THE ECONOMY OF THE DEBTORS' PRISON MODEL: WHY THROWING DEADBEATS INTO DEBTORS' PRISON IS A GOOD IDEA

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I. INTRODUCTION

Recently, the United States has seen a surge of state courts allowing imprisonment of debtors pursuant to an order of civil contempt. Complicating this ordinarily innocuous procedural remedy, the orders at issue are often based on the debtor's failure to pay a court-ordered debt. Thus, as some have posited, individuals are being imprisoned for being too poor—a schema reminiscent of Charles Dickens-esque debtors' prisons operating throughout 1800s America. Although some states have already outlawed the practice, citing concerns of unconstitutionality, many recognize the economic efficiency and possibly large deterrent effect of the revamped process.

This Note attempts to reframe the debate by arguing that critics suggesting the debtors' prison model promotes little deterrence fail to look to the correct link in the debt collection chain. Indeed, it is not the imprisonment of debtors that creates deterrence, but rather the *threat* of imprisonment that creates settlement. Although some deterrence value may be gained on the debtors' side of the equation, the true value of the model is in its deterrence of overly risky lending. Use of this model has resulted in a higher rate of settlement and repayment, in turn increasing both the return on investment and overall profit margin of third-party debt buyers. Because nationally recognized banks cannot legitimately use the debtors' prison model, first-party creditors may be deterred from entering into overly risky loan agreements in an attempt to stop lining the pockets of their direct competitors. This becomes an especially salient argument as more third party debt buyers move into the same commercial loan and financial services market as nationally recognized banks. Because this practice only recently reemerged within the United States, this Note necessarily evaluates debtors' prisons employed abroad—with a specific emphasis on the more traditional models enforced in Saudi Arabia and Dubai. Examining these models not only bolsters the argument that the threat of imprisonment deters risky borrowing and lending, but also highlights important truths about the systems operating behind the model. Part II of this Note alleviates complexity by providing an overview of the argument. Part III provides relevant historical background on debtors' prisons in England and the United States. Part IV continues to provide relevant information on the integrated parts of the model, and simultaneously analyzes how those parts work together to provide deterrence. Throughout Part IV, debtors' prisons in Saudi Arabia and Dubai are used to support the thesis of this Note. Part V of this Note identifies implications of the implementation of the debtors' prison model. Part VI offers a comprehensive conclusion tying these complicated parts into one cohesive theory.

II. OVERVIEW

Early critics of the debtors' prison model were quick to utilize emotionally sympathetic cases to bolster an argument that imprisonment for

failure to repay debt provides no deterrent to future similar behavior because those actually imprisoned are unlikely to repay their outstanding debt.[1] Moreover, critics of this option have argued that the *in terrorem*[2] effect of the debtors' prison model is either ineffective or too socially costly. Such critiques, however, have narrowly focused on the imprisonment itself, failing to take into account the larger picture of debt buying and collection. Indeed, looking at the *threat* of imprisonment instead of the relatively small number of debtors actually imprisoned, reveals that the *in terrorem* effect of the practice leads to shockingly high levels of repayment and settlement of amounts owed.[3] Likewise, while some have voiced concerns that utilization of imprisonment for failure to pay debt puts too much power in the hands of those creditors who offered the risky loan in the first place,[4] the threat of debtors' prison offers a strong disincentive to future similar behavior on the creditors' side as well. Because third party debt buyers compete directly with the nation's largest financial institutions,[5] which are unlikely to take advantage of the threat of debtors' prisons due to the involved optics, such institutions may react by engaging in less risky lending practices in order to curb lining the pockets of their competitors. This is especially true since utilization of the threat of imprisonment based on debt has shown record rates of return for third party debt buyers[6]—particularly in the wake of the 2008 Great Recession.

Because the return of this refurbished process is recent in the United States, it is helpful to look outside our borders when assessing the potential pitfalls and advantages of this model. Recently, the use of the debtors' prison

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[1] Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 143-84 (2002) (representing one of the main critiques of the debtors' prison model and discussing the model's lack of deterrence value).

[2] "In terror or warning; by way of threat." *In terrorem*, BLACK'S LAW DICTIONARY (2d ed. 1995), *available at* http://thelawdictionary.org/in-terrorem.

[3] Richard Lempert, *Organizing for Deterrence: Lessons from a Study of Child Support,* 16 LAW & SOC'Y REV. 513, 513-68 (1981-1982) (discussing both special and general deterrence gained by imprisonment for failure to pay child support, a system enforced through similar mechanisms as debtors' prison and receiving similar criticisms).

[4] Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509 (2011) (recommending modification of particular features of *in personam* proceedings to balance creditors' collections interests while protecting against abuse of the system).

[5] Although debt buyers compete with banks in the collection of debts in general, more and more debt buying companies are using complex structuring to move into the lending and borrowing business both inside and outside of the United States. Doug Alexander, *National Bank Benefits by Taking out the 'Garbage,'* BLOOMBERG BUSINESS, Sept. 30, 2014.

[6] "[O]ne hyper-successful company boasts of a 239 percent return." Peter Van Buren, *Poverty Is Profitable: 1 out of 3 US Consumers in Debt Collection*, HUFFINGTON POST POLS (July 29, 2014, 3:03 PM EDT), http://www.huffingtonpost.com/peter-van-buren/poverty-is-profitable-1-debt_b_5630444.html.

model throughout the Middle East has become one of the most controversial issues facing the world of debt buying and collection today. Looking comparatively to those models employed in Saudi Arabia and Dubai reveals truths about the deterrence value of this system. Analyzing these three systems on a spectrum, from implementation of a government enforced model in Saudi Arabia, to the most traditional form of debtors' prisons seen in Dubai, and lastly the system employed in the United States, where courts act as a check on creditor power, reveals significant conclusions. Particularly, examining the systems in place in Saudi Arabia and Dubai reveals that contrary to critics' conclusions, the threat of imprisonment seems to offer at least some amount of deterrence to overly risky lending and borrowing practices. Moreover, this comparative analysis reveals that the amount of deterrence served directly correlates to the efficiency of the enforcement mechanism behind the system.

Applying these lessons within the United States, it becomes obvious that in analyzing the deterrence value of the system, critics may have too quickly discounted this model. Specifically, it is not the imprisonment itself, but the *threat* of imprisonment combined with the check of an independent legal authority, which allows for a realization of the benefits of this *in terrorem* system while minimizing its social costs. Stated precisely, while the *threat* of imprisonment encourages a high rate of repayment and settlement amongst those already in debt, enforcement through an independent and democratic court system works congruently to alleviate social costs by minimizing arbitrariness. Together these factors ensure an efficient system, allowing debt buyers to make a remarkable return on their investment, and in turn discouraging future risky lending practices amongst first party creditors.

It is important to note at the outset that while many have concluded that imprisonment for failure to repay a debt is a de facto institution of a modern-day debtors' prison, those actually imprisoned are incarcerated not because they failed to repay their debt, but rather because they have willfully ignored an order of the court.[7] Even though some see this as a distinction without a difference, imprisonment on an order for civil contempt has long been recognized as an important coercive power of the courts. Indeed, an analogy in this arena can be drawn to that regarding the payment of child support. Although imprisonment for failure to pay child support has met similarly harsh critiques, the very real possibility of prison time in this arena has resulted in deterrence of similar behavior, providing a net gain to social welfare.[8] Like in cases involving imprisonment for debt, it is the threat of jail in child support cases that not only leads to settlement, but also deters similar behavior—maximizing the *in terrorem* effect of the practice while insulating the social costs to those worst offenders.[9] Analogously, imprisonment for debt serves a social good by holding

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7 Please see the discussion of relevant case law below for support of this assertion.

8 Lempert, *supra* note 3, at 513-68.

9 *Id.*

borrowers to their debts, ensuring first party creditors realize a financial loss for engaging in overly risky behavior, and hopefully deterring similar future behavior on both sides.

Thus, while issues of constitutionality and possibilities for abuse must be addressed and mitigated, the efficiency of the business model, potential return on investment, and deterrence of risky lending and borrowing suggests that critics of the system may have too hastily dismissed the potential of the debtors' prison model. This is especially true since any possible deterrent to risky borrowing and lending may become crucial as the United States faces impending debt bubbles from student loans and personal credit card debt.

