



Detail from *The Forlorn Hope*, newspaper masthead, ca. 1800, negative number 49720. Collection of the New-York Historical Society.

REPUBLIC OF DEBTORS

*Bankruptcy in the Age of
American Independence*



BRUCE H. MANN

HARVARD UNIVERSITY PRESS

Cambridge, Massachusetts

London, England

2002

IMPRISONED DEBTORS IN THE EARLY REPUBLIC

Creditor, hardhearted—

I know there is no music in your ears,
So pleasing as the groans of men in prison
And that the tears of widows, and the cries
Of famish'd orphans, are the feasts that take you.

John Pintard copied these lines into his commonplace book sometime between 1806 and 1809—recalling, no doubt, the “1 year, 3 weeks, 20 hours” he had passed imprisoned for debt ten years earlier. Although he had since returned to a state of at least modest comfort and even some distinction, Pintard nonetheless sprinkled his commonplace book with numerous observations on debt, poverty, prisons, lawyers, and adversity. Imprisonment for the crime—or was it the sin?—of insolvency scarred Pintard lastingly, as it did every other debtor whose letters or recollections survive.¹ For some debtors the scars were too grievous to acknowledge. Thomas Rodney—an officer in the Revolution, a member of the Continental Congress, and a judge of the Supreme Court of Delaware—kept voluminous diaries in which he recorded everything from the smallest slights to his dignity to intricate accounts of his dreams. Amid all the

detail, however, there is a gap, which corresponds to the fourteen months Rodney spent imprisoned for debt in the early 1790s. When his journals resume, they depict a bitter, impoverished man, steeped in resentment and humiliation, but who referred only obliquely many years later to the key to his bitterness.²

These clues notwithstanding, the world of imprisoned debtors remains largely unexplored—not because debtors themselves were at all reticent about decrying their fate but rather because the world itself is so alien. The small literature on imprisonment for debt in early America rarely ventures inside the prison walls, tacitly acknowledging the difficulty of discerning what lies within. The task of this chapter is to penetrate those walls—to explore the world of imprisoned debtors and examine how that world both reflected and influenced changing attitudes toward debt, insolvency, and imprisonment for debt in the Revolutionary era.³

The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt—most on *mesne* process, and all on execution of a judgment. That is, debtors could be imprisoned upon arrest for failure to pay a creditor before a formal adjudication that the debt was actually due, or they could be imprisoned for failure to pay the amount a court had found due. Once imprisoned, how a debtor had been arrested was immaterial.

Imprisoning one's debtor did little to assure payment of the debt. In tacit recognition of that, every colony north of the Potomac, with the possible exception of New Hampshire, permitted insolvent debtors to be bound to service to their creditors without their consent, typically for as long as seven years, the standard term for indentured servants.⁴ As one debtor succinctly warned, “the gaol will pay no debts.”⁵ That, of course, did not deter creditors, who hoped that the rigors of imprisonment would induce debtors to disclose concealed wealth or to part with assets that were exempt from attachment or, perhaps, that family members might step into the breach—or who acted out of anger. Arrest did sometimes produce epiphanies, as when William Dudley paid a disputed debt after being

dragged by a constable to the prison door in New York, "at which I was very much terrified of the thoughts of being committed to such a place."⁶ In reality, however, the most common outcome was that creditors received little or nothing. Several factors compelled this result. First and foremost, of course, was the penalty of imprisoned debtors. Family members did sometimes come forward, and debtors did sometimes volunteer otherwise unreachable assets, but most imprisoned debtors were insolvent. Second, even if a debtor had the assets to satisfy the creditor at whose suit he had been imprisoned, once other creditors sued—which they invariably did because only by suing could they take a place in line for a chance at the debtor's property—the debtor could not purchase his freedom simply by paying the first creditor in the queue and ignoring the rest. This necessarily meant that creditors, if they received anything, would receive less than the debtor owed them because only by agreeing to share in the deficiency could creditors begin to apportion whatever remained.⁷

