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THE BANKRUPTCY DISCHARGE: TOWARD A FRESHER START

DOUG RENDLEMAN†

Two cartoons are posted on a debtor-creditor teacher's door. In the first, Andy Capp, our favorite deadbeat, runs by two pedestrians, one of whom says, "There we go, another jogger. I can't understand this mania for fitness." His companion replies, "If you owed as much money to as many people as he does, you'd be jogging too." The second shows two golfers, a dour one saying to his grinning companion, "Bankruptcy doesn't seem to have hurt your putting eye a bit, Pete." Recognizing that bankruptcy affects more bowlers than golfers, this Article deals with the policy that keeps the golfer's putting eye sharp—the bankrupt's fresh start.

The bankruptcy discharge is both an end and a beginning. The discharge is a judgment that closes the legal procedure; the protagonists must thereafter use post-judgment procedure. Judgments have at least two aspects. They are *res judicata*, thus precluding the opponents from relitigating. Judgments also give rise to a right of enforcement allowing successful litigants to enjoy the fruits of victory. A bankruptcy discharge expunges debts, leaving creditors helpless to collect. The way a bankrupt enforces a discharge determines a great deal about bankruptcy as a beginning and an end.

The fresh start concept is an overarching policy that shapes almost every part of bankruptcy. "One of the primary purposes of the bankruptcy act," the Supreme Court said in *Local Loan Co. v. Hunt*,¹ is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."² Bankruptcy's fresh start should provide the bankrupt with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discour-

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1. 292 U.S. 234 (1934).

2. *Id.* at 244 (quoting *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915)).

agement of preexisting debt."³ How in particular does the golfer's discharge implement this fresh start policy? Three theories of the discharge will command our attention: affirmative defense, injunction, and discrimination. This Article will examine the extent to which each of these three theories of discharge gives meaning to the fresh start policy and translates that meaning into real-life results.

The way we perceive the purposes and nature of bankruptcy affects the way we perceive the discharge. Bankruptcy began as a mercantile mechanism to liquidate insolvent enterprises in an orderly fashion and to distribute the assets to creditors in a roughly equal way.⁴ Occasionally the debtor would refuse to cooperate and creditors sought some device to secure compliance.⁵ Bankruptcy by this analysis is a device to control the debtor.⁶ Professor MacLachlan tells us that the English introduced the discharge to induce bankrupts to disclose and deliver all their assets to their creditors.⁷

During the 20th century, however, discharge to facilitate orderly, fair liquidation to creditors lost ground to discharge to provide a fresh start to bankrupts. Of course, bankruptcy courts today continue to liquidate failed business, and bankruptcy statutes still hinge the discharge on debtor cooperation.⁸ More than nine-tenths of all bankrupts today, however, are consumers, and few consumer bankrupts own enough assets to administer.⁹ Creditors refuse to fight over nothing. The adversary relationships among creditors and between creditors and the bankrupt have broken down. "Consumer bankrupts adopted a mercantile institution, developed it into a haven for the lower middle class, and extended to the whole population an opportunity to discharge debts previously thought to be restricted to a minority. The bankruptcy discharge developed a social welfare purpose: the fresh start."¹⁰ The

3. *Id.*

4. *Reed v. McIntyre*, 98 U.S. 507, 511-13 (1878); 1A COLLIER ON BANKRUPTCY § 14.01 (14th ed. 1978); Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918); Olmstead, *Bankruptcy, A Commercial Regulation*, 15 HARV. L. REV. 829, 843 (1902); Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 3-4 (1940).

5. *See* Levinthal, *supra* note 4, at 225.

6. *See* Glenn, *Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor*, 23 VA. L. REV. 373, 388 (1937).

7. J. MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* § 100 (1956).

8. *See* Bankruptcy Reform Act of 1978, 11 U.S.C.A. § 727(a) (West 1979).

9. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. pt. I at 65 (1973) [hereinafter cited as COMM'N REP.]; D. STANLEY & M. GIRTH, *BANKRUPTCY PROBLEM, PROCESS, REFORM* 20 (1971).

10. Rendleman, *Bankruptcy Revision: Procedure and Process*, 53 N.C.L. REV. 1197, 1203 (1975).

idea that bankruptcy itself connotes evil motives or defective morals no longer surfaces frequently. What bankruptcy does mean, however, is neither fully articulated nor theoretically explored.

A relative decline in harsh creditor tactics accompanied the development of the consumer economy. Earlier society discharged debts to recognize true in law what was true in fact—that certain debts are uncollectable or collectable only at too high a moral and economic cost for society to bear. The stern ethic of an earlier generation,¹¹ however, is now anachronistic. The growth of the impersonal society and the increasing role played by institutional creditors has led to accrual accounting, an actuarial approach to collection, and a systematic reserve or allowance to write off bad debts.¹² Institutional creditors now can afford play in the joints; they ignore first meetings of bankrupts' creditors and instead deduct uncollected debts from their income tax.¹³ Today's consumer has also been washed by a wave of debtor-oriented reform, judicial¹⁴ and legislative,¹⁵ federal¹⁶ and state.¹⁷ Flinty hearts, it cannot be gainsayed, continue to beat.¹⁸ More creditors, however, recognize a bad bargain and cut their losses.

Nevertheless, something remains of the ethical notion that people should pay their debts and that bankruptcy is vaguely antisocial. Filing bankruptcy still admits failure, and bankrupts suffer some stigma and disapproval.¹⁹ Society concedes that bankruptcy may be desirable but only for a few people in extreme difficulty, and not too often at that.²⁰ More people suffer acute financial distress than file bankruptcy,

11. See, e.g., MacLachlan, *Puritanical Therapy for Wage Earners*, 68 COM. L.J. 87, 89 (1963).

12. See Stone, *A Primer on Bankruptcy*, 16 TUL. L. REV. 339, 361 (1942).

13. I.R.C. § 166.

14. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

15. See, e.g., Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692 (West 1979).

16. See, *id.*; *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

17. The Virginia Legislature, for example, deleted the last remnants of debt imprisonment when it revised its Civil Remedies & Procedure Code in 1977. See VA. CODE § 8.01-462 (1977). Similarly, the North Carolina General Assembly feeling the hot breath of the federal court on the back of its collective neck, recently ameliorated debt imprisonment for Tarheels. See *Survey of Developments in North Carolina Law*, 56 N.C.L. REV. 901-05 (1978).

18. See, e.g., *Goodwin Agency, Inc. v. Chesser*, 131 Ga. App. 686, 206 S.E.2d 568 (1974); Greenfield, *Coercive Collection Tactics—An Analysis of the Interests and the Remedies*, 1972 WASH. U.L.Q. 1.

19. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966); Caplovitz, *The Benefits of Bankruptcy*, Wash. Post, Sept. 13, 1975, at A5.

20. Shuchman, *An Attempt At A "Philosophy of Bankruptcy,"* 21 U.C.L.A. L. REV. 403, 463 (1973).

perhaps because society values paying bills and attaches a stigma to bankruptcy.²¹ We know little about why some distressed debtors file bankruptcy and others disdain.²² Perhaps "escape from the ordinary effect of a contractual obligation must of necessity be well guarded and enshrined in ritual, since society wishes it to be considered as abnormal conduct."²³ Even today, the bankrupt's companion could think that bankruptcy might affect his golf score adversely.

If bankrupts are not evil or bad people, perhaps they are merely ill: "the debtor is treated as a sick man of society, one whom society ought to reform and restore to a useful position in its ranks."²⁴ We also view bankruptcy and the discharge in economic terms²⁵ as conferring benefit. It redistributes wealth, for people use or consume goods and services without paying. Business bankruptcy is said to punish mismanagement, inefficiency, and lack of productivity and to reallocate resources to enterprises that will use them more efficiently.²⁶ Bankruptcy spreads the effect of economic change and encourages people to take risks by removing some of failure's permanent sting. Effective discharges advance the economy because "debtors with 'fresh starts' are better enabled to participate in the credit economy."²⁷ Discharge liberates the bankrupt psychologically. "A debtor doomed to spend the rest of his life working for his old creditors is discouraged from trying to accumulate any property, and the motive which leads many a man to productive effort may thus be destroyed."²⁸ Thus, bankruptcy gives a fresh start " 'free from the obligations and responsibilities consequent upon business misfortunes', . . . unhampered by the pressure and discouragement of preexisting debt."²⁹ This medical analogy coupled with the economic benefits of discharge, suggests the desirability of therapy. Crippled, debt-laden consumers can be cured or rehabilitated to consume again. This point of view, however, lacks concreteness. Does rehabilitation mean to help repay or to free from grasping credi-

21. *But cf. id.* at 428-32 (questioning whether there is a moral obligation to repay institutional creditors).

22. . COMM'N REP., *supra* note 9, at 46.

23. Stone, *supra* note 12, at 354.

24. Stone, *supra* note 12, at 349.

25. See Shuchman, *supra* note 20, at 441-42.

26. Friedman, *Chrysler: Are Jobs the Answer?*, NEWSWEEK, September 10, 1979, at 66.

27. COMM'N REP., *supra* note 9, at 68. See also Caplovitz, *supra* note 19 (15 to 20 million consumers would benefit from bankruptcy and stimulate economy).

28. J. MACLACHLAN, *supra* note 7, § 100.

29. *Local Loan Co. v. Hunt*, 292 U.S. at 244 (quoting *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 555 (1915)).

tors? We will seek solid answers to the questions raised by these vague and conflicting policies as we examine the evolution of the three theories of discharge.

I. DISCHARGE AS AFFIRMATIVE DEFENSE

Under the short-lived Bankruptcy Act of 1867, the bankrupt who obtained a discharge might plead it "as a full and complete bar to all suits brought on any . . . discharged debts."³⁰ This will be called the affirmative defense theory of the discharge. The 1898 Act defined discharge to mean "the release of a bankrupt from all his debts . . .";³¹ but it failed to define the procedural effect of a discharge. The Act split jurisdiction to adjudicate bankruptcy issues between federal bankruptcy courts and state courts with general jurisdiction. After the bankruptcy discharge, the creditor could sue the bankrupt in a nonbankruptcy court on a debt involved in the previous bankruptcy. The nonbankruptcy court where the creditor sued to enforce the claim then applied bankruptcy law to determine the discharge's effect on that claim.³² This introduced potential conflict between federal bankruptcy policy as enunciated by federal courts and state interests in enforcing creditors' claims against defaulting debtors in state forums.

