice.com/civil-litigation-46/body-attachment-459501.html (Maryland debtor who had been served with body attachment order indicated that debtor planned to take out payday loan to cover $500 bond).

141. FTC-Franken letter, *supra* note 97, at 6.

The legal system must allocate parties' rights as efficiently as possible, a reality a consumer must acknowledge at the moment she borrows money and assumes the risk that she will default on her obligations. Provided debtors are properly served,[142] one might argue that debtors who opt out of the legal process by failing to respond to court orders to participate in in personam proceedings voluntarily forfeit an opportunity to assert their defenses and their bargaining power.

Debtors' failure to participate at the judgment and collection stages, however, may be partially explained by the ease with which one can fall into the role of a passive debtor. Debtors face a barrage of letters and calls from debt collectors for months or even years, and—particularly when a debtor is unable to pay—a debtor may understandably want to cut off all contact with her creditors (perhaps by screening her phone calls or even by changing her phone number or address). Once lawsuits begin—and even when debtors receive summonses from the court to participate in in personam actions—a debtor may not easily overcome her inertia and, in some cases, a degree of learned helplessness.

2. Debtors' unfamiliarity with exemptions

While consumers are a heterogeneous group, many, if not most, exhibit a striking lack of financial sophistication. Many consumer borrowers, for example, are unfamiliar with important borrowing terms, including the true cost of credit.[143] In the area of debt collection, debtors' lack of sophistication is reflected, among other things, in their unfamiliarity with their state and federal exemption rights.[144]

Exemption laws, which vary significantly from state to state, protect specific amounts of certain categories of property from creditors' collection efforts. For example, federal and state exemption

142. Consumer advocates contend, however, that improper service, or "sewer service," may contribute to consumers' absence from debt collection actions. *See supra* note 129 and accompanying text.

143. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 12–13 n.18 (2008).

144. Attorneys who represent both creditors and debtors, as well as judges, acknowledge that debtors largely seem unfamiliar with their exemption rights. *See, e.g.*, Yang, *supra* note 83; Alop, *supra* note 105; Barauski, *supra* note 13; Interview with Ashley B. Highland, Supervising Attorney, CARPLS (Jan. 7, 2011).

laws generally insulate Social Security payments, retirement accounts, some wages, veterans' benefits, unemployment compensation, workers' compensation, alimony and child support, and some personal property.[145] Courts have articulated exemption statutes' broad and fundamental public policy goals: "(1) to provide the debtor with enough money to survive; (2) to protect the debtor's dignity; (3) to afford a means of financial rehabilitation; (4) to protect the family unit from impoverishment; and (5) to spread the burden of a debtor's support from society to his creditors."[146]

In spite of compelling policy justifications for the protection of exempt property, it is easy for a debtor—either voluntarily or unwittingly—to forfeit exempt property to a creditor. Even when a debtor is judgment-proof, the debtor is not without assets; rather, a judgment-proof debtor's assets are exempt or encumbered.[147] "Nothing in the exemption laws . . . prevents the debtor from making a voluntary payment from otherwise exempt assets."[148]

Moreover, although a creditor has no property interest in a debtor's exempt property,[149] a debtor's right to exempt property is not necessarily "self-executing."[150] In other words, the debtor must generally affirmatively assert her exemption rights, which requires the debtor to have (1) received notice of her exemption rights (or learned about them through other means, as from an attorney[151]), and (2) understood those rights and how to assert them. Because debtors must affirmatively claim certain property as exempt, and exemption laws do not prohibit debtors from making "voluntary" payments to creditors out of exempt property, it may make financial sense for collectors to seek payment from even the poorest of debtors.

While exempt assets are thus always vulnerable to creditor collection efforts, the subjects of in personam proceedings may be

145. *See* SHELDON ET AL., *supra* note 3, app. F at 421–54.

146. SHELDON ET AL., *supra* note 3, at 239. *But see* William T. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779 (1974) (arguing that some exemptions do not help guard against destitution, but instead protect property held exclusively by members of the middle and upper classes).

147. Whitford, *supra* note 27.

148. *Id*.

149. *See, e.g.*, SHELDON ET AL., *supra* note 3, § 12.3.2, at 254.

150. BROWN, *supra* note 29, § 6:70.

151. Many debtors who participate in in personam proceedings, however, are unlikely to be represented. *See* Barauski, *supra* note 13.

particularly likely to forfeit exempt property to collectors. Regardless of the validity of the underlying judgment or the debtor's entitlement to specific exemptions, a debtor threatened with imprisonment may feel exceptional pressure to satisfy the debt collector's claim.[152] As described in a Maryland collection practice guide, "[b]ody attachments are usually rather effective, as most debtors do not like to be imprisoned and suddenly find funds for bonds."[153] Thus, the coercive nature of in personam collection proceedings—coupled with debtors' lack of familiarity with their exemption rights—increases the likelihood that debtors will forfeit exempt property to creditors.

The risk that debtors will forfeit exempt property to creditors raises normative concerns, since federal and state exemption laws are intended to protect debtors' livelihood.[154] A debtor (especially a low-income debtor) facing one or more collection attempts can seek refuge in exemption laws, which are designed to protect debtors and their families from destitution, and to provide debtors with a means of financial rehabilitation.[155] These rights are not purely humanitarian or magnanimous, however. Exemption laws prevent debtors from becoming charges of the state who rely primarily or exclusively on taxpayer support.[156] Thus, it is crucial to ensure that debtors—for whose benefit exemption laws were implemented and whose effective utilization of these rights benefits society as a whole—do not unwittingly abandon these protections.

IV. REDUCING THE HARMS OF AND IMPROVING THE LAWS GOVERNING IN PERSONAM DEBT COLLECTION

In this section, I first discuss the psychological, familial, and social consequences of in personam proceedings—consequences created and exacerbated by the specific debtor behaviors and the

152. *See supra* note 138 and accompanying text.

153. MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, PRACTICE MANUAL FOR THE MARYLAND LAWYER § 6.33 (3d ed. 2006) [hereinafter PRACTICE MANUAL].

154. SHELDON ET AL., *supra* note 3, § 12.2.1, at 239.

155. *Id.*

156. *E.g.*, *In re* Hersch, 23 B.R. 42, 45 (Bankr. M.D. Fla. 1982) ("[E]xemption laws have always been liberally construed in favor of the claim in order to achieve the beneficial purpose for which it was created: to preserve home and shelter for the family, so as to prevent the family from becoming a public charge.").

unique qualities of in personam proceedings discussed above.[157] I then analyze the incongruity between two realities of in personam proceedings: (1) the fact that most courts have labeled "nonpayment contempt" as illegal but have regarded "nonappearance contempt" as legal and largely benign, and (2) the risk that both sanctions pose similar harms to debtors and society.