III. BACKGROUND

A. Debtors' Prisons in England

Like many of America's legal structures, imprisonment for failure to pay a debt is a practice based on common law legal traditions inherited from Britain.[10] In 1267, the Statute of Marlbridge was among the first in England to allow imprisonment for debt.[11] Enacted as a preventative measure to flight, the statute allowed the debtor to be held in prison until a trial could establish a formal term of imprisonment.[12] This statute was followed by the passage of the Statute of Action of Burnell in 1283, which allowed a creditor to obtain a bond against a debtor's property.[13] If the debtor defaulted, the creditor could levy on and sell the debtor's property in repayment of the debt.[14] If the sale of the debtor's chattel could not raise the requisite amount to satisfy the debt, the creditor could then utilize the bond to imprison the debtor, provided that the creditor agreed to supply the debtor bread and water.[15]

Whereas creditors had previously been obligated to care for imprisoned debtors, as the debtors' prison system evolved during the 13th, 14th, and 15th centuries measures were instituted by which creditors could detach themselves from any modicum of support for the imprisoned debtor.[16] Indeed, English courts during this time could be quoted as stating, "[i]f a man . . . lie in prison for debt, neither the plaintiff at whose suit he is arrested . . . is bound to find him meat, drink, or clothes; but he must live on his own . . . and if no

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[10] Marcus Cole, *A Modest Proposal for Bankruptcy Reform,* 5 GREEN BAG 2d 269, 271-72 (2002).

[11] *Id*. at 271.

[12] *Id*. at 271-72.

[13] Vern Countryman, *A History of American Bankruptcy Law,* 81 COM. L.J. 226, 226 (1976).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 226-27.

man will relieve him, let him die in the name of God."[17] Although the above language may seem foreboding, inhumane treatment and death of imprisoned debtors was not uncommon.[18] In fact, after investigating debtors' prisons across England, one commentator reported, "[t]he city's prison officials . . . routinely tortured incarcerated debtors and herded destitute prisoners into overcrowded, disease-ridden wards and dungeons. . . . disobedient prisoners [were punished] by confin[ement] . . . in a yard containing the corpses of prisoners who had recently starved to death."[19] Statements such as this make clear that the court's language, excerpted above, was more honesty than embellishment.[20]

The practices of debtors' prisons were institutionalized with some modification when the English formally enacted their bankruptcy laws.[21] For example, in 1543, a law providing for involuntary proceedings allowed for the seizure and sale of the property of an imprisoned debtor, while the creditor sought additional remedies.[22] Despite reform, the practice remained common throughout the 16th and 17th centuries, with some reports claiming that as many as 2,437 out of 4,084 total inmates were imprisoned for debt during this time period.[23]

During the 18th century, presumably as the result of public pressure due to reports of inhumane treatment, a variety of insolvency acts were passed allowing debtors limited relief. One insolvency act, for example, allowed release from jail for those owing less than 100 pounds if the debtor agreed to surrender his estate and take a poor debtor's oath.[24] Although the Debtors Act of 1869 sought to extinguish the use of the debtors' prison model, the practice continued, with the Judicial Committee of the Privy Council reporting as many as 7,867 debtors still imprisoned in the year 1899.[25]

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[17] *Id*. at 227 (quoting Marbury v. Scott, 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (Exchequer 1674)).

[18] Alex Pitofsky, *The Warden's Court Martial: James Oglethorpe and the Politics of Eighteenth-Century Prison Reform*, 24 EIGHTEENTH-CENTURY LIFE 88 *passim* (Winter 2000) (discussing Oglethorpe's role as a reformer of the Eighteenth-Century English prison system).

[19] *Id*. at 88.

[20] *Id.*

[21] Countryman, *supra* note 13, at 227-228.

[22] *Id.* at 227.

[23] *Information Leaflet Number 66 Imprisoned Debtors*, LONDON METROPOLITAN ARCHIVES (July 2011), https://www.cityoflondon.gov.uk/things-to-do/london-metropolitan-archives/visitor-information/Documents/66-imprisoned-debtors.pdf.

[24] *Id.*

[25] *Judicial Statistics, England and Wales, 1898. Part II*. CIVIL JUDICIAL STATISTICS, (John Macdonell ed., London, Eyre and Spottiswoode, 1900).

B. The Institutionalization of English Style Debtors' Prisons in the United States

In response to a decade of repeated commercial failure and financial crisis, the United States Congress passed the Bankruptcy Act of 1800 ("Act"), just three years after the framing of the Constitution.[26] The Act, which emulated the still thriving British debtors' prison model, was limited to merchants, but provided for involuntary proceedings upon the creditors' filing of a petition alleging an act of bankruptcy.[27] Those debtors who did not surrender their property or person, failed to make the proper disclosure of assets, or unsuccessfully complied with some other measure, were deemed to "be adjudged a fraudulent bankrupt" and were to be imprisoned for a term not less than one, and not more than ten years.[28] Although this first Act was quickly repealed, during the interim period before the Second Bankruptcy Act in 1841, imprisonment for debt was widely used for both deterrence and enforcement purposes.[29] Debtors' prisons were employed with particular vigor in Massachusetts, Maryland, New York, and Pennsylvania.[30] Indeed, each of these states reported, "from three to five times as many persons [were] imprisoned for debt as for crime."[31] A wave of reform blossomed in the 1830s and many states outlawed debtors' prisons, a ban appearing in many state constitutions and statutes today.[32] Importantly, "many of these provisions are limited to contract debtors . . . and contain exceptions for absconding contract debtors or those guilty of fraud . . . ."[33] Thus, at no time was the practice of holding a debtor in civil contempt for failure to abide by a court order to pay a sum of money deemed illegal or unconstitutional, outside of a very limited set of circumstances pursuant to the language of the relevant state constitution or applicable statute.

Evidencing the continued constitutionality of the practice is the historical development of federal law during this time period. As early as 1902, the Supreme Court endorsed the idea that money owed *in custodia legis*[34] was not in

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[26] Countryman, *supra* note 13, at 226-33; *see also History of the Federal Judiciary-Bankruptcy Jurisdiction in the Federal Courts*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/jurisdiction_bankruptcy.html (last visited Sept. 13, 2015).

[27] Countryman, *supra* note 13, at 228.

[28] *Id.*

[29] *Id.* at 229.

[30] *Id.* at 228.

[31] *Id.* at 229.

[32] Countryman, *supra* note 13, at 229; *see also Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1679 n.1 (1971) (stating that "[f]orty-one states ban imprisonment for indebtedness by provisions in their constitutions, and nine have statutory prohibitions").

[33] Countryman, *supra* note 13, at 229.

[34] "*In the custody of the law*" *in custodia legis*, BLACK'S LAW DICTIONARY (2d ed. 1995), http://thelawdictionary.org/custodia-legis.

fact "debt."[35] In *Mueller,* after being adjudicated a bankrupt, Mr. Nugent was ordered to pay a total of $14,233.45.[36] Mr. Nugent failed to do so and was found guilty of contempt, with a recommendation for imprisonment.[37] Mr. Nugent objected, arguing that he could not be imprisoned for failure to pay a debt.[38] Ultimately, the Supreme Court held that the order for incarceration was tenable because it "was not an order for the payment of a debt, but an order for the surrender of assets . . . placed *in custodia legis* by the adjudication."[39] Thus, the court recognized the very principle that allows imprisonment for failure to pay a creditor in modern times—put simply, it is not the debtor's failure to repay a debt which allows incarceration, but rather the fact that he has failed to comply with a court order dictating payment of a sum properly within the custody of the court.[40]

Years later in 1948, Congress passed 28 U.S.C. § 2007, which essentially attempted to mirror state provisions by forbidding imprisonment for failure to pay debt at the federal level.[41] Even though the statute appeared to eliminate debtors' prisons, in effect the language was interpreted to exempt imprisonment for debt based on orders of contempt, abiding by the Supreme Court's decision in *Nugent*.[42] Although Nugent arguably remains good law on this point of interpretation, it elucidates the Supreme Court's and the Federal Government's historical interpretation of the constitutionality of the practice at issue.

