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CREDITORS' CONTEMPT

B.Y.U. LAW REVIEW (FORTHCOMING 2011)

Lea Shepard

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 "debtors' 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 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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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, an increasing percentage of her income was devoted 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 distressed debt[4] at high volumes and used both legal and extra-legal (non-litigation) methods to extract payments from borrowers.

The debt buyer's law firm filed an action against Melanie in small claims court, and since Melanie had not shown up to the court hearing, the

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[1] It is not unusual for debtors to fail to respond to creditors' efforts to reach them through phone and the mail. *See, e.g.,* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J., Nov. 28, 2010, at A1 (citing CEO of debt buyer Encore Capital Group, Inc., who asserts that only 6% of debtors respond to dunning letters, and only 18% respond to phone calls).

[2] A charge off is the accounting process by which a business acknowledges a receivable (an asset or loan) is uncollectible. A credit card account is characterized as a "charge off" account when no payment has been received on the account for 180 days. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 5 (2009).

[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) (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, e.g.,* Silver-Greenberg, *supra* note 1.

firm obtained a default judgment[5] against her for $2300. 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 didn't go to court. Unaware that her debt had been sold and that the debt buyer had recovered a default judgment against her, Melanie didn't 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 couldn't really improve the situation by going. 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 of a price, given Melanie's tight budget.[7]

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

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[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 60 to 90% of debt collection actions result in a default judgment).

[6] The terminology of *in personam* debt collection remedies varies significantly from state to state. Examples of these proceedings include "citations to discover assets," "debtors' examinations," *e.g.*, Merkel v. Keller, No. 102,239, 2010 WL 2670846, at *2 (Kan. Ct. App. 2010) ("judgment debtor examination"), "turnover orders," *e.g.,* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(b)(1) (2005) (stating that the court may order the judgment debtor to "turn over" nonexempt property in the debtor's possession or that is subject to the debtor's control), "supplementary proceedings," *e.g.,* 735 ILL. COMP. STAT. § 5/2-1402 (2008), "proceedings supplemental," *e.g.,* Ind. Trial R. 69(E) (referring to "proceedings supplemental to execution"), and "proceedings in aid of execution," *e.g.,* OHIO REV. CODE. ANN. § 2333 (2010).

[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 after concluding that defending against a valid debt would be futile. 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. One can only imagine that the process server threw the documents "down the sewer" and subsequently falsifies its affidavit of service. *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 v. Keller, No. 102,239, 2010 WL 2670846, at *2 (Kan. Ct. App. 2010).

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

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[9] *See, e.g.,* Brent A. Olson, MINNESOTA BUSINESS LAW DESKBOOK § 39:7 (2010-2011 ed., vol. 20A2) ("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 Const. Inc. v. Ma, No. A126752, 2011 WL 664657, at *2 (Cal. Ct. App. 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 Automotive Brake Supply, No. B181348, 2006 WL 306790, at *1 (Cal. Ct. App. 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 non-cash 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. Illinois Legal Aid, "I Was Arrested and Have to Go to Court," http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentID=5403 (last updated Nov. 2009).

[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). Originally designed to tide a consumer over until payday, payday loans were initially intended to 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 "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).

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 15 years of service at his old company, Steven received a pension income of $525 per month. Unable, however, to find a part-time job to supplement his income, Steven found that his monthly earnings didn't 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 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 10 other debtors—only a few of whom were represented[13]—and checked in with the clerk. After about a 20-minute wait, the creditor's attorney called out Steven's name and guided him into the hallway outside the courtroom, where five other debtors' 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 wasn't 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]

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[13] The vast majority of debtors who participate in *in personam* proceedings tend to be unrepresented. Telephone Interview with Kate Barowsky, Attorney-at-Law (Dec. 15, 2010) (noting that only about 5-10% 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 sum certain 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 debtors' 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 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,

Steven, unfortunately, couldn't 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 hadn't 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 didn't 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 to pay the monthly amount could result in a contempt of court citation and possible imprisonment.[17]

> 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 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* ROBERT J. HOBBS, FAIR DEBT COLLECTION 267-94 (Supp. 2006) (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).

[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, e.g.,* Vermont Nat'l Bank v. Taylor, 122 N.H. 442, 444-445 (N.H. 1982). Other states, however, have concluded that this practice violates states' prohibitions on

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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. 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 extra-legal (non-litigation) attempts, including dunning[18] phone calls and letters.[19]

If extra-legal debt collection efforts prove unsuccessful, an unsecured creditor must enlist in state law's "race of the diligent"[20] and compete against other unsecured creditors for a stake in the debtor's property. After obtaining a judgment against the debtor,[21] an unsecured creditor has two basic ways of attempting to satisfy its claim. Initially, the creditor may bring an *in rem* action ("execution"[22]) against the debtor. Alternatively (or,

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imprisonment for debt. *See, e.g., In re* Byrom, 316 S.W.3d 787 (Tex. Ct. App. 2010) (in habeas proceeding, holding unconstitutional contempt order requiring independent executor of estate to pay $85,000 into court registry or be jailed for contempt).

[18] "Duns" refer to collectors' preliminary contacts with consumers. *See* HOBBS, *supra* note 15, § 1.5.1, at 4. These include form letters and phone calls. Dunning letters and calls tend to increase over time in severity of tone and expense to the collectors.

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

[20] State court collection law is considered a "race of the diligent" because unsecured creditors must rush to the courthouse, obtain a judgment, and pursue collection remedies before other collectors exhaust the debtor's assets. 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 (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.").

[21] While a creditor must ordinarily obtain a judgment before making formal collection attempts, a creditor, in exceptional circumstances, may seek prejudgment attachment. *E.g.,* STEVE H. NICKLES & DAVID G. EPSTEIN, DEBTOR-CREDITOR: CREDITOR REMEDIES AND DEBTOR RIGHTS UNDER STATE AND NON-BANKRUPTCY FEDERAL LAW 34 (2009) [hereinafter NICKLES & EPSTEIN, DEBTOR-CREDITOR].

[22] The term "execution" may generally describe any process that carries into effect a

depending on state law,[23] 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[24] seizes the debtor's unencumbered,[25] nonexempt[26] property, sells it, and applies the sale proceeds to its judgment. *In rem* judgment enforcement is considered "cumbersome" and inefficient,[27] since the creditor, lacking information about the debtor's physical property, may not know where to look for the debtor's assets.[28]

At early common law, the legal system developed another method of debt collection, one that sought to eliminate various deficiencies[29] in the *in rem* collection process. *In personam* debt collection remedies (variously known as "debtors' examinations," "turnover orders," "citations to discover assets," "supplementary proceedings," "proceedings supplementary," and "proceedings in aid of execution")[30] 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[31]) 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

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court's judgment. *E.g.,* JAMES J. BROWN, JUDGMENT ENFORCEMENT PRACTICE AND LITIGATION § 9.02[C], at 9-8 (2010); 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, DEBTOR-CREDITOR, *supra* note 21, at 127 (2009).

[23] *See infra* Part III.B.

[24] 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, 522 50 P.2d 815, 817 (1935) (authorizing constructive seizure of heavy machinery and equipment set in a concrete floor or embedded in brick).