While recent proposed amendments to debt collection laws would help remedy fundamental defects in the collection system, these proposals would fail to directly address specific problems with in personam debt collection actions. Thus, to fill in key regulatory gaps, this Article recommends two fundamental reforms that are necessary to establish greater equilibrium between debtors and creditors in in personam proceedings.

A. The Normative Harms of Excessively Coercive Debt Collection

In crafting modern debt collection law, Congress recognized that a collection system unchecked by procedural protections for debtors risks contributing to societal dysfunction by triggering various psychological, financial, and familial harms and externalities.[158] Congress's passage of the Fair Debt Collection Practices Act (FDCPA) was motivated in large part by a finding that debt collector harassment contributed to a number of social ills, including personal bankruptcies, marital instability, job losses, and invasions of personal privacy.[159] In an attempt to reduce these harms,

157. *See supra* Parts III.A–C.

158. *See, e.g.,* 15 U.S.C. § 1692(a) (2006) (listing in congressional findings and declaration of purpose harms caused by abusive debt collection practices). In finding that abusive debt collection contributes to numerous social harms, *id*., the FDCPA's supporters concluded that most debtors defaulted on their loan obligations involuntarily, not opportunistically. S. REP. 95-382, at 1697 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1977 WL 16047 ("One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.' In fact, however . . . the number of persons who willfully refuse to pay just debts is miniscule."). This proposition, however, is part of an intractable debate in bankruptcy and consumer law about individuals' ability to control their financial lives. *See, e.g,* Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1946–49 (2011) (describing the longstanding debate about whether a reduction in the "stigma" associated with bankruptcy had contributed to a historic and dramatic increase in the number of individuals seeking bankruptcy relief).

159. 15 U.S.C. § 1692(a) (listing in Congressional findings and declaration of purpose specific social problems caused by abusive debt collection practices).

the FDCPA prohibits third-party debt collectors from engaging in specific abusive, misleading, or unfair conduct.[160]

Some of these prohibited practices reflect a tendency among certain debt collectors to conflate civil and criminal liability in an attempt to shame or scare debtors into repaying debts.[161] For example, a debt collector may not represent that nonpayment of any debt will result in arrest or imprisonment unless such enforcement is lawful,[162] may not falsely imply that the consumer committed any crime or other conduct in order to disgrace the consumer,[163] and may not solicit a postdated check[164] from a debtor for the purpose of threatening or instituting criminal prosecution.[165]

The worst harms suffered by debtors in the in personam debt collection context—ones that conflate civil and criminal liability,[166] inflict psychological stress,[167] and increase the risk of creditor coercion[168]—are precisely those types of harms that the FDCPA has targeted. Consider, for example, the experiences of two in personam debtors. One "no-show" debtor was imprisoned for two nights after being handcuffed in front of his children.[169] Although he acknowledged the debt was valid, the debtor described the experience as "[t]he scariest thing that ever happened to [him]."[170] Another debtor suffered serious chronic psychological stress—

160. *See, e.g.*, NICKLES & EPSTEIN, *supra* note 22, at 34.

161. *See, e.g.*, *id.* at 1 (describing how collection practices are designed around "debtor-held notions of morality (including duty and guilt)" and "principles of human psychology (including duty, guilt, and fear of embarrassment and loss)").

162. 15 U.S.C. § 1692(e)(4).

163. *Id.* § 1692(e)(7).

164. Many have raised concerns that debt collectors misuse civil or criminal dishonored check statutes, or "bad check" laws, to extract payment from debtors. *See, e.g.*, SHELDON ET AL., *supra* note 3, § 9.1, at 145. These statutes have a legitimate goal of deterring individuals from writing checks that will be dishonored. *Id.* Some debt collectors, however, deliberately solicit postdated checks from financially distressed consumers, knowing that the possibility of dishonored check prosecution provides the collector with powerful collection leverage. *Id.* As one court observed, bad check laws "lend themselves to use by the unscrupulous who seek only payment of debts and have no interest in criminal prosecution other than . . . [to collect] money allegedly due them." Tolbert v. State, 321 So. 2d 227, 232 (Ala. 1975).

165. SHELDON ET AL., *supra* note 3, § 1692(f)(3).

166. *See infra* notes 199–201 and accompanying text.

167. *See infra* notes 174–176 and accompanying text.

168. *See supra* notes 89, 93–95, 152 and accompanying text.

169. *See, e.g.*, Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, WALL ST. J., Mar. 17, 2011, at C1.

170. *Id.*

including recurring panic attacks, an inability to travel, and claustrophobia—after being arrested following her failure to appear at a debtor's examination.[171]

In personam debt collection, moreover, can have a large impact on debtors' already precarious financial lives. To the extent that in personam proceedings place pressure on debtors to borrow money from friends or family or from fringe lending sources (often at exorbitant interest rates[172]), debtors may dig themselves deeper into a financial morass.[173] Debtors faced with the prospect of even temporary incarceration might agree to pay debts to avoid work and childcare disruptions—concerns that might explain debtors' failure to appear in court in the first place.[174]

Those debtors who suffer the most serious financial and psychological consequences of in personam debt collection would presumably be prime candidates for bankruptcy relief. Bankruptcy—a critical safety valve for financial failure—would provide the immediate protection of an automatic stay[175] to debtors seeking a reprieve from the most coercive effects of in personam proceedings. The automatic stay functions as a "time-out," forcing creditors to stop all collection activity in an effort to provide the debtor with "breathing room."[176] Likewise, in an attempt to promote equality of distribution among all similarly situated creditors, a bankruptcy filing requires creditors who received payment from the debtor in the ninety-day prefiling period to return that money to the trustee.[177]

171. Caldwell v. McMahan's of Lancaster, Inc. (*In re* Caldwell), No. 05-66074-fra13, Adv. No. 06-6270-fra, 2006 WL 3541931, at *2 (Bankr. D. Or. Dec. 7, 2006).

172. *See* Martin, *supra* note 12, at 564.

173. *See, e.g.*, SHELDON ET AL., *supra* note 3, § 2.1.6, at 9 (describing generally how debt collection litigation can have serious consequences for the consumer's—especially a low-income consumer's—assets and income).

174. *See supra* note 130 and accompanying text.

175. 11 U.S.C. § 362 (2006); *see, e.g.*, *Caldwell*, 2006 WL 3541931, at *1–*2 (awarding debtor $50,000 for damage suffered when creditor, in violation of automatic stay, sought debtor's arrest after debtor's failure to appear at debtor's examination); *In re* Atkins, 178 B.R. 998, 1001, 1010 (Bankr. D. Minn. 1994) (creditor was found to have willfully violated the automatic stay in a case where the debtor was arrested on the strength of a bench warrant issued in pre-bankruptcy proceeding).