IV. ANALYSIS

A. An Analysis of Civil Contempt

"The power to punish for contempt[ ] is inherent in all courts."[43] Contempt for the purposes of this Note refers to the failure of the party subject to a court order to abide by its terms.[44] Civil and criminal contempt orders have long been employed for both coercive and punitive reasons.[45] A criminal contempt order is seen as a punitive measure, and as such carries with it the necessity of a defined jail sentence.[46] Unlike a criminal contempt order, civil contempt is

35 Mueller v. Nugent, 184 U.S. 1, 13 (1902).
36 *Id.* at 1.
37 *Id*.
38 *Id.* at 1-13.
39 *Id.* at 13.
40 Nugent, *supra* note 35, at 1-18.
41 28 U.S.C. § 2007.
42 James, *supra* note 1, at 154-160.
43 Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 369 (2006) (internal citation omitted).
44 *Id.* at 369-70.
45 *Id.* at 369.
46 *Id*. at 371.

deemed a coercive remedial measure meant to force the subject party to comply with the terms of a court order.[47] Because of the purpose behind civil contempt orders, there is no definite jail term attached.[48]

Civil contempt orders are commonly used to compel a debtor to pay a court ordered debt.[49] The legality of enforcing imprisonment through a contempt order for refusal to comply with a previous court order to repay debt is commonly upheld within the context of the federal courts.[50] This is especially true within the realm of cases involving an order to pay child support.[51] When such an order is filed, the "deadbeat" parent can be held in prison in the hopes that doing so will coerce them into paying their debt.[52] Indeed, as recently as 2011 the Supreme Court, presiding over an appeal from South Carolina, acknowledged a state's right to enforce civil contempt proceedings in child support cases.[53] *Turner v. Rogers* involved a claim by a father held in contempt five times for failure to pay a weekly sum of $51.73 in child support.[54] After being released from prison on his fifth contempt charge, he was found yet again to be in contempt for failure to pay $5,728.76 and was again sentenced to prison.[55] Mr. Turner appealed, on the basis of due process violations.[56] Ultimately, the Supreme Court found that Mr. Turner's due process rights were violated because he was unrepresented,[57] and had no notice that the case would turn on whether he was able to make the payment owed.[58] Moreover, the Court noted, the lower court did not make a finding that he was able to make the payment owed, as required.[59] Important for the purposes of this Note, the Court did not overturn the state court's right to imprison Mr. Turner, noting that both the Government and the State of South Carolina recognized the use of coercive enforcement remedies as important tools of the courts.[60]

Certainly, while incarceration for failure to pay child support should be narrowly utilized, the punishment exists both to deter similar behavior and in recognition that a state may require the use of a coercive threat in order to meet an important societal goal. Similarly, a civil contempt order for failure to pay debt also serves the public good. Considered broadly, holding those who enter into

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47 *Id.*

48 Ressler, *supra* note 43, at 371.

49 *Id.* at 363.

50 *Id.*

51 *Id.* at 363-64.

52 *Id.* at 371.

53 Turner v. Rogers, 131 S. Ct. 2507, 2517 (2011).

54 *Id.* at 2509.

55 *Id.*

56 *Id.* at 2509-12.

57 Right to counsel, although outside the scope of this Note, would go a long way toward dissuading the critiques of the current use of civil contempt orders to imprison based on failure to pay a debt.

58 *Rogers*, 131 S. Ct. at 2511.

59 *Id.*

60 *Id.* at 2517.

contractual agreements accountable for money owed ensures not only that the other contracting party benefits from repayment, but also that future would-be-borrowers understand the responsibility of entering into such an agreement. As with all *in terrorem* laws, the debtors' prison model may stand as a warning to those considering defaulting on their debt, but more precisely it operates to coerce settlement and repayment. Even though the threat of imprisonment is the key to promoting deterrence, it is the tangible punishment of imprisonment behind the threat that ensures the models' effectiveness. Although in general any economic system functions more efficiently if debt is constrained from building to disastrously high levels, even a modicum of deterrence gained by the debtors' prison model becomes vitally important in times during which the United States faces daunting levels of debt likely to result in the reemergence of financial downfall and crisis.

As the above analysis shows, in common law a debtor may be imprisoned when they refuse to abide by a court order to repay or disgorge tangible assets.[61] As *Turner v. Rogers* demonstrates, "[t]he ability of the contemnor to comply with a court order . . . is a required prerequisite to a finding of contempt . . . . It is axiomatic that a person may not be held in contempt nor imprisoned . . . for failure to comply with a court order if it is impossible to comply."[62] Indeed, "[b]efore an offender can be confined solely for nonpayment of financial obligations he . . . must be given an opportunity to establish inability to pay."[63] In these circumstances, a debtor must establish the existence of a negative.[64] As such, issues regarding the burden of proof may become complicated if, for instance, a contemnor neglects to provide the court with evidence of disputed assets or fails to convince the court that he or she is unable to pay by other means.[65] Nonetheless, the premise remains that a debtor cannot be imprisoned if he can show that it is impossible to comply with the terms of the court order.[66]

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[61] Ressler, *supra* note 43, at 364.

[62] *Id.* at 377 (citing Bearden v. Georgia, 461 U.S. 660, 667-68 (1983) ("holding that a fine may not be converted into a jail sentence simply because of the inability to pay"); 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.")).

[63] George v. Beard, 824 A.2d 393, 396 (Pa. Commw. Ct. 2003) (citing Commonwealth v. Schwartz*,* 275 Pa. Super. 112, 418 A.2d 637 (1980)), *aff'd*, 574 Pa. 407, 831 A.2d 597 (2003).

[64] *Id.*

[65] Ressler, *supra* note 43, at 377.

[66] *Id.*

B. The Constitutionality of Debtors' Prisons

The return to a modified debtors' prison model in the United States, whereby third party debt buyers have the option to use the coercive function of civil contempt orders to encourage repayment of debt, has led to questions about the constitutionality of the practice. To summarize, in most states the common practice is for a third party debt buyer to buy distressed debt for pennies on the dollar and then after exhausting all other collection options, file a complaint against the debtor individually to recoup the money owed.[67] A debtor will then be ordered to pay, likely within the confines of a court ordered judgment.[68] If the debtor willfully refuses to fulfill the terms of that order, without any indication that he is unable to pay back the debt, he may be imprisoned.[69] Although some states have held this practice unconstitutional, others have recognized the important difference of imprisonment based on contempt and imprisonment for failure to pay debt.

1. *Albarran v. Liberty Healthcare Management*

Recently in *Albarran v. Liberty Healthcare Management*, an Arkansas appellate court addressed whether a circuit court was precluded from using imprisonment as a punishment for failure to abide by the terms of a civil contempt order for repayment of a debt.[70] Because the reasoning of the court was highly dependent on the facts underlying the case, it is necessary to engage with the rather complicated series of events leading to the filing of the contempt order. The debtor in this case was injured in an auto-accident and after receiving treatment, his physician, Dr. Rick Looper at the Accident and Injury Treatment Center (listed as "d/b/a" for Liberty Healthcare Management), submitted a bill totaling $3,710.00 to his health insurance, Preferred Network Healthcare Recoveries ("Healthcare Recoveries").[71] Healthcare Recoveries then remitted payment of $637.43 to Dr. Looper in accordance with the details of the debtor's health insurance plan.[72] The debtor subsequently settled his auto-accident claim for a total of $30,000.[73] Healthcare Recoveries then sent two checks: one to the

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[67] Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J., (Nov. 28, 2010, 12:01 AM ET), http://online.wsj.com/articles/SB10001424052702304510704575562212919179410.

[68] *Id.*

[69] *Id.*; Albarran v. Liberty Healthcare Mgmt., 2013 Ark. App. 738, 431 S.W.3d 310 (2013) (holding that circuit court was not precluded from ordering debtor in contempt upon creditor complaint that debtor had failed to comply with attorney fee judgment of the court).

[70] 2013 Ark. App. at 7, 431 S.W.3d at 315.

[71] *Id.* at 1, 431 S.W.3d at 312.

