

THE TRANSFORMATION OF IMPRISONMENT FOR DEBT IN ENGLAND, 1828 TO 1838

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The objects of the law have been “entirely subverted by the influence of that new species of deceitful humanity which casts a withering look of indifference and neglect upon the man of self-restraining virtue, while it protects and defends, and weeps over, the self-inflicted misfortunes of knaves and rascals”. (Elliott 1838:3).

INTRODUCTION

Prior to the nineteenth century, there were two forms of imprisonment for debt. The first was imprisonment prior to judgment on the merits of the substantive claim, called imprisonment on the mesne process, on a *capias ad respondendum*. The second was imprisonment in execution, on the final process, on a *capias ad satisfaciendum*. Both were available to creditors as of right, with no need to allege that the debtor’s default was fraudulent. Mesne process imprisonment was available simply on the claimant’s affidavit that the debtor had defaulted. Actions could also be commenced by summons, which did not entail arrest and imprisonment. Final process imprisonment was not the only form of execution of a judgment. Creditors could choose to take execution on goods and chattels (*fieri facias*), limited execution against land (*levari facias* or *elegit*), or to take the body of the debtor. There was no remedy against intangible property. Once the creditor acted against the body, there could be no further action against the debtor’s property. The parties were in a stalemate if a debtor chose to remain in gaol to protect his or her assets. The creditor could release the debtor from prison, but that was also an effective release of the debt. Meanwhile, the debtor could remain in gaol, living on intangible property and that part of his or her land which was exempt from direct execution.

Mesne process imprisonment ended on judgment being given on the substantial

cause of action, or on the time for proceeding with the action running out. In the latter case, a *supersedeas* allowed release, usually after several months of fruitless imprisonment. There was no set length for final process imprisonment, although a variety of ameliorating provisions usually meant that perpetual imprisonment was theoretical rather than actual.

By 1828, the forms of mitigation had become quite fixed. The first was bail, by which two respectable property holders guaranteed that the debtor would appear at the trial or pay the judgment. Secondly, an 1813 statute (53 Geo III c102) established a permanent Insolvent Debtors Court on principles which had been in operation through temporary Acts for over a century. Debtors applied to the Court for relief, supplying a list of assets and assigning all of their property, including land and intangibles, for the rateable benefit of their creditors. If they had not acted in contravention of broadly defined commercial morality, the Court released them from prison, but not from their debts. Future acquired property remained liable to pay past debts. Creditors were barred from initiating this process against large debtors. However, compulsory powers under the Lords' Act ((1759) 32 Geo II c28) were available when the judgment debt was under £300. Thus, by a complex and expensive procedure, creditors could force their imprisoned debtors to cede all of their property, and be released from gaol. The financial limit meant that there was thus no effective remedy against large land and intangible property holders who refused to pay and were willing to remain in the comparative luxury of the major London prisons and their environs.

While large debtors with exempt assets, including the aristocracy, were thus in a special position, so were large traders. Any trader owing over £100 to a single creditor could be declared bankrupt, allowing rateable distribution of assets to the creditors. Unlike insolvency, bankruptcy did not require a preliminary period of imprisonment, and it released bankrupts from future liability. Non-traders and small traders were at a double disadvantage.

Small debtors were also affected by specific mitigating statutes. There was no arrest on the mesne process under £20 ((1827) 7 & 8 Geo IV c71). As a result, the local Courts of Requests had power to order only final process imprisonment, their jurisdictional limits being under £20. Final process imprisonment in those courts was also limited. A 1786 statute (26 Geo III c45) set the maximum sentence for debts under 20s at 20 days, and for debts under 40s at 40 days. Insolvency was thus usually restricted to superior court debtors.

Just as insolvency provisions were a result of mitigation of imprisonment for debt, so were default judgments. Until the lower limit was placed on mesne process imprisonment, there could be no trial or judgment without an appearance by the defendant. The lower limit, imposed by a series of Frivolous Arrests Acts (see (1725) 12 Geo I c29 and (1827) 7 & 8 Geo IV c71), was accompanied by default judgments under that limit. The link between jurisdiction and appearance was thus broken as part of an attempt to lessen the harshness of civil imprisonment.

While wealthy debtors could evade imprisonment entirely, through the process of bankruptcy, or retain sufficient exempt assets to ensure a comfortable life in gaol, poor debtors were forced to rely on charity and statutory maintenance schemes. At common law, creditors had no obligation to maintain their debtors in gaol (*Dive v Maningham* (1464) 1 Plowden 60; 75 ER 96, *Manby v Scott* (1659) 1 Mod. 124, 132;

86 ER 781, 786). Charitable assistance was sometimes available, and sometimes not, and the “groats” payable by creditors under the Lords’ Act (2s 6d per week, later 3s 6d), required the debtor to spend more than many debtors had, to force its payment. A statutory county allowance was also poorly enforced (McConville 1981:18; Holdsworth viii:232-233).¹

There was no formal link between imprisonment and the commission of commercial offences. Insolvency and the charities had regard to the debtor’s conduct, but the creditor retained the right to imprison the most innocent debtor, either before or after judgment. Two English statutes transformed imprisonment for debt, although they did not abolish it, as is commonly believed. This paper examines the background to the 1838 Act, which restricted mesne process imprisonment to those about to leave England, while leaving final process imprisonment untouched. The other transforming Act was the Debtors Act, 1869, which finally transformed civil imprisonment of both kinds. In future only the “guilty” would be imprisoned, but it was soon found that the only offences committed by post-1869 prisoners were poverty and ignorance.

The parallel statutes in New South Wales were (1839) 3 Vic. No. 15 (“abolition” of mesne process imprisonment) and (1843) 7 Vic. No. 19 and (1846) 10 Vic. No. 7 (parallel to the 1869 English Act, though 26 years earlier).

1. *The Campaign to 1828*

The campaign to abolish imprisonment for debt began in the late eighteenth century. Before then, only Dr Johnson opposed it in principle, and he had little support from others (Anonymous 1844:14-15; Lineham 1974:14; Clay 1861:39).² In the sixteenth and seventeenth centuries, writers were concerned about the exploitation of imprisonment by creditors, rather than its existence (see Shaw 1947; Dobb 1952:18), reflecting a complacent attitude to the law which lasted until late in the eighteenth century.

Howard’s reports on *The State of the Prisons* in the 1770s drew attention to imprisoned debtors, “the most pitiable objects in our gaols” (Howard 1784:2). His campaign was directed towards prison conditions more than it was towards abolishing imprisonment. However, his reports did include very long summaries of the legal and physical conditions of imprisoned debtors in other countries, showing his preference for the “compassionate law” of Scotland which allowed non-fraudulent debtors to avoid imprisonment (see Howard 1784 on Scotland:147f). Howard’s were the first and most important of many revelations of prison conditions, which were to raise awareness about civil prisoners. That awareness later fuelled the abolition campaigns.

Howard’s evangelical compassion was reflected in the prisoner welfare charities of the same period. The largest was the Thatched House Society, the primary concern of which was not to abolish imprisonment, but to mitigate its harshness by assisting “innocent” debtors to obtain their releases. Its aristocratic and commercial supporters were hardly likely to press strongly for a major permanent change to the law, and as a Society it did not do so. However, some of its members favoured legal change (Lineham 1974:99-101,110), and the Society obtained the 1786 statute which imposed a uniform fixed sentence on Courts of Requests debtors (Lineham 1974:101). That was one of the few occasions on which evangelicals entered the political debate over civil imprisonment.³ Instead, the Thatched House Society and

other release charities mitigated the effects of imprisonment for debt, and in doing so, ironically, may have extended it, by reducing the pressure for further legal reform.

While evangelical philanthropists were reticent to express their attitudes to civil imprisonment, the debtors themselves were more radical in the eighteenth century than in any other period. The first clashes between debtors and authority were in the 1720s. The Mint sanctuary for debtors was destroyed in 1722, but some debtors created a New Mint across the river. The debtors occupying the sanctuaries created a tightly structured society, with its own sense of legitimacy, including ritualised punishment of bailiffs. This resistance to authority with a whiff of Jacobite sympathy was enough for government action. One of the debtors' leaders was hanged, probably under a statute protecting officers against the occupants of pretended places of privilege (Thompson 1975:247-249; Haagen 1982:26). That was not the only violent reaction by debtors. In 1780, the Gordon rioters burnt down the Fleet and King's Bench debtors' prisons, releasing their inmates (Thompson 1980:81; Howard 1784:170, 182).

The first organised prisoner campaign against imprisonment for debt began with a pamphlet by James Stephens, arguing that the law was unconstitutional and in breach of the Magna Carta. In 1770, Stephens took himself to the King's Bench court by *habeas corpus*, where he demanded his release on constitutional grounds. His argument failed, and he made an escape with several others to draw attention to the situation. On his eventual return to the King's Bench prison, the abolition agitation caused a break down for several months of the delicate relationship between prisoners and prison officials. A settlement was negotiated, with the prisoners agreeing to appeal to parliament. They were released by the next insolvency Act. This was the first of a number of prisoner campaigns attacking the legitimacy of civil imprisonment over succeeding decades, prisoners being slow to see that parliament would not usually react to their pleas with more than an insolvency Act or a Select Committee (Lineham 1974:84-86; Innes 1980:290-298).

The campaign was eventually linked by the debtors to the French Revolution. In 1793, Fleet prisoners nailed a proclamation to the chapel door, demanding liberty as had been achieved in France (Haagen 1982:26; Lineham 1974:118-119). In 1816, a Tri-Coloured committee proposed to destroy simultaneously all of the debtors' prisons of London, though nothing came of the plan (Thompson 1980:691-692; Ignatieff 1978:161). For several decades there appears to have been a republican influence in the debtors' prisons, 200 inmates of King's Bench being members of the London Corresponding Society in the 1790s (Thompson 1980:132). Thompson describes the gaols as finishing schools for Radicals, where victims of the debt laws had time to read, argue and enlarge their acquaintance (Thompson 1980:697). The corrupting influence of imprisonment which so concerned evangelists, was more than a moral corruption.

Stephens' argument was essentially backward looking, returning to the Magna Carta for its inspiration. This constitutional argument was repeated in subsequent pamphlets seeking abolition (which are discussed below), but it was not restricted to this debate. Radical perceptions were strongly influenced by the same argument in other popular disputes as well. However, Thompson argues that in the 1790s Paine and Burke established a forward looking, republican radical tradition which lasted for 100 years (Thompson 1980:Chs 4-5). The civil imprisonment pamphlets show

that the change did not occur overnight. As shown in Section 5 below, even in 1838 pamphlets urging the abolition of imprisonment for debt were still influenced by “out-moded” constitutional arguments and deferential attitudes towards the aristocracy. On the other hand, the 1793 proclamation, the 1816 Tri-Coloured committee and the prisoner members of the London Corresponding Society, a republican movement, show a quite different perception among some debtors of their own plight.

The debtors’ campaign was not conducted by the members of a single social class. Debtors’ prisons contained members of all social classes, though two groups of people predominated. Superior court debtors, who usually owed larger sums, and who made up most of those released by the Insolvent Debtors Court, were very often tradesmen, mechanics, artisans and clerks. The terms “artisan” and “mechanic” covered a range of incomes and roles in the production system, some being employers, some employees and some sub-contractors (see Mayhew 1981; Thompson 1980:259f,274f,297f). However, it seems that small traders were the most frequent superior court debtors. Those imprisoned by the lay Courts of Requests owed the smallest sums and were most in need of charitable assistance. They were often labourers (Common Law Commission, *Fourth Report* 1831-32: 68Df (evidence); Gillies 1834:481-482; House of Commons Select Committee (HCSC) 1819:20,21,56 (evidence); HCSC 1813-14:12; HCSC 1818a:253; HCSC 1815:6,8-11; Account 1814-15; Anonymous 1838d:123; Duffy 1973:57-58).⁴

The class differences among prisoners extended to the prisons themselves. Wealthier debtors had themselves transferred by *habeas corpus* to the Fleet or King’s Bench prisons, where pleasant conditions inside or even outside the prison walls (in the prisons’ “Rules”) could be bought. In these prisons, in particular, debtors ran their own lives and could indulge in drinking and debauchery if they wished. The Fleet was “the largest brothel in the Metropolis” (HCSC 1791:63; HCSC 1813-14:4; HCSC 1815:4,13-14,21; HCSC 1816; HCSC 1818a; HCSC 1819:21(evidence); HLSC 1809; HLSC 1820:42,144,167-171(evidence); HLSC 1835a-e; Commission of Inquiry 1819; Prison Inspectors, *Second and Third (Home) Reports* 1837 and 1837-38; Dickens 1836-37:655-656 esp; Clay 1861:63). By contrast, poorer debtors in the superior court gaols lived in diseased squalor, and were subjected to extortion, torture and murder in the early eighteenth century (HCSC 1729a; HCSC 1729b; HCSC 1730; HCSC 1791; Thomas 1972:Ch 2; Howard 1784:52-55; HCSC 1815; Tighe 1832).

Inferior court debtors remained in squalid local prisons (HCSC 1791; HCSC 1816:57; HCSC 1818a:253-254; HLSC 1835d-e: minutes at 82f; Prison Inspectors, *Second and Third (Home) Reports* 1837 and 1837-38; Howard 1784; Clay 1861:99), or were sent to the Whitecross Street prison for London debtors, established in 1815. The latter had superior physical conditions to the local gaols it replaced, though at the expense of less autonomy among prisoners over their own lives. However, even in that prison, debtors provided their own services and local government through an elected Republic (HCSC 1813-14:13,14; HCSC 1815:28; HCSC 1816:55; HCSC 1818a:251,253; Rules 1817; Gillies 1834; Dickens 1836-37:655). While criminal gaolers and prisoners were coming under much tighter control in the new penitentiaries, extended control was very much more slowly introduced in the debtors’ prisons. The rationale for tight criminal prison control was rehabilitation and reform, neither of which was appropriate to debtors while they were still arrested irrespective of guilt or innocence.

During the early industrial revolution, credit was much less institutional and possibly more pervasive than it is now. Employees were paid irregularly, and even annually by some factories. It was thus necessary to borrow money for living expenses, while being a creditor of one's employer (Lineham 1974:43,44,46,232; Duffy 1973:106; Harding 1966:316; Thompson 1980:274-275). Many owed money to tallymen, door to door sellers who sold goods on credit at high prices, often to the wives of working men without the knowledge of their husbands (HLSC 1835d-e:Minutes, 82-83,228; Elliott 1838:18-20; Rubin 1983a). Small traders were in a bind. They were often owed money by working people, who were themselves the creditors of their employers. In turn, the traders owed money to their suppliers. As their debtors had little property, small traders were the strongest advocates of the retention of imprisonment, by which charities and friends could be coerced to pay the debts of the poor.

Lineham argues that this confused class picture of borrowing and lending means that the abolition debate and civil imprisonment itself cannot be seen as a form of class conflict (Lineham 1974:43-44,116,128,130). One aim of this paper is to test that argument, concentrating on the 10 years leading up to the first climax in the debate, the 1838 Act. It will be suggested that Lineham was wrong to assume that there was one monolithic commercial class. Furthermore, even though members of all social classes were imprisoned, there was certainly no equality of treatment in gaol. A gentleman living in a comfortable house near the Fleet or King's Bench, suffered a different form of imprisonment to a woman who died in Devon County Gaol after 45 years' imprisonment for a debt of £19 (HCSC 1819:144,167-171; HCSC 1791:647).

The period between 1770 and 1838 witnessed the early industrial revolution, with its rapid social changes, the emergence of powerful new classes and the waning of the authority of an old class. Since 1688, society had been dominated by a landed aristocracy, with a larger group of less influential gentry beneath them (Neale 1982:28-29,72-99; Atiyah 1979:11-27; Thompson 1973; Thompson 1975:197,206,216, 240-241; Hay *et al* 1975; Pearson 1976; Thompson 1980:26,65,72-73). Although predominantly capitalist in its outlook, the aristocracy was most concerned to pass on its landed property to eldest sons through complicated testamentary and marriage settlements, a tradition which lasted into the second half of the nineteenth century. That concern resulted in the rule against perpetuities, a compromise between commercial and landed interests (see Atiyah 1979:131-135; Neale 1982:82,198-199), and had a strong influence on the campaign to abolish imprisonment for debt. Politically, the abolition of civil imprisonment was linked to the extension of remedies against exempt property, including land, much of which was exempt before 1838.

