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Paul Johnson

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Paul Johnson

Economic History Department,
London School of Economics.

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Paul Johnson,
Department of Economic History
London School of Economics,
Houghton Street,
London. WC2A 2AE.
United Kingdom.

Telephone: +44 (0)171 955 7061
Fax: +44 (0)171 955 7730

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Creditors, Debtors and the Law in Victorian and Edwardian England[1]

In 1853 the granddaughter of the eminent English jurist, Sir William Blackstone, entered in her local County Court a plaint for damages against Thomas Turner, agricultural labourer and part-time town crier of Wallingford in the county of Berkshire. Following an earlier legal dispute between Turner's brother, William, and Miss Blackstone over the rent of allotment gardens, in which the case against Blackstone had been dismissed, Thomas Turner was alleged to have assaulted Miss Blackstone as she left the court. According to the plaintiff, Turner 'thrust both his clenched fists' at her over the shoulder of another man, 'and struck at me three or four times close to my face. He did not touch me but was very close.... He also made use of some very opprobrious expressions unfit for any woman to hear. He said "D--- your b--- eyes you have robbed and swindled me of £30".'[2]

The initial reason for the resort to legal process by William Turner, and common to the great majority of cases pursued through the new County Courts established in 1846, was an alleged contractual debt. Indeed, the legislation establishing this County Court system, which rapidly came to dominate all other civil courts in terms of the volume of business conducted, was entitled 'An Act for the more easy Recovery of Small Debts and Demands in England.'[3] However, these courts also had jurisdiction in actions founded on tort, up to the value of £50, and it was on this basis that Miss Blackstone brought her case for damages against Thomas Turner. This case of *Blackstone vs. Turner* is of significance for reasons other than the juridical ancestry of the plaintiff, because it illustrates some of the biases of court procedure and sentencing policy in these lowly civil courts.

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[1] This paper was prepared for a conference on 'Private Law and Social Inequality in the Industrial Age' held at the German Historical Institute, London, 14-17 December 1995.

[2] *Berkshire Chronicle*, 16 July 1853.

[3] 9 and 10 Vict. c. 95.

Thomas Turner 'conscientiously, strongly and firmly' denied that the alleged offence of constructive assault had been committed, though he agreed his language had been unguarded. Blackstone called forth her maid, her land surveyor, a butcher and a labourer as witnesses to the assault; Turner called a hotelier, two painters, a bootmaker and his daughter (who also happened to be, respectively, his brother-in-law and niece), all of whom attested to the fact that they had not seen Turner raise his fists. Judge J.B. Parry, Q.C., had no doubt about Turner's guilt, since in his view 'if every person in that court had been called and said they did not see the defendant strike the plaintiff, it could not have countervailed the evidence of unimpeached witnesses.'[4]

This unequivocal verdict stood at odds with the evidence. Miss Blackstone had initially attempted a criminal action against Turner, and had taken out a summons for him to appear before the magistrates, but had been forced to abandon that course,[5] probably because of the flimsy nature of the case. One anonymous Wallingford J.P. noted in a letter to the *County Courts Chronicle* that there had been 'a great discrepancy of the evidence produced, and several credible witnesses swore positively that no assault had been committed.'[6] Why Judge Parry took such a one-sided view of the conflicting evidence is unclear, but the social pressures for him to do so must have been great. Miss Blackstone's brother, William Seymour Blackstone was the Deputy Lieutenant for Berkshire, had been the Conservative M.P. for Wallingford for the twenty years from 1832, the family had the patronage of the Anglican living at Wallingford,[7] and according to Dod's *Electoral Facts* in 1853, 'the territorial and

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[4] *Berkshire Chronicle*, 16 July 1853.

[5] Ibid.

[6] *County Courts Chronicle* (herafter *CCC*) Sept. 1853, p. 120.

[7] M. Stenton, *Who's Who of British Members of Parliament: Volume I, 1832-1885*. Harvester Press, Hassocks, 1976. p. 36.

personal influence of Mr Blackstone and his family' remained considerable.[8]

We see in this verdict a clear favouring of the word of a person of standing above that of a labourer. This is perhaps not surprising; similar social biases in the evaluation of witnesses and the assessment of evidence were a powerful force in the shaping of the Victorian criminal justice system.[9] What is more revealing here is the nature of the sentence passed and the way it was enforced by this minor civil court. Judge Parry awarded damages at the maximum sum of £50, plus full costs, to Miss Blackstone, and quite exceptionally ordered immediate execution of this award. Turner could not pay, and so his personal possessions were seized by the court bailiff; at sale they realised just £3 3s. Turner was then ordered by the court to pay off his debt at the rate of 6s. per month, which, in the words of the *County Courts Chronicle*, had the effect of 'alienating a considerable proportion of his weekly earnings for seventeen years prospectively, and subjecting him, in default of payment, to repeated monthly imprisonments during the whole of his future life'.[10] Turner defaulted on the first instalment, and in November he again appeared before Judge Parry, now owing £63 12s. 9d., a result of additional court charges.