[72] *Id.*

[73] *Id.* at 2, 431 S.W.3d at 312.

debtor for $26,290.00, and the other to Dr. Looper for $3,710.00 based upon a lien allegedly claimed by Liberty on behalf of the doctor.[74]

The debtor then filed a petition for declaratory judgment against Healthcare Recoveries and Liberty, seeking to invalidate Liberty's lien.[75] Although the debtor later settled and dismissed his claim with Healthcare Recoveries, his claim against Liberty continued.[76] Liberty subsequently filed a motion to dismiss the petition, disclaiming any interest in the proceeds of the debtor's settlement.[77] The circuit court entered an order granting Liberty's motion to dismiss, and awarded attorney's fees of $4,410.00, for payment within 30 days.[78] The debtor filed a notice of appeal of the initial order.[79] The circuit court certified the case for appeal, requiring the debtor to file an additional notice.[80] Because the debtor failed to file his notice, the Arkansas appeals court dismissed his claim.[81]

The debtor subsequently failed to timely pay Liberty's attorney's fees, arguing that he could not pay the proceeds out of his settlement money.[82] The circuit court rejected his argument.[83] Liberty then engaged in informal collections processes, but when unable to collect, filed a motion for contempt.[84] The debtor attempted to stop the contempt proceedings from moving forward by arguing that the circuit court was deprived of jurisdiction because he filed his appellate transcript with the Arkansas Court of Appeals.[85] The circuit court rejected the debtor's argument and held that he "was in willful . . . violation of the court's order due to his failure to comply with the order directing him to pay attorney's fees."[86] In doing so, the court noted "that there had been no testimony or evidence at the hearing demonstrating [the debtor's] inability to comply with the court's order."[87] In short, the court found that the debtor had willfully violated the court order because he had disregarded the court's order to pay the outstanding sum and provided no explanation as to his inability to pay the debt in light of his recent windfall.[88] Indeed, the circuit court reasoned that a court possesses the power to imprison when it appears that a contemnor has the ability to comply with the court's order, but chooses not to—such

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74 *Id.*
75 *Albarran*, 2013 Ark. App. 738 at 2, 431 S.W.3d at 310, 312.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Albarran*, 2013 Ark. App. 738 at 2-3, 431 S.W.3d at 310-13.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.* at 3, 431 S.W.3d at 312-13.
85 *Albarran*, 2013 Ark. App. 738 at 2-3, 431 S.W.3d 310-13.
86 *Id.*
87 *Id.* at 3, 431 S.W.3d at 313.
88 *Id.*

an action, concluded the court, is the meaning of willful obstinacy.[89] In so holding, the court allowed Liberty a body of attachment, allowing the local sheriff to bring the debtor into "custody to bring him before the court to see if there was any reason for his failure to comply with the court's order."[90] The debtor then timely filed notice of appeal, bringing the case before the Arkansas Court of Appeals.[91]

The Arkansas Court of Appeals began its analysis by acknowledging that civil contempt is designed to coerce compliance with a court order, and in this sense the contemnor[92] is thought to "carry the keys of their prison in their own pockets."[93] Because the circuit court's order was definite in its terms and clear in its impositions, the question before the court was whether the debtor's behavior constituted willful obstinacy.[94] The debtor in this case argued that because he did not have the ability to comply, his sentence would be a *de facto* sentence to debtors' prison, outlawed by the Arkansas State Constitution.[95] In response, the court of appeals acknowledged that "[a] court's power to institute civil contempt in order to acquire compliance with its orders is a long-standing rule of law, but it may not be exercised where the alleged contemnor is without the ability to comply."[96] Thus, noncompliance does not constitute willful disregard of a court order unless the debtor had the methods and means of complying and willfully chose not to do so.[97]

First addressing the debtors' prison argument, the court explained that a debtor imprisoned in this way is not being imprisoned for failure to pay a debt but rather because they have been given numerous opportunities to comply with a court order and refused to do so.[98] The court emphasized that just because the debtor chose not to comply with a contempt order *related to an outstanding debt*, it did not change the fact that he failed to comply with an order of the court.[99] Dismissing the first argument, the court ultimately held that the circuit court properly used their power to coerce compliance because: "there had been no testimony or evidence at the hearing demonstrating [an] inability to comply with the court's order, and the court found him in contempt but gave him another 30 days to comply . . . [and the debtor] has consistently refused to pay the attorney's fees" ordered by the court.[100]

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89 *Id.* at 4, 431 S.W.3d at 314.

90 *Albarran*, 2013 Ark. App. 738 at 3, 431 S.W.3d at 313.

91 *Id.* at 4, 431 S.W.3d at 313-14.

92 *Contemnor* is a common way to refer to the party subject to the contempt order. *Id.*

93 *Id.* (internal citation omitted) (quoting Fitzhugh v. State, 296 Ark. 137, 138, 752 S.W.2d 275, 276 (1988)).

94 *Id.* at 4-5, 431 S.W.3d at 313.

95 *Albarran*, 2013 Ark. App. 738 at 5, 431 S.W.3d at 313-14.

96 *Id.* (citing Ingle v. Ingle, 2013 Ark. App. 660, 3 (2013)).

97 *Id.*

98 *Id.* at 5-6, 431 S.W.3d at 313-15.

99 *Id.* (Emphasis added).

100 *Albarran*, 2013 Ark. App. 738 at 7-8, 431 S.W.3d at 315.

Although a thorough discussion of the *Albarran* case is helpful to our analysis in a multitude of ways, of particular importance is the court's discussion of the constitutionality of imprisoning someone based on debt default. Even though the Arkansas State Constitution includes a clause outlawing the jailing of an individual based on failure to pay a debt,[101] as the court rightly points out, the debtor in this case was not jailed for a failure to repay. Rather, the debtor was being jailed because he had been given upwards of three opportunities to comply with the court's order, and had failed to do so, providing absolutely no proof that he was in any way unable to pay the debt. This was further evidenced by the fact that the debtor had previously settled his auto-accident case and had in his possession a settlement check far in excess of the amount owed.[102] Other state courts considering this matter have failed to recognize the social value of ensuring compliance with a court order and have held antithetically to *Albarran*.

2. *In Re Byrom*

In a case of equal factual complication, the court in *In Re Byrom* refused to imprison a debtor on a contempt order for failing to deposit $85,000 into the court registry.[103] The debtor in this case, Mr. Jerry Byrom, became the sole beneficiary and independent executor of his mother's estate.[104] Shortly thereafter, a creditor filed an unsecured claim against the estate in the sum of $31,992.75 based on two orders signed by the applicable County Probate Court.[105] Both orders were due from the funds of the decedent's estate within 30 days of the issuance date.[106] Neither of the sums were paid, and the creditor was given notice that his claims had been rejected.[107]

Approximately two years later, the creditor filed to remove Byrom as the independent executor or, alternatively, to require him to post a bond in order to compel an accounting of his mother's estate.[108] The creditor claimed that he and the deceased's "attorney/guardian ad litem, sued Byrom in his capacity as independent executor 'for Authentication of Claims,'" alleging in relevant part that Byrom had "failed to comply with a final order of the court, signed on April 23, 2007."[109] The trial court held in the creditor's favor, removing Byrom as independent executor and awarding the creditor $14,034.10 to be paid in 30

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101 *Id.* at 6, 431 S.W.3d at 314; ARK. CONST. art. II, § 16.
102 *Albarran*, 2013 Ark. App. 738 at 1, 431 S.W.3d at 312.
103 *In re* Byrom, 316 S.W.3d 787 (Tex. App. 2010).
104 *Id.* at 788-89.
105 *Id.* at 789.
106 *Id.*
107 *Id*.
108 *Byrom*, 316 S.W.3d at 789.
109 *Id.*

days.[110] Moreover, the court ordered that Byrom deposit the cash relating to a sale of real property in the amount of $622,786.22—later the required deposit was reduced to $85,000.00.[111] Because Byrom had not paid the amount required in the time allowed, the creditor moved for contempt.[112] At the hearing on the matter, Byrom acknowledged the $622,786.22 windfall from the sale of his mother's estate, but claimed he was still unable to pay the $85,000 owed.[113] The trial court informed Mr. Byrom that if he failed to deposit the required money into the court's registry he would be held in contempt and imprisoned; Byrom did not pay the money and was imprisoned.[114]

On appeal, Byrom argued that imprisonment for failure to pay debt was unconstitutional under the Texas State Constitution Article 1, Section 18, which states, "[n]o person shall ever be imprisoned for debt."[115] The Texas Court of Appeals noted that "an obligation that is a legal duty arising out of the status of the parties is not a debt and therefore may be enforced by contempt."[116] While acknowledging the validity of the use of imprisonment in some instances, the court of appeals found that debts arising out of a contract or placed in the form of a judgment are debts within the language of the constitutional provision.[117] Because the court found that the debt at issue in this case qualified as such, the debtor could not be imprisoned to regain the sum owed.[118]

In Re Byrom represents a state court's interpretation of state law and should be read as such. To reiterate, the model discussed herein does not run afoul of laws like that discussed in *Byrom*. The debtors in these cases are not being held in prison for failure to pay debt but rather for willful failure to abide by an order of the court. Civil contempt orders have long been utilized to compel action in accordance with a court's will.[119] States that have held unconstitutional the use of civil contempt orders in this arena have failed to uphold an important power of the court.

