

‘CONTRARY TO THE SPIRIT OF THE AGE’:¹ IMPRISONMENT FOR DEBT IN COLONIAL VICTORIA, 1857–90

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The reintroduction in 1857 of imprisonment for debt in colonial Victoria flew in the face of international momentum for its abolition. In its criminalisation of debt and poverty, the Fellows Act 1857 (Vic) (21 Vict, No 29) also defied the rapid advancement of democratic and egalitarian principles in the fledgling colony. Frequently referred to as ‘gross class legislation’, the law was used unabashedly to target poor small debtors, leaving ‘mercantile men’ with significant debt untroubled by the prospect of a debtors’ gaol. Despite consistent and broad opposition to the Fellows Act 1857 (Vic) (21 Vict, No 29), its advocates resisted repeated attempts to abolish or meaningfully amend it. It is argued here that the law, and its survival against the ‘spirit of the age’, can be understood as part of a broader story of conservative resistance to the democratic innovations that threatened the power of the Victorian mercantilist establishment.

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¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 1 June 1858, 520 (Charles Perry).

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I INTRODUCTION

In September 1864, *The Age* published an affidavit sworn by Ellen Hicks, telling ‘the tale of a respectable girl lately imprisoned for debt in Beechworth gaol.’² In it, Hicks described the circumstances which led to her imprisonment and the subsequent ‘indignities’ she suffered during this confinement.³ Injured at work in a foundry boiler explosion in Chiltern, Victoria, Hicks was initially treated for a severe skull fracture by a local doctor. Needing further treatment, Hicks was admitted to the Beechworth Hospital where she remained for five weeks. During her stay in hospital, Hicks was summoned by the doctor to the Chiltern Police Court, claiming non-payment of the fees charged to Hicks for his professional services after the explosion. Hicks left her hospital bed and appeared at Chiltern, pleading inability to pay given her incapacity and consequent lack of income. A verdict was given against Hicks of £9 15s plus 4s 6d costs or, in default, to be imprisoned for 14 days. Returning to Chiltern after her recovery and release from hospital, Hicks was immediately arrested and returned to Beechworth, this time to be incarcerated at the gaol.⁴

Hicks’ experience was but one instance in an extended catalogue of victims of the *Fellows Act 1857* (Vic) (21 Vict, No 29) (*‘Fellows Act’*).⁵ Referred to by

² Charles Mackenzie, Letter to the Editor, *The Age* (Melbourne, 20 September 1864) 6.

³ *Ibid.*

⁴ *Ibid.*

⁵ The *Fellows Act*, named for its author, Thomas Howard Fellows (a Member of the Legislative Council and Legislative Assembly variously in the years 1854–72), was known formally as *An Act for the More Easy Recovery of Certain Debts and Demands 1857* (Vic) (21 Vict, No 29) (*‘Fellows Act’*). It was also referred to as the *County Courts’ Act: An Act for the More Easy Recovery of Certain Debts and Demands*, because of its function as an amending Act to the *County Courts’ Act 1852* (Vic) (16 Vict, No 11). It was also known as the *Small Debts Act* or the *Small Debts (County Court) Act*: see, eg, Victoria Police Force, Parliament of Victoria,

The Mount Alexander Mail as the ‘most iniquitous and barbarous law’,⁶ ‘totally opposed to every principle of justice, so antagonistic to the Englishman’s love of “fair play” ... [and] a disgrace to the legislature of a free country’,⁷ the *Fellows Act* reintroduced to the colony of Victoria the practice of imprisoning debtors for non-payment of ‘honestly’ contracted civil debt.⁸ In 1864, during debate on one of the many attempts to abolish the law, George Mackay informed the Victorian Legislative Assembly of the comparatively vast and disproportionate numbers detained in Victorian gaols due to debt. Mackay noted that

in England in one year only 8,000 persons were imprisoned for debt, yet in this colony during a similar period 633 persons were so committed; whereas the English average, considering the difference of population, should, if equal to that in Victoria, have been 37,950 persons.⁹

Indeed, between 1859 and 1865, approximately 2,128 persons were taken into custody under the *Fellows Act*.¹⁰ Objections to the law as enabling the

Criminal Statistics (Parliamentary Paper No 10, 1861) 5, which lists imprisoned debtors under the heading ‘Small Debts Act’. For ease of reference, the Act will be referred to in this article as the *Fellows Act*, following popular usage. In his report to the Secretary of State, the Victorian Governor referred to the Act as being ‘popularly termed’ as the ‘Fellows’s Act’: *Reports to Secretary of State on Past and Present State of Her Majesty’s Colonial Possessions, 1860 Part II: North American Colonies; African Settlements and St Helena; Australian Colonies and New Zealand; Eastern Colonies; Mediterranean Possessions and Ionian Islands* (No 2955-1, 1862) 91.

⁶ Editorial, ‘Imprisonment for Debt’, *The Mount Alexander Mail* (Victoria, 9 June 1858) 2.

⁷ Editorial, ‘Imprisonment for Debt’, *The Mount Alexander Mail* (Victoria, 16 June 1858) 2.

⁸ At separation, the colony of Victoria inherited New South Wales’ *Insolvency Act 1843* (NSW) (7 Vict, No 19) and *Imprisonment for Debt Abolition Act 1846* (NSW) (10 Vict, No 7). Section 2 of the *Imprisonment for Debt Abolition Act 1846* (NSW) (10 Vict, No 7) stipulated that no debtor was to be imprisoned unless

the defendant fraudulently conceals money goods or valuable securities from his judgment creditor or that the defendant is about to leave the Colony without satisfying the judgment or that he has any income salary or other means whereby in the opinion of the Commissioner he can pay such judgment or is about to remove any of his property out of the jurisdiction of the said Court.

See also JLB Allsop and L Dargan, ‘The History of Bankruptcy and Insolvency Law in England and Australia’ in JA Watson (ed), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 2, 415, 452–3.

⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 February 1864, 63 (George Mackay). Judicial statistics for England and Wales show that 6,529 debtors were imprisoned in 1864: United Kingdom, *Judicial Statistics 1864: England and Wales* (No 3534, 1865) pt 2, x.

¹⁰ See the statistics beside ‘Small Debts Act’ in Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 10, 1861) 5; Victorian Police Force, Parliament of

‘punishment of poverty’ were countered by those who demanded imprisonment for non-payment of debt as the only security available to creditors in a highly mobile and transient population and in the context of an otherwise dysfunctional insolvency regime.¹¹ Indeed, popular and press outrage at this ‘frightful law’¹² was, it appears, surpassed only by the enthusiasm with which those empowered to do so used the law to imprison those unfortunate enough to fall under its provisions.

Specifically, the *Fellows Act* extended the jurisdiction of the County Courts to claims of up to £250, allowing creditors some prospect of the recovery of smaller debts without incurring the heavy expenses of the higher courts which, previously, had been their only recourse.¹³ Most significantly, and representing the vast majority of causes entered under the *Fellows Act*, s 22 enabled creditors to recover debts not exceeding £20 before any two justices of the peace. Actions under the *Fellows Act* in either case were subject to s 54, which provided that plaintiffs with a verdict in their favour might obtain a warrant for the imprisonment of a debtor if no payment was forthcoming. Section 54 stated:

If any bailiff or officer shall make a return to any warrant of execution that he could find no sufficient property of the person against whom such warrant shall have issued liable to satisfy such execution the clerk of the court out of which such warrant shall have issued shall forthwith and without any previous notice or summons to the person against whom such warrant shall have issued issue a warrant in the form in the sixth schedule to this Act or to the like effect and the bailiff of the said court and the keeper of the gaol to whom such

Victoria, *Criminal Statistics* (Parliamentary Paper No 91, 1861–2) 5; Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 12, 1962–3) 5; Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 1, 1863) 5; Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 2, 1864) 5; Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 62, 1864–5) 6; and see the statistics beside ‘Imprisonment for Debts Act’ in Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 6, 1866) 7.

¹¹ For contemporary accounts of Victoria’s insolvency laws, see Sir George Stephen, *The Systems of English Bankruptcy and Colonial Insolvency: Briefly Compared in a Letter to His Excellency Sir Charles Hotham, KCB* (JJ Blundell & Co, 1855); Sir George Stephen, *Insolvency Reform* (JJ Blundell & Co, 1860); Sir George Stephen, *Insolvency Abuses: Exposed by Sir George Stephen in a Letter to the Committee of the Chamber of Commerce* (AJ Smith, 1868) (‘*Insolvency Abuses*’); *Insolvency Reform* (Varley Brothers, 1895); PD Phillips, *A Treatise on the Insolvency Law in Force in the Colony of Victoria* (JC Stephens, 1899).

¹² Victoria, *Parliamentary Debates*, Legislative Assembly, 15 March 1860, 787 (George Stephen).

¹³ *Fellows Act* (n 5) s 21.

warrant is directed shall respectively execute and obey the said warrant and all constables and other officers shall aid and assist in the execution of such warrant but no imprisonment under any such warrant shall operate as a satisfaction or discharge of the amount due under any order or judgment but it shall be lawful for the clerk of such court at any time to issue a fresh execution upon such order or judgment [p]rovided always that save as hereinafter mentioned no warrant of commitment shall issue upon the return to any such fresh execution.¹⁴

In effect, as *The Age* explained, a creditor, having obtained his judgment, ‘issues an execution against his victim’s property’, even though ‘[p]ersons of this class seldom have any property’.¹⁵ The bailiff or officer, on finding no property, may ‘accordingly [return] a report of *nulla bona*; whereupon, *without any further notice*, the Clerk of the Court issues a warrant for the arrest of the debtor’.¹⁶ In verdicts given by a County Court judge, a debtor could be imprisoned (on each execution) for up to a month.¹⁷ Imprisonment, in neither situation, discharged the debt, and there was no limit on how many warrants could be issued against the satisfaction of the same debt.¹⁸

This article is the first to examine the *Fellows Act*. Indeed, despite its widely felt impact and the sustained and often heated debate it provoked during its lengthy period of application, the *Fellows Act* has garnered little attention in social, political or legal histories of colonial Victoria. One reason for the lack of scholarly attention to the peculiar details of colonial Victoria’s debt laws is pragmatic: as Allsop and Dargan acknowledge, ‘[i]t is impracticable to attempt to trace the history of every law in every jurisdiction’ in Australia.¹⁹ In this view, the basic similarity of law and legal systems in the Australian colonies is accepted; to tell the story of each colony separately would be an exercise in repetition.²⁰ To be sure, overviews of Australian bankruptcy and insolvency laws have tended to incorporate colonial legislation within

¹⁴ Ibid s 54.

¹⁵ Editorial, “The ‘Pound of Flesh Act’”, *The Age* (Melbourne, 29 January 1858) 6.

¹⁶ Ibid (emphasis in original).

¹⁷ *Fellows Act* (n 5) s 54, sch 6.

¹⁸ Ibid s 54.

¹⁹ Allsop and Dargan (n 8) 454.

²⁰ Paul Finn advised caution ‘in exaggerating regional differences and colonial fragmentation’: Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 2; but also accepted ‘striking’ variations in ‘beliefs and attitudes between the colonies’: at 2, quoting Geoffrey Serle, *The Rush to Be Rich: A History of the Colony of Victoria, 1883–1889* (Melbourne University Press, 1971) 13.

'English law', often looking directly to England to provide the origins and history of current Australian federal law, neatly sidestepping the varieties of colonial era law.²¹ Additionally, consideration by legal scholars of the laws of the separate colonies has been commonly eschewed in favour of treating the laws of the founding colony, New South Wales, as broadly representative of 'Australian' law prior to Federation in 1901 (with exceptions noted).²² Given that Victoria (and Queensland) inherited New South Wales law, this is understandable, but it is an approach that has tapered the analytical gaze and thus the scope within which specific colonial law and legal regimes have been considered. A result is that the questions of how Victorian colonial insolvency laws may have derived from or impacted specific historical, social and political circumstances have been left mostly unexamined by legal and other scholars.²³

Drawing predominantly on parliamentary debates and press commentary, this article offers an account of the life of the *Fellows Act* and the system of imprisonment for 'honest' debt it re-established in Victoria. It also offers an inquiry into the *Fellows Act* as a cultural artefact; that is, law as an imaginative construction of a particular viewpoint and set of social, political, ideological and cultural understandings and beliefs.²⁴ It is suggested here, firstly, that the

²¹ See, eg, John Tribe, 'Discharge in Bankruptcy: An Historical and Comparative Examination of Personal Insolvency Relief in England and Australia' (2012) 20 *Insolvency Law Journal* 240; Paul B Lewis, 'Can't Pay Your Debts, Mate? A Comparison of the Australian and American Personal Bankruptcy Systems' (2002) 18 *Bankruptcy Developments Journal* 297. The zeal for uniformity with English law is discussed in Sir W Harrison Moore, 'A Century of Victorian Law' (1934) 16 *Journal of Comparative Legislation and International Law* 175.

