

Putting Fear Back Into the Law and Debtors Back Into Prison: Reforming the Debtors' Prison System

Richard E. James*

I. INTRODUCTION

Today, H. Beatty Chadwick sits in state prison in Thornton, Pennsylvania; he recently passed his seventh anniversary behind bars.¹ He has not been charged with a crime and his incarceration is indefinite in duration. Most people would say such a thing could not happen in the United States, yet Chadwick still sits in jail. Chadwick is currently imprisoned for civil contempt.²

Chadwick's problems began in November 1992 when his wife filed for divorce.³ The civil contempt charge at issue arose out of the disposition of \$2,502,000 of marital assets.⁴ Chadwick claimed he used the money to settle an overseas debt.⁵ His wife retained an investigator who discovered that the money in question had been shuffled around overseas before disappearing, with strong indications Chadwick still had access to it.⁶ The Delaware County (Pennsylvania) Court of Common Pleas ruled that Chadwick had attempted to defraud both the court and his wife by transferring the money abroad.⁷ When Chadwick refused to return the assets after the court ordered him to do so, the court found him in contempt and issued a warrant.⁸ He was eventually arrested and sent to jail with the bail set at \$3 million.⁹ Chadwick can become a free man at his choosing by either posting bail or surrendering the missing assets.¹⁰

* B.A. 1978, Baylor University; M.Ed. 1982, Montana State University, Northern; M.A. 1987, University of Missouri; J.D. Candidate December 2002, Washburn University School of Law. I would like to thank Professors Myrl Duncan and Alex Glashauser for their patience and guidance. This article is dedicated to the GOMD and my parents, Leo and Audrey James, whose unfailing support make all things possible.

1. Francis X. Clines, *7 Years for Jailed Pauper: Or Is It Millionaire Schemer?*, N.Y. TIMES, Mar. 24, 2002, at A33.

2. Chadwick v. Janecka, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *5 (E.D. Pa. Jan. 3, 2002).

3. *Id.* at *3.

4. *Id.*

5. *Id.*

6. *Id.* at *3-4. This involved moving money through such places as Gibraltar, Switzerland, England, and Panama and through such instruments as annuity contracts and stock certificates. *Id.*

7. *Id.* at *4.

8. *Id.* at *4-5. In addition to the court ordering Chadwick to turn over the \$2.5 million, he was also ordered to pay \$75,000 for his wife's attorney's fees and costs, give up his passport, and stay in the jurisdiction. *Id.* at *4. Chadwick fled after finding out about the warrant, but was captured on April 5, 1995. *Id.* at *5.

9. *Id.* at *5.

10. *Id.*

Instead, Chadwick has chosen to remain in jail. Through multiple appeals in both the Pennsylvania and federal courts, he maintained he had no control over the assets.¹¹ In his appeals, he argued that because his punishment was no longer coercive and had become punitive, he could not be held for civil contempt.¹² Eventually, the United States District Court for the Eastern District of Pennsylvania agreed to hear his case and granted his petition for habeas corpus.¹³ In *Chadwick v. Janecka*,¹⁴ the court determined that Chadwick's sentence was essentially indefinite in duration and acknowledged the difficulty in determining exactly when a sentence transforms from coercive into punitive.¹⁵ Still, the court found his jail time had essentially become punitive in nature.¹⁶ However, before Chadwick could be released, the trial court stayed its order for thirty days to allow Mrs. Chadwick to appeal.¹⁷ Mrs. Chadwick did so, and the Third Circuit Court of Appeals granted a further stay pending her appeal.¹⁸ In August 2002, the Third Circuit reversed the District Court's grant of Chadwick's habeas petition.¹⁹ Chadwick steadfastly maintains he is essentially being held in a debtors' prison, saying "I would have thought debtors' prison was abolished long ago."²⁰ Is he correct?

This note will examine debtors' prisons in twenty-first century America. Debtors' prisons do exist, but they are not effective. It is time to reform the system, not to abolish debtors' prisons, but to restore the fear of the law so that modern debtors' prisons will have the desired deterrent effect.

This note will demonstrate how debtors' prisons can be effective in today's society by first looking at a brief history of debtors' prisons beginning with the ancient world and continuing through the British experience at home and in the New World. Then, the emergence of a

11. *Id.* at *5-6, 19. Almost immediately upon his arrest, Chadwick filed in federal court to quash the state warrant, arguing the state's finding of contempt was improper under Pennsylvania law. *Id.* at *5. The federal court refused to hear the motion because it involved a pending state proceeding. *Id.* Chadwick then filed six habeas petitions in state court, all of which were denied. *Id.* at *5-6. While his last denial was still subject to appeal and one denial was under appeal, he went back to federal court a second time with another habeas motion. *Id.* This second federal habeas motion, as well as an eventual third and fourth, was dismissed because Chadwick had not exhausted his state remedies; it had not yet been heard by the Pennsylvania Supreme Court. *Id.* at *6-9. Finally, in 1999, Chadwick filed a habeas motion with the Pennsylvania Supreme Court, his seventh in state court, which was denied summarily. *Id.* at *9.

12. *Id.* at *8-9.

13. *Id.* at *10. Since the Pennsylvania Supreme Court had ruled, Chadwick's fifth federal habeas motion was heard on April 20, 2001, by the U.S. District Court for the Eastern District of Pennsylvania. *Id.* at *9-10.

14. No. 00-1130, 2002 U.S. Dist. LEXIS 10 (E.D. Pa. Jan. 3, 2002).

15. *Id.* at *18-20.

16. *Id.* at *24.

17. *Id.* at *27.

18. Clines, *supra* note 1.

19. *Chadwick v. Janecka*, No. 02-1173, 2002 U.S. App. LEXIS 17172, at *32 (3d Cir. Aug 20, 2002) [hereinafter *Chadwick II*].

20. Clines, *supra* note 1.

de facto debtors' prison system in the United States through the use of civil contempt and statutes will be examined. Next, Cass Sunstein's work on fear and the law will be explored in light of the failure of this de facto system to provide genuine deterrent value. Sunstein's work will be used to explain why the system has failed. Finally, this note will evaluate the need for reform and suggest formalization of the concept of debtors' prisons to provide standardization in dealing with imprisonment of debtors and to restore fear of the law by utilizing Sunstein's theories to intelligently craft statutes.

Individuals like Chadwick should be seriously punished for intentionally withholding money after a court has determined the payment of the debt is just, but that punishment should have an end point. Chadwick, and others like him, should know that such behavior will lead to criminal charges, followed by trial, and if convicted, long jail terms. This approach should be standard for those who fail to pay debts or court-ordered judgments with one exception. Tort judgments, because of their unique nature, should be treated differently and are outside the scope of this note.²¹ Debtors who refuse to pay any other type of debt or judgment should anticipate harsh penalties.

II. HISTORY OF DEBTORS' PRISONS

A. *The Ancient World*

Incarcerating people for non-payment of debt began at least as early as the fifth century B.C. with the Romans.²² Early Roman law provided for the arrest and imprisonment of a debtor at the request of a creditor until the case could be heard.²³ However, even the Romans eventually opted for an end to debtors' prisons.²⁴ In 326 B.C., the law allowing for imprisonment of debtors was repealed, debtors were released, and incarcerating a person for failure to pay a debt became illegal.²⁵

The Romans were not the only culture to at least experiment with the idea of a debtors' prison; nearly all other cultures have at some point in their past allowed for incarceration of persons unable to pay their debts.²⁶ In the ancient Middle East the practice was wide-

21. Tort judgments often are large judgments an individual cannot pay, rather than a debt willingly entered into or an attempt by the court to coerce payment of assets the debtor has intentionally hidden from the court. Certainly one could make the argument that in those cases where the tortfeasor has the ability to pay and simply refuses, the approach discussed in this note should apply as well.

22. Becky A. Vogt, *State v. Allison: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 338 (2001). This provision was found in the Twelve Tables, the first written Roman law code. *Id.*

23. *Id.* at 339.

24. *Id.*

25. *Id.*

26. *Id.*

spread,²⁷ and the Bible makes mention of the custom.²⁸ Debtors' prisons were commonplace in the ancient world regardless of the culture.²⁹ Although deterrence may have been a part of the justification for imprisonment, the primary goal seems to have been to achieve repayment of the debt.³⁰

B. *The English Experience*

The early settlers in England were even harsher than the Romans, allowing enslavement by the creditor for the non-payment of debt until the Norman Conquest in 1066.³¹ For the next 200 years, there was no enslavement or imprisonment for debt.³² Then in 1267, the British enacted a law that allowed for the imprisonment of debtors: the Statute of Marlbridge.³³ The British courts could issue a writ that required the debtor to be incarcerated until the debt and court costs were paid.³⁴ This statute marked a change in approach from the earlier, rather hands-off approach to debtors and seemed to coincide with the end of feudal obligations.³⁵ The idea of imprisoning someone for non-payment of a debt was inconsistent with the obligations of labor and loyalty owed to feudal lords.³⁶ Feudal lords were unlikely to allow debtors to be imprisoned and thus be unable to supply the labor that the feudal system was built upon.³⁷ Once feudalism died out, Parliament began to pass statutes, such as the Statute of Marlbridge, that allowed incarceration of debtors.³⁸

Under a later statute in 1285, the Statute of Merchants, a creditor could have the sheriff immediately seize and jail the debtor who failed to pay.³⁹ Inability to pay seemed to have been no defense.⁴⁰ In fact, the statute allowed the sheriff to seize and sell the debtor's property

27. *Id.* at 339-40. Interestingly enough, Jewish culture dealt with the overcrowding this caused in their jails and courts by releasing the debtors every fifty years. *Id.* at 340.

28. *Matthew* 18:28-30 (King James). The text reads:

But the same servant went out, and found one of his fellowservants, which owed him an hundred pence: and he laid hands on him, and took him by the throat, saying, Pay me that thou owest. And his fellowservant fell down at his feet, and besought him, saying, Have patience with me, and I will pay thee all. And he would not: but went and cast him into prison, till he should pay the debt.

Id.

29. Vogt, *supra* note 22, at 339-40.

30. *Id.* Obviously the debtor could not work to repay the debt while incarcerated, so often he remained in jail unless someone was willing to post a surety for him. *Id.* at 340.

31. *Id.*

32. *See id.* at 340-41.

33. *Id.*

34. *Id.* at 341.

35. *Id.* at 342. A vassal could hardly fulfill his annual labor requirements to the lord if he was in prison for debt. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 342-43.

39. *Id.* at 342.

40. *See id.* at 341-42.

to satisfy the debt, but if the debtor had no property, it was off to jail.⁴¹ This English approach to the problem continued when the colonists began settling in North America.

C. *Debtors' Prisons in the United States*

As immigrants settled in the American colonies, the debtor laws were brought over from England essentially unchanged.⁴² At first, in an effort to attract colonists from the Old World, the colonies were sympathetic to debtors.⁴³ Eventually, once the colonists began to build wealth, they strengthened debt laws in order to protect themselves from those who would default.⁴⁴ The result was a well-established debtors' prison system in the colonies by the end of the seventeenth century.⁴⁵

By the early eighteenth century, the colonies were beginning to reassess the wisdom of debtors' prisons.⁴⁶ Reasons for this reassessment included a shortage of labor in the colonies, the fact that jailing debtors rarely resulted in payment of the debt, and the burdensome costs on the community to maintain the prisoners.⁴⁷ As a result of these factors, and because the laws were not well enforced, very few people were actually imprisoned for debt in the colonies.⁴⁸

Efforts to find a better way to deal with non-payment of debt actually began quite early in the new nation's history.⁴⁹ One of the first colonies to pass a law on debtors' prisons was New Hampshire in 1771.⁵⁰ The law allowed certain privileges for imprisoned debtors, including the freedom to move up to one hundred feet beyond the walls of the prison.⁵¹

As the colonies prospered and became states, the pendulum began to swing back and more debtors began to be imprisoned in the latter part of the eighteenth century and the beginning of the nineteenth.⁵² Different states dealt with the issue in different ways; some

41. *Id.*

42. *Id.* at 343.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 343-44. The colonial governments quickly discovered that imprisoning people for debt actually made the debtor's financial situation worse by adding court costs and fees to the original debt and that their families often became dependent on the public dole. *Id.* It should be noted, however, that these early colonial debtors' prisons were designed to be coercive rather than punitive; the idea was always that the debtor could go free as soon as the debts were paid. *Id.* at 340-41.