[25] "Unencumbered" property refers to property unburdened by a creditor's security interest. BLACK'S LAW DICTIONARY (9th ed. 2009).

[26] "Nonexempt" property refers to property that is not subject to any federal or state exemptions. State and federal exemptions insulate a wide variety of income and property from seizure by creditors. *See, e.g.,* SHELDON ET AL., *supra* note 3, 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 (1979).

[27] DAN B. DOBBS, LAW OF REMEDIES § 1.4, at 16 (2d ed., vol. 1, 1993).

[28] *See infra* note 94 and accompanying text.

[29] *See infra* Part II.A.

[30] *See* sources cited *supra* note 6.

[31] *See infra* Part III.B.

directly. Court orders are enforced through the court's contempt authority,[32] which judges generally exercise in this context through threats of imprisonment.[33] *In personam* judgment collection is very popular with creditors, primarily because these remedies can be very effective. 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.[34]

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 equivalent of imprisonment for debt default,[35] which, with some significant caveats,[36] is illegal in every state.[37] 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.

Academics and other commentators, moreover, have long argued that civil contemnors[38] (like debtors imprisoned under the court's contempt authority) are entitled to more substantial due process protections.[39] In

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[32] DOBBS, *supra* note 27, at 16.

[33] WILLIAM H. BROWN, THE LAW OF DEBTORS AND CREDITORS § 6:58 (2010) ("[t]he majority of states refuse to impose compensatory fines on the debtor who is in contempt) (citing HAWKLAND AND LOISEAUX, DEBTOR-CREDITOR RELATIONS 107 (2d ed. 1979)).

[34] Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STAR TRIB., June 6, 2010, at 1A.

[35] *See, e.g.*, Carter v. Grace Whitney Properties, 939 N.E.2d 630, 635-36 (Ind. App. 2010); In re Byrom, 316 S.W.3d 787, 791 (Tex. Ct. App. 2010).

[36] SHELDON ET AL., *supra* note 3, 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").

[37] *See, e.g.,* SHELDON ET AL., *supra* note 3, at 346-47. Although the U.S. Constitution does not itself prohibit imprisonment for debt, BROWN, *supra* note 22, 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).

[38] 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, 1025 (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.*

[39] See, e.g., Jayne S. Ressler, Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor

addition, beginning in the 1970s, many litigants have successfully argued that all debtors participating in post-judgment proceedings are entitled to meaningful procedural due process protections (including notice of their exemption rights).[40]

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. These risks are acute in a competitive collection system that rewards speed and 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 *in personam* debt collection actions remains markedly and adversely skewed toward creditors. It examines several factors that contribute to this imbalance: a dissonance between the "extraordinary"[41] coercive power of *in personam* debt collection and the ability of creditors in many states to institute these proceedings against undeniably ordinary debtors; debtors' passivity and failure to participate in the debt collection process generally; and 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, I focus 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, I argue, violates states' prohibitions on imprisonment for debt default. These proposals are necessary to curtail *in personam* proceedings' *in terrorem* effects—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 political,

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Incarceration in the Modern Age, 37 RUTGERS L.J. 355, 391 (2006).

[40] SHELDON ET AL., *supra* note 3, at 252.

[41] Albert E. Jenner, Jr., Philip W. Tone & Arthur M. Martin, *Historical and Practice Notes*, S.H.A. (1983), c. 110, para. 2-1402.

economic, and moral 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,"[42] 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. The state must be vigilant in preserving the public's faith in the state's judgment enforcement system, which—particularly because *in personam* proceedings involve the potential deployment of law enforcement—requires closely guarding debtors' due process rights and ensuring 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 *in personam* debt collection actions 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.[43] As this Article explains, however, proposed reforms do not address a chronic imbalance in the leverage exercised by creditors over debtors in *in personam* debt collection. This Article fills in that critical gap in the conversation.

This Article proceeds in four parts. Part I 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 II 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 III describes how excessive creditor leverage in *in personam* debt collection actions—exacerbated by a problem I label as "contempt confusion"—contributes to normative harms that modern debt collection laws seek to curtail. This Part also describes current proposals to reform the debt collection system and observes that none of these proposals directly address clear problems with the operation of debtors' examinations, supplementary proceedings, and other *in personam* proceedings. For this reason, I recommend two critical reforms to help balance the scales between debtors and creditors in *in personam* proceedings. Part IV concludes.

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[42] 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.").

[43] *See, e.g.,* S. 3888, 111th Cong. (2010); FTC, *supra* note 5.

I. 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,[44] a means by which creditors, through the use of various writs,[45] could satisfy judgments by pursuing debtors' physical assets. In an agrarian economy, 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.[46]

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[44] ABRAHAM CLARK FREEMAN, A TREATISE ON THE LAW OF EXECUTIONS IN CIVIL CASES, AND OF PROCEEDINGS IN AID AND RESTRAINT THEREOF, Vol. 2 1282 § 392 (1888) ("[t]he ordinary method for enforcing a judgment for money is by levy and sale of the property of the defendant.").

[45] 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) [hereinafter EPSTEIN & LANDERS, DEBTORS AND CREDITORS]. 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.*; JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY, VOLUME 3, at 316 (2010); David Gray Carlson, *Critique of Money Judgment Part One: Liens on New York Real Property*, 82 ST. JOHN'S L. REV. 1291, 1305 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) [hereinafter EPSTEIN, DEBTOR-CREDITOR RELATIONS]. The writ of *levari facias* allowed the creditor to collect rents from the debtor's property or the property itself. *Id.*

[46] *See, e.g.,* Isadore H. Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings*, 35 COLUM. L. REV. 1007, 1008 (1935) (describing the proceeds of execution sales as likely sufficient to satisfy the "great part of money judgments . . .

As debtors (including corporate debtors[47]) began to possess more intangible assets, however, execution writs frequently proved inadequate in satisfying creditors' claims.[48] Execution writs were issued by courts of law,[49] which did not have the authority to reach intangible property or a debtor's equitable interests in property (e.g., choses in action like stock certificates, insurance policies, or debts owed to the debtor).[50]

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.[51] 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.[52] The assets were subsequently sold, and the proceeds were used to help satisfy the creditor's judgment.[53]

The creditor's bill also served many auxiliary functions that helped creditors enforce their judgments. A creditor's bill could be used for discovery: through a creditor's bill, the judgment creditor could examine the debtor and third parties in an attempt to locate assets.[54] To thwart debtors' attempts to fraudulently convey property to friends or family, a creditor could request an injunction prohibiting a debtor from disposing of or encumbering property.[55] 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.[56]

Although they helped creditors reach intangible assets and equitable interests, creditor's bills were inefficient collection tools.[57] Before the merger

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in a rural or semi-rural community where everyone was acquainted with the affairs of everyone else.").

47 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).

48 *See, e.g.,* EPSTEIN & LANDERS, DEBTORS AND CREDITORS, *supra* note 45, at 108.

49 *See, e.g.,* EPSTEIN, DEBTOR-CREDITOR RELATIONS, *supra* note 45, at 152.