176. *In re* Chesnut, 422 F.3d 298, 301 (5th Cir. 2005) ("The automatic stay . . . provid[es] 'breathing room' for a debtor and the bankruptcy court to institute an organized repayment plan.").

177. 11 U.S.C. § 547 (2006).

Surprisingly, however, bankruptcy might not be a viable option for many debtors facing in personam collection actions. Professor Richard Hynes has found that relatively few debtors who have been sued in state court ultimately file for bankruptcy.[178] Hynes explains that these nonfiling debtors tend to be poorer than most bankruptcy filers, suggesting that nonfilers may be too poor to file for bankruptcy.[179]

Hynes's conclusion is consistent with the results of a study conducted by Professor Michele White, who found that many debtors in serious financial distress do not file for bankruptcy.[180] According to Professors Katherine Porter and Ronald Mann, debtors tend to file once they have saved up enough money to pay for bankruptcy attorneys' fees and court costs.[181]

These findings suggest that the cost of a bankruptcy filing might deter even those facing in personam actions from seeking bankruptcy protection. If debtors are too poor to seek refuge in bankruptcy law, these individuals might choose an alternate path and opt to pay the most aggressive creditors from "last resort" sources, like exempt assets, loans from family and friends, and fringe credit lenders.[182]

Thus, as with many of life's complications, the harms of in personam debt collection might be borne most heavily by the poor, raising serious normative concerns. Under traditional law and economic theory, one might postulate that a creditor would have little interest in instituting in personam litigation against poorer debtors, since, presumably, a creditor would be less likely to recoup the costs of legal action from a debtor with fewer assets to her name. Scholars, however, have established that this proposition is often untrue. It may, in reality, be easier for creditors to sue a debtor than to determine if she is a viable litigation target.[183]

Because those debtors who suffer the worst harms of in personam debt collection might be too poor to seek refuge in

178. *See, e.g.*, Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 4–5 (2008) (finding that less than twenty percent of Virginia consumers sued in 2001 filed for bankruptcy by 2006).

179. *See id.* at 6.

180. *See* Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206 (1998).

181. *See* Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 290 (2010).

183. *See supra* notes 139–141 and accompanying text.

183. *See supra* note 114 and accompanying text.

bankruptcy, it is critical to determine how in personam debt collection procedures can be improved. The goals must be to simultaneously preserve in personam debt collection actions as a necessary "nuclear option" exercisable against debtors who are able but unwilling to repay their judgment creditors, and to prevent creditors from using these proceedings more coercively and indiscriminately against less sophisticated, sometimes judgment-proof debtors.

B. "Contempt Confusion": Conflating Imprisonment for Failure to Show Up and Imprisonment for Failure to Pay Up

The twin goals of in personam proceedings—discovery and collection—create efficiencies for debt collectors attempting to extract payment from debtors as quickly and as inexpensively as possible. Yet, due to various factors discussed above—the structure of in personam remedies, creditors' incentives in a competitive collection process, and unsophisticated debtors' predictable responses to the initiation of these proceedings[184]—in personam proceedings appear to function far more coercively in practice than courts and regulators have been willing to concede.

In this section, I discuss how the legal system treats very differently two separate sanctions that, in reality, generate similar consequences and harms: (1) contempt for failure to appear in court or for failure to otherwise comply with requests for information ("nonappearance contempt") and (2) contempt for failure to turn over money or property to the creditor ("nonpayment contempt").

1. How the law treats nonpayment and nonappearance contempt differently

Only about one-third of states authorize nonpayment contempt,[185] a sanction intended, among other things, to coerce an able but unwilling debtor to repay her creditor. More and more courts have grown reluctant to use their contempt authority to threaten to imprison even decidedly "can-pay" debtors for failure to comply with courts' directives to turn over money or property to creditors.[186] These courts have concluded that this exercise of their

184. *See* discussion *supra* Parts III.A–C.

185. *See* Silver-Greenberg, *supra* note 169, at C1.

186. *See, e.g.*, Carter v. Grace Whitney Props., 939 N.E.2d 630, 635–36 (Ind. Ct. App.

contempt authority is unconstitutional,[187] since it is functionally equivalent to imprisoning debtors for default, a practice illegal in every state.[188]

Increasingly, the prohibition on imprisonment for debt default has been equated with a consumer protection rule,[189] one largely consistent with the historical movement in the law toward reasonable limitations on the harshness of collection tactics.[190] By regarding courts' use of their contempt authority as illegal imprisonment for debt default, courts continue to breathe life into this constitutional prohibition, validating public perceptions of the rule as a form of protection against aggressive collection practices.

Even though most courts ban judges' exercise of their contempt authority to enforce money judgments, all courts generally authorize the use of nonappearance contempt in in personam proceedings.[191] The rationale of nonappearance contempt is ostensibly clear and

2010); *In re* Byrom, 316 S.W.3d 787, 791 (Tex. Crim. App. 2010).

187. *See, e.g.*, Pineiro v. Pineiro, 988 So. 2d 686, 687 (Fla. Dist. Ct. App. 2008) (holding that enforcing through contempt debts other than familial support obligations violates Florida's prohibition against imprisonment for debt); Pettit v. Pettit, 626 N.E.2d 444, 447 (Ind. 1993) ("[T]he general rule that money judgments are not enforceable by contempt remains unaffected by our decision today."); *Carter*, 939 N.E.2d at 635 (noting that because parties may enforce obligations to pay a fixed sum of money through execution, all forms of contempt are generally unavailable to enforce a monetary obligation); Brown v. Brown, 412 A.2d 396, 403 (Md. 1980) ("[I]ncarceration is not an available remedy for the enforcement of money decrees . . . ."); *Byrom*, 316 S.W.3d at 792 (in habeas proceeding, holding unconstitutional a contempt order requiring independent executor of estate to pay $85,000 into court registry or be jailed for contempt).

188. *See* SHELDON ET AL., *supra* note 3, at 346–47.

189. *See* STANLEY G. HILTON, TO PAY OR NOT TO PAY: INSIDER SECRETS TO BEATING CREDIT CARD DEBT AND CREDITORS 184 (2003) ("The debtor's prison was transplanted from the mother country to the United States in the early decades of our country's existence. It eventually found itself cast into the ash heap of history and condemned as an 'inhumane' and irrational procedure for hounding debtors."); ROBIN LEONARD & JOHN C. LAMB, SOLVE YOUR MONEY TROUBLES: GET DEBT COLLECTORS OFF YOUR BACK & REGAIN FINANCIAL FREEDOM 126 (2007) ("The mere thought of debtors' prison probably sends shivers up your spine. . . . As unusual and cruel as it seems today, debtors' prison was a major collection method in the 18th and mid-19th centuries of our republic.").