As Hay showed, relations between the ruling class and the propertyless masses in the eighteenth century were characterised by paternalism and deference, with the terror of the criminal law filling the vacuum whenever those relations broke down. A very weak state meant that the law achieved its control through extremely severe punishment combined with the ideological benefit of the appearance of mercy and justice, when potential victims of the law were released from its punishment (Hay 1975). As Haagen points out, imprisonment for debt had many of the characteristics of criminal law, which Hay described. Severe punishment was possible for quite trivial defaults in obligation, and a large measure of discretion among creditors

allowed them to manipulate debtor gratitude to their own ends (Haagen 1982:22f esp). However, the role of social class is less clear for civil law than for criminal law.⁵ The gentry and aristocracy controlled the criminal law in a manner which they did not achieve over imprisonment for debt. We have seen that all social classes were represented among both creditors and debtors. If any group was predominant among creditors, it was the middle classes of small and large traders. The gentry and aristocracy were more likely to be debtors than creditors.⁶ Their wealth was in the form of land, rather than intangible property such as debts.

The industrial revolution led to new methods of creating a new form of wealth, and a gradual decline in the power of the old landed ruling class. The market values of a landed class gave way to the market values of an industrial and commercial one. Neale argues that there were five distinct classes in this transition period, not all of which engaged in political or industrial action: the first, was an aristocratic, land-holding upper class; the next, a middle class of big industrial property owners and senior professional men, deferential towards the upper class; then a middling class of the petit bourgeois, aspiring professional men and other literates and artisans, which was privatised like the middle class, but which was collectively less deferential towards the upper class as it recognised it as an obstacle to its own advancement; then came working class A, consisting of an industrial proletariat and workers in domestic industries, which was collectivist and non-deferential and which wanted government intervention for their protection rather than liberation; and last, working class B, comprising agricultural labourers, low paid non-factory urban labourers, domestic servants, the urban poor, and most working class women, which was deferential and dependent (Neale 1982:133 and see 144f). He argues that the middling class emerged as the central, most unstable and most significant political class between 1800 and the 1840s, with a high level of perception of its own position vis-a-vis the other classes by the 1820s. Except for working class B, the other classes also had perceptions of their own positions, working class A developing it as time went on (Neale 1982:135; and see Thompson 1980:212f,463-464). The middling class based its perception on a long radical tradition (Neale 1982:136; and see Thompson 1980:76,97-107,121,198-199), radicals doing well in the 1832 and 1835 elections, but badly in the 1837 one, just prior to the important 1838 debtor and creditor Act. Despite its influence, the Reform Bill of 1832 benefited only the middle class and led to another generation of campaigning for reform agitation (Holdsworth xiii:325-326; Lineham 1974:212). In the 1840s, only 6 per cent of the population had the vote (Neale 1982:117).

Before the end of the eighteenth century, the imprisonment for debt debate had spread to parliament, though one cannot draw a line between the abolition debate and those about ameliorating measures such as insolvency, shorter Courts of Requests sentences and limits on mesne process imprisonment. Even in 1790, the range of arguments which was to last until 1838 had already been established. Some members of the House of Commons opposed further mitigation of the legal position of debtors in a commercial country. Others felt that it was a disgrace to have imprisonment for debt in a civilised nation, the true law of the land having been perverted by practice (17-2-1790, 28 PHE 374f). The debate had a different flavour in the Lords: in 1793, there was concern not to make outrageous innovations to the law of the land and a concern to support commerce, which had brought opulence to the country (27-3-1793, 30 PHE 647f). The combination of commercial and

aristocratic interests and arguments was to remain a powerful opponent to abolition for decades.

Debtors' petitions to parliament were sometimes referred to a Select Committee, where they occasionally led to some mitigation of the law (Bowditch 1837:13; see Thompson 1980:375-376). The first in this period was a 1791 House of Commons Select Committee on Imprisonment for Debt (HCSC 1791). The Committee heard many complaints by debtors, but did not repeat them, as it felt that they were obviously one-sided (HCSC 1791:645)! While it provided a very useful statement of the law and misery of imprisonment of the time, the report made no recommendations to end the misery. An 1809 House of Lords Select Committee on Civil Imprisonment was less sympathetic to debtors. After pointing out the unjustified difference in treatment between criminals and debtors (the latter being treated more harshly), its report simply stated that mesne process imprisonment had to remain, because of the dishonesty of a great proportion of debtors. It contains the equally remarkable observation that the rich suffer more than the poor by imprisonment, and thus deserve more sympathy. It is difficult to find traces of the old aristocratic paternalism in this report, even though it recommended some amelioration of the position of prisoners. Its tone towards the "lower orders" varied from being patronising to hostility.

By the early nineteenth century, the battle lines were being drawn in their 1830s form. There was strong opposition to reform in the House of Lords and among some traders, while supporters of reform included radical prisoners, some traders and even some members of the House of Lords (see Lineham 1974:121-132). These apparent contradictions were compounded by some traders' use of the constitutional argument to support the continuation of imprisonment (Lineham 1974:137). Each side could be nostalgic about the past, the abolitionists referring to the golden age of feudal pre-imprisonment law, and traders to the more recent time when imprisonment had had less mitigating fetters. The constitutional argument would have appealed to the very powerful and conservative Ellenborough and Eldon in the Lords. Their opposition to legal change included resistance to the abolition of imprisonment for debt, the abolition of slavery, and the abolition of capital punishment for minor offences, as well as opposition to parliamentary reform, land title reform and extended execution remedies against real property. The aristocracy had a talent for universalising its own interests (Lineham 1974:229), like so many ruling classes. Land reform would damage the aristocracy and harm the genius of the people (Lineham 1974:147; Haagen 1982:16; Holdsworth xiii:264-266,499, 605-606; Atiyah 1979:361-369). The aristocracy's aversion to change was consistent with its self-interest. Once imprisonment for debt were abolished, the commercial pressure for greater access to land would be so much stronger.

The pressures for reform built up by debtors, humanitarian reformers such as Redesdale in the House of Lords, the pathetic descriptions of the plights of debtors in the Select Committees and revelations of evangelicals such as Neild, the Secretary of the Thatched House Society (Lineham 1974:121-124), were sufficient to cause the passage of the permanent insolvency Act of 1813 (the Redesdale Act, 53 Geo III c102), despite conservative and commercial opposition. Although the Act shortened the periods of imprisonment of insolvents to about eight weeks (Common Law Commission, *Fourth Report* 1831-32:7,61,96D), it also seems to have deflected

debate away from abolition⁷ and towards detailed adjustments of insolvency legislation. There were Lords and Commons Select Committees on insolvency in 1816, 1819 and 1820 (HCSC 1816; HCSC 1819; HLSC 1820). The 1816 and 1819 Committees were Commons inquiries and were dominated by a concern for commerce. The questions asked were loaded against debtors, and most of the witnesses at the 1816 hearings were members of trade protection societies who complained about increased debtor fraud since the 1813 Act.⁸ Those witnesses showed, for the first time in an official inquiry, an indignant, self-confident assertion of right among the middling class of shopkeepers and small traders. Despite trader petitions to the contrary, the two reports favoured administrative change to insolvency, rather than the repeal of the legislation. Neither inquiry touched on the abolition of imprisonment, which is understandable given their backgrounds. However, these reports showed that permanent insolvency legislation had been accepted in the commercial minded House of Commons, and the permanent Acts were renewed and refined regularly up to and including the 1838 Act. Parliament had given up its discretion to pass temporary relieving Acts, and the possible gratitude of debtors for each of those Acts. A new attitude to law had also been shown. When it contained defects, it could be permanently altered.

The Redesdale Act had been introduced in the House of Lords, and that House's 1820 Select Committee was much more sympathetic to the Act and to debtors than the Commons in this period. In the end, its recommendations also favoured administrative changes. Despite its sympathies, the report gave the weak rationalisation for a lack of criminal law safeguards for debtors, that insolvency legislation was merely a relaxation of imprisonment for debt, rather than the ground for new offences. However, this report introduced an argument which was to dominate the abolition debate. Remarkably for the House of Lords, it pointed out that the reason for the continuation of imprisonment was that the direct property remedies available to creditors were too weak. Further remedies against choses in action and land would be a long term solution to imprisonment, which could then be restricted to fraud. The aristocracy's belief in the sanctity of land was beginning to shift. While recognising the logic of the argument, the committee then backed down, claiming that so great a change could not come at once. Given the hostility of commerce and many members of the House of Commons to the Redesdale Act, it was probably right.

Debt law reform was not explicitly party political. Romilly was almost as cautious as Peel, despite the admiration of Romilly by Brougham, the most important subsequent reformer (Holdsworth xi:597-598; Duffy 1973:87,129-130; Lineham 1974:155-156. See also Medd 1968:245-246,298-299). Even the passage of the Redesdale Act had crossed party lines (Lineham 1974:174).

The other reports of the early nineteenth century were also more likely to consolidate the law than to lead to changes. An 1823 report on small debts was concerned only about administrative changes to the inferior courts (HCSC 1823). Four reports between 1813 and 1819 on conditions in debtors' prisons were restricted to administrative and physical conditions in the gaols, rather than the principles of debt law (HCSC 1813-14; HCSC 1814-15; HCSC 1818a; Commission to Inquire 1819). However some of them revealed miserable physical conditions for debtors, while others emphasised the extravagance and debauchery of wealthier

debtors. Those further revelations may have affected the attitudes of some participants in the subsequent abolition debate.

Debt law reform statutes prior to 1828 attempted to mitigate the effects of imprisonment for debt, rather than abolish it. The new Whitecross Street debtors' prison and the Prisons Act 1835 each attempted to improve the physical conditions in gaol, while ensuring slightly closer control over gaolers and civil prisoners.⁹ The permanent insolvency Act also resulted in more official intervention in the place of individual initiative. Creditors had less control over the sentences of their debtors, and the Thatched House Society's unofficial settlements with creditors were replaced by judicial settlements (HCSC 1816:47(evidence); Lineham 1974:194-195). The lifting of maximum immunity levels for mesne process arrest, and the imposition of maximum Courts of Requests sentences showed a similar centralising tendency, as did the creation of a Bankruptcy Court to replace local commissioners ((1831) 1 & 2 Will IV c56).

Despite these changes, 60 years of campaigning, parliamentary speeches and select committees had little effect on debtor and creditor law. Average sentences were probably shortened and physical conditions in gaol may have improved a little. As a result, the threat to imprison a debtor probably lost some of its coercive power. However, creditors, debtors and gaolers all retained most of their traditional autonomy. Creditors could arrest whomever they chose, and retained control over bankruptcy discharge until 1842 (5 & 6 Vic c122). Debtors continued to run their own lives in prison, and prison keepers retained most of their entrepreneurial autonomy.

The state had begun to interfere with the traditionally private official arrangements between debtors and creditors. Official inspection under the Prisons Act replaced the private inspectors who had succeeded Howard, and the new Bankruptcy and Insolvent Debtors Courts replaced the previous local arrangements. However, the state retained most of its eighteenth century features in debtor and creditor law. State institutions were more a source of and support for wealth, than a means of control over local activities. The period between 1770 and 1830 was one of very gradual mitigation of imprisonment for debt, and very gradual loss of local autonomy. Even ten years later, little more had changed.

2. Evangelicals and Utilitarians

In the late eighteenth century, the advocates of debtor and creditor law reform were humanitarians, usually with evangelical backgrounds, and debtors themselves, often operating outside the traditional boundaries of political debate. By the 1820s, there had been a shift in the direction of the debate. Debtors would not be as radical in their objections again, and the evangelists were less conspicuous in debtor and creditor law reform, even if Christians retained key positions in the prisons in the 1840s. There was now a permanent insolvency Act, and a vigorous new middling class ready to shout when its interests were affected by the Act and other legal changes. The abolition campaign was quiescent, but was about to be renewed by Brougham in a new language and with a concern for new principles rather than simple compassion for debtors.

Evangelists had participated in the political debates about debtor and creditor law, especially through the Thatched House Society. However, their principal function was the release of thousands of individuals from prison and revelations of

the appalling conditions under which debtors were kept. Howard's reports, later supplemented by Neild's, formed the emotional background to the debate. Until Brougham's 1828 speech, compassion, rather than "scientific" principles, was the driving force behind most campaigners (Lineham 1974:128-130,197,228; see McConville 1981:78-80,219-220).

Evangelical Methodists appear to have played a less direct role as well. Thompson (1980:39-42,385-401,427,441-443) argues that Methodism, the religion of the poor and the new industrial workers, was a key element in their self-perception, being a consolation for the absence of political power and part of the reason for that absence, as it stressed obedience to authority. Meek submission and a guarantee of a better life in the future helped to create the discipline required of workers in the new factories, and may also have resigned some debtors to the existence of imprisonment for debt. Thus, like its charitable activities, the teachings of evangelism may have lessened the pressures for debt reform, much as Christian leaders such as Wesley may have opposed civil imprisonment (Lineham 1974:129).

The other key intellectual influence on imprisonment for debt and on the creation of a new society during the industrial revolution was utilitarianism, the language of the emerging middle classes.¹⁰ With evangelism, it was one of the dominant ideologies of the industrial revolution. There was no single utilitarian attitude to government regulation. The greatest number would achieve its greatest happiness through individual effort and competition, perhaps with the aid of legislation. It was more a language and an approach than a set of formulae to be applied to any problem. There is some debate about Bentham's influence on specific legal reforms (see Beynon 1981; Cornish *et al* 1978:115,118-119; Midgley 1975; Duncanson 1983:132-134), but his "scientific" rational approach (see Eardley-Wilmot 1860:25) was adopted widely by middle class lawyers and reformers. Instead of the law being fixed for all times, its defects could be shown by inquiry and then reformed to benefit the greatest number of, if not all, members of society. That positivist jurisprudence, which still dominates English speaking law schools,¹¹ was individualist, reformist and pluralist, seeking a middle view which is best for society as a whole. It had influenced Romilly (McConville 1981:83),¹² and it was the approach of the new reformist professional lawyers of the nineteenth century, represented most notably by Brougham (Cornish *et al* 1978:115,118-119). Utilitarianism's most characteristic current legal manifestation is the floodgates argument, by which efficiency takes precedence over justice.

Beccaria and Bentham believed in a fine balance of pain over pleasure for criminals. If they were slightly worse off by committing a crime than by not doing so, they would be deterred. There was no need for the maximum deterrence theories and practices which had characterised and justified the squalor of eighteenth century prisons (Haagen 1982:23-24; McConville 1981:80-83).

They also opposed imprisonment for debt in the absence of fraud (Bentham 1962:135-136,170-183; see Lineham 1974:104,127,130-131,174; and Atiyah 1979:391-392). Bentham's argument was that imprisonment was both unjust and unnecessary for the protection of creditors. It was inflicted on debtors solely on the basis of their creditors' self-serving affidavits, with the result that the innocent were punished by unmerited imprisonment, while the law rewarded rich debtors by allowing them to have comfortable lives in prison. The blame for the sophistry, hypocrisy and

masquerade of this law lay with the judges who profited by it. The distinction between insolvency and bankruptcy was equally unjustifiable, and due to the same people: "Never was technical jargon and sham learning employed to a viler purpose: — never was fouler corruption covered by whiter sepulchres" (Bentham 1962:180). The law was not illegal as many had asserted. The grievance was that it was legal, and lawyers should not be satisfied once legality had been established, but should seek to reform the law. Participants in the abolition debate acted on as little information as the judges did in ordering imprisonment. One side of the argument assumed that all debtors were villains, and the other that they were all saints. The solution was a matter of common sense. Although Scottish law was better than English, it still required a period of one month's imprisonment before the debtor could be released on a transfer of his or her property under *cessio bonorum*. Judges should only order imprisonment after an investigation had shown that the debtor was guilty of an offence. They should take time to investigate debtors' behaviour.

Despite Bentham's hostility to the legal profession, from the time of Brougham's speech in 1828, utilitarianism came to dominate the abolition debate in parliament. The traditional values of the aristocracy were being replaced by those of commerce, and few MPs were unambiguous representatives of debtors or the working classes. The parliamentary debate turned into an argument between advocates for different sections of the middle classes as to how commerce might best be served by debtor and creditor law, while allowing some amelioration of the position of debtors. However, utilitarianism was not the only language spoken after 1828. Debtors continued to join more conservative members of the aristocracy in speaking the anti-commercial language of the constitution and compassion, though to different ends.

3. *Brougham's Law Reform Speech of 1828*

Brougham¹³ was a radical Whig member of the House of Commons, who became Lord Chancellor in 1830, when he moved to the House of Lords. He, Joseph Hume, another radical member of the House of Commons, and Cottenham, a later Lord Chancellor, were the most important civil imprisonment abolitionists of their time. Bentham encouraged Brougham's 1828 speech, though he tried to get him to argue for a code, being dissatisfied with Brougham's pragmatism. Brougham expressed the values of the middle classes, not those of the developing working classes. He opposed the arguments of the popular parliamentary reform movement in 1817, and felt that the powerlessness of the working classes could be overcome by education, rather than a change in their circumstances. Through self-discipline, a man could rise in economic and social status. He felt that the middle classes were the heart of England and the source of its wealth.

