Body Attachment and Body Execution: Forgotten But Not Gone
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INTRODUCTION

Although the civil processes of body attachment (*capias ad respon-
dendum*)¹ and body execution (*capias ad satisfaciendum*)² often are perceived as outmoded remedies that have been abolished, these methods of enforcing debts frequently are available to present day creditors. Despite the existence of several legal impediments to the unfettered utilization of these drastic remedies, methods for circumventing the various state constitutional and statutory prohibitions against imprisonment for debt exist. Procedures implemented to effect body attachment or body execution must be measured against the evolving debtor due process standard. After examining the legal history of body attachment and body execution, this Note will analyze the present status of these ancient creditors' remedies.

HISTORY OF BODY ATTACHMENT AND BODY EXECUTION

Depriving a debtor of his liberty in an attempt to force payment of a debt is a remedy of ancient origin. Any society dependent upon trade and commerce must provide an aggrieved creditor with the means to enforce payment of an overdue obligation to ensure the availability of credit and the concomitant growth of the economy. Recognizing this necessity, early social systems provided redress to the aggrieved creditor by means viewed today as unduly harsh and cruel. The ancient Romans, for example, allowed a debtor to be sold into slavery for defaulting on his obligations.³ If more than one creditor desired satisfaction from the

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¹. "A judicial writ . . . by which actions at law were frequently commenced; and which commands the sheriff to take the defendant, and him safely keep, so that he may have his body before the court on a certain day, to answer the plaintiff in the action." Black's Law Dictionary 262 (4th ed. 1968).

². "A writ of execution . . . which commands the sheriff to take the party named, and keep him safely, so that he may have his body before the court on a certain day, to satisfy the damages or debt and damages in certain actions. It deprives the party taken of his liberty until he makes the satisfaction awarded." Id.

³. This practice was sanctioned by the Law of the Twelve Tables (451-450 B.C.), the
debtor, the obligees were permitted to dissect his body, and split it into proportionate shares.\(^4\) Seizure of the corpse of a defaulting debtor was another remedy available in Roman law.\(^5\)

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first known compilation of Roman Law, 1 S. Scott, The Civil Law 63-64 (1932). Intended as a comprehensive and concise codification of the customary law of the people, the Tables formed the foundation for the subsequent development of Roman Law. \textit{Id.} at 8-11. Table III, “Concerning Property which is Lent,” provided in pertinent part:

**Law IV**

Where anyone, having acknowledged a debt, has a judgment rendered against him requiring payment, thirty days shall be given to him in which to pay the money and satisfy the judgment.

**Law V**

After the term of thirty days granted by the law to debtors who have had judgment rendered against them has expired, and in the meantime, they have not satisfied the judgment, their creditors shall be permitted to forcibly seize them and bring them again into court.

**Law VI**

When a defendant, after thirty days have elapsed, is brought into court a second time by the plaintiff, and does not satisfy the judgment; or, in the meantime another party, or his surety does not pay it out of his own money, the creditor, or the plaintiff, after the debtor has been delivered up to him, can take the latter with him and bind him or place him in fetters; provided his chains are not of more than fifteen pounds weight; he can, however, place him in others which are lighter, if he desires to do so.

\[\ldots\]

\[\ldots\]

**Law IX**

After he has been kept in chains for sixty days, and the sum for which he is liable has been three times publicly proclaimed in the Forum, he shall be condemned to be reduced to slavery by him to whom he was delivered up; or, if the latter prefers, he can be sold beyond the Tiber.

\textit{Id.} at 63.

4. Law X of Table III provided:

Where a party is delivered up to several persons, on account of a debt, after he has been exposed in the Forum on three market days, they shall be permitted to divide their debtor into different parts, if they desire to do so; and if anyone of them should, by the division, obtain more or less than he is entitled to, he shall not be responsible.

\textit{Id.} at 64. Although a nonliteral interpretation of Law X has led some jurists to the conclusion that the permitted division applied only to the Roman debtor’s property, Scott has concluded, on the basis of allusions to the Law by early Roman writers, that “there can be little doubt that its abhorrent features \ldots{} were susceptible of literal interpretation, and that the partition of the body of the unfortunate debtor was entirely dependent upon the inclination of his creditors.” \textit{Id.} at 64 n. 1.

5. “There are also said to be 'abundant traces in Rome, as in Europe until recent times, of an ancient custom of seizing the corpse of a defaulting debtor as a means of enforcing payment from his heirs.” V. Countryman, Cases and Materials on
Debt slavery existed in medieval England as a vestige of ancient Anglo-Saxon law, but the practice ended soon after the Norman victory in 1066 at Hastings, apparently because the Saxons employed the remedy too frequently against their Norman conquerors. Two hundred years after the disappearance of debt slavery, Parliament and the courts hesitantly began to grant creditors the power to imprison defaulting debtors. The reluctance of the legislature and judiciary to make available the remedies of body attachment and body execution was a function of the medieval social structure, based on a lord-vassal hierarchy, with each vassal owing allegiance to his overlord and with the king at the pinnacle of the system. Because the imprisonment of a vassal for debt would interfere with the services owed to his lord, the remedy was slow to evolve.

Notably, however, it was for the benefit of the nobles that the first debt imprisonment statute was passed in 1267. The Statute of Marlbridge provided for the issuance of a writ of arrest to bring an accountant before the court to explain any alleged defalcations during his tenure. Subsequently, in 1285, the lords convinced Parliament to pass the Statute of Westminster, which permitted body execution against accountants unable to repair their arrearages.

As the developing merchant class became aware of such statutory remedies available to noblemen, they successfully pressed Parliament for similar rights. In 1283, the Statute of Acton Burnell was enacted, providing that a merchant might secure from a debtor a bond that, upon default by the debtor, entitled the creditor immediately to levy on and

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7. Id.
8. With respect to the plight of the debtor, imprisonment was not necessarily a more desirable alternative than slavery. The debtor placed into slavery by his creditor was able to "work his debt out." Contrarily, if the debtor were imprisoned, his period of confinement had no effect on the debt, but merely suspended further execution on the overdue obligation. Thus, the amount of time the debtor spent in prison did not reduce his obligation but served to increase it by the addition of jail fees. See V. Countrystman, supra note 3, at 80; A. Freeman, Law of Executions § 462 (1876).
10. 52 Hen. 3, c. 23 (1267).
11. Freedman, supra note 9, at 334-35.
12. 13 Edw. 1, c. 11 (1285).
13. See A. Freeman, supra note 8, § 451; Freedman, supra note 9, at 336-37.
14. 11 Edw. 1 (1283).
sell the debtor's chattels. If the sale did not produce revenue sufficient to satisfy the obligation, the creditor could have the debtor imprisoned if he was willing to supply the debtor with bread and water. Enacted in 1285, the Statute of Merchants provided creditors with a more expedient means of debt collection. Pursuant to that Act, the creditor could have the debtor imprisoned immediately upon default, and, if the debt was not paid within three months, the debtor's chattels and the profits from his lands were transferred to the creditor until the debt was satisfied.

During this period of legislative expansion, the common law courts fashioned creditors' remedies broader in scope than those created by Parliament. Combining legal fictions with the action of trespass, these remedies allowed arrest to begin a civil action and allowed imprisonment to satisfy a forthcoming judgment. The substantial tactical ad-

15. V. COUNTRYMAN, supra note 5, at 78.
16. 13 Edw. 1 (1285).
17. See V. COUNTRYMAN, supra note 5, at 78.
18. This combination resulted from the fact that early thirteenth century common law allowed civil arrest at the beginning of a suit or in execution of a judgment only in actions of trespass vi et armis (trespass with force and arms). Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24, 26-27 (1926). Thus, a creditor seeking the arrest of his debtor had to frame his action in this trespassory form rather than in the logical form of an action for debt.
19. Although trespass was originally a criminal action, the court eventually permitted civil recovery as an adjunct to the king's right of redress, and because trespass was criminal in nature, arrest was permitted as of course in such actions. Freedman, supra note 9, at 332.
20. Freedman, supra note 9, at 331. During this period the Court of Common Pleas and the King's Bench competed for jurisdiction over civil cases. The King's Bench was the first court to permit a fictitious trespass action, the Bill of Middlesex, to be used in securing jurisdiction over a civil defendant by arrest. The Court of Common Pleas countered this device in 1661 by convincing Parliament to enact a statute providing that arrest could be had only when the actual cause of action was revealed. 13 Car. 2, c. 2 (1661). Shortly thereafter, however, the King's Bench successfully circumvented the intended curative statute by permitting the addition of an ac etiam ("and moreover") clause to the Bill of Middlesex, thereby disclosing the true nature of the action. The Court of Common Pleas similarly gained jurisdiction under the statute by permitting the addition of an ac etiam clause to its writ of trespass quare clausam fregit. T. PLUCKnett, supra note 6, at 343-44.