In the previous month Turner had earned an average of 14s. 8d. per week, on which he attempted to maintain his wife and five dependent children aged between 18 months and 15 years. He had spent his savings of over £6 on legal expenses, and since the seizure and sale of his personal property the family had no possessions other than clothing and basic household goods. Nevertheless Judge Parry concluded that Turner had had the means to pay his instalment, and had wilfully refused to do so. Turner was sent to Abingdon Gaol for 30 days for deliberate non-payment of a debt; his wife and family sought relief in the local workhouse. When William Church, 'a

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[8] C.R. Dod, *Electoral Facts from 1832 to 1853*. Whittaker and Co., London, 1853. p.323.

[9] Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent*. Oxford University Press, New York, 1991.

[10] *CCC*, January 1854, p.4.

respectable tradesman of the town' rose in court with an offer to pay the instalment on behalf of Turner, he was 'ordered by the judge to sit down and remain silent.'[11]

The evident vindictiveness of Judge Parry's decision inspired the 'leading inhabitants and tradesmen' of Wallingford to send a deputation of protest, led by the mayor, to the Home Secretary, Lord Palmerston. They argued that, regardless of the merits of the verdict in the case of *Blackstone vs. Turner*, the sentence was unjust in principle:

> People of England with all their boasted privileges, could never live in a state of security if upon any trivial breach of the law, they might be subjected to fines amounting to more than the whole of their property, or, in default of payment, to imprisonment during the whole of their lives.[12]

Palmerston was reported to have taken a *prima facie* view that the case was one of great 'hardship and cruelty',[13] but as the *County Courts Chronicle* noted, this was 'a wrong without a remedy.'[14] The judge had acted strictly within the law, there was no right of appeal from the County Court to a higher court, the Secretary of State had no power to interfere with the orders of a judge, and the Royal prerogative did not extend to custody under civil process. Thomas Turner had received a sentence of virtual life imprisonment from a civil court because of non-payment of a debt incurred through an alleged minor verbal abuse of a middle class woman.

The case of Thomas Turner was exceptional in its detail, but the imprisonment of small debtors by County Court judges was common, both before and after the 1869 Act 'for the Abolition of Imprisonment for Debt'.[15] Yet large-scale debtors, those who had the financial status and presence of mind to petition for bankruptcy, could

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[11] *Berkshire Chronicle*, 19 November 1853.

[12] *Berkshire Chronicle*, 17 Dec. 1853.

[13] Ibid.

[14] *CCC*, January 1854, p.4.

[15] 32 & 33 Vict., c.62.

avoid the double jeopardy faced by Turner of a creditor imposing a substantial claim on his future income, and threatening imprisonment in the case of non-payment. Bankruptcy was intended to facilitate a rational distribution of assets to creditors, not saddle the debtor with long-term liabilities. By the 1870s the nature and extent of this legal discrimination was widely recognised. It was not just the radical political economist Leoni Levi who was noting the 'incongruity, if not injustice' in this system[16]; a leading article in *The Times* concluded that 'the law is really unfair and unequal. Under an appearance of justice to all classes, it presses hardly on some'.[17]

The differential treatment of what, almost oxymoronically, might be called 'rich' and 'poor' debtors, appears to be at odds with both contemporary and modern interpretations of the rise of contract law in Victorian England. In his *Treatise on the Law of Contracts*, the legal theorist Charles Addison argued in 1847 that 'the law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal'.[18] More recently, Patrick Atiyah has suggested that 'the period 1770-1870 saw the emergence of general principles of contract law closely associated with the development of the free market and the ideals of the political economists'.[19]

While general principles may characterise some elements of contract law in Victorian England, they do not seem to apply to the legal relationship between creditors and debtors. Despite three official enquiries into the working of the County

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[16] L. Levi, 'On the Abolition of Imprisonment for Debt', *Law Magazine and Review*, 3 (1847), p. 598.

[17] *Times*, 27 December 1879, reprinted in *County and Borough Prisons: Correspondence in the 'Times'*, Howard Association, London, 1880, p.6.

[18] Cited in P.S. Atiyah, *The Rise and Fall of Freedom of Contract*. Oxford University Press, Oxford, 1979. p. 400.

[19] Atiyah, *Rise and Fall*, p. 398.

Courts and the imprisonment of small debtors between 1873 and 1909[20], there was no move towards universalism in the law regulating the recovery of debts in the Victorian and Edwardian period. As well as suffering their poverty, the poor had to suffer an overtly prejudicial class bias in the one area of contract law that had direct and repeated bearing upon their lives.

In this paper I want to consider why small debtors received disproportionately harsh treatment as compared with bankrupts - in other words, why legal theory and legal practice were so consistently and enduringly at odds with each other. I will examine, in turn, four possible explanations for this discriminatory treatment: differences in the legislative basis of the separate debt recovery systems relating to bankruptcy and small debts, differences in their practical procedures, differences in the economic circumstances of the debtors, and differences in their social status. However, in order to provide some context for this discussion I will first present a brief outline of the development of the law relating to small debts and bankruptcy in Victorian England.