48. *Id.* at 344.

49. *See id.*

50. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 240 (1973).

51. *Id.*

52. Vogt, *supra* note 22, at 344.

were more strict than others.⁵³ Some states incarcerated far more people for debt than for crime, in some cases up to five times more.⁵⁴

By the early nineteenth century, several states had constitutions that prohibited imprisonment for debt, and by the early twentieth century, most of the forty-eight states had followed suit either through their constitution or by statute.⁵⁵ Incarceration for failure to pay debts ended largely because it failed to accomplish its purpose: to force repayment of the money owed.⁵⁶

In addition to failing to force repayment of debts, the states recognized that imprisoning the debtor had undesired effects on the debtor's family and society at large.⁵⁷ Also, many of the states sprang from colonies led by men who remembered the British debtors' prisons and were determined not to let it happen in America.⁵⁸ As constitutions were written in those states, language prohibiting incarceration for debt was included in the documents.⁵⁹ Finally, the way business was done in the United States began to change dramatically in the early twentieth century with the growth of corporations and changes in lending practices.⁶⁰ Incarcerating a corporation was not possible and corporate debts were usually far larger than any corporate officer's ability to pay.⁶¹ The emergence of new ways of lending such as the chattel mortgage, promissory notes, and the crop-lien system also played a part in the end of formal debtors' prisons in the United States.⁶²

All fifty states now prohibit incarceration for debt as a penalty for violating commercial obligations.⁶³ The states differ in their approach to debtors' prisons, but all prohibit jailing an insolvent debtor who has not engaged in fraud.⁶⁴ All states except Alabama allow incarceration for debt if fraud is involved.⁶⁵

53. *Id.* Some required the debtors to take a poor debtor's oath before granting relief from jail while others were more generous. *Id.* Some factors the colonies used to determine if release from jail was in order included time served, how large the debt was, and how long the debtor had resided in the colony. *Id.*

54. *Id.* at 344-45.

55. *Id.* at 345.

56. *Id.*

57. *Id.* These effects included supporting the debtor's family and sometimes even the debtor himself after his release, since some debtors eventually became dependent on the community. *Id.*

58. *Id.* at 346. There seemed to be widespread resentment and indignation toward the idea of debtors' prisons in many places. *Id.* at 345.

59. *Id.* at 346.

60. *Id.* at 345-46.

61. *Id.* at 345.

62. *Id.* at 345-46.

63. Michael M. Conway, Note, *Imprisonment for Debt: In the Military Tradition*, 80 *YALE L.J.* 1679, 1679 (1971).

64. *Id.*

65. Comment, *Constitutional Law: Imprisonment for Debt*, 15 *CAL. L. REV.* 153, 154 (1926-27).

At the federal level, elimination of formal debtors' prisons began quite early. In 1948, federal lawmakers enacted 28 U.S.C. § 2007, which prohibited incarceration for debt anywhere such practice had been outlawed by state law.⁶⁶ Also under this statute, federal courts must enforce the state statutes in this area.⁶⁷ Since all fifty states now outlaw incarceration for debt by either law or their constitution, in theory debtors' prisons have been eliminated in the United States.⁶⁸

III. DE FACTO DEBTORS' PRISONS IN THE UNITED STATES TODAY

In spite of both federal and state laws to the contrary, a de facto debtors' prison system has emerged over time in the United States. At the federal, state, and local levels, today one can be imprisoned for failure to pay money. The favorite forms of incarceration for debt seem to be the use of civil contempt, enactment of federal statutes in certain politically sensitized areas, restrictions on the rights of debtors to travel, and creative use of the police power at the local level.

A. *The Use of Civil Contempt to Imprison for Debt*

As noted in *Chadwick v. Janecka*, civil contempt has often become the charge of choice to imprison people who refuse to pay just debts.⁶⁹ A court attempting to compel compliance with any order through the use of contempt can choose sanctions from any one of three categories.⁷⁰ First, the court can levy a determinate sanction; in other words, a jail term with a fixed end.⁷¹ However, such a sanction is a punitive, criminal sanction.⁷² The use of a criminal sanction requires a criminal trial where the defendant is entitled to all the attendant constitutional rights.⁷³ Second, the court can order a coercive sanction, like incarceration, until the prisoner conforms to the court order as in *Chadwick*, or levying a daily fine until the contemnor complies.⁷⁴ Last, the court can assess a compensatory or remedial sanction, which usually takes the form of a fine paid to the plaintiff as a remedy for losses because of the defendant's refusal to obey the court order.⁷⁵

Technically, in cases like *Chadwick's* that involve coercive orders for child support or marital assets, the money owed is not a debt but a

66. Vogt, *supra* note 22, at 348.

67. *Id.*

68. *See id.*

69. *See Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *15 (E.D. Pa. Jan. 3, 2002).

70. DAN B. DOBBS, JR., *DOBBS LAW OF REMEDIES* §2.8(2) (2d ed. 1993).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

“status obligation.”⁷⁶ This distinction allows courts to enforce such orders by imprisonment without running afoul of state constitutions or statutes that prohibit imprisonment for debt.⁷⁷ Such enforcement assumes that the prisoner has the ability to comply with the court order and is simply refusing to do so; that “he carries the keys to the jail in his own pocket.”⁷⁸ The problem with this remedy is that it is open-ended, at least until a court determines the order has lost its coercive effect.⁷⁹ Under Pennsylvania law, as is true in all states, once the order has lost its coercive effect and has become punitive, the prisoner must be released or charged with criminal contempt.⁸⁰ Unfortunately, there is no bright-line definition of when that occurs, either at the state or federal level.⁸¹

Since there is no bright-line definition of when such punishment changes from coercive to punitive, it is up to the judge who hears the case to draw that line. Some judges have used a defendant’s ability to comply with the order as the measure, since the burden is on the defendant to prove he cannot comply.⁸² In Chadwick’s case, state judges repeatedly have held that he had the ability to comply with the order, and therefore, the punishment levied still had the potential to coerce compliance.⁸³ The federal district judge agreed that Chadwick likely could comply, even stating, “this court is convinced that Chadwick has the present ability to comply with the July 22, 1994, order.”⁸⁴ In spite of this finding, the District Court held that it would be unreasonable to think that, after almost seven years of imprisonment, Chadwick would ever comply with the court order.⁸⁵ Therefore, the court found the imprisonment had lost its coercive effect.⁸⁶

Since Chadwick’s punishment was no longer coercive and yet his term of incarceration was indefinite, the court held his Fifth Amendment due process rights were being violated.⁸⁷ The judge stated that the Due Process Clause protects individuals from a governmental deprivation of liberty without due process and that Chadwick’s punitive

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *14-15 (E.D. Pa. Jan. 3, 2002). *See generally* *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994).

81. *Chadwick*, 2002 U.S. Dist LEXIS 10, at *18. Indeed, the U.S. District Court for the Eastern District of Pennsylvania felt strongly that the issue of when punishment for contempt changes from coercive to punitive was a matter for the state to resolve. *Id.* at *8. It was only after the Pennsylvania Supreme Court refused to rule that the federal district court stepped in. *Id.*

82. *See id.* at *17-18.

83. *Id.* at *19-21.

84. *Id.* at *19.

85. *Id.* at *22-23.

86. *Id.* at *23.

87. *Id.* at *23-24.

imprisonment without a criminal proceeding was illegal.⁸⁸ As a result, the court ordered Chadwick released, but noted that he should not be allowed to defy a court order.⁸⁹ The court strongly suggested that the state court follow up with criminal proceedings, either criminal contempt or perjury, against Chadwick.⁹⁰ Before Chadwick could be released, however, the United States Court of Appeals for the Third Circuit issued a stay, pending appeal of the district court's order.⁹¹

The Third Circuit, in reversing the district court, ruled that there was no United States Supreme Court precedent for the idea that incarceration must end in civil contempt cases when it becomes unlikely the contemnor will ever comply.⁹² The appellate court also pointed out that the amount of time spent in prison by a contemnor in a civil contempt case is unlimited so long as the prisoner has the ability to comply.⁹³ Given these two ideas, the court went on to hold that the Pennsylvania state courts had properly applied the law in Chadwick's case and therefore there were no grounds for habeas relief.⁹⁴

Lest one think that Chadwick's case is an isolated one centering around an unusually spiteful man and a divorce, imprisonment for debt, or at least the threat of imprisonment for debt, masquerading as civil contempt is common.⁹⁵ In *Commodity Futures Trading Commission v. Armstrong*,⁹⁶ another illustrative case, the plaintiff refused to surrender to a court-appointed receiver corporate assets worth approximately \$14.9 million.⁹⁷ As a result, in January 2000 the United States District Court for the Southern District of New York ordered him incarcerated until he surrendered the assets.⁹⁸ He has never admitted or denied having the assets.⁹⁹ Instead, Armstrong has argued that since the assets were not found at his home or office, no court

88. *Id.*

89. *Id.* at *25.

90. *Id.*

91. Clines, *supra* note 1.

92. *Chadwick II*, No. 02-1173, 2002 U.S. App. LEXIS 17172, at *31 (3d Cir. Aug 20, 2002).

93. *Id.* at *27.

94. *Id.* at *32.

95. See *SEC v. Custable*, No. 94 C 3755, 1999 U.S. Dist. LEXIS 1776, at *1-2 (N.D. Ill. Feb. 10, 1999) (granting government's motion to hold all defendants in civil contempt as well as to fine and incarcerate Custable until the \$60,000 penalty was paid or he established his inability to do so); *Wronke v. Madigan*, 26 F. Supp. 2d 1102, 1104 (C.D. Ill. 1998) (affirming continued incarceration of father held in contempt for failure to pay past due child support); *State ex rel. Hinckley v. Sixth Judicial Dist. Court*, 1 P.2d 105, 108 (Nev. 1931) (ordering contemnor to be held in county jail until fine paid); *State ex rel. Phillips v. Knox*, No. E2000-02988-COA-R3-JV, 2001 Tenn. App. LEXIS 867, at *1-2, 34 (Nov. 29, 2001) (affirming trial court's finding of civil contempt and sentence of thirty days incarceration for failure to pay past due child support).

96. No. 01-6159(L), 2002 U.S. App. LEXIS 4305 (2d Cir. Mar. 18, 2002).

97. *Id.* at *1. The court ordered Armstrong to turn the money over to a court-appointed receiver for Princeton Economics International Limited and Princeton Global Management Limited. *Id.* at *1-2.

98. *Id.*

99. *See id.* at *5.

could reasonably believe he had them.¹⁰⁰ The initial order was set to expire on July 14, 2001, but was extended indefinitely when the trial court determined that Armstrong did not demonstrate either compliance or inability to obey the order.¹⁰¹ The court also found that the imprisonment was still coercive in nature, and that Armstrong might be just beginning to feel the effects of his incarceration.¹⁰²

The United States Court of Appeals for the Second Circuit in March 2002 dismissed the case, citing lack of appellate jurisdiction.¹⁰³ The appeals court held it would only have jurisdiction if it found that the plaintiff's civil contempt incarceration had lost its coercive effect and had become punitive.¹⁰⁴ In his appeal, Armstrong argued that the incarceration had lost its coercive effect, citing two reasons: the length, which at the time of the appeal was slightly more than two years, and his continued statements that he would *never* obey the court order.¹⁰⁵ In rejecting these arguments, the appellate court ruled that the time he had served must be evaluated in relation to the amount of the property in question.¹⁰⁶ This court agreed with the lower court that Armstrong, now that he is faced with indefinite imprisonment, may re-evaluate his stance.¹⁰⁷

However, the court of appeals did note in its opinion that "a great prolongation of Armstrong's incarceration will require a careful reassessment of its coercive potential."¹⁰⁸ Left unsaid was when that would occur and what the court would look for to determine that Armstrong's imprisonment had become punitive. Although the appellate court deferred to the judgment of the trial judge on the issue of whether or not the imprisonment had lost its coercive effect, the court correctly noted the problems with such a determination: "[a] district court judge's determination whether a civil contempt sanction has lost any realistic possibility of having a coercive effect is inevitably far more speculative than his resolution of traditional factual issues."¹⁰⁹ Of course, herein lies the issue for both Chadwick and Armstrong:

100. *Id.*

101. *Id.* at *2.