Procedure accommodated discharge to the federal structure in two ways. Stays of action in nonbankruptcy courts were provided to allow the bankruptcy court to determine the status of a particular debt and whether the bankrupt would be discharged.³³ But if the creditor sued the bankrupt in a nonbankruptcy court after the discharge, that court determined the discharge's effect.³⁴ The Supreme Court, of course, could review nonbankruptcy court decisions to determine whether the federal discharge had been frustrated.³⁵

State statutes also accommodated the federal bankruptcy discharge to state judgments. Generally these statutes, which, although drafted with the Bankruptcy Act of 1898 in mind, are still in force today, cancel state judgments and judgment liens for debts that have been discharged in bankruptcy.³⁶ Some coordinate state with federal

30. See Act of March 2, 1867, ch. 176, § 21, 14 Stat. 517, 533.

31. Bankruptcy Act § 1(15), 11 U.S.C. § 1(15) (1976) (repealed 1978).

32. See, e.g., *In re Havens*, 272 F. 975, 976 (2d Cir. 1921).

33. Bankruptcy Act §§ 9-17, 11 U.S.C. §§ 27-35 (1976) (repealed 1978).

34. See *Local Loan Co. v. Hunt*, 292 U.S. at 240.

35. *E.g.*, *Dimock v. Revere Copper Co.*, 117 U.S. 559 (1886).

36. See, e.g., CAL. CIV. PROC. CODE § 675b (West Cum. Supp. 1980); MICH. COMP. LAWS § 600.2914 (1968); MINN. STAT. ANN. § 548.18 (West 1946); N.Y. DEBT. & CRED. LAW § 150

procedure and allow state defendants who have filed bankruptcy to stay pending state actions.³⁷ To suspend an existing state judgment, two states allow the bankrupt to bring the federal discharge to the state court right away.³⁸ Most, however, force the bankrupt to wait a full year before avoiding the state judgment;³⁹ this apparently insures that the one year period that creditors have to ask for revocation of the bankrupt's discharge has expired.⁴⁰

These state accommodation statutes generally compel the bankrupt to give notice to the judgment creditor and provide for hearings on whether the judgment is discharged.⁴¹ If the bankrupt convinces the judge that his discharge in bankruptcy does cover a state judgment, an order cancelling, satisfying, or discharging the judgment is entered.⁴² Two statutes specify that the entry indicate that the judgment was discharged in bankruptcy.⁴³ If the judgment is satisfied of record, execution cannot issue.⁴⁴ The South Dakota and California statutes terminate judgment liens,⁴⁵ and they and the New York statute specify that the order does not affect valid liens.⁴⁶ These statutes performed two functions under the affirmative defense theory of discharge: they provided a forum to adjudicate discharge issues, and they cleared the formal records, particularly the real estate records, of impediments to the discharge. And some state courts supplemented the effect given to a discharge by these statutes by enjoining creditors from enforcing dis-

(McKinney Cum. Supp. 1979); N.C. GEN. STAT. § 1-245 (Cum. Supp. 1979); OR. REV. STAT. § 18-420 (1977); S.C. CODE § 15-35-630 (1976); S.D. COMPILED LAWS ANN. § 15-16-20 (1967); VA. CODE § 8.01-455 (1977).

37. *E.g.*, OR. REV. STAT. § 18-420 (1977); *see* Iowa Mut. Ins. Co. v. Parr, 189 Kan. 475, 370 P.2d 400 (1962).

38. MICH. COMP. LAWS § 600.2914 (1968); OR. REV. STAT. § 18-420 (1977).

39. *See, e.g.*, CAL. CIV. PROC. CODE § 675b (West Cum. Supp. 1980); MINN. STAT. ANN. § 548.18 (West 1946); N.Y. DEBT. & CRED. LAW § 150 (McKinney Cum. Supp. 1979); S.C. CODE § 15-35-630 (1976); S.D. COMPILED LAWS ANN. § 15-16-20 (1967).

40. *See* Bankruptcy Act § 15, 11 U.S.C. § 33 (1976) (repealed 1978). There are similar provisions under the Bankruptcy Reform Act, 11 U.S.C.A. §§ 727(d) & (e), 1328(e) (West 1979).

41. CAL. CIV. PROC. CODE § 675b (West Cum. Supp. 1980); MICH. COMP. LAWS § 600.2914 (1968); MINN. STAT. ANN. § 548.18 (West 1946); N.Y. DEBT. & CRED. LAW § 150 (McKinney Cum. Supp. 1979); OR. REV. STAT. § 18.420 (1977); S.C. CODE § 15-35-640 (1976).

42. CAL. CIV. PROC. CODE § 675b (West Cum. Supp. 1980); MINN. STAT. ANN. § 548.18 (West 1946) (unlisted debts not affected); N.Y. DEBT. & CRED. LAW § 150 (McKinney Cum. Supp. 1979); S.C. CODE § 15-35-650 (1976) (also allows bankrupt to amerce clerk for \$10 or, if willful, \$100 for failure to comply); S.D. COMPILED LAWS ANN. § 15-16-20 (1967).

43. MICH. COMP. LAWS § 600.2914 (1968); VA. CODE § 8.01-455 (1977).

44. *See, e.g.*, Crocker v. Bergh, 118 Minn. 316, 136 N.W. 737 (1912).

45. CAL. CIV. PROC. CODE § 675b (West Cum. Supp. 1980); S.D. COMPILED LAWS ANN. §§ 15-16-24, -25 (1967).

46. *Id.*, N.Y. DEBT. & CRED. LAW § 150 (McKinney Cum. Supp. 1979).

charged judgments in any way.⁴⁷

Professor Nadler summarized the abstract learning about discharges:

[A] discharge in bankruptcy neither cancels nor destroys the obligation or debt itself but is, rather, remedial in nature and has the effect merely of disabling the creditor from legally enforcing his claim. A discharge is merely a release from and not a satisfaction of a provable debt. Courts have recognized that the effect of a discharge in bankruptcy is to suspend a creditor's right of action to enforce the collection of his claim but the debt itself remains and carries with it a moral obligation to pay it as, if and when, the bankrupt may wish to do so. In this respect, therefore, a discharge in bankruptcy is in the nature of a legal privilege which the bankrupt may either use or waive. He may refuse to pay or he may accept his moral obligation to pay. Such, therefore, is the rationale for the established principle that this legal privilege made available by his discharge in bankruptcy must be affirmatively asserted by the bankrupt and may be deemed to have been waived by his express or unequivocally implied commission and omission.⁴⁸

This theoretical statement has both procedural and practical implications.

Bankrupts waived discharges in two major ways. First, they failed to plead the discharge as an affirmative defense to an action on the debt. An affirmative defense is a responsive pleading in which the defendant confesses that the plaintiff's allegations are true but adds material to avoid the otherwise valid claim. To allow the plaintiff to prepare to respond, the defendant must raise affirmative defenses specifically, and the defendant who fails to plead a defense waives that defense and may not introduce evidence about it.⁴⁹ Discharge in bankruptcy is an affirmative defense listed in Federal Rule of Civil Procedure 8(c).⁵⁰ Bankrupt defendants who failed to interpose discharge were often held to have waived it, and a judgment for the plaintiff precluded the bankrupt from relitigating dischargability.⁵¹

Reaffirmations constitute a second form of waiver. Courts refuse to enforce simple promises. To enter an enforceable contract, each

47. *See Morris v. Perkins*, 148 Ga. 554, 97 S.E. 526 (1918) (creditor process enjoined without state statute); *Badger v. Jordan Marsh Co.*, 256 Mass. 153, 152 N.E. 92 (1926) (semble); *Harrison v. First State Bank of Garrison*, 57 N.D. 143, 220 N.W. 644 (1928).

48. C. NADLER, *CREDITOR AND DEBTOR RELATIONS* 560 (1956).

49. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 4.9 (2d ed. 1977).

50. FED. R. CIV. P. 8(c). *See also* N.C.R. CIV. P. 8(c).

51. *Dimock v. Revere Copper Co.*, 117 U.S. 559 (1886); *Winthrop Sales Corp. v. Shelton*, 389 S.W.2d 70 (Mo. App. 1965).

party to the contract must usually accompany his promise with consideration. Professor Murray, however, said that bankruptcy did not discharge the moral obligation; thus, "an express promise to perform an obligation that has been discharged in bankruptcy is enforceable even though there is no consideration or detrimental reliance to support it."⁵² Thus, the creditor could sue the bankrupt and overwhelm the affirmative defense of discharge by showing an express promise after bankruptcy to pay the debt.

The affirmative defense theory of discharge expressed the fresh start policy inadequately. The bankruptcy discharge's effect became, in the words of Judge Cowans, "like the bankrupt sitting there waiting for the other shoe to drop."⁵³ A creditor could participate in a debtor's bankruptcy, partake of the bankruptcy dividend, lodge an action in a nonbankruptcy court charging that the debt was not discharged, and collect the balance.⁵⁴ Many bankrupts, lacking money to pay their debts, also lacked money to retain an attorney to defend post-discharge collection actions. In addition, many bankrupts, relying on the discharge, failed to appear in nonbankruptcy actions after discharge; the creditors then took judgment by default and garnished the bankrupts' wages or levied on the bankrupts' property. State judges lacked expertise in dealing with the specialized issue of dischargeability, and some lacked sympathy for the federal policy of fresh start. Erroneous judgments were entered against bankrupts, and fragmented litigation failed to develop a coherent body of binding precedent sympathetic to the fresh start policy.⁵⁵ In the face of these abuses, telling bankrupts that discharges were affirmative defenses consoled them just a little less than telling mugging victims to file tort actions for battery and conversion.⁵⁶

After the Supreme Court's 1934 decision in *Local Loan Co. v.*

52. J. MURRAY, *MURRAY ON CONTRACTS* § 99 (2d rev. ed. 1974).

53. *Bankruptcy: Hearings on S. Res. 88, H.R. 6665 and H.R. 12250 Before the Subcomm. No. 4 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 38 (1970) (statement of Daniel R. Cowans) [hereinafter cited as *Hearings*].

54. Shuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 *STAN. L. REV.* 735, 741 (1971).

55. See S. REP. NO. 91-1173, 91st Cong., 2d Sess. (1970); H.R. REP. NO. 91-1502, 91st Cong., 2d Sess., reprinted in [1970] *U.S. CODE CONG. & AD. NEWS* 4156; *Hearings*, *supra* note 53, at 32, 38, 66; Countryman, *The New Dischargeability Law*, 45 *AM. BANKR. L.J.* 1 (1971).