Those values seem inconsistent with a firm determination to abolish imprisonment for debt, but abolition was only one of his aims for debtor and creditor law, and the reform he proposed was more a transformation than a complete abolition of civil imprisonment. It was to be a transformation to suit the middle classes as creditors, rather than one solely concerned with the injustice inflicted on debtors.

Brougham's career in law reform reached its peak with his exhaustive, and presumably exhausting, six hour speech in the House of Commons on February 7, 1828 (18 *Hansard (2nd Series)* 127). He was not a young enthusiast, but was a 50 year

old with a long professional career behind him on which he said he based his speech. His lengthy membership of the legal professional club and the even more prestigious people appointed to the Royal Commission established as a result of his speech, may partly explain why his reform proposals were so influential.

His aim in the speech was to examine the whole of the common law, except for commercial law, which was of quite recent origin and needed little reform in his view. However, the speech contained very little discussion of substantive law, but was concerned about adjectival law. He concentrated on legal administration and procedure, and a little on remedies. Despite these limits, the range of his speech was still remarkable for a common lawyer. He argued that it was necessary to look at the whole of the law in one vision, a long step from the traditional *ad hoc* approaches of past lawyers. He made the utilitarian claim that the law had “defects”, which had developed in past centuries and which required investigation before reform, the latter being the task of parliament. He cited ancient authorities to support his calls for reform, but they appeared at the end of the speech as an afterthought, as if they were added for the benefit of those whose inclination was to look to the past. Similarly, he replied to conservative criticisms of innovation, by arguing that innovation was the work of time, and that those who did not allow the law to remain up to date were innovators themselves. That was unlikely to endear him to the aristocracy. Nor was his reference to the barbarous past.

Brougham’s speech gave further evidence of his middle class values. He felt that the criminal law was designed to be applied to the ignorant masses, but that he could not discuss it at length as those masses would be unsettled by such a general discussion. He spoke of the natural liberty of the people, but the core of his utilitarian philosophy was capitalist and commercial. He had little respect for aristocratic notions of land ownership as the basis of civil society, even though he argued that the rule against perpetuities showed an admirable balance between freedom of commerce and the preservation of the aristocracy. His argument on land tenures was a strictly capitalist one. All land should be held under a uniform title, to allow easy conveyancing, “improvements” of land and the circulation of property.

Uniformity, clarity and administrative convenience characterised most of his other proposals and analyses as well. He examined superior and inferior court administration at length, attacking the small empires of self-interest which the weak eighteenth century state had allowed to accumulate.¹⁴ He attacked the methods of appointment of judicial officers, the system of pleading, the laws of evidence and construction of documents, the methods of taxing costs and Privy Council delays. He also sought diligent reform of the inferior civil courts.

He criticised both forms of imprisonment for debt. Mesne process procedures (18 *Hansard (2nd Series)* 192-195) should be subject to obvious “principles”: preventing escapes by debtors, giving debtors notice of their hearings and avoiding “unnecessary inconvenience” to debtors, the criterion for necessity apparently being commercial need. English law offended these principles “most grievously”, as it assumed defendants were wrong, and thus automatically allowed arrest. To give power to his argument, he pointed out that his fellow MPs when not covered by the privilege of parliament could be arrested and made to obtain bail from their tradesmen, upon whose good grace they would have to rely. The power of the

argument did not come from the circumstances of the wretches who were taken to gaol, who were mentioned in only two or three sentences, but from the self-interest of his respectable, propertied audience. He argued that the law was wrong to assume that people would flee their homes and countries for only £20, the then minimum limit on mesne process imprisonment. Although that argument would seem to support only an increased exemption limit, he went on to propose the abolition of imprisonment on the mesne process, except in cases where "we think" the debtor is about to flee, as was the law in Scotland. The "we" implied that the pre-judgment arrest decision should be taken from creditors, though he did not say who should make it, nor in what circumstances. Similarly, where a debtor failed to appear, a default judgment would be much more appropriate than outlawry, he argued. These reforms would benefit all classes, even though it would force tradesmen to be more cautious in giving credit.

Those small traders became the principal opponents to Brougham's reform proposals. They felt that their livelihood was in danger and rejected his paternalistic argument that the poor would be better off with less credit. Brougham's commercial tone had not convinced the whole of commerce.

Equally "obvious and natural principles" were behind his proposed final process imprisonment reforms (18 *Hansard (2nd Series)* 234-238), a new "common sense" having been created by the utilitarian spokesmen for commerce.¹⁵ English law on this point was "the very worst in Europe". The person of the debtor should be taken only in cases of wilful concealment of property and those involving criminal or grossly imprudent conduct in contracting the debt. In the place of unrestricted execution imprisonment, the "utmost latitude" should be given to creditors to obtain satisfaction from all their debtors' property, including land and intangibles. Anything less was the height of injustice, no consistent reasoner being able to argue for the special position of land. The exemption of copyhold land from execution and the limits of *elegit* offended the obvious principles on which his speech was based. Furthermore, the ancient principle of law had been to include all personalty in direct execution, choses in action having been subsequently created as an important form of wealth. Their inclusion in the property which creditors could take directly, would be both a return to principle and a method of avoiding the injustice which allowed wealthy debtors to languish in the Rules or reside overseas while living on intangible wealth, laughing at their creditors and the courts. Once the direct property remedies were universal, and the exemption of land from execution against deceased non-traders' estates had been abolished, final process imprisonment could also be abolished. Imprisonment could then be restricted to extravagant and fraudulent debtors. He thus brushed aside the argument that only imprisonment was capable of revealing concealed assets.

Brougham's dramatic speech had the effect he wanted. Although Peel thought that an inquiry on such a broad basis would lead to confusion rather than enlightenment (see (7-2-1828) 18 *Hansard (2nd Series)* 255-256), the issues raised in the speech were referred to a Royal Commission on the Common Law. Its reports laid the foundations for much of the structure of the present legal system and modern procedure. They also sustained a vision of the role of parliament as investigating and reforming defects in the law.

The speech and commission reports dominated the subsequent parliamentary

debate on imprisonment for debt, in its language and in its boundaries. No MPs argued that the law should be changed beyond the proposals made in Bentham's speech, though debtors continued their extra-parliamentary pressure for broader reform.

Unlike Hume's speech on the previous day which argued for similar reforms to imprisonment and property remedies (18 *Hansard (2nd Series)* 125-127), Brougham was apparently not motivated primarily by the plight of innocent debtors. Nor did he crudely state the strongest commercial argument, which would have been for unlimited property remedies as well as unlimited imprisonment for debt. His argument was tempered by utilitarian principles. It was consistent with the notion of a limit on punishment, and a balance of pain over pleasure for those who sought to violate the morality of commerce. He did not propose to abolish imprisonment, but to transform it into a system of rational punishment for the guilty. Simultaneously, he would have replaced property exemptions with universal direct execution.

The two parts of his argument had two sets of opponents, who became unnatural allies. The aristocracy opposed the extension of property remedies to all forms of landholding, and the sale of that land to the benefit of creditors. However, their opposition waned, as the social and political importance of land waned. Small traders opposed the new restrictions on imprisonment for debt, as many of their debtors had neither tangible nor intangible property on which execution could be levied. Brougham had failed to notice the coercive power of the threat of imprisonment, which allowed pressure to be placed on poor debtors' friends and charities to pay the imprisoning creditor.

When, in 1869, imprisonment was finally transformed as proposed by Bentham and Brougham, a third set of opponents became apparent, though they received the least official attention. Imprisonment of the fraudulent meant in practice, imprisonment of the poor and the least knowledgeable. The "professional" debtors who haunt modern debt collectors were able to avoid the punishment which was meant to be applied to them, while the gaols contained only those at the bottom of society. Imprisonment was transformed from coercion for all, however unequally applied in practice, to punishment of the poor. The reformers' good intentions had been entirely perverted (see Walpole Report 1873).

4. *The Common Law Commission*

Like present Law Reform Commissions, the Common Law and Real Property Commissions appointed after Brougham's speech were composed of respectable lawyers, on the rationale that law reform was a technical matter which only lawyers could understand. The Common Law Commission included three men who became judges in the course of its proceedings, Alderson and Parke among them, and were subsequently replaced (see Cornish *et al* 1978:133; Eardley-Wilmot 1860:65; Common Law Commission, *First Report* 1829). It produced six reports between 1829 and 1834, covering most of the issues mentioned in Brougham's speech. The Commission's technique was consistent with the utilitarian approach of Bentham. They collected very thorough statistics, and obtained information by written surveys and the examination of hundreds of witnesses.

The first report of 1829 was on the practice and procedure of the superior courts

of the common law. One of the survey questions was whether mesne process arrest ought to continue and, if so, whether the exemption limit should be raised. Court officials unanimously believed that arrest on mesne process should continue, but members of the legal profession held a wide range of views. Some claimed that they were practical men whose role did not include policy analysis; others that the law should not change; others that the exemption limit should be raised (one claiming that £50 was appropriate, as it was the "average value of a respectable man's liberty and character",¹⁶ taking the reduction of all forms of human experience to monetary equivalents to a new depth); and others wanted wider reform. One barrister went beyond Bentham and Brougham, arguing that imprisonment prior to judgment should be entirely abolished, and replaced by seizure of property in cases where the defendant was preparing to abscond (Common Law Commission, *First Report* 1829:492 (evidence of George Long)). He was 150 years ahead of his time, as Lord Denning recently introduced *Mareva* injunctions on similar principles.¹⁷ There was equal diversity of opinion on whether creditors often abused their right to arrest debtors.

The Commissioners' first report left open the issue of the reform of mesne process, seeing their function in that report as enquiring into administrative rather than substantive matters, though they briefly canvassed the arguments and recognised the coercive effects of the threat of imprisonment (Common Law Commission, *First Report* 1829:71). Their purely administrative approach was reflected in the Uniformity of Process Act, 1832, which introduced a system of pleading common to all of the superior courts, but which retained mesne process imprisonment.¹⁸

This narrowly technical view of the role of law reform may have led to a loss of heart among some reformers, but the extra-parliamentary pressure for more substantial reform was continued in 1829 and 1830 (Holdworth xiii:265). The ferocity of the debate is illustrated by three letters published in the *Times*, and subsequently as a separate pamphlet in 1830 by Samuel Miller, a cordwainer (Miller 1830). The letters were concerned mainly with the exemption limit on mesne process, complaining that £20 was too high. This pamphlet, addressed by one small trader to the shopkeepers of London, shows the entirely independent position taken by the middling class of articulate small traders. Sympathy for debtors was described as "fashionable cant", with only the deserving going to gaol. Newspaper accounts of the grim conditions in the Whitecross Street prison were mere puffs. Philanthropy and debtors were not the only objects of attack. Lawyers were members of an awful profession, patricians were responsible for the poor state of the law and the utilitarian "march-of-intellect" was also criticised. Miller was fighting defensively, claiming that traders were being blamed for the then economic decline of the country. This clamorous voice would be heard again.

By the time of the fourth report of the commission, specifically on imprisonment for debt, Brougham was Lord Chancellor. Reform proposals were thus likely to be received well by the government, if not the whole of parliament. The commissioners followed a similar procedure to that used in the first report, including questionnaires and examination of witnesses. Like previous parliamentary inquiries, they were concerned to discover the legal position in other European countries. English law was again shown to be among the most punitive in Europe. Questionnaires were

returned by 323 bankers, merchants and other large traders, as well as over 100 lawyers. The questions asked more about the respondents' use of imprisonment than they did about their attitudes to it. However, it was almost unanimously felt that the insolvency Acts were used fraudulently by debtors. The commercial respondents' attitudes to reform were shown by their answers to a question asking whether arrest caused hardship to solvent debtors. They tended to answer either that it was rare for debtors to be treated harshly as they mostly deserved their fate, or that innocent debtors were often subject to oppressive procedures. They answered about two to one respectively, which presumably meant that a similar attitude would have been taken to reform. The most useful question asked of members of the legal profession was whether arrest on mesne process produced hardship or oppression to debtors. Again, for every one who answered that it often did, two answered that it did not. Many of these respondents gave corresponding opinions on whether mesne process arrest should be abolished, in about the same ratio. One of the commissioners, Stephen, analysed the survey results and found that of the 445 witnesses, 61 had explicitly favoured the abolition of imprisonment on the final process and 183 had been against it. The smaller number of witnesses who were interviewed seemed to be more favourable to reform than those who simply returned questionnaires. From a much smaller sample, it also seemed that barristers tended to favour reform more than solicitors and attorneys. It also became clear from the survey and evidence that imprisonment was proportionally much more often used against poor debtors than against wealthier ones who owed larger amounts. Against the propertyless poor, there was no alternative to arrest. Overall, some used arrest as a normal procedure, some only when the debtor had, in the eyes of the creditor, acted fraudulently, and some never used it.

Thus, the largest survey of big business and the profession in this period provided less than satisfactory evidence as to their attitudes to imprisonment. It seems that only a minority favoured reform, with less support for final process reform than for abolition of mesne process imprisonment. Utilitarianism may have been the language of commerce, and large commerce in particular, but on this issue Bentham and Brougham had not yet convinced even a majority of those for whom they wrote. Small business was very much less convinced, as Miller and others showed.¹⁹

Joseph Hume's evidence to the commission was unequivocal in arguing for a shift from body to property execution, a merger of bankruptcy and insolvency and the limitation of mesne process arrest to those about to leave the country. Although those views were similar to Brougham's, his reasoning was quite different. He agreed that the distinction between land and other property was "preposterous", but was generally less favourable to commerce than Brougham. Hume was the most consistent debtors' advocate in this period, and his views were a strange mixture of utilitarianism and constitutionalism. He claimed that by allowing arrest without trial, the law was contrary to the Magna Carta. He supported that argument with reference to the sorry plight of the imprisoned poor, detailed statistical evidence and complaints that creditors should not be judges in their own causes.

The published evidence excluded prisoners' answers to the commissioners on the weak argument that it was defamatory. The replacement of names by blanks would have solved the problem. One King's Bench prisoner, T.S. Tighe, published his response separately (Tighe 1832). It is difficult to find out how widely this and other

pamphlets were circulated, although Hume may have been influenced by this one, which is among his papers in University College, London. It is equally difficult to discover how representative Tighe's views were. His was not a very forceful document, and seems to have been written as much to demonstrate the injustice of his own confinement as to make a wider point. However, he felt that imprisonment for debt was most unjust, even though he did not feel qualified to give an opinion on its abolition. This deferential attitude may partly have reflected his view that abolition was most unlikely, as the weight of powerful opinion favoured retention. Therefore, most of the pamphlet illustrated the extortion and brutality in King's Bench prison. Even if it was partly exaggerated, Tighe's pamphlet should make us cautious about concluding that conditions had been ameliorated so much and sentences so shortened by the 1830s that imprisonment had lost its coercive power, eventual "abolition" simply reflecting those "facts" (*contra* Duffy 1973:160). Tighe pinned his hopes on a reforming government in a reformed parliament, a trust which was subsequently shown to be misplaced. Apart from prisoners and perhaps Hume, most of those who favoured reform appeared to owe their first allegiance to commerce, so that any benefit to debtors from reform could only have been secondary.

Unfortunately for the reformers, the commissioners' report was not unanimous. Four of the five commissioners agreed that mesne process arrest should be restricted to cases where the debtor contemplated absconding. The majority also found that final process imprisonment should be restricted to cases of fraud and to coercing debtors into either paying the debt or ceding their property, with cession being possible before imprisonment and a bar to subsequent arrest. They felt that those actually imprisoned on the final process should be subject to compulsory cession of property, so as to lessen abuse by rich debtors, while those guilty of fraud should be subject to criminal prosecution. The result would have been that innocent debtors willing to cede all of their property would not need to be subjected to imprisonment, before or after judgment. Instead, all forms of property should be available to creditors, both directly and through coerced cession by the debtor. These "alterations may be conveniently accomplished with great advantage to all, more especially to the commercial classes of YOUR MAJESTY'S subjects" (Common Law Commission, *Fourth Report* 1831-32:45).

The majority commissioners had sought to avoid the law's harshness against debtors, to end the opportunity wealthy debtors had to avoid remedies against their land and intangible assets, and to assist commerce. The arguments they used were a combination of legal "principle" and practical utility. The former was judged by reference to the spirit and policy of the law which so opposed unlimited imprisonment for debt, as if that were not an entrenched part of post-feudal law, and to English law's concern for the right to life and liberty of its subjects. The practical arguments took up most of their 40 page report. They argued that imprisonment hurt debtors, their families and creditors generally, all to the advantage of one creditor. The efficacy of imprisonment was an insufficient reason for retention, because that alone would justify even more extreme remedies, such as corporal punishment. Friends and relatives were coerced unjustly by imprisonment, and debtors were forced to pay even when the debt was not due. Nor did imprisonment avoid fraud. Many traders complained that debtors manipulated

the Insolvent Debtors Court to their own ends. In fact, the very harsh remedy of imprisonment was likely to encourage irritation and a refusal to pay. Its high costs also contributed to greater insolvency in individual cases. Imprisonment was likely to harm the morals of debtors, and to reduce the labour force unnecessarily. Furthermore, creditors should not be judges in their own cause, as they were under mesne process imprisonment.