I

In 1846 a comprehensive system of County Courts was established to supersede the idiosyncratic network of Courts of Requests through which civil actions for low value had hitherto been conducted.[21] The County Courts had jurisdiction where the debt, damage, or demand claimed did not exceed £20, a limit raised to £50 in 1850 and to £100 in 1905.[22] This definition of 'small' was relative. In the 1850s few manual workers, even skilled artisans, could have earned more than £1 per week, a

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[20] *Select Committee on Imprisonment for Debt*, PP 1873 XV; *House of Lords Select Committee on the Debtors Act* PP 1893-4 (HL) IX; *Select Committee on Debtors (Imprisonment)* PP 1909 VII.

[21] H.W. Arthurs, '"Without the Law": Courts of Local and Special Jurisdiction in Nineteenth Century England', *Journal of Legal History* 5 (1984), 130-49.

[22] Sir Thomas Snagge, *The Evolution of the County Court*. William Clowes, London, 1904. p.14.

figure that may have doubled by the turn of the century,[23] so debts equal to a year's wage income could be pursued through these courts. In practice the sums owing were generally much less. Throughout the period 1847-1914 over 98% of cases were for sums of less than £20, with an average amount owing of around £3,[24] and many claims were for less than the equivalent of a week's wages. Court records from both London and an industrial area of north-east England for 1910-11 show that half of all small debt cases were for sums owing of less than £1, and a quarter were for less than 10 shillings.[25]

The County Court system was an immediate success, at least in terms of the amount of business conducted. In the first quinquennium the yearly average of causes was 433,000, and by 1904 over 1.4 million plaints for recovery of debt were initiated in these courts. This may, in part, have reflected the accessibility of the courts. Despite their name, the County Courts were not organised by administrative county, but instead the country was mapped out into 60 circuits encompassing over 500 court towns, chosen according to the Registrar General of Population's enumeration districts.[26] Court towns within each circuit had an average range of jurisdiction of seven miles, which was considered a reasonable distance for a plaintiff or defendant to walk in order to attend a hearing.[27] Accessibility to the due process of law was

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[23] C.H. Feinstein, 1990, 'New estimates of average earnings in the United Kingdom, 1880-1913', *Economic History Review* 43: 595-632.

[24] Aggregate statistics of court business are derived from the returns of the county courts, published annually in the Judicial Statistics volume of the Parliamentary Papers. See also H. Smith, 'The Resurgent County Court in Victorian Britain', *American Journal of Legal History* 13 (1969), pp. 126-38, at p.128.

[25] West Hartlepool County Court plaint book, 1910; Public Record Office AK 19/9 (these records have now been transferred to the Cleveland County Archives); Wandsworth County Court, ordinary summons book B (1911); Greater London Record Office AK21/1

[26] Snagge, *Evolution*, p.13. There were 59 new County Court circuits, plus the existing City of London court.

[27] J.E.D. Bethune, Report to the Lord Chancellor on the formation of County Court Districts, 19 Dec. 1846. Public Record Office, Kew, LCO 8/1 137401.

a necessary requirement of a more general and commercial system of contract law, and in this sense at least, County Courts fit with the rationalising process noted by Atiyah.

However, a logical organisational structure does not guarantee the application of 'universal law', and in the case of recovery of debts in nineteenth-century England universality was undermined by the evolution of a quite separate but parallel legal system for the administration of bankruptcy. Although the substantive law of bankruptcy was in place in England by 1800, the nineteenth century saw successive attempts to improve the efficiency of bankruptcy administration.[28] Important legislative changes in 1831 and 1883 expanded the role of government in the management of bankrupt estates, although in the 1860s there was a short-lived reaction against 'officialism' and a return to creditor-managed administration. However, the basic principles of bankruptcy endured throughout the century. Traders, and from 1861 non-traders who owed substantial debts, could file a petition in bankruptcy. Debtors had to be fairly wealthy to go bankrupt, since a £10 fee was levied on bankruptcy petitions, but this could be a sound investment. Bankruptcy status protected the assets of the debtor from summary seizure by creditors, and safeguarded any future earnings from claims arising from previously acquired debts and liabilities.

The annual business of the bankruptcy courts was, relative to the County Courts, minuscule in terms of number of cases, but significant in terms of sums owing. Up to 1860 there were between 1,100 and 2,000 cases annually, with losses averaging £4 million to £5 million a year. After the 1883 Bankruptcy Act, there were around 4,000 bankruptcies a year, with losses averaging £5 million - a not dissimilar figure to the more than £4 million of debts annually being pursued through the County Courts in the Edwardian period. It should be noted that formal bankruptcy was not the only way of shedding debts; private arrangements between creditors and debtors appear to have been more numerous than formal bankruptcy proceedings at least until

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[28] The nineteenth century reforms of bankruptcy law are covered in detail in V. Markham Lester, *Victorian Insolvency*. Oxford University Press, Oxford, 1995.

the 1880s, and the growth in the number of limited liability companies meant that by the end of the century company winding-up accounted for annual losses in the order of £20 million[29] .