56. Excessive efforts to collect discharged debts were tortious. Compare *Gore v. Gorman's Inc.*, 143 F. Supp. 9 (W.D. Mo. 1956) with *Standley v. Western Auto Supply Co.*, 319 S.W.2d 924 (Mo. App. 1959). The paucity of reported cases, however, illustrates the impotence of retrospective legal solutions to solve social problems.

Hunt,⁵⁷ federal court injunctions were available to ameliorate the abuses of state jurisdiction and the affirmative defense theory of discharge. In *Local Loan*, a creditor sued a bankrupt for assigned wages, relying on a holding of the Illinois Supreme Court that assignments of wages earned in the future created liens enforceable after bankruptcy. Instead of challenging the Illinois doctrine with inevitable appeals through the state hierarchy and from there to the United States Supreme Court, the bankrupt successfully asked the bankruptcy court to declare the debt discharged and to enjoin the creditor from suing in state court to collect that debt. On appeal, the Supreme Court affirmed the bankruptcy court's injunction on the ground that the federal court possessed jurisdiction to secure the fruits of a federal decision, but the Court emphasized the extreme nature of the bankrupt's plight that created "unusual circumstances" and led to the federal injunction.

Local Loan injunctions provided a specious form of relief to harassed bankrupts. The same penury that led people to bankruptcy in the first place and prevented them from defending later collection actions meant that they lacked money for attorneys to sue for federal injunctions.⁵⁸ Moreover, some federal courts of appeals, apparently preferring to keep dischargeability issues in state courts, rarely or never found that the "unusual circumstances" prerequisite for a federal injunction existed.⁵⁹ *Local Loan* nevertheless supplied a precedent for the changes in discharge by the 1970 amendments to the Bankruptcy Act.

The affirmative defense theory of discharge was subject to abuse because it was based on an unrealistically naive view of the real world and an excessively modest view of bankruptcy courts' role in the bankruptcy process. Congress concluded that creditor overreaching and harassment frustrated the bankruptcy discharge so long as the discharge was an affirmative defense and the court in which suit was brought determined its effect. This theory of the discharge, moreover, delegated power to interpret a federal statute to lower state court judges

57. 292 U.S. 234 (1934). Compare state injunctions cited note 47 *supra*.

58. Countryman, *supra* note 55, at 2-10. But cf. *Hearings*, *supra* note 53, at 37, in which Referee Cowans testified that lawyers who had been retained for bankruptcy were more likely to stay with the bankrupt in bankruptcy court without an additional fee than they were to defend a state collection action without an additional fee.

59. *Hearings*, *supra* note 53, at 74; Countryman, *supra* note 55, at 2-10; Smedley, *Bankruptcy Courts as Forums for Determining the Dischargeability of Debts*, 39 MINN. L. REV. 651 (1955). Cf. *Personal Indus. Loan Corp. v. Forgay*, 240 F.2d 18 (10th Cir. 1956) (finance company, small loan debtor create sufficient circumstances).

who presided over courts that were often of limited jurisdiction and sometimes not of record.

At least two ways existed to moderate the evils of the affirmative defense theory of the discharge: Congress could have eliminated the abused grounds as a bar to the dischargeability of particular debts,⁶⁰ or it could have given the bankruptcy courts plenary jurisdiction to determine the effect of discharge.

II. THE INJUNCTIVE DISCHARGE

The 1970 Amendments, avoiding any "startling changes in the law,"⁶¹ built upon *Local Loan* and gave bankruptcy courts jurisdiction to determine whether the debts of the types most subject to creditor abuse were discharged.⁶² Pursuant to the 1970 amendments, the original bankruptcy notice to creditors told them to file their objections to discharge in the bankruptcy proceeding or forever to hold their peace. If they failed to file or if they filed and the bankruptcy court held the debt discharged, the debt was extinguished. After discharge, three doctrines protected the discharged bankrupt from harassment in nonbankruptcy courts. First, the usual rules of res judicata prevented the creditor who had received an opportunity to litigate or had litigated, from maintaining a successful action on a discharged claim.⁶³ Second, the discharge order declared that it voided personal judgments on discharged debts.⁶⁴ Third, the discharge order, which creditors received, enjoined them from "instituting or continuing any action or employing any process" to collect discharged debts.⁶⁵

Thus passed the affirmative defense theory of the discharge. Unfortunately, Congress's attention was focused on questions of dischargeability jurisdiction and jury trials. It neglected to debate or even to consider carefully the separate implications of the injunctive theory of the discharge. Referee Cowans did testify that "possibly the existence of the contempt sanction would tend to stop" creditor abuse.⁶⁶

60. H.R. REP. NO. 1111, 86th Cong., 1st Sess. 2-3 (1959); S. REP. NO. 1688, 86th Cong., 2d Sess. 2-3 (1960).

61. *Id.* at 9.

62. Bankruptcy Act § 17, 11 U.S.C. § 35 (1976) (repealed 1978); Countryman, *supra* note 54, at 26.

63. Countryman, *supra* note 55, at 26, 30.

64. Bankruptcy Act § 14f(1), 11 U.S.C. § 32f(1) (1976) (repealed 1978).

65. *Id.* § 14f(2), 11 U.S.C. § 32f(2).

66. *Hearings, supra* note 53, at 53.

A. Limitations on Enforcement Through Contempt

Contempt for violation of an injunction takes three forms. Criminal contempt punishes the contemnor to vindicate society's interest in respect for courts and obedience to court decrees, and resembles a criminal prosecution in almost every respect. Compensatory contempt forces the contemnor to pay the wronged party's loss caused by contemnor's violation of the injunction, and resembles a civil action for money damages for breach of the legal standard embodied in the injunction. Courts impose coercive contempt fines or imprisonment to alter contemnor's incentive to obey and to force the conduct to which the other party is entitled. For example, if a bankrupt refuses to tell the trustee the location of the estate's property, the judge may order him imprisoned to jar his memory and to help the trustee collect the estate.⁶⁷

Contempt in bankruptcy developed slowly for two reasons. First was ambivalence about the adjudicator's status. "Referees" presided over bankruptcy proceedings; the federal district judges appointed these junior judges.⁶⁸ Second, bankruptcy lacked comprehensive procedural rules. Acting in the early 1970s under Congress's grant of rulemaking power,⁶⁹ the Supreme Court promulgated Rules of Bankruptcy Procedure that modestly began to cure these defects. The rules rejected the statutory name "referee" and renamed the adjudicator "judge."⁷⁰ The rules also brought the 1970 discharge amendments into practice; the form for discharge that the clerk sent to creditors enjoined them "from instituting or continuing any action or employing any process to collect [discharged] debts."⁷¹

Rule 920 allowed contempt to be imposed for violation of the discharge injunction. The contempt rule, however, reflected ambivalence about the status of the bankruptcy judge-referee as well as the scope of rulemaking authority by remitting all contempts involving either imprisonment or more than a \$250 sanction to the district judge. Even so limited, the referee's new power to impose contempt generated controversy.⁷² Professor Landers accused the Rules Advisory Committee of

67. See generally *Maggio v. Zeitz*, 333 U.S. 56 (1948).

68. Bankruptcy Act § 34a, 11 U.S.C. § 62a (1976) (repealed 1978).

69. 28 U.S.C. § 2075 (1970), as amended by Bankruptcy Reform Act, Pub. L. No. 95-598, § 247, 92 Stat. 2672 (1978).

70. FED. R. BANKR. 901 (7).

71. OFFICIAL BANKR. FORMS, Form 24; FED. R. BANKR. 404(f) & (h).

72. Kennedy, *The Proposed Bankruptcy Rules and Official Forms*, 46 AM. BANKR. L.J. 53, 58, 70 (1972).

the "fudge" method and concluded that it bestowed the title of judge but hesitated to confer judicial power.⁷³ Justice Douglas, on the other hand, dissented from the order promulgating the Rules, in large part because he feared that the contempt power was dangerous.⁷⁴

Judges use contempt to deal with two discrete problems: misconduct in court as well as violation of injunctions and other orders. Rule 920 appears to have been drafted with the problem of maintaining a decorous courtroom in mind, and a \$250 fine seems ample for that office. The idea of arming bankruptcy judges with contempt power in order to enforce the discharge injunction received less attention. The bankruptcy judges wielded the contempt rule as hesitantly as the Advisory Committee and the Supreme Court that had promulgated it.

B. Limited Scope

1. Private Creditor Collection Attempts

The scope of the automatic stay and discharge injunction further attenuated the development of contempt to protect fresh starts. The statute told judges to enjoin creditors from "instituting or continuing any action or employing any process to collect,"⁷⁵ but judges construed that language narrowly. While Congress aimed to end abusive suits to collect discharged debts in nonbankruptcy courts and to channel litigation about whether a debt is discharged into bankruptcy court, the 1970 Amendments intentionally failed to tamper with the doctrine that allowed courts to enforce reaffirmed debts.⁷⁶ Moreover, the legislative history supports the view that Congress did not intend in the 1970 amendments to forbid the informal, nonjudicial tactics like threatening collection letters that creditors used to secure reaffirmation.⁷⁷ The *Wall Street Journal* provided an example of coercive reaffirmation: after bankruptcy, a truck big enough to cart off all the family furniture appeared in a bankrupt's drive; the driver carried papers that reaffirmed most of the debts that the bankrupt owed to a finance company; the woman signed despite bankruptcy.⁷⁸

Such abuses led one commentator to remark that, if the discharge

73. Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 867 (1973).

74. 411 U.S. 991, 992-94 (1973).

75. Bankruptcy Act of 1898 § 14f(2), 11 U.S.C. § 32 (1976) (repealed 1979).

76. S. REP. NO. 1173, 91st Cong., 2d Sess. 11 (1970); see Countryman, *supra* note 54, at 23-24.

77. See *In re Thompson*, 416 F. Supp. 991, 996 (S.D. Tex. 1976).

78. Wall St. J., Sept. 29, 1979, at 1, col. 6.

injunction interdicted only judicial collection, bankrupts were "destined to endure considerable creditor harassment without relief from the bankruptcy court."⁷⁹ Nevertheless, judges, apparently out of deference to the legislative history of the 1970 amendments, continued to construe narrowly the protections afforded by those amendments. For example, Rutgers University responded to a former student whose student loans were discharged in bankruptcy by denying her the right to register and withholding her transcripts. A New Jersey district judge held that "such thinly-veiled coercion . . . to compel repayment of loans duly discharged" did not constitute proscribed legal action.⁸⁰

A district judge on the West Coast went further. An enrolled Indian and member of the Colville Confederated Tribes borrowed from the Tribes, assigning future income accruing to his "Indian Money Account," which was principally income from tribal lands collected by the government. After the loan was discharged in bankruptcy, the Tribes nevertheless followed their usual practice and withheld the bankrupt's share, applying it to the balance of the discharged loan. The judge declined to enjoin the Tribes to refund the money taken and to cease taking it in the future because they did not employ legal process.⁸¹

This decision is incorrect. The question is not whether the Tribes' conduct constituted legal process but whether the debt was discharged. *Local Loan* held that, despite contrary state authority, an assignment of future wages did not create a security interest enforceable after bankruptcy: "[t]he wages earned after [bankruptcy] became the property of the bankrupt clear of the claims of all creditors."⁸² After *Local Loan* no one should have argued that a debt agreement created a security interest in property acquired after bankruptcy.⁸³ The payments that accrued after bankruptcy were indistinguishable from wages

79. 14 Hous. L. Rev. 486, 497 (1977).