In practice, neither of these wholly fictitious writs was issued; rather the defendant was arrested immediately upon the filing of suit. This procedure was extended to true actions of trespass so that, by the eighteenth century, "most actions . . . began with a capias instead of an original writ." Id.

In substance the remedy of imprisonment for debt was also available in the early English courts of equity. Technically, however, imprisonment for debt did not exist:
vantage of imprisoning the defendant at the initiation of a suit was not unnoticed by plaintiffs' attorneys, who regularly utilized statutory arrest powers.\(^{21}\)

Although incarcerating one subsequently found to be innocent appears to be unjust,\(^{22}\) even more severe was the remedy of body execution granted to a prevailing plaintiff, whereby, pursuant to the writ of *capias ad satisfaciendum*, the debtor was held in close imprisonment until he paid the debt or until the creditor permitted his release.\(^{28}\) As the remedy of body attachment to secure jurisdiction was extended explicitly by statute or judicial procedure, body execution as a means of satisfying a forthcoming judgment implicitly followed;\(^{24}\) the rule was established early that a defendant could be imprisoned in satisfaction of a judgment whenever the action was, or might have been, initiated by the arrest of the defendant.\(^{25}\) Perhaps the most appalling feature of common law body execution was the lack of any duty upon the state or the creditor to provide sustenance to the often destitute, imprisoned debtor.\(^{28}\) Moreover, the irony of debtors' prison was exemplified by the Court of Chancery considered any failure to perform a decree to be "a contempt, a quasi-criminal offense; and therefore if one was committed to jail upon his failure to pay a sum of money in obedience to a chancery decree, this was not imprisonment for debt. The distinction was historical rather than substantial . . . ." Ford, *supra* note 18, at 26.

\(^{21}\) See notes 8-17 *supra* & accompanying text. Also utilized was the device of pleading a sham trespass. See note 18 *supra*. "By the time of Blackstone all the courts of common law were arresting defendants in suits pending before them, the process being variously called *capias ad respondendum*, *testatum capias*, Bill of Middlesex, writ of *latitat*, or writ of *quo minus*, according to the court from which it issued and the county in which it was to be served." Ford, *supra* note 18, at 27.

\(^{22}\) To many, arrest on *mesne* process may seem unwarranted in any instance, but there would seem to be circumstances when *capias ad respondendum* might be required, for example, when a defendant is about to flee the jurisdiction to avoid answering a complaint against him, or when a defendant is concealing himself within the jurisdiction.

\(^{23}\) Freedman, *supra* note 9, at 347. Unfortunately for the debtor, the creditor's consent to release was considered an irrevocable and full satisfaction of the debt. Thus, even if the creditor believed the debtor could earn enough to pay the judgment were he granted his freedom, it was not in the creditor's best interests to permit his release. *Id.*

\(^{24}\) Ford, *supra* note 18, at 26-27.

\(^{25}\) Harbert's Case, 3 Coke II, 76 Eng. Rep. 647 (Ex. 1584); Ford, *supra* note 18, at 27.

\(^{26}\) Freedman, *supra* note 9, at 348. The common law sentiment was expressed aptly in *Manby v. Scott*:

> If a man be taken in execution and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes . . . but he must live on his
the fact that the prisoners were not permitted to secure funds in satisfaction of their obligations by working, even though impoverished debtors often had no other means of acquiring money.27 Even a compassionate sheriff could not permit imprisoned debtors to raise funds by working in the community; such permission was deemed to sanction an escape which forfeited the sheriff's right to retake the defendant.28 Furthermore, if a sheriff permitted an escape he became liable for the full amount of the debt, a compelling reason for him to keep debtors in close custody.29

Like other English precedents and statutes, those allowing body attachment and body execution were adopted by the American colonies in their initial stages of development.30 The demand for manpower to build and protect the new communities, however, made debtors' prison an impractical institution; incarcerated debtors contributed nothing to the evolving communities, and their families often became dependent on charity.31 Nevertheless, there was little pressure for reform because enforcement of the law was haphazard at best, and few seventeenth century colonial debtors actually were imprisoned.32

As American society stabilized and credit transactions increased, however, creditors began availing themselves of civil arrest, and more debtors were imprisoned.33 In response, colonial, and later state, legislatures enacted a variety of ameliorative devices:34 the New Hampshire legislature in 1771 enacted a statute that permitted a debtor the freedom of the prison yard and extended its bounds to one hundred feet from the

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27. Freedman, supra note 9, at 347. See note 8 supra.
28. A. Freeman, supra note 8, § 461.
29. Id.
30. V. Countryman, supra note 5, at 81.
32. Id. at 251.
33. Id. at 251-52.
34. Id. at 252-53.
prison walls;\textsuperscript{35} South Carolina passed an installment act that allowed debts incurred before 1787 to be paid at specified dates in the future;\textsuperscript{36} other colonies permitted indentured servitude in satisfaction of debts, or provided for discharge from debtors' prison on the swearing of a poor debtor's oath or general assignment of all the debtor's property for the benefit of his creditors.\textsuperscript{37} Body execution was not abolished, however, because many debtors were unable to qualify under the relief acts or were unfortunate enough to reside in a jurisdiction that had not enacted such laws.\textsuperscript{38} Thus, despite various ameliorative devices, many thousands of persons were imprisoned on mesne or final process throughout the eighteenth and most of the nineteenth centuries.\textsuperscript{39}

When the nation experienced a series of financial panics during the early nineteenth century, the spectre of debtors' prison became real to many who previously had closed their eyes to the misery of lower class imprisoned debtors.\textsuperscript{40} States therefore enlarged the scope of their ameliorative acts, and moved toward the total abolition of debtors' prisons "by successively forbidding the imprisonment of petty debtors, Revolutionary [War] veterans, householders, and females . . . ."\textsuperscript{41} Most legislatures expanded the prison limits for debtors until in some


\textsuperscript{36} Id. at 241. The South Carolina statute was actually a planter's relief act, illustrating the power of dominant economic classes in each colony to have such statutes passed in their behalf.

\textsuperscript{37} P. Coleman, supra note 31, at 252-53.

\textsuperscript{38} See id. at 253-54.

\textsuperscript{39} One commentator's discussion of an 1830 report by a prison reform organization indicates the scope of the problem:

The number of persons imprisoned annually for debt was 3,000 in Massachusetts, 10,000 in New York, 7,000 in Pennsylvania, and 3,000 in Maryland; the estimated total for the northern and middle states was 50,000 a year. In these states there were from three to five times as many persons imprisoned for debt as for crime.

Ford, supra note 18, at 29. These debtors frequently were imprisoned for failure to pay insignificant amounts:

During the eight months ending February 25, 1830, thirty debtors were imprisoned in Philadelphia for debts of less than one dollar. About fifteen per cent of the prisoners in the northern and middle states were detained for debts of less than five dollars; about fifty-five per cent were detained for debts of from five to twenty dollars, and only ten per cent owed more than a hundred dollars.

\textit{Id.}

\textsuperscript{40} See P. Coleman, supra note 31, at 21.

\textsuperscript{41} Id. at 257.
states the jail boundaries extended to state borders.42 "At worst, therefore, imprisonment for debt thus became a legal status rather than a physical condition." 43

The logical conclusion of this ameliorative trend was the complete abolition of debtors' prison; by the 1870's nearly all states had implemented such a reform by the enactment of constitutional provisions prohibiting imprisonment for debt.44 An examination of these constitutional prohibitions and their judicial construction, however, reveals that, notwithstanding the constitutional impediments, debtors still may be imprisoned in satisfaction of debts.