The principal statutory mechanisms for freeing imprisoned debtors recognized this reality. Every colonial and state insolvency and bankruptcy statute turned on the principle of creditors accepting some proportionate loss of their debts in return for a share of the debtor's property. The details, of course, varied. As we saw in the preceding chapter, colonies and states differed on whether release was available through insolvency proceedings, which freed the debtor and distributed his assets among his creditors but did not relieve him of his obligation to pay the underlying debts, or through bankruptcy proceedings, which accomplished the same ends but also discharged the debtor from liability for unpaid debts. They differed on whether either proceeding, if available at all, was available to all debtors or only a few, and whether by free application to a court or only by special act of the legislature. They differed on whether debtors could invoke relief on their own or all or a certain portion of their creditors had to agree, and on whether creditors could be compelled to join or be bound by a composition. They disagreed on the consequences of a creditor refusing to join other creditors in fashioning a settlement and on how to determine priority among creditors in dividing up an insolvent estate. They also differed on the length of time a debtor had to be impris-

oned before qualifying for discharge, on who was responsible for maintaining the debtor in prison, and on whether a creditor could hold a debtor in prison by paying his support. And these were just the major points of disagreement.

Disagreement or no, imprisonment for debt was an unquestioned piece of the cultural baggage of English immigration in the seventeenth century. It could hardly have been otherwise for a practice that had existed in England for three hundred years. This is not to say that English law on the subject was transplanted wholesale—rather, that the idea of imprisoning delinquent debtors was never in dispute. As a petitioner from Salem, Massachusetts, remarked in 1678, "it is every dayes way in every trading towne, for merchants upon neglect of payment, for to arrest their debtors." The application of the idea varied among colonies, partly in response to differing conditions of labor, partly because of differing facilities for incarceration, partly because of the presence or absence of reform impulses—none of which touched the premise that imprisonment was appropriate for failure to pay one's debts.⁸

So accepted was the idea of imprisonment for debt in early America that opposition to it did not appear until the 1750s, although criticisms of the practice had circulated—utterly ineffectually—in England for at least a century. Even then, the opposition was not to imprisonment for debt but to keeping debtors imprisoned after they had turned all their property over to their creditors as long as some debts remained unpaid. As one anonymous writer noted, in explicit disclaimer of any broader opposition, "if it should be objected, as a Consequence from my Reasoning, that the Person of the Debtor can in no Case be taken and holden; I shall not allow the Consequence; for Reason supposes he may be taken and holden." Within a few years, however, the level and nature of public attention to imprisonment for debt changed.⁹

Toward the end of the 1760s, a genre of popular public literature that might best be described as "dueling broadsides" (or, for the more verbose, "dueling pamphlets") began to feature the plight of unjustly—as they claimed—imprisoned debtors. There was Hendrik Oudenarde, who wrote a stream of letters from the debtors' prison in New York protesting

his arrest and confinement for failing to pay an arbitration award that he regarded as severe, but that he had attempted to pay nonetheless. Or John Wright Stanly, who wrote at least three pamphlets from jail in Philadelphia denouncing his former partner, Jonathan Cowpland, whom he claimed had defrauded him, for kidnaping him from Honduras and returning him to Philadelphia, where Cowpland arrested him for debt. Or Gazelena Rousby's broadside campaign against James Jauncey, who had imprisoned her husband for a debt due Jauncey from an estate, the executorship of which her husband had allegedly declined.¹⁰

In none of this literature is there any imputation that the debtor's insolvency represented moral failure. To be sure, one would not expect debtors to argue that their plight reflected their own moral shortcomings, but neither does one find their creditors replying that their insolvency was immoral. Instead, debtors and creditors alike agreed that the debtor's insolvency and consequent imprisonment were caused by elements external to the debt itself—for debtors, economic misfortune, a vindictive creditor, or perhaps a fraudulent partner; for creditors, the dishonesty or villainy of their debtors, character defects, to be sure, but hardly specific to debt. As one anonymous author wrote, "a Man's Misfortunes does not prove him a Rogue. Nor is Weakness, Inadvertency, or Imprudence, which all Men have more or less of, a Proof of Fraud, Dishonesty, or Extravagancy." Some debtors undoubtedly were rogues—such as the Maryland swindler imprisoned for debt in Philadelphia by Samuel House, who understandably preferred to let him "lay there and rot"—but one could not reflexively assume that they were.¹¹