²² Legal scholars have relatively few substantial historical works on Australian colonial insolvency law to draw from; namely Bruce Kercher's work which is predominantly concerned with New South Wales. Allsop and Dargan (n 8) acknowledge a 'substantial debt' to Kercher's work: at 448 n 240. See, eg, Bruce Kercher, 'An Indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction, 1788 to 1814' (1990) 6 *Australian Journal of Law & Society* 15; Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Federation Press, 1996); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 112–18. See also John Gava, 'The Revolution in Bankruptcy Law in Colonial New South Wales' in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law* (Butterworths, 1989) 210.

²³ For a comprehensive overview of the status of legal history in Australia, see Horst Lücke, 'Legal History in Australia: The Development of Australian Legal/Historical Scholarship' (2010) 34(1) *Australian Bar Review* 109.

²⁴ See generally Menachem Mautner, 'Three Approaches to Law and Culture' (2011) 96(4) *Cornell Law Review* 839, 849–50; Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 1999) 3. See also Ian Duncanson, 'Australia's Law in History' (1990) 6 *Australian Journal of Law & Society* 1.

passage of the *Fellows Act* and the subsequent debate around imprisonment for debt was rooted in, and pivoted around, questions about the type of society that ought to be built in the fledgling colony. Indeed, for those who saw the young colony as an opportunity to establish a society built on the best virtues of British civilisation, the *Fellows Act* was a 'disgrace to the age'²⁵ and a 'burning disgrace to the English nation in Australia'.²⁶ It will be shown that the debates drew heavily and self-consciously on the principal arguments, for and against, found in debt law discourses in Great Britain and internationally, linking local Victorian political discourse on imprisonment for debt to this ongoing transnational debate.

Secondly, it is suggested here that in addition to its place in the transnational debates about imprisonment for debt, the *Fellows Act* must also be understood in its specific local context. It is argued that the *Fellows Act*, in its contradiction of the international momentum against imprisonment for simple debt, is inexplicable outside of the explanatory framework provided by Victoria's relatively advanced development as a liberal parliamentary 'ultra-democracy'.²⁷ In the wake of the 1854 uprisings by miners on the goldfields at Ballarat, the Victorian Parliament had committed to the abolition of property qualifications for Members of the Legislative Assembly and, in November 1857, extended the franchise to achieve near universal [white] manhood suffrage.²⁸ The success of these Chartist principles in shaping Victorian political institutions had given the masses not only a broad capacity to participate in power, but also, as Scalmer notes, 'a capacity to frighten elites'.²⁹

²⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 March 1860, 788 (Charles Don).

²⁶ Editorial, 'Treatment of Debtors', *The Star* (Ballarat, 25 June 1860) 4.

²⁷ Leigh Boucher, 'Race, Rights and the Re-Forming Settler Polity in Mid-Nineteenth Century Victoria' (2013) 15 *Journal of Australian Colonial History* 83, 89. See also Andrew Wells, *Constructing Capitalism: An Economic History of Eastern Australia, 1788–1901* (Allen & Unwin, 1989) 3; Sean Scalmer, 'Containing Contention: A Reinterpretation of Democratic Change and Electoral Reform in the Australian Colonies' (2011) 42(3) *Australian Historical Studies* 337, 337; Gregory Melleuish and AR Buck, 'Democracy, Political Rhetoric and the Conservative Response to Manhood Suffrage in Colonial New South Wales' (2008) 10(1) *Journal of Australian Colonial History* 145, 147; Zdravka Brunkova and Martin Shanahan, 'Did Democratic Institutions Help Australia Avoid the Resource Curse?' (Conference Paper, Annual Congress of the European Business History Association, 22 August 2013) 17.

²⁸ Joy E Mills, 'The Composition of the Victorian Parliament, 1856–1881' (1942) 2(5) *Historical Studies: Australia and New Zealand* 25, 33; Raymond Wright, *A People's Counsel: A History of the Parliament of Victoria 1856–1990* (Oxford University Press, 1992) 38. The First Assembly existed from 1856 to August 1859. The Assembly elections of August to September 1859 were the first to occur without a property qualification.

²⁹ Scalmer (n 27) 339. In brief, the key Chartist principles were: universal manhood suffrage; annual parliamentary elections; the secret ballot; equal electoral districts; the removal of

Political, social and economic historians have, however, recognised the success of the colonial political elite's efforts in Victoria to place institutional limits on the reach of 'mass democracy'.³⁰ Arguably, this successful containment of the radical possibilities of democratic enfranchisement was, on the one hand, enabled by the closer proximity of interests that existed between the Council and the first Assembly of 1856–59 and, on the other, stimulated by the looming prospect that future Assemblies would likely be composed of interests much less compatible.

To be sure, the Council was, and remained, as Mills indicated, 'the stronghold of big business, landowning and squatter interests'.³¹ The first Assembly of 1856 (the first and last that required a property qualification) was dominated by merchants ('tradesmen'), closely followed by land and property owners and allied professionals composed mainly of barristers and solicitors,³² earning it the epithet of 'The Tradesman's Parliament'.³³ Indeed, even after the property qualification was abolished, the post-1859 Assemblies, with a few exceptions, were composed of men wealthy enough to support themselves, given that MPs were not paid until after 1870.³⁴ As Parkinson notes, even under the conditions of expanded manhood suffrage, the Assembly was drawn 'mainly from the professional, small landowning, manufacturing and trading classes'.³⁵ The author of the *Fellows Act*, solicitor Thomas Fellows, had represented landowning and pastoral interests as counsel to the Pastoral Association and had continued to do so as a Member of the original govern-

property qualifications for parliamentary candidates; and the payment of Members of Parliament. These principles and the role of Chartism in Australian colonial politics and institutional development is discussed in Paul A Pickering, 'A Wider Field in a New Country: Chartism in Colonial Australia' in Marian Sawer (ed), *Elections: Full, Free & Fair* (Federation Press, 2001) 28, 30–2.

³⁰ Scalmer (n 27) 340. See also Brunkova and Shanahan (n 27) 18; Geoffrey Serle, 'The Victorian Legislative Council, 1856–1950' (1954) 6(22) *Historical Studies: Australia and New Zealand* 186, 186; Philip McMichael, *Settlers and the Agrarian Question: Foundations of Capitalism in Colonial Australia* (Cambridge University Press, 1984) 211.

³¹ Mills (n 28) 26. See also Wells (n 27) 3–4; Weston Bate, 'From Eureka to Ned Kelly: A Police Force out of Step with Society' (2004) 75(1) *Victorian Historical Journal* 88, 90.

³² Mills (n 28) 31.

³³ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 February 1859, 875 (Butler Aspinall).

³⁴ *Members' Compensation Act 1870* (Vic) (34 Vict, No 383).

³⁵ Charles Parkinson, 'George Higinbotham and Responsible Government in Colonial Victoria' (2001) 25(1) *Melbourne University Law Review* 181, 186.

ing Legislative Council.³⁶ He moved as Solicitor-General to the Legislative Assembly at its creation and, it is suggested, worked with predominantly sympathetic colleagues in this chamber to reinforce or establish the institutional forms that would so successfully limit the impact of the imminent democratic innovations on established economic and power structures.³⁷

Having overseen the passage of the *Fellows Act* in the Assembly, among a raft of other laws, Fellows moved back to the Council, where he contributed to its growing reputation as a bastion of autocratic sentiment; a reputation reinforced by its repeated refusal to allow the passage of government (ie Assembly) legislation, including the Assembly's later efforts to repeal the *Fellows Act*.³⁸ Given this context, the *Fellows Act*, it is suggested, can be comprehended as an element in a broader pushback by established economic and power interests against the encroachments of the growing politics of popular sovereignty. The effect of the *Fellows Act* was, however, not so much institutional as ideological. Drawing on discourses about 'the latent fecklessness and immorality of manual workers and about the latent industry and honesty of the property-owning classes',³⁹ it is argued that the framers and supporters of the *Fellows Act* were as much interested, if not more so, in reinforcing establishment ideas about political virtue and the morality of the labouring and mining classes. Their interest lay as much in who should properly have access to power, as it was about facilitating the 'more easy Recovery of certain Debts and Demands'.⁴⁰

The sections that follow will track the move towards the idea that only fraudulent debtors should be criminalised (ie leading to the 1865 amendment of the *Fellows Act*), but also the subsequent resistance to this distinction by the administering justices who continued to penalise the non-payment of

³⁶ Carole Woods, 'Fellows, Thomas Howard (1822–1878)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/fellows-thomas-howard-3507>>, archived at <<https://perma.cc/C3NX-UF2N>>.

³⁷ For discussion of conservative 'reaction' in this period, see David Dunstan, 'Naked Democracy: Governing Victoria 1856–2006' (2006) 77(2) *Victorian Historical Journal* 229, 230–1; Maggie Black, 'The Battle for the Lands: Glimpses from a Squatter's Correspondence' [2011] (88) *La Trobe Journal* 65, 65, 68.

³⁸ See generally Serle, 'The Victorian Legislative Council, 1856–1950' (n 30) 193–5.

³⁹ *Fellows Act* (n 5). See also Paul Johnson, 'Class Law in Victorian England' (1993) 141 (November) *Past & Present* 147, 147.

⁴⁰ See Johnson (n 39) 157–8; Gerry R Rubin, 'Debtors, Creditors and the County Courts, 1846–1914: Some Source Material' (1996) 17(1) *Journal of Legal History* 74, 75; JM Main, 'Making Constitutions in New South Wales and Victoria, 1853–1854' (1957) 7(28) *Historical Studies: Australia and New Zealand* 369, 380; Paul Johnson, *Making the Market: Victorian Origins of Corporate Capitalism* (Cambridge University Press, 2010) 59 ('*Making the Market*').

small debts with criminal punishment. Part II establishes the ideological context in which the *Fellows Act* was passed and proposes that it was intended to serve the political and ideological interests of those interests fearful of the challenge posed by democratic advances to the social and class norms on which the status and wealth of the established order was built. Part III demonstrates the way in which transnational arguments against imprisonment for debt permeated the discourse of abolitionists, particularly in their efforts to change the law in order to draw a distinction between the honest and the dishonest debtor. It argues further that while these efforts were eventually successful, the administration of the *Fellows Act* remained in the hands of those who retained a political and ideological interest in securing the rights of property against those without property.

II 'ENACTED BY A TRADESMAN'S PARLIAMENT'⁴¹

The *Fellows Act's* passage through the Victorian Parliament in November 1857 raised a bitter and sustained complaint among some Members of the Legislative Assembly about 'the stealthy way in which the clauses giving this power of imprisonment were inserted into the *County Courts Act*'.⁴² In the immediately succeeding session of Parliament after its enactment and, indeed, in nearly every session until its eventual amendment in 1865, resentment at how the provision had 'been smuggled through the House' lingered at the edges of debate and fed into broader questions about whose interests Parliament and its laws should properly serve.⁴³ Specifically, abolitionist rancour at the way in which imprisonment for debt was entered into the Victorian statute book was formed, in part, around their conviction that Parliament was acting in the interest of the 'Ancient Colonists', the pre-gold rush pastoralists and their mercantilist allies.⁴⁴ On top of these cleavages of social class, however, a further grievance grew from the combined soils of the nativist-nationalist-republican resentments against the recently landed sons of English gentry who sought to assert themselves (and English practices) over the young colony's emerging institutions, society and politics.

⁴¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 February 1859, 875 (Butler Aspinall).

⁴² Victoria, *Parliamentary Debates*, Legislative Assembly, 7 April 1865, 638 (Samuel Bindon).

⁴³ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 April 1858, 418 (Thomas Fellows). Here, Fellows was refuting the accusation that the Act had been 'smuggled through the House'.

⁴⁴ Mills (n 28) 35.

A *Establishing Imprisonment for Debt Prior to Universal
Manhood Suffrage*

The first elected Parliament of the colony had been opened less than a year prior to the passage of the *Fellows Act* and, as Wright notes, the new Assembly's Members were inexperienced, 'stumbling [and] uncertain', with an 'unsure grasp of chamber procedure'.⁴⁵ As Mills points out, this first Victorian Assembly was unique in that it was the only one elected in the colony under a property qualification and with a limited suffrage.⁴⁶ The result was that it was an Assembly dominated by 'tradesmen' (ie merchants and traders), with pastoralists and lawyers bringing up the rear. Miners' representatives and Members of radical and republican persuasion ('a muster of the rank and file'⁴⁷) were present, but in a minority. Further, this 'Tradesman's Parliament'⁴⁸ was populated by a significant number of Members of what the press referred to as 'Our Commercial Parliament':⁴⁹ Melbourne's Chamber of Commerce. These men were closely aware of the challenge posed to their interests by the impending abolition of property qualifications in the Assembly and extended manhood suffrage.⁵⁰

In this mix were former Members of the original Legislative Council, including Thomas Fellows, the architect of the eponymous Act. Accepted as 'a conservative stronghold of the landowners and pastoralists', the Legislative Council had been the ruling chamber of the Colony (in various configurations) since 1851.⁵¹ Fellows, a solicitor who had served as assistant to Thomas Chitty for six years,⁵² arrived in Melbourne from England in April 1853 and, as mentioned above, had sat in the Legislative Council since September 1854, moving to the newly formed Assembly as Solicitor-General

⁴⁵ Wright (n 28) 33.