**LIMITS ON BODY ATTACHMENT AND BODY EXECUTION IMPOSED BY STATE AND FEDERAL LAW**

**A. State Constitutions**

Although 41 states presently have constitutional provisions relating to imprisonment for debt,45 few states unequivocally prohibit body at-

42. Id. During this same period (1800-1870), state governments experimented with a variety of insolvency laws designed not only to prevent the debtor's imprisonment, but also to grant the debtor a "fresh start" by discharging his defaulted obligations. See V. COUNTRYMAN, supra note 5, at 80-81.

43. P. COLEMAN, supra note 31, at 257.

44. See notes 45-52 infra & accompanying text.


The Supreme Court in Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122 (1819), expressly approved of state bans on incarceration for debt:

Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation.

Id. at 200-01.
tachment or body execution. Beginning with a blanket prohibition, most state constitutions enumerate exceptions that permit body attachment or body execution in specified instances. Typical exceptions are those for debtors guilty of fraud, for debtors who refuse to make a general property assignment for the benefit of creditors, for absconding debtors, for debtors who fail to pay statutorily imposed fines or penalties, and for debtors found guilty of libel or slander. Recognizing these explicit limits to their constitutional prohibitions, legislatures have enacted statutes enumerating procedures for effecting body attachment and body execution.

46. ALA. CONST. art. I, § 20; GA. CONST. art. I, § 2-121; HAWAI'I CONST. art. I, § 17; Md. CONST. art. III, § 38 (but alimony and child support payments are not to be considered debts); MISS. CONST. art. III, § 30; N.M. CONST. art. II, § 21; TENN. CONST. art. I, § 18; TEX. CONST. art. I, § 18.


49. ALAS. CONST. art. I, § 17; Ore. CONST. art. I, § 19; Utah CONST. art. I, § 16; Wash. CONST. art. I, § 17.

50. Ill. CONST. art. I, § 14 (but only if the individual willfully refuses to make payment after being afforded an opportunity to pay in installments); Mo. CONST. art. I, § 11; Okla. CONST. art. II, § 13.


(a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modification, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State.

52. The states in the fourth judicial circuit (Maryland, Virginia, West Virginia, North Carolina and South Carolina) illustrate the functional range of these statutes. Maryland's statutory scheme is the most restrictive, making no provision for body attachment; before judgment one may attach only property belonging to the defendant. Md. R.P. Subtit. G 40-61. Nor does Maryland allow body execution; instead it permits a judgment creditor to interrogate the debtor concerning the concealment of property, fraudulent conveyances or, if execution is returned unsatisfied, regarding the debtor's assets in general. See Md. R. P. 627-28. If the debtor refuses to convey property to the creditor when ordered, or if he refuses to answer interrogatories, he may be im-
In addition to the explicit exceptions enumerated in many state constitutions, state court interpretations of the term "debt" have limited further the functional scope of constitutional prohibitions against imprisonment for debt. If it is determined that the basis of a judgment does not give rise to a "debt" within the ambit of the state constitution, the debtor remains subject to imprisonment notwithstanding the constitutional prohibition. Constitutional provisions prohibiting imprisonment for contempt. Id. 628(e). Thus, although the debt might not be within Maryland's constitutional prohibition, a creditor will be able to achieve body execution only through the court's discretionary contempt power.

Virginia and West Virginia permit body attachment, but in Virginia the writ of capias ad respondendum may be had only upon the filing of an affidavit alleging that the defendant is about to flee the state. Va. Code Ann. § 8-569 (1950). West Virginia also permits body attachment on the grounds of possible flight, and further allows capias ad respondendum upon the filing of an affidavit alleging: that the defendant is removing property from the state with an intent to defraud creditors, that he is liquidating or concealing his assets with similar intent, or that the debt itself was contracted fraudulently. W. Va. Code Ann. § 53-7-1 (1966). Both jurisdictions have abolished body execution, Va. Code Ann. § 8-400 (1950), W. Va. Code Ann. § 56-3-2 (1966), and have substituted interrogatory proceedings subsequent to judgment. Va. Code Ann. § 8-435 (Supp. 1974), W. Va. Code Ann. § 38-5-1 (1966). If the debtor fails to appear, refuses to obey a turnover order, refuses to answer, or makes evasive answer, he may be held in contempt and imprisoned until he complies. Va. Code Ann. §§ 8-438 (1950), W. Va. Code Ann. § 38-5-5 (1966). Thus, although neither Virginia nor West Virginia constitutionally prohibit body attachment and body execution, a citation for contempt is the only way in which a debtor may be imprisoned for a debt owing a private creditor.

North Carolina and South Carolina have a more liberal statutory procedure providing for both body attachment and body execution. The grounds for obtaining body attachment vary slightly between the two jurisdictions. North Carolina permits capias ad respondendum in cases of intentional tort, fines or penalties, seduction, money received, embezzlement or misconduct by a fiduciary or professional, fraudulent concealment of another's property, fraud in contracting the debt, or fraudulent conveyances. N.C. Gen. Stat. § 1-410 (1969). South Carolina allows capias ad respondendum in all but the first three of these instances (intentional tort, fines or penalties, seduction), and also permits body attachment if the defendant is about to flee the jurisdiction. S.C. Code Ann. §§ 10-802 (1962). Both North Carolina and South Carolina permit body execution in any instance in which the judgment creditor might have had body attachment. N.C. Gen. Stat. § 1-311 (1969), S.C. Code Ann. § 10-1705 (1962). The judgment debtor whose body is taken in execution may obtain discharge by making an assignment for the benefit of creditors, N.C. Gen. Stat. § 23-13 (1969), S.C. Code Ann. § 10-846 (1962); South Carolina alone requires a poor debtor's oath, S.C. Code Ann. § 10-844 (1962). Both jurisdictions offer the judgment creditor the option of interrogating the debtor regarding his estate, but neither requires it before arrest of the defendant. N.C. Gen. Stat. § 1-352 (Supp. 1975), S.C. Code Ann. § 10-1721 (1962). Accordingly, the judgment debtor may languish in prison until he pays the judgment or transfers all of his property to his creditors.
ment for debt have been held inapplicable to payments due for alimony,\textsuperscript{53} for maintenance of a spouse,\textsuperscript{54} for child support,\textsuperscript{55} and for property settlements pursuant to divorce proceedings.\textsuperscript{56} Jurisdictions have advanced various theories in holding that such obligations are not constitutionally cognizable debts. It has been held that alimony payment is a duty owing to the public as well as to the spouse,\textsuperscript{57} that the constitutional prohibition is applicable only to debts arising \textit{ex contractu},\textsuperscript{58} that an alimony award is in effect a property settlement requiring payment to the wife of her share of the estate,\textsuperscript{59} or that the spouse is being imprisoned for contempt in not obeying a decree of the court.\textsuperscript{60} States

\textsuperscript{53} See, e.g., \textit{Ex parte} Stephenson, 252 Ala. 316, 40 So. 2d 716 (1949); \textit{Ex parte} Lazar, 37 Cal. App. 2d 327, 99 P.2d 342 (Dist. Ct. App. 1940); DeFrances v. Knowles, 244 So. 2d 168 (Fla. Dist. Ct. App. 1970); Lewis v. Lewis, 80 Ga. 706, 6 S.E. 918 (1888); Kazubowski v. Kazubowski, 43 Ill. 2d 405, 259 N.E.2d 282 (1970); Roach v. Oliver, 215 Iowa 800, 244 N.W. 899 (1932); Toth v. Toth, 242 Mich. 23, 217 N.W. 913 (1928); Clausen v. Clausen, 250 Minn. 293, 84 N.W.2d 675 (1957); Jensen v. Jensen, 119 Neb. 469, 229 N.W. 770 (1930); Adams v. Adams, 80 N.J. Eq. 175, 83 A. 190 (1912); Pain v. Pain, 80 N.C. 293 (1879); State ex rel. Cook v. Cook, 66 Ohio St. 566, 64 N.E. 567 (1902); \textit{Ex parte} Bighorse, 178 Okla. 218, 62 P.2d 487 (1936); Fritz v. Fritz, 45 S.D. 392, 187 N.W. 534 (1916); Robinson v. Robinson, 37 Wash. 2d 511, 225 P.2d 411 (1950).