However, it was not differences between County and bankruptcy courts in the average size of debt or number of cases heard which produced the accusations of unfairness, injustice, and class bias in the treatment of debtors. What concerned the critics was the relative viciousness of the County Courts in exacting full payment from small debtors, and in imposing penal sentences on those who could not or would not pay. In the small debt courts, when a case was found for the plaintiff (and the chances of a case being found for the defendant were never better than 1:50, and usually nearer 1:100)[30], the debtor was required to pay 100 per cent of the sum owing. Since, almost by definition, small debtors had few assets, the requirement to pay off the debt in full was effectively a lien on future earnings. This contrasted with bankruptcy proceedings where the object was to distribute the bankrupt's remaining assets proportionately among the creditors on some pro-rata basis which seldom exceeded a payment of 10s. per £ of debt, and to prevent creditors exercising a claim on the future earnings of the bankrupt. In the case of small debtors, past errors were to be redeemed by future virtue, while for bankrupts, past errors were to be written off.

The degree of financial discrimination against small debtors was striking, but it was not the primary justification for describing the legal system of debt recovery as 'class law'.[31] This epithet was used particularly to characterise the quite iniquitous system of imprisoning small debtors who failed to redeem their debt by paying-up the sums due, and at the times specified by the court. Arrest on *mesne* process was

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[29] Lester, *Insolvency*, pp. 240-6; 306-13.

[30] Johnson, 'Small Debts', p. 67.

[31] Paul Johnson, 'Class Law in Victorian England', *Past and Present* 141, (1993), pp. 147-69; G.R. Rubin, 'Law, Poverty and Imprisonment for Debt, 1869-1914, in G.R. Rubin and David Sugarman (eds.), *Law, Economy and Society, 1750-1914*. Abingdon, 1984. pp. 241-99, at pp. 275-6.

abolished in 1838, and the Debtors Act of 1869, entitled 'An Act for the Abolition of Imprisonment for Debt' appeared to abolish arrest and imprisonment on final process,[32] but in practice, as Gerry Rubin has demonstrated in his pioneering analysis of this Act, several thousand people each year continued to be incarcerated for non-payment of small debts.

As well as being discriminatory, this retention of the power of committal over small debtors seems to run counter to the more general, rational and market-oriented development of contract law in the Victorian period described by Atiyah. If the purpose of a legal system for the recovery of debt is to maximise the payments to creditors, it seems perverse to apply the sanction of imprisonment on the debtor, since this will almost of necessity prevent him acquiring or earning the means to pay. Imprisonment for debt signified the continuation of a pre-modern punitive sanction against the body of the debtor for his economic transgression. Bankruptcy proceedings, on the other hand, sought a rational distribution of economic loss among the creditors, on the principle they had all openly entered into contracts with the defaulting party, and had to accept the downside of market fluctuations and business failure.

II

Describing the difference in treatment of bankrupts and small debtors is easy; explaining it is more tricky, especially when we know that the prejudice the law expressed towards small debtors was widely recognised by contemporaries. Was the utilitarian pursuit of general legal principles, rational administration and equal treatment nothing more than a rhetorical smoke screen to disguise blatant class prejudice, or should we look for a more complex and more subtle historical explanation? I believe that in most respects both the reforms to, and the operation of,

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[32] Arrest on final process had been abolished for debts of less than £20 in 1844, but in 1845 this liberalising measure was reversed by a new Act which designated as fraudulent any debt contracted by an individual lacking any reasonable prospect of being able to pay; a condition which applied to most working-class debtors most of the time. Fraudulent debtors were not exempted from arrest on final process by the 1844 Act. See Rubin, 'Law', pp. 244-9.

the laws of bankruptcy and indebtedness were rational and equitable; that the outcomes should have been so diverse is a consequence of contemporary presumptions about economic psychology and moral worth. In order to make this case I will look in turn at the legislative basis and the practical procedures of the small debt and bankruptcy systems, at the economic circumstances of the debtors, and at their social status.

Legislation

The legislative intention of the 1846 Act which established the County Courts was clear - to improve the efficiency of debt collection. Pursuit of debtors through the existing Courts of Request involved a number of hindrances which became increasingly burdensome as the scale and range of commercial activity expanded in the era of the penny post and the railway. The commissioners or judges who decided on cases in these courts were laymen (by the 1830s they had to be substantial property owners) with limited legal knowledge, and limited time to devote to hearings. More important, perhaps, the jurisdiction of the Courts of Request was geographically limited and judgements could not be enforced against defendants whose goods or persons lay beyond the court borders.

What the County Courts provided, from 1847, was a comprehensive and standardised network of small claim courts, with common competences and rules of procedure. There was an official code of rules, common forms and scale of costs, judges were trained lawyers with seven years' standing at the Bar (later raised to 10 years), and they were assisted by Registrars who required five years' standing as solicitors.[33] This professionalisation of small debt recovery procedure was not restricted to the judiciary; lawyers also enhanced their status by obtaining a near monopoly of the right to represent litigants, to the exclusion of unqualified 'low attorneys'. The 1846 Act gave courts the power to refuse to hear any but the parties to a suit or their attorney or counsel. In practice this work was conducted by solicitors rather than barristers; there was no acknowledged County Court Bar, even

[33] Snagge, *Evolution*, p. 12.