⁴⁶ Mills (n 28) 32.

⁴⁷ Editorial, 'A People's Party at Last?', *The Age* (Melbourne, 18 June 1856) 2.

⁴⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 February 1859, 875 (Butler Aspinall).

⁴⁹ Editorial, 'Our Commercial Parliament', *The Age* (Melbourne, 20 February 1855) 4.

⁵⁰ Mills (n 28) 30.

⁵¹ *Ibid* 35. See also Main (n 40) 372.

⁵² Thomas Chitty was the younger brother of Joseph Chitty, author of *A Practical Treatise on the Law of Contracts Not under Seal* (S Sweet, 1834), now better known as *Chitty on Contracts: Oxford Dictionary of National Biography* (online at 2 March 2019) 'Chitty, Joseph, the Younger (1796–1838)'.

in September 1856.⁵³ Fellows' allegiances were with the established order — the squatter pastoralists and the propertied merchant and commercial class⁵⁴ — and his politics evinced little sympathy for the popular democratic aspirations expressed regularly in vociferous 'monster' meetings on the streets of Melbourne, Ballarat, Bendigo and Castlemaine.⁵⁵ Popular hopes that the First Assembly would represent an 'honest democracy' in which '[n]o interest in the country — digger, merchant, farmer, squatter, barrister, or citizen — is omitted',⁵⁶ were, however, quickly superseded by a belief that conservative forces, inside and outside Parliament, were intent on shoring up their position against the democratic tide.⁵⁷ Butler Cole Aspinall, an Assemblyman opposed to any measure designed to entrench the power of the propertied elite, expressed this growing sense that more experienced Members of the new Parliament were subjecting their less experienced colleagues to procedural bamboozlement and legal trickery in order to put up legislative walls against the popular will. Aspinall went as far as to speak against the Bill providing for manhood suffrage, describing it as a 'promise of universal suffrage, and only ten pages of legal incapacity succeeding it'.⁵⁸

In this context, and at the urging of the Chamber of Commerce,⁵⁹ Fellows introduced his 'Bill for the More Easy Recovery of Certain Debts and Demands'. It was part of an omnibus of Bills he presented to the Assembly in June 1857 in the midst of the uproar and controversy over the Land Bill

⁵³ Woods (n 36). In 1847, Fellows published *The Law of Costs, as Affected by the Small Debts' Act and Other Statutes* (William Benning & Co, 1847). It is likely that Fellows modelled his Bill on the English *Small Debts Act 1845*, 8 & 9 Vict, c 127. See Margot C Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge University Press, 2003) 173; V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* (Clarendon Press, 1995) 90.

⁵⁴ Fellows was standing counsel to the Pastoral Association: Woods (n 36).

⁵⁵ See generally 'Monster Demonstration in Favor of a Dissolution of Parliament, and of Reform', *The Age* (Melbourne, 2 June 1858) 5 ('Monster Demonstration'); Main (n 40) 374; Brunkova and Shanahan (n 27) 18–19; AGL Shaw, 'Violent Protest in Australian History' (1973) 15(60) *Historical Studies* 545, 555–6.

⁵⁶ 'A People's Party at Last?' (n 47) 2.

⁵⁷ Melleuish and Buck (n 27) 154–5; Scalmer (n 27) 340.

⁵⁸ Joanne Richardson, 'Aspinall, Butler Cole (1830–1875)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/aspinal-butler-cole-2905>>, archived at <<https://perma.cc/Z5JD-4GPH>>. Wright also notes the concerted efforts by the Legislative Council since 1855 to diffuse the political power of the miners by means of conditional legislative reform: Wright (n 28) 38.

⁵⁹ See, eg, the report of a Chamber of Commerce meeting in Editorial, 'Chamber of Commerce', *The Age* (Melbourne, 2 July 1857) 5.

introduced a few months prior.⁶⁰ Unsurprisingly, this tactic was met with immediate suspicion, particularly by the press in goldmining areas. *The Star* of Ballarat questioned the ‘rush of law that is just now being attempted’, regarding it as ‘neither reasonable nor palatable.’⁶¹ *The Star* speculated that this glut of Bills was ‘a covert design to distract attention, and, if possible, divide opinion.’⁶² Many ordinary Victorians were agitated by this ‘rush of law’, seeing the manoeuvre as an attempt by the first Parliament to settle important decisions outside of the mandate of the as yet unrepresented bulk of the male population.⁶³ Indeed, a repeated demand made by one of many mass meetings that gathered at the Eastern Market opposite Parliament was, simply, that the important decisions that would set the shape of the future colony should wait until the Assembly had had the benefit of an election conducted on the basis of the forthcoming expanded suffrage.⁶⁴ A mass meeting in Richmond called in response to the proposed Land Act, for instance, resolved that

in the opinion of this meeting the present Assembly does not represent the people, and as the unsold lands belong equally to the unrepresented and the represented, the measure for regulating the future occupation of the lands should be postponed until the representation of the colony can be taken upon a just basis.⁶⁵

In this sense, the population’s anger was not focused solely on the content of specific Bills, but also on the broader question of the longer-range intentions of the established political and economic elite. Many feared that Fellows’ treatment of the Assembly as ‘a set of asses that he could do with ... what he

⁶⁰ As John Ireland notes, the conflict over the means by which Crown land would be transferred to selectors pivoted on the wish of squatters to maintain their extensive land holdings and those, broadly represented by Victorian Land Leagues and the Land Convention, who advocated for small-scale agricultural holdings: John Ireland, ‘The Victorian Land Act of 1862 Revisited’ (1994) 65(2) *Victorian Historical Journal* 130, 132. For a detailed account of the succession of failed Bills that preceded the *Victorian Land Act 1862*, see John Quick, *The History of Land Tenure in the Colony of Victoria* (JG Edwards, 1883) chs 2–3.

⁶¹ Editorial, ‘Legislation for the Gold Fields’, *The Star* (Ballarat, 24 June 1857) 2.

⁶² *Ibid.*

⁶³ Editorial, ‘The Country against the Squatting Bill’, *The Age* (Melbourne, 21 September 1857) 5.

⁶⁴ See, eg, ‘Monster Demonstration’ (n 55) 5. The broader representation allowed by ‘universal’ manhood suffrage meant that ‘we are not likely to have such a set of incapables again to legislate for us’: *ibid.*

⁶⁵ Editorial, ‘The Land Bill’, *The Age* (Melbourne, 17 June 1857) 5.

pleased⁶⁶ reflected an intention by Fellows and his allies to ride roughshod over the infant democratic institutions of the colony. Indeed, Fellows was a favoured target of democrats, mocked and jeered in person and in the press as, in particular, a lackey of the ‘squattocrat[s]’.⁶⁷ A press account of one of Fellows’ attempts to address a public meeting recounts that he ‘stood for at least half an hour without being heard. The hooting, roaring, and whistling was indescribable.’⁶⁸ The satirical journal *Melbourne Punch* rhymed eloquently about Fellows and his allegiances in a poem called ‘Fellows’ Warning’: ‘The squatters to me will be loyal and true, / They know that I’ve done for them all man can do.’⁶⁹ Given this environment of suspicion and vigilance, and the contentiousness around Fellows and the first Assembly, it is ironic that the Bill reintroducing imprisonment for debt, targeted specifically at small debtors, was indeed ‘smuggled’ through Parliament with minimal comment from Members of Parliament and unnoticed by the press.

The newspapers, usually scrupulous in their watchfulness over the actions of Parliament,⁷⁰ had focused their attentions on the Land Bill controversies, offering only cursory analysis of the measure known during its progress through Parliament as the ‘County Courts Bill’. Indeed, the press was generally supportive of the Bill throughout its passage and immediately on its enactment,⁷¹ overlooking the coincidences between it and the publicly stated demands of the Melbourne Chamber of Commerce.⁷² As to the power given by the *Fellows Act* to effect the imprisonment of debtors, the press made mention of it only after the Act received its Royal Assent. One of the first mentions by the press of the *Fellows Act*’s conferral of the power of imprisonment for debt (s 54) observed that the ‘clause ... appears to be exceedingly harsh and stringent’, but accepted that ‘many persons are of [the] opinion that it will act as a salutary check upon those who are apt recklessly to

⁶⁶ Ibid.

⁶⁷ Editorial, ‘Fellows’ Warning’, *Melbourne Punch* (Melbourne, 1 October 1857) 1.

⁶⁸ Editorial, ‘Mr Fellows at St Kilda’, *The Age* (Melbourne, 5 May 1857) 5.

⁶⁹ ‘Fellows’ Warning’ (n 67).

⁷⁰ See Elizabeth Morrison, *Engines of Influence: Newspapers of Country Victoria, 1840–1890* (Melbourne University Press, 2005) ch 3.

⁷¹ ‘Legislation for the Gold Fields’ (n 61) 2; Editorial, ‘County Courts’, *The Bendigo Advertiser* (Bendigo, 25 June 1857) 2; Editorial, ‘New County Court Act’, *The Bendigo Advertiser* (Bendigo, 4 December 1857) 2.

⁷² ‘Chamber of Commerce’ (n 59) 5.

incur debts,' leaving it to their readers to draw their own conclusions and to judge the *Fellows Act* by its operation.⁷³

In Parliament too, only Legislative Council Member Nehemiah Guthridge took notice of the late appearance in the Bill of a clause giving power of imprisonment, immediately prior to its final reading and passage on 7 October 1857. In the brief exchange that constituted the third reading of the Bill, Guthridge demurred at the adoption of a Council committee report containing amendments to the Bill, moving instead that the Bill should be recommitted 'with a view to expunge the clause giving the power of imprisonment'.⁷⁴ Guthridge quickly withdrew his proposal, however, in deference to the argument that in 'the absence of the legal gentlemen to whom the House looked for opinions on these matters,' the much delayed Bill should not be further postponed as this would 'be tantamount to the rejection of the bill'.⁷⁵ In the face of such an ultimatum and the pointed reminder of his lesser professional status, Guthridge was not willing, evidently, to risk the displeasure of his absent Council colleagues by causing them further work and, perhaps, drawing unwanted attention to the Bill shortly to be sent back to the Assembly. In the Assembly, and accepting the imperfect record that is the *Victorian Hansard*, it appears that no mention at all was made of the imprisonment clauses in the County Courts Bill. The most vigorous debate focused on the proposals to pay fees to court bailiffs in place of a salary and the stipulation that no judge of the County Court should be eligible to sit in either House of Parliament.⁷⁶ The *Fellows Act* was finally given assent on 24 November, coming into force on 1 January 1858. In direct contrast to the scant attention given to it during its passage through Parliament, the *Fellows Act* in its operation generated a broad wave of revulsion against it in principle and shock at its outcomes, leading to immediate and sustained attempts to effect its repeal or modification.

⁷³ 'New County Court Act' (n 71) 2.

⁷⁴ Victoria, *Parliamentary Debates*, Legislative Council, 6 October 1857, 1306 (Nehemiah Guthridge). Guthridge was an Irish house painter turned small trader turned property owner, who entered the Legislative Council on a platform of support for 'liberal' principles, but as a firm advocate of property qualifications for the Upper House. He tarnished his reputation by his quick repudiation of many of his stated positions, becoming known as 'The Traitor' in the press: Letter to the Editor, 'The Traitor', *The Age* (Melbourne, 15 September 1856) 2.

⁷⁵ Victoria, *Parliamentary Debates*, Legislative Council, 6 October 1857, 1306 (Henry Miller).

⁷⁶ Victoria, *Parliamentary Debates*, Legislative Council, 30 September 1857, 1268.

B ‘*The Barbarism of Our Law of Imprisonment for Debt Is Only Surpassed by Its Inequality*’⁷⁷

As early as 12 January, lawyers receiving copies of the legislation wrote to the press raising their concerns at the provisions providing authority to imprison debtors, about which, it was assumed, ‘very few, if any, of the Victorian community have familiarised themselves.’⁷⁸ By late January, *The Age* newspaper was making comment on the ‘New County Courts Act’, which it condemned as ‘antagonistic to the spirit of what we are accustomed to consider “enlightened legislation”’⁷⁹ in three important aspects: the manner in which such a law was enacted; the apparent reversion to law ‘fit only for a barbarous age’;⁸⁰ and its unequal application.⁸¹ In the first aspect, dismay was expressed at the way in which ‘such a despotic enactment’ was ‘passed silently through Parliament’, contrary to the proper conduct of ‘an enlightened Legislature in this Nineteenth Century.’⁸² In the second aspect, as the substance of the *Fellows Act* became more widely comprehended, it was decried as a gauche misstep for the young colony and an embarrassing exposure of legislative inexperience in the world of enlightened and democratic nations.⁸³ Even the press in Tasmania and New South Wales referred to the *Fellows Act* respectively as this ‘Frightful Victorian Law!’⁸⁴ and as a ‘cruel injustice.’⁸⁵ By June, the third point of antagonism, the unequal impact of the law, was being felt by its target demographic, the miners.