\textsuperscript{55} See, e.g., Roach v. Oliver, 215 Iowa 800, 244 N.W. 899 (1932); \textit{In re} Wheeler, 34 Kan. 96, 8 P. 276 (1885); Lamb v. Lamb, 83 Nev. 425, 433 P.2d 265 (1967); State v. Hollinger, 69 N.D. 363, 287 N.W. 225 (1939).


\textsuperscript{57} See, e.g., Howard v. Howard, 118 So. 2d 90 (Fla. Dist. Ct. App. 1960); Wilson v. Chumney, 214 Ga. 120, 103 S.E.2d 532 (1958); Lewis v. Lewis, 80 Ga. 706, 6 S.E. 918 (1888); \textit{Ex parte} Birkhead, 127 Tex. 556, 95 S.W.2d 933 (1936).

\textsuperscript{58} See, e.g., Adams v. Adams, 80 N.J. Eq. 175, 83 A. 190 (1912); Clauson v. Clauson, 84 N.W.2d 675 (Minn. 1957); State v. Latham, 136 Tenn. 30, 188 S.W. 534 (1916).


have further held that neither taxes owing, 61 judgments obtained in tort

The procedural safeguards afforded to a defendant in a contempt proceeding are determined by an artificial bifurcated system of classification. (1) The contempt is classified as either civil or criminal, depending upon the purposes of the sanction; (2) the defendant's act constitutes either direct or indirect contempt depending upon whether the act was committed within the presence of the court.

If the purpose of the sentence imposed on a defendant is punitive, then the contempt is criminal. Vindication of the court's authority is the underlying purpose of a criminal contempt conviction. The sentence may take the form of an unconditional fine or a determinate prison sentence. The purpose of the sentence imposed in a civil contempt proceeding is to coerce the defendant to obey a judicial order or to obtain relief for the opposing party. Civil contempt is sanctioned by conditional fines and indeterminate prison terms. In cases of civil contempt, the contemnor is treated as a party to civil litigation and does not enjoy the advantages of the rules of criminal procedure.

Whether a contempt is direct or indirect depends upon whether the act was committed "within the presence of the court." Contemptuous conduct committed in open court is direct, and therefore is subject to summary punishment. Indirect contempt requires a plenary proceeding. See Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183 (1971). See also R. Goldfarb, The Contempt Power (1965).

A judgment debtor usually is subject to citation for indirect civil contempt, and therefore is entitled to a hearing. It is not inconceivable, however, that a debtor could be cited for direct civil contempt and thereby deprived of an opportunity for a hearing.

Further, although courts have consistently held that a present inability to comply constitutes an affirmative defense in civil contempt proceedings, United States v. Bryan, 339 U.S. 323, 330 (1950) (a court may not imprison a defendant for failure to produce documents he does not have, unless he is responsible for their unavailability); Garroule v. Garroule, 455 P.2d 306, 308 (Okl. 1969); Mowery v. Mowery, 50 Tenn. App. 648, — , 363 S.W. 2d 405, 408-09 (1962); Carey v. Carey, 132 Ind. App. 30, 171 N.E. 2d 487, 489 (1961) (dictum); Robertson v. State, 20 Ala. App. 514, — , 104 So. 561, 575 (1924), a civil contempt proceeding may not be used as a device to collaterally attack the disposition of the initial proceeding. Maggio v. Zeitz, 333 U.S. 56, 68 (1948). Only factors that occurred after the initial judgment or order, which affect the alleged contemnor's ability to comply, are admissible as evidence in the contempt proceeding. Id. at 68-69. Because the contemnor's ability to comply is a question of fact for the trial court, commentators have expressed concern that an error at the fact-finding stage could result in the indefinite imprisonment of a party, without means of release. Dobbs, supra, at 266.

When the purpose of the contempt proceeding and the interest deprived are the same as the purpose of and deprivation affected by body attachment or body execution, the "contempt" label should not subject the debtor to procedures determined by an artificial classification system. At least one recent case has held that such postjudgment proceedings for collection of money judgments violate due process insofar as they allow a contempt adjudication and order of imprisonment to issue following an ex parte proceeding. Vail v. Quinlan, 406 F. Supp. 951, 959-60 (S.D.N.Y. 1976).

61. See, e.g., McCaskell v. State, 53 Ala. 510 (1875) (attorney license tax); Engle-
actions,\textsuperscript{62} nor liabilities resulting from fraudulent conduct\textsuperscript{63} are considered debts for purposes of the applicable constitutional prohibition. Thus, despite state constitutional prohibitions ostensibly to the contrary, debtors are frequently subject to body execution to satisfy unpaid obligations.

B. Federal Bankruptcy Act

Because the Bankruptcy Act affords a debtor the personal privilege to be free from civil arrest for a debt dischargeable in bankruptcy,\textsuperscript{64} it appears to offer protection from debt imprisonment. The statutory protection of the Bankruptcy Act, however, is subject to limitations similar to those found in the state constitutional prohibitions discussed above.

The bankrupt must qualify for the protection of the discharge pro-
visions of the Bankruptcy Act to avoid body execution. Provable debts, whether allowable in whole or in part,\textsuperscript{65} are dischargeable unless specifically excepted by the Act.\textsuperscript{66} Section 17 of the Bankruptcy Act, however, excepts from discharge a broad range of obligations, including "alimony due or to become due, or maintenance or support of wife or child," or "taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy,"\textsuperscript{68} liabilities for willful and malicious torts,\textsuperscript{69} and liabilities resulting from fraudulent conduct.\textsuperscript{70}

Because these liabilities are also frequently outside the purview of state constitutional prohibitions against imprisonment for debt,\textsuperscript{71} adjudication in bankruptcy may offer only limited protection from imprisonment for debt.

In addition to the exceptions from discharge enumerated in section 17 of the Bankruptcy Act, section 14c of the Act bars the discharge of a debtor who has committed specified acts, the majority of which are fraudulent in nature.\textsuperscript{72} Thus, even if the debt itself is dischargeable,

\textsuperscript{65} The concept of provability and allowability is peculiar to bankruptcy. A creditor's claim may be provable in its entirety against the bankrupt's estate, Bankruptcy Act § 63, 11 U.S.C. § 103 (1970), though only a lesser portion may be allowable pursuant to Bankruptcy Act § 57, 11 U.S.C. § 93 (1970). It is the allowable portion only that is granted a dividend in the bankruptcy distribution. \textit{Id.}

\textsuperscript{66} Bankruptcy Act § 17, 11 U.S.C. § 35 (1970); 1A COLLIERS ON BANKRUPTCY ¶ 17.03 at 1582-83 (14th ed. 1975).

\textsuperscript{67} Bankruptcy Act § 17a(7), 11 U.S.C. § 35(a)(7) (1970). The remainder of the subsection excepts debts arising from "seduction of an unmarried female, or . . . for breach of promise of marriage accompanied by seduction, or . . . criminal conversation." \textit{Id.}


\textsuperscript{71} See notes 53-63 supra & accompanying text.

\textsuperscript{72} Bankruptcy Act § 14c, 11 U.S.C. § 32(c) (1970), provides in pertinent part:

The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18 (section 152 makes criminal: fraudulent concealment of a bankrupt's assets; false oaths in bankruptcy; false claims against the estate; fraudulent receipt of a bankrupt's property; bribing anyone concerned with the bankruptcy; or falsification, destruction or concealment of documents relevant to the bankruptcy); or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might
section 14 may remove the protection of the Bankruptcy Act and subject the bankrupt to imprisonment.\textsuperscript{73}

Although civil arrest therefore survives state constitutional prohibitions against imprisonment for debt and may remain viable despite a debtor's bankruptcy, procedures employed to effectuate civil arrest must comport with the due process and equal protection standards of the fourteenth amendment.