The redefinition of debt from moral delict to economic risk made the new literature possible. Reform emerges from dispute, not consensus. As long as debt and failure to repay were widely deemed immoral—that is, as long as condemnatory voices like Samuel Moody's remained prominent—there were no grounds on which to question imprisonment for debt. Once economic causes were admitted, however, people could begin to imagine different responses to indebtedness. The redefinition was, of course, imperfect and incomplete. But, as we saw earlier, it had begun well before midcentury and gathered momentum in the rapid expansion of production

and trade during the Seven Years' War and, more urgently, during and after the Revolution. Not surprisingly, the redefinition applied principally to debtors who were themselves entrepreneurs in the changing economy. After all, the criticisms of debt that recurred in public debates over land banks, paper money, and commerce in the first half of the century all reserved their strongest opprobrium for the purchasers rather than the purveyors of consumer goods, even though both acquired the items on credit. Thus, when Americans began to question the efficacy of imprisonment for debt, their animating concern was the imprisonment of people who trafficked in credit rather than those who merely purchased on it.

For proof of this one need look only at the first American writing to criticize imprisonment for debt, a pamphlet published in Rhode Island in 1754 entitled *The Ill Policy and Inhumanity of Imprisoning Insolvent Debtors, Fairly Stated and Discussed*. Early in the pamphlet the anonymous author notes that "all Men are liable to Pain, Misery, and Death; to the Loss of Reputation, Credit, Estate, Friends, and every Thing that is dear and valuable in Life." Almost immediately, however, he makes it clear that the imprisonment for insolvency of "all Men" is not his concern; rather, it is that of "the Merchants and Traders, who are every Moment liable to Misfortunes." Why this is so becomes apparent as the analysis unfolds.¹²

The fundamental question for the author was whether, when a debtor was insolvent, "it is best for Society, that his Creditors receive a Proportion of their Debts . . . and his Person be sat at Liberty to seek new Employment; or that his Body be imprisoned for the Deficiency, until he pays the utmost Farthing, which is impossible?" What is best for society, he argues, is that "Manufactures are more encouraged, Trade and Business negotiated, Navigation and Commerce carried on with more Dispatch and Safety." In short "it is best for Society, that a Law of Liberty for Insolvent Debtors, should be Established in all Trading Communities." The emphasis throughout is on trade. Although the author nowhere explicitly excludes from his analysis what we might think of as "traditional" debtors, the exclusion is clearly implicit. It is the "Man in Trade and Business, who is both a Debtor and Creditor, and is therefore liable every Moment to Accidents, unforeseen Casualties, and Contingencies," who is in need of

relief, not poor farmers or laborers. After all, he asks, "how often do we see the Bowl of Fortune, like the Bowl at Nine Pins, strike one Pin, which Pin strikes the next, who knocks down a third; all are shook, but some by Chance, stand out the Game." Are "those that stand, better Pins than those that Fall?" Might not "the Bowl of Fortune have happen'd on the standing Side first?" Not only does this capture the truism that creditors in trade or business are themselves debtors; it also expresses the commonality of interest between creditors and the debtors whose failures were economic rather than moral—which is to say, debtors who were also in trade or business.¹³