The majority concern for commerce was slightly equivocal. They argued that human misery had no pecuniary price. More importantly, they simply rejected the arguments of small traders to whom small debts were owing, who claimed that imprisonment was the only practical remedy against debtors without property. The commissioners dismissed their argument with the observation that they should be more careful in extending credit. That observation was bound to infuriate traders such as Miller. Like Brougham's and Bentham's suggestions, these proposals forced together the peculiar alliance between small traders and the aristocracy. The latter's traditional concern for the special place of land was not given the slightest weight. The majority proposals were also less than debtors may have had a right to expect, their evidence having been kept secret on a specious argument. Imprisonment would continue on the mesne process, either on a simple creditor affidavit that more than £20 was owing and that the debtor was about to abscond, or on a judicial order. Even the commissioners recognised the possibility of false creditor affidavits. Final process imprisonment would also continue, to coerce debtors into payment or cession of property. Creditors would continue to be able to choose between property remedies and the traditional indirect method of threatening imprisonment. The major beneficiaries of these proposals would have been large creditors, whose debtors had sufficient property to be obtained directly or indirectly. The interests of all other members of the community would have been subordinated to those of larger traders.

Stephen's dissenting report could not have favoured traders more, had it been written by a trade protection society. His technique was to fill his report with quotes from traders and practitioners who wished to see both forms of imprisonment continued. He favoured the continuation of mesne and final process arrest, as well as the extension of direct property execution to all forms of property. The law did not require further liberalisation, but further tightening up, as the mesne process limit was too high and debtors should be forced to cede their property once in gaol, if their creditors required it. In his view, final process imprisonment should continue, so as to coerce the friends of propertyless debtors, to place the onus of disclosing property on debtors, to reward diligent creditors and to avoid fraud. Debtors had made contracts promising to pay or go to gaol, and they should honour them. Of the 445 witnesses, only 61 had favoured abolishing final process imprisonment, and 183 had favoured its retention. As execution imprisonment was therefore just, so was mesne process imprisonment. Without it there would be more fraud, more absconding and more litigation. Final process imprisonment was an insufficient remedy on its own, as the abolition of mesne process arrest would give debtors time to conceal their property or to abscond.

Stephen's basic argument was that Britain's prosperity depended on commerce and credit, especially in the then economic crisis, and that credit depended on imprisonment for debt. The majority would have accepted the former statement,

but would have denied the latter. Both reports accepted the capitalist argument that property was merely another form of money, and that all forms should be directly available to creditors. Neither accepted that pre-judgment property seizure should be a substitute for mesne process imprisonment, Stephen because he doubted its efficacy, and the majority because they felt that the seizure of property before judgment was even more unjust than arrest before trial. All the commissioners were imbued with commercial morality, their dispute being as to how commerce might best be served by law and how far the interests of debtors might be taken into account in reaching the final decision. The aristocratic interest in primogeniture was brushed aside by all of them.

5. Reaction to the Fourth Common Law Commission Report

As Section 6 below shows, in each year between 1833 and 1837, there were unsuccessful Bills seeking to abolish or transform both forms of imprisonment for debt. They were accompanied by vigorous extra-parliamentary campaigning by small traders, debtors and conservatives, the publication of Dickens' *The Pickwick Papers* in 1836, and detailed "neutral" technical commentary by lawyers.

Those Bills followed the first parliamentary Reform Act, 1832, the civil imprisonment abolition issue coming to a peak simultaneously with a rush of other reform legislation. The Reform Act did not come about through gentle persuasion and conciliation, but was preceded by radical organisation, political upheaval and massive demonstrations. Fear of the spread of revolutionary ideas from across the Channel united the old aristocracy and the new middle class, the alliance being cemented by the Reform Act. As a result, the concessions gained in the 1832 Act benefited only the members of the propertied middle class who lived outside the great towns, and even after it, only about 800,000 of the 6 million adult males had the vote. The working classes and much of the middle classes had to continue pressing for another concession in 1867. However, the aristocracy was more willing to listen to others' opinions after the Act, aristocratic Whigs especially being more open to reform (see Perkin 1969:308-319; Stevenson 1979:Ch10; Rowe 1977; Thompson 1965; Thompson 1975:269; Thompson 1980:888-902; Neale 1982:117; Lineham 1974:212; Holdsworth xiii:325-326). If the imprisonment for debt debate is a guide, the opinions of the middle classes were more persuasive than those of the working classes.

The most important surviving evidence of the abolition campaign consists of books and magazine articles, although there were regular petitions to parliament as well, which were frequently ordered to lie on the table of the House where they were forgotten (Bowditch 1837:13; Thompson 1980:375-376). The authors of the pamphlets and articles represented all interests in the debt debate, except perhaps for the large merchants and bankers of the middle class, whose interests were clearly represented by reformers such as Brougham. We cannot be sure how influential those writings were on the formation of parliamentary or public opinion, although Hume collected many of them, some containing the handwritten note "For Mr Hume M.P." The publication of *The Pickwick Papers* may have had more effect on public opinion than all other literature, given its massive sales.

I have examined three publications written by middle or middling class prisoners, who felt that they were reduced in social status by being forced to live with members

of the lower orders while in gaol. The first was Tighe's 1834 pamphlet which was discussed above. While he hoped for a reform in the law and linked the problem to an hereditary assembly, Tighe felt that the solution lay in parliamentary reform rather than collective action by debtors. The other two publications were written by the same author, R.P. Gillies, and were very much less deferential towards the aristocracy (Gillies 1834; Gillies 1837). Like Tighe's pamphlet, the description of Gillies' case and his own prejudices indicate that he was a man of middle or middling class rank above that of a shopkeeper. He also linked his arguments to the unrepresentative hereditary assembly, even after the Reform Act, arguing that the House of Lords was dominated by a Tory clique which was protecting its own propertied interest under the guise of a concern for commerce. Lawyers were also obstructing change, receiving very high incomes from the existing law. He did not make a general attack on commerce however, but simply stated that liberty was a higher value than commerce. Nor did he call for collective action. Gillies' assessment of those opposing change appears to have been partly accurate, and his forecast that imprisonment would continue at a high level under a law which nominally restricted it to those guilty of fraud was even more accurate. He also argued that imprisonment infringed basic constitutional liberties, a claim which had been made by so many debtors at the end of the eighteenth century.

This backward looking constitutional argument was repeated in a pamphlet and a substantial book published in 1837 and 1838. Both authors were anonymous, and neither revealed whether he or she had been a prisoner, nor anything else about his or her personal circumstances. The first was by "Runnymede Secundus, a follower of Bentham" ("Runnymede Secundus" 1837). Despite the reference to Bentham, the argument was entirely based on the supposed constitutional invalidity of imprisonment for debt, which Bentham had rejected. It reported that on her accession to the throne, the popular young Queen Victoria had claimed that imprisonment for debt violated the Magna Carta, which was a basic law by which all others were judged, and that she was right to do so. This argument contains no element of "reasonable" balance between debtors and creditors, nor of the importance of credit to a commercial country. It unambiguously favours debtors, while accepting the rule of law, a common lower order attitude in the eighteenth and early nineteenth centuries (see Brewer and Styles 1980:14f; Neale 1982:189; Thompson 1975:258-269).

The 1838 book (Anonymous 1838d) was equally unequivocal. It put the debtors' case in a powerful fashion, with no concern for commerce. As such, it is important for having shown a separate debtor viewpoint, which was anti-commercial as well as anti-aristocratic. It also showed a debtor interest apart from that put by Brougham and his parliamentary reform colleagues. A 189 page, 5s book, its author must have seen it as a major campaign document.

Its argument was that imprisonment for debt was "tyrannical, revolting, oppressive, unequal, criminal and demoralising in practice" (Anonymous 1838d:3). The book was both backward and forward looking, complaining of the violation of the Magna Carta as well as linking the campaign to the French Revolution and positive action. Debtors had three enemies: the King and his favourites, lawyers and creditors. The latter were "mean, slimy, sneaking, lick-spittle, dastardly villains, who rob and murder you under the law-sanction. These are the Jews" (Anonymous 1838d:62).²⁰ Feudal law had not had imprisonment for debt, and its purity had

been distorted for reasons of self-interest by creditors, who were judges in their own cause, and their advocates. Its continuation was due to parliamentary self-interest. Insolvency and other mitigating legislation by philanthropists, was a mockery and hypocrisy.

This powerful hyperbole contained several useful insights. Despite its apparent universal application, the law operated most harshly on the poor. Furthermore debtors did not flee the payment of their debts, but fled from prison. Its abolition would reduce, rather than increase physical evasion. He also argued that fraud was a separate issue to the abolition of imprisonment, and should be dealt with in separate provisions if it is a crime. That argument was never conceded by the reformists in parliament, who were concerned to appease commerce while continuing to mitigate imprisonment.

The inter-weaving of arguments and interests is shown by the author's adoption of the constitutional argument and his or her reference back to feudal law as a golden age, appeals which were familiar to the aristocracy. He or she also complained about rich debtors who evaded their obligations by living in the Rules. They caused the Whitecross Street prison to contain hundreds of insolvent small traders, who were unable to collect what was owing to them, nor pay what they owed. Ironically, as we have seen, advocates for those small traders were the most vocal campaigners against the abolition of imprisonment, being much more often creditors than debtors.

The author's proposal was much less passive than those of the middle class who had described their experiences in gaol. He or she suggested that debtors should organise themselves into committees, uniting for their freedom, and that the committees should affiliate nationally, techniques used by the campaign for political reform. The committees should organise meetings, petitions and letters to newspapers. These proposals were published in 1838, the year of the major debt law reform Act. There is no evidence of a national debtors' campaign before the Act, perhaps because the call was ineffective, or because its force was removed by the Act. Some of the many petitions constantly before parliament may have been inspired by this book, even though I was able to trace only one surviving copy. Whatever the book's impact, it did not change the language of parliamentary debates, where discussion continued to concentrate on finding a compromise to suit commerce.

Other documents by prisoners were also published in this period. The most passionate commentator of the 1840s was the evangelist, G. C. Smith, who was in gaol in 1843 and 1844 as a result of the debts of his church and mission. He published hundreds of pages of repetitive anti-imprisonment pamphlets and magazines (Smith 1843 and 1844 a and b). In a fervent style which quickly loses its charm for the reader, Smith mustered compassionate, Christian and constitutional arguments against imprisonment, subjecting every important figure of the day to personal pleas and petitions. However, his writings are now an invaluable source of details about prisoner campaigns of the 1840s. Smith organised petitions from every debtors' prison in England and Wales to support pro-debtor Bills then before parliament. The very high level of prisoner activity shown by Smith's writings, including the weekly publication of the Fleet Papers by Richard Oastler, demonstrate that one should not assume that the relative paucity of prisoner

publications surviving in libraries means that debtors were passive about their own position. Just because there was no G.C.Smith recording debtor activity in the 1830s, does not mean that they were less active than in the 1840s.

In fact, Smith republished 8 documents originally published by prisoners between 1836 and 1838. Like the 1838 book described above, they stressed compassionate and constitutional arguments and many of them attacked the self-interest of lawyers which they saw as the reason for the continuation of imprisonment for debt. These documents were written by angry people, yet they accepted and relied on the rhetoric of the rule of law. It seems that Queen Victoria's 1836 statement about the violation of the Magna Carta was the source of the revival of the constitutional argument (see Smith 1843a and 1844a: No 8 at 59,61). Smith may have chosen to re-publish only the most deferential of the prisoner documents of the period, or those surviving may truly represent what was written at the time. However representative they are, they had a clear reverential tone towards the aristocracy, though not towards commerce and lawyers. Several of them were addressed to individuals such as the Duke of Wellington or to the House of Lords generally, calling on them to perform their traditional duty towards the poor (Smith 1843a and 1844a: Nos 8,9 & 11 at 59-66,68,71,83). Those appeals, like Smith's personal appeals to the aristocracy, had little effect. Ultimately, it was the House of Lords which opposed the abolition of imprisonment for debt between 1835 and 1838. It was taking a long time for the end of traditional paternalism to result in the end of deference. These documents show that debtors played a very active role in the campaign. Their basic argument did not seek fine compromises, but asserted that debtors were being imprisoned unconstitutionally and immorally. Morality and constitutionality were both quite foreign to utilitarianism, which took a neutral, reformist approach. The debtors' arguments showed a mixture of the two lower class attitudes to authority. Most of them were traditionally deferential towards authority, but some were obviously affected by the radical reform campaigns. Neither approach was very effective in obtaining the changes sought, though the barrage of debtor literature and petitions must have kept the issue before parliament and may have helped to change the attitudes of parliament and the middle class.

The refusal to compromise that was shown by some of the debtor documents was matched only by the documents published by small traders, who also saw themselves as a quite separate group from the rest of society, and who were even more opposed to wealthy debtors living in the Rules of King's Bench and the Fleet. However, their aim was to strengthen rather than abolish imprisonment for debt.

Miller's 1830 pamphlet which was discussed above, was only one of a series by small traders arguing that imprisonment was the only way in which their debts could be collected. They argued that abolition would lead to damaged credit and greater speculation, and that the law's mitigation had already gone too far, few creditors being unnecessarily harsh on their debtors. There were insufficient commercial men in parliament to see the obvious truth of these statements (see Miller 1830; and Anonymous 1837c).

The most articulate of these authors was J.H. Elliott, whose pamphlet was published in 1838 (Elliott 1838). He adopted Stephen's dissenting Common Law Commission report, arguing that the law had already gone too far. His tone was as strident as the 1838 debtors' book discussed above, showing that the debate had

become very clearly defined by then, and that the 1838 Act was incapable of satisfying all sides. In his view, the law had been “subverted by the influence of that new species of deceitful humanity which casts a withering look of indifference and neglect upon the man of self-restraining virtue, while it protects and defends, and weeps over, the self-inflicted misfortunes of knaves and rascals” (Elliott 1838:3). He felt especially concerned that those who usually argued for reforms which benefited commerce were here proposing one which went against small traders. Bentham’s utilitarian language suited trade on most occasions, yet he was wrong about imprisonment. Brougham did not understand the needs of small traders, nor that imprisonment had an essential coercive characteristic. The campaign for abolition came from the vicious direction of public sympathy and lax moral conduct. Brougham’s information about the utility of imprisonment had come only from great traders. Small traders had different needs, which Brougham did not recognise.

Elliott was remarkably perceptive about the ideological role of law as well: “the laws under which they live, are a very material part of the moral education of a people” (Elliott 1838:24). By coercing debtors and their relatives, imprisonment taught them the “stern principles of commercial morality” (Elliott 1838:11), the right morality. Poverty was usually caused by criminal or at least vicious conduct. The poor would waste their money if they were unable to buy from tallymen and shopkeepers on credit. That credit backed by imprisonment helped “the feeble controlling power over the appetites” (Elliott 1838:20) of the masses. Commerce wanted the poor to “learn to live in the daily and hourly habit of enduring labour, and of abstaining from the instant enjoyment of its fruits” and the master virtues, “industry, providence, and self-dependence” (Elliott 1838:24).

Elliott’s pamphlet and those of other small traders, clearly show that they had a fully developed perception of their relationship to other groups in society. The poor had to be taught the right way to live, and the law played a key role in that teaching. Lawyers were not independent professionals for the benefit of all in society, but had interests of their own to promote. Newspapers favouring reform were mistaken, as it would harm their own positions as small businesses. The reformers in parliament, such as Brougham, represented large traders rather than small commerce, and failed to understand the needs of the latter. The aristocracy and gentry also opposed small traders, being very slow to pay their debts. Traditional deference made shopkeepers unwilling to arrest them, and the gentry had no employment skills even when they were arrested. All forms of property should be subject to direct execution, one point on which small and large commerce agreed. However, small traders felt that they needed the unlimited discretionary punishment which Bentham had attacked, in order to collect from those without property. They had their own views on whether that was fair.