**THE FOURTEENTH AMENDMENT AND DEBTOR IMPRISONMENT**

**A. Due Process**

Because body attachment and body execution result in a deprivation of liberty, it can be argued that they demand a higher due process standard than do other creditors' remedies. Courts examining body attachment and body execution, however, have relied upon the due process standards applicable to creditors' remedies involving property deprivation,\textsuperscript{74} thereby establishing these standards as the minimum necessary to bring body attachment and body execution within due process limits.

Although prior to 1969, the Supreme Court had upheld the constitutionality of prejudgment property seizures without prior notice and the opportunity for a hearing,\textsuperscript{75} *Sniadach v. Family Finance Corp.*\textsuperscript{76}
established that a single procedural rule does not always satisfy due process;\textsuperscript{77} the procedure required by the fourteenth amendment may depend upon the interest affected.\textsuperscript{78} In finding the Wisconsin wage garnishment statute unconstitutional, the Court in \textit{Sniadach} relied heavily on the specialized nature of the property interest involved; prejudgment attachment of wages, the Court held, placed a severe hardship on the defendant and afforded his creditor a tremendous advantage in negotiations.\textsuperscript{79}

Although the Court in \textit{Fuentes v. Shevin}\textsuperscript{80} required notice to the debtor and an opportunity for a hearing prior to any deprivation in the absence of extraordinary circumstances,\textsuperscript{81} \textit{Mitchell v. W. T. Grant}\textsuperscript{82} appeared significantly to contract the \textit{Fuentes} rule\textsuperscript{83} by allowing a temporary and conditional nature was not protected under the Constitution. 127 Me. at —, 141 A. at 702. According to the Maine court, the ultimate judicial determination of the property interests involved satisfied the requirements of due process. \textit{Id.} at —, 141 A. at 703.

\textsuperscript{76} 395 U.S. 337 (1969).
\textsuperscript{77} \textit{Id.} at 340.
\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} at 340-41; cf. \textit{Repetti v. Gil}, 372 N.Y.S.2d 840, 848 (1975) (body attachment). The hardship of garnishment falls not only on the defendant, but on his family as well. \textit{Id.} at 340. A garnishment puts the debtor under considerable pressure to pay the debt, even though he may have a valid defense to the claim. \textit{Id.} at 341. \textit{See Clark \& Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution, 59 Va. L. Rev. 355 (1973).}

\textsuperscript{80} 407 U.S. 67 (1972). In \textit{Fuentes} the Supreme Court invalidated prejudgment seizure devices for failure to provide notice and an opportunity for a hearing. The Court considered the constitutionality of prejudgment replevin statutes in Pennsylvania and Florida, which allowed for the seizure of property in possession of the debtor on \textit{ex parte} application and the posting of security by the creditor.

In analyzing the due process issue, the Court in \textit{Fuentes} employed a two-step approach: (1) to come within the ambit of the fourteenth amendment's protection the deprivation must be of a constitutionally cognizable interest, and (2) once a cognizable interest is found, the focus of the inquiry turns to the procedure required to effect the deprivation. \textit{Note, Possessory Liens: The Need for Separate Due Process Analysis, 16 Wm. \& Mary L. Rev. 971, 979-81 (1975)} [hereinafter cited as \textit{Possessory Liens}].

\textsuperscript{81} 407 U.S. at 84-90. The Court enumerated three factors it considered essential to the finding of extraordinary circumstances: (1) an important governmental or general public interest, (2) a need for prompt action, and (3) state control of the legitimate force. \textit{Id.} at 91. \textit{See Clark \& Landers, supra} note 79, at 359-64.

\textsuperscript{82} 416 U.S. 600 (1974).

\textsuperscript{83} Justice Powell, concurring in the result, noted: "The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the \textit{Fuentes} opinion is overruled." \textit{Id.} at 623. \textit{See Note, Changing Concepts of Consumer Due Process in the Supreme Court—The New Conservative
creditor with “current, real interests in the property”\(^{84}\) to effect its deprivation absent the strict procedural protections of \textit{Fuentes}.\(^{85}\) Unfortunately, the most recent debtor due process case, \textit{North Georgia Finishing, Inc. v. Di-Chem, Inc.},\(^{86}\) failed to refine the due process analysis;\(^{87}\) there the Court appeared to reach a \textit{Fuentes} result,\(^{88}\) after pursuing


84. 416 U.S. at 604. Two aspects of the creditor’s interest that required procedural protections were emphasized by the Court: first, it noted that the value of the property as security for the seller was subject to continual erosion after the buyer’s default; second, the seller’s security interest would have been defeated under Louisiana law if the buyer had transferred the property to a bona fide purchaser. \textit{Id.} at 608-09. The Court held that the nature of an installment sales situation resulted in both debtor and creditor having a property interest in the contested items, and this “duality” of interests required that the procedure employed protect both parties. \textit{Id.} at 604. The Court concluded that the debtor’s deprivation was outweighed by three factors: (1) the low risk of a wrongful prejudgment sequestration, (2) the debtor’s inability to make the creditor whole without sequestration, and (3) the high risk of alienation or destruction of the controverted property which accompanied prior notice and hearing. \textit{Id.} at 610. See \textit{Rendleman, Analyzing the Debtor’s Due Process Interest}, 17 \textit{WM. & MARY L. Rev.} 35, 39-41 (1975).

85. \textit{Mitchell} distinguished \textit{Fuentes} on the basis of technical differences in the Louisiana procedure, which, according to the Court, tended to lower the risk of a wrongfully issued writ. Unlike the replevin statutes challenged in \textit{Fuentes}, the sequestration writ could issue only after judicial approval of an affidavit setting forth specific facts establishing default. 416 U.S. at 617-18. Because of this added requirement for specificity under the Louisiana law, the Court noted that “[t]here is far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing.” \textit{Id.}

86. 95 S. Ct. 719 (1975). In an action to recover the purchase price of goods delivered, Di-Chem garnished North Georgia Finishing’s bank account pursuant to a Georgia statute providing for the issuance by the clerk of court of a writ of garnishment after the plaintiff had filed an affidavit and posted a bond. The Supreme Court held the garnishment procedure to be unconstitutional as a violation of due process. \textit{Id.} at 722-23. See \textit{Hansford, Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem}, 9 \textit{Ga. L. Rev.} 589 (1975).

87. The Court in \textit{Di-Chem} failed to synthesize its various decisions in debtor due process cases and enunciate applicable standards to guide courts and legislatures. Instead, the Court made “very sparse comparisons of the present case with \textit{Fuentes v. Shevin} on the one hand, and with \textit{Mitchell v. W. T. Grant Co.} on the other; conclude[d] that this case resembles \textit{Fuentes} more than it does \textit{Mitchell}; and then [struck] down the Georgia statutory structure as offensive of due process.” 95 S. Ct. at 726 (Blackmun & Rehnquist, JJ., dissenting) (citations omitted). See \textit{Rendleman, supra} note 84, at 41-43.

88. The Court found the Georgia garnishment vulnerable for the “same reasons” enunciated in \textit{Fuentes}: “Because the official seizures [in \textit{Fuentes}] had been carried out without notice and without opportunity for a hearing or other safeguard against mis-
a *Mitchell* analysis, in a case that, like *Sniadach*, did not involve the current, real interest of a creditor in the controverted property.

These recent decisions, then, have failed to establish a viable test for lower courts to apply in resolving due process questions arising in a debtor-creditor context. Despite the uncertainty of the law, however, body attachment and body execution can be analyzed in light of the current due process framework, and some conclusions can be drawn.

1. *Due Process: Body Attachment*

If *Di-Chem* merely resurrects *Fuentes*, as was contended by two concurring justices, body attachment clearly must be preceded by prior notice and an opportunity for a hearing to comport with the due process requirements of the fourteenth amendment. Even if the broad sweep of *Fuentes* has been contracted by subsequent decisions, however, prior notice appears necessary to validate the procedure. *Mitchell*’s modification of the strict requirements of *Fuentes*, allowing the creditor with a real interest in the property to obtain an interim deprivation without prior notice and an opportunity for a hearing, in no way impacts the due process requirements of body attachment. A creditor undeniably has no “current, real interest” in the body of his debtor; *Mitchell* is therefore inapposite.