50 *See, e.g.,* Stephens v. Cady, 55 U.S. 528, 531 (holding that a copyright, which has no corporeal, tangible existence, cannot be seized via execution); Riesenfeld, *supra* note 47, at 178; Doreen J. Gridley, *The Immunity of Intangible Assets From a Writ of Execution: Must We Forgive Our Debtors?*, 18 IND. L. REV. 755, 758-61.

51 *See, e.g.,* EPSTEIN, DEBTOR-CREDITOR RELATIONS, *supra* note 45, at 153. The creditor's bill was also known as a creditor's suit. *Id.*

52 *See, e.g., id.*

53 *See, e.g., id.*

54 *See, e.g., id.*

55 *See, e.g., id.*

56 *See, e.g., id.*

57 *See, e.g., Cohen, supra* note 46, at 1013 (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").

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.[58]

Initially, a creditor had to obtain a judgment in a court of law and attempt to satisfy the judgment through execution.[59] 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: applying for a creditor's bill in a court of equity.[60]

Bringing two actions was expensive and time-consuming.[61] 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.[62]

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").[63] Following the adoption of these 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.[64] 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.[65]

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[58] Walter H. Moses, *Enforcement of Judgments against Hidden Assets*, 1951 U. Ill. L.F. 73, 75 (1951) ("[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").

[59] *See, e.g.,* DAVID G. EPSTEIN, JONATHAN M. LANDERS & STEVE H. NICKLES, DEBTORS AND CREDITORS: CASES AND MATERIALS 58-59 (1987) [hereinafter, EPSTEIN ET AL., DEBTORS AND CREDITORS].

[60] See, e.g., id.

[61] *See* Moses, *supra* note 58, at 75.

[62] *See, e.g.,* Riesenfeld, *supra* note 47, at 179-81; Gridley, *supra* note 50, 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).

[63] *See, e.g.,* id, at 180-81 (citing N.Y. Code Civ. Proc. Reported Completed, §§ 853 ff (1850); Iowa Code §§ 1953 ff (1851); Iowa Code §§ 3391 ff (1860)).

[64] *See, e.g.,* EPSTEIN ET AL., DEBTORS AND CREDITORS, *supra* note 55, at 60 (describing supplemental proceedings as "a continuation of the creditor's original action against the debtor").

[65] BROWN, *supra* note 33, § 6:58.

B. The Risk of Imprisonment in In Personam Actions

While creditor's 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[66] seizure of property, which is subsequently sold to help satisfy the creditor's judgment.[67]

In rem enforcement of judgments has been described as inefficient and cumbersome,[68] 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.[69] A debtor cannot "disobey" an *in rem* command, which does not direct the debtor to do anything.[70]

In contrast, *in personam* remedies force the debtor to play a meaningful role in the debt collection process. *In personam* remedies require a debtor to appear in court, share copies of certain documents with the creditor,[71] answer questions about the location of assets, and turn over non-exempt property directly to creditors.[72]

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.[73] As a

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[66] *See supra* note 24 and accompanying text.

[67] DAN B. DOBBS, LAW OF REMEDIES Vol. 1, § 1.4, at 15 (2d ed. 1993).

[68] *Id.* at 16.

[69] *Id.*

[70] *Id.*

[71] 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).

[72] As I later discuss, however, the coercive qualities of *in personam* proceedings put pressure on debtors to sacrifice exempt assets to creditors. *See infra* notes 127-129 and accompanying text; *see* sources cited *infra* note 132.

[73] In any contempt action, a person may not be imprisoned or sanctioned if she is

civil contemnor who "holds the key" to her own jail cell, the debtor may be fined[74] or imprisoned until she complies with the court's directive.[75] A debtor can purge herself of nonappearance contempt by physically appearing at the courthouse and truthfully answering 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 or not 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,[76] creditor policies,[77] attorney aggressiveness,[78] and a judge's predilections[79] 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 1) to show up in court and provide information about their

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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."); 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.").

[74] *See, e.g.,* Cadle Co. v. Lobingier, 50 S.W.3d 662 (Tex. Ct. App. 2001) (judgment debtor who failed to comply with turnover order was subject to $500-per-day fine and period of incarceration. *But see supra* note 33 (explaining that most states refuse to impose compensatory fines on a debtor who is in contempt).

[75] *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.").

[76] Telephone Interview with Beverly Yang, Staff Attorney, Land of Lincoln Legal Assistance Foundation (Oct. 5, 2010).

[77] Lucette Lagnado, Medical Seizures: Hospitals Try Extreme Measures To Collect Their Overdue Debts: Patients Who Skip Hearings On Bills Are Arrested, WALL ST. J. (Oct. 30, 2003), at A1.

[78] Telephone Interview with Beverly Yang, Staff Attorney, Land of Lincoln Legal Assistance Foundation (Oct. 5, 2010).

[79] Lucette Lagnado, Medical Seizures: Hospitals Try Extreme Measures To Collect Their Overdue Debts: Patients Who Skip Hearings On Bills Are Arrested, WALL ST. J. Oct. 30, 2003, at A1.

assets[80] or 2) 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.[81]

Because *in personam* remedies trigger the potential deployment of law enforcement, their contours must be closely patrolled. This coercive function gives *in personam* remedies its teeth, and is part of the remedy's appeal to creditors.[82] For as long as *in personam* remedies have existed, however, commentators have described this shift in bargaining power as potentially problematic, a topic I explore in the following section.

II. 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,[83] familial support obligors,[84] and Ponzi scheme defendants have all been the subjects of *in personam* debt collection actions.

Creditors, commentators, and judges 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 [the remedies] where it is evident that the judgment debtor has no property, but merely as an experiment to try

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[80] *See, e.g.,* Minn. Stat. § 550.011 (2011).

[81] See *supra* Part I.

[82] *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 [a type of *in personam* remedy] is nothing short of an unmitigated boon for judgment creditors."); *see infra* note 85 and accompanying text.

[83] *Simpson must turn over Heisman, $500,000 in valuables*, CNN (March 27, 1997), *available at* http://articles.cnn.com/1997-03-27/us/9703_27_simpson.order_1_fujisaki-peter-gelblum-ronald-goldman?_s=PM:US.

[84] *See, e.g.,* In re Marriage of Pope-Clifton, 355 Ill. App. 3d 478, 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).

to frighten or harass him to pay something on the judgment or otherwise."[85] 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 settlements 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.[86] Elizabeth Toben and Professor Bradley Toben have observed that *in personam* remedies have "readjust[ed] the balance of debtor-creditor relations," resulting in "nothing short of an unmitigated boon for judgment creditors."[87]

In the sections that follow, I discuss those specific debtor behaviors and characteristics of modern *in personam* proceedings that increase the risk of excessive creditor leverage: 1) the ability for 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, lack of sophistication, and lapses in debtors' procedural protections, including a failure 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. These manifestations of weaknesses in debtor protections undoubtedly merit independent scrutiny. I focus 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

States' laws governing *in personam* remedies fall into two general categories: 1) those that require judgment creditors[88] to unsuccessfully

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[85] DANIEL S. RIDDLE, THE LAW AND PRACTICE IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION (3d ed. 1886); *See also* Bruce Matson*, Creditor Process Against Negotiable Notes: The Case for a New UCC* § 3-420, 24 WM. & MARY L. REV. 503, 507 n.22 (1983) ("Because these procedures involve *in personam* orders, they are considered extraordinary relief and thus are granted only when a creditor's remedies at law are inadequate.").