in the largest towns.[34] There remained, however, some ambiguity about exactly who could speak on behalf of whom in court. Narrow application of the restrictive conditions of the 1846 Act[35] gave way to a recognition that working men might often be unable to attend a hearing and so should be allowed to be represented by a wife or other family member or even a 'friendly neighbour'. Likewise employers could be represented by someone in their employment, for instance a book-keeper, but judges attempted, not always successfully, to draw the line at 'the class of accountants and debt-collectors' because 'their function is not to represent absent parties'.[36]

H.W. Arthurs has written rather negatively of the way in which the 1846 legislation saw the final demise of local and communal justice and the rise of formalism and professionalism[37], but in terms of rational administration on general principles, the County Courts represented a positive step along the progressive path outlined by Atiyah. Greater legal formalism was a way of reducing the discretion of the courts and, as far as parties to any contract were concerned, of increasing the certainty of outcome. In economic terms, this contributed to an overall reduction in transaction costs, a factor identified by institutional economists as a key element in the development of the industrial economies in the 19th century.[38]

Victorian legislation on bankruptcy was similarly intended to improve efficiency

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[34] Snagge, *Evolution*, pp. 23-4; David Sugarman, 'Simple images and complex realities: English lawyers and their relationship to business and politics, 1750-1950', *Law and History Review* 11(2), Fall 1993, 257-301. See particularly p.295.

[35] CCC (4), September 1847, p.79.

[36] Comments of Judge Snagge in Halifax County Court, on the question of unqualified practitioners. CCC (31) April, 1888, p. 368. The fact that this opinion needed to be reiterated more than forty years after the establishment of the county courts indicates that the boundaries of professional competence between lawyers and other professionals or quasi-professionals remained contested throughout the Victorian period. See D. Sugarman, 'Qui colonise l'autre? Réflexions historiques sur les rapports entre le droit, les juristes et les comptables en Grand-Bretagne' *Droit et Société*, 7 (1993), pp. 169-82.

[37] Arthurs, 'Without the Law', pp. 143-4.

[38] Douglass C. North, *Institutions, institutional change and economic performance* Cambridge University Press, Cambridge, 1990.

and reduce costs; this has been analysed recently by Markham Lester. He sees this history as fitting very definitely into Atiyah's model of reform induced by classical economic ideals, even though the creation of the posts of official assignee by the 1831 Bankruptcy Act, and official receiver under the 1883 Act, do not conform to an absolutist interpretation of *laissez-faire* government.[39] The primary intention of these reforms was to promote a more efficient administration of bankrupt estates, and to maximise the dividends paid to creditors. Some legal regulation was required to ensure the rational distribution of assets among a multiplicity of competing claims from creditors, and to prevent bankrupts spiriting away any assets in their possession before administration of their estate could begin. There were substantial differences of opinion, within both the commercial and legal communities, about how these goals could best be achieved, but little disagreement about the goals themselves.

Procedure

Legislative intent may not be translated into effective action. How rational, general, open and efficient was the system of debt recovery in practice? Bankruptcy administration faced a particular procedural problem in the case of small estates - it was not worth the while of any individual creditor to expend time and effort administering the bankrupt's estate for a small share of the dividend, and collective supervision of private assignees was also often more trouble than it was worth. The result was erratic, sometimes irresponsible, and sometimes corrupt administration of bankrupt estates, yet consistent bankruptcy administration was a necessary feature of an efficient commercial society. Private interest was not sufficiently motivated to ensure the public good, and it was this failure of both individual and collective action in the case of small estates that motivated Lord Brougham to propose that an official assignee be appointed by the court to administer the bankrupt estate, and to draw appropriate compensation from the estate. This element of officialism was a key component of the 1831 Bankruptcy Act.

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[39] Lester, *Insolvency*, pp. 301-2.

The introduction of official administration may have promoted the public good by imposing a more standardised and rational procedure for the distribution of assets to creditors, but the creditors themselves were far from convinced of the merits of the system. Lester has shown that the business community, although far from unanimous in its attitudes towards bankruptcy reform, was vociferous in its opposition to official administration. The principal complaint related to cost; the expenses of administration on average consumed one third of the assets available for distribution in a bankrupt's estate.[40] Yet a return to creditor-managed bankruptcy in 1869 did nothing to reduce costs, and the 1883 Act which re-imposed administration by official receivers for bankruptcies with assets under £300 failed to bring administration costs below 40% of gross receipts in these smaller cases.[41]

The small debt courts, by comparison, were models of efficiency. The average debt was around £3, the cost of entering a plaint and issuing a summons for a claim of this sum was 4 shillings, followed by a further charge of 1 shilling for taking the admission if the case was admitted, or 6s. 9d. for a hearing. For a straightforward case of average value, therefore, costs represented around 8% of the sum owing if settlement was achieved before a court hearing, and 18% if the case came to court. Even if a case was pursued through to the issue and execution of a warrant of commitment, the additional fees amounted to only 1s. 2d. per £ of debt, or a total cost of under 24% of the average debt.[42]

Not only was the small debt recovery procedure cheap, it was also quick. The first stage was for the creditor to enter a plaint for recovery of the debt with the registrar of the court. This plaint gave the name and address of the alleged creditor and debtor and the nature and size of the alleged debt. A summons stating the

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[40] Ibid, p. 133.