80. *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362 (D.N.J. 1978). See notes 118-28 and accompanying text *infra*.

81. *Aubertin v. Colville Confederated Tribes*, 446 F. Supp. 430 (E.D. Wash. 1978).

82. 292 U.S. at 243.

83. The judge granted summary judgment without deciding that question. *Aubertin v. Colville Confederate Tribes*, 446 F. Supp. 430, 436 (E.D. Wash. 1978). The answer, however, is not free from doubt. Compare *Sims v. Jamison*, 67 F.2d 409 (9th Cir. 1933) (postbankruptcy foreclosure of prebankruptcy crop liens enjoined) and *Butler Cotton Oil Co. v. Collins*, 200 Ala. 217, 75 So. 975 (1917) (semble) with *Bridge v. Kedon*, 163 Cal. 493, 126 P. 149 (1912) (prebankruptcy security interest in inheritance creates an equitable right enforceable against property inherited after discharge); *Gannon v. Graham*, 211 Iowa 516, 231 N.W. 675 (1930) (prebankruptcy assignment of anticipated inheritance as security not voided by discharge); *Union Nat'l Bank v. Lenton*, 54 N.D. 262, 209 N.W. 350 (1926), *cert. denied*, 375 U.S. 506 (1927) (prebankruptcy crop lien granting a present interest in unplanted crops attaches to crops planted after discharge). In the writer's opinion, *Local Loan's* holding that a prebankruptcy assignment of wages cannot create a

earned after bankruptcy. Because the Tribes apparently failed to file an exception or objection to dischargeability in bankruptcy, we can assume the debt was discharged. In addition, the court viewed the adjudicative process too narrowly and confused the broader substantive discharge with the remedy of the mass-produced discharge injunction of the 1970 amendments.⁸⁴ Instead, the bankrupt should have been entitled, under the bankruptcy court's equitable powers, to a declaratory judgment of discharge and a *Local Loan* injunction against collection to vindicate the fresh start policy of federal bankruptcy.⁸⁵

2. Collection Through NSF Check Prosecutions

Difficult problems arise when bankrupts ask federal courts to enforce the bankruptcy discharge by enjoining state criminal prosecutions under rubber check statutes. The state has a vital interest in enforcing a valid criminal law that prohibits obtaining property through fraud. But, as prosecutors and trial judges know, creditors resort to rubber check statutes to collect civil debts evidenced by insufficient funds (NSF) checks.⁸⁶ The federal bankruptcy court, however, also has a valid interest in protecting a discharged bankrupt's fresh start from indirect collection tactics. Thus, the protagonists ask judges to stake out their positions in this penumbral area with injunctions, and the judges mould the language of equity to accommodate federal and state policies.⁸⁷

The problem is illustrated by four recent cases, all decided under the old Bankruptcy Act and concerning the relation between NSF check prosecutions and the bankruptcy discharge. These come from federal district courts in North Carolina,⁸⁸ Alabama,⁸⁹ Texas,⁹⁰ and Arkansas.⁹¹ Policy conflicts and some tentative solutions emerge from a summary and analysis of these opinions.

security interest in wages earned after bankruptcy compels a similar result for crops, inheritances, and trust funds. See *Brown v. Cunningham*, 303 Ill. App. 307, 25 N.E.2d 113 (1940) (inheritance).

84. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46-50 (1979).

85. See *State Fin. Co. v. Morrow*, 216 F.2d 676, 679 (10th Cir. 1954); Bankruptcy Act § 2(a)(15), 11 U.S.C. § 11(a)(15) (1976) (repealed 1978).

86. Wright, *Duties of a Prosecutor*, 33 CONN. B.J. 293 (1959).

87. Cf. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977) (federal injunction against state litigation arguably in violation of federal constitutional rights).

88. *In re Penny*, 414 F. Supp. 1113 (W.D.N.C. 1976).

89. *In re Godfrey*, 472 F. Supp. 364 (M.D. Ala. 1979).

90. *In re Thompson*, 416 F. Supp. 991 (S.D. Tex. 1976). See generally Note, 14 Hous. L. REV. 486 (1977).

91. *In re Porter*, 462 F. Supp. 370 (E.D. Ark. 1978).

The time sequence of the lawsuits differs. Shortly after the Arkansas bankrupt filed for bankruptcy, a check prosecution was commenced against him. The bankrupt sought to enjoin the prosecution, citing Rule 401, which stays actions on unsecured debts. The North Carolina and Alabama sequences are similar: the debtor filed for bankruptcy, a check prosecution began and the bankrupt moved to stay the pending criminal prosecution. The Texan was prosecuted on his check after the bankruptcy discharge, and he asked the court to hold that the payee was in contempt for violation of the discharge injunction.

The Arkansas case differs from the Alabama and North Carolina proceedings in several important respects. First, the Arkansas prosecution was pending when the bankrupt moved to enjoin it. The North Carolina and Alabama bankrupts had been convicted, the North Carolinian after a trial and the Alabaman after a guilty plea. Both had been sentenced to imprisonment, with probation granted or sentence suspended on condition that they repay their payees, and both sought to enjoin the execution of the sentence. Second, the Arkansas criminal prosecution was begun within the time during which a creditor must file a claim in the bankruptcy proceeding to prevent his debt from being discharged. The criminal prosecutions in Alabama and apparently in North Carolina did not commence until after the time to bar discharge had expired. The Alabama payee did not file in bankruptcy, nor apparently did the North Carolinian. In contrast to the other three, the Texas payees sat out bankruptcy without filing to protect their rights, and the bankrupt was found not guilty of the criminal charges.

The results are surprising. The Alabama bankrupt who had pleaded guilty and the convicted North Carolinian received injunctions. The untried Arkansas bankrupt and the acquitted Texan received no relief from the bankruptcy court. The procedural posture of the Arkansas and Texas litigations, however, may explain the failure of the courts in those cases to enjoin. Under *Local Loan*, a bankruptcy court possesses jurisdiction to enjoin a state proceeding that interferes with a bankruptcy discharge.⁹² The *Younger v. Harris*⁹³ analysis, the application of which determines when a federal district court may enjoin a state criminal prosecution alleged to interfere with federal civil and constitutional rights, is simply out of place in litigation that deals

92. Compare *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) with Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY'S L.J. 251, 282 (1979).

93. 401 U.S. 37 (1971); see Fiss, *supra* note 87, at 46-50.

with a bankruptcy discharge.⁹⁴ But jurisdiction to enjoin does not mean that the court must enjoin. Bankruptcy should be available to relieve financially pressed debtors, not to shelter criminals from the consequences of their crimes.⁹⁵ An injunction of a check prosecution would be most inappropriate when the prosecution had been commenced before bankruptcy and was pending when the bankrupt sought to abort it, and when the payee had filed or still had time to file in bankruptcy to bar discharge of the debt. Thus, because the Arkansas payee could still have pursued bankruptcy remedies against the bankrupt, the Arkansas court, despite its misplaced *Younger* analysis, may have been correct in denying an injunction.⁹⁶

The procedural posture may also explain the Texas decision. The creditor's conduct was extreme. The creditor made no effort to bar discharge for fraud, but after discharge his attorney wrote the bankrupt threatening to prosecute unless paid. This letter violated the canons of ethics and probably constituted the tort of abuse of process. A criminal prosecution followed in which the bankrupt was acquitted, revealing the charges to be groundless. The bankrupt asked the bankruptcy court to hold the creditor in contempt for breaching the discharge injunction. The court, however, held that the creditor had not violated the injunction because neither the collection letter nor the criminal action were "process" in the sense of the harassing lawsuits that Congress had intended to stop with the 1970 amendments.⁹⁷

The Texas bankrupt probably should have moved to enjoin or stay the prosecution earlier; instead he waited until after acquittal to commence an action for contempt. The bankruptcy court had *Local Loan* jurisdiction to enjoin state actions that frustrated the discharge. In an injunction proceeding, the bankruptcy court could have squarely faced the issue whether the prosecution had frustrated the discharge instead of construing the discharge injunction. Moreover, the stakes would

94. *But see In re Porter*, 462 F. Supp. 370, 372 (E.D. Ark. 1978).

95. H.R. REP. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6299; S. REP. No. 989, 95th Cong., 2d Sess. 51 (1978) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5837.

96. If the payee-creditor seeks bankruptcy remedies while the criminal prosecution is pending, the privilege against self-incrimination may compel the bankruptcy court to wait until the criminal prosecution is completed. If the bankrupt is convicted, would the doctrine of res judicata then prevent the fraud question from being relitigated in bankruptcy? The Supreme Court has suggested that it would not. *See Brown v. Felson*, 99 S. Ct. 2205 (1979).

97. *In re Thompson*, 416 F. Supp. 991 (S.D. Tex. 1976). Other courts have interpreted "process" more broadly in different contexts. *See, e.g., Griffin v. County School Bd.*, 363 F.2d 206, 210 (4th Cir. 1966).

have differed: in an injunction action, the creditor only faces being told to go forth and sin no more; but in a contempt action, the creditor may be punished. The lack of warning from the form discharge injunction and the higher stakes in contempt might have militated against imposing punishment. The discharge, however, was broader than the discharge injunction.⁹⁸ Under the old Bankruptcy Act, the discharge injunction should have barred only hard-core creditor misconduct, and bankrupts should have sought to enjoin questionable conduct promptly under *Local Loan*, where it could have been litigated in a timely fashion out of the shadow of contempt.