[86] Jenner, Jr. et. al*, supra* note **Error! Bookmark not defined.**, para. 2-1402.

[87] *See, e.g.,* Toben & Toben, *supra* note 82, at 197.

[88] 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 (August 16, 2010), at 4.

attempt execution before pursuing *in personam* actions ("*in rem* states")[89] and 2) those that allow creditors to pursue *in personam* debt collection actions immediately after obtaining the judgment ("*in personam* states").[90] 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.[91] 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).[92]

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.[93] Under this view, all states should permit creditors to seek *in personam* remedies independent of execution, since proceedings like debtors' 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 for the purpose of determining what property a debtor owns and where that property is located. If a

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[89] *See, e.g.,* Mo. Rev. Stat. § 513.380 (2010); N.H. Rev. Stat. Ann. § 498:8 (2011); Ind. Code § 34-55-8-1 (2011); Minn. Stat. Ann. § 575.02 (2011); Ohio R. Civ. P. 69; Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 278 (1971) ("Statutes in several states forbid the use of contempt imprisonments to enforce money judgments that can be enforced in other ways.").

[90] *See, e.g.,* 735 Ill. Comp. Stat. Ann. § 5/2-1402 (2010); Mich. Comp. Laws Ann. § 600.6104 (2010). Texas' turnover statute is a cross between these two general categories. Under that 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 (2008).

[91] Alfred F. Conard, An Appraisal of Illinois Law on the Enforcement of Judgments, 1951 U. ILL. L.F. 96, 108 (1951).

[92] *See supra* notes 57-58 and accompanying text.

[93] *See, e.g.,* Conard, *supra* note 91, at 108; Whitford, *supra* note 26, at 1096-97 (describing the prerequisite of an unsatisfied execution as "an unnecessary costly technicality").

creditor has insufficient knowledge about the debtor's money and property, execution may be waste of time and resources, since creditors may not know 1) whether it is worth it to attempt execution in the first place, or 2) to which assets to direct the sheriff.[94]

By contrast, in *in personam* states, creditors can initiate proceedings like debtors' examinations immediately after obtaining a judgment against the debtor.[95] 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.[96] 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,"[97] an unsecured creditor must rush to obtain a judgment and to perfect its lien against the debtor's property.[98] The institution of an *in personam* action is a quick and relatively efficient way for a creditor to stake its claim. Generally, the service of the summons to participate in an *in personam* debt collection action creates a lien on the debtor's non-exempt personal property and enjoins the debtor from disposing of it.[99]

Somewhat paradoxically, it can be economical for creditors (particularly debt buyers, whose profit model relies on a fast, high-volume collection process[100]) to move quickly without taking the time to evaluate their chances of repayment. Delay in collection can result in increased litigation costs. In

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[94] Whitford, *supra* note 26, at 1096-97 ("[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"). 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").

[95] *See* sources cited *supra* note 90.

[96] Telephone Interview with Alan Alop, Deputy Director, Legal Assistance Foundation of Metropolitan Chicago (Dec. 2, 2010); Interview with Sarah Grincewicz, Esq., The Albert Law Firm (Jan. 7, 2010).

[97] *See* sources cited *supra* note 20.

[98] Whitford, *supra* note 26, 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).

[99] *See, e.g.,* 735 Ill. Comp. Stat. Ann. § 5/2-1402(m) (2010).

[100] *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).

addition, delay can reduce a creditor's prospects at successful collection, since a debtor might experience further financial setbacks, leave the jurisdiction and more easily dodge creditor communications, declare bankruptcy,[101] or waste or transfer non-exempt assets.[102]

Since the debtors' examination functions as an independent discovery device, creditors often initiate *in personam* proceedings without considering a specific debtor's ability to satisfy the judgment.[103] Suing an insolvent debtor may be cheaper than determining whether she is truly incapable of repaying her creditor.[104] Moreover, even if creditors wanted to initiate a potentially time-consuming pre-judgment discovery process, they generally could not do so in small claims cases.[105]

Collection lawyers also know that securing a judgment is relatively easy[106] and inexpensive, particularly because the vast majority of debt collection actions result in default judgments.[107] The late Professor Caplovitz has described the initiation of a lawsuit as a riskless proposition for creditors, since "[t]he creditor almost invariably wins, mainly because the debtor fails to show up." One legal aid attorney posits that debt collection attorneys' financial incentives (i.e., an 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.[108]

Creditors' incentives to sue debtors and institute *in personam* actions without first evaluating the likelihood of repayment inevitably results in some imprecision: debt collectors will invariably target some poor, unsophisticated, and/or judgment-proof[109] debtors. From the debtor's

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101 Because of the risk that the bankruptcy trustee will avoid preferential payments, 11 U.S.C. § 547 (2010), 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.

102 Whitford, *supra* note 26, at 1062.

103 Telephone Interview with Kate Barowsky, Attorney-at-Law (Dec. 15, 2010).

104 Whitford, *supra* note 26, at 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.").

105 *See, e.g.,* Rule 6, Indiana Rules of Court, Small Claims, 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.").

106 Telephone Interview with John N. Dore, Attorney at Law, Chicago (Nov. 17, 2010).

107 *See* FTC, *supra* note 5.

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

109 A judgment-proof debtor is one with no nonexempt or unencumbered assets.

perspective, this can be problematic, since debtors are often ill-prepared or unequipped to respond to the institution 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,[110] which, according to one estimate, issues over 40,000 body attachments a year,[111] debtors' examinations are conducted outside of the judge's presence[112] and are not memorialized through court reporting. Many—if not most—debtors are unrepresented,[113] and creditors' attorneys have no obligation to inform debtors of their exemption rights.[114] 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 debtors' failure to participate in the legal process. Many debtors are absent from every aspect of debt collection, ranging from actions on the debt (which, in as many as 60 to 90% of cases, result in a default judgment[115]) and collection actions like debtors' examinations.[116]

Why exactly debtors fail to participate in the debt collection process is a subject of debate and empirical uncertainty.[117] Consumer advocates cite as likely causes various factors largely outside of the debtor's control: sewer service,[118] the incomprehensibility of communications from the court,

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William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1055 (1979).

110 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 post-judgment courtroom in the country.

111 Interview with Clerk of First District Municipal Department of the Circuit Court of Cook County, Illinois (Jan. 7, 2010).

112 Creditors' attorneys conduct the debtors' examinations in the hallway outside of the courtroom.

113 *See supra* note 13.

114 Telephone Interview with the Hon. Paul M. Fullerton, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit (Dec. 3, 2010).

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

116 Some estimate that debtors show up to *in personam* debt collection actions about 50 percent of the time. Telephone Interivew with the Hon. Paul M. Fullerton, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit (Dec. 3, 2010).