[41] Ibid, p.295.

[42] Scale of Court Fees. *CCC* March 1855. See also *Select Committee on Imprisonment for Debt*, P.P. 1873 XV, q. 197 (Evidence of Mr Henry Nicol, superintendent of County Courts in the Treasury).

substance of the action was then served on the defendant, giving the date of a court hearing, which was usually within four weeks of a plaint being entered. If the case came to court and a judgement was issued, it was up to the plaintiff to secure the compliance of the debtor. If the debtor could not or would not pay, the creditor could apply for a judgement summons to be issued, which obliged the debtor to attend court to explain why he had not paid as directed. If a defendant failed to attend a judgement summons hearing without notification of good cause, then a warrant for execution against goods owned, or for commitment to prison for up to 6 weeks, was issued against him. Few cases went this far; on average only 60% of cases came to court, judgement summonses were issued in about 20% of cases, warrants of commitment issued in about 7%, and imprisonment enforced in less than 0.5% of cases.

Universal accessibility to a uniform system of law had been one of the objectives in the establishment of the county courts, and simplicity of procedure was held to be an important element of accessibility. Particulars of claims were entered in straight forward language in the plaint book, parties were able to be witnesses in their own case, and judges were empowered to admit hearsay evidence about, for instance, a defendant's ability to pay. Compared with the complexity of bankruptcy administration, this was almost a model of plain man's law, although which plain man benefited could depend on the outlook of the particular judge or registrar. In 1905 the President of the County Court Registrars' Association prompted a fervent exchange of opinion in the trade journal, the *County Courts Chronicle*, by stating in his presidential address that:

> In the smaller class of cases, as they knew, they did not insist on the rules of evidence. No registrar who knew his business thought of insisting on the rules of evidence. He asked for the tradesman's books the very first thing, and, if the entries were properly made up and in order of date, that was taken as *prima facie* evidence in many cases to which, very rightly, a great deal of importance was attached.[43]

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[43] *CCC* July 1905, p. 175. See also correspondence in *CCC*, August 1905, p. 203.

Yet this flexibility could equally work in the interests of the debtor. Courts had no resources to investigate the means of each defendant, and in determining the size and frequency of repayment instalments they typically took the unsubstantiated word of the defendant or his representative about how much could be afforded each week or month.

In the early days of the County Courts some judges took informality and accessibility too far, at least in the eyes of the *County Courts Chronicle*. At Brentford County Court in 1847, not only did the court sit in the back room of a public house, with large numbers of 'intoxicated and noisy' defendants present, but the judge, clerk and high bailiff all sat at 'at a common lodging table, none of them being distinguished by any badge of office'.[44] The *Chronicle* remarked that Judges should always appear in wig and gown, and clerks in robes, because 'it is a form in the administration of justice to which the public mind has become so familiarised that it will not associate the idea of equal dignity and importance to a Court that shows them not.'[45]

Concern about the public 'face' of justice, as represented by the theatre of court proceedings, recurred throughout the years up to 1914. In 1905 it was reported that Judge Edge had refused audience to an unrobed solicitor in his court, even though robing was a recommendation, not a requirement, of the Law Society; in an echo of the discussion almost sixty years earlier, it was suggested in the *County Courts Chronicle* that robing should be enforced 'to maintain the dignity of the legal profession'.[46] But the stage set was as important as the costumes. After an extension of the jurisdiction of the County Courts in 1903 the editor of the *Chronicle* lamented the 'disgraceful accommodation at the metropolitan County Courts', and argued that their physical facilities should be enhanced to match their increased importance. As in Brentford in 1847, part of the concern was that the propriety of legal proceedings was being compromised by an association with common drinking

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[44] *CCC*, Sept. 1847, p. 77.

[45] *CCC*, October 1847, p.?.

[46] *CCC* May 1905, p. 123.

dens. In Westminster County Court, of all places, it was claimed that:

> The registrars' court is about as large as a railway carriage, and situate in a sort of passage; the robing-room is about the same size, and has no adequate accommodation at all. There are no waiting rooms or proper lavatories for suitors. Consultations must be held in the public street or the public house. In the court, counsel, solicitors, witnesses and judge are all huddled together in a miniature Black hole of Calcutta.[47]

But if the external status of the courts continued to be a cause for concern, their rising professional status was a matter for some self-congratulatory puffery; fifty years on from the foundation of the County Courts, the *Chronicle* could boast that of the 29 judges appointed in the previous 6 years, 13 were QCs.[48]

There was no obvious sign of this growing legal formalism crowding out the layman's direct access to the due process of law. Whilst many traders used solicitors to represent them in court, in a minority of cases working-class plaintiffs appeared in person to pursue their claims for payment by lodgers or for repayment of small loans. [49] It is unclear how far this use of the County Courts by working-class plaintiffs indicates a general acceptability of the institution and the process of debt recovery. The enormous number of cases annually processed by these courts must mean that the experience of being 'County Courted' was common among manual workers, even though defendants failed to attend initial hearings in around half of all cases that came to court. For those who did attend a hearing (or, as was frequently the case, whose wife attended the hearing), the experience of court procedure must have been breathtaking; records of the West Hartlepool court show that cases were heard and judgements dispensed at the rate of one every 85 seconds.[50]

If we compare bankruptcy and small debt procedure in terms of cost, speed,

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[47] *CCC* January 1905, pp. 3-4.