The North Carolina and Alabama federal district judges granted relief to bankrupts convicted of rubber check crimes. What influenced two of the nation's best federal district judges to interfere with the state criminal process to protect a convicted defendant's federal bankruptcy discharge? They viewed the prosecutions as indirect collection techniques, perversions of the criminal process to exact civil debts. Both creditors sat out the bankruptcy without moving to bar discharge. The North Carolina criminal prosecution and the defense against the federal injunction were maintained by the creditor's attorney. Both state judges granted the bankrupt NSF check defendant probation contingent on repayment, and each sentence included an order of restitution. Thus, the federal judges concluded that both creditors abused the criminal process to restore the bankrupts' obligations by a circuitous route.

The relief, however, differed. Judge James McMillan in North Carolina permanently enjoined criminal proceedings against the bankrupt founded on the discharged debt.⁹⁹ Although the Alabama bankruptcy judge had refused to enjoin the criminal prosecution, federal District Judge Frank Johnson approved an injunction that proscribed the bankrupt from paying and the creditors from receiving money to satisfy the discharged debts.¹⁰⁰ Apparently the Alabama state court

98. Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1976) (repealed 1978) (discharge); Bankruptcy Act § 14(f)(2), 11 U.S.C. § 32(f)(2) (1976) (repealed 1978) (injunction).

99. *In re Penny*, 414 F. Supp. 1113, 1115 (W.D.N.C. 1976).

100. The procedural posture was unorthodox. Instead of defendant's appealing from granting of the injunction or from the denial of a motion to modify or dissolve the injunction based on changed circumstances, the district attorney appealed a finding that the bankrupt's guilty plea was not new evidence to support a modified injunction. Thus, the standing and finality doctrines entered, and Judge Johnson held that the district attorney lacked standing to challenge the injunction. *In re Godfrey*, 472 F. Supp. 364, 369 (M.D. Ala. 1979). Viewing the district attorney's motion to reopen as resembling a motion to modify in light of changed circumstances, *id.* at 369 n.7, Johnson then "held" that even the creditors, who stood idly by while the time to bar discharge ran, could not assert that the bankrupt's guilty pleas were new evidence. There is no reason, however, to think that Judge Johnson would have decided differently had the creditors appealed from an

judge could still fine the bankrupt or sentence him to jail, but the discharge suspended that part of the Alabama criminal statute that required the convicted defendant to make full restitution to the payees.¹⁰¹

Judge McMillan halted the criminal prosecution and any sentence because the creditors could have misused the criminal process to collect a civil debt "if a sentencing judge, or probation or parole officer, took repayment of the debt into account when dealing with" the bankrupt. He qualified the injunction, however, with the statement that, "if the debt is ultimately found to be *not* dischargeable, no federal purpose would be served by continuing to enjoin the state prosecution."¹⁰² In deciding which form of relief was best, the judges in these cases thus needed to know the unknowable. Did injunctions merely against restitution force an honest bankrupt into prison? On the other hand, would excising the restitution feature of the criminal sentence cause the charges to be dropped and allow the guilty to go free?

Enjoining a state prosecution for frustration of a bankrupt's discharge is most appropriate when: 1) the creditor allows the time to prevent discharge to run; 2) the criminal prosecution is reactive to or preceded by threats to prosecute absent payment; and 3) the bankrupt's criminal sentence includes restitution—that is, it tells the bankrupt "pay your bills or go to jail." Aberrational features such as a private prosecuting attorney may make an injunction even more appropriate.

Some public policy questions importune for answers. Would preventing all rubber check prosecutions when the creditor failed to move to bar discharge interfere unduly with state criminal justice? Should all criminal prosecutions brought before the time to bar discharge runs be allowed to continue? What preclusive effect might a conviction or acquittal have in bankruptcy?¹⁰³ Should the bankruptcy court examine the evidence to learn whether the state criminal prosecution is well grounded? In addition to policy questions about the relation between sovereigns, factual evidence about low-level, unrecorded police conduct, prosecutorial discretion, and judicial practice may guide a decision. Do the particular prosecutor, police department, and judge use the criminal statutes to collect NSF checks? For example,

injunction because the critical factor seems to have been that the time to move to prevent discharge had run.

101. ALA. CODE § 13-4-123 (1979 Cum. Supp.).

102. *In re Penny*, 414 F. Supp. 1113, 1115 (W.D.N.C. 1976).

103. *Cf. Brown v. Felson*, 99 S. Ct. 2205 (1979) (bankruptcy fraud must be determined by bankruptcy court; doctrine of *res judicata* not applied).

after the payee of a NSF check lodges a complaint, one Virginia police department telephones the drawer to "warn" him or her before serving the arrest warrant. If the drawer pays the check, the police refrain from serving the warrant. Is intent to defraud presumed or established constructively under the criminal statute or must the government prove specific intent to defraud?¹⁰⁴ Answers to these questions may supply additional evidence of indirect collection through the criminal process.

In summary, the 1970 amendments altered the framework and dynamics of the debate. The worst abuses of the affirmative defense theory of the discharge ended. The amendments, however, concentrated on judicial solutions rather than the real world of the debtor-creditor environment and thus failed to resolve all the drawbacks of the previous practice. Congress ignored coercive reaffirmation. The discharge injunction was too narrow to protect the discharge fully. Courts failed to develop the meaning of contempt, and they concentrated on the narrower discharge injunction while neglecting the broader discharge. Pressure on the discharge moved from civil collection efforts to criminal bad check prosecutions. All these problems, however, were steps toward the creation of a systematic doctrine of discharge and fresh start.

III. THE DISCRIMINATION OR *Perez* THEORY OF DISCHARGE

The Supreme Court's 1971 decision in *Perez v. Campbell*¹⁰⁵ articulated a theory of fresh start that complimented and expanded the 1970 amendments. Before *Perez*, state licensing statutes, ostensibly intended to protect the public's health, safety, and welfare, allowed the government to revoke a bankrupt's occupational license and to refrain from reissuing it until the bankrupt paid the discharged debts.¹⁰⁶ Many other state statutes dealing with motorists' financial responsibility allowed the government to suspend a driver's license when a judgment related to driving was discharged in bankruptcy.¹⁰⁷ To the charge that these statutes coerced bankrupts into paying discharged debts and

104. In the Alabama case the bankruptcy judge had concluded that the guilty plea to the worthless check charge was not new evidence to reopen and prove in bankruptcy because, although the bankruptcy act required specific intent, the criminal statute implied fraud. *In re Godfrey*, 472 F. Supp. 364, 367 (M.D. Ala. 1979).

105. 402 U.S. 637 (1971).

106. See *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *Tracy v. Contractors' State License Bd.*, 63 Cal. 2d 598, 407 P.2d 865, 47 Cal. Rptr. 561 (1965).

107. For a discussion of the purpose and history of these statutes, see *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 157-71 (1962).

thwarted the Bankruptcy Act's fresh start policy, the Supreme Court had previously responded that they were intended to prevent irresponsible drivers from injuring others and escaping with impunity.¹⁰⁸

Perez, another fresh start attack on the financial responsibility statutes, ended this short-sighted disregard for the fresh start policy. In *Perez*, the court rejected the earlier decisions as examining these statutes' stated purposes but overlooking their effect. After subjecting the financial responsibility statute to functional scrutiny, the Court held that protecting judgment creditors from irresponsible drivers by suspending licenses until judgments discharged in bankruptcy were paid conflicted with the fresh start policy of bankruptcy and that the statute was, therefore, invalid under the supremacy clause.¹⁰⁹ On the other hand, it was held that so long as bankruptcy was a neutral factor, a state could require a judgment debtor to prove financial responsibility before issuing a license.¹¹⁰

Following the logic of *Perez*, the courts invalidated a California statute that permitted the state to revoke a bankrupt contractor's license so long as discharged judgments remained unpaid,¹¹¹ a Shreveport police department rule that allowed the authorities to dismiss a policeman who filed bankruptcy,¹¹² and a fire department rule from the same city that automatically discharged firefighters who filed bankruptcy.¹¹³ Perhaps reading *Perez* too narrowly, one court said, however, that a police department might consider a job applicant's previous bankruptcy in deciding whether to hire that applicant.¹¹⁴

More difficult *Perez* issues grew out of bankruptcy and educational loans. This was part of the larger debate about the high default rate for educational loans. Educational loans are unsecured, and it has been argued that they should be discharged like any other unsecured loan. However, several forceful contrary arguments exist.¹¹⁵ Institutions loan money for education to young people who lack a credit his-

108. *Reitz v. Mealey*, 314 U.S. 33, 37 (1941). See also *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 158-74 (1962).

109. 402 U.S. at 649-52. See also *Miller v. Anckaitis*, 436 F.2d 115 (3d Cir. 1970).

110. See, e.g., *Ross v. Gunaris*, 395 F. Supp. 623 (D. Mass. 1975).

111. *Grimes v. Hoshler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), cert. denied, 420 U.S. 973 (1975).

112. *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975).

113. *In re Loftin*, 327 So.2d 543 (La. App. 1976), appeal denied, 331 So. 2d 851 (1976).

114. *Marshall v. District of Columbia Gov't*, 559 F.2d 726, 729 (D.C. Cir. 1977) (dictum) (district court lacked jurisdiction).

115. See Ahart, *Discharging Student Loans in Bankruptcy*, 52 AM. BANK L.J. 201, 204 n.10 (1978).

tory. The loan finances an education that enhances the debtor's earning capacity, but earning capacity is not the sort of "property" in which a debtor can grant a security interest.¹¹⁶ The borrower graduates with large debts but few assets except the ability to earn. In this context, it is not surprising that thousands of former students and graduates did file bankruptcy to discharge student loans. Although not more than one percent of student borrowers ever sought bankruptcy, administrators feared that the spectacle of students lining up to discharge these debts politically endangered the entire loan program, and courts strained existing doctrine to find educational loans nondischargeable.¹¹⁷ The dischargeability debate ended when Congress amended

116. Cf. *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) (security interest in future wages invalid in bankruptcy); *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (college degree not property to be divided when marriage dissolved); *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (semble). That an education is unsecurable nonproperty, however, is inescapably arbitrary, as a reading of Felix Cohen's article, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954), teaches us. Property can exist without an object, *id.* at 361, without value, *id.* at 363, and even without a right to sell or transfer, *id.* at 369. See also *Flores v. Brown*, 39 Cal. 2d 622, 248 P.2d 922 (1952); *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461, 274 P. 959 (1929) (personal injury cause of action).