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

118 Sewer service occurs when a process server fails to serve the consumer but

debtors' trepidation about the legal system, lack of access to legal representation, work and family constraints, and a lack of transportation.[119] Creditors, in contrast, argue that debtors' absence is, in effect, an implicit admission of liability. 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.[120]

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.[121] The consequences of a failure to participate in a debtors' examination or in another *in personam* proceeding, however, can be even more severe. While creditors benefit from the ability to combine discovery and collection in one *in personam* action, this combination can dramatically increase the coerciveness of this remedy. If a debtor fails to show up at a debtors' examination and the court issues a rule to show cause,[122] the debtor may eventually be arrested or asked to surrender herself[123] to local law enforcement authorities.[124] Based on debtors' track record of passivity in the debt collection process,[125] 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.*[126]

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,[127] taking out a payday loan or cash advance on her credit

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falsely asserts that he has successfully done so. FTC, *supra* note 5, at 8.

[119] *Id.* at 7, 12.

[120] *Id.* at 7.

[121] *Id.* at iii.

[122] 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.

[123] Telephone Interview with the Hon. Paul M. Fullerton, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit (Dec. 3, 2010) (explaining that debtors usually surrender themselves voluntarily to law enforcement officials).

[124] 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 76-79 and accompanying text.

[125] *See* discussion *supra* Part C.1.

[126] I refer to this problem as "contempt confusion." *See* discussion *infra* Part III.A.

[127] *See, e.g.,* Letter from the Federal Trade Commission to Senator Al Franken

card,[128] or borrowing money from friends or family. As the 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."[129]

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,[130] a neoclassical economist might argue that debtors who opt out of the legal process by failing to respond to a court order 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.[131] 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.[132]

(August 16, 2010), at 6, *available at* http://caveatemptorblog.com/wp-content/uploads/FTC-Response-to-Sen-Franken-2010.08.16.pdf [hereinafter FTC-Franken letter].

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

129 *See* FTC-Franken letter, *supra* note 127, at 6.

130 Consumer advocates contend, however, that improper service, or "sewer service," may contribute to consumers' absence from debt collection actions. *See supra* note 118 and accompanying text.

131 Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PENN. L.R. 1, 12-13 n.18 (2008).

132 Judges and attorneys who represent both creditors and debtors acknowledge that

Exemption laws, which vary significantly from state to state, protect from creditors' collection efforts specific amounts of certain categories of property. For example, federal and state exemption laws generally insulate Social Security payments, retirement accounts, some wages, veterans' benefits, unemployment compensation, workers' compensation, alimony and child support, and some personal property.[133] 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.[134]

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 assetless; rather, a judgment-proof debtor's assets are either exempt or encumbered.[135] "[N]othing in the exemption laws . . . prevents the debtor from making a voluntary payment from otherwise exempt assets."[136]

Moreover, although a creditor has no property interest in a debtor's exempt property,[137] a debtor's right to exempt property is not necessarily "self-executing."[138] In both *in rem* as well as *in personam* debt collection, courts do not agree on whether or not debtors are entitled to notice of a claim of exemptions.[139] In addition, the debtor must generally affirmatively assert her exemption rights, which requires that the debtor have 1) received notice of her exemption rights (or learned about them through other means, as from an attorney[140]); and 2) understood those rights and how to assert them.

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debtors largely seem unfamiliar with their exemption rights. *See, e.g.,* Telephone Interview with Beverly Yang, Staff Attorney, Land of Lincoln Legal Assistance Foundation (Oct. 5, 2010); Alan Alop, Deputy Director, Legal Assistance Foundation of Metropolitan Chicago (Dec. 2, 2010); the Hon. Paul M. Fullerton, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit (Dec. 3, 2010); Ashley B. Highland, Supervising Attorney, CARPLS (Jan. 7, 2011); Kate Barowsky, Attorney-at-Law (Dec. 15, 2010).

133 *See* HOBBS, *supra* note 15, at 267-94 (summarizing each state's exemption laws).

134 SHELDON ET AL., *supra* note 3, at 239 (1st ed. 2008); *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).

135 William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1055 (1979).

136 Id.

137 *See, e.g.,* SHELDON ET AL., *supra* note 3, at 254.

138 BROWN, *supra* note 33, § 6:70.

139 *Id.*

140 Many debtors who participate *in personam* proceedings, however, are unlikely to be

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 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.[141] 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."[142] 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.[143] These rights are not purely humanitarian or magnanimous. 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.[144] In doing so, exemption laws prevent debtors from becoming charges of the state who rely primarily or exclusively on taxpayer support.[145] 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.

III. 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—ones created and exacerbated by the specific debtor behaviors and the unique qualities of *in personam*

represented. *See supra* note 13.

141 *See supra* note 127.

142 Maryland Institute for Continuing Professional Education of Lawyers, PRACTICE MANUAL FOR THE MARYLAND LAWYER § 6.33 (3d ed. 2006).

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

144 *Id.*

145 *E.g.,* In re Hersch, 23 B.R. 42, 45 (Bankr. 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.").

proceedings I discuss above.[146] 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 proposals to debt collection laws would help remedy fundamental defects in the collection system, these proposals would fail to directly address specific problems in *in personam* debt collection actions. Thus, to fill in key regulatory gaps, I recommend 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

Debt collection laws and policies recognize that, although creditors deserve to be repaid, a collection system unchecked by procedural protections for debtors contributes to societal dysfunction by triggering various psychological, financial, and familial harms and externalities. Congress' passage of the Fair Debt Collection Practices Act (FDCPA), for example, was motivated in large part by a conclusion that debt collector harassment contributed to a number of social ills, including personal bankruptcies, marital instability, job losses, and invasions of personal privacy.[147] In an attempt to reduce these harms, the FDCPA prohibits third-party debt collectors from engaging in specific abusive, misleading, or unfair conduct.[148]

Some of these prohibited practices reflect debt collectors' tendency to conflate civil and criminal liability in an attempt to shame or scare debtors into repaying debts.[149] For example, a debt collector may not represent that nonpayment of any debt will result in arrest or imprisonment unless such enforcement is lawful,[150] may not falsely imply that the consumer committed any crime or other conduct in order to disgrace the consumer,[151] and may not solicit a postdated check from a debtor for the purpose of threatening or instituting criminal prosecution.[152]

Many have also raised concerns that debt collectors misuse civil or criminal dishonored check statutes, or "bad check" laws, to extract payment

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146 *See* discussion *infra* Parts II.A-C.

147 15 U.S.C. § 1692(a).

148 *See, e.g.,* NICKLES & EPSTEIN, DEBTOR-CREDITOR, *supra* note 21, at 34 (2009).

149 *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)").

150 15 U.S.C. § 1692e(4).

151 *Id.* § 1692e(7).