Further, debtors wishing to avoid this situation have multiple outlets for avoiding retribution. First and foremost, a debtor facing this kind of punishment can work with a debt buyer or collector to structure a repayment plan accounting for their individual financial situation. Debtors may also avoid imprisonment by proving to the issuing court that they are unable to repay their debt. Alternatively, and perhaps more simply, a debtor facing this situation can file for bankruptcy, which carries with it an automatic stay from collections and the potential

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110 *Id.*
111 *Id.* at 789-90.
112 *Id*. at 790.
113 *Byrom*, 316 S.W.3d at 790.
114 *Id.*
115 *Id.* at 791; TEX. CONST. art. I, § 18.
116 *Byrom*, 316 S.W.3d at 792 (referencing *In re* Henry, 154 S.W.3d 594, 596 (Tex. 2005) (holding that delinquent child support payments are not a debt)).
117 *Id.*
118 *Id.* at 792-95.
119 *See, e.g.,* Ressler, *supra* note 43, at 371.

discharge of their debt. Thus, concerns over the constitutionality of these laws confuse the process of the issuance of a civil contempt order and refuse to acknowledge that a debtor in this situation likely failed to mitigate their predicament in any tangible way.

C. Third Party Debt Buying and Second Party Debt Collectors

Recently, "debt buying" has become one of the fastest growing trends in the debt collection market.[120] "Debt buying," for our purposes, refers to tertiary parties who purchase debt from first and second party debt owners and subsequently attempt to collect the debt.[121] Because most of the contempt orders referred to here result from legal actions taken by these third party buyers, this Note focuses mainly on the efficiency of the practice for these downstream buyers.

To grasp a basic understanding of the debt buying process, it may be illustrative to distinguish it from debt collection. When a first party creditor makes the decision to sell debt to a third party debt buyer they create a debt portfolio, which they market to potential buyers.[122] The portfolios contain large collections of similar or "bundled" debt—similarities range from "type of debt, to location of the debtor."[123] Because debt buyers may have incomplete or inaccurate information there may be some additional cost insulated from the possibly low sticker price of the debt.[124] After collecting the necessary information, debt buyers may then attempt to collect on the debt or sell the portion of the debt they could not recover to another buyer.[125] Unlike debt collection, the debt buyer has no contracted return rate that must be paid to the original creditor upon collection.[126]

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[120] FED. TRADE COMM'N., THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY, i (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[121] *Id.*

[122] *Debt Buyers and Debt Collection Agencies: What Consumers Should Know*, CLEARPOINT CREDIT COUNSELING SOLUTIONS, http://www.clearpointcredit counselingsolutions.org/resource-center/articles-and-tips/dealing-with-debt/debt-buyers-debt-collection-agencies, subsection "Third Party Debt Collectors and Debt Buyers" (last visited Sept. 20, 2015) [hereinafter *Debt Buyers and Debt Collection Agencies*].

[123] *Id.* at subsection *The Debt Buying Process.*

[124] *Id.* at subsection *Debt Buyers May Not Have Accurate Information.*

[125] *Id.* at subsection *Resale*.

[126] *Id.* at subsection *What Happens Next?*; *see also Examination Procedure Debt Collection,* CONSUMER FIN. PROT. BUREAU, http://files.consumerfinance.gov /f/201210_cfpb_debt-collection-examination-procedures.pdf (last visited Oct. 20, 2015) [hereinafter *Examination Procedure*] ("Third-party debt collection agencies [referred to elsewhere in this Note as debt collectors for simplicity] collect debt on behalf of originating creditors or other debt owners, often on a contingency fee basis. Debt buyers purchase debt, either from the originating creditor or from another buyer, usually for a fraction of the

Hoping to grasp a better understanding of this emerging market, the Federal Trade Commission ("FTC") recently conducted a study analyzing information from the nine largest debt buyers, who accounted for 76.1% of debt sold in 2008.[127] Through its study, the Commission acquired data on more than 5,000 debt portfolios, encompassing nearly 90 million consumer accounts.[128] Combined, "these accounts had a face value of $143 billion dollars," but were purchased for a mere $6.5 billion, meaning that debt buyers paid only 4.5% of the value of the debt.[129] Thus, these downstream debt buyers paid an average of only 4.0 cents on the dollar to acquire debt with a value of $143 billion dollars.[130]

Because the purchase price of the debt is so low, a third party debt buyer must only see a slight return to see a large profit. Because, as explained above, debt buyers do not operate on commission, their revenues are not tempered by a contractual obligation to return a percentage of the debt collected to the original creditor. Although traditional methods of phone calls and mail-outs allowed large revenues, employment of the threat of imprisonment has led to record levels of return on investment.[131] Indeed, since employing this method, one debt buying company reported "a 239 percent return."[132]

One of the largest differences between a debt buyer and a debt collector is the contract between the collections agency and the bank. Although debt buyers purchase the debt outright, many debt collectors do so on the basis of commissions and are contractually obligated to return a percentage of the debt collected to the debt owner.[133] For a bank or other large financial institution, the collections agency offers both positives and negatives. Specifically, entering into this sort of contract ensures that the bank will recover at least some of the value of debt; however, this arrangement also ensures that the institution will incur the cost of a potentially long recovery period.[134] This, however, does not mean that debt collectors do not enjoy a large return on investment. In 2010, debt collectors recovered around $54.9 billion in total debt, earning approximately $10.3 billion in commission. This means that in 2010 alone, the debt collection industry

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balance owed.").

127 FED. TRADE COMM'N., *supra* note 120, at i.

128 *Id*. at ii.

129 *Id.*

130 *Id*.

131 Silver-Greenberg, *supra* note 67 ("Debt collectors used to harry nonpaying borrowers for months with letters and phone calls. But those tactics are less effective now that many more borrowers are deeply in debt. So the new breed of debt collectors turns much more quickly to court to squeeze money out of distressed paper."); s*ee also* Van Buren, *supra* note 6.

132 Van Buren, *supra* note 6.

133 CONSUMER FIN. PROT. BUREAU, *supra* note 126.

134 This is especially true since debt collectors, particularly those attached in some way to large banks, are unlikely to use the threat of imprisonment, meaning their only method of recovery is direct solicitation to the debtor through phone calls and mail, which, as already mentioned, have a low response rate. Silver-Greenberg, *supra* note 67.

returned over $44.6 billion in debt to first party creditors and the general economy.[135]

Because the difference between debt collectors and debt buyers is technically difficult, a hypothetical may be illustrative. Assume that Bank X issues a loan to Borrower Y for $10,000. Borrower Y defaults, leaving $9,000 of the loan unpaid. In attempt to collect Y's outstanding debt, Bank X will enter into a commission-based contract with Collector Z. Collector Z will then attempt to collect the debt from Borrower Y, largely through phone and mail contact. If Collector Z is successful, a large portion of the $9,000 will go back to Bank X, minus the commission owed to Collector Z. Because the value of the debt depreciates as it ages, if Collector Z remains unsuccessful, at some point Bank X will determine that selling the debt at a huge discount is more profitable than incurring any additional collections costs. At this point Bank X will contract with Buyer B—an independent third party company—to sell Borrower Y's debt and information outright. If Buyer B is successful in collecting the outstanding debt, Buyer B will keep 100% of the money gained. After purchasing the bundled and heavily discounted debt, Buyer B will then attempt to collect the debt via phone and mail outs. If Buyer B is unsuccessful in their initial collection attempts, they may then pursue filing a claim against Borrower Y. If Borrower Y chooses not to settle, the court may enter judgment in favor of Buyer B, ordering repayment of the debt. If Borrower Y continues to evade the court order, Buyer B can file for civil contempt, and a court will determine if Borrower Y can be imprisoned for intentionally failing to comply with the court's order. Keep in mind that if Borrower Y can show that they are unable to repay the debt, the court cannot sentence them to imprisonment.