190. Congress's passage of the FDCPA in 1977, for example, reflected an important change in regulators' approach toward debt collection abuses. According to consumer advocates, Congress—in passing the FDCPA—acknowledged that most delinquency is not intentional. *See* HOBBS, *supra* note 2, § 1.4.2, at 3. Under this view, the Act rejects "the myth of substantial numbers of deadbeats justifying draconian collection tactics." *Id.* Congress, in passing the FDCPA, acknowledged that society has an interest in imposing reasonable limitations on coercion in the debt collection process.

191. *See, e.g.*, FED. R. CIV. P. 37(b)(1) (allowing failure to comply with discovery order to be treated as contempt of court).

defensible: litigants cannot opt out of the legal system by ignoring summonses or requests for information.[192] Under this view, every citizen must be prepared to participate in the legal process if a court deems her cooperation necessary to the administration of justice.

2. The functional similarities between nonappearance and nonpayment contempt

In concluding that nonappearance contempt is necessary to the administration of justice and simultaneously rejecting nonpayment contempt as unconstitutional, the legal system is adopting a misguided position about the functional consequences of each sanction. Specifically, by treating nonpayment contempt as illegal and nonappearance contempt as legal, the law is treating the two sanctions as substantially distinguishable when, in fact, both forms of contempt can function as excessively coercive collection techniques.

Undoubtedly, there is an important legal distinction between threatening to imprison debtors for failing to show up to in personam proceedings and threatening to incarcerate debtors for failing to forfeit money or property to creditors. The specific and immediate objective of nonappearance contempt is to put pressure on the debtor to appear in court and provide information about what assets she owns and where they are located. A debtor may purge herself of nonappearance contempt by physically appearing at the courthouse and truthfully answering questions about her property—a seemingly reasonable, non-onerous request.

In contrast, the plain goal of nonpayment contempt is to force a debtor to turn over money or property to a creditor. Even though a court may only threaten to imprison for nonpayment a debtor who, the court finds, is capable of compliance,[193] nonpayment contempt is more controversial. Nonpayment contempt, which most courts equate with the unconstitutional imprisonment for debt default, is entangled in the complicated legacy of debtors' prisons. And in a legal system that acknowledges the inevitability of financial failure,[194]

192. *See* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911) ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.").

193. *See* sources cited *supra* note 79.

194. *See* Mann & Porter, *supra* note 181, at 291 (describing bankruptcy as the United States' "institutional remedy" for financial distress).

nonpayment contempt has been perceived as an unduly harsh way to sanction a debtor.[195]

In spite of the differences in the legality and legitimacy of nonappearance and nonpayment contempt (as well as critical differences in how a debtor may purge herself of each form of contempt), ordinary debtors may be less sensitive to these distinctions. Once a "no-show" debtor is arrested or threatened with arrest, she may find it difficult to distinguish between the immediate source of the arrest threat, her failure to appear in court, and the proximate cause of the threat of incarceration: the debt default itself.

I label this problem as "contempt confusion": a nonappearance contemnor-debtor's propensity to conclude that the threat of incarceration is a punishment or sanction for failing to pay a creditor. Because of contempt confusion, the debtor may reasonably conclude that the path of least resistance in response to the institution of nonappearance contempt sanctions is to pay the debt.

Encouraging a "no-show" debtor to capitulate and turn over funds to the creditor is not *in and of itself* problematic, nor is it a message that a creditor must be discouraged from sending. Any litigant has the right to vigorously pursue legal remedies to, among other things, signal to her opponent that the litigant will be a vigilant and formidable adversary and that the costs of litigation (including the costs of attending an in personam proceeding) may render capitulation or settlement worthwhile.

If, however, a creditor can institute in personam proceedings imprecisely (without regard to the true ability of a debtor to satisfy the judgment), contempt confusion can yield consequences similar to those triggered by "nuisance value" claims in civil litigation. "Nuisance value" refers to a litigant's ability to assert a meritless claim or defense in the pursuit of a payoff that the other party sacrifices to rid herself of the bothersome litigation.[196] The other party calculates the payoff by estimating the cost of successfully

195. *See, e.g.*, Ressler, *supra* note 42, at 386–88 (expressing concerns that indefinite imprisonment for non-payment inflicts hardship on the contemnor's family and creates difficulties for contemnors who, once released, seek to return to the work force). *But see, e.g.*, Richard E. James, Note, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 143–45 (2002) (supporting the use of criminal penalties for debt default).

196. Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1850 (2004).

defending against the weak or meritless claim.[197] While the creditor's underlying claim in the in personam debt collection context is hopefully most often not meritless,[198] the creditor's *legal entitlement to the assets* that the debtor-contemnor may feel pressure to forfeit may be less clear.

Thus, courts cannot ignore the two-fold risk that (1) the court's threat to imprison the debtor for failure to appear in court places direct or indirect pressure on the debtor to capitulate and pay the underlying debt,[199] and (2) the debtor neglects her right to claim exemptions or contest the underlying debt due to information asymmetries between the debtor and the creditor, the debtor's pro se status, a lack of court oversight, and the debtor's lack of sophistication.[200]

In practice, a court that threatens to imprison a "no-show" debtor is not merely enforcing discovery obligations. The two functions of in personam proceedings—discovery and collection—are inextricably intertwined. Thus, based on the debtor's perceived costs and benefits of turning over money or property to her creditor to settle the dispute, a court's threat to imprison a debtor for *failure to appear* in court can put direct pressure on the debtor to *pay the creditor*. Even a poor or judgment-proof debtor may perceive payment as the safest option.

The risk of "contempt confusion" is precisely the type of risk that modern consumer protection laws have attempted to ameliorate. One can expect that creditors will be formidable adversaries, and that they may utilize all rights afforded to them under collection laws. Currently, however, when the state threatens imprisonment, there is a risk that a debtor, without asserting key procedural and substantive rights, will perceive payment of the debt as the path of least resistance.[201] It is at this point the law must intervene. Targeted legal

197. *Id.*

198. Consumer advocates and some judges, however, have raised concerns that some collectors regularly sue on time-barred debt, a violation of the FDCPA. FTC, *supra* note 5, at 23, 29.

199. *See supra* notes 134–38 and accompanying text.

200. *See* discussion *supra* Part III.A–C.

201. *Cf.* Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 710–11 (2008) (noting that while inequities in the legal system cannot be eradicated, debt buyers' lawsuits against unrepresented consumers on time-barred debts undermine the adversarial process).

reforms can attempt to establish a fairer bargaining relationship between debtors and creditors.