When the first pamphlets to question the efficacy of maintaining in jail debtors who were willing to relinquish their property appeared in the 1750s, the redefinition of debt from a moral to an economic offense was still in its infancy. Creditors needed to be reminded of the difference. An anonymous Connecticut writer observed in 1755 that, "as a Prison . . . in the Apprehension of Men, so much resembles the final Punishment of Wickedness, they imagine, that Man that is so unhappy as to be doomed in that Place, is not only become a Bankrupt as to his Fortune, but as to his Faith and Honour; and generally treat him as such." Lest one think that his caution applies to all debtors, the author makes clear that his concern is for the "Man of Skill and Experience in Merchandize, . . . who, by the Badness of the Times in Trade, or by the mere Providence of God, has been reduced."¹⁴ Nonetheless, the redefinition was real enough that the biblical parable of the unmerciful servant, which forty years earlier Samuel Moody had invoked to illustrate the rigor of creditors' remedies, could now be offered to argue that imprisoning "honest Insolvents" violates "the Christian Religion"—the first time anyone had suggested in print that imprisonment for debt might not have divine sanction. Indeed, the parable was even recited to support the proposition that a bankruptcy law would be "agreeable to the Genius of our holy Religion."¹⁵

One can discern before the Revolution an occasional glimmer of recognition that whatever relief accrued to men of commerce from an economic construction of debt should apply equally to all imprisoned debtors. For example, another Connecticut writer, the pseudonymous Justinian,

declared sweepingly in 1770 that "confinement for debt, when nothing to pay, is contrary to the foundation of law." He appeared to be speaking of all insolvent debtors when he wrote that "[i]t is difficult for the poor to command attention—their words make a despicable sound . . . The miseries of the poor are disregarded, and yet some of the lower rank, undergo more real hardship in one day, than those of a more exalted station, suffer in years." But the glimmer is just that—a fleeting glimpse. Even Justinian seemed to have had in mind a more limited class of debtors when he asked if "[m]en whose words are taken for £4 or 500 lawful money"—an unsecured amount well beyond the reach of debtors who were as impoverished before imprisonment as they were in prison—"must they be made drones?" A genuinely catholic opposition to imprisonment for debt lay far in the future.¹⁶

✕ Strictly speaking, there were no debtors' prisons in America before the Revolution, and only two that even approximated the description in the first decades afterward. In physical terms, imprisonment for debt in America before the Revolution—and everywhere but Philadelphia and New York after the Revolution—meant something very different than it did in England. There, freestanding prisons exclusively for debtors, such as the King's Bench and Marshalsea prisons in London, were of long standing. In America, on the other hand, the closest approximation to a separate debtors' prison before the Revolution was a room set aside for debtors in a jail otherwise filled with criminals awaiting trial or execution. Even that degree of separation was unusual—where jails existed, it was much more common for debtors and criminals to be thrown together. Where jails did not exist, a room in the sheriff's house or an outbuilding sufficed.¹⁷

Descriptions of the physical conditions of imprisonment for debtors before the Revolution are few, although the complaints are many. Charles Woodmason, an Anglican minister traveling in South Carolina in 1767, described sixteen debtors crowded into a room measuring twelve feet square in the jail in Charleston, where "[a] person would be in a better

Situation in the French Kings Gallies, or the Prisons of Turkey or Barbary, than in this dismal Place." Before 1759, debtors in New York were held in the attic of city hall, which doubled as a prison. When overcrowded, some were moved to the sub-basement with condemned criminals. Sanitary conditions were so bad as to be remarked upon by people passing by on the street. A description of the county jail in Worcester, Massachusetts, in 1785, shortly before the county built a new, more commodious jail, probably typifies the jails of similar-sized counties before the Revolution. The Worcester jail was a small, two-story structure. On the first floor was one room, fourteen feet square, for criminals, plus a smaller "condemned room" and dungeon, "which are used only on Special occasions." Debtors were confined in a room on the second floor, about fourteen or fifteen feet square, which adjoined a smaller room commonly used for female prisoners. Although Massachusetts law required that criminals and debtors be housed separately, the sheriff reported "that upon some occasion he has been obliged to mix Criminals with Debtors, and at other times, Debtors with Criminals."¹⁸

The picture becomes a bit clearer after the Revolution when we turn to the two institutions in America that came closest to separate debtors' prisons on the English model—the New Gaol in New York and the Prune Street jail in Philadelphia. They are of particular importance for our purposes because the number and prominence of debtors imprisoned there prompted the national debate over bankruptcy legislation in the 1790s.