[48] *CCC*, April 1897, p. 87.

[49] Johnson, 'Class Law', p.166, note 61.

[50] Johnson, 'Small debts', p. 70.

and accessibility, then it is small debt recovery in the County Courts that most closely reflects a universal law responding to the novel needs of a commercial society.[51] It seems unlikely, therefore, that the widely perceived discriminatory nature of small debt enforcement can be attributed either to differences in the legislative basis or the procedural norms of the bankruptcy and small debt courts. Perhaps, then, the explanation lies in substantive differences in the economic circumstances of bankrupts and small debtors.

Economic Circumstances

The majority of defendants in the small debt courts were male manual workers - in the small number of plaint books I have found in which occupation is recorded, over 90% of defendants fall into this category, with around 5 % being dealers or traders of some sort. The plaintiffs were overwhelmingly local traders, with drapers usually heading the list, but with general dealers and grocers following closely behind.[52] In the bankruptcy courts, on the other hand, grocers, publicans, builders and farmers constituted the largest categories of debtors, followed by bootmakers, tailors, drapers, butchers and bankers.[53] In the main, therefore, bankrupts were shopkeepers and dealers who owed other traders, small debtors were working men who owed shopkeepers and dealers.

But this clear distinction by occupation becomes fuzzy when we attempt to distinguish by reference to the financial value of the debts. By the late Victorian and Edwardian period, between 30 and 40% of bankruptcy estates had a gross asset value of under £25, with an average value of around £12. By comparison, in 1911 the average per capita value of working class financial assets held across a broad array of

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[51] Atiyah, *Rise and Fall*, pp. 518-9.

[52] Johnson, 'Small Debts', p. 68.

[53] Lester, *Insolvency*, pp. 314-5.

saving and insurance institutions was around £11[54], and a contemporary estimate put the average value at death of working class estates in the period 1899-1904 at £16[55]. Around one third of bankrupts, therefore, were indistinguishable from the majority of adult male manual workers in terms of the value of their accumulated financial and non-financial assets.

If we examine the financial threshold of claims allowable in the County Courts we also find no clear distinction between small debts and bankruptcy. In 1910, 70% of bankrupt estates yielded gross assets of less than £100, which was the maximum threshold for action in the County Courts. Of course the stated liabilities of bankrupts typically would have been over £100, but so too could be the liabilities of small debtors. Whereas in bankruptcy the claims of all creditors were pooled, in the County Courts individual creditors pursued their claims independently, so a multiple debtor could face several simultaneous claims for recovery of debts each up to the value of £100. Although the legislation relating to recovery of debts appeared to establish a crisp distinction of scale between bankruptcy and small debt proceedings, in fact this was illusory.

Social status

What really distinguished the defendants in bankruptcy and small debt proceedings was their social status, and this mattered because of assumptions made by judges about the economic motivations of people of different social class. The majority of County Court judges presented a consistent view, in both their judgements and their responses to official inquiries, that many working men defaulted on their debts quite deliberately, that this was an oppressive burden on honest traders, and that the power of imprisonment must be retained in order to extract due payment. A few examples must suffice.

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[54] Paul Johnson, *Saving and Spending: The Working-Class Economy in Britain 1870-1939*. Oxford University Press, Oxford, 1985. p.205.

[55] L.G. Chiozza Money, *Riches and Poverty* (London, 3rd edn., 1906), p. 51.

In an open letter to Lord Palmerston, Home Secretary, in 1854, Judge Johnes of the Caernarvon County Court could not have been more explicit in his beliefs about the rights and wrongs of plaintiffs and defendants:

> Take a common case - a young man, without family, earning high wages as a miner or mechanic, contracts a debt of a few pounds with a small tradesman, who sues him and obtains judgement. To take out execution against the goods is futile because, though in one sense wealthy, the defendant probably has none worth levying on. His high wages are possibly squandered in taverns or secreted in such a way that they cannot be reached by the creditor... The defendants who thus evade and defy their creditors, are commonly men who are, in a pecuniary sense, much better off than the great majority of the professional men of this country - the wages they receive being commonly higher than the average remuneration of professional men, especially when we take into account the less refined mode in which they live... On the other hand, the creditors, whose confidence they abuse, generally belong to the poorest and most necessitous class of small retail dealers, a class who have no superfluous funds to spend in dubious litigation with knaves, and to whom legal redress, unless it be really cheap and accessible, is a mockery.[56]

Here we see, combined in one short comment, moral judgements about the fecklessness of manual workers and the integrity of small traders, together with a gross misrepresentation of the economic circumstances of working class life.

Although Judge Johnes was more forthright and open in his opinions than many County Court judges[57], his views about the calculated dishonesty of working-class debtors were widely shared by his fellow judges. Judge Snagge, in Witney Court in 1897, remarked that: 'A judgment summons is the only way in which a levy can be made effectually upon the pockets of the labouring man who has obtained credit and wishes to button up his pocket and does not wish to pay.... They often say they will

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[56] *CCC* July 1854, p. 164.