C. The Inadequacy of Proposed Reforms

Recently, various groups—most notably the FTC—have proposed significant changes to federal and state debt collection laws.[202] These groups have suggested that the aging laws governing debt collection are ripe for reform[203] given stark changes in the legal landscape, including a rising tide of collection actions[204] and the growth of the debt-buying industry.[205]

In a recent report, the FTC addressed specific concerns about the debt collection industry: (1) collectors' tendency to sue debtors with little evidence of the underlying debt;[206] (2) "sewer service";[207] (3) the high rate of default judgments;[208] (4) collectors' improper garnishment of exempt funds in debtors' bank accounts;[209] and (5) creditors' suits on time-barred debts—a prohibited "unfair" practice under the FTC Act.[210] In response to these concerns, the FTC encouraged states to pursue specific reforms, including (1) adopting measures to increase the likelihood that consumers will defend or otherwise participate in litigation;[211] (2) requiring collectors to include in their complaints more information about the underlying debt;[212] and (3) mandating that collectors disclose to consumers that filing suit on time-barred debt is illegal.[213]

202. *See* FTC, *supra* note 5; RICK JURGENS & ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 8 (2010).

203. JURGENS & HOBBS, *supra* note 202, at 1.

204. FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE—A WORKSHOP REPORT 55–56 (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

205. JURGENS & HOBBS, *supra* note 202, at 18.

206. FTC, *supra* note 5, at 16–18.

207. *Id*. at 8–12.

208. *Id*. at 7.

209. *Id*. at 31–35.

210. *Id*. at 23.

211. *Id*. at 13.

212. *Id*. at 17, 19.

213. *Id*. at 26–27. The FTC has also endorsed federal and state-level adoption of laws that would limit the amount that banks can freeze in accounts holding debtor-depositors' exempt funds (e.g., Social Security or disability payments). FTC, *supra* note 5, at iv.

These reforms are long overdue. They would help improve the accuracy and legitimacy of courts' judgments. Because of these problems—in particular, debtors' frequent failure to defend against collection actions[214]—one can be less confident that a judgment represents a true and accurate adjudication of a debtor's liability to a creditor. Frequently, the first time a debtor may learn of (or truly understand) a judgment or its consequences may be at the collection stage.[215] In essence, the judicial system's division of labor between adjudication and judgment enforcement has broken down, placing an increased burden on judges at the collection stage to help ensure that judgments are accurate.[216]

These reforms, however, would do little to directly remedy specific problems with in personam actions. While some concerns about in personam collection actions relate to doubts about the legitimacy of creditors' underlying judgments, the judgment stage is only a prerequisite to collection—and the source of only a portion of the complications plaguing debtors.

In 2010, in response to a newspaper report about problems with in personam debt collection actions,[217] Senator Al Franken introduced legislation proposing to amend the FDCPA to, among other things, provide enhanced validation notices[218] to consumers and improve the process by which consumers dispute their debts.[219] One provision of the bill, moreover, proposes to amend the FDCPA by prohibiting a debt collector from seeking a warrant for the

214. *See supra* notes 116–117 and accompanying text.

215. Highland, *supra* note 144.

216. Debtors may be able to raise substantive defenses to the judgment at the in personam collection phase, but their right to do so may be limited. E-mail from the Hon. Paul M. Fullerton, Assoc. Judge, DuPage Cnty., Ill., 18th Jud. Cir., to Lea Shepard, Assistant Professor of Law, Loyola Univ. Chi. Sch. of Law (Jan. 10, 2011) (on file with author).

217. 156 CONG. REC. S7801 (daily ed. Sept. 29, 2010) (statement of Sen. Al Franken) ("The problems in the debt collection industry first came to my attention in June, when my hometown newspaper, the Star Tribune, began a series on the subject about the story about the Minnesotans who have landed in jail because debt collectors were pursuing them for a debt.").

218. Under the FDCPA, debt collectors must provide consumers with a validation notice—a description of the debt and the debtor's right to seek verification of the debt—within five days after the collector's initial communication with the debtor. *See* 15 U.S.C. § 1692(g)(a) (2006). This requirement attempts to prevent collectors from "dunning the wrong person" (or a debtor who has filed for bankruptcy) or from "attempting to collect debts that the consumer has already paid." PRIDGEN & ALDERMAN, *supra* note 20, § 12.13, at 149.

219. S. 3888, 111th Cong. §§ 2–3 (2010).

debtor's arrest from a court or any law enforcement agency.[220] Since, however, the bill explicitly provides that this provision would have no effect on a court's inherent authority to hold a debtor in civil contempt,[221] this legislation—if reintroduced in Congress—would likely have no effect on any of the coercive in personam debt-collection practices described in this Article.

D. Recommendations

1. How turning over bond payments to creditors perpetuates contempt confusion

In many states, the law perpetuates "contempt confusion"[222]—the conflation of nonappearance and nonpayment contempt—by turning over bond funds directly to creditors. When a debtor fails to appear at an in personam action, the court may eventually issue a body attachment writ—an arrest warrant—against her. When a debtor is arrested for failing to appear in court (or is asked to surrender herself to law enforcement authorities), she must post a bond to secure her appearance at a subsequent contempt hearing. While some courts release a debtor with only a signature (or recognizance bond),[223] others require debtors to post a cash bond.[224] The bond may be set at the amount of the judgment,[225] and, after court costs are deducted, the bond money is generally turned over to the creditor in partial or full satisfaction of its judgment.[226]

220. *Id.* § 5(a).

221. *Id.* § 5(b).

222. *See* discussion *supra* Part IV.A.

223. One example of a signature bond is Illinois' "I-Bond," which allows the debtor to be released without posting any money. Cook Cnty. Pub. Defender, *Guide to the Criminal Justice System*, COOK COUNTY GOVERNMENT, ILLINOIS, http://www.cookcountygov.com/portal/server.pt/community/public_defender,_law%20_office_of/260/guide_to_the_criminal_justice_system (last visited Sept. 27, 2011).

224. Dore, *supra* note 116. If, for example, an Illinois judge sets a type of cash bond—a "D bond"—the debtor (or someone on the debtor's behalf) must post 10% of the bond amount before she will be released. Cook Cnty. Public Defender, *supra* note 223.

225. *See, e.g.*, PRACTICE MANUAL, *supra* note 153, § 6.33 (advising collection attorneys to "[b]e sure to request the bond in the amount to cover the full unpaid balance of the debt, including post-judgment interest of 10 percent, attorney's fees (if applicable), and costs"); Serres & Howatt, *supra* note 36.