Section 541 of the Bankruptcy Code of 1978 roughly defines "property" as property, and the legislative history says that it "bring[s] anything of value" into the estate. H.R. REP. 595, 95th Cong., 1st Sess. 176, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6136. Property might also be said to include any interest the government will recognize or protect or that people may call on the government to exclude from the use or possession of others. Moreover, judges developing property interests based on what they think is sensible, is in accord with common understanding, and will encourage productive activity. Section 541 eliminated § 70a's unnecessary transferable-leviable limitations and will allow courts to define the estate's property based on social, moral, and economic policy as well as administrative reality. Thus, the question whether an education that creates the present right to practice a profession is the estate's property could be answered affirmatively. The court could either keep the estate open to collect the enhanced income that an education generally provides or follow the approach of the Iowa Supreme Court and value a person's education on the spot; see *Horstmann v. Horstmann*, 263 N.W.2d 885 (Iowa 1978) (working spouse's contribution to student spouse's legal education as implied loan). Of course, a professional degree can be property for one purpose—dissolution of marriage—but not another—bankruptcy—depending on the purpose of the inquiry and the policies advanced and retarded.

Creditors take security interests in impalpable, intangible property such as a business's relations with its customers expressed as goodwill, a trademark, or a trade name, as well as the right to exclude others from exercising exclusive rights defined in the copyright and patent statutes. W. DAVENPORT & D. MURRAY, SECURED TRANSACTIONS § 2.11(c) at 77 (1978). Thus, no analytical barrier prevents creditors from taking a security interest in an education embodied in a professional degree. Realizing on the collateral without violating the thirteenth amendment, which prohibits involuntary servitude, may be somewhat difficult, but that is the creditor's problem.

A college degree will remain unsecurable nonproperty in bankruptcy, however, because of the overarching fresh start policy: post-petition compensation will continue to be outside of the estate because to include it would interfere too much with the bankrupt's fresh start.

117. *Abbott v. Regents of Univ. of Cal.*, 516 F.2d 830 (9th Cir. 1975) (failure to disclose prior loans discharged in bankruptcy constituted false representation preventing discharge despite advice of counsel); *State v. Wilkes*, 41 N.Y.2d 655, 363 N.E.2d 555, 394 N.Y.S.2d 849 (1977) (student loan "unprovable" because of contingencies of repayment).

the Higher Education Act to interdict students from discharging most educational debts in bankruptcies begun after September 30, 1977.¹¹⁸

Prior to this legislative resolution of the problem, however, colleges cast about for ways to collect discharged educational debts. *Perez* issues were raised when colleges withheld bankrupts' transcripts and other information or prevented bankrupts from enrolling until the bankrupt paid or, in some instances, agreed to pay the discharged debts. These policies arguably interfered with fresh start in several ways: they deterred debtors with dischargeable educational loans from filing for bankruptcy; they coerced bankrupts to omit to schedule educational loans or, after bankruptcy, if they did schedule, to repay or agree to repay discharged educational debts if they desired to re-enroll, transfer, apply elsewhere, or seek employment that required certification; and they disabled bankrupts who did discharge educational loans from earning a livelihood in the fields of endeavor that they choose.¹¹⁹

Did these coercive tactics interfere with fresh start enough to violate *Perez*? Courts answered that question differently and perhaps inconsistently. The courts agreed that the colleges' conduct was not the sort of "process" or "action" that violated the discharge injunction.¹²⁰ Nevertheless, Judge Stern enjoined Rutgers University from denying transcripts and withholding registration to a bankrupt former student, not because the conduct was statutorily proscribed "legal process," but because these devices were used to coerce the bankrupt to repay discharged debts and thus interfered with the federal fresh start policy.¹²¹ The Eighth Circuit, however, concluded that *Perez* proscribed only governmental coercion; a private college therefore could, pending repayment, withhold transcripts from students who had discharged educational loans, and private creditors could use "nonlegal, informal" coercive tactics to achieve repayment or reaffirmation.¹²²

Judge Stern differed from the circuit court. He argued that even a

118. Higher Education Act of 1965, Pub. L. No. 89-329, § 439(a), 79 Stat. 1219, as amended by Pub. L. No. 94-482, § 127(a), 90 Stat. 2081 (1976) (formerly codified at 20 U.S.C. § 1087-3 (1976) (repealed 1978)) (educational loan less than five years old nondischargeable unless bankrupt showed an undue hardship absent discharge).

119. See *Grimes v. Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), cert. denied, 420 U.S. 973 (1975).

120. See text accompanying notes 75-80 *supra*, *Girardier v. Webster College*, 563 F.2d 1267, 1272-73 (8th Cir. 1977); *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1367-68 (D.N.J. 1978). See also *In re Thompson*, 416 F. Supp. 991, 995-96 (S.D. Tex. 1976).

121. *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1366-67 (D.N.J. 1978). The judge also held that using bankruptcy to discriminate constituted an invidious classification under the equal protection clause, *id.* at 1367, but this adds nothing to the *Perez* analysis.

122. *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977). The court also rejected a

private college should forward transcripts because "a student has some sort of a property interest in his transcripts which reflect time, money and hard work."¹²³ Judge Bright, concurring in the Eighth Circuit opinion, articulated the opposite position. He asserted that both private and public colleges could withhold transcripts because the absence of a transcript is not analogous to the lack of a driver's license. The student retains the "ever continuing benefits" of the "fund of knowledge"; the college merely "declined to confer any additional benefits . . . by furnishing transcripts . . . for the unpaid educational courses."¹²⁴

The Eighth Circuit's conclusion that *Perez* only reaches discrimination against bankrupts by public entities reads *Perez* too narrowly.¹²⁵ *Perez* involved a state law that helped private creditors, but the Court struck out at conduct that makes "it more probable that the debt will be paid despite the discharge."¹²⁶ The distinction between private and public creditors is irrelevant in determining whether a creditor's conduct impinges upon a bankrupt's fresh start. The Constitution explicitly grants Congress the power to pass bankruptcy statutes that perforce regulate private debtor-creditor relations. The supremacy clause operates because the creditor's coercion leads the bankrupt to reaffirm a discharged debt, which is then enforceable in the state courts, or to pay that discharged debt.¹²⁷ The private-public distinction, therefore, unjustifiably tacks fourteenth amendment analysis on the bankruptcy power.¹²⁸

Two questions are relevant to an analysis of post-discharge creditor conduct: Whose conduct may frustrate a bankrupt's fresh start? What conduct frustrates a bankrupt's fresh start so much that judges should proscribe it? Justifying coercive conduct by arguing that its goal is reaffirmation ignores the persuasive argument that *Perez* voids reaffirmation itself.¹²⁹ A transcript is the practical equivalent of a driver's

Buckley Amendment argument. *Id.* at 1276-77. See also McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (dictum).

123. *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1366 n.6 (D.N.J. 1978).

124. *Girardier v. Webster College*, 563 F.2d 1267, 1277-78 (8th Cir. 1977) (Bright, J., concurring). See also Note, 12 GA. L. REV. 143 (1977).

125. See generally Comment, 91 HARV. L. REV. 1336, 1339-46 (1978).

126. 402 U.S. at 650 (quoting *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 173 (1962)).

127. Under the bankruptcy power, Congress may qualify the fresh start policy by excepting debts and debtors from the discharge. See, e.g., 11 U.S.C.A. §§ 523, 726 (West Supp. 1979). See also *Marvin Tragash Co. v. United States Dep't of Ag.*, 524 F.2d 1255 (5th Cir. 1975).

128. See Comment, *supra* note 125, at 1341-42.

129. See Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict*

license because students and drivers need the documents to use the skills that the documents certify. Both the licensing authority and the college monopolize their respective certificates.¹³⁰ Courts should therefore forbid both public and private creditors from withholding a transcript and the opportunity to register as ransom for discharged debts. They should not condone this form of coercive reaffirmation because it vitiates the fresh start policy in a particularly harsh fashion.

Discharged student loans also cause problems to a young lawyer who applies to a state bar.¹³¹ Boards of bar examiners have denied applications on the ground that the applicants lack good moral character and are unfit to practice law. Lawyers have frequent opportunities to defraud clients and others and to frustrate or obstruct the administration of justice. Properly considered, poor moral character includes both conduct evidencing moral turpitude and conduct that causes reasonable people to doubt whether the person is fair, honest, and respectful of the law and the rights of others.¹³² Applicants have argued, however, that they satisfied the criteria for a bankruptcy discharge and that to deny them a license burdens this discharge. The courts must therefore attempt to protect the public from potentially unscrupulous lawyers without frustrating an honest debtor's right to an unencumbered fresh start.

Bankruptcy should be a neutral element in determining whether to admit an applicant to the bar. Refusing to license because an applicant who received a discharge in bankruptcy and refused to resurrect discharged debts would violate *Perez*.¹³³ The conduct that led to bankruptcy may, however, be relevant to the applicant's moral character, for past mismanagement, sharp practices, or sleaziness may evidence fu-

Between Contract Theory and Bankruptcy Policy, 47 IND. L.J. 36, 60-69 (1971); Countryman, *The Use of State Law in Bankruptcy Case, Part II*, 47 N.Y.U. L. REV. 631, 670-71 (1972).

130. See Comment, *supra* note 125, at 1343-44.

131. See Florida Bd. of Bar Examiners *re* Groot, 365 So. 2d 164 (Fla. 1978); Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454 (Fla. 1978); Application of Gahan, — Minn. —, 279 N.W.2d 826 (1979).

132. See Florida Bd. of Bar Examiners *re* G.W.L., 364 So.2d 454 (Fla. 1978).

133. Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 455, 457 (Fla. 1978); Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 828 (1979). *But cf.* Marshall v. District of Columbia Gov't, 559 F.2d 726, 729 (D.C. Cir. 1977) ("The bankruptcy statute . . . does not wipe out the *fact* of a prior bankruptcy. Nor does it prohibit employers from using the *fact* of bankruptcy in considering whether the past record of a job applicant merits his consideration for employment.") (dictum). The court in *Gahan* properly rejected this approach because it "chill[s]" the exercise of the right to file bankruptcy. Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 829 (1979).

ture vulnerability or weakness.¹³⁴ The state courts have rejected the idea that bankruptcy courts filter out those who do not deserve discharge and that all discharged bankrupts are honest but unfortunate or improvident debtors.¹³⁵ In their view, asking applicants about bankruptcy allows bar examiners to examine the prebankruptcy events that are relevant to a judgment on an applicant's moral character.