102. *Id.* at *3.

103. *Id.* at *1.

104. *Id.* at *3.

105. *Id.* at *5. Armstrong also argued that since his home and offices had been searched and none of the assets were found, the district court acted unreasonably in holding that he still controlled the assets. *Id.*

106. *Id.* at *6.

107. *See id.* at *6-7.

108. *Id.* at *7.

109. *Id.* at *4.

when is enough enough, and by what measure is that determination made?¹¹⁰

The United States Supreme Court case that lower courts consistently look to on the issue of civil contempt is *United Mine Workers of America v. Bagwell*,¹¹¹ cited by both the *Chadwick*¹¹² and *Armstrong*¹¹³ courts. In *Bagwell*, the Court drew a clear distinction between criminal and civil contempt, saying it turned on the type and purpose of the punishment.¹¹⁴ According to the *Bagwell* Court, if the sentence is designed to be remedial, then it is civil.¹¹⁵ If the sentence is designed to make clear the court's authority, then it is punitive and therefore criminal contempt.¹¹⁶

In distinguishing criminal contempt from civil, the *Bagwell* Court pointed out precedent to establish that such contempt was a "crime in the ordinary sense."¹¹⁷ The Court also stated that "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,"¹¹⁸ and "for 'serious' criminal contempts involving imprisonment of more than six months, these protections include the right to a jury trial."¹¹⁹

On the other hand, the Court noted that the typical civil contempt sanction was one in which the subject was jailed indefinitely until he chose to obey a court order, and so had within his power the ability to choose his time of release.¹²⁰ Thus, civil contempt was subjected to a lower standard when being evaluated for protections for the contemnor.¹²¹

In *Bagwell*, the Court held that incarceration was clearly punitive if a court levies it after the disobedience, and the contemnor is unable to either avoid or shorten the imprisonment by complying.¹²² The Court also noted that because of the unique nature of civil contempt sanctions, there are fewer procedural protections for the contemnor.¹²³ This lack of procedural protection poses great danger. Justice

110. In *Armstrong*, the Court wrote that its inquiry involved the purpose of the sanction and whether it was designed to induce compliance and whether by complying the contemnor could end the sanction. *Id.*

111. 512 U.S. 821 (1994).

112. *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *14-16 (E.D. Pa. Jan. 3, 2002).

113. *Armstrong*, 2002 U.S. App. LEXIS 4305, at *4.

114. *Bagwell*, 512 U.S. at 827-28.

115. *Id.*

116. *Id.*

117. *Id.* at 826 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)).

118. *Id.* at 826 (quoting *Hicks v. Feiock*, 485 U.S. 624, 632 (1988)).

119. *Id.* at 826-27 (quoting *Bloom*, 391 U.S. at 199).

120. *Id.* at 828-29.

121. *See id.*

122. *Id.*

123. *Id.* at 831.

Harry Blackmun, writing for the majority in *Bagwell*, stated that when “such contempts take on a punitive character, however, and are not justified by other considerations central to the contempt power, criminal procedural protections may be in order.”¹²⁴ Justice Blackmun sounded a further note of caution by writing that the potential for abuse is uniquely present in the contempt power.¹²⁵ He believed this area was different from other areas of the law where the legislature defined the boundaries.¹²⁶ Here, the judge had sole power to identify the contempt, prosecute it, and levy the punishment.¹²⁷

Although *Bagwell* provided much needed guidance to lower courts in the area of civil and criminal contempt, *Bagwell* does not help when it comes to a contemnor who refuses over a long period of time to comply with a court order. The Court stopped short of delving into the twilight zone of when punishment for civil contempt transitions from coercive to punitive in such cases. As a result, judges dealing with cases like *Chadwick* and *Armstrong* are left to their own devices, and as these two cases indicate, the outcomes may vary widely.¹²⁸ The stage is set for a modern day debtors’ prison: a long confinement of indeterminate length with release being conditioned upon payment of what is essentially a debt or on an unpredictable, unguided decision that the imprisonment is no longer coercive.

B. Federal Imprisonment for Non-Payment of Debt

The United States Congress enacted 28 U.S.C. § 2007 in 1948, prohibiting incarceration for debt anywhere that such practice had been outlawed by state law.¹²⁹ This statute was an update of §§ 990-992 of the Revised Statutes of the United States, which Congress enacted May 28, 1896.¹³⁰ The 1896 code was intended to ensure that an individual could not be imprisoned for debt in civil actions under federal law if the state in which the case arose forbade such imprisonment.¹³¹ The statute offered not only a shield but also a sword: if

124. *Id.*

125. *Id.* (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)).

126. *Id.*

127. *Id.*

128. In *Chadwick II*, the appellate court recently held that his nearly eight years in prison still has not resulted in a change in his punishment from coercive to punitive. *Chadwick II*, No. 02-1173, 2002 U.S. App. LEXIS 17172, at *32 (3d Cir. Aug. 20, 2002). However, in *Armstrong*, the appellate court has already indicated that, after only two years, his punishment may soon change from coercive to punitive. *Commodity Futures Trading Comm’n v. Armstrong*, No. 01-6159(L), 2002 U.S. App. LEXIS 4305, at *7 (2d Cir. Mar. 18, 2002).

129. *Vogt*, *supra* note 22, at 348.

130. 28 U.S.C. § 2007 (2000) (revisor notes).

131. *See Low v. Durfee*, 5 F. 256, 258-59 (D. Mass. 1880) (holding the federal statute simply prevented imprisonment for debt under circumstances where it was prohibited by state law and allowing imprisonment for debt under those circumstances where it was permitted by state law).

such imprisonment was allowed by the state, then it was also allowed under the federal statute.¹³²

In spite of these early statutes, the United States Supreme Court held in 1902 in *Mueller v. Nugent*¹³³ that enforcing contempt was not imprisonment for debt under Revised Statute § 990.¹³⁴ This same idea that enforcement of contempt was not imprisonment for debt carried over into the new statute, and courts have found that such enforcement was not forbidden by the statute.¹³⁵ So, even though on its face, this statute has the effect of eliminating federal debtors' prisons, courts have interpreted it to allow imprisonment for debt in the contempt context. Moreover, the federal government has continued to create new statutes that result in people going to jail for debt.¹³⁶

In 1997, Jeff Ballek spent six months in an Alaskan jail after being convicted of failing to pay overdue child support in the amount of \$56,000.¹³⁷ In *United States v. Ballek*,¹³⁸ he was convicted under the Child Support Recovery Act of 1992 (CSRA),¹³⁹ which made it a federal crime to not pay court-ordered child support.¹⁴⁰ Ballek filed an appeal, arguing that his sentence violated the Thirteenth Amendment and was essentially incarceration for debt.¹⁴¹ He also asserted that he had no money to pay child support and therefore he could not "willfully fail to pay child support."¹⁴² The district court's decision was upheld by the Ninth Circuit Court of Appeals.¹⁴³ The appellate court found that Ballek's failure to pay child support was intentional because of his refusal to work at higher paying jobs in order to avoid having to pay the support.¹⁴⁴ Additionally, this court specifically rejected the idea that jailing Ballek for refusing to pay child support created a debtors' prison.¹⁴⁵

132. *Id.*

133. 184 U.S. 1, 13 (1902).

134. *Id.* at 13 (holding that a bankrupt individual who was jailed for refusing to pay money to the receiver as ordered by the court was not imprisoned for debt).

135. *Usery v. Fisher*, 565 F.2d 137, 139 (10th Cir. 1977) (holding that an employer who refused to comply with a court order to pay employees could be imprisoned for civil contempt without running afoul of Colorado law or 28 U.S.C. § 2007); *Atlas Corp. v. De Villiers*, 447 F.2d 799, 803 (10th Cir. 1971) (holding that when ordered to pay money by a court and subsequently being jailed for civil contempt, it is not imprisonment for debt under New Mexico statute or 28 U.S.C. § 2007).

136. Examples include the Child Support Recovery Act of 1992 as well as 42 U.S.C. § 652(k), which prevents issuance of a passport to any person more than \$5000 in arrears for child support.

137. Catherine Wimberly, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 *STAN. L. REV.* 729, 730 (2000).

138. 170 F.3d 871 (9th Cir. 1999).

139. The Child Support Recovery Act of 1992 is 18 U.S.C. § 228 (1998).

140. Wimberly, *supra* note 137, at 729 n.1.

141. *Id.* at 740.

142. *Id.* at 740 (quoting *Ballek*, 170 F.3d at 874).

143. *Id.*

144. *Id.* at 740-41.

145. *Id.* at 741.

In rejecting this idea, the appellate court noted that child support is a debt owed not just to one's children, but to society at large.¹⁴⁶ The court compared this obligation to other societal obligations, such as performing military service.¹⁴⁷ Since the other obligations mentioned by the court were not monetary, the comparison was somewhat strained, but necessary, in order for the court to avoid running afoul of 28 U.S.C. § 2007.¹⁴⁸

The court's decision to distinguish this obligation from debt was especially important because Alaska's state constitution guarantees freedom from debtors' prisons.¹⁴⁹ This prohibition, combined with the protection in 28 U.S.C. § 2007, should make the probability of imprisonment for debt in Alaska nil. However, in Ballek's case, by labeling child support a "societal obligation," the court was able to rationalize its way out of the dilemma.¹⁵⁰ Other states have been equally creative in the rush to jail people in arrears for child support while trying to avoid laws prohibiting debtors' prisons.

In *Middleton v. Middleton*,¹⁵¹ a Maryland court held that imprisoning an individual for failure to pay child support was not incarceration for debt because a support decree is not a debt.¹⁵² In this case, a mother sought to obtain overdue child support by asking the court to find the delinquent father in contempt.¹⁵³ The lower court ruled against her, holding that once a judgment was issued for the amount in arrears, civil contempt could not be used to induce the father to pay.¹⁵⁴ The appellate court overturned, holding that the overdue payments were not a debt.¹⁵⁵ Since the payments were not a debt, contempt and imprisonment were available remedies until he paid the money.¹⁵⁶ By using such judicial sleight-of-hand, individuals are being incarcerated for debt.

The federal government has not only legislated debtors' prisons in the area of child support, but has for many years provided through statute imprisonment as punishment for failure to pay taxes.¹⁵⁷ It certainly can be argued that imprisonment for failure to pay taxes does

146. *Id.*

147. *Id.* at 741 n.48.

148. *See id.*

149. Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 40 (1995).

150. Wimberly, *supra* note 137, at 741.

151. 620 A.2d 1363 (Md. 1993).

152. *Id.* at 1368-69.

153. *Id.* at 1368.

154. *Id.*

155. *Id.* at 1369.

156. *Id.*

157. Walter T. Henderson, Jr., *Criminal Liability Under the Internal Revenue Code: A Proposal to Make the "Voluntary" Compliance System a Little Less "Voluntary,"* 140 U. PA. L. REV. 1429, 1442 (1992).

not rise to the level of a debtors' prison and instead is another societal obligation. However, like imprisonment for failure to pay child support, such confinement is basically incarceration for failure to pay debt.

Courts and the federal government may attempt to put a new face on the old problem of debtors' prisons by calling child support a "social obligation" or by calling court orders "decrees" rather than "debts," but if an individual is incarcerated for failure to pay money owed, then that individual is in a debtors' prison. Statutes such as the CSRA reflect a growing awareness that incarceration or fear of incarceration may be the only deterrent to prevent people from disregarding financial obligations.