The wage garnishment procedure attacked in *Sniadach*, a case of unquestioned viability, provides the closest analogy to body attachment; both wages and personal freedom are specialized interests, the deprivation of which visits a severe hardship upon the defendant and grants the creditor excessive leverage. Because the interest affected by body taken repossession they were held to be in violation of the Fourteenth Amendment.”

89. *S. Ct.* at 722.

89. After comparing the Georgia garnishment statute with the sequestration statute challenged in *Mitchell*, the Court found that “[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute.” *Id.*

90. In *Di-Chem* the only party who could be said to have a current, real interest in the bank account was its owner; thus any conclusion of dual interest, parallel to that in *Mitchell*, was precluded.

91. See notes 80-90 *supra* & accompanying text.


93. See notes 82-85 *supra* & accompanying text.

94. One commentator has suggested that *Mitchell*’s dual interest analysis should be applied only to consensually created, written security interests. Rendleman, *The New Due Process: Rights and Remedies*, 63 Ky. L.J. 531, 555 (1975). Another commentator has suggested that the *Mitchell* dual interest approach may be applicable to repairmen’s liens. Note, *Possessory Liens, supra* note 80, at 1006.

95. See note 79 *supra* & accompanying text.
attachment is more fundamental than that involved in a wage garnishment, it is submitted that notice and an opportunity for a hearing prior to body attachment is indisputably a constitutional requirement.

Because few post-Sniadach courts have confronted directly the constitutionality of body attachment statutes, it is difficult to measure the degree of judicial acceptance of the contention that notice and an opportunity to be heard prior to body attachment are constitutionally required. In *Perlmutter v. De Rowe*, the Supreme Court of New Jersey obliquely considered whether the state's body attachment statute complied with the due process requirements of the fourteenth amendment. A defendant subjected to body attachment contended that the statute, which allowed incarceration prior to judgment unless bail was furnished, was violative of the state constitutional prohibition against imprisonment for debt. In an opinion evidencing a deference to form over substance, the New Jersey court held that because the purpose of the writ, with its attendant bail provision, was not to ensure payment of a forthcoming judgment but rather to ensure the availability of the defendant at trial and for subsequent body execution, the arrest prior to judgment did not constitute imprisonment for debt. Although the court considered this conclusion to be dispositive, in dictum it considered the procedures necessary to comport with modern concepts of due process. Stating that a civil arrest defendant "should have all the same procedural rights and protections as if he were arrested on a criminal charge," the court enigmatically declined to require notice.

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97. The breadth of the challenge to the state's body attachment statute is unclear. After stating that the defendant challenged the statute as "violative of the federal and state constitutions," *id.* at 285, the court disposed of the appeal after a consideration of the state constitutional issues only. *Id.* at 289.
98. *Id.* at 286-88.
99. *Id.* at 289. Although the bail that could be furnished under the writ of body attachment was not intended to satisfy a forthcoming judgment, it served as an alternative to imprisonment, which would assure the defendant's presence at trial in an action for debt. Further, the court specifically stated that the bail was intended to assure the physical presence of the defendant should it be necessary to imprison him to satisfy a forthcoming judgment. *Id.* at 286. The court's holding, therefore, seems to be that imprisonment to assure imprisonment for debt is not imprisonment for debt. This holding may be doubted.
100. After considering only the state constitutional issue, the court stated: "What we have said disposes of this appeal . . . ." *Id.* at 289. See note 97 supra.
101. *Id.* at 289-90.
102. *Id.* at 289. It is unclear whether the court was advocating criminal procedural
and an opportunity for a hearing prior to body attachment. Because the New Jersey court failed even to take cognizance of Sniadach, the cogency of its decision is slight.

In Fleming v. McEnany, the Court of Appeals for the Second Circuit gave only tangential consideration to the constitutionality of Vermont's body attachment statute. The plaintiff in Fleming had been imprisoned pursuant to a writ of body attachment in an action brought against her for the recovery of property damages. She subsequently brought suit against the jail keeper, the arresting officer, the plaintiff in the original action, and the original plaintiff's attorney, contending that the defendants were liable for false imprisonment because the state's civil arrest procedure was unconstitutional. The majority circumvented the due process issue by finding that all of the defendants had acted under a qualified privilege, and thus would not have been liable even if the process were unconstitutional. Although this finding made it unnecessary for the majority to consider Sniadach's impact on the challenged procedure, the court dismissed its significance, stating: "At the time it was decided, Sniadach did not automatically invalidate the Vermont capias procedure. Sniadach involved a different statute in a different state."

protections in all cases of civil arrest or only in cases in which the alleged debt arose from fraudulent conduct.

A substantial number of courts have suggested that in the area of civil arrest, due process mandates criminal procedural protections. See note 139 infra.

103. The court approved arrest "after issuance of the writ on ex parte affidavits." 274 A.2d at 289.

104. 491 F.2d 1353 (2d Cir. 1974).

105. Id. at 1356 & n.1.

106. Id. at 1357-60. The court found that under Vermont law the sheriff and his assistants were insulated from tort liability as long as a writ was not void on its face. Since the capias writ in Fleming complied with all of the statutory formalities, there was no liability for false imprisonment on the part of these public officers. Id. at 1357-58. In considering the potential liability of the attorney and his client, the court noted that the scope within which their acts would be considered privileged was narrower than that enjoyed by the sheriff. The majority concluded, however, that neither the attorney nor the client incurred liability because the writ had been issued in good faith and in compliance with all of the statutory requirements. Id. at 1358-60.

107. Id. at 1360. In determining whether bad faith sufficient to overcome the limited immunity of plaintiff and his attorney existed, the court noted that Sniadach had been decided only one month before the issuance of the writ, and that the Vermont capias procedure had been upheld just seven months before by the state's supreme court. Id. at 1358-60. In that prior case, LaFlamme v. Milne, 127 Vt. 301, 248 A.2d 692 (1968), the Supreme Court of Vermont had based its decision on the proposition that the age of a procedure should be accorded great weight in deciding its constitutionality. The
Because the dissenting judge in *Fleming* reasoned that the privilege extended only to public officials, thereby exposing two of the defendants to potential tort liability, he found it necessary to resolve the due process issue.\footnote{108} Finding that, absent extraordinary circumstances, *Sniadach* and *Fuentes* mandated prior notice and an opportunity for a hearing in civil arrest actions,\footnote{109} the dissent stated that Vermont's body attachment statute "did not provide the process due when the deprivation of a right as sacred as liberty was involved."\footnote{110}

One of the few recent cases confronting directly the due process issue in the context of body attachment, *Roberts v. Macaulay*,\footnote{111} voided a Georgia statute providing for summary seizure of property and imprisonment of defendant debtors without prior notice and an opportunity for a hearing.\footnote{112} In holding the body attachment provisions of the statute unconstitutional, the Supreme Court of Georgia stated: "[T]he tides of judicial opinion are now running against unrestricted process involving restraint of the person in civil litigation. In the wake of *Sniadach v. Family Finance Corp.* . . . any process having punitive effect prior to judgment is subject to reexamination."\footnote{113} A Pennsylvania statute allowing body attachment in suits to recover fines and penalties,\footnote{114} faced fourteenth amendment challenge\footnote{115} in *Non-Resident* need for notice and a hearing, the court reasoned, was diminished by the fact that the defendant eventually would have an opportunity to be heard on the merits of the case. Such reasoning was rejected in *Sniadach*.