226. MASS. GEN. LAWS ANN. ch. 224, § 21 (West 2000) (providing that supplementary proceedings will be dismissed and the debtor shall be released "on payment in full to the creditor" or upon "giving to the creditor . . . a bond, . . . with sufficient surety[,] . . . approved by the creditor, . . . conditioned that the debtor shall pay to the creditor the amount due on

Every state prohibits imprisonment for ordinary civil debts,[227] and, in some states, courts have concluded that use of their contempt authority to compel "can-pay" debtors to turn over money or property to creditors falls within this prohibition.[228] Even, however, in jurisdictions that ban courts from sanctioning "can-pay"[229] debtors for failure to turn over money or property to creditors, courts can (1) imprison a debtor who fails to show up at an in personam proceeding, (2) force that debtor to post a bond to secure her appearance at a subsequent contempt hearing, and (3) turn over that bond money to the collector in satisfaction of its judgment.[230] This is the functional equivalent of threatening to incarcerate a debtor for defaulting on a credit obligation. In essence, courts' practice of turning over bond money to creditors in nonappearance cases substantively transforms nonappearance cases to nonpayment contempt cases, which violates states' prohibitions on imprisonment for debt. As Professor Alan White has explained, "[i]f, in effect, people are being incarcerated until they pay bail, and bail is being used to pay their debts, then they're being incarcerated to pay their debts."[231]

This practice is harmful, since a debtor anxious to secure her release will be desperate to procure bond funds through any available means, such as through a credit card cash advance, a loan from a friend or family member, a payday loan, or forfeiture of exempt property.[232] Thus, I propose that bond money should only be used to secure a debtor's appearance at a subsequent hearing—not to expedite the creditor's collection efforts. Court procedures intended

the judgment . . . within sixty days . . . or within such longer time as the court may allow.").

227. *See supra* note 39.

228. *See supra* notes 186–187 and accompanying text.

229. In any contempt action, a person may not be imprisoned or sanctioned if she is incapable of complying with the court order. *See, e.g.*, United States v. Rylander, 460 U.S. 752, 757 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question. . . . Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." (citation omitted) (emphasis omitted)); George v. Beard, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003) ("Before an offender can be confined solely for nonpayment of financial obligations he or she must be given an opportunity to establish inability to pay.").

230. *See, e.g.*, *In re* Butler, No. 07–81047, 2011 WL 806078, at *1 (Bankr. C.D. Ill. Mar. 2, 2011).

231. Chris Serres, *Debtors and the New Breed of Collectors: Is Jailing Debtors the Same as Debtors' Jail?*, STAR TRIB. (Minneapolis), June 6, 2010, at A9.

232. *See supra* note 140.

to expedite collection efforts must not compromise other important societal interests, including the protection of exempt property and reasonable limits on the coerciveness of debt collection procedures.

2. Putting your money where your mouth is: Protecting debtors' exempt property to sustain exemption laws' normative goals

In spite of (or, perhaps, because of) its protected status, exempt property has always been vulnerable to creditors' collection efforts. Because a debtor's right to claim property as exempt requires her to be familiar with her exemption rights and how to assert them, exempt property can easily be forfeited—either knowingly or unwittingly—to creditors.[233] While this problem is not unique to in personam debt collection,[234] various groups—including the FTC, debtors' attorneys, creditors' attorneys, judges, and debtors themselves—have observed that debtors, either under pressure from courts or creditors or in ignorance of their exemption rights, are at risk of sacrificing exempt property to creditors in in personam proceedings.[235]

To protect exempt property and to safeguard the important policies advanced by exemption rights,[236] I propose that judges take an active role in ensuring that debtors do not unknowingly or involuntarily turn over exempt money or property to creditors. Specifically, I propose that once a collector has instituted an in personam proceeding, the judge be required to confirm that a debtor who transfers money or property to a collector in any in-court payment plan[237] or out-of-court settlement is not unknowingly forfeiting retirement assets or other exempt property.

Some sympathetic judges (and even some debt collectors[238]) may already prod unrepresented debtors into asserting their rights by, for example, asking debtors who appear before them whether or not the

233. *See* discussion *supra* Part III.C.2.

234. The FTC and others have expressed concern that banks and creditors are improperly freezing exempt funds in debtors' bank accounts. FTC, *supra* note 5, at iv. To remedy this problem, the FTC has encouraged states and the federal government to adopt laws limiting the amount that banks can freeze in accounts holding debtor-depositors' exempt funds. *Id.*

235. *See supra* notes 139–141 and accompanying text; sources cited *supra* note 144.

236. *See supra* note 146 and accompanying text.

237. For an example of a judge attempting to create a payment plan, see Button v. James, 909 N.E.2d 1007, 1008 (Ind. Ct. App. 2009).

238. Barauski, *supra* note 13.

debtors are choosing to claim any exemptions.[239] The probability that a particular judge will actually inform a debtor of her exemption rights, however, is currently likely to vary significantly among members of the bench. Because judges must strive to be impartial and disinterested, a judge may understandably feel uncomfortable independently raising the topic of exemptions with a debtor.[240] A judge who does so may be accused of improper advocacy. For this reason, a specific directive to judges—a change in the law or a local court rule—is necessary to reduce the risk that a debtor will unknowingly sacrifice exempt property to creditors.

Undoubtedly, this proposal will increase administrative burdens on courts already overloaded with cases. Thus, one might instead propose cheaper alternatives that do not require the court's intervention: for example, a requirement (1) that collection attorneys disclose to debtors information about their exemption rights, and/or (2) that the court provide debtors with a standardized form describing in "plain English" what property is protected under state and federal exemption laws.

For example, the creditor could be required to represent to the court that the creditor has informed the debtor of available exemptions (e.g., by providing the debtor with a standardized disclosure form describing categories of property exempt under state and federal law). In addition, the creditor could be required to represent either that (1) the creditor has made a reasonable investigation into the source of the funds the debtor proposes to transfer to the creditor, and the creditor believes that the debtor is not forfeiting any exempt property, or (2) the debtor is transferring exempt property to the creditor, but the attorney and creditor used no "unfair or deceptive"[241] means to induce the debtor to make such a transfer.

While it would be cheaper to require creditors—and not courts—to disclose to debtors their exemption rights, a creditor- or disclosure-based reform would likely yield few improvements. Providing debtors with a disclosure form would duplicate the exemption notice requirement in effect in many jurisdictions, as

239. Grincewicz, *supra* note 105.

240. Fullerton, *supra* note 16.

241. States can consult as persuasive authority courts' interpretations of "unfair or deceptive acts or practices" under the Federal Trade Commission Act. *See* 15 U.S.C. § 45(a)(1) (2006).

some summonses already provide examples of property exempt under federal and state law.[242] Judges, creditors' attorneys, and debtors' attorneys report that, in spite of these notices, unrepresented debtors frequently fail to assert their exemption rights.[243]

Courts and regulators, of course, can improve the comprehensibility of notices and can even empirically test what types of disclosures are the most effective.[244] Debtors, however, may not read the disclosures in the first place. In addition, given disquietingly low levels of financial literacy,[245] many debtors may be unable to comprehend even the most intelligible of notices. Thus, there is reason to be pessimistic that additional or clearer disclosures would improve significantly upon the status quo. Indeed, for many years, consumer law has been dominated by disclosure requirements, and, as a whole, these disclosures have largely been ineffective in preventing consumers from making ill-advised decisions.[246]

In addition, it is impractical to rely on creditors to help safeguard debtors' exemption rights. Creditors and debtors are legal adversaries, and, as long as a debtor's right to exemptions is not "self-executing,"[247] it is unrealistic—absent the imposition of a controversial[248] or underutilized[249] enforcement method—to

242. *See, e.g.*, 735 ILL. COMP. STAT. ANN. § 5/2-1402 (West 2010) (listing in sample notice examples of property exempt under federal and state law).