Federal law has gone even further than just imprisoning people for non-payment of certain debts. Today, Eudene Eunique cannot leave the United States because the State Department will not issue her a passport.¹⁵⁸ Since the United States is a democracy and people are generally free to travel, one would assume that she has committed a dangerous crime. Instead, Eunique cannot leave the country because she is more than \$5000 behind in child support payments.¹⁵⁹ Under 42 U.S.C. § 652(k),¹⁶⁰ the Secretary of State is prohibited from issuing a passport to a person who is more than \$5000 in arrears in child support as certified by his home state.¹⁶¹ California certified Eunique as such, and as a result, the United States Secretary of State refused to issue the passport.¹⁶²

Eunique challenged the decision in *Eunique v. Powell*,¹⁶³ alleging the Secretary's ruling infringed her constitutional right to travel.¹⁶⁴ The United States Court of Appeals for the Ninth Circuit agreed she had a constitutional right to travel internationally, but held that it could be regulated so long as her due process rights were not vio-

158. *Eunique v. Powell*, No. 99-56984, 2002 U.S. App. LEXIS 17612, at *2-3 (9th Cir. Aug. 23, 2002).

159. *Id.*

160. 42 U.S.C. § 652(k) (2000) reads:

Denial, revocation, or limitation of passport on account of child support arrearages. (1) If the Secretary receives a certification by a State agency in accordance with the requirements of section 454(31) [42 USCS § 654(31)] that an individual owes arrearages of child support in an amount exceeding \$5,000, the Secretary shall transmit such certification to the Secretary of State for action (with respect to denial, revocation, or limitation of passports) pursuant to paragraph (2). (2) The Secretary of State shall, upon certification by the Secretary transmitted under paragraph (1), refuse to issue a passport to such individual, and may revoke, restrict, or limit a passport issued previously to such individual. (3) The Secretary and the Secretary of State shall not be liable to an individual for any action with respect to a certification by a State agency under this section.

Id.

161. *Eunique*, 2002 U.S. App. LEXIS 17612, at *2-4.

162. *Id.*

163. *Id.* at *1.

164. *Id.* at *4.

lated.¹⁶⁵ The court held that her due process rights were not violated and therefore the statute was constitutional.¹⁶⁶

The majority did not address the issue of limiting Eunique's freedom because she failed to pay a debt. In a strongly worded dissent, Judge Kleinfeld noted:

If Ms. Eunique were a murderer who had done her time, she could get a passport. But a person delinquent in paying child support is punished by denial of a passport. All debtors should pay their debts. Debts for child support have a special moral force. But that does not justify tossing away a constitutional liberty so important that it has been a constant of Anglo-American law since Magna Carta, and of civilized thought since Plato.¹⁶⁷

Judge Kleinfeld appears to be the only judge that saw the broad implications of restricting a person's freedom because of debt. Surely 42 U.S.C. § 652(k) has the effect of turning the United States into one large debtors' prison for those who find themselves in Eunique's position.

Since the ruling in *Eunique*, at least one other court has followed the precedent the case established. *In re Walker*¹⁶⁸ followed *Eunique* and refused to lift a hold issued by the Secretary of State on an individual's passport.¹⁶⁹ Walker, like Eunique, was in arrears in his child support obligations, and the court noted *Eunique* as the basis for its holding.¹⁷⁰ The *Walker* court gave the debtors' prison implications of its holding almost no discussion, instead citing *Eunique* for the concept that denial of a passport on these grounds was constitutional and a Tenth Circuit decision upholding the constitutionality of the Child Support Enforcement Program.¹⁷¹ Certainly this is likely to be the first of many cases to come that will follow the precedent established by the Ninth Circuit.

Whether one agrees that these cases essentially convert the United States into a large debtors' prison or not, it is difficult to deny that the federal government sees incarceration or limiting one's personal freedoms as a viable option to enforce payment of certain debts. However, the federal government is unwilling to admit that such incarceration does constitute the return of debtors' prisons. It is time to recognize that these statutes do create debtors' prisons and formalize the debtors' prison concept by statute. The propensity of the federal government to use incarceration to address certain hot button issues

165. *Id.* at *5-6, 14.

166. *Id.* at *5-6.

167. *Id.* at *42 (Kleinfeld, J., dissenting).

168. 276 B.R. 568 (Bankr. W.D. Tex. 2002).

169. *Id.* at 569.

170. *Id.*

171. *Id.* at 569-71.

involving debt in spite of federal law to the contrary has not been lost on local officials.

C. *Imprisonment for Debt at the Local Level*

Local officials have also jumped on the debtors' prison bandwagon. In Shawnee County, Kansas, creditors can file a petition with the court that requires debtors who are in arrears to come to the courthouse and list their assets and income.¹⁷² There is no limit on the number of times a creditor can do this, and the creditor can do it as often as once a month.¹⁷³ If the debtor fails to appear and fill out the form, the court issues a warrant, and eventually the debtor is picked up and incarcerated until he can post bond.¹⁷⁴ When the debtor can post bond, the bond money is applied against the debt, thereby giving the creditor an incentive to require the debtor to report on a regular basis.¹⁷⁵ Moreover, the concept of a debtors' prison arises when the debtor, as is often the case, has no money to post bond.¹⁷⁶ Technically, he is in jail for failure to appear in court to list his assets, but realistically he is in jail because he owes money.¹⁷⁷ In such cases, the debtor sits in jail until he can post bond, which is usually just a few days, but it can last indefinitely.¹⁷⁸ This approach is not unusual, as a recent case involving the City of Wichita, Kansas, proved.

Plaintiffs suing the City of Wichita in *Reinschmiedt v. City of Wichita*¹⁷⁹ recently were awarded an \$11 million settlement for being victimized by what was essentially a debtors' prison operation.¹⁸⁰ Wichita published a "hit list" for police department use because of the costs involved with issuing warrants for people who owed the city money.¹⁸¹ If the police were to see or pick up a person whose name appeared on the hit list, the debtor was incarcerated.¹⁸² Only after the debtor was incarcerated was the warrant issued.¹⁸³ This saved the city money because the only warrants issued were for people already in custody.¹⁸⁴ Obviously, this process implicates several legal issues, but essentially these people were being incarcerated without due process

172. Interview with John Francis, Associate Professor, Washburn University School of Law, in Topeka, Kan. (May 23, 2002).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. Case No. 99 C 2312 (Kan. Dist. Ct. June 28, 2002) (issuing final order).

180. Interview with Lawrence J. Leatherman, Plaintiffs' Attorney, Palmer, Leatherman, & White, L.L.P., in Topeka, Kan. (June 7, 2002).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

simply because they owed money.¹⁸⁵ Although the warrant procedure in this case led to trouble for the City of Wichita, the larger issue is that Wichita arrests and incarcerates people for failing to pay debt owed to the city.¹⁸⁶

Local officials have not failed to recognize that perhaps the strongest deterrent for non-payment of just debts is the threat of jail time. In some cases, like the case involving the City of Wichita, governments have gone too far in their zeal to establish a de facto debtors' prison and have trampled the rights of defendants. Underlying this effort, however, is the frustration that people today have lost their fear of serious consequences when they fail to pay their debts. One should not be surprised when federal, state, and local officials try whatever works to instill consequences and put fear back into the law.

IV. FAILURE OF DE FACTO DEBTORS' PRISONS IN THE UNITED STATES

In spite of the existence of de facto debtors' prisons in the United States, the effort to force debtors to pay has failed. Many would argue that this concept has failed because the underlying premise of sending people to jail for failing to pay their debts is flawed. However, this concept has failed because modern day debtors' prisons, like the debtors' prisons of old, are oriented toward coercion rather than punishment. As long as the purpose is to coerce payment rather than punish for failure to pay, the purpose undercuts the deterrent effect of the threat of incarceration. For debtors' prisons to provide deterrence, society must move beyond attempting to recover the money and instead focus on punishing the wrongdoer.

A. *Failure of Civil Contempt As a Deterrent*

The purpose of incarcerating people for civil contempt is to coerce them to comply with a court order rather than to deter them from the behavior that got them there in the first place.¹⁸⁷ If people are willing to be incarcerated for long periods of time then the question becomes whether or not such incarceration can ever be a reasonable deterrent.¹⁸⁸ Many people looking at Chadwick's case would say that incarceration for civil contempt does not seem to have a deterrent effect. However, it is not the idea of incarceration that has failed to provide the deterrent, but rather the length of time someone jailed for

185. *Id.*

186. *Id.*

187. Chadwick v. Janecka, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *14 (E.D. Pa. Jan. 3, 2002).

188. An excellent example is Chadwick, who, on April 5, 2002, began his eighth year of imprisonment. Clines, *supra* note 1.

civil contempt can expect to serve. Certainly eight years behind bars would give the average person cause to think, but eight years for civil contempt is very unusual. The longest civil contempt term on record in the United States is only ten years.¹⁸⁹ The average civil contempt term in the United States is about eighteen months.¹⁹⁰

A closer look at *Chadwick* and *Armstrong* shows why civil contempt has failed to change these men's minds. Both cases involve large sums of money. In Chadwick's case, the original amount he was accused of hiding was \$2.5 million, but his ex-wife contends that in the last few years while he has been in prison that amount may have grown to as much as \$6 million.¹⁹¹ Armstrong's case involved the hiding of assets worth \$14.9 million in 2000.¹⁹² There are no estimates as to how much those assets may be worth today, although it is not unreasonable to assume they have increased in value.

In both cases, these men likely believed that they could be held only for a limited amount of time for civil contempt. Chadwick is a lawyer, and Armstrong had counsel to advise him.¹⁹³ Although it is reasonable to assume that Chadwick has been surprised by the length of his stay, even with the recent Third Circuit ruling, one wonders how much longer he can be held. Both of these men appear to have made a calculated decision: trade a few years of their lives for a potentially great return.

There are probably few people that would not trade a civil contempt conviction involving the typical term of eighteen months in jail for a multi-million dollar payoff at the end. Every day in both the corporate and government service world, people accept postings to far off and undesirable places in hopes of advancing their careers. It is typical for the breadwinner in a family to trade location, working conditions, and sometimes even low pay for the promise of career advancement because he or she knows that advancement will benefit the family financially in the long term.

After a court decides the punishment has become punitive rather than coercive and the debtor must be released, criminal charges can be filed against both Chadwick and Armstrong. However, the standard of proof in a criminal case is much higher. In both cases, the prosecutor would have to prove beyond a reasonable doubt that the

189. *Id.*

190. *Id.*

191. *Id.*

192. *Commodity Futures Trading Comm'n v. Armstrong*, No. 01-6159(L), 2002 U.S. App. LEXIS 4305, at *1 (2d Cir. Mar. 18, 2002).

193. The Pennsylvania Bar lists Chadwick as an inactive member. *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *2 n.1 (E.D. Pa. Jan. 3, 2002). Armstrong was represented by Bernard V. Kleinman, New York City, NY. *Armstrong*, 2002 U.S. App. LEXIS 4305, at *1.

men intentionally hid assets.¹⁹⁴ Under civil contempt, however, the burden rests with the two men to prove why they cannot comply with the orders.¹⁹⁵ In criminal prosecution, the burden would fall on the prosecutor. Certainly in Chadwick's case such a standard of proof would be extremely difficult to meet, and even if so met, it would be hard to imagine a likely sentence would be greater than time served given the length of his incarceration to this point. Even in Armstrong's case, the standard of proof would be difficult for a prosecutor to meet since no one can locate the assets involved.

Once again, one is left with the realization that if both these men are patient, they will perhaps soon be free with multi-million dollar payoffs awaiting them. The likely reason both are holding out today is that there is no true fear of the law. Even though for a short period they may have to be patient, the payoff far exceeds any penalty. Some might argue there is some social stigma associated with imprisonment, but given the large payoff, most people would be willing to accept any such stigma. The entire premise of civil contempt is coercion rather than punishment, and as long as it remains so, these men have an incentive to be patient and wait. These two cases are illustrative of why a debtors' prison based on the use of civil contempt has failed to instill fear of the law and thus deter undesirable conduct.