In Daylesford, a crowd of miners watched stunned as one of their number, ‘a well known respectable young man who has been but a few weeks married [was] handcuffed and secured on a police dray, *en route* for Castlemaine’ on account of ‘an inability to pay a trifling debt.’⁸⁶ In Castlemaine, the incarceration of Robert Haynes, ‘a colored man ... who by frugality and industry acquired some little property by vending “pies all hot”’, was met with indignation, particularly at his having been ‘taken up like any other felon by a

⁷⁷ Editorial, ‘Imprisonment for Debt’, *Leader* (Melbourne, 22 April 1865) 13.

⁷⁸ Letter to the Editor, ‘Imprisonment for Debt’, *The Argus* (Melbourne, 12 January 1858) 6.

⁷⁹ Editorial, *The Age* (Melbourne, 27 January 1858) 4.

⁸⁰ Letter to the Editor, ‘Imprisonment for Debt’, *The Age* (Melbourne, 22 January 1858) 6.

⁸¹ See Editorial, *The Age* (Melbourne, 27 January 1858) 4.

⁸² *Ibid.*

⁸³ See, eg, ‘Imprisonment for Debt’, *The Mount Alexander Mail* (Victoria, 1 November 1858) 2.

⁸⁴ Editorial, ‘Frightful Victorian Law!’, *The Cornwall Chronicle* (Launceston, 19 June 1858) 2.

⁸⁵ Editorial, ‘Melbourne’, *The Sydney Morning Herald* (Sydney, 29 April 1858) 3.

⁸⁶ Editorial, ‘Daylesford’, *The Mount Alexander Mail* (Victoria, 4 June 1858) 4.

policeman, with [a] truncheon.⁸⁷ It was rapidly becoming clear to the Victorian population that the ‘harsh and stringent’ law enacted by the *Fellows Act* was intended to operate only on the ‘common herd’, and would produce no dread in the hearts of wealthier debtors.⁸⁸ *The Bendigo Advertiser* noticed early that as a consequence of the *Fellows Act*: ‘The small debtor is ... placed in a worse position than those on a larger scale. Men may fail for their hundred thousands, and the Courts of Insolvency afford them protection and relief. But woe to the poor wretch who can only count his liabilities by twenties or fifties.’⁸⁹ On noting the Chamber of Commerce’s opinion that ‘the punishment of imprisonment for debt acts as a wholesome restraint in deterring persons from contracting liabilities which they have no reasonable prospect of paying,’ *The Mount Alexander Mail* ‘anxiously inquire[d]’ whether that Chamber was ‘disposed to carry their belief a trifle further, so as to include the large as well as the small debtor within the scope of their resolution.’⁹⁰ In its sarcastic inquiry, the paper was calling out the mendacity of the Chamber in its advocacy and support for the imprisonment of small debtors when, as it would later tacitly acknowledge, its own members and the mercantile classes whose interests it represented had the benefit of a ‘lax and inefficient’ insolvency law.⁹¹

In contrast to the impoverished small debtor, debtors outside of the jurisdictional reach of the *Fellows Act* and with sufficient funds to pay court fees were able to avail themselves of the protection of the Insolvency Court. Those who, ‘in their commercial transactions have practiced every species of moral robbery, and who have invented a science of deceit and an art of swindling’ could, with ‘an airy step and a cheerful brow’, undergo what was popularly referred to as the ‘professional operation of “getting whitewashed”’.⁹² Sir George Stephen, the foremost expert in insolvency at that time, wrote of the ‘infinitely varied’⁹³ and blatant abuses made of the

⁸⁷ Editorial, ‘Debtors’ Woes in Castlemaine Gaol’, *The Age* (Melbourne, 19 February 1858) 5.

⁸⁸ The phrase ‘common herd’ is taken from an article in the *Liverpool Albion*, reprinted in *The Age*, discussing the ‘inconsistency, cruelty, and blood-thirsty character’ of English imprisonment for debt laws at that time, arguing that these laws were ‘intended to operate on the common herd, and it is for that herd to take up the subject and press it on until a reformation is accomplished’: ‘Law Reform’, *The Age* (Melbourne, 8 August 1856) 2.

⁸⁹ Editorial, ‘Imprisonment for Debt’, *The Bendigo Advertiser* (Bendigo, 28 January 1858) 2.

⁹⁰ Editorial, ‘Imprisonment for Debt’, *The Mount Alexander Mail* (Victoria, 16 June 1858) 2.

⁹¹ Editorial, ‘The Insolvency Laws’, *The Mount Alexander Mail* (Victoria, 8 April 1857) 2.

⁹² Editorial, *The Argus* (Melbourne, 19 April 1860) 4.

⁹³ Stephen, *Insolvency Reform* (n 11) 7.

Victorian insolvency laws, in which not ‘more than one in fifty applications’ to the Court for certificates of conformity were refused.⁹⁴ He discussed further the ‘one startling fact’ which exposed the leniency shown by the Insolvency Court to the entrepreneurial debtor: that ‘the insolvent estate in this colony have on the average paid 6½d, per pound, whereas in England the average dividend has been nearly 5s per pound.’⁹⁵ Thus, as Stephen complained, ‘the insolvent gets relieved from his debts ... and begins the world again’ with little stigma or hardship,⁹⁶ while, as *The Bendigo Advertiser* wrote, ‘the creditor [is set] altogether on one side as an inconvenient and unpleasant nuisance.’⁹⁷

The small debtor without means of recourse to insolvency, however, was at the mercy of their creditor. Rather than being relieved of their debts and their subsequently acquired assets protected in the manner of the certified insolvent, the debtor falling under the scope of the *Fellows Act* was ‘liable to be pursued perpetually for one and the same debt until it has been paid to the uttermost farthing.’⁹⁸ The *Fellows Act* was then readily comprehended by lawyers, the press, miners and their allies as a ‘law only against the poor man.’⁹⁹ In this respect, the *Fellows Act* imported and replicated the inequalities and class bias built into the English laws that regulated indebtedness. Johnson has observed that in 19th century English law relating to debt, ‘[e]conomic actions undertaken by people of different social standing became regulated in different ways because of a priori value judgements about the character traits of the different classes.’¹⁰⁰ He argues that the result was that ‘the poor were in effect criminalized for their poverty and forced to repay all they owed, while middle-class and entrepreneurial debtors were protected from their creditors and absolved of a large proportion of their debt.’¹⁰¹

The inequality and stringency of the *Fellows Act*’s application to only the poorest of debtors, especially in the contrasting context of Victoria’s dysfun-

⁹⁴ Ibid 5. A certificate of conformity was defined by the Legislative Assembly Select Committee on Insolvency as follows: ‘the certificate of conformity discharged the subsequently acquired property of bankrupts from all liability’: ‘Report of the Select Committee on Insolvency’, *The Age* (Melbourne, 2 January 1862) 5.

⁹⁵ Editorial, ‘Commercial Intelligence’, *The Argus* (Melbourne, 3 April 1857) 4.

⁹⁶ Stephen, *Insolvency Reform* (n 11) 7.

⁹⁷ Editorial, ‘Insolvency Law Reform’, *The Bendigo Advertiser* (Bendigo, 15 October 1861) 2.

⁹⁸ Editorial, ‘Imprisonment for Debt’, *The Bendigo Advertiser* (Bendigo, 28 January 1858) 2.

⁹⁹ Letter to the Editor, ‘Imprisonment for Debt — The County Courts Act’, *The Age* (Melbourne, 19 January 1858) 6.

¹⁰⁰ Johnson, ‘Class Law in Victorian England’ (n 39) 149.

¹⁰¹ Ibid 158.

ctional insolvency laws as they applied to larger-scale debtors, was considered to be particularly galling given the rhetoric of liberty and reasoned progress favoured by the colony's political elite. One commentator on the *Fellows Act* wrote:

We boast of our progressive movements. We tell the world that the liberty of the subject is guarded with jealous care, that our institutions are the noblest in the world and that our laws are framed with careful consideration so as to be as much for the protection and benefit of the poor man as they are for those rolling in wealth and luxury! What a mockery! What a deceit wherewith to blind the believing one!¹⁰²

Anger at the *Fellows Act* was provoked then not solely by its harshness and defiance of progressive ideals, but also by its embodiment of a fundamentally hierarchical and aristocratic ideological view of society modelled on the landed gentry tradition of England, a view which was also at the heart of the concurrent battles over land settlement in Victoria.

Much is made of the evolution of the egalitarian ethos in colonial society in which, as Bolton noted, '[c]heap land, dear labour, and the possibility of gold were enough to tempt Jack to leave off habits of deference and become as good as his master'.¹⁰³ Less acknowledged are the (successful) efforts by the 'better' elements of colonial Victorian society to impose limits and brakes on the 'mobocracy' that they feared would undermine their status, wealth and power.¹⁰⁴ Haagen has noted the 'ideological importance of [debt] law to the English ruling class' as a means of coercion but also as a tool for 'reinforcing the attitudes of deference and dependence on which the authority of the propertied classes rested'.¹⁰⁵ Opponents of the *Fellows Act* immediately understood it in a similar vein, drawing a direct line between it and the wealthy elite's efforts to retain for themselves the vast swathes of land acquired by squatting, and the type of gentleman and tenant society that would evolve from this entrenchment of a landed class. In June 1858, *The Kyneton Observer*

¹⁰² Letter to the Editor, 'Is Poverty a Crime?', *The Ovens and Murray Advertiser* (Beechworth, Victoria, 24 February 1858) 2.

¹⁰³ GC Bolton, 'The Idea of a Colonial Gentry' (1968) 13(51) *Historical Studies* 307, 307. See also Dunstan (n 37); Peter Cochrane, *Colonial Ambition: Foundations of Australian Democracy* (Melbourne University Press, 2006); Marion Littlejohn, 'The First Mining Boom: The Impact of the Gold Rushes on Colonial Victoria' (2013) 48(1) *Agora* 20, 22.

¹⁰⁴ Robert Darby, 'Colonial Ambition: Foundations of Australian Democracy by Peter Cochrane' [2008] (94) *Labour History* 172, 172; Dunstan (n 37) 230. See also Scalmer (n 27) 340.

¹⁰⁵ Paul H Haagen, 'Eighteenth-Century English Society and the Debt Law' in Stanley Cohen and Andrew Scull (eds), *Social Control and the State* (St Martin's Press, 1983) 222, 235, 237.

pointed to the *Fellows Act* as a deed that should ‘produce a salutary effect in enlightening the understandings and sharpening the apprehensions of the unpropertied classes of the colony’ that, left in place, ‘will leave them with little hope of ever attaining to a position more desirable than that of their proletarian compeers in Europe.’¹⁰⁶ The paper wished to ‘vent our own indignation’ that common men who had broken ‘all the ties of home and kindred’ to travel to the new and progressive colony ‘in the expectation of escaping a landed and moneyed aristocracy’, had found instead ‘the land of promise already occupied by self-constituted lords of the soil, to whom the newly arrived immigrant must become a thrall or starve.’¹⁰⁷ ‘In place of a liberal land law’, the paper pronounced, ‘the Victorian Parliament ... have consigned the victims of their own policy [ie the locking up of the land for the benefit of a small number of pastoralists] — the unfortunate miner and impoverished tradesman to a GAOL — to what is tantamount to perpetual imprisonment!’¹⁰⁸

The *Fellows Act* was for many then a further signal, alongside the land bills, that the institutions of the young colony were being constructed in a manner overtly favourable to the interests of the squatter–pastoralists and the ‘arrogant and selfish dogmas’ of their mercantilist allies — this was certainly not in doubt.¹⁰⁹ As Brunkova and Shanahan observe, the established elite made overt attempts in this period ‘to control future laws by building an impenetrable bastion of power for the wealthy’ into the constitution of the Legislative Council.¹¹⁰ Popular anxieties and fears were focused also on the determined and clear-eyed efforts by the wealthy elite to recreate the ‘institutions’ (such as debtors’ prisons) of the political, social and economic inequalities of the old order. On the streets outside Parliament, this suspicion was plainly stated:

[W]hen are we, who have made pilgrimage hither to the ends of the earth in order to be free, to be relieved from the consequences of that virulently diseased civil polity that sucks up the very vitals of our native land [ie

¹⁰⁶ Editorial, ‘Small Debts v Commerce’, *The Kyneton Observer* (Victoria, 3 June 1858) 2.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Brunkova and Shanahan (n 27) 19. Turner suggests that this was done in an effort to avoid ‘a tyranny of labour’: Henry Gyles Turner, *A History of the Colony of Victoria: From Its Discovery to Its Absorption into the Commonwealth of Australia* (Longmans, Green & Co, 1904) 77. Serle refers to the Legislative Council as the ‘guardian of the “rights of property”’: Serle (n 30) 186. See also McMichael (n 30) 211.