243. *See supra* notes 140–142 and accompanying text; sources cited *supra* note 145.

244. Regulators routinely conduct empirical studies to determine what changes to regulations would be most effective. *See, e.g.*, JAMES M. LACKO & JANIS K. PAPPALARDO, FED. TRADE COMM'N, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (June 2007), *available at* http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf.

245. *See, e.g.*, Jeffrey T. Dinwoodie, *Ignorance Is Not Bliss: Financial Illiteracy, the Mortgage Market Collapse, and the Global Economic Crisis*, 18 U. MIAMI BUS. L. REV. 181, 185 (2010) ("Americans of all ages have an alarmingly low level of expertise in what may be considered basic, everyday practices relating to money and personal finance."); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 235–38 (2002).

246. *See, e.g.*, Bar-Gill & Warren, *supra* note 143, at 26–32; Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 HARV. J. ON LEGIS. 123, 137–38 (2007); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 769–79 (2010).

247. BROWN, *supra* note 29, § 6:70.

248. Strong consumer law enforcement techniques tend to generate significant controversy and thus are often met with significant resistance from various stakeholders, including creditors and some regulators. *See, e.g.*, NAT'L CONSUMER LAW CTR., COMMENTS

anticipate much improvement if such a requirement were implemented.

Requiring judges to ensure that debtors are knowledgeable about their exemption rights during in personam proceedings is neither radical nor unprecedented. Indeed, similar mandates are imposed on judges in other areas of the law.[250]

Consider, for example, reaffirmation agreements in consumer bankruptcy cases. In every individual debtor's Chapter 7 bankruptcy case, bankruptcy judges must approve unrepresented debtors' reaffirmation agreements with creditors.[251] In a reaffirmation agreement, a debtor agrees to repay part or all of a debt (e.g., a $3,000 credit card obligation) that would otherwise be discharged in the bankruptcy proceeding.[252] If the debtor instead allowed the court's discharge to take full effect, she would be absolved from repaying the loan.[253]

Reaffirmation agreements have been roundly criticized.[254] As Professor Charles Tabb has posed the issue, "Why would a debtor ever do such a crazy thing?"[255] Debtors choose to reaffirm debts for

TO THE FEDERAL RESERVE BOARD [REGULATION Z; DOCKET NO. R-1390] 12 CFR PART 226: TRUTH IN LENDING – PROPOSED RULE (2010) (providing one example of consumer law advocates' attempt to defend a powerful consumer remedy—the Truth in Lending Act's right of rescission—against proposed changes inspired by creditors' and others' significant resistance to the remedy); Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. REV. 171, 198 (2010) (explaining that although courts have strong powers to modify consumers' mortgage payment obligations under the Truth in Lending Act's rescission provisions, most courts have been unwilling to do so).

249. *See, e.g.*, Whitford, *supra* note 27, at 1096 (implying that debtors rarely assert their rights in the execution context).

250. For example, when a defendant tenders a guilty plea at arraignment, the judge must determine, among other things, whether the plea is voluntary and whether the defendant understands the charge and the consequences that could follow if the plea is accepted. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 24.1, at 994–1000 (4th ed. 2004). Likewise, courts must serve as "fiduciaries" to class members. JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:4 (7th ed. 2010). In that role, courts must approve class action settlements, since the vast majority of the class members whose rights will be affected by settlements play no role in the settlement negotiations. *Id.*

251. *See* 11 U.S.C. § 524(d) (2006).

252. *See id.* §§ 524(c), 727(a)(10).

253. This assumes that the debtor would have no other problems receiving the discharge.

254. *See, e.g.*, Gary Klein, *Suggestions for the National Bankruptcy Review Commission and Congress: Eliminate Reaffirmation Agreements*, 4 AM. BANKR. INST. L. REV. 528, 529 (1996) (suggesting that reaffirmation agreements "serve no legitimate purpose commensurate with the cost to the system of the loss of debtors' fresh starts").

255. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 10.35, at 1027 (2009).

various reasons: (1) to retain property that otherwise would be forfeited to the creditor in bankruptcy, (2) to protect a non-filing cosigner from being pressured to repay the debt, (3) to allay the debtor's post-default guilt or express gratitude to a creditor, or (4) to compensate the creditor for a promised new benefit (e.g., a post-bankruptcy line of credit).[256] Some have questioned whether reaffirmation agreements subvert bankruptcy's "fresh start" policy,[257] since reaffirmations chip away at the bankruptcy discharge that the debtor presumably needs to regain her financial footing.

Given widespread concerns about whether or not debtors should be permitted to recommit to pay dischargeable debts,[258] the Bankruptcy Code imposes various substantive and procedural restrictions on debtors' ability to enter into reaffirmation agreements.[259] For example, before a bankruptcy judge can approve an unrepresented debtor's reaffirmation, the court must hold a discharge hearing at which the court must (1) inform the debtor of the serious consequences of a reaffirmation,[260] (2) determine whether the agreement imposes an "undue hardship" on the debtor, and (3) decide whether the reaffirmation is in the debtor's "best interests."[261] In assessing these factors, the court considers, among other things, the unrepresented debtor's ability to afford the payments that she would be required to make under the agreement.[262]

One might argue that judicial intervention is more justifiable in the reaffirmation context than it is in an in personam proceeding. Reaffirmations partially unravel a bankruptcy discharge—the end goal of every bankruptcy filer. Reaffirmations thus increase the chances that the debtor will face future financial trouble. The bankruptcy court's intervention ensures that the reaffirmation (in effect, an action against the debtor's own self-interest) meets minimal standards of reasonableness.

256. *See, e.g.*, *id.* at 1027–28.

257. *Id.*

258. *See, e.g.*, NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 145–65 (1997).

259. 11 U.S.C. § 524(c)–(d), (k)–(m) (2006).

260. *Id.* § 524(d)(1)–(2).

261. *Id.* § 524(c)(6)(A)(i)–(ii). If, however, the debt is a consumer debt secured by real property, the court need not approve such an agreement.

262. *See, e.g.*, *In re* Melendez, 224 B.R. 252 (Bankr. D. Mass. 1998); *In re* Bryant, 43 B.R. 189 (Bankr. E.D. Mich. 1984).