B. *Failure of Federal Debtors' Prisons to Provide a Deterrent*

In spite of the prohibition against imprisonment for debt contained in 28 U.S.C. § 2007, the federal government has continued to pass legislation that does allow imprisonment for debt.¹⁹⁶ However, these laws seem to have failed. There is an important difference between these statutes and jailing someone for civil contempt. That difference is that these statutes criminalize the behavior involved, so if convicted and imprisoned for debt, the prosecutor by definition has met the standard of proof required.

The Child Support Recovery Act illustrates the failure of many of these laws.¹⁹⁷ The CSRA was passed with great hope. Senator Richard Shelby stated that it provided the deterrence necessary to prevent all non-custodial parents from refusing to pay child support.¹⁹⁸ Senator Shelby painted a picture of a world where children were supported by their parents, causing a corresponding reduction in welfare rolls.¹⁹⁹

194. *Chadwick*, 2002 U.S. Dist. LEXIS 10, at *24 n.6 (citing *United Mine Workers v. Bagwell*, 512 U.S. 821, 826-27, 834 (1994)).

195. *Armstrong*, 2002 U.S. App. LEXIS 4305, at *5.

196. See 42 U.S.C. § 652(k) (2000); 18 U.S.C. § 228 (2000).

197. 18 U.S.C. § 228 (2000).

198. *Wimberly*, *supra* note 137, at 738.

199. *Id.*

However, a closer look at the statistics should have doomed the legislation from the start. Over half of all children whose mothers draw welfare on their behalf have fathers with no education or marketable skills.²⁰⁰ In addition, these same children have parents who did not marry.²⁰¹ Judges apparently have recognized the problem because in the first seven years the statute was in effect, there were only 105 criminal convictions nationwide.²⁰²

Since people falling into this category will likely not have the money to pay child support, the CSRA essentially constructed a debtors' prison trap. Arguably, these are not the type of people typically deterred by the threat of short periods of incarceration. The CSRA allows a term of only six months for a first-time offender and even repeat offenders only face a two-year maximum.²⁰³ Meanwhile, in the conundrum that has historically faced debtors' prisons, the imprisoned parent cannot earn money for child support while in jail.²⁰⁴ The statute was designed to both punish and generate restitution for the custodial parent.²⁰⁵ In reality, if imprisonment is used for punishment, it will only delay restitution, except in those rare cases where the parent in arrears actually has money. This is the same dilemma faced in tax cases; the tax evader may well be punished with a jail term, but the likelihood of payment while in jail is slim.

Attempts by the federal government, in areas like child support and tax evasion, to criminalize non-payment of debt through legislation are more effective than the use of civil contempt because they are an effort to combine both coercive and punitive measures. However, because the coercive element is present, the sentences cannot be long. If the objective is at least partially to coerce the deadbeat parent to pay, a long prison term will defeat the purpose because it will reduce the parent's ability to earn money. The dilemma is similar to that present in the civil contempt cases where the objective is coercion, but the presence of the coercive aspect prevents the court from applying the best form of punishment: a long prison sentence. Without the long prison sentence, there is no fear of the law and deterrence fails.

Although *Eunique v. Powell* presents an interesting constitutional problem, does this modified form of a debtors' prison offer real deterrence or instill fear of punishment into those who would flaunt the child support laws? This attempt at limiting the freedom of citizens because of debt will likely fail over time as well. The percentage of

200. *Id.* at 739.

201. *Id.*

202. *Id.* at 740.

203. *Id.* at 741.

204. *Id.*

205. *See id.* at 729.

Americans who travel abroad is likely small in comparison to the general population. When one also reduces that subset by the number of people in arrears on child support, Eunique's case is likely very unique.

Eunique does open the door to a larger issue. If the court will uphold the constitutionality of 42 U.S.C. § 652(k), then can Congress legislate in other areas involving non-payment of debt and restrict citizens' rights to travel abroad? It would appear, based on the holding in *Eunique*, that as long as the citizen's due process rights are not violated, Congress can indeed do so.²⁰⁶ Assuming courts continue to uphold 42 U.S.C. § 652(k), lawmakers will have to grapple with whether or not the statute has a valid deterrent effect.

Once again, 42 U.S.C. § 652(k) suffers from the same defect as both civil contempt and other federal efforts to force payment of debt statutorily. That defect is the attempt to make the penalty coercive rather than punitive in nature. In other words, as soon as Eunique pays her past due child support, the Secretary of State will issue the passport. It would be hard to believe that someone owing in excess of \$5000 in child support would likely clear the debt simply to travel abroad. To instill the sort of fear of punishment necessary to actually force compliance, the law must have real teeth. This law is designed to prevent people from leaving the United States, which would make collecting child support even more difficult. However, refusing to issue a passport to someone seriously behind in child support, with very few exceptions, will not likely cause people to rush out and start setting things right with their ex-partners.

C. *Failure of Local Debtors' Prisons to Deter Debtors*

Certainly local procedures, such as the ones in Shawnee County, Kansas, constitute a debtors' prison. The question that remains is whether it deters people from failing to pay debts. In Shawnee County, the answer appears to be no. The people who typically are required to appear are at the bottom of the socio-economic pyramid, and the threat of a short jail sentence tends not to deter them.²⁰⁷ As in every other way de facto debtors' prisons are practiced in the United States, the primary goal of the system in Shawnee County is to coerce people to pay their debts.²⁰⁸ The jail time is not punitive in nature. Technically this jail time is not ordered because of a failure to pay the debt, but not appearing upon order of the court.

206. *Eunique v. Powell*, No. 99-56984, 2002 U.S. App. LEXIS 17612, at *8 (9th Cir. Aug 23, 2002).

207. Interview with John Francis, Associate Professor, Washburn University School of Law, in Topeka, Kan. (May 23, 2002).

208. *Id.*

In *Reinschmiedt v. City of Wichita*, the court not only stopped the practice of picking up people from a “hit list,” but levied a large civil penalty against the city for its practices.²⁰⁹ However, the City was penalized not for running a debtors’ prison, but for violating the due process rights of those arrested.²¹⁰ If the City had continued issuing warrants for everyone who owed it money and arresting people before the warrant was issued, the city would still be jailing debtors without warrants today.²¹¹

Since cities have for many years issued warrants and jailed those who do not pay fines or other fees to the city, and this fact is commonly known, it is unlikely that the threat of going to jail for a day or two is any deterrent to those who would disobey. Citizens essentially roll the dice. If caught, they just pay up and go free; if not caught, so much the better. Whenever the remedy a defendant will have to pay is equal to the defendant’s gain by not doing so, the defendant will have an incentive to break the law. To stamp out this type of behavior, the sanction must be severe enough that no rational person would “roll the dice.” Since the system is built around coercion rather than punishment, they are free to make that choice. However, this practice has removed all deterrence from the system.

V. NO FEAR OF THE LAW

It is obvious that the United States, contrary to both state and federal law, has at least a de facto debtors’ prison system in place. Since such a system runs afoul of both federal and state statutes, it is implemented through the smokescreen of civil contempt, failure to appear, reform of child support laws, and other such ruses. Still, the de facto debtors’ prison system seems to be failing. It fails because in every area the laws and practices are oriented toward coercion rather than punishment. Even historically, debtors’ prisons were coercive – as soon as the debt was settled, the prisoner could go free.

If the United States is going to have a debtors’ prison system, then policymakers need to decide what the goal of the system is to be. Most would say the goal is to deter undesirable conduct in the future; in other words, the system should have a deterrent effect. To have a deterrent effect, people must fear the law. As long as the system is coercive rather than punitive, people will not fear the consequences. Historically, coercive debtors’ prisons have not worked, but a truly punitive debtors’ prison has yet to be tried in modern society.

209. Interview with Lawrence J. Leatherman, Plaintiffs’ Attorney, Palmer, Leatherman, & White, L.L.P., in Topeka, Kan. (June 7, 2002).

210. *Id.*

211. *Id.*

The possibility of a connection between diminished fear of the law and a tendency to break the law deserves exploration. Professor Cass Sunstein, University of Chicago Law School, has taken the work of a social psychologist, Paul Slovic, and applied it to fear and the law.²¹² Slovic's work centers around how people perceive risk as well as when and why they become frightened.²¹³ His work entails how people perceive risks to their health and personal safety, but Sunstein takes this research a step further by connecting it to policymaking and law.²¹⁴

A. *The Availability Heuristic and Risk*

When assessing whether there is a connection between the seeming loss of fear of debtors' prisons and the willingness to defy the law, it is helpful to consider Slovic's availability heuristic. A heuristic is simply a mental shortcut.²¹⁵ The availability heuristic, when applied to risk, means that one will perceive a risk as more serious if one can easily think of a relevant example of the risk.²¹⁶ If a person can think of such an example, that person will tend to believe the risk is more probable.²¹⁷

The example Sunstein uses from Slovic's work to illustrate the availability heuristic is that the rate at which people purchase insurance against natural disasters, like floods or earthquakes, is affected by their recent experiences.²¹⁸ The more fresh and vivid the experience, the more likely they are to purchase insurance.²¹⁹ The more remote the experience with such disasters, the less likely they are to do the same.²²⁰ This leads Sunstein to the following conclusion: if the goal is to alert the public to a risk, then "make a vivid example of its occurrence highly salient to the public."²²¹

Contrast this point with the idea prevalent in the United States that there are no debtors' prisons in America. Most people give no thought to the idea that in the United States, under certain circumstances, they can go to jail for owing money. The reason is that Americans learn in high school history classes that the United States abolished debtors' prisons long ago. Those who do know that such a thing is possible realize that the risk of any substantial jail time for

212. Cass R. Sunstein, *The Laws of Fear* (John M. Olin Law & Econ., Working Paper No. 128, 2d Series, 2001), at <http://www.law.uchicago.edu/Lawecon/index.html>.

213. *Id.* at 3.

214. *Id.* at 4.

215. *Id.* at 5.

216. *Id.*

217. *Id.*

218. *Id.* at 6.

219. *Id.*

220. *Id.*

221. *Id.* at 8.

non-payment of debt is very small. In either case, the availability heuristic would indicate that since the public views the risk of imprisonment for debt to be either non-existent or very small, it is a risk worth taking.

This point is further buttressed in Sunstein's paper when he examines Slovic's work on intuitive toxicology.²²² This work is oriented toward people's attitudes concerning toxic chemicals, poisoning, and the environment.²²³ One of the points that comes out of Slovic's work in this area is that often people view risk as, in Sunstein's words, an "all or nothing" matter.²²⁴ This all-or-nothing attitude carries over into areas other than just chemicals and the environment. When applied to debtors' prisons, this research would indicate that if people think the risk of being incarcerated for debt is very low, then they will likely view it as non-existent. Likewise, if they see the risk as very high, then they will view the risk as very likely to occur. The problem with the current de facto debtors' prison system is that the risk of incarceration is viewed as low, and consequently, the public thinks the risk is low. Commentators have criticized Sunstein's definition of fear, though these criticisms do not lessen the impact fear has on encouraging people to pay debt.

Professor Rachel Moran, University of California School of Law, believes that Sunstein has focused his definition of fear too narrowly, resulting in fear as "nothing more than a cognitive heuristic, or mental shortcut."²²⁵ She believes Sunstein disregards other behaviors that may provide a more complete understanding of how fear works.²²⁶ These include the ideas of "bounded willpower and bounded self-interest."²²⁷ Moran describes how Sunstein himself has explored these concepts in other work.²²⁸

222. *Id.*

223. *Id.*

224. *Id.* at 9.

225. Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1, 1 (2002).