England]? Are we the men to allow our new social institutions to be inoculated with the same distemper? Shall we, whose fathers struck the lion down — shall we pay the wolf homage, proffering lowly gaze and servile knee to wealth — to an upstart plutocracy — to a new race of shepherd kings, already become an abomination to us?¹¹¹

Popular agitation was roused not only by the specifics of the legislative programme being ‘smuggled’ through the first Assembly. It was also formed around the larger questions of whether the elite would succeed in embedding English class and social norms and values into Victoria’s developing laws and institutions, or if the new colony’s democratic fervour would triumph in sweeping away those norms and hierarchies.¹¹²

III ‘IT MAY APPEAR REACTION, IN WHICH THE HUMANITARIAN PRINCIPLES OF THE AGE ARE NEGLECTED’¹¹³

By mid-April 1858, the widespread clamour for the repeal of the *Fellows Act* found an advocate in Assemblyman James Macpherson Grant. Grant had arrived in Victoria from Scotland in 1851 to try his luck at the Bendigo diggings. He would, however, find better fortune on resuming his practice as a solicitor in Melbourne. In 1854, he found fame, and a political constituency, when he undertook the defence of the Eureka Stockade rebels without charge.¹¹⁴ He moved the following year to the Legislative Council and then into the new Assembly in October 1856, retaining always his radical sympathies.¹¹⁵ In introducing his ‘Imprisonment for Debt Abolition Bill’ on 22 April 1858, however, Grant initially misheard the tenor of the objections to the law, and called for a return to ‘the old law’, which he said ‘was much more just, satisfactory, and effectual’ than the *Fellows Act*.¹¹⁶ Even for those who were hesitant about embracing the imprisonment clauses of the *Fellows Act*,

¹¹¹ ‘The Land Bill’ (n 65) 5.

¹¹² See Bolton (n 103) 320; McMichael (n 30) 84, 208–9.

¹¹³ Editorial, ‘Recovery of Debts,’ *The Age* (Melbourne, 18 January 1858) 6.

¹¹⁴ Geoffrey Bartlett, ‘Grant, James Macpherson (1822–1885),’ *Australian Dictionary of Biography* (Web Page, 1972) <<http://adb.anu.edu.au/biography/grant-james-macpherson-3652>> archived at <<https://perma.cc/2P7S-BEAR>>.

¹¹⁵ Ibid. See also Ralph Biddington, *Parliamentarians and Brothers-in-Law: The Life of James Macpherson Grant, with Some Information on His Brother-in-Law, David Gaunson* (2016).

¹¹⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 April 1858, 417 (James Grant). The ‘old law’ referred to was the New South Wales insolvency legislation, which applied at the time in Victoria: *Insolvency Act 1841* (NSW) (5 Vict, No 17).

such a characterisation of the condition of the preceding debt law in Victoria was absurd.¹¹⁷ Under the old law, it had been close to impossible to collect small debt unless a debtor was pursued through the courts at great expense, often exceeding the amount of the debt.¹¹⁸ Consequently, there was a widely held view that unless ‘something’ was done to facilitate the collection of small debts, the system of credit on which trade was enabled, and working people depended, it was thought, would break down.¹¹⁹

From 1858 until 1865, almost every session of Parliament witnessed the successful passage through the Assembly of a Bill for the abolition or limitation of imprisonment for debt, followed almost routinely by the Legislative Council’s refusal of the same Bill (see Table 1). This seemingly perpetual deadlock, enabled by the Legislative Council’s constitutional power to block any measure coming from the Assembly,¹²⁰ pivoted on the question of how, on the one hand, to do justice to the creditor, and how, on the other, to avoid committing injustices against the ‘honest’ debtor. Advocates for the *Fellows Act* were adamant that ‘if we destroyed this terror of imprisonment, we should deprive ourselves of an efficacious instrument for preventing men from continuing to trade when the chances of their retrieving lost ground have become all but desperate.’¹²¹ In this view, imprisonment was beneficial to the debtor as much as the creditor in its operation as a deterrent to the ‘reckless’ acquisition of debt.

¹¹⁷ See, eg, Editorial, *The Mount Alexander Mail* (Victoria, 2 December 1857); Victoria, *Parliamentary Debates*, Legislative Assembly, 1 June 1858, 521 (Daniel Campbell).

¹¹⁸ Stephen, *Insolvency Reform* (n 11) 8–9, 22.

¹¹⁹ Arguments against the abolition of imprisonment for debt posited that ‘such a change in the law would be ruinous to small tradesmen, and that it would also prevent persons laboring under temporary pressure obtaining credit’: Editorial, ‘The Week’, *Leader* (Melbourne, 30 July 1864) 1. As Lester notes, similar arguments were made in England regarding the ‘security’ provided to creditors by the capacity to imprison debtors. It was seen as the principal basis on which credit could be extended to the working classes: Lester (n 53) 100–1.

¹²⁰ Mills (n 28) 36; Brunkova and Shanahan (n 27) 18.

¹²¹ Editorial, *The Argus* (Melbourne, 15 February 1861) 4.

Table 1: Progress of Legislation Relating to Imprisonment for Debt

Year	Legislative Developments
1857	<i>An Act for the More Easy Recovery of Certain Debts and Demands 1857</i> (Vic) (21 Vict, No 29) enacted.
1858	Imprisonment for Debt Abolition Bill passes in Legislative Assembly. Motion for first reading of Bill by Legislative Council summarily rejected.
1859–60	Imprisonment for Debt Abolition Bill reintroduced to Legislative Assembly in February 1859. Legislative Council refers Bill to a Select Committee in August 1860.
1862	Bill to Limit the Power of Imprisonment for Small Debts introduced in May and November. Bill terminated at fall of Government.
1864	Prorogued Bill to Amend the Law for Imprisonment for Debt re-introduced to Legislative Assembly. Bill withdrawn in favour of County Courts Amendment Bill.
1865	Government introduces Bill to Amend the Law relating to Imprisonment for Debt in February. In response to perceived flaws in the Bill, Private Members Bill (Imprisonment for Debt Law Amendment (No 2) Bill) also introduced. Bill to Amend the Law relating to Imprisonment for Debt is passed by the Legislative Council. <i>Imprisonment for Debt Law Amendment Act 1865</i> (Vic) (29 Vict, No 284) enacted.
1872	Imprisonment for Debt Abolition Bill committed pro forma at second reading by Legislative Assembly.
1876	Imprisonment for Debt Abolition Bill reintroduced. Bill lapses or fails with change of Government.
1890	<i>Imprisonment of Fraudulent Debtors Act 1890</i> (Vic) (54 Vict, No 1100) enacted.

Opponents of the *Fellows Act*, however, pointed to what they regarded as the fundamental ‘barbarism’ and inhumanity of a system that would see men and women punished and treated as criminals, without regard to the circumstances of their indebtedness.¹²² Conceding the ‘imperative that something should be done’ about the problem of small debt collection,¹²³ progressive opinion demanded that in place of the undifferentiated application of the *Fellows Act*, ‘[p]unishment for villainy, and not for poverty, is what is required’.¹²⁴ This view held that ‘no act which makes it depend upon whether a man has a few pounds for court fees, whether he shall go to prison or go scot free, can be called even civilised’.¹²⁵ Representative of abolitionist opinion, *The Bendigo Advertiser* also placed the morality of the debtor at the heart of its opposition to the *Fellows Act*, arguing that ‘a law which makes no distinction between fraud and misfortune, and places in the hands of the creditor the power of treating as a criminal the man who owes him money, can only be characterised as atrocious, and unworthy of any country which lays claim to be considered as civilised and free’.¹²⁶ One effect of locating the morality of the debtor at the centre of debates over the abolition or amelioration of the *Fellows Act*, however, was that imprisonment for debt, in principle, was accepted in the case of fraudulent or dishonest debtors. The eventual acceptance by the legislature of the demand that only ‘dishonest’ debtors should face criminal punishment was, however, disfigured by the *Imprisonment for Debt Law Amendment Act 1865* (Vic) (29 Vict, No 284) (‘1865 Amendment Act’). While this Act abolished imprisonment for simple debt, it bestowed on administering justices the power to imprison fraudulent debtors on the basis of their own determination of a debtor’s intention.¹²⁷ By shifting the repercussions of an inability to pay small debt out of the realm of the civil laws that regulated the relations between debtors and creditors and into the arena of criminal law, small debtors came to be defined by those administering the law, as necessarily criminal and liable to even harsher punishment.

¹²² Letter to the Editor, ‘Imprisonment for Debt’, *The Age* (Melbourne, 25 June 1858) 4.

¹²³ Editorial, ‘Imprisonment for Debt’, *The Ovens and Murray Advertiser* (Beechworth, Victoria, 19 February 1859) 2.

¹²⁴ Letter to the Editor, ‘Imprisonment for Debt’, *The Age* (Melbourne, 25 June 1858) 4.

¹²⁵ *Ibid.*

¹²⁶ Editorial, ‘The Abolition of Imprisonment for Debt’, *The Bendigo Advertiser* (Bendigo, 17 March 1860) 2.

¹²⁷ *Imprisonment for Debt Law Amendment Act 1865* (Vic) (29 Vict, No 284) s 3 (‘1865 Amendment Act’).

A '[T]he Punishment of the Unfortunate as If They Were Criminal Is Useless as Well as Cruel':¹²⁸ Distinguishing the 'Dishonest' Debtor

For small traders, the *Fellows Act* had brought about a welcome reversal of power in the debtor–creditor relationship. Its effect was near immediate: within a week of its coming into force, according to the *Ovens Constitution*, the *Fellows Act* was 'employed in one hundred and fifty cases; of this number only twenty-eight were settled out of court, and about an equal number were dismissed on various grounds.'¹²⁹ In other words, the *Fellows Act* was achieving its principal goal in effecting the repayment of debts. Within its first week of operation, '[t]he total amount of money, exclusive of costs, involved in the total number of cases is within a fraction of a thousand pounds sterling, giving an average of more than £6 10s to each case.'¹³⁰ For many creditors, the prospect of returning to the status quo that prevailed prior to the *Fellows Act* was unacceptable. Objecting to the prospect of its total repeal by Grant's abolition Bill, *The Ovens and Murray Advertiser* reminded its readers that '[b]efore the existence of the *Small Debts Act* [*Fellows Act*], it was pretty much left to the debtor's choice whether he should pay or not.'¹³¹

Supporters of the *Fellows Act* justified the discriminatory harshness of the law as having been 'necessitated by the very loose and unsound system upon which business has been conducted.'¹³² It was, they argued, the 'desperate disease' generated in a tradesman's business by the rampant exploitation of the facility of credit that produced 'the desperate remedy' of imprisonment afforded by the *Fellows Act*.¹³³ Few disputed the view that the poor insolvency regime in combination with the 'migratory nature' of large portions of the colony's population had 'rendered it next to impossible, if it was worth the trouble, to trace [the debtor] from one locality to another, in order to collect three or four pounds.'¹³⁴ As *The Ovens and Murray Advertiser* explained: 'In a mining community like ours, men are continually on the move. Untrammelled by a fixed abode, or occupation, they roam from place to place, getting a

¹²⁸ Editorial, 'Imprisonment for Debt', *The Mount Alexander Mail* (Victoria, 1 November 1858) 2.

¹²⁹ 'Recovery of Debts' (n 113) 6. This article reproduced observations from the *Ovens Constitution*.

¹³⁰ *Ibid.*

¹³¹ Editorial, 'Imprisonment for Debt', *The Ovens and Murray Advertiser* (Beechworth, Victoria, 21 April 1858) 2.

¹³² 'Recovery of Debts' (n 113) 6.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

few pounds in debt here, and a few pounds in debt there, and when pressed for payment their place knows them no more.¹³⁵ Further, the *Fellows Act* was justified because concomitant to the ‘unsettled and wandering’ conditions of the colony was the absence of the disciplining ‘influence of superiors and the love of a good name’ which in the ‘settled and stationary’ English population, kept men on ‘the path of duty’.¹³⁶ In these conditions, the Act’s lack of distinction between misfortune and fraudulent behaviour, Fellows proclaimed, was the foundation of its effectiveness: ‘The Act operated most beneficially *in terrorem*. It made a man pay.’¹³⁷ Fear of the gaoler, he reasoned, would both discourage reckless indebtedness and encourage the payment of debts, as well as stop debtors from simply walking away from their liabilities. ‘Where,’ Fellows asked the Assembly, ‘was the injustice of such an Act?’¹³⁸

Opponents of imprisonment for debt quickly answered Fellows’ question with numerous stories of ‘respectable’ men and women falling victim to his Act.¹³⁹ Early apologists for the *Fellows Act* had predicted that its power to imprison debtors would be used only infrequently in the most intractable of cases. They argued that genuinely impoverished debtors would be unlikely targets of a creditor’s summons, reasoning that as the incarceration of a debtor would not add anything to a creditor’s purse and ‘detracts from his popularity’, ‘[p]oor men willing, but unable to pay, [would be] seldom if ever molested’ by creditors.¹⁴⁰ The press, however, exploded this argument, carrying tales of the ‘almost daily instances of the harshness of the law of imprisonment for debt’;¹⁴¹ of honest men and women ‘thrown into the same cell with the mean and unprincipled blackleg’.¹⁴² Articles recounting the squalid conditions of the overcrowded gaols into which small debtors were placed alongside common criminals were followed by accounts of suicide and the abject fear prompted by the *Fellows Act*, particularly within the impoverished miners’ camps on the

¹³⁵ Editorial, ‘Imprisonment for Debt’, *The Ovens and Murray Advertiser* (Beechworth, Victoria, 21 April 1858) 2.