In both debt buying and debt collection, the original creditor loses some amount of the total value of their original investment. For debt that remains delinquent past 30 days, the rate of recovery for debt collectors is approximately 20%. Moreover, because the longer a debt remains uncollected the more its value depreciates, a recovery of only 20% after 30 days, represents not only an 80% facial loss to the institution of the overall debt, but also the amount representing the debt's depreciation value. Further, the bank incurs an opportunity cost by losing the chance to sell the debt when it is younger and more valuable. Although utilizing a debt collection agency may be less costly because the original creditor retains a large amount of control, sale of debt constitutes an immediate return on investment without having to absorb the costs of a long collections process.[136] Moreover, sale to a debt buyer insulates the institution from the depreciation loss and opportunity cost of uncollected debt. That being said, considering the FTC rates above, debt buyers are unlikely to pay above five to ten percent of the face

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[135] ERNST & YOUNG, THE IMPACT OF THIRD-PARTY DEBT COLLECTION ON THE NATIONAL AND STATE ECONOMIES 2 (February 2012), http://www.acainternational.org/files.aspx?p=/images/21594/2011final-ey-acaeconomicimpactreport1.pdf.

[136] *Debt Buyers and Debt Collection Agencies*, *supra* note 122, at subsection *What Happens Next?*.

value of the debt.[137] This means that regardless of which method the creditor employs, in a worst-case scenario they may lose between 80-95% of the face value of the debt.[138]

D. How The Debtors' Prison Model Works Abroad

> Debtors' prisons are still widely used throughout the world.
>
> In Greece, a debtor can still be imprisoned for not paying his . . . debt to a private bank. Germany maintains comparable concepts to debtors' prisons. Debtors in the United Arab Emirates (including Dubai) can be imprisoned for failing to pay their debts. China, including Hong Kong, has debtors' prisons, inter alia.[139]

By examining debtors' prisons abroad, we can see both the strengths and weaknesses of the system currently employed in the United States. Stringent models employed by Middle Eastern states, like Saudi Arabia and Dubai, are of particular import because they evidence the deterrence to risky borrowing and lending that the threat of prison provides. Additionally, looking at different forms of enforcement ranging from what could be considered the most traditional in Dubai to the most modern in the United States makes clear that although most *in terrorem* legal structures offer some level of deterrence, the system behind the practice can aid in maximizing that benefit while minimizing the associated social costs. To understand how these comparisons add or detract from the larger discussion of the functionality of debtors' prisons in the United States, it is necessary to explore how these systems operate.

1. Saudi Arabia

Before delving into how the debtors' prison model functions in Saudi Arabia, it is important to understand a bit about the country's legal and judicial structure. Because Saudi Arabia is an Islamic state, its legal and judicial structure is based on Islamic law, regardless of whether a case is civil or criminal in nature.[140] The Saudi Arabian court system is divided into three parts, the Shari'ah

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[137] FED. TRADE COMM'N., *supra* note 120, at i.

[138] *See id.*; Van Buren, *supra* note 6.

[139] CHARLES JEROME WARE, LEGAL CONSUMER TIPS AND SECRETS: AVOIDING DEBTORS' PRISON IN THE UNITED STATES 178 (2011).

[140] *About Saudi Arabia, Legal and Judicial Structure,* ROYAL EMBASSY OF SAUDI ARABIA IN WASHINGTON, DC (last visited Oct. 2, 2015), http://www.saudiembassy.net /about/country-information/government/legal_and_judicial_structure.aspx [hereinafter *About Saudi Arabia*].

Courts, which hear the largest number of cases across the broadest spectrum of issues, the Board of Grievances, which presides over matters involving the government, and lastly "various committees within government ministries that address specific disputes, such as labor issues."[141] For those unfamiliar with Shari'ah law, the term refers to a series of guidelines derived from the Holy *Qur'an*, the *Sunnah*,[142] *Ijma'*,[143] and *Qias*.[144] In 2007, by royal order, the Saudi Arabian system was enlarged to include a Supreme Court and smaller courts presiding over commercial, labor, and administrative issues.[145] Like the legal system in the United States, "Shari'ah [law] presumes that a defendant is innocent until proven guilty, and only in serious crimes or in cases of repeat offenders is one likely to witness severe punishments."[146] Because there is no separation between secular and religious aspects of society, the government plays a large role.[147]

Like many other areas of Saudi Arabian society, the Saudi government controls much of the country's financial sector.[148] Even with government oversight, recent reports from Saudi Arabia put the rate of consumer debt used to purchase consumer goods at 75%.[149] Reacting to this debt saturated market, Saudi Arabian banks cracked down on their lending and borrowing practices.[150] In order to enable banking reform, the SADAD Payment system, established by the Saudi Arabian Monetary Agency in 2004, streamlined bill payment through a more unified system of banks.[151] In boosting the efficiency of bill repayment the system strengthened the rights of banks,[152] allowing them to implement stricter debt collection practices.[153]

Collection practices in Saudi Arabia today are extremely strict: "When . . . money is not repaid in due time, the bank freezes the account, stops all electronic transactions of the debtor, and . . . sends them notifications through the

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[141] *Id.*

[142] The *Sunnah* refers to "the practices and sayings of the Prophet Muhammad during his lifetime." *Id.*

[143] *Ijma'* refers to "the consensus of opinion of Muslim scholars on the principals involved in a specific case occurring after the death of the Prophet." *Id.*

[144] *Qias* refers to a source of law referred to by analogy. *Id.*

[145] *About Saudi Arabia, supra* note 140..

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Saudi Arabia and the UAE Handle Bad Debts Differently, yet Both Come to the Same Wrong Conclusion*, FAILKA (Feb. 6, 2013, 5:23 PM), http://failaka.com/saudi-arabia-uae-bad-debts/#sthash.b2A7oFDe.0BZn4bR7.dpbs [hereinafter FAILKA Article].

[150] *Id.*

[151] *SADAD,* SABB, https://www.sabb.com/1/2/sabb-en/personal/services/sadad [hereinafter SABB].

[152] *Id.*; Diana Al-Jassem, *60,000 Saudis Unable to Repay Their Debts*, ARAB NEWS (Feb. 6, 2013) http://www.arabnews.com/60000-saudis-unable-repay-their-debts.

[153] SABB, *supra* note 151.

police department."[154] Through utilization of the police department and the courts, those debtors who default on their debt are imprisoned until they are able to settle with the appropriate bank.[155] Similar to the system operating in the United States, "Saudi law allows imprisonment for debt but makes an exception if the person is insolvent."[156] Some reports, however, claim that unlike in the United States where imprisonment for debt is permitted only in cases in which the debtor willfully refuses to comply with a court order, debtors' prisons in Saudi Arabia are used more frequently and more arbitrarily.[157]

Claims of arbitrariness largely result from the countries' utilization of Shari'ah law, which exists in the absence of codification and without a reliable system of precedent.[158] Facially, Saudi Arabia's interpretation of the debtors' prison model is much more traditional—meaning it is closer to the historical system followed in England—than that currently existing in the United States. Notably, the Saudi Arabian model highlights the importance of having an independent and reliable system behind implementation of the debtors' prison method to guard against arbitrariness and overuse. As discussed below, however, even within this stricter debtors' prison model, the threat of imprisonment may in fact deter risky borrowing and lending. Even the seemingly strict model employed in Saudi Arabia may seem relatively tame when compared with that employed in Dubai, which has no bankruptcy system, leaving debtors no real options outside of a prison sentence.