226. *See id.*

227. *Id.*

228. *Id.* at 6. Sunstein has used the concept of bounded willpower to describe how people will at times do things that they realize are opposed to their interests. *Id.* He cites as an example of this behavior the fact that people will spend money to satisfy immediate interests in spite of knowing that saving money is actually in their best interest. *Id.* Bounded self interest is demonstrated when people do things to limit their self interest, usually because they care about, or act like they care about, others. *Id.* As an example, Sunstein offers a game that involves two subjects and a sum of money. *Id.* The first subject is given a sum of money and told he must share it with the second subject but is not told how to allocate it between himself and the second subject. *Id.* The second subject then either must accept the money or reject it. *Id.* If the second subject rejects it, then neither subject gets any of the money. *Id.* Sunstein points out that it is in the best interest of the first subject to offer the smallest amount possible; and in the best interest of the second subject to accept whatever is offered because it is better than nothing. *Id.* at 6-7. Interestingly, that is not what happens; the first subject usually would offer a reasonable division of the money and the second subject would usually reject very small offers. *Id.* at 7. There seemed to be some unspoken standard of fairness that both parties recognized. *Id.*

Although this analysis may be thought provoking to law and economics theorists, when applied to debtors' prisons, both views would tend to support the idea that a more strict approach is necessary. Certainly most would agree it is in a debtors' long-term interest to pay bills or court ordered judgments when so assessed. However, people may well assume the risk of not paying in spite of the fact it is in their long-term interest to do so. This may be especially true if a debtor thinks the likelihood of punishment is very low. Likewise, if people believe the perceived standard of fairness has not operated in their favor, it would tend to increase the likelihood that they take that risk. For example, in a divorce case similar to Chadwick's, one spouse may decide it is not fair that the other spouse receive half the marital assets because the second spouse never worked outside the home. Therefore, the first spouse perceives sharing these assets with the second spouse to be unfair.

Moran believes Sunstein should have "evaluated popular intuitions about danger in light of all three elements of behavioral law and economics," and if he had done so, he might have come to a different conclusion about how populist decisionmaking affected the process of regulation.²²⁹ Even so, it is hard to imagine how such an evaluation would have changed the way people assess the risk of debtors' prison. Using Moran's approach, it might be easy to see how such a three-part analysis of human behavior might actually explain why people are willing to take the risk of incarceration and essentially ignore their debts.

Like Moran, Professor Eric Posner of the University of Chicago Law School also believes Sunstein's view of fear is too simplistic.²³⁰ Posner believes that in Sunstein's world, "people are assumed to be rational except to the extent that cognitive biases interfere with rational choice."²³¹ Posner finds emotion (fear) to play a large part even in the examples used by Sunstein and argues there is more at work than simply the availability heuristic.²³² He posits that there are three important parts to fear: (1) "fear is contagious,"²³³ (2) "fear feeds on itself,"²³⁴ and (3) "fear . . . can persist for quite a long time."²³⁵ This view of fear supports Sunstein's concept of social amplification.

229. *Id.* at 7. The three facets of human behavior are bounded rationality, bounded will-power, and bounded self-interest. *Id.* at 6.

230. See Eric A. Posner, *Law and the Emotions*, 89 *Geo. L.J.* 1977, 2002-03 (2001).

231. *Id.* at 2002.

232. See *id.* at 2002-03.

233. *Id.* at 2003.

234. *Id.*

235. *Id.*

B. *Social Amplification and Risk*

Another important part of Slovic's work that Sunstein ties to the law is the idea of social amplification. Rarely do individuals have first-hand knowledge of certain risks, so they tend to be influenced by the beliefs of others.²³⁶ In some cases, a highly publicized event will, because of social amplification, cause a public reaction far out of proportion to the actual threat, so the public winds up fearing something that actually carries very low probability of risk.²³⁷ As an example, Slovic uses the accident at the Three Mile Island nuclear power plant.²³⁸ There were no injuries and no harm from the low-level radiation release, but the public reacted by demanding tighter controls on nuclear power and, in some cases, opposing it altogether.²³⁹ This reaction would tend to support Posner's theory that fear is contagious and that people often stop thinking clearly during a panic.²⁴⁰

At the same time, Sunstein points out that Slovic's research indicates that in some areas, this concept works in reverse, and a sort of "social attenuation of risk" occurs resulting in disregard of or downplaying of certain serious risks.²⁴¹ An example of such social attenuation would be that if the individual believes something cannot or will not happen, and everyone he knows believes likewise, then that person will not likely take the risk of such a thing occurring seriously, in spite of the fact that the risk might be very real and very high.²⁴² As examples, Slovic offers public attitudes toward not using seat belts in cars, indoor radon, and cigarette smoking.²⁴³

Once again, as federal, state, and local governments increasingly rely on some form of debtors' prison to deal with the problem of non-payment of certain debts, the risk of incarceration increases. Still, legislators and other officials refuse to publicly call this imprisonment what it is, a debtors' prison. As a result, many individuals perceive the risk of jail time for non-payment of debt to be low or non-existent. Everyone around them will begin to take the same view, so the idea that such risk is low is amplified. The end result is that social amplification takes place. The perception that the risk of being punished for breaking some law mandating the payment of money and the reality of that risk becomes disconnected.

236. Sunstein, *supra* note 212, at 9, 11.

237. *Id.* at 10.

238. *Id.*

239. *Id.*

240. Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681, 685 (2002).

241. Sunstein, *supra* note 212, at 10.

242. *Id.*

243. *Id.*

As debtors' prisons, like the ones cited in Kansas, become more and more common, this trend could potentially have the effect of breaking this social amplification. However, in order to truly break it, the jail time would have to be significant. Typically, the jail terms at the local level for petty offenses like those in Shawnee County are very short.²⁴⁴ These types of incarcerations are easy to hide, and because short jail terms are hidden, few know imprisonment for debt is possible. Even when they are not hidden, people rarely put the label of "debtors' prison" on them because of the implications of the name, and hence, social amplification takes place.

This is an example of what Sunstein calls a "social cascade."²⁴⁵ He uses global warming as an example, but it is just as easy to substitute debtors' prison.²⁴⁶ If a person is unsure about whether or not one can be imprisoned for non-payment of debt, but a respected friend is sure one cannot be, then the person will likely wind up agreeing with the respected friend.²⁴⁷ Enter now a third person, who, when confronted with the views of the first two, now agrees that one cannot be imprisoned for debt in the United States.²⁴⁸ Thus the progression continues until the belief becomes widespread in the community, completely independent of reality.²⁴⁹

Sunstein argues that there is more at work in a community than just informational forces; he believes reputation is an important part of a person's evaluation.²⁵⁰ Even though a person may disagree with a viewpoint, he may still support that view for fear of looking foolish, uneducated, indifferent, or any number of other things.²⁵¹ Perhaps the most interesting point involving these reputational cascades is that legislators tend to be more sensitive to these pressures.²⁵²

As a result, because reputation is important to legislators, they may actually introduce or support statutes designed to remedy risks they know to be very small.²⁵³ This calls to mind the overwhelming bipartisan support for the Child Support Recovery Act, even though Congress heard testimony that over half of all children accepting government payments for support had young, single fathers with no marketable skills or education.²⁵⁴ It would have been very difficult for

244. Interview with John Francis, Associate Professor, Washburn University School of Law, in Topeka, Kan. (May 23, 2002).

245. Sunstein, *supra* note 212, at 11.

246. *Id.*

247. *Cf. id.*

248. *Cf. id.* at 11-12.

249. *See id.* at 12.

250. *Id.*

251. *Id.*

252. *Id.* at 13.

253. *Id.*

254. Wimberly, *supra* note 137, at 739.

any senator or representative to oppose such a measure in spite of its low probability of making a difference. As a result, another bill establishing a debtors' prison was enacted into law.²⁵⁵

Sunstein concludes this section by noting that if enough people are indifferent to significant risks, then the forces mentioned above will work to cause others to be indifferent as well.²⁵⁶ He believes that both social and reputational cascades may explain why the public seems unconcerned about real dangers.²⁵⁷

When one combines the availability heuristic, the concept of social cascading, and the informational and reputational forces at work, it becomes easier to understand why debtors' prison laws do not have an effect on people's behavior. First, people simply do not believe debtors' prisons exist in the United States, and as a result, they tend to minimize the risk or believe the risk is non-existent.

Second, this perception of no debtors' prisons is fed by legislators. They are caught up in the dilemma of feeling obligated to take action to solve problems created by non-payment of debt, but come up against both state and federal laws forbidding imprisonment for debt. Legislators are sensitive to how others perceive them, and social cascading, combined with reputational forces, causes them to react. They react by disguising the debtors' prison system with civil contempt, failure to appear, reform of child support laws, and other ruses.

C. *Evaluation of Risk*

Sunstein also notes Slovic's work in the area of what makes risks acceptable to people.²⁵⁸ Slovic found that the public can assign very different evaluations to risks that are identical in terms of lives lost based on certain variables.²⁵⁹ The variables people consider when deciding whether a certain risk is acceptable or unacceptable "include whether the risk is (1) dreaded; (2) potentially catastrophic; (3) inequitably distributed; (4) involuntary; (5) uncontrollable; (6) new; and (7) faced by future generations."²⁶⁰

Obviously, an individual would not likely consider all seven of these variables when evaluating whether the risk of incarceration was worth taking when failing to pay some debt. However, if some of these considerations are applied to Chadwick and Armstrong, one can easily imagine either or both of these men doing a mental evaluation

255. 18 U.S.C. § 228 (2000).

256. Sunstein, *supra* note 212, at 13.

257. *Id.* Slovic offers as examples failure to use seat belts, smoking, and radon gas in homes. *Id.* at 10.

258. *Id.* at 16.

259. *Id.*

260. *Id.*

of these factors when they chose to withhold their millions from the court. For example, would Chadwick or Armstrong dread the type of imprisonment they would be likely to face when being jailed for civil contempt? It is unlikely that they would experience real dread or view the incarceration as catastrophic when they know that they will eventually have to be released, especially when the average term for civil contempt is eighteen months.²⁶¹ Likewise, it is unlikely that either man would view his imprisonment as uncontrollable or involuntary given all either has to do to secure his release is turn over the money.

Similarly, when someone who is significantly in arrears for child support matches those same variables against the likelihood of jail time under the Child Support Recovery Act or the likelihood of being denied a passport under 42 U.S.C. § 652(k), would he find the risk acceptable? Like Chadwick and Armstrong, it is unlikely that he would experience real dread or view the risk of incarceration as catastrophic when he considers that in the first seven years the CSRA was in effect, there were only 105 criminal convictions nationwide.²⁶² Similarly, most child support offenders would not consider the denial of a passport catastrophic or look upon it with dread. In either case, the risk would not be involuntary or uncontrollable when all they would have to do to avoid jail time is pay the back child support.

These ideas are supported by what Slovic and Sunstein believe “dread” really means.²⁶³ Dread is more than just another word for risk.²⁶⁴ In Slovic’s arena of fatalities, it would seem that a dreaded risk would be one that involved “significant pain and suffering before death.”²⁶⁵ In a more broad sense, it would have to be something especially feared. For example, a thirty- or forty-year prison term would likely be dreaded while a three- or four-year jail term might not be, especially if there were a multi-million dollar payoff at the end.

Sunstein does a similar analysis with voluntariness and controllability. He argues that when a risk is deemed to be involuntary, it is viewed this way because “people who face the risk do not know about it or because it is especially difficult or costly to avoid it.”²⁶⁶ He finds the reverse to be true of a risk the public sees as voluntary – it is voluntary because people are aware of the risk or it can be avoided easily or cheaply.²⁶⁷ The child support debtor in today’s society is certainly aware of the risk of not paying, but because it generally can be

261. Clines, *supra* note 1.

262. Wimberly, *supra* note 137, at 740.

263. Sunstein, *supra* note 212, at 21.

264. *Id.*

265. *Id.*

266. *Id.* at 22.

267. *Id.*

avoided easily and cheaply, the public would consider it a voluntary rather than involuntary risk. Therefore, not paying child support would be an acceptable risk.

Again, the concepts of the availability heuristic and social cascading work against instilling fear of the law into those who would not pay just debts. When those concepts are combined with the variables the public uses to assess risk and matched against the risks of incarceration for failing to pay, one can quickly see very little fear of the law and why modern day debtors' prisons are failing to provide a deterrent effect.