Courts, however, differed slightly on the proper approach. Of the state courts ruling on this issue, the Minnesota court was the strictest.¹³⁶ It began by assuming that people have a duty to pay their debts.¹³⁷ Neglectful or irresponsible default, said the court, revealed that the applicant lacked good moral character, but default might be excused by compelling or unusual hardship that was beyond the applicant's control, such as "an unusual misfortune, a catastrophe, an overriding financial obligation, or unavoidable unemployment."¹³⁸

The Minnesota court, however, held that failure to repay educational loans when able justified denying admission. "Such flagrant financial irresponsibility reflects adversely on an applicant's ability to manage financial affairs and reflects adversely on his commitment to the rights of others, thereby reflecting adversely on his fitness for the practice of law."¹³⁹ The Florida court's approach differed: an applicant had a right to "set in motion the mechanism to avoid repayment of his debts at the very time he developed the capacity to begin repayment [because that] is precisely the reason that the bankruptcy laws exist."¹⁴⁰

Let us examine the particular cases to attempt to discover which approach better served the underlying policies. Some, perhaps most, of lawyers' financial irresponsibility did not result in bankruptcy or occurred after the applicant had joined the bar, and this would escape the examiners' scrutiny, perhaps to emerge later.¹⁴¹ The Florida bar admitted out-of-state lawyers without considering voluntary bankruptcy a

134. Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 457 (Fla. 1978); Application of Gahan, 279 N.W.2d 826, 829 (Minn. 1979).

135. See Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 460-61 (Fla. 1978) (Hatchett, J., concurring in part and dissenting in part).

136. See Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 831 (1979).

137. *Cf.* Dennis v. Blount, 497 F.2d 1305 (9th Cir. 1974) (failure of employees to pay debts can be taken into account with other facts to allow discharge).

138. Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 831 (1979).

139. *Id.*

140. Florida Bd. of Bar Examiners *re* Groot, 365 So.2d 164, 167 (Fla. 1978). This departed from the same court's earlier statements that the bankruptcy discharge leaves a moral responsibility to creditors and that filing bankruptcy to defeat creditors is "morally reprehensible." Florida Bd. of Bar Examiners *re* G.W.L., 364 So.2d 454, 459 (Fla. 1978).

141. *In re* Conner, 265 Ind. 610, 358 N.E.2d 120 (1977).

"black mark."¹⁴² Many judges and bar examiners viewed discharging educational loans as a generational issue.¹⁴³ Thus, law graduates who filed bankruptcy and discharged educational loans before being sworn in were particularly vulnerable. In retrospect, many would have been better advised to wait. As we will see, other considerations affected the timing of the bankruptcy petitions.

The bar applicants involved in these cases timed their bankruptcies adroitly. One preceded the effective date of the amendment that prevented bankrupts from discharging most educational loans by only three days,¹⁴⁴ another by ten weeks.¹⁴⁵ One applicant filed bankruptcy long before the debts were due but only three days before graduation;¹⁴⁶ another filed one week before taking a position.¹⁴⁷ People should be allowed to exercise their right to a discharge whenever it will be most beneficial. That the law was about to change, the debt was owed but not due, or the debtor was about to begin earning money cannot affect professional licensing without burdening the fresh start. A desire to choose to wipe the slate as clean as possible, "to unburden himself of accumulated debts in order to retain, to the detriment of his creditors, the full financial benefits of his new employment, [is] precisely the reason that the bankruptcy laws exist."¹⁴⁸

The type of debts discharged with the educational loans and the assets the bankrupt retained were also considered by the courts. One applicant discharged, in effect, only educational loans.¹⁴⁹ The nature of the debt discharged should have been irrelevant. Congress allowed bankrupts to discharge educational loans. States should not have burdened that possibility by saying, as the Minnesota court did, that discharging educational loans "indicates to us a lack of moral commitment to the rights of other students and particularly the rights of creditors."¹⁵⁰ Nor should the licensing authorities have considered the way an applicant structured his assets in bankruptcy to enhance

142. Florida Bd. of Bar Examiners *re* G.L.W., 364 So. 2d 454, 461 (Fla. 1978) (Boyd, J., dissenting).

143. *Id.* at 460.

144. Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 827 (1979).

145. Florida Bd. of Bar Examiners *re* Groot, 365 So. 2d 164, 165 (Fla. 1978).

146. Florida Bd. of Bar Examiners *re* G.L.W., 364 So. 2d 454, 456 (Fla. 1978).

147. Florida Bd. of Bar Examiners *re* Groot, 365 So. 2d 164, 166 (Fla. 1978).

148. *Id.* at 167. But contrast the same court's earlier decision in Florida Bd. of Bar Examiners *re* G.L.W., 364 So. 2d 454, 459 (Fla. 1978).

149. Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 828 (1979). See also Florida Bd. of Bar Examiners *re* G.L.W., 364 So. 2d 454 (Fla. 1978).

150. Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 831 (1979).

exemptions and save property from his creditors.¹⁵¹ The state that burdens conduct within the bounds of a federal statutory right violates the supremacy clause.

The professional licensing authorities should have ignored the circumstances, timing, and details of bankruptcy. The authorities, however, could focus on the conduct that led to the trouble and consider other factors that revealed lack of probity or ability to manage.¹⁵² The two decisions that rejected bankrupts' bar applications for lack of good moral character found that the applicants had failed to satisfy their obligations with no exceptional circumstances except large educational debts and no employment.¹⁵³ The Florida court found that the applicant it ordered admitted "had suffered unusual misfortune"—a domestic rift had left him custodian of two small children and partially supporting his former spouse—and, the court concluded that he "had a valid present need to devote his entire employment income to his current, not past, financial responsibilities."¹⁵⁴

The licensing decisions moved beyond conduct that coerced bankrupts to reaffirm discharged debts. No creditors were involved, even indirectly. In denying admission, the Minnesota court disclaimed interest in whether the applicant "has any present willingness or ability to reaffirm the debts."¹⁵⁵ Similarly, the unsuccessful Florida applicant had already reaffirmed the debts.¹⁵⁶ Coercion to reaffirm will interfere with the fresh start. So does discouraging other debtors from filing bankruptcy, causing those who do file bankruptcy to omit dischargeable debts, and attenuating bankrupts' occupational choice.¹⁵⁷ Any ac-

151. *Id.* at —, 279 N.W.2d at 828. The bankrupt saved his chariot, a 1959 Jaguar. He borrowed against it until his "equity" equaled the automobile exemption and then placed the loan proceeds in an exempt bank account. After filing, he withdrew the money and unencumbered the vehicle.

152. "Federal law does not preclude us from evaluating the responsibility of a bar applicant in satisfying his or her financial obligations." Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 831 (1979).

153. *See id.* at 828, 831; Florida Bd. of Bar Examiners *re* G.L.W., 364 So. 2d 454, 459 (Fla. 1978).

154. Florida Bd. of Bar Examiners *re* Groot, 365 So. 2d 164, 168 (Fla. 1978).

155. Application of Gahan, — Minn. —, —, 279 N.W.2d 826, 832 (1979).

156. Florida Bd. of Bar Examiners *re* G.L.W., 364 So. 2d 454, 457 (Fla. 1978). The court allowed the applicant to reapply, *id.* at 455, 460, which *may* allow the observer to conclude that the applicant would be admitted if, in addition to promising to pay his discharge debts, he actually paid them.

157. *See* Grimes v. Hoschler, 12 Cal. 3d 305, 312, 525 P.2d 65, 69, 115 Cal. Rptr. 625, 629 (1974). *But see* Note, 7 FLA. ST.U.L. REV. 587 (1979) (only coercion to repay or reassume discharged debts violates supremacy clause).

tivity that dilutes the practical availability or value of a discharge may impinge on the fresh start policy.

The same policy that impelled Congress to limit the dischargeability of educational loans colored the way courts responded to bankrupts who did discharge those loans. The loan enhanced the ability to earn but was perforce unsecured. Believing that people should not enjoy enhanced earnings without paying the enabling loan, Congress allowed educational creditors five years to collect most educational debts. By withholding bar memberships unless the bankrupt showed exceptional circumstances for discharging educational loans, the courts thus maintained a consistent pattern of treating educational loans as debts of honor that bestowed a peculiar benefit and should have been repaid if possible. Given these assumptions, the courts decided the bar application cases properly. Some of the courts' statements, however, resurrected the discarded affirmative defense theory of discharge and revealed insensitivity to the ramifications of bankruptcy's fresh start.

IV. THE 1978 BANKRUPTCY CODE

The preceding parts of this Article traced the evolution of bankruptcy's fresh start up to the enactment of the Bankruptcy Reform Act of 1978. As noted earlier, the first theory—affirmative defense—was curtailed by the 1970 amendments, leaving the injunction and *Perez* theories to effectuate fresh start. Although the latter theories remain as the principal underpinnings of fresh start under the new Code, they have been altered in important ways. Congress broadened equitable protection through the discharge injunction, embodied the *Perez* theory in the statute, and consolidated and augmented the bankruptcy court's jurisdiction to adjudicate disputes related to discharge.

A. Broader Stay and Discharge Injunction

Congress replaced the automatic stay rule with a broader statute, coordinated the discharge injunction with the automatic stay, and expanded the conduct forbidden by the automatic and the discharge injunction. When the debtor files bankruptcy, each creditor receives a stay that forbids the creditor from suing, repossessing, and perfecting or enforcing liens, and from "any act to collect, assess, or recover a [prebankruptcy] claim."¹⁵⁸ Unless removed by the bankruptcy

158. 11 U.S.C.A. § 362(a)(6) (West 1979).

court,¹⁵⁹ this stay lasts until it is replaced by the discharge injunction.¹⁶⁰ The discharge releases the bankrupt from discharged debts, voids all judgments on discharged debts, and enjoins conduct inconsistent with the discharge.¹⁶¹ The injunction under the 1970 amendments only forbade creditors from "instituting or continuing any action or employing any process."¹⁶² The 1978 Code broadens the interdiction to ban also "any act, to collect, recover or offset any such debt as a personal liability of the debtor."¹⁶³

The broader injunction will end many abusive practices.¹⁶⁴ The legislative history tells us that it bans "dunning by telephone or letter, or indirectly through friends, relatives, or employees, harassment, threats of repossession and the like."¹⁶⁵ This injunction, which prohibits any efforts to collect a discharged debt, should end pressure to repay or coercion to reaffirm discharged debts. The employer contact, the midnight call and the man with the truck should fade into history. The 1978 Code should also hamper more indirect efforts to collect like union or employer threats to terminate employment unless a bankrupt pays a discharged debt to the credit union.