Two anonymous articles published in 1838 in Fraser’s *Magazine* clearly expressed a conservative, aristocratic contribution to the debate, but one which was beginning to appear archaic. The first (Anonymous 1838c) stressed the constitutional argument put by debtors, noting that an 1837 letter by King’s Bench prisoners to Denman LCJ questioning whether imprisonment violated the *Magna Carta*, had not received a reply. The constitutional argument was the familiar one, with the traditional plea for a return to feudal law in which the only remedy had been against goods, with little access to land. The Queen had been rightly anxious about the subject, lawyers and the

courts having distorted the pure common law to their own ends. The Uniformity of Process Act had removed the rotten foundations on which imprisonment law lay, by abolishing the fictional trespass on which it had been based. There was no ground for arguing that it had intended to continue imprisonment.²¹ The perennial political argument that opponents operated on mere expedience, as opposed to the sound principles of the observer, was used to attack the reformers. The Whigs and radicals had tortured imprisoned debtors by constantly raising and lowering their hopes for reform. The reformers were a soap boiler and two pettifogging attorneys,²² whose proposals would have pulled down the aristocracy and landed proprietors, by linking abolition to extended remedies against real property. The paternalism felt by the aristocracy for the imprisoned poor and their common constitutional argument did not extend to allowing reform at the expense of the superior orders of society.

The second article repeated much of the first, with even more flamboyant attacks on the “most execrable race of vermin in the known world, *the common law attorney*” (Anonymous 1838e:550). Imprisonment for debt was due to an “inordinate thirst for gold” (Anonymous 1838e:548), commerce having led to too much production and credit. A “ravaging appetite for wealth” (Anonymous 1838e:548) had also resulted in the appalling conditions shown by the Factory Commission. Credit and over-production would be reduced by abolishing all remedies against defaulters, except in secured transactions. All debts could then be placed on the level of honour, lawyers being excluded. The result would be “caution, restraint, forethought, economy, independence, honour, simplicity of living” (Anonymous 1838e:552). The only opponents would be large and small commerce, usurers and lawyers. Proponents would be philanthropists, philosophers and “those who wish to see their estates handed down unimpaired” (Anonymous 1838e:552).

This weak attempt to define the self-interested aristocratic argument by reference to “moral politics”, was the only intellectual response open to those members of the landed class who wished to keep their land from the mercantile classes, while simultaneously retaining a paternalist relationship with the poor.

The anti-commercial tone of this traditional argument was shared with some debtors, but by 1838 it had dwindling support among the aristocracy. In the final parliamentary debates, there was little evidence of this view, even in the House of Lords.

These articles, pamphlets and books are most valuable for demonstrating the arguments, attitudes, interests and self-perception of the social classes whose views they represent. Their political influence and effect on public opinion may have been slight in cases where their circulation was small, although one can assume that Joseph Hume was not the only parliamentarian to have read them. They probably had the effect of keeping the issue alive in the minds of MPs, but their generally immoderate and sectional tones were quite different to the styles adopted by most parliamentary speakers. Most parliamentary debates were conducted in the moderate, purportedly neutral language which had been adopted by Brougham, in his 1828 speech. This was a little less true of the House of Lords than of the Commons, though even there the language of commerce was predominant.

There is no doubt about the importance of Dickens' *The Posthumous Papers of the Pickwick Club*, which was published by instalments in 1836 and 1837. Parry put

its March 31st, 1836 first publication as the birthday of the abolition of imprisonment for debt, its descriptions of the cruelty of civil imprisonment having "supplied the motive power necessary to pass the Act, by rousing the public conscience to insist on something being done" (Parry 1914:44-45; see also Trumble 1896:105). His simple argument that this period, "the springtime of social reform", was due to the constant repetition of cries by the poor and a new public conscience, overstated bourgeois benevolence and ignored the complex interaction of the interests of the social classes involved. However, we should not underestimate the effect of Dickens' novel. Although it was the first major work of a 24 year old reporter, its monthly publication quickly rose from 25,000 to 40,000 copies. It was read by members of all social classes, including the judiciary (Patten 1972:11,17-19). One should not assume that the views of members of social classes flowed automatically from the economic interests of those classes. A variety of views was possible within a single social class, as the Common Law Commission showed in 1831-32 for middle class merchants and bankers. Some had favoured reform to imprisonment for debt, but most had not. *Pickwick* may subsequently have persuaded more of them that change was needed. The actual form of the amending Act in 1838 was influenced by the interaction of the interests of several social classes, the consciousness of the members of those classes as to what their own and others' positions required and the nature of the campaign, which itself was influenced by those interests and attitudes. *Pickwick* seems to have been a major factor in that debate, and it is significant that its themes did not support the complete abolition of imprisonment for debt.

When reading *Pickwick* it is impossible not to see that Dickens strongly opposed the law as it was, prior to 1838. Pickwick, the hero of the book, was a judgment debtor, not a creditor. He was arrested in execution after losing an action for breach of promise of marriage. His refusal to pay the judgment was due to the falsity of the case against him, and the immoral role of the plaintiff's counsel in maintaining the action. His primary wealth was in the form of intangible property, so that Mrs Bardell, the plaintiff, could not collect the debt by *fieri facias* against his property. Eventually, her own attorneys, Dodson and Fogg, had her arrested on a *cognovit* or confession of judgment of costs, showing that even after the abolition of mesne process imprisonment it would still be easy to have debtors arrested on the final process. Pickwick was thus pressured to pay the costs of them both so that she could be released, Mrs Bardell having waived the payment of the judgment itself.

The fact that Pickwick and Bardell were both members of the middle class, does not mean that sympathy was directed only to middle class debtors. The book gives very moving descriptions of the plight of imprisoned poor debtors and their families, despite its division of debtors into the worthy and unworthy poor. The unworthy were given little sympathy, although the impression was given that their attitudes were reinforced by prison. Debtors were the victims of "the open oppression of the law" (Dickens 1836-37:374). The most pathetic victims were Chancery prisoners, whose sentences were still perpetual at that time.

However, Dickens' description of lazy, dissolute debtors would have allowed middle class humanitarians to be touched by the plight of the innocent poor, without abandoning their commercial values and outlook. Dickens found that some debtors exploited their creditors by remaining in gaol and then taking advantage of the

chaotic Insolvent Debtors Court. Imprisonment could be justified for them at least. Wittingly or not, Dickens' book supported the transformation rather than the abolition of imprisonment for debt.

Despite the wealth of the hero and the fact that he was in gaol deliberately, Dickens also pointed out that money in gaol was just what it was outside (Dickens 1836-37:684). Wealthy debtors could have some comfort while the poor lived in poverty. Similarly, those who did not wish to work were not harmed by imprisonment, while those who did were harmed too much. Pickwick's servant, Sam, commented "It's unekal, and that's the fault on it" (Dickens 1836-37:667).

Although the novel was dedicated to a lawyer, it included ferocious attacks on lawyers. The villains were Dodson and Fogg, who engineered the whole action against Pickwick to create income for themselves, and who manipulated the case of Ramsey to the same end (Dickens 1836-37:344-345). All of the descriptions of lawyers and the courts were characterised by seediness, even though Pickwick's attorneys were not guilty of fraud.

The Preface to the 1847 Cheap Edition shows that in retrospect at least, Dickens saw the book as part of a campaign to abolish imprisonment for debt. The Preface claimed that cheap literature had a duty not to be behind the age. However, Dickens avoided becoming directly involved in campaigns, saying that that interfered with his writing (Dickens 1960:109). This was the first of several of his novels to be set in debtors' prisons, his father having been imprisoned for debt when Charles was 12, and penology being a popular subject for novels in the nineteenth century (Holdsworth 1928:9; Collins 1964:13-14,30).²³ His reputation as a reformer commenced with this book, even though his later novels and attitudes were certainly not more reformist than most members of society.²⁴ Those later reactionary views should not obscure the importance of this first, reformist novel.

Despite Dickens' admission that much of the trial scene was inaccurate (Dickens 1960:98), his strong legal background and brilliant powers of observation ensured that most of what he wrote was accurate and remains invaluable in giving the flavour of nineteenth century legal proceedings (see Holdsworth 1928).

The Pickwick Papers was very critical of the imprisonment of innocent debtors, very popular and was published between 1836 and 1837, when the abolition debate in parliament had reached its peak. In both of those years there were Bills before parliament to abolish both forms of imprisonment for debt, the Bills meeting strong resistance in the House of Lords. The House partially acquiesced at the end of 1837, and the Act was passed in 1838, although final process imprisonment continued unaltered, despite Pickwick having been a final process prisoner. One can only speculate as to exactly how much influence *Pickwick* had on the legislation.

Debtors, small traders and conservatives had all agreed with Dickens that lawyers were greedy, self-interested and exploitative manipulators of the law. Given that public reputation, it is not surprising that many members of the legal profession in the early nineteenth century tried to establish an image of themselves as neutral, professional advisers to parliament and the public. Legal journals such as the *Legal Observer* and the *Monthly Law Magazine* began an irritating tradition among legal periodicals of offering descriptions of legal debates and analyses without stating firm opinions. In 1837 for example, the *Legal Observer* described the arguments for and against the imprisonment for debt Bill before parliament, hoping that the "right

conclusion' would be reached, assuming that there was an ideal solution which would suit all parties or at least meet an abstract notion of justice (Anonymous 1837b; see also Anonymous 1837a).

These attempts to establish an essential, professional and neutral niche for lawyers in the new industrial society, resulted in the journal writers making apparently reasonable comments, such as that the law must distinguish between honesty and dishonesty (Anonymous 1838a:193), one can trust professional judges to decide that issue (Anonymous 1838-39:70), the principle against retrospectivity must be respected (Anonymous 1838-39:66), the present debt law displays somewhat of injustice (Anonymous 1838-39:66), and it was now universally accepted that imprisonment for debt was oppressive and inexpedient (Anonymous 1838a:193). The statements may have been sincerely believed in most cases, but they may equally often have been examples of self-delusion. These techniques had the effect of defusing controversy and setting the "proper" scope for debates. What was a lawyer's reasonable compromise, was often a mask to disguise a conscious or unconscious preference for the middle class, utilitarian solution of cautious reform. Middle solutions, such as that reached in the 1838 Act, suited the middle class, though not the middling class of small traders, as even the *Legal Observer* accepted (Anonymous 1837b). Similarly, the neutral, professional image created by lawyers replaced the more overt greed of their predecessors. However, the new image was in the lawyers' own interest, as well as that of the middle class. Middle class interest was often disguised as neutrality, the "new" profession being their servants above all.

In their pamphlets, professional lawyers seemed to be less concerned to be seen to be neutral on "political" matters, than they were in their journals. One barrister argued that imprisonment for debt was as absurd as limited property remedies, though he was not so certain that insolvency should discharge future debt liability (Cooke 1838). That Brougham-like argument was in contrast to that of a "Gentleman Connected with the Superior Courts of Law". His *Plain Thoughts* ("Gentleman" 1837) were plainly commercial and inspired by the needs of small traders. He argued that imprisonment for debt was necessary for commerce, that rich debtors in prison owing above the £300 Lords' Act limit should be compelled to disgorge their property, and that the poor were notoriously likely to pay only under compulsion. A third practitioner, a solicitor, was surprisingly favourable to debtors (Bowditch 1837). However, although he felt that imprisonment was barbaric and that insolvent debtors should have the same benefits as bankrupts, he did not argue for the complete abolition of imprisonment. He felt only that it should be placed under judicial control. The many different views of those seeking reform is another explanation for the minimal effects of the 1838 legislation. They had no agreed program.

6. *Parliamentary Compromises*

The 1838 Act was passed while the Whigs were in government, though the issue was no more a strictly party political one, than it had been earlier in the century. Both political parties had conservative and reformist sides, even if the 1830s legal reforms were sponsored by Whig governments and Whig reformers such as Brougham wanted to act more quickly than Tories such as Peel (see Perkin 1969:313-315; Holdsworth xiv:3-4; Eardley-Wilmot 1860:166). The imprisonment

for debt abolitionists in parliament on the whole were Whigs and Radicals.

The extra-parliamentary debt law reform campaign led to abolition Bills each year between 1833 and 1838, but that was not the only relevant legislative action. This was a time of dramatic legislative change, under the utilitarian recognition that law was not immutable, but could have defects which it was the function of parliament to repair, after Select Committee investigation. Between 1828 and 1838, there were regular amendments to the insolvency Acts, attempting to improve one of the newest but most chaotic courts in England (see Holdsworth xiii:377-378; xv:99), the Bankruptcy Court was established to replace corrupt local commissioners, and the Prisons Act of 1835 was passed, as discussed in Section 1 above. Brougham attempted to replace the Courts of Requests in his Local Courts Bills of 1830, 1833 and 1837, each time unsuccessfully (see Eardley-Wilmot 1860:80,92,206). Hume also pressed Peel to abolish imprisonment of both kinds for debts under £5, without success (Common Law Commission, *Fourth Report* 1831-32:153D (evidence of Hume)).

Despite those changes, the main focus for the debt reform debate was the series of abolition Bills commencing in 1833 and culminating in (1838) 1 & 2 Vic c110. Some of the pamphlets, articles and books discussed above were written in direct reaction to those Bills. The question to be discussed here is how far the parliamentary debates and action reflected the arguments and interests represented in those writings.

The greatest opposition to the abolition Bills came from the House of Lords, which passed none of the Bills “abolishing” both forms of imprisonment, despite the House of Commons having done so several times. Not all of the Bills commenced in the Commons, but that is where their greatest support lay, despite the widened commercial franchise, the strong opposition of the Common Council of the City of London (Lineham 1974:214; Duffy 1973:46), and dozens of commercial petitions against the Bills (see Parry 1914:47-48; Lineham 1974:215). As previously noted, there was something of a tradition of petitions piling up on the tables of the Houses, where they were either forgotten or led to fruitless Select Committees.

In 1833, 1834 and 1835, Bills were introduced into the House of Commons by the Whig, Sir John Campbell, the first two under a Whig government. Each Bill proposed to abolish both forms of imprisonment, except in cases of “fraud” and to extend property remedies as a *quid pro quo*. The 1835 Bill passed through the Commons, but lapsed in the Lords. It was more thorough in reaching the debtors’ property and avoiding imprisonment than any subsequent Bill (Anonymous 1838b:17-21; and see Lineham 1974:212-215). A Bill to “abolish” both forms of imprisonment, merge bankruptcy and insolvency and make some extensions to property remedies was introduced in 1836 in the House of Lords by the Whig Lord Chancellor, Cottenham, but failed to reach the House of Commons (Anonymous 1838b:21-26; and see Lineham 1974:216-217). It was reintroduced in the Commons in 1837 by Campbell, then Attorney-General. After being sent to the House of Lords, it lapsed when parliament was dissolved for another election, which the Whigs won again, on a reformist platform (Anonymous 1838b:27-30; and see Lineham 1974:217-218).

The Commons debates over the 1837 Bill ((6-2-1837) 36 *Hansard* 146; (1-3-1837)

36 *Hansard* 1175; (6-3-1837) 36 *Hansard* 1362; (6-4-1837) 37 *Hansard* 823; (30-6-1837) 38 *Hansard* 1741), show that the parliamentary arguments reflected some of the extra-parliamentary campaign. This Bill omitted the list of fraudulent misdemeanours and the 1835 Bill's proposed preliminary insolvency hearing, Campbell saying that there would be separate legislation on those matters. A pre-imprisonment insolvency hearing was finally established by Brougham's Act of 1842 (5 & 6 Vic c116). The opposition to the 1837 Bill combined arguments about its adverse effect on commerce and its effects on the landed aristocracy. Richards, a Tory, was the strongest opponent and, remarkably, was the only member to argue against the "abolition" of imprisonment on the ground that it would hurt commerce. In introducing the Bill, Campbell had apparently been right to say that the principle of abolition had been accepted in the House. Even Eldon in the Lords had apparently accepted that the present law was barbarous. Richards was also the only Commons MP to put the argument that expanded remedies against land would hurt the aristocracy. Furthermore, he claimed that the preliminary insolvency provision was designed to increase ministerial patronage, by increasing the judiciary, showing his remarkable flexibility in combining commercial and conservative arguments. He fought the issue all the way, pressing for delays, which were rejected by large majorities.

Most of the discussion concerned matters of detail: compensation for office holders, Campbell not wanting to compensate sheriffs' officers who made their living by placing their claws on unfortunate debtors; parliamentary privilege from arrest, a red herring in an abolition debate; the effect of the Bill on the Courts Palatine; and the bankruptcy provision, by which a single unpaid judgment creditor could press for bankruptcy after 21 days default. The debate on the latter point shows that Campbell and the government were not motivated simply by humanitarian concern for debtors. Pollock, one of the Common Law Commissioners and a Tory, argued that the provision was too harsh on debtors, especially small traders. There was some irony in that argument, as small traders were the staunchest advocates of strong anti-debtor laws. Campbell added to the irony, by announcing that the provision had been added after consultation with commercial men. Richards was apparently correct when he claimed that Campbell consulted only with elite traders and bankers.