¹³⁶ Editorial, ‘Imprisonment for Debt’, *The Ovens and Murray Advertiser* (Beechworth, Victoria, 1 May 1858) 2.

¹³⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 April 1858, 418 (Thomas Fellows).

¹³⁸ *Ibid.*

¹³⁹ See, eg, Editorial, *The Mount Alexander Mail* (Victoria, 9 June 1858); Editorial, *The Mount Alexander Mail* (Victoria, 1 November 1858).

¹⁴⁰ Editorial, ‘Imprisonment for Debt’, *The Ovens and Murray Advertiser* (Beechworth, Victoria, 21 April 1858) 2.

¹⁴¹ Letter to the Editor, ‘*Fellows’s Act*’, *The Argus* (Melbourne, 12 August 1862) 7.

¹⁴² Editorial, ‘Imprisonment for Debt’, *The Bendigo Advertiser* (Bendigo, 28 January 1858) 2.

dwindling goldfields.¹⁴³ As *The Ovens and Murray Advertiser* observed, the *Fellows Act* fell rapidly from being ‘worshipped with loud acclaim’ to being ‘torn in pieces with fiercest execrations’, with not even its ‘warmest friends [daring] to raise a finger in its favour’.¹⁴⁴ Grant’s Bill to abolish imprisonment for debt had then washed into Parliament on a tide of public outrage, and the prospect of having ‘that relic of barbarism’ expunged from the statute book was met with widespread support, both within and outside Parliament.¹⁴⁵

Despite its obvious injustices, Grant’s initial Bill to abolish the *Fellows Act* in its totality was, however, met with ‘no small amount of angry feeling’ by Fellows’ supporters¹⁴⁶ and, ultimately, was subjected to the discourtesy of a summary refusal by the Legislative Council to grant even a first reading of the Bill.¹⁴⁷ Debate over this first abolition Bill, however, laid down the themes that would characterise the debates that accompanied the successive Bills introduced by the Assembly and rejected by the Legislative Council until 1865. In the face of the intransigent refusal of the Legislative Council (and the Chamber of Commerce) to contemplate abolition and, therefore, a return to the conditions that prevailed prior to the *Fellows Act*, its opponents redirected their efforts towards ‘assimilat[ing] the law of imprisonment for debts ... to the law as it now stands in England’.¹⁴⁸ The goal of abolitionists changed then from repealing the *Fellows Act* toward amending it, so that, reflecting the English approach, it applied only to the ‘dishonest’ small debtor.

Describing his objection to the *Fellows Act*, John O’Shanassy, in support of Grant, pointed to the ‘indiscriminate nature of the punishment under the Act’ as ‘inexpedient and objectionable’.¹⁴⁹ He noted that

[t]here were two classes of people who were not provided for in our legislation; one was the class of unfortunate men, not a dishonest one, who were improperly punished ... and the other was the class of really fraudulent men, who could not often be effectively reached.¹⁵⁰

¹⁴³ See, eg, ‘Is Poverty a Crime?’ (n 102) 2; ‘Treatment of Debtors’ (n 26) 4; Editorial, ‘The Suicide of Mr Meadows in Geelong’, *The Star* (Ballarat, 7 August 1862) 4.

¹⁴⁴ Editorial, ‘Imprisonment for Debt’, *The Ovens and Murray Advertiser* (Beechworth, Victoria, 21 April 1858) 2.

¹⁴⁵ Editorial, ‘Imprisonment for Debt’, *The Kyneton Observer* (Victoria, 24 April 1858) 2.

¹⁴⁶ *Ibid.*

¹⁴⁷ Victoria, *Parliamentary Debates*, Legislative Council, 3 June 1858, 540.

¹⁴⁸ Editorial, ‘Chamber of Commerce’, *The Age* (Melbourne, 3 June 1863) 5.

¹⁴⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 April 1858, 418 (John O’Shanassy).

¹⁵⁰ *Ibid.*

The law's failure to draw a moral line between different classes of small debtor meant then that the law operated in a manner that was ineffective and irrational. A key argument of abolitionists was that the *Fellows Act*, rather than benefiting creditors, was instead harming them in two vital ways. On the one hand, placing an impoverished debtor into prison meant that the debt was even less likely to be paid because the debtor was no longer able to work. The result was that the *Fellows Act*, by its effect, was 'designed to punish ... "poverty"', rather than facilitate and enable payment.¹⁵¹ On the other hand, a debtor, whether honest or dishonest, with sufficient funds to pay court fees, was now, through fear of imprisonment, more likely to avail himself of the more amenable and protective provisions of the insolvency statutes, and have his or her debts whitewashed in such a manner as that described by Stephen.¹⁵² In this circumstance, a debtor with means to pay, but fearful of imprisonment, preferred the protection of the Insolvent Court which would relieve him of his debt, but also vastly reduce the chances of a creditor obtaining more than a fraction, if anything, of what was owed to him. As Grant noted:

The practical result of Mr Fellows's Act had been to increase the annual insolvency of the colony from 210 to 607 ... The number of insolvents whose liabilities were under £200 in the year 1857, was 14 whilst the number of insolvents whose liabilities were under that amount in 1858 was 371. In 1857 there was only one insolvent whose liabilities were under £50, whilst in 1858 there were 166. In 1857 there was only one insolvent whose liabilities were under £20, whilst in 1858 there were 63.¹⁵³

As Grant suggested, the *Fellows Act* had prompted both the supposed honest and dishonest debtor who had some capacity to pay into the arms of the insolvency statutes, swamping the insolvency system, while the genuinely impoverished remained subject to the pointless and vindictive criminal punishment allowed by the *Fellows Act* (see Table 2).¹⁵⁴

¹⁵¹ Editorial, 'A Visit to the Melbourne Debtors' Prison', *Leader* (Melbourne, 4 July 1863) 13.

¹⁵² Stephen, *Insolvency Abuses* (n 11) 4.

¹⁵³ Victoria, *Parliamentary Debates*, Legislative Assembly, 16 February 1859, 874 (James Grant).

¹⁵⁴ *Ibid.*

Table 2: Impact of Debt Imprisonment on Insolvencies¹⁵⁵

Year	Insolvencies	Total Liabilities	Statute
1857	210	£846,394	<i>Insolvency Act</i>
1858	646	£779,761	<i>Small Debts Act</i> [ie <i>Fellows Act</i>]
1859	956	£1,109,587	<i>Small Debts Act</i>
1860	1,373	£1,280,742	<i>Small Debts Act</i>
1861	1,287	£1,088,298	<i>Small Debts Act</i>
1862	1,053	£1,053,507	<i>Small Debts Act</i>
1863	939	£426,049	<i>Small Debts Act</i>
1864	1,125	£570,309	<i>Small Debts Act</i>
1865	1,291	£474,665	<i>Small Debts Act</i>
1866	1,103	£585,898	<i>Imprisonment for Debts Act</i>
1867	1,000	£677,083	<i>Imprisonment for Debts Act</i>
1868	863	£617,763	<i>Imprisonment for Debts Act</i>
1869	818	£653,614	<i>Imprisonment for Debts Act</i>
1870	996	£479,490	<i>Imprisonment for Debts Act</i>
1871	631	£444,117	<i>Imprisonment for Debts Act</i>
1872	804	£696,868	<i>Imprisonment for Debts Act</i>
1873	672	£330,337	<i>Imprisonment for Debts Act</i>
1874	776	£543,157	<i>Imprisonment for Debts Act</i>
1875	773	£641,390	<i>Imprisonment for Debts Act</i>
1876	712	£551,814	<i>Imprisonment for Debts Act</i>

¹⁵⁵ In the following parliamentary papers, the statistics under the ‘Insolvents’ or ‘Insolvencies’ and ‘Total Liabilities’ or ‘Amount of Liabilities’ headings refer to insolvencies (ie bankruptcies) and debts relieved by the courts (without recourse to imprisonment) and, perhaps, lost to creditors, under the *Insolvency Act 1843* (Vic) (7 Vict, No 19), the *Insolvency Statute 1865* (Vic) (28 Vict, No 273) and the *Insolvency Statute 1871* (Vic) (34 Vict, No 379). The table does not propose a direct correlation — economic conditions must also

The language of morality and reason employed by O'Shanassy and Grant, among others, was clearly drawn from, and shaped by, the discourse on debt law that had emerged in England in the previous decades. As *The Mount Alexander Mail* observed, the folly of imprisoning an honest although impoverished person for debt was a 'conclusion which the wisest jurists in England have lately reached, but which our colonial legislators have not yet been able to comprehend'.¹⁵⁶ Writing on the shifting understandings of debt

be considered, for instance. Rather, it suggests support for contemporary impressions of a significant and sustained rise in the number of small debtors availing themselves of the insolvency statutes after the passage of the *Fellows Act*. The statistics in this table are derived from the Registrar-General's Office of Victoria: Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1857* (Parliamentary Paper No 46, 1858-9) 74; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1858* (Parliamentary Paper No 9, 1859) 140; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1859* (Parliamentary Paper No 78, 1860) 111; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1860* (Parliamentary Paper No 3, 1861) 95; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1861* (Parliamentary Paper No 9, 1863) 277; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1862* (Parliamentary Paper No 3, 1864) 241; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1863* (Parliamentary Paper No 11, 1865) 87; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1864* (Parliamentary Paper No 1, 1866) 223; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1865* (Parliamentary Paper No 12, 1866) 113; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1866* (Parliamentary Paper No 82, 1867) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1867* (Parliamentary Paper No 53, 1868) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1868* (Parliamentary Paper No 67, 1869) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1869* (Parliamentary Paper No 1, 1870) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1870* (Parliamentary Paper No 92, 1871) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1871* (Parliamentary Paper No 63, 1872) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1872* (Parliamentary Paper No 71, 1873) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1873* (Parliamentary Paper No 60, 1874) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1874* (Parliamentary Paper No 27, 1875) 8; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1875* (Parliamentary Paper No 36, 1876) 8; Registrar-General's Office, Parliament of Victoria, *Statistical Register of the Colony of Victoria for the Year 1876* (Parliamentary Paper No 65, 1877) 10.

¹⁵⁶ Editorial, 'Imprisonment for Debt', *The Mount Alexander Mail* (Victoria, 1 November 1858) 2.

law in England, Gustav Peebles has observed that, from the early part of the 19th century:

[A] reformist spirit began to insist that there was a grand and necessary divide between honest and dishonest debtors, and that it was the state's task to objectively delineate the two, rather than allowing private creditors to keep subjectively treating them in an identical fashion.¹⁵⁷

It was this same 'spirit' that animated the colonial abolitionists in the Victorian Assembly and which, eventually, shaped the *1865 Amendment Act*, which was finally accepted by the Legislative Council in July 1865.¹⁵⁸ More pragmatically, others pointed to the changed conditions in the colony which meant that the *Fellows Act* was no longer necessary. William Frazer, who had moved an alternative abolition Bill in 1865, pointed out that '[t]he reason given for this legislation was that mercantile men were unable to recover their debts, owing to the shifting habits of the population; but this reason no longer existed'.¹⁵⁹ The Legislative Council may also have been persuaded by the (unsuccessful) Bill laid down in the House of Lords by the Lord Chancellor in June 1865, proposing the abolition of imprisonment for debt in England.¹⁶⁰

In any event, s 1 of the *1865 Amendment Act* legislated:

It shall not be lawful after the commencement of this Act for the clerk of any county court to issue a warrant of commitment upon a return made to any warrant of execution that the bailiff or officer could find no sufficient property of the person against whom such warrant shall have issued liable to satisfy such execution and no person shall be arrested or imprisoned in execution upon or in satisfaction of any judgment or order recovered or obtained in any county court save in the special cases where such court is empowered by law to make an order of commitment ...¹⁶¹

¹⁵⁷ Gustav Peebles, 'Washing Away the Sins of Debt: The Nineteenth-Century Eradication of the Debtors' Prison' (2013) 55(3) *Comparative Studies in Society and History* 701, 707. See also Johnson, *Making the Market* (n 40) 60; Bruce Kercher, 'The Transformation of Imprisonment for Debt in England, 1828 to 1838' (1984) 2 *Australian Journal of Law & Society* 60, 62.