\footnote{108. 491 F.2d at 1360-61 (Kaufman, C.J., dissenting).}
\footnote{109. Id. at 1362-63.}
\footnote{110. Id. at 1363.}
\footnote{111. 232 Ga. 660, 208 S.E.2d 478 (1974).}
\footnote{112. Id. at —, 208 S.E.2d at 479-80. The Georgia procedure provided alternative routes to effect the imprisonment of an alleged debtor: (1) a judge or justice of the peace was under a duty to issue a warrant for the defendant's arrest if the plaintiff submitted an affidavit stating that the defendant violently or wrongfully had taken possession of the controverted property. *Ga. Code Ann.* § 82-201 (1970); (2) if a sheriff was unable to locate property on which a writ of execution had issued, and it appeared that the defendant had possession of the property, then the sheriff could imprison the defendant until the property was produced. *Ga. Code Ann.* § 82-204 (1970). The procedure required neither a bond nor an immediate appearance before a judicial officer. Furthermore, under Georgia law there was no provision by which the defendant could secure his freedom in the interim between his arrest and trial. 232 Ga. at —, 208 S.E. 2d at 480.}
\footnote{115. In addition to the due process challenge, the plaintiffs claimed that the statutory
Taxpayers Association v. Murray. Holding that prior notice and an opportunity for a hearing were essential to the constitutionality of the statute, and noting that the absence of these elements in the statute was cured by a recently amended local rule, the court held the controverted procedure not violative of the fourteenth amendment.

Thus, recent cases that have considered adequately the debtor due process line of cases have concluded that body attachment must be preceded by notice and an opportunity for a hearing to comport with the due process requirements of the fourteenth amendment.

2. Due Process: Body Execution

Unlike body attachment, body execution is available only after a final judgment on the merits of the underlying claim. Early cases therefore held that due process was satisfied by the notice and hearing available in the original action. These cases rejected the need for notice and an opportunity for a hearing prior to the body execution on the ground that such procedures would undermine the objective of the remedy, presumably by permitting a defendant to abscond and thereby escape incarceration. According to these early decisions, sufficient notice was provided if the complaint in the underlying action alleged an act by the defendant that would subject him to body execution under state law; a specific prayer in the complaint for body execution was not necessary. Consistent with this rationale, as recently as 1974, exemption for minors and married women was in violation of equal protection. See notes 142-51 infra & accompanying text.


117. 347 F. Supp. at 404.

118. Id. at 403. The local rule, Pa. C. P. (1st Judicial Dist.) R. 917, had been promulgated by the Court of Common Pleas of Philadelphia pursuant to the challenged state statute. 347 F. Supp. at 402-03.

119. Id. at 404.


122. See Baker Wholesale Co. v. Fleming, 227 S.C. 312, 87 S.E.2d 876 (1955) (complaint that alleged receipt of funds in a fiduciary capacity held sufficient basis for the issuance of body execution); Martin v. Hutto, 82 S.C. 432, 64 S.E. 421 (1909) (complaint alleged fraudulent misapplication and embezzlement of plaintiff's property).
the Supreme Court of Vermont, in *Dunbar v. Gabaree*, impliedly approved the implementation of body execution absent prior notice and an opportunity for a hearing. Although the court in *Dunbar* found the challenged body execution defective on other grounds, it distinguished *Sniadach* and *Fuentes* noting that they “involve[d] the total absence of any hearing at all . . . .”  

The weight of recent authority, however, as evidenced by *Yoder v. County of Cumberland*, holds prior notice and an opportunity for a hearing indispensable to the constitutionality of body execution. In *Yoder* the *capias* execution was issued for the alleged failure by the petitioner to pay counsel fees as required by a divorce decree. On the authority of *Sniadach*, the court held that due process entitled the petitioner to notice and a hearing prior to even a temporary deprivation of his personal freedom. The court acknowledged that the obligation to pay alimony had previously been established in the divorce suit and could not be relitigated, but reasoned that a determination of the petitioner’s present ability to comply with the divorce decree was a condition precedent to the issuance of the *capias* execution and mandated a hearing. The respondent in *Yoder* contended that the support of women and children constituted a compelling state interest that justified a summary temporary incarceration under *Sniadach’s* extraordinary circumstances exception. The court in *Yoder* recognized,

124. Id. at —, 330 A.2d at 92. The court decided that the jail execution was improper because it had been issued prior to the expiration of time for a possible appeal by the defendant. *Id.*
126. 278 A.2d 379 (Me. 1971).
128. 278 A.2d at 381. Yoder filed a petition of habeas corpus after his imprisonment pursuant to 19 M.R.S.A. § 722 (Supp. 10, 1974), which authorized the writ of body execution to issue summarily upon the failure to pay alimony, support, or counsel fees as required by a divorce-decree. The arrested party could petition the court for discharge from imprisonment “on such terms and conditions as justice may require.” 278 A.2d at 381-83.
129. *Id.* at 385-87.
130. *Id.* at 387.
131. *Id.* *Sniadach* recognized that extraordinary circumstances could abate the right
however, that because imprisonment of the petitioner would hinder rather than facilitate the support of the woman and her child, his incarceration would further no state interest.132

Similarly, in Mills v. Howard133 the petitioner, in arrears on support payments and the payment of counsel fees, was summarily incarcerated pursuant to a statute that permitted body execution when a defaulting husband's goods and chattels could not be secured.134 Noting that the defendant's indigency would constitute a valid defense, the Supreme Court of Rhode Island held that due process required prior notice and a hearing.135

In accord, the District Court for the District of Connecticut, in Abbit v. Bernier,136 tested the constitutionality of a Connecticut statute that provided for body execution if the personal estate of the debtor were insufficient to satisfy the judgment and the creditor were unwilling to accept realty.137 Noting that imprisonment without prior determination of a defendant's ability to satisfy a judgment may amount to punishment by reason of indigency, the court found a violation of the equal protection clause of the fourteenth amendment.138 The court therefore required a pre-incarceration hearing to determine the debtor's ability to prior notice and a hearing. 395 U.S. at 339. Standards for determining when such circumstances exist were articulated in Fuentes v. Shevin. See note 81 supra.

132. Id. at 387-88.
135. 109 R.I. at ——, 280 A.2d at 104.
137. CONN. GEN. STAT. ANN. § 52-369 (Supp. 1976). Connecticut law exempts from body execution debtors whose obligations are founded on contract. CONN. GEN. STAT. ANN. § 52-355 (1958). In Abbit, the judgment against the debtor arose from a tort claim. 387 F. Supp. at 60.
138. 387 F. Supp. at 62. The Abbit court based its conclusion on two recent Supreme Court decisions. In Williams v. Illinois, 399 U.S. 235 (1970), the state penal statute prescribed both a maximum term of imprisonment and fine. Id. at 236. If the defendant failed to pay the fine after serving the maximum sentence, he remained in prison, crediting five dollars against the fine for each day served, until the fine was satisfied. Id. at 236-37. The Court found that this imprisonment beyond the maximum statutory sentence constituted "an impermissible discrimination that rests on ability to pay" and invalidated the procedure as unconstitutional. Id. at 241. More recently, in Tate v. Short, 401 U.S. 395 (1971), the Court held impermissible the prison sentence of an indigent unable to pay his traffic fines. The Court held that the state's "fines only" system of traffic penalties could not, "consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine." Id. at 399.
to pay the judgment.\textsuperscript{139} Consistent with \textit{Yoder} and \textit{Mills}, then, \textit{Abbit} recognizes that in the context of body execution, due process is necessary to ensure equal protection.\textsuperscript{140}