Campbell's motivation was apparently the Benthamite one: he felt that by giving creditors access to all of their debtors' property, imprisonment could be safely abolished, subject to fraud provisions. He was seeking a middle way, and was attacked by both sides, though there were no unambiguous debtors' advocates in the parliament. His middle position allowed the Bill to provide that mesne process arrest would continue, simply on the basis of the creditor's oath that the debtor was about to flee. It took a Tory to point out that that was an invitation to abuse by creditors. The "neutral" utilitarian position ultimately favoured commerce.

The debate in the House of Commons was essentially a commercial one, with debtor welfare being secondary to commercial need. Apart from Richards, the House accepted that imprisonment could be "abolished" without jeopardising commerce, the controversy being as to the details of the "abolition" and Richards' assertion that only the interests of large commerce were being considered. The tone of the debate was quite different to that outside parliament. There was little overt

assertion of sectional needs. Except for Richards, there was a moderate “neutral” flavour to the Commons debate, under the assumption that a utilitarian solution was possible which would suit all interests. Those making the speeches apparently failed to perceive their own bias towards large commerce.

Once it reached the Lords, the Bill was dropped, as there was insufficient time for a debate. Brougham suggested that it should be introduced in the Lords in the next session ((11-7-1837) 38 *Hansard* 1861).

The Bill was reintroduced by Cottenham LC on November 24, 1837 in the same form. That is, it still included the “abolition” of both forms of imprisonment, and their replacement with much wider property remedies than the existing law. As the *Legal Observer* noted, large traders had the advantage that the Bill retained its quick bankruptcy provision at the request of one creditor, though that was no consolation to small traders (Anonymous 1837b). The first reading debate ((24-11-1837) 39 *Hansard* 185) showed a defensive mood about the delays to the legislation, especially by Brougham. Attempts to delay the Bill even further at this first reading stage failed.

As the Bill had been approved by the House of Commons several times, the critical debate was at the second reading stage in the House of Lords. That debate ((5-12-1837) 39 *Hansard* 550; see Anonymous 1837a) resulted in the Bill being referred to a Select Committee, which did not report until May 22, 1838. Cottenham introduced the second reading debate, putting the usual arguments that imprisonment hurt poor debtors and allowed rich ones to evade their obligations, and opposing the freedom of creditors to arrest debtors on a simple affidavit. However, he was not willing to extend property remedies to the sale of land and shares, feeling that a lien over the whole of those types of property was sufficient, as had been the case in the 1836 and 1837 Bills (Anonymous 1838b:40). He also felt that creditors should have a continuing right to arrest on the mesne process, but only when they had convinced a magistrate of the debtor’s intended flight.

The most powerful opposition was provided by Lyndhurst. He took support from the many petitions before parliament on the subject, which he said ran ten to one against reform. Further, he argued that a remedy against land was an insufficient substitute for imprisonment, as most of those arrested did not own land. Other types of property could be moved, making those remedies worthless as well. While agreeing that mesne process imprisonment on affidavit was harsh, it was effective, and there was no substitute. Similarly, final process imprisonment was essential to disclose hidden property. The others in the debate demonstrated similar mixtures of commercial concern and self-interest. Considering his role in initiating the debate and putting the issue to the Common Law Commission while he was Lord Chancellor, Brougham’s arguments were very weak, being essentially that imprisonment was less effective than some creditors claimed. Wynford’s proposals demonstrated the compromise between commercial and aristocratic interests most clearly. He favoured the introduction of judicial control over mesne process, but the continuation of final process imprisonment was required to ensure the disclosure of hidden assets. Property remedies should in principle cover all kinds of property, but the Bill’s proposals went too far in allowing creditors access to all of the profits of land.

The House of Commons had shown its primary interests to be commercial, but

the majority of its members were willing to transform imprisonment to fit modern notions of limited and deserved punishment, so long as the concession to debtors caused little disruption to trade. The House of Lords' compromise was between commerce and the aristocracy, between old and new forms of wealth. It is difficult to detect ancient notions of paternalism in the second reading speeches in the Lords. Cottenham showed a little sympathy for debtors, which not even Brougham followed. Brougham's sole expressed concern was to see that trade was not damaged by the reforms. Lyndhurst referred to the oppression and extortion that creditors of the lower orders engaged in through their access to mesne process imprisonment, but felt that commerce required that. Equally importantly, all members of the Lords expressed concern for commerce, and small commerce in particular. Property remedies would be no substitute for imprisonment when debtors either hid their property, or had none to pass on to their creditors as was often the case among the debtors of small traders. None of the Lords relied on ancient constitutional arguments, on traditional paternalist care for the poor, nor on explicit references to the importance of protecting land for its special position to the aristocracy. However, it appears to be no coincidence that the House of Lords debate included several arguments for lessening the Bill's proposed access to land. None of the speakers made the further argument though, that imprisonment should only be partially reformed as a result of their proposal to limit these remedies against land. The link between their own self-interest and the continuation of imprisonment for the poor may have been too unpleasant for their paternalist consciences.

The House of Lords Select Committee met 12 times, and altered the Bill radically. The evidence it took and its minutes were printed solely for the use of the Committee, and no copies survive. Only its written formal proceedings remain in the House of Lords Record Office.²⁵ Although the final shape of the Committee's report was foreshadowed in the second reading debate, it is extraordinary that little was known about the Committee's deliberations even in 1838. This was the most influential report on the subject to date.

The Bill was finally read a third time and passed by the House of Lords on June 12, 1838 (43 *Hansard* 656; *The Times* June 13, 1838). The third reading debate showed how far reformers such as Cottenham and Brougham had gone in their compromises. Cottenham had been persuaded by the other members of the Select Committee that final process imprisonment could not be abolished, as it coerced debtors into disclosing their hidden assets. However, the Committee did retain the 1836 and 1837 Bills' provision of a lien against land, and their extension of *elegit* to the whole of all kinds of landholdings. In a cumbersome way, land could ultimately be sold for the benefit of creditors. This apparently great concession by a landed class was further evidence of its infusion by newer, broader capitalist values. By the 1830s land was losing its pre-eminent social and political position. State power was being transmitted through new central institutions, the controls over which the aristocracy was beginning to share with the middle class.

The Committee also suggested a renewal of the insolvency Act which was about to expire, with the addition of a provision by which creditors could force their debtors through the Insolvent Debtors Court and thus obtain forced access to all of their property. The compulsory Lords' Act provision would thus be extended to all debtors, rather than being restricted to those owing under £300. Having lost so

much, debtors gained very little. Mesne process would be “abolished”. Paternalism was never less apparent.

Brougham offered little resistance to these amendments. He had been too busy in the Privy Council to attend many meetings of the Committee. He did point out that *cognovits* were a danger to debtors, allowing pre-judgment arrest to be as quick as mesne process had been. He suggested that they should be valid only when signed by an attorney acting on the debtor’s behalf. Ashburton added a frankly commercial argument. Imprisonment on the final process was little enough coercion he claimed, and small traders required it in collecting debts in the Courts of Requests. Abinger was reluctant to assent to the Bill, as no party would be particularly pleased with its final form. However, he felt that Parliament had to accede to the incessant agitation for reform.

Once the Bill passed the Lords, it was inevitable that it would become law, as the House of Commons had passed wider Bills in previous years. There was an immediate flurry of magazine articles, pamphlets and books by small traders (Elliott 1838), conservatives (Anonymous 1838c; Anonymous 1838e), debtors’ advocates (Anonymous 1838d), Benthamite reformers (Anonymous 1838b), and lawyers (Fane 1838; Cooke 1838; Anonymous 1838a; Anonymous 1838-39). Most of those pamphlets have already been discussed, but two are worth noting here. Fane, a Bankruptcy Commissioner, argued that the Bill would abolish nine-tenths of the acts of bankruptcy available to creditors. It would do so directly, as imprisonment without bail was an act of bankruptcy, and indirectly, as he argued that imprisonment was a very quick way to establish that the debtor was unable to pay the overdue debt (Fane 1838; see reply, Anonymous 1838a). Parliament reacted to his minor point, but ignored his major one, which was simply the commercial argument against abolition stated in a new form.

The other reaction worth noting here, was a large pamphlet about the Bill sent by the Lords to the Commons, arguing that the Bill had strayed so far from the original intentions of the House of Commons that it would be better to drop it than pass this delusion (Anonymous 1838b). Property remedies were much reduced, nine of them having been dropped over successive drafts of the Bill, each Bill being less comprehensive than the previous ones. The most important omissions were the failure to require a debtor’s schedule of assets so as to discover his or her property; insufficient coverage of beneficial interests in realty and personalty; the omission of an insolvency hearing before a Bankruptcy Commissioner, except in cases of imprisonment; and an exemption of unsecured debts owed to the debtor by banks and other creditors. Furthermore, both real and intangible property could be protected by crafty trusts and devises, even when covered by the Bill.

The second great principle of reform was also dealt with inadequately, according to this pamphlet. Imprisonment on the final process was to be left untouched, meaning that the same objectionable coercion would continue, this time at greater expense. Worse, imprisonment by the Courts of Requests would also continue, despite that having been the issue on which the campaign had begun. The clause requiring *cognovits* to be witnessed by attorneys would only increase costs for debtors, rather than protect them, and the very thought of compensating gaolers horrified the author. However, this Bill had one advantage over prior ones. By the time it reached the Commons, the creditor’s right to arrest his or her debtor on

suspicion of proposed flight was amended, the decision on that issue having been given to the judiciary.

The Bill reached the Commons quite late in the session ((12 and 14-7-1838) 44 *Hansard* 143 and 200) leaving little time for substantial amendment without endangering the passage of the Act. The Attorney-General "regretted" that final process imprisonment was not to be abolished, but argued that it was too late to debate the point. Hawes also accepted the Bill, despite its defects. Only Warburton objected vociferously. He "thought it was hardly worth while to make any amendments on such a miserable abortion of such a bill as this. Let the bill go forth with all its imperfection, and let the responsibility rest with the other House, which had passed, and the Government, which had sanctioned it". That was hardly an effective form of opposition, but he appears to have had little political choice.

The Commons amended the Bill in response to Fane's paper, by adding an act of bankruptcy to replace the previous one of 21 days imprisonment. Fane's major point was ignored. The Lords accepted the amendment, and only minor points required settlement before the Act was passed ((31-7-1838 and 10-8-1838) 44 *Hansard* 841 and 1149). Some members of the Lords were concerned with compensation for gaolers. Brougham showed the ambiguity of his position, by successfully opposing a delay in the commencement of the Act, which would have allowed time to draft Rules while continuing the imprisonment of some debtors, and by pleading the case of newspaper proprietors who would be required by the Act to accept advertisements at "uneconomic" rates. He drew up a Bill on his knee in three or four minutes on the latter point. His bill was rejected in the Commons, the Attorney-General pointing out its drafting deficiencies, and Aglionby arguing that a Bill which favoured the newspapers must place hardship on debtors ((15-8-1838) 44 *Hansard* 1312).²⁶ On this as on many other points, the great reformer Brougham's sympathy for debtors gave way to commercial interests when the two were in conflict.

The Act (1 & 2 Vic c110) became law on 16 August, 1838, and, except where otherwise provided for, came into force on 1 October, 1838.

7. An Act for Abolishing Arrest on Mesne Process (1838) 1 & 2 Vic c110

The Act abolished mesne process arrest and imprisonment by inferior courts, and restricted its use in superior courts (including the Courts of Pleas of the Counties Palatine). Superior court proceedings were to be commenced solely by summons. However, if the creditor convinced a superior court judge that there was probable cause for believing that the defendant was about to leave England, an arrest order was issued, with bail not to exceed the amount claimed (ss1-3,21). The defendant could apply for release, rather than having to wait for a *supersedeas*. Instead of 21 days in a debtors' prison being an act of bankruptcy, a Notice in Writing was issued to the defendant. If the debt was not paid or security given (including voluntary surrender to a debtors' prison), that default was a sufficient act to commence bankruptcy proceedings (s8). Warrants of attorney to confess judgment and *cognovits actionem* were valid only when signed in the presence of the debtor's attorney, in an attempt to prevent the continuation of pre-judgment arrest under another procedure (ss10-11).

Property remedies were extended, but they did not cover all forms of property and their provisions were very complex. The *elegit* remedy was extended to cover copyhold as well as freehold land, and covered the whole of the debtor's land, rather than half. The land to which the debtor had title at the date of judgment also became subject to a charge, actionable in equity after one year (ss11,13), rather than subject to direct sale. The land itself thus became liable, even if it was sold by the debtor after the date of judgment. However, judgments did not affect land until they were registered (s19).²⁷ Money, bank notes, cheques, bills of exchange and other securities for debts were subject to execution (s12). Unsecured debts owing to the debtor, such as money standing in a bank account, were excluded (Anonymous 1838b:77-78), the most important omission from the property remedies of the Act. They did not become generally recoverable until 16 years later (17 & 18 Vic c125 s61 and 23 & 24 Vic c126 ss28-30. See Holdsworth xi: 524). Stocks and shares in public funds and public companies were also liable under the 1838 Act, through the device of a charge (ss14-15). By s17, judgment debts were subject to the automatic addition of interest at 4% per year.

The continuation of final process imprisonment meant that the Insolvent Debtors Court also had to be continued (ss23-27), its provisions making up the bulk of the Act. The Act repeated most of the provisions of previous insolvency Acts: the petitioning debtor's entire estate was assigned to provisional assignees, who collected it together and distributed it rateably among creditors (ss35,36,56). The only exemption was wearing apparel, bedding and other necessities of the debtor and his or her family, and tools of trade, all to the total value of £20, an exemption list familiar to today's debtors whose goods are sold under *feri facias*, writ of execution or warrant of distress.²⁸ The debtor was then discharged from custody (s75), but not from liability on the debt itself, future acquired property remaining liable (ss87-89). He or she could not subsequently be arrested in execution (s90). Creditors could oppose the custodial discharge (s72), the court having the power to delay the discharge for up to six months (s76), or two or three years on proof of broadly defined semi-offences (ss77-78), such as putting creditors to unnecessary expense by vexatious or frivolous defences. Other listed offences were misdemeanours (s99), or perjury (s100). The insolvency provisions did not apply to Crown debtors, unless Treasury consent was obtained first (s103). However, it did apply to those imprisoned for contemptuous refusal to pay money (ss35-36).

Debtors could not obtain a discharge if they were residing in the Rules of King's Bench or the Fleet (s38), and those remanded in custody could be ordered by the court to stay inside the prison walls (s81). However, ill prisoners could obtain permission to reside in the Rules awaiting insolvency discharge (s38) (see *The Times* 14 June 1838, for an example of a case). Those who moved themselves to one of the large, more "comfortable" prisons were also excluded from the insolvency provisions (s95), the courts having power to order their removal to their home counties as well (s94).

Debtors could apply for insolvency release after 14 days imprisonment (s35), as had been the case in previous Acts, meaning that those who applied under the Act were usually kept in prison for a total of about eight weeks (Common Law Commission, *Fourth Report*:7,61,96D; Anonymous 1843:149). However, under previous legislation, creditors could force their debtors into an assignment of their

property only through the complex Lords' Act, and then only if the debt were less than £300. The 1838 Act virtually repealed the Lords' Act (s119), and replaced it with the creditor's right to apply for an order to vest a prisoner's property in the Provisional Assignee (s36). Debtors could no longer languish in the Rules, wasting their "creditors' " property in their "idle and debauched" lives. The failure of the Act to cover all forms of property in direct execution, meant that creditors had to imprison their debtors, then force them to compulsory insolvency, in order to get at all forms of property.

Debtors paid a high price for the "abolition" of pre-judgment imprisonment for debt. Most forms of property were now subject to direct execution, and imprisonment was a more efficient form of coercion than it had ever been. Once imprisoned, debtors could only remain in gaol for 21 days before their creditors could force them to disgorge what was not recoverable directly. The Act did not touch Courts of Requests debtors, as they were all arrested only on the final process. Superior court debtors remained subject to imprisonment, although at greater cost to their creditors. That greater cost and complexity for creditors was usually outweighed by much more accessible property remedies. Those remedies were bought at quite small cost to most creditors.