D. *Feelings and Risk*

Slovic also believes that emotions and feelings are a large part of how people react to risks.²⁶⁸ His interest in this area seems to be driven by the finding that the public tends to believe that high-risk ventures offer low benefits while beneficial activities are not risky.²⁶⁹ From this, Slovic draws the idea that there is an "affect heuristic" that provides people a shortcut instead of a more thorough, complete evaluation.²⁷⁰ This heuristic is a result of an "emotional, all-things-considered reaction to certain processes and products."²⁷¹ Slovic also believes that when people are provided data about benefits of a certain risk, then their perception of that risk is altered.²⁷² If people discover that a certain course of action involves low risk, then they assume that it carries high benefits.²⁷³ Likewise, if people discover that the course of action carries great benefits, then they assume it is low risk.²⁷⁴ This affect heuristic drives emotional responses, and these responses play an important role in how people perceive risk.²⁷⁵

The affect heuristic may well explain why people like Chadwick and Armstrong are willing to risk imprisonment in exchange for millions of dollars. The size of the payoff alone is so large and beneficial that the affect heuristic would drive a diminished expectation of risk. The same might well apply to someone who is not dealing with millions of dollars, but instead a child support order that would require a large amount of the person's income. The benefits of not paying the child support and being able to keep that money for personal use may cause the individual to disregard or minimize the risk of punishment.

268. *Id.* at 24.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 25.

273. *Id.*

274. *Id.*

275. *See id.* at 25-26.

Sunstein expands on Slovic's work by addressing the connection between cognition and emotion.²⁷⁶ Perhaps most interesting when thinking about why people do not fear modern debtors' prisons, Sunstein points out that, when assessing risk, an essential question is whether people can "imagine or visualize the 'worst case' outcome."²⁷⁷ He believes when people react to risks, that reaction is predominately built around how bad the outcome is coupled with how clear that outcome is, not how likely it is to occur.²⁷⁸ Herein lies a key problem with the modern day debtors' prison concept: people do not fear going to jail for debt because the possibility seems remote, and even if such a remote possibility were to occur, people believe the period of incarceration will be short. As a result, the outcome is not clear to people. They do not visualize this outcome as a bad one.

E. Race, Income, Other Factors and Risk

Slovic found that race and income make a difference as to how people perceive risk.²⁷⁹ Slovic found white males worry less about risks than other demographic groups.²⁸⁰ Even more interesting, Slovic found within the group of white males a subset of about thirty percent who "believe almost all risks to be very low."²⁸¹ The men in this subset had a tendency to be more educated, higher paid, and more conservative.²⁸² Sunstein offers some conjecture as to why this may be true. For example, he theorizes well-to-do white men may be afforded a greater sense of security because they believe they are better protected by society and its institutions.²⁸³

This difference in perception of risk based on race and income has much to offer in explaining modern attitudes toward imprisonment for debt. *Chadwick* and *Armstrong* both involved wealthy white men who knew that by defying the court they risked imprisonment. Nonetheless, they took that risk. It is likely that they both assumed that risk because they were confident they could not be held long for civil contempt. That, coupled with the large amount of money at the end, made the risk worth taking. It may be equally true that society tolerates the type of de facto debtors' prison practiced by Shawnee County, Kansas, when the court holds debtors for failure to appear because educated, financially secure white men run little risk of falling into that trap.

276. *Id.* at 26.

277. *Id.* at 26-27.

278. *Id.* at 27.

279. *Id.* at 28.

280. *Id.* at 28-29.

281. *Id.*

282. *Id.* at 29.

283. *Id.*

This idea that some classes face little risk from certain types of debtors' prisons also fits another finding by Slovic: people seem to believe that certain things cannot or will not happen to them.²⁸⁴ They are fully aware of the risk; but they just believe that, while other people had better watch out, it cannot or likely will not happen to them.²⁸⁵ According to Sunstein, if government wants to make people more afraid of some risks and less afraid of others, then it should be aware of what will and will not work.²⁸⁶ Certainly, at least to this point, governments have failed to instill a fear of not paying debts into the public, if that truly is governments' goal. This should be the goal, and Sunstein's work, if heeded by legislators, would go a long way toward achieving that goal.

F. *Summary: Debtors' Prisons and Slovic/Sunstein's Work*

There is much in Slovic's and Sunstein's work to illuminate why governmental attempts to address non-payment of certain types of debt with de facto debtors' prisons have failed. First, the unwillingness by federal, state, and local governments to openly acknowledge the existence of debtors' prisons plays a large part in this failure. This unwillingness plays right into Slovic's availability heuristic, and the idea that if people cannot readily remember an incident where someone was severely punished for non-payment of a debt, then they are not likely to fear the risk.²⁸⁷

Second, the availability heuristic works hand-in-hand with social amplification. If no one knows of anyone imprisoned for debt, the cascade effect occurs and people believe there is little or no risk associated with not paying debts. Consequently, these factors play into how people then evaluate the risk of not paying debts. People will tend to look at the potential benefit versus the perceived cost and, if the benefit is great, they will perceive the risk as low.²⁸⁸ Last, some would argue that not all segments of American society receive the same treatment and protections, therefore giving some socio-economic and racial groups an advantage. This concept transfers into how people perceive risk, and people at the top of the socio-economic ladder are likely to perceive less risk than those at the bottom.

When Slovic's and Sunstein's work is applied to how the de facto debtors' prison system is currently administered in the United States, it is easy to see why current enforcement has failed. The system is in conflict with both federal and state laws forbidding imprisonment for

284. *Id.* at 31.

285. *Id.* at 32.

286. *Id.* at 33.

287. *Id.* at 19.

288. *Id.* at 20.

debt, and therefore legislators have created the current “stealth” debtors’ prison system. A stealthy system, as demonstrated by Slovic and Sunstein’s work, will not change public attitudes toward risk and fear of punishment. If United States society believes it needs a debtors’ prison system in order to force people to pay debts, the question becomes how does society reform the current de facto debtors’ prison system and make it work?

VI. REFORMING THE DEBTORS’ PRISON SYSTEM

The debate is not whether to institute a debtors’ prison system in the United States; this country already has one. This leaves policy-makers with two choices: eliminate the de facto debtors’ prison system and replace it with something that works, or restructure the current system in such a way that it becomes effective.

This nation has in its history repeatedly tried to eliminate debtors’ prisons only to return to them. Without a powerful deterrent some people will, by their very nature, attempt to avoid paying debts. The United States keeps returning to incarceration in an effort to provide that deterrent. In other words, until some provocative new deterrent emerges, debtors’ prisons appear to be here to stay.

The most viable option is to restructure the current system in a way that provides a strong deterrent to those who would not pay their debts. Slovic and Sunstein, by offering interesting ideas on why people fear or do not fear certain risks, have not only provided insight into why the current system does not work, but have also discovered important keys to making a new system work. This reform must be accomplished through a combination of judicial, statutory, and sentencing reform.

Applying reform might not be as difficult as it would first seem. The most difficult hurdle for lawmakers to overcome is going public with the idea that the United States still has debtors’ prisons. The old English paradigm of poor people rotting away in debtors’ prison is deeply rooted in the American subconscious thanks to literature and decades of teaching.²⁸⁹ However, Americans have a basic concept of

289. There are many examples in literature of the horror of debtors’ prisons in England. Take this example from Charles Dickens:

At last Mr. Micawber’s [financial] difficulties came to a crisis, and he was arrested early one morning, and carried over to the King’s Bench Prison in the Borough. He told me, as he went out of the house, that the God of day had now gone down upon him — and I really thought his heart was broken and mine too. But I heard, afterwards, that he was seen to play a lively game at skittles, before noon. On the first Sunday after he was taken there, I was to go and see him, and have dinner with him. I was to ask my way to such a place, and just short of that place I should see such another place, and just short of that I should see a yard, which I was to cross, and keep straight on until I saw a turnkey. All this I did; and when at last I did see a turnkey (poor little fellow that I was!), and thought how, when Roderick Random was in a debtor’s prison, there was a

fairness, and most would agree that debts should be paid. Policymakers can build on that to help people realize that failure to pay debts hurts everyone and results in higher social costs. Probably the easiest place to start such reform is eliminating the practice of using civil contempt to coerce people into turning over money to a court.

A. *Reforming Civil Contempt*

The debtors' prison concept often masquerades as civil contempt. The judiciary could easily institute reform in the area of imprisonment for civil contempt by drawing a bright-line standard for when such imprisonment transitions from coercive to punitive. In order to be standard, this issue would have to be resolved by the United States Supreme Court. Although efforts by lower courts to draw such a line would be commendable, the effect would be a patchwork of rules varying from jurisdiction to jurisdiction. However, a clear ruling by the United States Supreme Court would allow all courts to point to a bright-line standard. The standard, if there is to be true deterrence, would have to be quite long. Otherwise, contemnors would likely decide to wait out the period. For example, if courts were to establish the current average of eighteen months as the new standard, many contemnors would consider such a term a small price to pay for a large payoff. However, a bright-line standard of twenty years may well have the deterrent effect desired.²⁹⁰

In the example cases of *Chadwick* and *Armstrong*, both men had strong incentives for withholding money from the court.²⁹¹ Using Slovic's risk analysis, both men likely believed they would serve a short time and then be released. In these two cases, the men probably realized there was a possibility they could go to jail for civil contempt. As a result, a more visible public policy probably would not have made a difference. This was likely an example of Sunstein's work exploring the connection between cognition and emotion.²⁹² When

man there with nothing on him but an old rug, the turnkey swam before my dimmed eyes and my beating heart.

CHARLES DICKENS, *DAVID COPPERFIELD* 160 (Grosset & Dunlap 1931) (1870).

290. It is difficult to draw a parallel between the idea that long prison terms would have a deterrent effect in this area of the law with other areas of the law where such an approach might already be working. For example, murder routinely carries a long prison sentence or even death, but people who commit murder rarely do so after coldly calculating the amount of time they might have to spend in jail versus the benefit of killing their victim. Likewise, some have argued the drop off in certain drug crimes after the enactment of long, mandatory sentences in the federal system is an example of this approach at work. However, there is evidence that these long federal sentences simply drove most of the drug prosecution into state courts where the sentences are shorter.

291. In *Chadwick*, the motivation was \$2.5 million. *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *3 (E.D. Pa. Jan. 3, 2002). In *Armstrong*, the incentive was almost \$15 million in corporate assets. *Commodity Futures Trading Comm'n v. Armstrong*, No. 01-6159(L), 2002 U.S. App. LEXIS 4305, at *1 (2d Cir. Mar. 18, 2002).

292. Sunstein, *supra* note 212, at 26.

these men evaluated the risk, they looked at not only the amount of money at the end, but also how negative the outcome would be coupled with how clear the outcome would be, not how likely it was to occur.²⁹³ This probably led them to conclude that the chances of jail time were small, but even if they did serve time, the sentence would be short.

However, if counsel had advised these men that there was precedent for a bright-line standard of twenty years, established by the United States Supreme Court, before imprisonment was deemed to change from coercive to punitive, their calculus likely would have been much different. Instead of gambling on a short sentence of approximately eighteen months, they would have known the risk was much greater.

Likewise, legislators could accomplish the same goal by enacting laws with heavy statutory penalties criminalizing failure to turn over money to the court. This would have likely caused Chadwick and Armstrong to assess their risks much differently. Both the federal and state governments must enact statutes that carry heavy jail time for failure to turn over money as a result of a court order. These statutes should be punitive, not coercive, meaning if an individual is convicted, he cannot shorten or terminate his sentence by surrendering the money. Instead, there would be no recovery of the money, and the individual would keep it, but the price would be a very long jail term. The defendant would not be required to turn over the money because the punishment would be the lengthy jail term; not surrender of the money. The term should be based on the amount involved. For example, in Armstrong's case where over \$14 million is being withheld,²⁹⁴ the mandatory prison sentence should be something around forty years. The federal criminal system uses sentencing guidelines now based on the severity of the crime, criminal history, and other factors. Similar guidelines could be developed based on the amount of money involved, whether the debtor had failed to pay previously, and other factors. Very few people when confronted with an almost certain jail term of forty years would take that risk, even for a multi-million dollar payday at the end. Using Slovic's risk analysis, a forty-year prison term would certainly cause "dread" or be deemed "catastrophic."