¹⁵⁸ *1865 Amendment Act* (n 127).

¹⁵⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 7 April 1865, 634 (William Frazer).

¹⁶⁰ See 'The Lord Chancellor on "Imprisonment for Debt"', *South Bourke Standard* (Victoria, 2 June 1865) 3. The Lord Chancellor's Bill was unsuccessful. Abolition of imprisonment for debt was accomplished in England by *The Debtors Act 1869*, 32 & 33 Vict, c 62; see Lester (n 53) 116; Finn (n 53) 186.

¹⁶¹ *1865 Amendment Act* (n 127) s 1.

Section 3 set out the ‘special cases’ in which imprisonment of debtors was to be lawful:

It shall appear to the satisfaction of such judge or justices that such person if a defendant incurring the debt or liability which is the subject of the action or proceeding in which judgment or an order has been obtained has obtained credit from the plaintiff or complainant under false pretences or by means of a fraud or breach of trust or has wilfully contracted such debt or liability without having at the same time a reasonable expectation of being able to pay or discharge the same or shall have made or caused to be made any gift delivery or transfer of any property or shall have charged removed or concealed the same with intent to defraud his creditors or any of them or has then or has had since the judgment obtained or order made against him sufficient means and ability to pay the debt ... it shall be lawful for such judge or justices (as the case may be) if he or they shall think fit to order that unless such person shall pay into such court or to the clerk of petty sessions (as the case may be) either forthwith or within the time limited in such order the money so unsatisfied ... he shall be committed to prison for any time not exceeding six months when the order is made by a judge and not exceeding two months when the order is made by justices.¹⁶²

The press hailed the amending Act’s passage as a moment of humanitarian progress, announcing that it meant that ‘the punishment of imprisonment for debt will cease to be inflicted in this colony’.¹⁶³ *The Bendigo Advertiser* praised the change, noting that the new Act was

founded on better principles; it does not make indebtedness, misfortune, or poverty, crimes punishable by forfeiture, as under the old Roman law, of the liberty and even the life of the debtor for the satisfaction of the creditor. Its essence is the principle that there must be proof of fraud on the part of the debtor to make his indebtedness an offence in law, and fraud being proved, it then follows that the offence being one against society is one which society by its institutions shall punish.¹⁶⁴

The 1865 *Amendment Act*’s apparent abolition of imprisonment for debt, except for cases in which credit was obtained with dishonest intent, would appear then to provide evidence for the argument that Australian bankruptcy

¹⁶² *Ibid* s 3.

¹⁶³ Editorial, ‘The Law of Debtor and Creditor’, *The Bendigo Advertiser* (Bendigo, 13 October 1865) 2.

¹⁶⁴ *Ibid*.

laws were developing along a progressive trajectory toward the differentiation between the dishonest debtor and the honest debtor, who should be spared criminal punishment.¹⁶⁵

B *‘[T]he Result Being Gross Tyranny Expressly Repudiated by the Legislature’*.¹⁶⁶ *Fraud Summons and the Perpetuation of Debtor Imprisonment*

It was, however, left to others to point out that rather than protecting ‘honest’ debtors from imprisonment, the new Act empowered judges and justices to expansively define ‘fraud,’ ‘false pretences’ and ‘breach of trust.’¹⁶⁷ And, while the numbers gaoled decreased, the new law increased the harshness of the regime under which debtors, now defined as criminal, were imprisoned (see Table 3). During debate, Frazer argued that the Attorney-General’s (ie Higinbotham’s) Bill, which eventually succeeded over Frazer’s alternative, ‘would make the law ten times worse than it was at present.’¹⁶⁸ He stated further that the Attorney-General’s Bill ‘absolutely increased the power of the County Court judges and justices of the peace as to imprisonment, and ought to be styled “A Bill to Increase Imprisonment for Debt”’.¹⁶⁹ Frazer was particularly concerned by s 4 of the *1865 Amendment Act*, which, in part, stated:

In any case in which any defendant in any action in the Supreme Court or upon any summons before justices in respect of any cause or causes of action or the cause of complaint aforesaid shall personally appear at the trial or hearing of the same court or the justices at the trial or hearing of the cause or summons or at any adjournment thereof if a verdict or an order shall be found or made against the defendant *shall have the same power and authority of examining the plaintiff or complainant and defendant and other parties touching the things hereinbefore in the last preceding section mentioned and of making an order as such court or justices might have exercised under the provisions hereinbefore*

¹⁶⁵ Carmel Meiklejohn (ed), *Officially Receiving: A History of Australia’s Bankruptcy Law and Administration* (Insolvency and Trustee Service Australia, 2010) 10.

¹⁶⁶ Editorial, *The Ballarat Star* (Victoria, 6 March 1867) 2.

¹⁶⁷ *Ibid.*

¹⁶⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 7 April 1865, 635 (William Frazer).

¹⁶⁹ *Ibid.*

*contained in case the plaintiff or complainant had obtained a summons for that purpose after judgment or order as hereinbefore mentioned.*¹⁷⁰

As the *Leader* explained, the 1865 Amendment Act ‘gives to the justices a collateral jurisdiction to inquire into fraud when the defendant has been merely summoned for debt’, breaching ‘one of the first principles of law that a man shall be informed of the charge which he is to answer.’¹⁷¹

Furthermore, the discretionary terms in s 3: namely, ‘to the satisfaction’ and ‘if he or they shall think fit’, allowed administering justices to arbitrarily define ‘false pretences’, ‘fraud’, ‘breach of trust’ and so on, according to their own disposition. The *Leader* identified this power as a clear danger in the 1865 Amendment Act, pointing to the fact that

honorary justices are for the most part engaged in trade. They are creditors, [and] such men would have a disposition to regard all defaulting debtors as fraudulent. The mere inability to pay would, in their eyes, be a crime to be punished severely.¹⁷²

Such anxieties expressed over the 1865 ‘abolition’ of imprisonment for honest debtors were quickly shown to be well founded. By March 1867, *The Ballarat Star* was able to confirm that ‘[t]he fears expressed in the Legislative Assembly have been more than realised, because a felon’s treatment is now added to the possible blunders of the bench, and we have returned to a state of things far worse than that which the existing law was framed to abolish.’¹⁷³ Indeed, rather than reserve the criminal punishment of imprisonment for debtors with a proven fraudulent intent, Higinbotham’s measure merely gave those administering the law a licence ‘to make almost anything they please into a crime.’¹⁷⁴ As *The Ballarat Star* explained, under the 1865 Amendment Act, ‘the power of imprisonment is not given for proved fraud, but for what the justices may choose to consider equivalent thereto, whether it be so or not.’¹⁷⁵ To compound matters, the law required that prisoners committed under a so-called ‘fraud summons’ must be ‘regarded as fraudulent debtors’ and ‘treated as common felons.’¹⁷⁶

¹⁷⁰ 1865 Amendment Act (n 127) s 4 (emphasis added).

¹⁷¹ Editorial, ‘Imprisonment for Debt’, *Leader* (Melbourne, 22 April 1865) 13.

¹⁷² *Ibid.*

¹⁷³ Editorial, *The Ballarat Star* (Victoria, 6 March 1867) 2.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

Table 3: Imprisonment for Debt under the Fellows Act 1857 and the Imprisonment for Debts Act 1865¹⁷⁷

Year	Statute	Debtors Imprisoned
1857		No statistics
1858	<i>Small Debts Act [ie Fellows Act]</i>	12
1859	<i>Small Debts Act</i>	102
1860	<i>Small Debts Act</i>	241
1861	<i>Small Debts Act</i>	284
1862	<i>Small Debts Act</i>	237
1863	<i>Small Debts Act</i>	286
1864	<i>Small Debts Act</i>	449
1865	<i>Small Debts Act</i>	529
1866	<i>Imprisonment for Debts Act</i>	189

¹⁷⁷ See above n 10; Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 63, 1867) 7; Victorian Police Force, Parliament of Victoria, *Criminal Statistics* (Parliamentary Paper No 36, 1868) 7; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1868* (Parliamentary Paper No 71, 1869) 10; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1869* (Parliamentary Paper No 4, 1870) 10; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1870* (Parliamentary Paper No 85, 1871) 11; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1871* (Parliamentary Paper No 51, 1872) 11; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1872* (Parliamentary Paper No 3, 1874) 11; Registrar-General's Office, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1873* (Parliamentary Paper No 66, 1874) 11; Office of the Government Statist, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1874* (Parliamentary Paper No 27, 1875) 12; Office of the Government Statist, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1875* (Parliamentary Paper No 36, 1876) 12; Office of the Government Statist, Parliament of Victoria, *Statistics of the Colony of Victoria for the Year 1876* (Parliamentary Paper No 65, 1877) 13. While debtors were counted as inmates of the various gaols, they were not included in the lists of criminal statistics for 1858. The total number of debtors incarcerated in 1858 has been calculated by counting the inmates identified as 'debtors' in each gaol on 1 May 1858. This number only reflects the inmates held within the system on that particular date, rather than the total number detained over the year. From 1859, statistics reflect the total number of debtors placed into custody for the year, but not a cumulative total of debtors in gaols (ie unreleased debtors incarcerated in the previous year).

Year	Statute	Debtors Imprisoned
1867	<i>Imprisonment for Debts Act</i>	223
1868	<i>Imprisonment for Debts Act</i>	166
1869	<i>Imprisonment for Debts Act</i>	140
1870	<i>Imprisonment for Debts Act</i>	141
1871	<i>Imprisonment for Debts Act</i>	180
1872	<i>Imprisonment for Debts Act</i>	180
1873	<i>Imprisonment for Debts Act</i>	172
1874	<i>Imprisonment for Debts Act</i>	199
1875	<i>Imprisonment for Debts Act</i>	234
1876	<i>Imprisonment for Debts Act</i>	196

As under the *Fellows Act*, public indignation was provoked by stories of ordinary ‘honest’ debtors detained under the new *1865 Amendment Act*, but now arbitrarily defined as fraudulent and treated as common criminals. One such debtor, ‘Another Victim,’ wrote to *The Ballarat Star* recounting his experience of being ‘arrested in Melbourne ... for a small debt to which I had consented to judgment some time previously.’¹⁷⁸ Having been detained without notice and removed to the Ballarat gaol, he was there forced ‘to rub shoulders with, and be treated like a thief.’¹⁷⁹ Protesting the injustice of his treatment, he wrote, ‘I had contracted the debt, admitted it, also my willingness to pay, but impecuniosity will attack the best intentioned persons, and I was unable to do so at the very time it was due.’¹⁸⁰ In these circumstances, he complained: ‘Mr Higinbotham ... can hardly say that I had committed a fraud.’¹⁸¹ The obvious problem with the *1865 Amendment Act*, then, to numerous observers, was the vagary of its language.¹⁸² It was accepted that the Act otherwise reflected the Assembly’s wish that honest debtors be

¹⁷⁸ Letter to the Editor, ‘Imprisonment for Debt’, *The Ballarat Star* (Victoria, 26 April 1867) 3.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² See, eg, Editorial, *The Ballarat Star* (Victoria, 6 March 1867); Editorial, *The Ballarat Star* (Victoria, 22 March 1867).

distinguished from dishonest and fraudulent debtors and that only fraudulent debtors should face imprisonment. The Act had been framed, *The Ballarat Star* conceded, ‘not to punish the unfortunate debtor, but to meet those cases in which something nearly akin to swindling is shown.’¹⁸³ As a correspondent wrote to *The Mount Alexander Mail*: ‘The third section of the Imprisonment for Debt Statute is both simple and plain, and no person who does not come within the meaning of that section ought to be imprisoned. Let those who administer the law study its wise provisions.’¹⁸⁴ Even if not apace with the old *Fellows Act*, the fact that relatively high numbers of ‘honest’ debtors continued to be imprisoned was understood as an outcome of the way in which the new Act was being administered by those given power under its provisions. Indeed, when introducing his (failed) ‘Imprisonment for Debt Abolition Bill’ to the Assembly in October 1872 (directed to the repeal of the 1865 *Amendment Act*), Attorney-General James Wilberforce Stephen noted that ‘[t]he Bill does not involve any matter of policy, but rather refers to the administration of the law in this country.’¹⁸⁵

Ironically, during debate on the 1865 *Amendment Act*, Higinbotham had refuted Frazer’s demand that ‘in no case should justices be empowered to imprison a debtor for any of those causes of action for which two justices could make an order for the payment of money for a civil debt.’¹⁸⁶ In defence of his measure, Higinbotham pointed out that ‘it was only in special circumstances that this power was given [ie fraud],’ and jeered at Frazer’s qualms, exclaiming: ‘It might be that the [H]on [M]ember believed that the justices of the country were not fit to deal with these cases — were incompetent to adjudicate on them.’¹⁸⁷ As *The Ballarat Star* later reminded its readers, Higinbotham had professed himself assured that the justices would ‘carefully exercise’ their broad discretion.¹⁸⁸ By 1867, Higinbotham’s faith that justices would use their discretionary power according to the spirit of the new Act was disappointed. He was forced to concede that ‘the country benches

¹⁸³ Editorial, *The Ballarat Star* (Victoria, 6 March 1867) 2.