Table of Commitments and Debtors in Custody
Commitments

	Insolvency Petitions	Mesne Process Sup Cts	Execution Sup Cts	Execution Cts Req	Execution County Cts	Execution total	Total Commit- ments	In custody in January
1836	4757	3466				7859	11932	
1837	5206							
1838	5254	4070				8388	13397	
1839	3676	627				8694	9636	2057 (1805 July)
1840	4667	154	5419	6001		11420	11808	1435
1841	5103	229	5826	6597		12423	13001	1735
1842	5352	258	6170	7279		13449	13951	1867
1843	4461	200	6201	6911		13112	13586	2228
1844	2905	264	5085	6209		11294	11792	2203
1845	1292							
1846	1461	155	2084	68	1166	3318	3847	699
1847		172	2620	361	1023	4004	4527	843
1848		197	3679		4551	9120	8782	976
1849		241	3118		4801	7919	8518	1150
1850		186	2945		4543	7488	7806	1095
1851		166	3027		4595	7622	8095	975
1852		248	2854		5219	8073	8653	985
1853		242	3004		5508	8512	9066	1031
1854		193	3419		5818	9237	9677	1023

The figures in the Table are based on the Prison Inspectors' Reports²⁹ and a separate series of insolvency statistics (Return of the Number of Insolvent Debtors 1847-48:2). The Prison Inspectors' statistics prior to 1840 understate imprisonment, as they often omitted local prisons (McConville 1981:223). They also changed their method of computing execution debtors in 1840, by separating Courts of Requests and superior court debtors from that year. Unfortunately, they reported no statistics for 1845. Debtors were included as execution prisoners if they had gone into gaol on the mesne process, but had subsequently become prisoners on the final process.

The figures show that, as might have been expected, the Act had a great effect

on the number of debtors arrested and imprisoned on the mesne process. From 3500 to 4000 per annum, mesne process arrests fell to between 150 and 250 each year.

However, the Act had only a temporary effect on insolvency statistics, the total number of commitments to prison in any year and the total number of debtors in custody at any time. (The latter were stated in January each year, so that they appear to follow on a year behind the other figures.) In each case, the Act caused a temporary dip in 1839 and 1840, after which the figures returned to their pre-1839 levels.

From that, one can conclude that the effect of the 1838 Act was to transfer mesne process arrest into arrest on the final process. The execution arrest statistics confirm this conclusion. After 1839, there was a sharp rise in arrest in execution which, by 1841, was sufficient to compensate for the reduction in mesne process arrest.

The 1838 Act caused only a temporary drop in total imprisonment. After a year or so, creditors became accustomed to the abolition of pre-judgment arrest, and final process arrest filled the mesne process gap. When offered a choice between expanded property remedies (which the 1838 Act included) and personal arrest, creditors apparently chose the latter.³⁰ Most creditors had lost little with the "abolition" of mesne process imprisonment.

Between 1842 and 1846, there were dramatic political debates over debt law, and the legislative pendulum swung briefly towards debtors before settling in the creditors' favour once more. 1842 was a good year for debtors. By 5 & 6 Vic c122, the certificate of bankruptcy was taken from the hands of creditors and given to the judiciary. Brougham also introduced the hastily drafted 5 & 6 Vic c116, which allowed debtors to approach the Bankruptcy Court for an exemption from imprisonment. Effectively, it was insolvency before rather than after imprisonment, as future property remained liable despite the prison exemption. It was not available to traders owing over £300. This Act was narrowly construed by the Court, and was in effect unavailable to the poor as it cost a minimum of £8 to obtain the exemption (Anonymous 1844a:3; R.G.W. 1844:95; Anonymous 1844b:659; see Anonymous 1843).

In 1844, 7 & 8 Vic c96 was passed and really did have an effect (see Prison Inspectors' comment, *Tenth (Home) Report* 1845: p vii). Debtors were now able to petition for their own bankruptcy. More importantly, the creditor's previously untouched right to imprison execution debtors owing any sum was altered. Imprisonment on the final process for debts under £20 was abolished, except when there was evidence of some kind of fraud, established before a judge (R.G.W. 1844). There was a very hostile commercial reaction to the 1844 Act (Elliott? 1845a; Elliott 1845b; Anonymous 1846: 152-153), which suggests that it had a real rather than a cosmetic effect on civil imprisonment. As a result, in 1845, 8 & 9 Vic c127 was passed (Brougham 1845; Anonymous 1845-46). It was a local courts Act which foreshadowed the (1846) 9 & 10 Vic c95 County Courts Act (Keane 1846; Anonymous 1847a). Both of these Acts provided a very easy means by which execution debtors owing under £20 could be imprisoned for up to 40 days on proof of broadly defined fraud. "Innocent" imprisonment for debts under that sum was not reintroduced.

The Table shows that the 1838 Act, the Act which was apparently the most dramatic of these statutes in legal terms, only shifted mesne process imprisonment

over to final process imprisonment. Brougham's 1842 Act appears to have been equally ineffective. Apart from a drop in insolvency petitions between 1842 and 1843, the arrest and imprisonment rates appear to have been unaffected by it.

The 1844 Act's effect is harder to judge, as there are no figures for 1845, and by the time of the next set of full statistics in 1846, there were two more Acts in force. However, the 1845 and 1846 Acts did not refer to the superior courts. In those courts, execution imprisonment dropped by two thirds between 1843 and 1846, only to rise by 1850 back to half of what it had been in 1843. The 1844 abolition of imprisonment on the final process under £20 and the introduction of a professional County Court system, appear to have had a permanent effect on superior court imprisonment.

The absence of 1845 figures makes it hard to judge the effect of the Act of that year. From the last year of full operation of the Courts of Requests for which figures are available (1844), until the first year of the County Courts (1846), arrests in execution ordered by the inferior courts were reduced by five sixths. By 1854, the County Courts were ordering arrests at the same rate as the pre-1844 Courts of Requests, albeit on the theory of arrest only for dishonesty. Fortunately, for the missing year of 1845, there is evidence that hundreds of debtors were imprisoned under the 1845 Act, and treated in gaol as if they were convicted felons (Anonymous 1847b:136-137).

From these statistics, one can conclude that the combined effects of the 1844, 1845 and 1846 Acts were that imprisonment under the superior courts was halved, while that in the inferior courts dipped temporarily and then resumed at the previous level under a new guise. Imprisonment for debt had come to be concentrated more heavily on those owing the smallest sums, the poor who were the defendants in the County Courts. That process would be consummated by the 1869 Debtors Act.

A final statistical point is interesting. Prior to, and even after the Married Women's Property Act, 1882, the legal disability that married women suffered in regard to property holding was accompanied by a partial immunity from imprisonment for debt. At common law, married women could be arrested (as could their husbands) in respect of the wife's pre-marriage contracts, but not in respect of debts incurred by them after marriage (*Scott v Morley* (1887) 20 QBD 120). The Prison Inspectors' Reports show that until the 1844 Act, the ratio of women civil prisoners remained steady at about 6.5%, with a jump to 7.8% in 1839, followed by a return to about 6.5%. The 1844, 1845 and 1846 Acts caused a greater proportional drop among female than among male imprisoned debtors. Between 1846 and 1852, the proportion of women did not exceed 4%, though it rose to 5% in 1854. Women prisoners had apparently been more likely than men to have been imprisoned for less than £20, and were less likely to be imprisoned under the "fraud" provisions of 1845 and 1846. However, men were always about 20 times more likely to be civil prisoners than women. Over the whole period, women comprised about 20% of criminal prisoners. There were no juvenile imprisoned debtors.

8. Class Conflict and the 1838 Act

The prisoner for debt is the "servile and venal tool which a depraved oligarchy would wish every subject of Britain to be" (Gillies 1837:88).

Duffy concluded that the legal reforms which followed the Reform Act of 1832 occurred as a result of the law adapting to the economic, population and social changes

of the industrial revolution. The law fell behind those changes, its old institutions cracking under new pressures. In his view, Bentham and Brougham exposed the lack of logic of the old debt law, and gave reform its shape, together with a new reformist role for parliament. Some traders and the aristocracy opposed these changes, but once constructive principles were applied to the old law, particularly in the Fourth Common Law Commission Report, its reform was inevitable. A new way of looking at the world, plain common sense, showed only one way in which law could be reformed, and resistance inevitably fell away (Duffy 1973:iv,6,15,19,27f,43,45, 96-98,105,124,132,137,141,146,149).

That explanation adopts the values of utilitarianism, and assumes that there is an objective body of legal principles which, once discovered, shows the deficiency of old law and the shape of new law. Law is assumed to be a neutral body of almost scientific principles, above scraps between classes, and floating free of temporary resistance once the obvious is recognised. Such a view rejects any interpretation based on the competing interests of classes, partly because the law is above such things, and partly because there is no obvious class explanation of the abolition of mesne process imprisonment. Duffy offers no convincing explanatory link between the economic and social changes of the industrial revolution, and the precise form of the 1838 Act (see Duncanson 1983). However, his explanation does recognise that utilitarianism was a new way of looking at the world, with its own logic, even if he does not recognise that the explanation is itself an example of that logic.

Lineham rejected a class explanation as well, saying that there was no single middle class view on the subject. Although trading morality combined with the aristocracy to resist reform, better information fed humanitarian views which were expressed in utilitarian form, compassion ultimately triumphing over commerce with the passage of the Act. In his view, the Act was an unambiguous victory for debtors (Lineham 1974:111,128,130,132,174,196,206,211-212,215-216,223,230,232, 235).

Duffy and Lineham did not define the "middle class", which supposedly had conflicting views on imprisonment for debt. As discussed in Section 1 above, Neale convincingly argues that there were two "middle classes" in the 1830s. The campaign to abolish imprisonment for debt lends strong support to his argument. The views of the wealthy middle class were expressed in Brougham's 1828 speech, in a utilitarian language which was free of explicit values and which was supposedly neutral. The middling class view was best expressed by Elliott, whose emotional writings came to the opposite conclusion to Brougham on civil imprisonment.

It is tempting to offer an explanation of the passage of the 1838 Act based simply on the economic and political interaction of the five classes discussed by Neale. That view would be that reform was promoted, via Brougham and other middle class lawyers, by middle class bankers and wholesalers whose influence in public life and parliament was growing, and whose own debtors had sufficient property and access to bankruptcy relief for imprisonment to be marginal in the creditors' private economies. They were urged to act by debtors' petitions and pamphlets. Those opposing reform were small traders and the aristocracy. While the small traders' interests usually coincided with those of the middle class on commercial questions, on this issue they did not. Small creditors usually had debtors with little direct access to property, their debts often being paid by friends and charities. Extended property

remedies would be no substitute for the loss of imprisonment. Their parliamentary allies were the aristocracy, particularly in the House of Lords. The latter's conservative attitude to law combined with a particular self-interest on this issue. They recognised that once imprisonment were abolished, direct property remedies would be even more difficult to resist, particularly wider remedies against land than *elegit*. Thus they broke their old, crumbling ties of paternalism and deference with the poor, and allied themselves with the middling class, who on other issues were their opponents. This relationship with small business was fragile, as their only interest in common was the continuation of imprisonment. They had directly opposed views on the extension of property remedies, although the political importance of land was diminishing. The 1838 Act emerged as a compromise between these opposing interests, working class debtors having little voice in parliament and little effect on the final shape of the Act, as the Courts of Requests were unaffected by it.

This simple instrumentalist explanation requires elaboration. It assumes that there were only five views on the subject in the country, corresponding with the five classes, and that the relationship between those classes was static in the period in question; it does not explain the ferocity of the debate; and it does not explain why the middle class favoured a reform which was not in its direct economic interest, even if it did not harm that interest.

Changing views within a single class were most obvious in the upper class (see Perkin 1969:230,314f). The aristocratic concern for the continued partial immunity of land from direct execution was obvious up until the early nineteenth century. After then, many members of the House of Lords, and not just Brougham, were infected by a new commercial morality, and a new broad alliance with commerce was formed.

As Thompson argues (Thompson 1965), in the late eighteenth and early nineteenth centuries the aristocracy and gentry were threatened by the possibility of the spread of revolutionary ideas across the channel. Rebellious lower orders were also a threat to the newly emerged, wealthy middle class. Despite the fight for a widened franchise having been carried by proletarian Radicals, the beneficiaries of the 1832 Reform Act were the members of the middle class. The legal and social changes which coincided with the new aristocratic and middle class alliance, caused the demise of land as the central social and political institution (see Nairn 1981:Ch 1).³¹ The alliance had control over the new political institutions (see Nairn 1981: Ch 4; Perkin 1969:314f).

As a result, the extension of property remedies to the whole of all kinds of landholdings was accepted by the House of Lords with less reluctance than might have been expected had one assumed that the aristocracy's interest was unchanging. This paper's analysis of the imprisonment for debt campaigns supports Thompson's views in his dispute with Nairn and Anderson (Thompson 1965). The aristocracy adopted the views of commerce, rather than the middle class adopting the outlook of the aristocracy. The House of Lords debates in 1837 and 1838 had no elements of traditional paternalist care for the poor, no reference to nostalgic constitutional arguments (see Thompson 1975:258,269; Thompson 1980:378-379), and relatively little expression of concern about the special place of land. The House of Lords had been much more sympathetic towards debtors between 1813 and 1820, although

even in 1820, commercial values were beginning to become dominant. The House of Lords' acceptance of broadened remedies against land in 1837 and 1838 showed that the process was much more developed by then, even if the "commerce" with which the aristocracy allied itself on this issue was that of small trade. The aristocracy may have consistently opposed the abolition of imprisonment for debt, but its reasons for doing so changed. By 1837, its primary concern was to protect small traders.

The middle class of large traders, bankers and professionals also showed changing views. The evidence given to the Fourth Common Law Commission in 1831-1832 showed that some of them used arrest, and that the majority opposed the abolition of imprisonment. Their advocate, Brougham, played quite a minor role in the debate in the late 1830s, being as concerned about the economic welfare of newspaper proprietors as that of small debtors. By then though, there was very much broader support for reform than there had been in 1831. There was little opposition to it in the Commons, and even opponents in the Lords recognised that there was widespread support for amendment to the law. More importantly, the "neutral" language of utilitarianism had come to dominate the House of Commons on this issue after Brougham's 1828 speech, even if it was not quite so dominant in the House of Lords. The advocates of commerce in the Lords tended to be more open in articulating their values, as did the middling class whose interests concerned many of the Lords.

The middling class of small shopkeepers and self-employed artisans were the most vocal advocates of the retention of imprisonment, even though insolvency lists show that they were very often the victims of imprisonment themselves. Once imprisoned, they may well have changed their minds about the utility of prison and the "small punishment" that was debtors' prison. As they were often victims of imprisonment, it may seem strange that they so often argued for its retention. However, they were more often creditors than insolvents. Their debtors usually had no property, and imprisonment was the only way to get at the assets of the poor, the compassion of their friends and charities. Small traders were in a desperate position. If they did not continue to coerce their debtors through imprisonment, their own creditors would arrest them. The law encouraged ferocious attitudes and actions between creditors and debtors.

Working class arguments against imprisonment changed, but their basic interest remained unaltered. Their argument shifted back and forth from the constitutional view that imprisonment violated the Magna Carta, to the view that it was commercial and legal oppression which must be resisted by collective action. Both views were put in 1838, but little was heard of them in parliament. Their arguments were a background to the final battle, rather than part of the frontline fight. Although their many pamphlets and petitions must have pricked middle class consciences, their anti-commercial tone was not represented in the final debates.

Despite over a century of mitigation of imprisonment through insolvency, better prison conditions, restrictions on mesne process and shortened Courts of Requests sentences, the law just prior to 1838 was very punitive. Creditors had a large degree of autonomy in their decisions to arrest and retain their debtors, and prison was a great deal more than the slight punishment some traders represented it to be. That punishment was partly justified by the evasive and punitive actions of debtors

themselves. Some debtors fled the country (though they were more likely to have fled imprisonment than their debts), arrested their own creditors on the mesne process, deliberately stayed in gaol to avoid payment, lived lavishly in the Rules, manipulated prison conditions, forced their creditors to great expense through legal manoeuvring, and hid their assets from the Insolvent Debtors Court (see *eg* HLSC 1820:57; (17-2-1790)28 PHE 381; HCSC 1816:22 (evidence); Elliott 1838:6).³² Some of their conduct was lawful and some not, while creditors were in such a strong legal position that they rarely needed to act unlawfully. Coercion, mistrust and hostility, were met by the same conduct, the law encouraging a punitive spiral (see Rock 1973:314-315). These hostile attitudes were reflected in the ferocity of the debate. Small traders blamed debtors for their losses and their own imprisonment during recessions, and debtors strongly criticised their creditors' conduct. Traders also claimed that imprisonment could not be abandoned because of the high level of deliberate default and fraud, their basic anti-abolition argument.

In the middle of this hostile debate, Dickens, the newspapers and debtors themselves, convinced many people that something had to be done for debtors, so much so that both Houses ultimately accepted the compromise 1838 Act with few dissenters. The main language of the parliamentary debate, utilitarianism, also favoured reform. It stressed that law could be altered when it was shown to be defective. The unreformed law punished all debtors to a theoretically unlimited extent, rather than only those who were guilty to a limited degree. Property was also seen as only property, whether it was land or intangible choses in action. As Lineham said, humanitarian concern in this period was expressed in utilitarian form, not in evangelical language (though see Smith 1843a and b; 1844a and b). However, the law was not changed simply by the power of ideas and compassion. Altruism was not stretched far enough to hurt the interests of those adopting the humanitarian or utilitarian positions. The middle class was not harmed by the Act. The aristocracy appears to have given up the partial immunity of land, but as I said, land was already losing its special place in society and politics, and the land remedy created by the Act was very cumbersome. Some of the middling class were very disappointed to see the commercial language of utilitarianism turned against them on this issue. Rather than accept the logic of the argument, middling class advocates fought reform all the way. Unlike the middle class, they could not afford to be compassionate.