152 *Id.* § 1692f(3).

from debtors.[153] These statutes have a legitimate goal of deterring individuals from writing checks that will be dishonored.[154] 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.[155] 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."[156]

Similar psychological, financial, and familial harms are triggered by creditors' use of *in personam* remedies. In the *in personam* debt collection context, the threat of imprisonment can cause tremendous personal, psychological, and familial stress. One "no-show" debtor, for example, was imprisoned for two nights after being handcuffed in front of his children.[157] Although he acknowledged the debt was valid, the debtor described the experience as "[t]he scariest thing that ever happened to [him]."[158] Another debtor suffered serious chronic psychological harm—including recurring panic attacks, an inability to travel, and claustrophobia—after being arrested following her failure to appear at a debtor's examination.[159] The debtor, who had sought bankruptcy protection before her arrest, was awarded $50,000 in compensatory damages for injuries sustained following the creditor's violation of the automatic stay.[160]

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[161]), debtors may dig themselves deeper into a financial morass.[162] Debtors faced with the prospect of even temporary incarceration might agree to pay debts to avoid work and childcare disruptions—concerns that might account for debtors' failure to appear in court in the first place.[163]

Those debtors who suffer the most serious financial and

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153 *See, e.g.,* SHELDON ET AL., supra note 3, § 9.1, at 145.
154 *Id.*
155 *Id.*
156 Tolbert v. State, 321 So.2d 227, 232 (Ala. 1975).
157 *See, e.g.,* Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition,* WALL ST. J., Mar. 17, 2011, at C1.
158 *Id.*
159 Caldwell v. McMahan's of Lancaster, Inc., (In re Caldwell), No. 05–66074–fra13, 2006 WL 3541931, at *2. (Bankr. D. Or. 2006).
160 *Id.* at *1.
161 *See* Martin, *supra* note 12, at 564.
162 *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).
163 *See supra* note 119 and accompanying text.

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 the automatic stay[164] for debtors who suffer the most coercive effects of *in personam* proceedings. The automatic stay functions as a "time out," forcing creditors to stop all collection efforts in an effort to provide the debtor with "breathing room."[165] Likewise, in an attempt to promote equality of distribution among all similarly situated creditors, a bankruptcy filing would force creditors who received payment from the debtor in the 90-day pre-filing period to return that money to the trustee.[166]

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.[167] Hynes explains that these non-filing debtors tend to be poorer than most bankruptcy filers, suggesting that non-filers may be too poor to file for bankruptcy.[168]

Hynes' conclusion is consistent with the results of a study conducted by Professors Katherine Porter and Ronald Mann, who found many debtors in serious financial distress do not file for bankruptcy.[169] What triggered the bankruptcy filings of debtors against whom creditors had initiated collection actions? According to Porter and Mann, debtors tend to file once they have saved up enough money to pay for the bankruptcy attorneys' fees and court costs.[170]

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

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164 11 U.S.C. § 362 (2010); *See, e.g.,* Caldwell v. McMahan's of Lancaster, Inc., (In re Caldwell), No. 05–66074–fra13, 2006 WL 3541931, at *1-*2 (Bankr. D. Or. 2006) (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 (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).

165 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.").

166 11 U.S.C. § 547 (2010).

167 *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 20% of Virginia consumers sued in 2001 filed for bankruptcy by 2006).

168 *See id.* at 6.

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

170 *See id.* at 292.

creditors from "last resort" sources, like exempt assets or fringe credit lenders.[171]

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 pursuing poorer debtors in *in personam* litigation, 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 have established that this proposition is often untrue, however. It may easier to sue a debtor than to determine if she is a viable litigation target,[172] and even judgment-proof debtors can tap "last resort" payment sources, like exempt property, loans from family and friends, and fringe credit sources like payday lenders.[173]

Especially because those debtors who suffer the worst harms of *in personam* debt collection might be too poor to seek refuge in bankruptcy, it is critical to determine how *in personam* debt collection procedures can be improved. The goals must be to simultaneously 1) 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 2) 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 I discuss above—the structure of *in personam* remedies, creditors' incentives in a competitive collection process, and unsophisticated debtors' predictable responses to the institution of these proceedings[174]—*in personam* proceedings appear to function far more coercively in practice than courts and regulators have been willing to concede.

Courts and legislators have not recognized the possible harms stemming from the initiation of *in personam* proceedings. In fact, the legal system treats very differently two sanctions that, in reality, generate similar consequences and harms: 1) contempt for failure to appear in court or otherwise fail to comply with other requests for information ("nonappearance contempt") and 2) contempt for failure to turn over money or property to the creditor ("nonpayment contempt").

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171 *See supra* notes 127-129 and accompanying text.
172 *See supra* note 104 and accompanying text.
173 *See supra* note 135 and accompanying text.
174 *See* discussion *supra* Parts II.A-II.C.

1. How the Law Treats Nonpayment and Nonappearance Contempt Differently

Only about one-third of states authorize nonpayment contempt,[175] 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.[176] These courts have concluded that this exercise of their contempt authority is unconstitutional,[177] since it is functionally equivalent to imprisoning debtors for default, a practice illegal in every state.[178]

Increasingly, the prohibition on imprisonment for debt default has been equated with a consumer protection rule[179]—one largely consistent with the historical movement in the law toward reasonable limitations on the harshness of collection tactics.[180] By regarding courts' use of their contempt

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[175] *See, e.g.,* Silver-Greenberg, *supra* note 157, at C1.

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

[177] *See, e.g., In re* Byrom, 316 S.W.3d 787 (Tex. Ct. App. 2010) (in habeas proceeding, holding unconstitutional contempt order requiring independent executor of estate to pay $85,000 into court registry or be jailed for contempt); Carter v. Grace Whitney Properties, 939 N.E.2d 630, 635 (Ind. App. 2010) (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); 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."); 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); Brown v. Brown, 412 A.2d 396, 403 (Md. 1980) ("[I]ncarceration is not an available remedy for the enforcement of money decrees").

[178] *See, e.g.,* SHELDON ET AL., *supra* note 3, at 346-47.

[179] *See, e.g.,* ROBIN LEONARD, JOHN C. LAMB, SOLVE YOUR MONEY TROUBLES: GET DEBT COLLECTORS OFF YOUR BACK & REGAIN FINANCIAL FREEDOM (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 19th centuries of our republic."); STANLEY G. HILTON, TO PAY OR NOT TO PAY: INSIDER SECRETS TO BEATING CREDIT CARD DEBT AND CREDITORS (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 cash into the ash heap of history and condemned as an 'inhumane' and irrational procedure for hounding debtors.").

[180] Congress' passage of the Fair Debt Collection Practices Act in 1977, for

authority as the 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.[181] The rationale of nonappearance contempt is ostensibly clear and defensible: litigants cannot opt out of the legal system by ignoring summonses or requests for information.[182] 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 in *in personam* proceedings and simultaneously rejecting nonpayment contempt as unconstitutional, the legal system is adopting a misguided position about the functional consequences of each sanction. 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.

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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 15, § 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.

[181] *See, e.g.,* Fed. R. Civ. P. 37(b)(1) (allowing failure to comply with discovery order to be treated as contempt of court).

[182] *See, e.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911) ("[I]f 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.").

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,[183] nonpayment contempt is more controversial. Nonpayment contempt, which most courts equate with the unconstitutional imprisonment for debt default, is entangled in debtors' prisons' complicated legacy. And in a legal system that acknowledges the inevitability of financial failure,[184] nonpayment contempt has been perceived as an unduly harsh way to sanction a debtor.[185]

In spite of the differences in the legality and legitimacy of nonappearance and nonpayment contempt (as well as critical differences between 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. The concept of "nuisance value" refers to a litigant's ability to assert a meritless claim or

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183 *See* sources cited *supra* note 73.

184 *See, e.g.,* Mann & Porter, *supra* note 169, at 291 (describing bankruptcy as the United States' "institutional remedy" for financial distress).