In addition, because a reaffirmation agreement is inconsistent with the underlying objective of a bankruptcy proceeding, a judge's oversight is arguably particularly important. In contrast, the forfeiture of property—even exempt property—in an in personam proceeding is arguably consistent with the larger function of the remedy: to help the creditor satisfy its judgment. Thus, one might contend that the judge presiding in an in personam proceeding need not interfere with a presumably voluntary, rational decision of a debtor to sacrifice exempt money or property to a creditor.

This view of the role of the judiciary, however, is reductionist. It also makes unwarranted assumptions about the "voluntariness" of a debtor's decision to turn over exempt property to a creditor. I discuss each issue in turn.

First, it is misguided to argue that a judge need not interfere with an in personam proceeding, provided its larger purpose—the collection of debts—is being served. This view minimizes a judge's potentially crucial role in a legal proceeding. Judges are not ceremonial notaries who merely rubber-stamp parties' agreements. Rather, it is appropriate for a judge, with constitutional and legislative guidance, to intervene to ensure that any legally significant decision of a debtor—regardless of the purpose of the overall proceeding—is truly informed and voluntary. The legal system functions most equitably and is more likely to produce the best substantive outcome when parties know all of the facts, are familiar with their rights, and are capable of asserting them.

Second, without meaningful judicial scrutiny of the agreements that debtors and creditors reach in in personam proceedings, one cannot assume that a debtor who turns over exempt property to a creditor in an in personam proceeding is doing so voluntarily, with full knowledge of her rights.

Some commentators contend that exempt property functions as a "carrot" in negotiations with creditors.[263] For example, in exchange for a debtor's agreement to forfeit exempt money or property to a creditor, the creditor may agree to certain concessions (for example, a reduction in fees).[264] Thus, one might argue that requiring a judge

263. Whitford, *supra* note 27, at 1062, 1096–97 ("Exemption statutes provide leverage most importantly by providing a resource pool—a carrot as it were—from which to offer voluntary payments to the creditor in return for appropriate concessions, such as favorable refinancing terms or a reduction in the size of the debt.").

264. *Id.*

to interfere with a debtor's forfeiture of exempt property would deprive the debtor of the freedom of negotiating a potentially mutually beneficial agreement with the creditor. A debtor might forfeit exempt funds, for example, to avoid garnishment—a form of collection that could ultimately cause the debtor to lose her job.

In the context of in personam proceedings, however, the specter of imprisonment looms over many debtors.[265] Thus, given the significant disparity in bargaining power between debtors and creditors, there is a risk that a skillful collector perceives exempt property more as sitting prey or "fair game" that can help satisfy a creditor's judgment. In the competitive world of collections (a "race of the diligent"[266] where "first in time is first in right"[267]), creditors who successfully capitalize on "contempt confusion" and persuade debtors to forfeit exempt funds can come out ahead. Only in the hands of the most legally sophisticated debtors is exempt property comparable to a carrot that can be skillfully dangled and maneuvered to extract concessions from creditors.

Thus, it is crucial for judges presiding over in personam proceedings to recognize that, although these remedies are designed to help creditors satisfy their judgments, judges must function independently to protect the adjudicative integrity of the collection system. Particularly where there exists a discrepancy in bargaining power between repeat-player creditors and less sophisticated and possibly unrepresented debtors, courts' contempt authority cannot be diverted to purely private ends.

V. CONCLUSION

In personam actions, important innovations in the law of debt collection, are useful to creditors. Creditors benefit significantly from an ability to combine discovery and collection in one proceeding and to shift much of the onus of debt collection to debtors. This Article raises the concern, however, that many of the efficiencies of modern in personam debt collection actions are products of collectors' ability to capitalize on debtors' lack of sophistication, debtors' lack of

265. *See supra* note 122 and accompanying text.

266. *See supra* note 21 and accompanying text.

267. *See* Rankin v. Scott, 25 U.S. (12 Wheat.) 177, 179 (1827) ("The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction . . . .").

participation in the debt collection process, and the in terrorem effects of courts' exercise of their contempt authority.

For this reason, it is crucial to ensure that a creditor's ability to institute in personam actions—and to influence the potential deployment of law enforcement—does not undermine other important social and economic goals, including (1) the preservation of debtors' exemption rights, and (2) the imposition of reasonable limitations on the coerciveness of debt collection. These goals can be advanced by requiring judges to inform debtors about their exemption rights before creditors may reap any financial rewards from the institution of in personam actions, and by eliminating creditors' access to bond funds—money extracted from debtors under the most stressful conditions, and funds whose sources may reflect the highest levels of debtor desperation. These reforms attempt to reduce or eliminate those creditor incentives and behaviors that unfairly harm debtors and undermine the procedural and substantive legitimacy of the collection system.

Of course, one's view about the wisdom of devoting resources to a realignment of leverage and bargaining power in in personam proceedings inevitably implicates an intractable debate about debtors' personal responsibility. In spite of compelling evidence to the contrary,[268] many see debt default—and, by extension, complications in the collection process—as a largely preventable and predictable consequence of unwise financial and lifestyle choices. Proponents of this argument would require debtors to bear the costs of their mistakes.

Undoubtedly, some debtors appear complicit in complicating the operation of the debt collection system. Under this view, debtors waive their rights by neglecting to defend themselves at the judgment stage or by failing to respond to summonses to participate in in personam actions. Likewise, debtors fail to fully educate themselves about their exemption rights—or may fail to explore whether legal aid assistance is available. While it may be tempting to categorize debtors as either helpless or recalcitrant and creditors as either ruthless or victimized, the realities are often much more complicated. A commentator's observation in a study of the working poor seems apt here as well: "[these] individuals . . . are neither

268. *See, e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 14–22 (2000); WARREN, *supra* note 21, at 99.

helpless nor omnipotent, but stand on various points along the spectrum between the polar opposites of personal and societal responsibility."[269]

When debtors in droves fail to appear in court, are unrepresented, and are ill-equipped to assert their exemptions, one must ask probing questions about the fairness of the debt collection system. It is crucial to understand why debtors make these harmful choices and to consider whether the extent of debtors' control over their pre- and post-default lives may at times be overstated.

The process by which the legal system adjudicates private disputes and assists private parties in enforcing those judgments involves a complex balancing of interests of debtors, creditors, and the state. Debt collection is a critical component of the consumer credit system, and in personam collection actions serve an important role in ensuring that judgments are not merely "symbolic."[270] Without a critical realignment of the balance of power between debtors and creditors, however, this system risks losing its legitimacy in the public's eyes, resembling a private collection arm of collectors, and sacrificing important societal interests in the name of expediency.

269. DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 6 (2004).

270. *See* LoPucki, *supra* note 47, at 4.