2. Dubai

Dubai is one of seven emirates comprising the United Arab Emirates (UAE).[159] As a member of the UAE, Dubai is subject to the federal law applicable to all seven emirates, but holds the right to manage its internal affairs.[160] Like Saudi Arabia, the legal system relied on in Dubai is largely based on Shari'ah law with foundations in the principles of civil law.[161] In reaction to exposure to international commerce, Dubai and the UAE have developed codified

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[154] *Id.*

[155] *Id.*

[156] *Saudi Arabia: Free Debtors from Prison, Continuing Detention Violates Arab Human Rights Charter, Saudi Laws*, HUMAN RIGHTS WATCH (Nov. 2, 2010), http://www.hrw.org/news/2010/10/28/saudi-arabia-free-debtors-prison [hereinafter *Free Debtors from Prison*].

[157] *Id.*; *see also* Christoph Wilcke, *Saudi Arabia Needs a More Transparent Justice System*, THE GUARDIAN, (Oct. 26, 2011, 05:30 AM), http://www.theguardian.com/commentisfree/libertycentral/2011/oct/26/saudi-arabia-justice-system-reform.

[158] *Free Debtors From Prison, supra* note 156; Wilcke*, supra* note 157.

[159] ANDREW TARBUCK & CHRIS LESTER, DUBAI'S LEGAL SYSTEM CREATING A LEGAL AND REGULATORY FRAMEWORK FOR A MODERN SOCIETY 7 (2009), www.lw.com/upload/pubContent/_pdf/pub2787_1.pdf.

[160] *Id.*

[161] *Id.*

federal laws, which cover everything from civil procedure to intellectual property.[162] Dubai retains courts and judges independent of the UAE, which apply both federal law and where federal law is silent, decrees enacted by Dubai's Ruler.[163] Dubai's court system is made up of a Court of First Instance, a Court of Appeal, and a Court of Cassation, each of which are divided into three divisions for civil law claims, criminal cases, and matters pertaining to Shari'ah law.[164]

The wide use of the debtors' prison model in Dubai, results largely from the country's relationship to credit card debt.[165] Due to restrictions embedded in Islam discouraging the charging of interest, credit card usage was traditionally very low in Dubai.[166] By 2008, however, foreign banks like Citigroup and HSBC fought to take the controlling share of the Dubai market, and as a result "the number of cards leapt to four million[,] . . . a fivefold increase in five years."[167] Although short term gains were prevalent, Dubai's lack of a reliable credit bureau led to creditors lacking knowledge as to how many cards or even how much debt any one debtor carried.[168] Lack of such information led to rampant engagement in risky borrowing and lending practices with inexperienced debtors accepting an average interest rate of 36%—more than twice the national average.[169] Some reports from this time period show debtors borrowing at a rate of 50%.[170] Such staggering debt required more stringent government oversight and the development of a stricter form of the debtors' prison model—perhaps even more akin to the historical English system than that developed in Saudi Arabia. Indeed; analogous reports of inhumane treatment are now surfacing from Dubai's debtors' prisons, with one report describing more than 250 prisoners sharing six rooms designed to hold only 48 and only two working toilets.[171] Unlike in the United States, where debtors are jailed after failing to comply with court orders, in Dubai bouncing a check is a jailable offense, and "debtors go to jail for bouncing the blank 'security checks' they must sign when accepting a card. If borrowers fail to pay, banks can deposit the checks for the sum owed," thus bouncing the check.[172] Like the Saudi Arabian system discussed above, the model employed in Dubai underscores the importance of the systems working behind the debtors' prison

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[162] *Id.* at 8.

[163] *Id.*

[164] Tarbuck & Lester, *supra* note 159, at 8-9.

[165] Jason Depale, *Stuck in a Web of Debt*, THE HINDU (Aug. 23, 2011), http://www.thehindu.com/opinion/op-ed/stuck-in-a-web-of-debt/article2384742.ece.

[166] *Id*.

[167] *Id.* (citing the source of this figure to a study conducted by the Lafferty Group, a London research firm).

[168] *Id.*

[169] *Id.*

[170] Depale, *supra* note 165.

[171] Henry Meyer, *Jailed in Dubai, Accused Wait Long After Good Times*, BLOOMBERG (Aug 11, 2010 11:14 AM), http://www.bloomberg.com/news/2010-08-10/jailed-in-dubai-accused-wait-long-after-the-good-times-have-disappeared.html.

[172] Depale, *supra* note 165.

model in realizing the benefits of the *in terrorem* effect while shielding against social costs.

Thus, unlike in the United States, where the decision to jail for failure to pay a debt stems from a civil contempt order issued by a neutral, detached magistrate, in Dubai and Saudi Arabia the government and the banks hold all the power. Important to note here is that even an advanced network of debt buyers operating in either state would be powerless to decide when and if imprisonment should be pursued. Thus, debt buyers would be unable to levy the threat of prison against debtors, and the same level of deterrence present in the United States would likely remain unrealized. Although the same level of deterrence may be unrealizable under the current debtors' prisons models, some point to the fact that even this strict imposition of prison sentences creates deterrence through fear, just as the threat of imprisonment does in the United States.[173]

V. IMPLICATIONS OF THE DEBTORS' PRISON MODEL

A. The Debtors' Prison Model is Economically Efficient as a Viable Business Model

Putting the constitutionality of the practice aside, at the very least, utilization of the debtors' prison model is an economically efficient and lucrative business tool. Encore Capital Group and its subsidiaries, such as Midland Credit Management, Inc., are thought to be some of the nation's biggest downstream debt buyers.[174] Midland Credit Management commonly uses the threat of imprisonment to try and encourage repayment of debt.[175] In 2009 alone, one out of six of Encore's subsidiaries reportedly filed upwards of 245,000 lawsuits with a resulting return of $487.8 million.[176] Further evidencing the effectiveness of this model is a case study from North Virginia, in which Midland filed 16,878 lawsuits over otherwise uncollectable debt between 2003 and 2014.[177] Of the 16,878 suits filed, nearly two-thirds either settled voluntarily or resulted in judgments in

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[173] *See infra* Part V.B (discussing the deterrence effect of prison sentences in either country).

[174] Danielle Douglas, *Taking on the Country's Biggest Debt Buyer*, THE WASHINGTON POST (May 9, 2014), http://www.washingtonpost.com/business/economy/taking-on-the-countrys-biggest-debt-buyer/2014/05/09/fbd65a24-a94d-11e3-b61e-8051b8b52d06_story.html.

[175] Silver-Greenberg, *supra* note 67. Repayment can refer to voluntary settlement, meaning in the absence of court intervention, or involuntary settlement as a result of court action, meaning that a creditor obtains a money judgment they can then utilize to pressure the debtor into repaying the money owed, including through wage garnishment and property liens.

[176] *Id.*

[177] Douglas, *supra* note 174.

favor of Midland, which the company then used to urge repayment from the debtor.[178]

Although critics may sight concerns over "robo-signing" of complaints without proper documentation and cost to the judicial system, with returns as large as those reported by Encore and other debt buyers,[179] the economic value of the practice is undeniable.[180] Further, some of these concerns may be over-exaggerated as Encore claims to have "180 million pages of documentation from issuers supporting the debts . . . collect[ed], with access to even more."[181] For those critics who worry that the *in terrorem* effect of this revamped process isn't worth the cost on judicial economy, Encore counters that it makes every possible effort to contact each individual debtor by phone or mail in an attempt to work out an oft discounted settlement.[182] Although some may regard such remarks as mere fluff, such critics may want to consider that the cost of collection "through . . . legal channel[s] is nearly fives times higher than [the] cost to collect through other channels," which ensures its use only as a last resort.[183] Moreover, because repayment of debt becomes exponentially more unlikely if a debtor is actually imprisoned, companies like Encore have a disincentive to pursue legal action past the contempt stage.