185 *See, e.g.,* Ressler, *supra* note 39, 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* 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).

defense in the pursuit of a payoff the other party sacrifices to rid herself of the bothersome litigation.[186] The other party calculates the payoff by estimating the cost of successfully defending against the weak or meritless claim. While the creditor's underlying claim in the *in personam* debt context is hopefully most often not meritless,[187] the creditor's *legal entitlement to the assets* the debtor-contemnor may feel pressure to forfeit may be less clear.

Thus, courts cannot ignore the two-pronged 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,[188] and 2) the debtor neglects her right to claim exemptions or contest the underlying debt due to information asymmetries between debtors and creditors, debtors' *pro se* status, a lack of court oversight, and debtors' lack of sophistication.[189]

Thus, in practice, a court that threatens to imprison a "no-show" debtor is not merely enforcing the discovery obligations imposed on a debtor summoned to participate in an *in personam* proceeding. 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 they may utilize all rights afforded to them under collection laws. When, however, the state threatens imprisonment, thereby creating a direct or indirect risk that a debtor, without asserting key procedural and substantive rights, perceives payment of the debt as the path of least resistance, the law must step in.[190] Targeted legal reforms can attempt to establish a fairer bargaining relationship between debtors and creditors.

C. The Inadequacy of Proposed Reforms

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

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

188 *See supra* notes 127-129 and accompanying text.

189 *See* discussion *supra* Parts II.A-II.C.

190 *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).

Recently, various groups—most notably the Federal Trade Commission (FTC)—have proposed significant changes to federal and state debt collection laws.[191] These groups have suggested that the aging laws governing debt collection are ripe for reform,[192] given stark changes in the legal landscape, including a rising tide of collection actions[193] and the growth of the debt-buying industry.[194]

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,[195] 2) sewer service;[196] 3) the high rate of default judgments;[197] 4) collectors' improper garnishment of exempt funds in debtors' bank accounts;[198] and 5) creditors' suits on time-barred debts—a prohibited "unfair" practice under the FTC Act.[199] In response to these concerns, the FTC has encouraged states to pursue specific reforms, including 1) adopting measures to increase the likelihood that consumers will defend or otherwise participate in litigation;[200] 2) requiring collectors to include in their complaints more information about the underlying debt;[201] and 3) mandating that collectors disclose to consumers that filing suit on time-barred debt is illegal.[202]

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[203]—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

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191 *See* FTC, *supra* note 5; NAT'L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS (2010).

192 NAT'L CONSUMER LAW CTR., THE DEBT MACHINE, *supra* note 191, at 1.

193 FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE—A WORKSHOP REPORT 55-56 (2009*), available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

194 NAT'L CONSUMER LAW CTR., THE DEBT MACHINE, *supra* note 191, at 18.

195 *See* FTC, *supra* note 5, at 16-18.

196 *See id.* at 8-12.

197 *See id.* at 7.

198 *See id.* at 31-35.

199 *See id.* at 23.

200 *See id.* at 13.

201 *See id.* at 17, 19.

202 *See 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 Disability payments). FTC, *supra* note 5, at iv.

203 *See supra* notes 78 and 79 and accompanying text.

consequences may at the collection stage.[204] 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.[205]

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,[206] Senator Al Franken introduced legislation proposing to amend the FDCPA to, among other things, provide enhanced validation notices[207] to consumers and improve the process by which consumers dispute their debts.[208] One provision of the bill, moreover, proposes to amend the FDCPA by prohibiting a debt collector from seeking a warrant for the debtor's arrest from a court or any law enforcement agency.[209] 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,[210] this legislation—if reintroduced in Congress—would likely have no effect on any of the coercive practices in *in personam* actions described in this Article.

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[204] Interview with Ashley B. Highland, Supervising Attorney, CARPLS (Jan. 7, 2011).

[205] 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, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit to Lea Shepard, Assistant Professor of Law, Loyola University Chicago School of Law (Jan. 10, 2011).

[206] S. 3888, 111th Cong. at *S7801 (2010) ("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.")

[207] 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 collector's initial communication with the debtor. *See* 15 U.S.C.A. § 1692g(a). 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. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW, § 12.13 (2010).

[208] S. 3888, 111th Cong. §§ 3, 4 (2010).

[209] *Id.* § 5.

[210] *Id.*

D. Recommendations

1. How Turning Over Bond Payments to Creditors Perpetuates Contempt Confusion

In many states, the law perpetuates "contempt confusion"[211]—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),[212] others require debtors to post a cash bond.[213] The bond may be set at the amount of the judgment,[214] and, after court costs are deducted, the bond money is generally turned over to the creditor in partial or full satisfaction of its judgment.[215]

Every state prohibits imprisonment for ordinary civil debts,[216] and, in some states, courts have concluded that courts' use of their contempt authority to compel "can-pay" debtors to turn over money or property to

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[211] *See* discussion *supra* Part III.A.

[212] One example of a signature bond is Illinois' "I-Bond," which allows the debtor to be released without posting any money. Cook County Public Defender, *Guide to the Criminal Justice System,* http://www.cookcountygov.com/portal/server.pt/community/public_defender,_law_office_of/260/guide_to_the_criminal_justice_system (last visited Mar. 29, 2011).

[213] Telephone Interview with John N. Dore, Attorney at Law, Chicago, Il. (Nov. 17, 2010). 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 County Public Defender, *Guide to the Criminal Justice System,* http://www.cookcountygov.com/portal/server.pt/community/public_defender,_law_office_of/260/guide_to_the_criminal_justice_system (last visited Mar. 29, 2011).

[214] *See, e.g.,* Maryland Institute for Continuing Professional Education of Lawyers, PRACTICE MANUAL FOR THE MARYLAND LAWYER § 6.33 (3d ed. 2006) (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, *In Jail for Being in Debt, supra* note 34, at 1A.

[215] Minn. Stat. § 588.04 (2011); Mass. Gen. Laws Ann. 224 § 21 (2010) (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 the creditor the amount due on the judgment within sixty days or within such longer time as the court may allow.").

[216] *See supra* note 37.

creditors falls within this prohibition.[217] Nevertheless, regardless of whether states that forbid courts from sanctioning "can-pay"[218] debtors for failure to turn over money or property to creditors, courts can imprison a debtor who *fails to show up* at an *in personam* proceeding, force that debtor to post a bond to secure her appearance at a subsequent contempt hearing, and turn over that bond money to the collector in satisfaction of its judgment.[219] 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 many 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."[220]

This practice is harmful, since a debtor anxious to secure her release will be desperate to procure bond funds through any available means: through a credit card cash advance, a loan from a friend or family member, a payday loan, or forfeiture of exempt property.[221] Thus, I propose that bond money should be used only used to secure a debtor's appearance at a subsequent hearing—not to expedite the creditor's collection efforts. The intervention of the court—and the threat that the state will deprive a debtor of her liberty—must not facilitate the collection efforts of a creditor in a way that compromises 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

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[217] *See supra* note 177 and accompanying text.

[218] 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."); 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.").

[219] *See, e.g.,* In re Butler, 2011 WL 806078, at *1 (Bankr. C.D. Ill. 2011).