Jail time for civil contempt in cases involving money tends to be reserved for those the court believes have the money to pay, but simply refuse to do so. This would not change; the jail term under this proposed reform would simply be long enough to deter any reasona-

293. *Id.* at 27.

294. *Armstrong*, 2002 U.S. App. LEXIS 4305, at *1.

ble person from withholding the money. An approach utilizing long prison terms would virtually eliminate the practice of thumbing one's nose at the court order. If the practice were criminalized, with a certain statutory penalty of considerable jail time, few people would be willing to assume the risk. Fear would find its way back into the law, and the deterrent effect would soon be demonstrated through fewer such cases. Although the social costs would initially be high, once the system took effect and the public had opportunity to react to it, over time the social costs would be lower.

B. *Reforming Federal Law*

Federal legislation, such as the Child Support Recovery Act, has begun to establish criminal penalties. These penalties separate this type of legislation from the civil contempt concept because the law is designed to be punitive, even though it may have some coercive elements. However, this type of federal legislation has failed on two counts. First, the efforts of Congress and the courts to mask the debtors' prison aspect of such legislation have undercut the useful effects of Slovic's availability heuristic and social cascading.²⁹⁵ Second, federal legislation has failed to be effective because of the generally short prison terms associated with the legislation.²⁹⁶ These terms are so short because the punishment is designed to be both punitive and coercive. For a debtors' prison to provide an effective deterrent, the coercive element must be dropped, and the punitive element must be severe. As Slovic's work illustrates, for the public to take a risk seriously, it must be dreaded and viewed as catastrophic.²⁹⁷

If the federal government wants its current *de facto* debtors' prison system to work, lawmakers must pass legislation that openly acknowledges that a person can go to jail for failing to pay debts. In addition, like the proposed penalties for civil contempt involving money, the penalties here must be severe to give the laws a deterrent effect. For example, perhaps a five-year prison term might be appropriate for a first-time offense under the CSRA, once the amount in question rose to a certain level. A second offense could result in a ten-year term. In any case, if Slovic and Sunstein's research means

295. Calling such things as child support a "societal obligation" rather than debt feeds this tendency. Wimberly, *supra* note 137, at 741.

296. For example, in the Child Support Reform Recovery Act, for a first offense the maximum term is six months, and for repeat offenses, the maximum term rises to only two years. *Id.* at 741.

297. Sunstein, *supra* note 212, at 21. Likewise, when one examines another federal attempt at enforcing child support payments, 42 U.S.C. § 652(k), the law that requires the Secretary of State to deny passports to people behind in child support payments, one sees similar faults. 42 U.S.C. § 652(k) (2000). First, there is the same reluctance on the part of the government to admit the passport is being denied because of a debt owed, and second, the penalty is not one that would deter the average member of the public.

anything, without significant publicity and punishment, there will be no fear of the law and no deterrent effect.

Judicial reformation of federal and state laws that result in imprisonment for debt in the face of legislation making such imprisonment illegal is more difficult. Since all fifty states have either statutes prohibiting incarceration for debt or constitutional prohibitions against it, the state courts could find procedures like those in Shawnee County, Kansas, illegal. Likewise, federal courts could drop the charade that child support payments and past due federal taxes are not debt. If this were to happen, then federal statutes allowing for the imprisonment of tax evaders and people in arrears for child support would be declared void by the court because of 28 U.S.C. § 2007, which prohibits federal incarceration for debt in states where it is illegal.

Obviously, this approach would force both states and the federal government to either let such debtors go free, or take the disingenuous laws prohibiting imprisonment for debt off the books. Faced with such a choice and the public outcry that would attend such a major change in thinking, state and federal legislators would be forced to pass statutes that openly acknowledge imprisonment for debt.

Like an alcoholic who wants to recover, the first step is admitting the problem. Here, policymakers must go public and admit there are modern day debtors' prisons at the federal, state, and local levels. The courts could force the hands of legislators. However, legislatures can reform this system even without the impetus of the courts. This will mean repeal of laws in all fifty states and changes to some state constitutions.²⁹⁸ Similar federal laws would have to be repealed or amended as well. Such changes would be absolutely critical because these laws prohibiting imprisonment for debt have led courts and policymakers to disguise actions resulting in debtors' prisons as something other than jail time for failure to pay.

This deception has fed the public perception that there is nothing to fear or that the risk of serious punishment for failing to pay is very small. The availability heuristic would indicate a person may know someone who is going to jail for civil contempt, failure to pay an obligation (child support), or failure to appear, and still believe there is no danger of going to jail for failing to pay a debt. The government has so cleverly disguised its debtors' prison system that people who know someone in one of these situations do not realize that they know someone who is going to jail for failing to pay a debt.

298. See Vogt, *supra* note 22, at 348.

The government causes people to underestimate the risk by disguising the punishment as something else. This is exactly the opposite approach one should take if the objective is deterrence. Policymakers must, through statutory reform, emphasize that debtors' prisons exist, and that people who fail to pay a just debt will go to jail. Once people start to hear of and experience first-hand people being sent to prison for failure to pay debts, Sunstein's work would indicate they will begin to perceive the threat as real and the risk as great.²⁹⁹

As the system becomes more and more publicly known, social amplification will take effect and people will begin to perceive the threat of imprisonment for debt as very real. As Sunstein notes, if the punishment and threat of punishment are highly publicized, there can be a public reaction far out of proportion to the actual threat.³⁰⁰ Consequently, the public can actually wind up fearing something with low probability of risk.³⁰¹ To get this effect, the laws must be very well known, and punishment must be connected to the statutes in the public's mind. At this time, the opposite effect is at work and there is a social attenuation of the risk of imprisonment for debt, causing the public to think the threat is less than it really is. Any statutory reform must include very open, visible statutes prohibiting non-payment of debt with statutory punishment that is equally well known by the public.

Obviously, the problem with such statutory reform is that it is dependent on elected legislators. Despite the enormous amount of individual debt in the United States today, the reality is that most people do pay their debts in spite of the fact that some, because of human nature, will take advantage of creditors. If that were not true, the entire lending industry would come crashing down. In addition, there would never be an equitable property settlement in a divorce case, and children of divorce could not rely on receiving support from non-custodial parents. So while on the surface such statutory reform may appear to call for great courage on the part of legislators, it would likely be very popular with the general public.

The most problematic of the current de facto debtors' prisons to reform are the debtors' prisons at the local level. First, local procedures vary greatly from county to county, municipality to municipality. Local officials are quick to try to discover new and innovative ways to deal with problems in this area, even though sometimes it violates certain rights, as officials in Wichita, Kansas, discovered.³⁰²

299. Sunstein, *supra* note 212, at 5.

300. *Id.* at 7.

301. *Id.*

302. Interview with Lawrence J. Leatherman, Plaintiffs' Attorney, Palmer, Leatherman, & White, L.L.P., in Topeka, Kan. (June 7, 2002).

In the Shawnee County example, the debtors' prison is a result of the individual failing to appear after being summoned by the court to demonstrate assets because of non-payment of debt.³⁰³ Once again, this is not punitive in nature, but coercive. Once the bond is paid, the debtor goes free and the bond is applied to the debt.³⁰⁴ However, unless the amount of the bond is sufficient to completely discharge the debt, which is rarely the case, the debtor may face the same prospect a month later.³⁰⁵ This is an inefficient use of both law enforcement personnel and the court's time and resources. Accordingly, to have true deterrent effect, the punishment should be heavily punitive to provide the deterrent effect necessary to prevent reoccurrence.

C. Criticism of Such an Approach

Certainly, such a stern approach will bring criticism. The first criticism will undoubtedly be that people in prison cannot pay debts. This has historically been the problem with debtors' prisons, but it results from old ways of thinking about the issue.³⁰⁶ Debtors' prisons have historically been designed to coerce people to pay debts; upon payment they were released.³⁰⁷ At the federal, state, and local level, officials in the United States have fallen back into that old paradigm.

What is needed is a fresh approach; an approach that abandons coerciveness and essentially "writes off" the debt in exchange for a long prison term, even if the defendant has the money. While it is true that the creditor, whether it be the state, an ex-spouse, or the debtors' children, may not get their money, they are rarely getting it now.³⁰⁸ This new approach, designed around Slovic and Sunstein's analysis of how people evaluate risks and how fear of certain outcomes determine behavior, will result in genuine deterrence. Over time, more state debts, more ex-spouses, and more children will receive money because the penalty for non-compliance will be so high that genuine fear of the consequences will be put back into the law.

The second criticism may well be that the nation's prisons are overcrowded now; with long, mandatory sentences for failure to pay debts, where will society warehouse these new "criminals"? Although in the beginning there will be a surge in people going to prison, once the risk becomes well known and social cascading takes effect, ulti-

303. Interview with John Francis, Associate Professor, Washburn University School of Law, in Topeka, Kan. (May 23, 2002).

304. *Id.*

305. *Id.*

306. Vogt, *supra* note 22, at 345.

307. *Id.* at 340-41.

308. Wimberly, *supra* note 137, at 747. In spite of the passage of the CSRA, the amount of overdue child support has skyrocketed to \$45 billion in 1997, up from \$27 billion owed in 1992, the year the CSRA was passed. *Id.*

mately there will be fewer people going to jail, and the social costs across the board will be lowered.

Others will argue that criminalizing non-payment of debt will create an impossible burden for the prosecutor in some debt cases. In Chadwick's case, the prosecutor might not be able to meet the "beyond a reasonable doubt" standard required in criminal prosecution. Some people who hide assets or refuse to pay just debts may escape punishment as a result of applying this standard. However, the Constitution is designed to protect people from imprisonment without due process, and if the prosecution cannot meet its burden, then people should not go to prison. The current system does imprison debtors in some cases without due process, which is something about which Americans should be nervous. Even though such a standard may allow some debtors to escape justice, all should find comfort in the fact that those who are convicted under such a criminal statute had access to their due process rights.

Finally, some Americans will simply, on philosophical grounds, oppose the reforms because they believe the whole debtors' prison concept is wrong. Those people are ignorant of reality. In the United States today, there are debtors' prisons operating at the federal, state, and local levels. People are going to jail every day across this nation for failure to pay debts. Since debtors' prisons do in fact exist whether people approve of them or not, the challenge is how to make them work so that the deterrent value is raised to the point that imprisonment for debt becomes rare.

VII. CONCLUSION

Chadwick would quickly agree that the United States is a country that employs debtors' prisons. The fact that he will likely soon leave prison, and his wife will be no closer than she was eight years ago to having access to their marital assets, is a vivid illustration that debtors' prisons are not working.³⁰⁹ The reason the present system does not work is that the underlying concepts do not mesh with public views and attitudes. This does not mean that debtors' prisons can never work; indeed, the concept probably offers the best hope for providing a workable deterrent for failing to pay just debts. However, the system, if it is to work, badly needs reform.

Building on the work of Slovic and Sunstein, debtors' prisons will work if the concept is openly acknowledged by public officials and reflected in statutory law. If eight years ago Chadwick, then fifty-

³⁰⁹ See *Chadwick v. Janecka*, No. 00-1130, 2002 U.S. Dist. LEXIS 10, at *26 (E.D. Pa. Jan. 3, 2002).

seven years old,³¹⁰ knew with certainty that withholding a large amount would have earned him a thirty- or forty-year prison term, it is likely he would have turned over the assets. Such a long confinement would have been almost certainly a life term for him. Instead, his patience and stubbornness are on the verge of paying off. Long, mandatory prison terms will create dread in the minds of the public in a way that current penalties do not.

Society can either elect to continue to reward obstinance as shown by people like Chadwick and Ballek, or find some way to make such behavior unacceptable to society and to the individual. It is time for federal and state legislatures to repeal or amend current laws forbidding imprisonment for debt and, in their place, enact new statutes designed to instill fear of violating the law into the minds of the public. The initial social costs may be high, but over time, this reform will actually reduce social costs by deterring people who otherwise would fail to pay just debts.

Such reform would give future Chadwicks and Balleks a clear choice: live up to your societal responsibilities and obligations, or spend a large portion of your life in jail. It is time for legislators and judges to make tough choices to make life better for everyone.

310. See Clines, *supra* note 1.