The New Gaol in New York stood in the northeast corner of the present City Hall Park, then known as the Commons or, more popularly, the Fields. Until rapid development transformed the area early in the nineteenth century, the location lay just beyond the northern edge of the settled part of town. Built in 1757–1758 in the style of domestic architecture that typified most public buildings before the 1790s, the prison was a three-story stone structure, "finished in a handsome manner, so as to represent marble." It was seventy-five feet wide and sixty feet deep, topped by a cupola and surrounded by a fence, with a central entry and barred windows. Initially home to debtors and criminals alike, the New Gaol became the debtors' prison after the Bridewell opened for criminals in 1775 a few

hundred feet to the west on the other side of the almshouse, although it continued to house a few convicted misdemeanants and accused criminals awaiting trial for minor offenses. The building had fourteen rooms on its three floors, arranged on either side of a hall that ran the depth of the building on each floor. The middle and upper halls—the second and third floors—each had six rooms, which seem to have been occupied by merchants and skilled artisans, perhaps four or five to a room. The lower hall, or first floor, housed laborers and other less substantial debtors in more crowded conditions. Less privileged debtors slept in the common hallway. In the early nineteenth century, and perhaps before, truly common debtors—prostitutes, sailors, and the like—occupied a damp cell in the basement. A rumor that the jail was haunted, which if true would have added a nice touch of dread, turned out to be a fabrication by the wife of an imprisoned debtor, who published it to raise money for her husband's release.¹⁹

Descriptions of the Prune Street jail in Philadelphia are spare. It was a stone building at the corner of Prune (now Locust) and Sixth streets, forty-five feet long and fifty-five feet deep, built originally as a workhouse for the Walnut Street jail, which it abutted. The Walnut Street jail, which housed criminals, occupied the remainder of the block to the north of the debtors' apartments. The yards of the two were separated by a wall, which was not tall enough to prevent a certain amount of communication between debtors and criminals. As one writer put it, "Crime and poverty . . . were the tenants of the two apartments, separated by a courtyard."²⁰

Conditions within the prisons were severe. "[T]his unhappy mansion," a "human slaughter house," "that dismal cage," a "loathsome storehouse" were but some of the descriptions of the New Gaol through the years.²¹ Unlike criminals and paupers, debtors had to provide their own food, fuel, and clothing—supplied from their own resources, the generosity of family or friends, begging, or the beneficence of a local relief society—or they did without. Occasional statutes requiring creditors to maintain their debtors under certain circumstances or providing state assistance were few, sporadic, and often ineffectual. In general, what William Holdsworth, the encyclopedic historian of English law, described

as "the strictly medieval view" of imprisoned debtors prevailed. In the harsh, uncompromising words of an English judge of the sixteenth century, a debtor in prison "ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle, and puts them in a pound." If the debtor cannot feed himself, he should hope for "the charity of others." If none is forthcoming, "let him die, in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment."²²

Pleas of starvation echoed in petitions and letters from debtors in every jail and prison across the decades. William Moore wrote from the jail in Poughkeepsie that for four days he had eaten nothing but a few scraps spared by fellow prisoners and found it hard to believe that there was "no Law provided man not to starve to Death in goal." Thomas Moland claimed that he had often "been a week at a Time without the Benefit of meals Victuals." Seven debtors in the New Gaol petitioned John Tabor Kempe, attorney general of the province, that they "are Really Like to perish To Death with Hunger, . . . And without Speedy Relieff, must Dye." Another debtor in the New Gaol, John Young, warned that he "must Inevitably perish for want of food and Raiment." Abel Butterfield, the former schoolmaster in Hardwick, Massachusetts, pleaded from jail in Worcester for food and clothing, "as he has lost his Right Arm [and] is almost naked." Andrew Fraunces, imprisoned in Newark, repeatedly begged William Duer for assistance. For three weeks, he claimed, he had known no "Comfort of Life except a Potatoe and a little salt meat." "[B]egging a bone to gnaw is all I have subsisted on." Duer, who was himself imprisoned in New York, could only reply that "I cannot do Impossibilities."²³