[220] Chris Serres, *Is Jailing Debtors the Same as Debtors' Jail?*, STAR TRIB., June 9, 2010, at 1A ("If, 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." (quoting Alan White)).

[221] *See supra* note 127.

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 knowledgeable about her exemption rights and how to assert them, exempt property can easily be forfeited—either knowingly or unwittingly—to creditors.[222] While this problem is not unique to *in personam* debt collection,[223] various groups—including the Federal Trade Commission, 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.[224]

To protect exempt property—and to safeguard the important policies advanced by exemption rights[225]—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 and submitted to the court's jurisdiction, the judge must be required to confirm that a debtor who transfers money or property to a collector in any in-court payment plan[226] or out-of-court settlement is not forfeiting retirement assets or other exempt property without full knowledge of her right to insulate exempt property from creditors' claims.

Some sympathetic judges (and even some debt collectors[227]) may already prod unrepresented debtors into asserting their exemptions by, for example, asking debtors who appear before them whether or not the debtors are choosing to claim any exemptions.[228]

The likelihood 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.[229] A judge who does so may be accused of improper advocacy. For this reason, a specific directive to

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[222] *See* discussion *supra* II.C.2.

[223] The FTC and others have expressed concern that banks and creditors are improperly freezing exempt funds in debtors' bank accounts. 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. FTC, *supra* note 5, at iv.

[224] *See supra* notes 127-129 and accompanying text; *see* sources cited *supra* note 132.

[225] *See supra* text accompanying note 134.

[226] 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).

[227] Telephone Interview with Kate Barowsky, Attorney-at-Law (Dec. 15, 2010).

[228] Interview with Sarah Grincewicz, Esq., The Albert Law Firm (Jan. 7, 2010).

[229] Telephone Interview with the Hon. Paul M. Fullerton, Associate Judge, DuPage County, Illinois, 18th Judicial Circuit (Dec. 3, 2010).

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.

Before the court individually reviews every payment plan or settlement, the creditor could be required, for example, 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 1) that 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) that the debtor is transferring exempt property to the creditor, but the attorney and creditor used no "unfair or deceptive"[230] means to induce the debtor into making 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 is duplicative of the exemption notice requirement in effect in many jurisdictions, as some summonses already provide examples of property exempt under federal and state law.[231] Judges, creditors' attorneys, and debtors' attorneys report that, in spite of these notices, unrepresented debtors frequently continue to fail to assert their exemption rights.[232]

Of course, courts and regulators can improve the comprehensibility of notices, and can even empirically test what types of disclosures are the most effective.[233] Debtors, however, may not read the disclosures in the first

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230 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).

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

232 *See supra* notes 127-129 and accompanying text; *see* sources cited *supra* note 132.

233 Regulators routinely conduct empirical studies to determine what changes to regulations would be most effective. *See, e.g.,* James M. Lacko and Janis K. Pappalardo, FEDERAL TRADE COMMISSION BUREAU OF ECONOMICS STAFF REPORT, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROPTOTYPE DISCLOSURE FORMS (June 2007), *available at* http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pd.

place. In addition, given disquietingly low levels of financial literacy,[234] 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.[235]

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,"[236] it is unrealistic—absent the imposition of a controversial[237] or underutilized[238] enforcement method—to anticipate much improvement if such a requirement were implemented.

Requiring judges in *in personam* proceedings to ensure that debtors are knowledgeable about their exemption rights is neither radical nor unprecedented. Indeed, similar mandates are imposed on judges in other areas of the law.[239] For example, in every individual debtor's Chapter 7

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234 *See, e.g.,* Jeffrey T. Dinwoodie, *Ignorance Is Not Bliss,* 18 U. MIAMI BUS. L., 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).

235 *See, e.g.,* Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 26-32 (2008); 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).

236 BROWN, *supra* note 33, § 6:70.

237 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.,* National Consumer Law Center, Comments to the Federal Reserve Board on Proposed Rule Changes to Regulation Z, Docket No. R-1390 (Dec. 23, 2010) (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 TILA's rescission provisions, most courts have been unwilling to do so).

238 *See, e.g.,* Whitford, *supra* note 26, at 1096 (implying that debtors rarely assert their rights in the execution context).

239 For example, when a defendant tenders a guilty plea at arraignment, the judge must determine, among other things, whether the plea is voluntary, 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,

bankruptcy case, bankruptcy judges must approve unrepresented debtors' reaffirmation agreements with creditors.[240]

In a reaffirmation agreement, a debtor agrees to repay part or all of a debt that would otherwise be discharged in the bankruptcy proceeding.[241] For example, a debtor who signs a reaffirmation agreement agrees to repay a $3000 credit card debt on which she has defaulted. If the debtor instead allowed the court's discharge to take full effect, she would be absolved from repaying the debt.[242]

Reaffirmation agreements have been roundly criticized.[243] As Professor Charles Tabb has posed the issue, "[w]hy would a debtor ever do such a crazy thing?"[244] Debtors choose to reaffirm debts for various reasons: 1) to retain property that otherwise would be forfeited to the creditor in bankruptcy, 2) to protect a nonfiling 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).[245] Some have questioned whether reaffirmation agreements subvert bankruptcy's "fresh start" policy, 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,[246] the Bankruptcy Code imposes various substantive and procedural restrictions on debtors' ability to enter into reaffirmation agreements.[247] 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,[248] 2) determine whether the

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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 (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.*

[240] *See* 11 U.S.C. §§ 524(d) (2010).

[241] *See id.* §§ 524(c); 727(a)(10).

[242] This assumes that the debtor would have no other problems receiving the discharge.

[243] *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.").

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

[245] *See, e.g., id.* at 1027-28.

[246] *See, e.g.,* National Bankruptcy Review Commission Final Report, Bankruptcy: The Next Twenty Years 145-65 (1997).

[247] 11 U.S.C. §§ 524(c)-(d); (k)-(m) (2010).

[248] *Id.* §§ 524(d)(1)-(d)(2).

agreement imposes an "undue hardship" on the debtor, and 3) decide whether the reaffirmation is in the debtor's "best interests."[249] In assessing these factors, the court considers, among other things, the unrepresented debtor's ability to afford the payments she would be required to make under the agreement.[250]

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.

In addition, in a sense, a reaffirmation agreement is *inconsistent* with the underlying objective of a bankruptcy proceeding; for this reason, 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. 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.

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[249] *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.

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

Some commentators contend that exempt property functions as a "carrot" in negotiations with creditors.[251] 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).[252] Thus, one might argue that requiring a judge to approve 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.[253] 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"[254] where "first in time is first in right"[255]), 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.

IV. 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

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[251] Whitford, *supra* note 26, at 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.").

[252] *Id.*

[253] *See supra* note 111 and accompanying text.

[254] *See supra* note 20 and accompanying text.

[255] *See* Rankin & Schatzell 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").

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 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, 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 choose to waive their rights by failing to defend themselves at the judgment stage or by failing to respond to a summons to participate in an *in personam* action. 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 helpless nor omnipotent, but stand on various points along the spectrum between the polar opposites of personal and societal responsibility."[256]

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

[256] DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 6 (2005).

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."[257] 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.

[257] *See* Lopucki, *supra* note 42, at 4.