\textbf{B. Equal Protection}

In addition to this dependent relationship manifested by equal protection and due process,\textsuperscript{141} the equal protection clause of the fourteenth amendment may furnish independent grounds for constitutional challenge to body attachment and body execution statutes that exempt certain groups. In \textit{Non-Resident Taxpayers Association v. Murray},\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{139} 387 F. Supp. at 62. After finding the statutory provision for body execution to be a denial of equal protection, the court in \textit{Abbit} suggested procedures that would ensure the constitutionality of a future statute. 387 F. Supp. at 62-63 n.12. The court suggested that due process required that the defendant have the right to cross-examine, the right to appointed counsel if indigent, and the opportunity to present witnesses. In addition, \textit{Abbit} stated that imprisonment should result only after the creditor proves a refusal (as distinguished from an inability) to satisfy a judgment by at least "clear and convincing evidence" and perhaps "beyond a reasonable doubt." \textit{Id.}
\item Other courts similarly have found imprisonment under civil process indistinguishable from criminal incarceration and have required some measure of criminal procedural protections. Maggio v. Zeitz, 333 U.S. 56, 79 (1948) (Black & Rutledge, JJ., concurring) (proof beyond reasonable doubt); Desmond v. Hachey, 315 F. Supp. 328, 323-33 (D. Me. 1970) (opportunity to present defense); \textit{In re Harris}, 69 Cal. 2d 486, \textemdash, 72 Cal. Rptr. 340, \textemdash, 446 P.2d 148, 152 (1968) (opportunity to be heard with assistance of counsel); Wright v. Crawford, 401 S.W. 2d 47, 49 (Ky. 1966) (right to counsel, right to counsel on appeal, cost-free record and transcript on appeal); Perlmuter v. DeRowe, 58 N.J. 5, \textemdash, 274 A.2d 283, 289 (1971) (dictum) (right to be advised of charges, right to be released on bail, right to later hearing as to probable cause for complaint); Mills v. Howard, 109 R.I. 25, \textemdash, 280 A.2d 101, 103 (1971) (right to be advised of charges, opportunity to present defense, right to counsel, opportunity to present witnesses).
\item If prior notice and an opportunity for a hearing are provided to prevent imprisonment by reason of indigency, the civil prisoner may secure his release by paying the sum for which he has been imprisoned. It therefore is submitted that criminal procedural protections are unnecessary in cases of imprisonment pursuant to civil process.
\item \textsuperscript{140} See notes 126-139 \textit{supra} & accompanying text.
\item \textsuperscript{141} The prior hearing mandated by due process ensures that a debtor \textit{unable} to satisfy a judgment will not be imprisoned, thereby avoiding an affront to the equal protection clause. See notes 126-140 \textit{supra} & accompanying text.
\end{itemize}
for instance, the District Court for the Eastern District of Pennsylvania considered the constitutionality of a body attachment statute exempting married women and minors.\textsuperscript{144} In analyzing the equal protection issue, the court anomalously applied different constitutional standards to those classes exempted from body attachment and those denied exemption.\textsuperscript{145} With respect to the exemption for married women and minors, the court applied the rational basis test,\textsuperscript{146} found a valid state interest in the protection of these classes,\textsuperscript{147} and held the statute not violative of the equal protection clause of the fourteenth amendment.\textsuperscript{148} The court stated, however, that the state must show a compelling state interest for depriving individuals of the statutory exemption;\textsuperscript{149} this interest was found in the state's need "to recover fines based upon a wilful and intentional refusal to pay taxes legally due and payable."\textsuperscript{150} The soundness of this bifurcated equal protection analysis is questionable; the court's approach makes the applicable equal protection standard dependent upon the perspective from which the statute is viewed.\textsuperscript{151}

Evidencing a sounder approach, a New York court in \textit{Repetti v. Gil}\textsuperscript{152}

\begin{itemize}
\item[145.] 347 F. Supp. at 402-03.
\item[146.] \textit{Id.} at 402. Under the rational basis test, a statute distinguishing among different categories may be sustained if the classifications bear some rational relationship to the statute's objectives. \textit{See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).}
\item[147.] 357 F. Supp. at 402. Although the court correctly noted that the classification would fail to meet the rational basis test only if it "rests on grounds wholly irrelevant to the achievement of the state's objective," \textit{Id.}, the court upheld the exemption without articulating the purported state objective. Instead, noting that "from time immemorial [sic]" minors and married women had been the subject of statutory protections, the court appeared to conclude that a legislative practice with such a heritage could not abridge the equal protection clause.
\item[148.] 347 F. Supp. at 402.
\item[149.] \textit{Id.} at 402-03.
\item[150.] \textit{Id.} at 403. The writ of body attachment would issue only in suits to recover fines and penalties. \textit{Id.} at 401.
\item[151.] When considering classes \textit{excluded} from the statute's operation, the court employed the rational basis test; when considering classes included within the statute's operation, the court employed a strict scrutiny (compelling state interest) test. \textit{See notes 142-150 \textit{supra} \& accompanying text. It is submitted that such a bifurcated approach \textit{itself} affronts the equal protection clause.}
\item[152.] 372 N.Y.S. 2d 840 (Sup. Ct. 1975).
\end{itemize}
found the statutory exemption of women from body attachment\textsuperscript{153} unconstitutional.\textsuperscript{154} Unlike the court in Non-Resident Taxpayers, which did not articulate the purported state objective,\textsuperscript{155} the Repetti court articulated the state interest advanced by the statute to be assurance of the presence at trial of defendants alleged to be particularly untrustworthy.\textsuperscript{156} Concluding that “[w]omen, in their humanity are equally as capable of untrustworthiness as men,”\textsuperscript{157} the court found the state statute violative of the equal protection clause under either the rational basis test or the strict scrutiny test.\textsuperscript{158}

The Repetti court’s refusal to choose between the rational basis standard and the strict scrutiny standard\textsuperscript{159} reflects current uncertainty as to the appropriate equal protection standard for analyzing sex classifications. Recent decisions of the Supreme Court appear to eschew both tests\textsuperscript{160} and to adopt instead a demonstrable basis standard, placing the burden on the state to prove that the sex classification is related rationally to the objective advanced by the statute.\textsuperscript{161}

\footnote{153. N.Y. CIVIL PRACT. LAW § 6101(1) (McKinney 1963) provides: “An order of arrest as a provisional remedy may only be granted . . . where there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit, and the person to be arrested is not a woman.”
\footnote{154. 372 N.Y.S.2d at 846.
\footnote{155. See note 147 supra.
\footnote{156. 372 N.Y.S.2d at 846.
\footnote{157. Id.
\footnote{158. Under the strict scrutiny test, the state must show that the classification is a necessary means of achieving a legitimate state purpose. See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

Although the court purported to find the exemptions unconstitutional under either the rational basis or strict scrutiny standards, 372 N.Y.S. 2d at 846, because the rational basis test subjects the state to a less rigorous standard, the court in effect measured the statute against this standard.\textsuperscript{159}

\footnote{159. 372 N.Y.S.2d at 846. See note 158 supra & accompanying text.
\footnote{160. In Reed v. Reed, 404 U.S. 71 (1971), a unanimous Court declared violative of the equal protection clause a state statute granting a preference to males above females as administrators of estates. Although the Court declined to adopt the strict scrutiny test, it failed to apply the presumption of validity attendant to the rational basis test, and shifted the burden of proving rationality to the state. See Note, Sex Discrimination in Employee Fringe Benefits, 16 WM. & MARY L. REV. 109, 116 (1975).

In Frontiero v. Richardson, 411 U.S. 677 (1973), four members of the Court argued for the application of the strict scrutiny test to sex-based classifications. Four other members, however, employing the evolving standard first articulated in Reed, found the challenged federal statutes unconstitutional. See Note, Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to La Fleur, 62 GEO. L.J. 1173, 1185 (1974).

\footnote{161. See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model
Non-Resident Taxpayers may be consistent with the rational basis test, it is submitted that sex-based exemptions from body attachment or body execution fail to meet the demonstrable basis test, and therefore are violative of the equal protection clause of the fourteenth amendment.

CONCLUSION

The ancient creditors' remedies of body attachment and body execution are deeply rooted in our legal system. These remedies have existed in various forms since the earliest days of Roman and English law. A recognition of the harsh nature of these remedies led to efforts to limit their application, most notably in the form of state constitutional prohibitions against imprisonment for debt. Despite such prohibitions, however, determined creditors may be able to obtain a debtor's imprisonment either before or after judgment.

Procedures implemented to effect body attachment or body execution, however, must comport with both the equal protection and the due process clauses of the fourteenth amendment. Due process requires that a defendant receive notice and an opportunity for a hearing prior to body attachment or body execution. With respect to body execution, the notice and hearing afforded in the suit on the merits does not satisfy due process requirements; consistent with the equal protection clause, a separate hearing to determine the defendant's ability to pay is necessary to avoid imprisonment by reason of indigency. In light of the developing demonstrable basis test for measuring the constitutionality of sex-based classifications, it is doubtful that body attachment or body execution statutes incorporating sex-based exemptions can survive constitutional scrutiny. Thus, although body attachment and body execution are available to present day creditors, their operation is restricted by both the due process and equal protection clauses of the fourteenth amendment.