[57] Judge Johnes was a frequent correspondent to the *County Courts Chronicle*.

not pay, but do so cheerfully when they hear the clang of the prison door behind them'[58] This sentiment was echoed by Judge Cadman at Dewsbury: 'There was undoubtedly a determination on the part of persons not to pay until the very last moment. Debtors in the past had been given every consideration, and tradesmen and other plaintiffs who had to pay for the goods they sued for in court were worthy of equal consideration'.[59] The fact that 99.5% of defendants paid up before the prison door closed behind them was taken to imply that the initial non-payment was, in many cases, wilful. It was also asserted that many of the initial purchases, particularly from itinerant traders or tallymen, were unnecessary fripperies, so the debtor was doubly unworthy.

Not all judges were as questioning of working-class intentions as Snagge and Cadman; there was always a diversity of opinions among the County Court judiciary and more widely within the legal profession. The *Law Times* was adamant that fraudulent debtors constituted 'an insignificant minority' of cases coming to the County Courts. The majority of debtors were 'poor persons to whom credit is often recklessly given, who benefit little by it, to whom debt is a calamity, whose "means" are so shadowy that evidence of them is most difficult to present in any satisfactory shape to a judicial tribunal.'[60] According to the progressive Judge E.A. Parry, between 1869 and 1914 the County Courts had sent to prison over 300,000 people who were not guilty of any crime; 'they have been imprisoned mainly for poverty or, if you will, for improvidence.'[61] Nevertheless, the majority view of the judiciary presented to three separate Select Committees between 1873 and 1909 was that the ultimate sanction of imprisonment must be retained in order to force working men to honour contracts they had openly entered into with traders.

In bankruptcy proceedings, on the other hand, the legal system endorsed the

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[58] *CCC* June 1897, p.155.

[59] *CCC* February 1897, p. 35.

[60] *Law Times*, quoted in *CCC*, March 1893, p.60.

[61] E.A. Parry, *The Law and the Poor* London, Smith, Elder & Co., 1914. p.57.

view of traders and businessmen that unpaid debts were an unfortunate consequence of the inevitable uncertainties of the commercial world. In the eyes of small businessmen, bankruptcy statistics were:

> the saddest official figures published, for the statistics relating to Poor Law administration must of necessity relate to a very large number of people who have never made a legitimate attempt to keep themselves from want, and are not deserving of consideration, while the bankruptcy figures must include amongst the failures a large proportion of men and women who may have missed success by the merest chance, but who have honestly attempted to carve out a career for themselves.[62]

This was, of course, a specious argument when applied to the working-class debtors dragged through the county courts. In an age before extensive sickness and unemployment insurance, when most manual workers were hired and paid by the day or the week, it was almost certainly workers rather than traders who had least control of their economic circumstances, and who had least economic opportunity to be extravagant. Moreover, as the *Law Times* remarked, the treatment of small debtors was unequal in law, regardless of the underlying economic, social and moral circumstances: 'If the theory of imprisoning for nonpayment of money which a court orders to be paid is the right one, there ought to be no distinction. Every money judgment in every court should be enforceable by commitment.'[63]

III

Let me try to draw some brief conclusions. I set out to consider why small debtors received disproportionately harsh treatment as compared with bankrupts, and why the concept of a more general, commercial and rational law of contract seemed not to emerge in the practice of debt recovery. What I have attempted to show is that in structure and procedure, both small debt recovery and bankruptcy administration did

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[62] *Trade Protection Journal*, October 1907, p. 170. See also Lester, *Victorian Insolvency*, p. 136.

[63] *Law Times*, quoted in *CCC*, March 1893, p. 60.

become more rational in the nineteenth century; this was particularly so in the recovery of small debts, where costs were low and action swift. But rational reform of both the small debt and bankruptcy systems did not produce similar outcomes.

In theory the different financial circumstances of bankrupts and small debtors might explain the divergence in outcomes. In practice, however, the financial circumstances of most bankrupts were not significantly different from those of many manual workers, so different outcomes cannot easily be explained by reference to objective economic criteria. What allowed lower middle class bankrupts to shed a large proportion of their debts was a legal presumption that they were worthy but unlucky traders who wished honestly to repay, to the best of their ability, debts often unwittingly incurred because of fluctuations in trading conditions. What led to the harsh and discriminatory treatment of small debtors was a judicial assumption that some significant proportion of them ended up in court because of a fundamental lack of desire and intention to honour debts they had willingly entered into. Of course these presumptions were seldom investigated; bankruptcy administrators sought to distribute assets, not uncover fraudulent intent; and in the county courts the judges, dealing with cases in little more than one minute each, had not the time, even if they had the inclination, to enquire into the motives and morals of the debtors. Despite the driving force of an autonoous legal rationalism in Victorian England, there remained considerable social inequality of legal outcomes for bankrupts and small debtors because of the deeply-rooted belief among a majority of judges that the working classes were morally inferior.

Paul Johnson London School of Economics

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