Further, while some may see this system as placing a large amount of power in the hands of creditors all too willing to take advantage, proponents suggest looking broadly at the economic benefit of discouraging default on debt. Indeed, creditors are simply working within a system of neutral and independent courts to hold debtors responsible for agreements they entered into voluntarily. Perhaps even more importantly, the system at issue here discourages negative behavior on both sides. On the one hand, this system may discourage future debtors from borrowing money they cannot afford, defaulting on debt already incurred, or encouraging settlement of outstanding claims. On the other hand, the system discourages first party creditors from continuing to make overly risky loans in the first place, lest they prefer to continue to provide profits to their direct competitors, many of whom offer the same services as traditional banks. This argument becomes more persuasive as more debt buyers are now utilizing complex business structuring to partner with or create subsidiaries engaging in commercial lending and borrowing.[184] Encore, for example, has partnered with Heartland to compete in this normally bank-centered market.[185] As Heartland's website emphasizes, partnerships such as

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[178] *Id.*

[179] As previously discussed, some companies report up to 239% in return rates. Van Buren, *supra* note 6.

[180] Douglas, *supra* note 174.

[181] *Id.*

[182] *Id.*

[183] *Id*.

[184] *Lending Services,* HEARTLAND, http://www.heartlandpaymentsystems.com/lending/ (last visited Nov. 2, 2015).

[185] *Id.*

this offer a direct advantage over more recognized commercial lending institutions because "[U]nlike most commercial banks, Heartland Lending Services and its lending partners understand small business owners. . . . That's why . . . you can borrow up to $750,000 for any business purpose—quickly, without collateral or complicated paperwork."[186] A closer examination of the two major modes of deterrence will reveal a fuller understanding of why the *threat* of imprisonment is the key to maximizing the benefits of the debtors' prison model.

B. The Debtors' Prison Model Offers Two Modes of Deterrence

Critics of the debtors' prison model point to the fact that debtors imprisoned for failure to repay their debt will be less likely to make payments once out of prison—due largely to the potential for job loss and the interruption in earning potential.[187] Although in theory this may be true, these same parties fail to look at the correct link in the chain to realize the model's true deterrence value. Indeed, it is not the imprisonment of debtors that creates the deterrence, but rather the *threat* of prison that creates repayment and settlement of debt owed. The discussion of Encore's astounding rate of return above bolsters this point. The use of the legal system to coerce debtors into repaying their obligations is extremely effective. Moreover, most people in this situation are not in fact imprisoned; instead, they settle their debt or agree to a repayment plan.[188] Although rare cases of imprisonment do occur,[189] this is a necessary evil because if the threat of imprisonment was empty then the deterrence value of the system would be moot. Thus, while it is logical to see that imprisoning debtors may not encourage those individual debtors to pay down their debts, those same debtors stand as an example, encouraging the vast majority to settle on their debt before such action is taken. Moreover, because once a debtor is imprisoned they become increasingly unlikely to repay,[190] debt buyers are logically discouraged from overusing motions for civil contempt.

Further, the effectiveness of the threat of being imprisoned for failure to abide by a court order is likely to deter risky lending and borrowing practices. In recent years this method of debt collection has seen an enormous return on investment for third party buyers. However, the cost associated with this model—in human capital through employment of legal assistance, court fees, and

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[186] *Id.*

[187] *See generally* James, *supra* note 1, at 163.

[188] Silver-Greenberg, *supra* note 67.

[189] While no national statistics are kept on how many people are incarcerated in the United States for failure to pay debts, some reports cite to a few hundred across the country. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

[190] James, *supra* note 1, at 148.

the like—make it an unrealistic option for first party creditors obviously unable to take advantage of bundled discounted debt. Not to mention that the perceived harshness of this method likely ensures too much ill will for a nationally known and recognized bank or other similar creditor to take advantage of this model. As we saw above, when a creditor chooses to sell debt, they may incur an extremely large loss on the face value of the debt—up to 95% estimating from the FTC's latest reports.[191] In the long term, realizing such a loss and recognizing that a direct competitor is able to see a large return as a result, may discourage first party lenders from making the type of loans that lead to the employment of the debtors' prison model in the first place. Thus again, critics of this model fail to look systemically at the effects of this practice to realize its true deterrence value.

C. The Use of the Debtors' Prison Model in the International Sphere Demonstrates Both its Effectiveness and Deterrence Value

The successful use of the debtors' prison model abroad not only helps to demonstrate its effectiveness, but also points to differences in the U.S. system that may maximize deterrence while minimizing social cost. Saudi Arabia, arguably implements a more traditional form of debtors' prisons model than that employed in the U.S. Although the Saudi system exempts debtors who can show they are insolvent, its reliance on Shari'ah law often results in the arbitrary imprisonment of debtors.[192] That said, even this conceivably harsher system has proven to provide deterrence as recent changes in the law working in tandem with the threat of being imprisoned, has dramatically lowered borrowing and lending.[193] Indeed, one of the chairmen of the National Committee for the Care of Prisoners and their Families, has commented, "I think Saudis are becoming more cautious about getting indebted due to the strict procedures that banks are following."[194] The chairman, went on to explain that those already in debt have begun to look for money in other places, such as asking family members for help, out of fear of imprisonment.[195] Although this system may seem harsh to outsiders, in a country where recent estimates place consumer debt as making up 27.2% of GDP, a harsher version of the debtors' prison model may be necessary to discourage overly risky borrowing and lending.[196] The evidence from Saudi Arabia confirms the deterrent effect of the model while

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[191] FED. TRADE COMM'N., *supra* note 120, at i-ii.

[192] *Free Debtors from Prison, supra* note 156.

[193] Al-Jassem, *supra* note 152 (reporting a drop in borrowing and lending after implementation of debtors' prisons by the national committee for the care of prisoners and their families).

[194] *Id.*

[195] *Id.*

[196] *Id.*

emphasizing that the oversight of courts in the United States is important for minimizing social cost.

Emphasizing the importance that debt buyers play in maximizing deterrence, Dubai's debtors' prison model relies on heavy threats with adverse results.[197] Although Dubai's system has evidenced some deterrence, many identify an inability to maximize these benefits due to the lack of any form of collections systems.[198] Underlining the importance of such systems in relation to deterrence is the fact that because citizens of Dubai are unable to turn to a company offering debt restructuring, they flee from the country in mass.[199] Analyzing these models comparatively highlights the significance of the system working behind the implementation of the debtors' prison model and reveals that contrary to critics' assertions, the threat of imprisonment actually does reduce risky borrowing and lending practices.

VI. CONCLUSION

The rate of return for debt buyers who utilize the threat of prison to pressure debtors into repaying and/or settling outstanding amounts owed, shows not only that the system is an efficient business model, but that it is a useful and proven method for the collection of debt. Although critics argue that the system is too harsh and provides little deterrence, they fail to recognize that the deterrence value of the debtors' prison model comes not from those imprisoned after defaulting on debt and then consistently failing to take responsibility for their actions, but rather from the market incentives the model provides to creditors. Whether creditors utilize debt buyers or debt collectors, they are likely to realize only a small amount of the original value of the debt. Although certainly these first party creditors are in no sense hurting from this loss, the potential return realized by the nation's largest debt buyers, who compete directly with first party creditors, is likely to disincentivize creditors from lending to such risky borrowers in the first place. This conclusion is evidenced by the employment of debtors' prisons in other countries. In Saudi Arabia, which imposes a much more stringent version of the system, we can see that while the threat of prison may be more effective than imprisonment itself, the heavy penalty of prison discourages borrowing while restricting lending to less risky endeavors. Likewise, Dubai's system reiterates the importance of underlying financial and legal structures, capable of promoting deterrence,

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[197] Hugh Naylor, *Pay up or Go to Jail, Banks Tell Debtors,* THE NATIONAL (July 26, 2009), http://www.thenational.ae/news/uae-news/pay-up-or-go-to-jail-banks-tell-debtors#full.

[198] *Id.* Collection systems could mean a uniformly followed bankruptcy system or the widespread utilization of credit bureaus, collections agencies, and debt buyers.

[199] Robert F. Worth, *Laid-Off Foreigners Flee as Dubai Spirals Down*, N.Y. TIMES (Feb. 11, 2009), http://www.nytimes.com/2009/02/12/world/middleeast/12dubai.html.

while avoiding abuse. Although some may argue that creditors will not be deterred, at the very least the large return on investment seen through utilization of the legal system ensures the continued use of the debtors' prison model, and at most, as profits soar, creditors may be more reluctant to leave billions of dollars on the table.