¹⁸⁴ Editorial, ‘Imprisonment for Debt’, *The Mount Alexander Mail* (Victoria, 22 September 1868) 2.

¹⁸⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 1872, 1922 (James Stephen).

¹⁸⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 7 April 1865, 636 (William Frazer).

¹⁸⁷ *Ibid* 636 (George Higinbotham). In the same debate, Frazer had indicated his preference that only judges of the County Court should be given competence to try to imprison fraudulent debtors: at 636 (William Frazer).

¹⁸⁸ Editorial, *The Ballarat Star* (Victoria, 22 March 1867) 2.

regarded this [A]ct as substantially a re-enactment of the law of imprisonment for debt [ie the *Fellows Act*], and sentenced persons to imprisonment merely because they were in debt.¹⁸⁹ Higinbotham had belatedly come to accept, as various commentators had already predicted, that the vagaries of the *1865 Amendment Act* would allow justices to ‘[strain] the law beyond its obvious meaning, so that non-payment of a debt is treated as a fraud worthy of criminal punishment.’¹⁹⁰ *The Ballarat Star* was less measured in its language of blame for the widespread thwarting of the Act’s intention to distinguish between the ‘honest’ and ‘dishonest’ debtor, stating that the ‘persons who really seem to be in the wrong are the magistrates.’¹⁹¹ The implication of this statement was, of course, that while the law may have been changed, what had not changed was the politics and values of that class of men who implemented it, particularly in regard to their views on the nature of the relationship between the small debtor and his or her creditor.

Shortly before the consolidation of imprisonment for debt laws in the *Imprisonment of Fraudulent Debtors Act 1890* (Vic) (54 Vict, No 1100), *The Age* commented that ‘[i]t is questionable ... whether the administration of the [*1865 Amendment Act*] has been in accordance with its spirit, and whether imprisonment for debt has not been more common under a law which professed to abolish it than it was before that law was passed.’¹⁹² Similarly, *The Record and Emerald Hill and Sandridge Advertiser* had observed that ‘the intentions of the Legislature in abolishing imprisonment for debt are habitually frustrated by the mode of procedure adopted in regard to small debtors in our Court of Petty Sessions’, remarking further that ‘in this way the abolition of imprisonment for debt which a few years ago was hailed as an advanced step in the progress of civilisation is rendered absolutely nugatory by the administration of the law in regard to a fraud summons.’¹⁹³ For many, within and outside Parliament, the great frustration of the *1865 Amendment Act* was then that the task of implementing its progressive and humanitarian goals was handed over to those who stood largely opposed to such goals and, indeed, to the idea that an unpaid debt was anything but a marker of poor character.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Editorial, *The Age* (Melbourne, 16 December 1889) 4.

¹⁹³ ‘Fraud Summonses’, *The Record and Emerald Hill and Sandridge Advertiser* (Victoria, 14 March 1879) 3.

In her 2003 book, *The Character of Credit*, Margot Finn remarks on a similar association between the growth in demand for enlightened English debt law and increased rates of incarceration in the aftermath of the legal reforms of 1836–46.¹⁹⁴ She points to '[t]wo broad and interlocking trends in penal policy' which became apparent: '[A] sharp escalation of local and national government attempts to subject all debtors gaoled by small-claims courts to punitive confinement, and an increasing determination to distinguish clearly between merely unfortunate and actively culpable debtors.'¹⁹⁵ Her explanation for this phenomena echoes that offered by GR Rubin, in his work examining the perpetuation of imprisonment of small debtors even after its apparent 'abolition' in England in 1869.¹⁹⁶ Finn further argues that debt laws were designed and implemented according to middle-class ideas of the 'flawed moral character of working-class debtors'.¹⁹⁷ Finn argues that the increased determination to discipline small debtors by means of imprisonment was an extrapolation of '[p]erceived class differences' in which 'petty debtors and their creditors invariably represented different social classes and displayed distinctive market moralities'.¹⁹⁸ Put simply, the possession of property signified virtue and stability in economic relations, whereas the un-propertied were designated as 'thrifless and extravagant, lacking the strength of will to resist the embellishments of the tallyman or the lure of the public house'.¹⁹⁹ The imprisonment of small debtors, in this view, was the application of a punishment by those with property on those without property.

The view of imprisonment for debt as a class-based institution had, of course, already been heard with regard to the *Fellows Act* in 1858, during debate on Grant's first abolition Bill. Grant identified the *Fellows Act* as 'a piece of gross class legislation, inimical to the idea of popular sovereignty toward which Parliament was progressing'.²⁰⁰ He suggested that the Act's allies had legislated only 'for the respectable classes of society', and accused them of

¹⁹⁴ Finn (n 53) 174.

¹⁹⁵ Ibid.

¹⁹⁶ GR Rubin, 'Law, Poverty and Imprisonment for Debt, 1869–1914' in GR Rubin and David Sugarman (eds), *Law, Economy and Society, 1750–1914: Essays in the History of English Law* (Professional Books, 1984) 241 ('Law, Poverty and Imprisonment for Debt'). See also Lester (n 53) 116–20.

¹⁹⁷ Finn (n 53) 175.

¹⁹⁸ Ibid.

¹⁹⁹ Rubin, 'Law, Poverty and Imprisonment for Debt' (n 196) 273.

²⁰⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 May 1858, 510 (James Grant).

making law only in the interests of ‘those who were members of a Chamber of Commerce.’²⁰¹ In reply, Legislative Assembly Member James Service righteously confirmed this, asserting that the ‘House was bound to legislate for the respectable classes of society’, asking ‘what class was it objected to the Act? Was it the creditors, or the respectable portion of the community? No; it was the debtors — that class which lived upon society.’²⁰² Indeed, some commentators were unabashed in their support for the idea that the institution of imprisonment for debt was a necessary instrument in the protection of the values and property of the ‘respectable classes’²⁰³ against the encroachments of the labouring classes.

Similarly, reaction against the 1872 attempt to (again) abolish imprisonment for debt was based on arguments about the moral character of the ‘workingman’. In a letter sent to *The Bendigo Advertiser*, the writer sought to paint a picture of the ‘specimens of a class who would be benefited by the passing of the bill to abolish imprisonment for debt.’²⁰⁴ These were, he wrote:

[A] class of individuals who (to hear some people talk) are so much imposed upon by tradespeople — a workingman. This man can, and does when he likes to work, earn from £3 to £5 per week, has but a small family to keep, and will not pay anyone because of his love for drink; has several cases in the County Court, and is protected by a bill of sale and the commuted orders of the judge, which encourage him to get more into debt and drinking habits. A warrant is the only means to make him pay. I could go on and give numbers of cases of men receiving good wages who spend their money in wilful waste instead of giving it to their wives to pay their just debts, and the officials of the County Court know that as a rule it is not the honest industrious man who figures most at the court, but the drinking, indolent part of the community ...²⁰⁵

The Ovens and Murray Advertiser was even more explicit in its view of the role of imprisonment for debt, claiming it as a weapon in this latest ‘phase of the struggle betwixt capital and labor.’²⁰⁶

²⁰¹ Ibid.

²⁰² Ibid 509 (James Service).

²⁰³ Ibid. See also Editorial, *The Hamilton Spectator* (Victoria, 2 November 1872).

²⁰⁴ Editorial, ‘The Bill to Abolish Imprisonment for Debt’, *The Age* (Melbourne, 9 November 1872) 5.

²⁰⁵ Ibid.

²⁰⁶ Editorial, ‘Imprisonment for Debt’, *The Ovens and Murray Advertiser* (Beechworth, Victoria, 1 May 1858) 2.

The biases relating to moral character and debt that were attached to social class had then undoubtedly travelled with the propertied English immigrants, both gentry and middle-class, who arrived in Victoria to take up the task of establishing and developing the fledgling colony.²⁰⁷ However, while power in Victoria, like England, was still largely afforded to those with property rather than those without,²⁰⁸ it was, unlike England, a condition that was being fervently challenged, most obviously in the context of crown lands alienation. In this climate, the *1865 Amendment Act's* attempt to draw a distinction between honest and dishonest small debtors ultimately foundered on the rocks of both class distinction, and the efforts of the wealthy classes to resist the erosion of the power structures and social and legal institutions that benefited them and ensured their authoritative status. In the context of the *1865 Amendment Act*, the distinction between honesty and dishonesty, with rare exception, would always be adjudged by mercantile men about poor working men and women. *The Mount Alexander Mail* identified this defect of the Act, observing that

[t]he strong local influence of tradesmen upon the magistrates frequently of their class, and with whom they are continually associated, shuts up the ears of the justices, when the unfortunate debtor is charged with the gross crime of not paying a butcher's or a grocer's account.²⁰⁹

The men charged with its administration, mostly mercantile men and traders, viewed the labouring classes as less likely, by virtue of their class position, to be honest in matters of financial obligation towards their 'betters' and, consequently, awarded imprisonment according to that belief rather than the prescription of the Act.

IV CONCLUSION

The story of the *Fellows Act* serves as a reminder that, in Victoria, laws against the small debtor originated in the context of the fiercely fought ideological battles over the shape and nature of the colony's legal and economic institutions, and in the context of debates over whose interests and values these institutions should properly serve. In 1860, when reintroducing one of his many Bills which sought to repeal the *Fellows Act*, Grant portrayed the law as

²⁰⁷ See Bolton (n 103) 307; Serle (n 30) 186.

²⁰⁸ Mills (n 28) 36–7.

²⁰⁹ Editorial, 'Melbourne', *The Mount Alexander Mail* (Victoria, 25 September 1876) 3.

an expression of an alliance between the pastoral and merchant classes who had earlier staked their claim on the colony's institutional levers of economic and political control, and the more recently arrived English settlers, seeking to replant the class norms and institutions of the old world into the new. 'Upwards of 15 years ago,' he told Parliament, 'imprisonment for debt, as a principle, was abolished in the Sydney Legislature; and although much might be said against "old chums" ... it was reserved for "new chums" to re-introduce this barbarous principle into the colonial statute-book.'²¹⁰ Indeed, members of the wealthy and propertied elite and their representatives and allies in the young Parliament made little secret of their view of imprisonment for debt as a useful tool in their broader battle against the labouring classes' encroachments into the arenas of political power and property ownership that had hitherto been closed to them or out of reach.

This context goes some way toward answering the question of why Victoria reintroduced imprisonment for debt as the tide of popular and enlightened opinion turned against it. The reintroduction of imprisonment for debt in Victoria had defied the momentum of international campaigns against an apparently irrational and inefficient system of law 'which operated at a huge public cost ... [and] deprived the nation of the industry of those imprisoned', and which commonly failed to achieve its ostensible intention: the repayment of a debt.²¹¹ Arguments against imprisonment for debt in Victoria had echoed similar criticisms that had rolled across Great Britain, Europe and the United States and, as Peebles notes, had 'spread and intensified [into] a vast, international reform effort [that] managed to shutter all the debtors' prisons of Europe' by the end of the 19th century.²¹² In Victoria, on the contrary, the momentum against imprisonment for debt was resisted, and the efforts to ameliorate its inequalities and injustices largely thwarted.

While transnational abolitionist sentiment animated sustained efforts to repeal the *Fellows Act*, its survival can be explained by both the peculiar context of the instabilities of the colony's gold fields and the rapid and often radical democratic reforms and demands that played out in the 1850s and 1860s. Imprisonment of small debtors was justified on the basis of a transitory and mobile population that was peculiar to Victoria, but also functioned as part of the economic establishment's fear of, and resistance to, the democratic change and political foment of the 1850s and 1860s. While the

²¹⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 March 1860, 786 (James Grant).

²¹¹ Allsop and Dargan (n 8) 434.

²¹² Peebles (n 157) 702.

law relating to the imprisonment of debtors did change in the face of sustained opposition, and in the face of the increasingly entrenched and bitter division that grew between the Assembly and Council, the administration of the law often worked to subvert the intention of that legislative change. Habitual institutional practice alongside inflamed class animosities thwarted Parliament's intention to abolish imprisonment for debt. The passage of the *Fellows Act* was, in this sense, an expression of resistance to the expansion of democratic principles in the Victorian polity and ought to be understood alongside, and in the context of, contemporaneous struggles over Land Acts and the political demands of the 'monster' gatherings.²¹³ That is, as a component of a range of measures intended to exert social control over the expanding reach of the newly enfranchised 'masses'.

²¹³ 'Monster Demonstration' (n 55). See also above Part II(A); Shaw (n 55) 555–6.