Conditions could also be dangerous, whether because of violent prisoners or unhealthy quarters. For example, Hugh McEwan feared for his life in the New Gaol—"this Drery place of Exile"—at the hands of "a monster Confined amongst us" who had physically assaulted several imprisoned debtors, women as well as men, "who on account of their Confinement Can Not Run from his [murderous?] Desires." Accommodations in the Worcester County jail, never good under the best of circumstances,

took a sharp turn for the worse on December 6, 1785, when eleven new debtors were imprisoned, further overcrowding the twelve who were already there, including some who had been imprisoned nearly a year, and one for a year and a half. With no space left in the one room set aside for debtors, the jailer put the new arrivals in an unheated garret. Bowed, perhaps, but not chastened, all twenty-three debtors petitioned the court of quarter sessions the very next day complaining of the cramped billet and lack of heat in winter, which made the garret in particular "by no means fit for any of the Human Race to lodge in."²⁴

Scenes such as these prompted the formation of relief societies. Not surprisingly, the two largest and best known were in New York and Philadelphia—the Society for the Relief of Distressed Debtors (later renamed the Humane Society) in New York and the Philadelphia Society for Alleviating the Miseries of Public Prisons, organized within four months of each other in 1787 and modeled in part on similar societies recently founded in England. Smaller, somewhat ephemeral groups doubtless existed elsewhere, such as "the Committee of the Patriotic Society for the relief of distressed debtors" in Newark. The Philadelphia Society ministered primarily to criminals, and the Humane Society later devoted "a portion of its care to the resuscitation of persons apparently dead from drowning," but the purposes of both with respect to debtors were similar. Each distributed donated food and clothing, appointed visitation committees to inspect conditions in the prisons, and lobbied for various legislative reforms, although never to abolish imprisonment for debt itself. The Humane Society, for example, explicitly accepted imprisonment for debt as "a justifiable punishment of the debtor," limited only by the qualification that subjecting an imprisoned debtor "to the sufferings of cold and hunger, and the consequent hazard of his life, infringes that fundamental axiom in legislation that the punishment of an offence should always be in proportion to the degree of it." Its central mission was largely palliative—to "administer to the comfort of prisoners, by providing food, fuel, clothing, and other necessaries of life," and to "procure the liberation of such as were confined for small sums, and were of meritorious conduct, by discharging their debts." Of the two, it was the Philadelphia Society that left the most vivid images of the conditions of imprisoned debtors.²⁵

The dominant impression of the debtors' prison conveyed by the records of the Philadelphia Society in the late 1780s is one of licentious chaos. It is almost as though the cautions of ministers earlier in the century that debt bred luxury and vice had proven true, and that as punishment for their sins debtors now lived in a purgatory worthy of Hieronymus Bosch. The debtors' prison observed by the visitation committees of the Philadelphia Society was one in which thugs levied "garnish" on new arrivals by forcibly stripping them of their clothes to sell for liquor, criminals scaled the wall separating the two sides to abuse and rob the debtors, turnkeys extorted favors from visitors, drunkenness and fighting abounded, men and women mixed indiscriminately, and prostitutes procured their arrests for debt to serve a captive clientele. The county grand jury charged that the jail had become such a "desirable place for the more wicked and polluted of both sexes" that newly released prisoners routinely signed "fictitious notes" and confessed judgment on them so they could return to the "scenes of debauchery."²⁶ Adding to the confusion, both Prune Street and the New Gaol were comparatively open. Visitors—whether family members, friends, creditors, messengers, vendors, or the like—came and went with relative ease. Charles Brockden Brown's fictionalized description of the Prune Street apartments a few years later is a bit tamer but evokes the same themes of dissolution:

The apartment was filled with pale faces and withered forms. The marks of negligence and poverty were visible in all; but few betrayed, in their features or gestures, any symptoms of concern on account of their condition. Ferocious gaiety, or stupid indifference, seemed to sit upon every brow. The vapour from an heated stove, mingled with the fumes of beer and tallow that were spilled upon it, and with the tainted breath of so promiscuous a crowd, loaded the stagnant atmosphere.²⁷