The specific form of the 1838 Act came about through the complex interaction of several factors: the interaction of the economic interests and self-consciousness of the members of five social classes during a period of rapid social change; a clash of ideologies, including that expressed by law; the form of the campaign documents; a changed attitude to law; and the interaction of the laws of bankruptcy, insolvency, personal and property execution and the small debts courts. This complex picture was further complicated by a shift in the nature of the ruling classes, and a temporary opposition of interests within that group. The aristocracy was not so much losing its power, as merging with the middle class. Its traditional attachment to land was being relaxed, and its temporary allies on imprisonment were middling class small traders. It was accepting the values of utilitarianism, but was not yet willing to take those values to their logical conclusion, despite the clamours of the compassionate. Enough was given to quieten the noise temporarily, but not permanently.

There is an apparent irony in the fact that the “abolition” of imprisonment for debt occurred simultaneously with the ascendancy of commercial values. However, a careful analysis shows that the 1838 Act was no victory for debtors. Working class imprisonment by the Courts of Requests was untouched, and direct property remedies were extended to the disadvantage of debtors with land or intangible property. Superior court debtors obtained the advantage of new heavy restrictions on mesne process imprisonment, but they paid a high price for it. Final process imprisonment continued, and there was soon a return to old imprisonment rates, the form of imprisonment having altered, rather than its substance. They were also faced with direct intangible and landed property remedies, and the loss of their right to remain in prison to protect their property. Thus, the 1838 Act had worsened the position of most debtors. However, small debtors were advantaged by the 1844 abolition of all forms of imprisonment under £20. Unfortunately, that improvement lasted only until the imprisonment power was restored in a new form in 1845. From 1846, County Court imprisonment returned almost to the old Courts of Requests levels, while superior court imprisonment remained at about half what it had been prior to the 1844 Act. Imprisonment was becoming more overtly anti-working class.

Correspondingly, large middle class creditors were advantaged by the 1838 Act. They had lost inexpensive imprisonment on the mesne process, but final process imprisonment continued when it was felt to be required by individual creditors. The larger debts of this group would have justified the extra cost of obtaining a judgment. They also acquired better direct and indirect property remedies.

Middling class creditors felt before the 1838 Act that they would be disadvantaged by its enactment, even in its final form. However, the quick reversion to pre-Act arrest rates suggests that their only loss may have been the greater expense of final process arrest in debts above £20, where mesne process could previously have been used. Some creditors may have found that their enhanced access to property did not outweigh this greater expense.

The aristocracy voluntarily relinquished the partial immunity of land and the right to remain in gaol protecting its assets. Neither was significant in the new world.

The passing of the 1838 Act was less a revolutionary change in the law, than another example of the measures to mitigate imprisonment which had been regularly enacted since the seventeenth century. Its primary beneficiaries were not the poor debtors whose position had engendered the compassionate forces which influenced so many people. It benefited the middle and middling classes more than any other class. That is not to say that this Act was an overt instrumentalist plot by the commercial sectors of society to gain further benefits for themselves while apparently giving way to compassion. Middling class advocates genuinely felt that the Act would harm them, just as humanitarians thought that reform would help debtors. However, the principle of self-interest ensured that the power of altruism did not overcome the power of money.

The commercial values of the middle and middling classes were also enhanced by the Act. It enshrined two of their arguments as law. It became explicitly illegal to leave England while owing an unpaid debt, whether or not the object was to avoid payment (s3). It was also no longer possible for large creditors to remain in prison protecting their assets (s36). They joined the list of commercial offences which were sufficient to prevent immediate insolvency release (such as concealment of financial

affairs and obtaining credit without having a reasonable expectation of being able to pay the debt), as part of the law's ideological message. Commercial self-interest was elevated to universal, neutral law. The law defined legitimate behaviour, and in doing so defined the circumstances in which it was reasonable to default on a loan. It declared that the responsibility for over-extension lay with the debtor, just as the primary responsibility for payment lay with him or her, rather than with the creditor to obtain some of the debtor's property.

The 1838 Act did not complete the process of transformation of imprisonment for debt. The law prior to 1838 had allowed creditors to arrest debtors in even the most innocent circumstances. The Act began the change to a law of arrest only when the debtor was "guilty" of some "offence". Once all imprisoned debtors were declared guilty in 1869, they had lost the ambiguity which had been attached to civil imprisonment since its inception. It was no longer possible to view them as a group of unfortunates. They were guilty individuals, declared so by law. That was so even though their "offences" were commercial, and even though they were very often arrested without inquiry as to the nature of their offences. The utilitarian program for reform was not merely one of less punishment for fixed offences. It was one which ensured that commercial morality was legitimised, and that the only relevant questions were the commercial ones set by the law. One asked whether an offence was committed, not whether debtor and creditor law helped to continue uneven distributions of property. Power lay in the ability to define the topics of inquiry (see Gabel and Harris 1982-1983:372-373).

The middling class writer, Elliott, recognised that the law played a central role in the education of the working classes. In his view, the stern principles of commercial morality had to be taught to the poor, so that their natural tendency to waste their money on immediate gratification could be curbed. Self-discipline, work and credit would all help the poor to climb out of poverty, and imprisonment for debt taught those values. This analysis was accurate as far as it went, but he did not see that the "abolition" campaign was really a campaign for transformation. Only debtors sought true abolition. The utilitarian reformers and even non-commercial humanitarians, such as Dickens, sought only to restrict it to the "guilty". The moral lesson taught by imprisonment would be even clearer once the law declared that all who were in gaol were guilty of a commercial offence. These lessons for the new industrial workforce were also given by many other teachers, including religion (see Thompson 1980:394,401,442,451) and contract law generally, through its assertion that "freely entered" bargains must be kept (see Atiyah 1979:395-396; Thompson 1975:263; Gabel and Feinman 1982).

The 1838 Act was a further encroachment on the creditor's discretion to collect his or her debts in whatever way was most advantageous to him or her. Even in the eighteenth century, there was never complete liberty to treat debtors in any way the creditor wished. The insolvency Acts restricted the length of the sentences of debtors, and there were further restrictions on mesne process and Courts of Requests imprisonment. Like the early nineteenth century reduction in the numbers of capital offences, punishment for debt default was reduced by a series of eighteenth and nineteenth century statutes, of which the 1838 Act was one. However, as I showed in Section 1, one cannot press the criminal law parallel too far. Eighteenth century debt recovery actions were much less often initiated by the

aristocracy and gentry than were criminal prosecutions. There was also no shift in debtor and creditor law to match the criminal law's alteration from private to public enforcement. There are no debt police, or Directors of Public Debt Recovery.

The discretion to imprison debtors was apparently gradually shifted to judicial hands, but the shift was more formal than real. The 1838 Act removed mesne process control to the judiciary, even if the process was still initiated by creditors. The Debtors Act, 1869 placed the final decision to order execution arrest in judicial hands as well, as had the 1845 and 1846 Acts for small debts. However, creditors also initiated that action after those Acts, and the creditor's decision to begin the procedure was usually the last conscious decision made about the imprisonment of a particular debtor. By 1873 it had been found that the judiciary was automatically issuing imprisonment orders, without conscious regard to "guilt" (Walpole Report 1873. See also Unwin 1935 and Kelly 1977:Ch 3, for modern examples of the same complaint). The loss of creditor discretion was thus more apparent than real.

General civil imprisonment was not abolished in Britain until 1970 (Administration of Justice Act, 1970), and it still survives in the majority of Australian states, where the impersonal nature of consumer credit has yet to result in a final shift to impersonal property remedies (see Kercher and Noone 1983:38-43). Even after the true abolition of imprisonment, creditors retain their discretion over property remedies, with only minimal judicial control. In debt collection, the state still plays its eighteenth century role of providing the apparatus by which private property is amassed and collected by individual initiative with a minimum of official interference (see Kercher and Noone 1983: Ch 2; Thompson 1973).

The 1838 Act was the beginning of the transformation of imprisonment for debt, not the beginning of its abolition. Debtors owing over £20 could no longer be arrested before judgment, without formal judicial approval. Creditors shifted their collection efforts to execution imprisonment, and eventually lost that uncontrolled discretionary arrest power as well. That apparent loss was far from the loss of all imprisonment. Nor did creditors lose their actual control over the process of arrest. However, the law had by then formally declared that guilt must be established before imprisonment, rather than the proof of innocence being sufficient for release after prior arrest. The ideological significance of that change is clear. A "neutral" law was teaching commercial lessons and legitimising commercial values. Simultaneously, the focus of imprisonment shifted from the unequal coercion of the members of all social classes (except the middle class, with its exclusive access to bankruptcy), to the punishment of the poor alone (Rubin 1983b; Morris 1965: Ch 9; de Berker 1965; Payne Report 1969: pars 978-982).

Endnotes

1. A clear statement of pre-1838 law is contained in the Common Law Commission's *Fourth Report* 1831-32.
2. Lineham 1974 gives useful summaries of the campaign documents before 1828. I have concentrated on those after that date, especially those of 1837 and 1838 when the debate was at its peak.
3. Their most wordy contribution was in the 1840s when a minister of religion, G.C. Smith, was arrested by another minister. See the 1843 and 1844 editions of *The Mariners' Church Gospel Temperance Soldiers' and Sailors' Magazine* (Vol 30) and *Bethlehem; or the House of Bread* (same author and years) (Smith 1843 and 1844a and b). Other years and other volumes had further relevant

articles, though the magazine's name and volume numbering changed for little apparent reason. It was also called *The Soldiers' Magazine and Military Chronicle* and the *Sailors' and Soldiers' Magazine* at different times. Its flamboyant tone remained unchanged.

4. Insolvency petitions (including petitioners' occupations) were published in the press. See *eg Warwick and Warwickshire Advertiser and Leamington Gazette* for 1840 and 1850-51 and *Law Times* for 1843.
5. Langbein 1983 argues that even Hay's thesis is weak.
6. See Atiyah 1979:517. Few members of the landed class would have been forced to go to prison to protect their property. Even in 1838 they were very slow to pay, but small traders were sufficiently deferential to be reluctant to arrest them: Elliott 1838:15-16.
7. There were poorly supported moves to abolish mesne process arrest in 1814. See Lineham 1974:202.
8. An 1817 Select Committee on the Bankrupt Laws is further evidence of the domination of the House of Commons by commerce. As in the insolvency Committees of the same House, the questions asked of witnesses strongly favoured creditors, the most common being the rhetorical question of whether credit was necessary in a commercial society (HCSC 1817).
9. HCSC 1813-14:4; HCSC 1815:4,13-14; HLSC 1835a-c; HLSC 1835d-e: Minutes 82f; Prison Inspectors, *Second and Third (Home) Report* 1837 and 1837-38; Holdsworth xiii:320; Clay 1861:99; McConville 1981:223,232,233,249; Lineham 1974:78; Duffy 1973:158; Tighe 1832; Dickens 1836-37; and Gillies 1834 all show that eighteenth century conditions continued in debtors' prisons after the Prisons Act and the establishment of the Whitecross Street prison.
10. See Thompson 1980:62,401,441; Clay 1861:90. See generally Perkin 1969:204-205,261-262,287,322; Thompson 1980:845-848,850-854,915; McConville 1981:80-83,220-221; Atiyah 1979:261,274,391-392. On attempts to create a working class utilitarianism, see Thompson 1980:845-848.
11. Duffy 1973 seems to adopt it in arguing that reform prior to 1830 was based on humanitarianism, rather than "legal principles". See pp 86,127,128.
12. Brougham admired Romilly. See (7-2-1828) 18 *Hansard (2nd series)* 129-130 and Brougham 1856:104.
13. On Brougham, see Holdsworth xiii:103; Perkin 1969:210,229-230,305-307,348; Lineham 1974:201,203-205; Beynon 1981:71-72; Cornish *et al* 1978:118-119; Atiyah 1979:370-372; Duffy 1973:iv,96,118,131,136-137,141-142; Eardley-Wilmot 1860. Brougham wrote on a remarkable range of subjects, including political economy, literature, history, physical science, philosophy, the constitution, law, foreign policy, slavery and education. See Brougham 1856. He wrote on debt law as early as 1812. See Brougham 1856:107.
14. "There is not a worse constituted tribunal on the face of the earth, not before the Turkish *cadi*, than that at which summary convictions on the game-laws take place; I mean a bench or a brace of sporting justices." (7-2-1828) 18 *Hansard (2nd series)* 166. The more important attacks were on the superior courts.
15. Duffy 1973:141 shows that modern lawyers share Brougham's perception of what is natural common sense.
16. Common Law Commission, *First Report* 1829:489 (evidence of Mr Serjeant Edward Lawes).
17. The *Fourth Report* of the Common Law Commission argued that pre-judgment property seizure would be more unjust than pre-judgment arrest : 1831-32:16.
18. See Cornish *et al* 1978:120. In 1830, the number of superior court judges was also raised from 12 to 15, which had been one of Brougham's proposals. There were still only 15 in 1867. See Abel-Smith and Stevens 1967:48. The fusion of the courts was left to an 1867 Royal Commission on the Judicature: Abel-Smith and Stevens:48.
19. *Contra* Lineham 1974:208-209,211, who claims that the evidence showed that bankers and large merchants tended to doubt the utility of arrest, while small shopkeepers favoured it. That is misleading in that it implies that most large commercial houses favoured reform.
20. This was not the only example of anti-semitism in the campaign.
21. Except that that was one explicit object of the Common Law Commission's *First Report*!
22. Lineham 1974:218 names the soap boiler as Hawes and the lawyers as Campbell and Brougham.
23. Other novels set in debtors' prisons included Smollett, *Roderick Random* (1748) Ch 61; Thackeray, *Vanity Fair* (1848) Ch 53; Thackeray, *The Virginians* (1859) Chs 45f; and Thomson 1879. See Lineham 1974:77-78 for a longer list.
24. Collins 1964:89,193-194,316-317,319. Even the 1867 Charles Dickens edition of *The Pickwick Papers* included a reference to his pleasure at the alterations that had taken place to imprisonment for debt and his hope that the poor would be better treated. He may have wished to enhance his own reputation. His reformist reputation was renewed by Trumble 1896:104-105; and Parry 1914:44-45, referring to *The Pickwick Papers*.

25. Letter to author from D.J. Johnson, Deputy Clerk of the Records, Record Office, House of Lords, 8 November 1983. There were 17 Committee members including Cottenham, Wellington, Redesdale, Ellenborough, Lyndhurst, Brougham and Abinger (Anonymous 1838b:31). The same pamphlet shows that little was known about the Select Committee's proceedings even in 1838.
26. Brougham lost the point. See (1838) 1 & 2 Vic c110, s115.
27. Registration began in 1692: Holdsworth xv:114.
28. The ACT Court of Petty Sessions Ordinance 1930, s162(1) lists the same kinds of property to the total value of \$100, showing that ancient statutory formulae tend to linger: see Kercher and Noone 1983:30.
29. 1837 [89] XXXII.1 : 448-449; 1839 [210] XXI.1 : 18a-19a; 1840 [283] XXV.1 : 36a-37a; 1841 Sess 2 [347] IV.1 : 54a-55a; 1842 [422] XX.1 : 54a-55a; 1843 [519] XXV and XXVI.31 : 54-55; 1844 [541] XXIX.1 : 54-55; 1846 [753] XXI.1 : 54-55; 1847-48 [925] XXIV. 373 : 54-55; 1847-48 [1006] XXV. 461 : 54-55; 1850 [1173] XXVIII. 1 : 48-49; 1851 [1384] XXVII.1 : 58-59; 1856 [2047] XXXII.I : 55-59; 1856 [2056] XXXII.329 : 58-59; 1856 [2057] XXXII. 635 : 58-59; 1856 [2121] XXXIII. 73 : 58-59; 1857 [2169-Sess 1] VII.1 : 58-59 (the Prison Inspectors, (*Home Reports*, 1836 year to 1854 year); and Return of the Number of Persons Confined for Debt 1839 : 2.
30. These conclusions were confirmed by R.G.W. 1844:89. The most passionate campaigner of the 1840s, G.C. Smith (Smith 1843a, 1843b, 1844a, 1844b), wrote nothing about the 1838 Act in his hundreds of pages on imprisonment for debt, presumably because the Act had little effect.
31. The parallel US development is traced by Fraser 1983.
32. These tactics had existed for centuries. See Dobb 1952:19-20.

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