A Texas district court disdained to interpret the discharge injunction under the 1970 amendments as prohibiting a letter threatening to prosecute the bankrupt criminally unless he paid a discharged debt; the creditor's threat, the judge held, was not legal "process."¹⁶⁶ This coercive tactic to achieve reaffirmation or repayment is an "act to collect" that is forbidden by the 1978 Code's discharge injunction.¹⁶⁷ The Eighth Circuit allowed private colleges to withhold transcripts until discharged educational loans were paid, holding that this practice con-

159. *Id.* § 362(d), (e), (f).

160. *Id.* § 362(c). Creditors may ask the judge to modify, terminate, annul, or condition the stay under *id.* § 362(d). A hearing is held to determine the status of the stay. *Id.* § 362(e).

161. *Id.* § 524(a). Creditors may realize on valid security or sue codebtors, *id.* § 524(a)(1), (e); and after discharge, creditors may collect nondischargeable claims, *id.* § 523.

162. Bankruptcy Act § 14(f)(2), 11 U.S.C. § 32 (1976) (repealed 1978). See discussion in part II of this Article.

163. 11 U.S.C.A. § 524(a)(2) (West 1979). The suggested interim bankruptcy forms contain a discharge injunction that omits the changes made by *id.* § 524(a)(2).

164. D. STANLEY & M. GIRTH, *supra* note 9, at 60-62.

165. H.R. REP. NO. 595, 95th Cong., 1st Sess. 366 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 6321; *see* S. REP. NO. 989, 95th Cong., 2d Sess. 80 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787, 5866.

166. *In re Thompson*, 416 F. Supp. 991 (S.D. Tex. 1976); *see* text accompanying notes 75 & 77 *supra*.

167. 11 U.S.C.A. § 524(a)(2) (West 1979).

stituted neither state action nor legal process.¹⁶⁸ Because the 1978 Code's injunction forbids creditors from "any act to collect," courts should rule that this new discharge injunction prevents colleges from holding transcripts hostage,¹⁶⁹ and they should view retention of records by doctors, dentists, lawyers, and others similarly.

The proscriptions in the 1978 Code's discharge order interact with the way the Code militates against reaffirmation. The Code ostensibly retains the rule that bankrupts may be bound by promises to reaffirm discharged debts without receiving any consideration, but it hedges the rule with procedural protections. The Code provides for a hearing on reaffirmation, judicial approval of the bankrupt's agreement to reaffirm prior to discharge, and a thirty-day period in which the bankrupt may rescind such an agreement. Moreover, if a reaffirmed consumer debt is not secured by real property, the judge, before discharge, must find that reaffirmation is in the bankrupt's best interest and does not impose undue hardship, or, in the alternative, that the reaffirmation was in good faith and either in settlement of a dischargeability complaint or entered into in connection with an agreement to redeem collateral.¹⁷⁰

The 1978 Code, however, should not close the debate on whether to abolish reaffirmations completely. The reaffirmation procedure summarized above attempts to strike a compromise between those who favor reaffirmations and those who oppose them.¹⁷¹ The complex procedure for permitting a reaffirmation and the injunction against coercion to reaffirm will probably prevent most reaffirmations. The theory underlying reaffirmation, however, is that the discharge is merely a legal defense to a suit on the debt, that the bankrupt's moral obligation to the creditor remains, and that this is sufficient consideration to make a fresh promise to repay enforceable. This theory thus retains the outmoded view of discharge as an affirmative defense and confronts us with an inadequate perspective of fresh start; it is at war with *Perez*, the new discharge, and the broadened injunction. Congress should therefore reconsider the compromise and preempt state contract doctrine by

168. *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977); see text accompanying notes 118-27 *supra*.

169. 3 COLLIER ON BANKRUPTCY ¶ 525.03 (15th ed. 1979); Note, 15 WILLAMETTE L.J. 563, 571 (1979).

170. 11 U.S.C.A. § 524(c) (West 1979). *Id.* § 722 allows the bankrupt to redeem tangible personalty from a lien under certain conditions.

171. See 124 CONG. REC. H11,096 (daily ed. Sept. 28, 1978); 124 CONG. REC. S17,413 (daily ed. Oct. 6, 1978).

abolishing reaffirmations.¹⁷² Bankrupts would then be able to pay creditors voluntarily or to give former creditors money. The discharged debt, however, would not float about as a moral obligation, and the bankrupt's second promise would not be enforceable in court.

Even though a bankrupt's discharge voids judgments and enjoins collection, procedural rules providing that discharge is an affirmative defense should be retained. Bankrupts will continue to interpose bankruptcy as a defense in nonbankruptcy courts. For example, when a bankrupt allegedly owes debts that are exempted from discharge under the new Code, such as unscheduled debts, family support, fines, penalties, forfeitures, or educational loans,¹⁷³ whether they have, in fact, been discharged may be determined by a nonbankruptcy court. Moreover, a creditor may bring suit in a nonbankruptcy court against a debtor who has filed for bankruptcy, and the debtor may not remove or, if he does remove, the bankruptcy court may remand.¹⁷⁴ To adjudicate the discharge issue, a debtor must interpose the discharge as an affirmative defense under the nonbankruptcy court's procedure. The affirmative defense of bankruptcy, therefore, must be retained in procedural rules for this contingency.

The discharge voids nonbankruptcy judgments and enjoins writs of execution or enforcement of judgment liens. Are the state statutes, discussed earlier,¹⁷⁵ that allow someone to mark the void judgment "void" or "satisfied" now superfluous? Title examiners can be nitpicking and superstitious people, sellers are often in more of a hurry to close than buyers' examiners would prefer, and memories fade while the land records remain the same.¹⁷⁶ If the bankrupt seeks to sell real property, these state statutes may provide something tactile to satisfy the buyer's examiner, expedite the closing, and save everyone money. Two questions remain, however. Does marking the judgment "discharged in bankruptcy,"¹⁷⁷ burden the discharge under *Perez*, and is one year too long to wait before marking the judgment?¹⁷⁸ The Rules Advisory Committee should consider an expedited procedure, based on

172. See COMM'N REP., *supra* note 9, pt. II, § 4-507(a) at 142; D. STANLEY & M. GIRTH, *supra* note 9, at 59-62.

173. 11 U.S.C.A. §§ 523(a)(3), (a)(5), (a)(7), (a)(8), 523(c) (West 1979).

174. 28 U.S.C.A. §§ 1471(b), 1478(a), (b) (West 1979).

175. See notes 36-40 and accompanying text *supra*.

176. See, e.g., *Ingram v. Associates Financial Serv. of America, Inc.*, 475 F. Supp. 1089 (E.D. Va. 1979) (attempt to enforce sixteen year-old discharged judgment enjoined).

177. E.g., MICH. COMP. LAWS § 600.2914 (West 1968); VA. CODE § 8.01-455 (1977).

178. See notes 39 & 40 and accompanying text *supra*.

the state statutes, to allow the bankruptcy court to enter a declaratory judgment that the bankrupt could record with other title documents. A uniform rule that integrates federal bankruptcy with local real estate practice would benefit the whole nation. Until then, the state statutes serve a useful purpose.

B. Codification of Perez Theory

The 1978 Code embodied *Perez* theory in section 525, which forbids governmental units from basing adverse licensing or employment decisions "solely" on bankruptcy, insolvency, or failure to pay a discharged debt.¹⁷⁹ This provision strengthens the policy against reaffirmation; allowing adverse collateral action because the discharged debtor refused to pay or reaffirm a debt would frustrate the fresh start by coercing payment and hampering career choices.¹⁸⁰ "Solely" is the key word, for according to the legislative history the statute allows a governmental unit to impose nondiscriminatory net capital rules and to consider "other factors, such as future financial responsibility or ability."¹⁸¹ This allows state bar examiners to consider if the events leading to an applicant's bankruptcy bear on whether the applicant lacks good moral character.¹⁸² It leaves unanswered, however, the question whether there is something unique about the legal profession or discharging educational loans that allows a state bar to require an applicant who has discharged educational loans to show "exceptional circumstances" before issuing a license to practice law.

The Commission recommended that the Code also prohibit private discrimination,¹⁸³ but Congress rejected that view.¹⁸⁴ Credit-oriented groups worried that courts might interpret private discrimination to prevent them from considering bankruptcy when evaluating people

179. 11 U.S.C.A. § 525 (West 1979). Excepted are three federal statutes that discriminate against bankrupts to protect farmers. 7 U.S.C. §§ 181-299, 204, 499a-499s (1976 & Supp. II 1978). Farmers are particularly vulnerable to sharp and irresponsible industry practices. Cf. Packers and Stockyards Act, 7 U.S.C. § 206 (1970) (converts farmer-creditors into statutory trustees).

180. See *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1367 (D.N.J. 1978).

181. H.R. REP. NO. 595, 95th Cong., 1st Sess. 367 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6322-23; S. REP. NO. 989, 95th Cong., 2d Sess. 81 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5867.

182. See text accompanying notes 131-139 *supra*.

183. COMM'N REP., *supra* note 9, pt. II, § 4-508 at 143.

184. H.R. REP. NO. 595, 95th Cong., 1st Sess. 366-67 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6321-23; S. REP. NO. 989, 95th Cong., 2d Sess. 81 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5867.

for credit.¹⁸⁵ The legislative history says that the provision is "not exhaustive," may forbid "other forms of discrimination," and may reach "quasi-governmental" or "other organizations," and the courts are exhorted to "continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy."¹⁸⁶ The provision, however, is oriented toward government employment and licensing, and only a brave judge will hold that a private employer who fires an employee for filing bankruptcy has violated the statute.

The statute reads *Perez* narrowly in only prohibiting discrimination against bankrupts by governmental units,¹⁸⁷ and Congress should delete that limitation.¹⁸⁸ Congress apparently intended to enhance bankrupts' fresh starts by protecting their jobs. Even though public sector employment is growing, if Congress seeks to protect livelihoods, it should treat public and private employers alike. If the city cannot fire a bankrupt policeman,¹⁸⁹ a private security company should be prevented from terminating a bankrupt security guard.¹⁹⁰ The Commission's proposal forbade "discrimination," which defines the forbidden conduct too broadly. Nevertheless, Congress could substitute "entity" for "governmental unit" in the existing *Perez* section,¹⁹¹ which is more precise and detailed than the Commission's proposal, without producing an overbroad result. Creditors would then be allowed to consider past financial responsibility, ability, and probity, as revealed by prebankruptcy conduct, when deciding whether to extend credit, but private retaliation because bankruptcy is considered to be immoral or irresponsible would be forbidden. If the public/private distinction is not useful to advance the fresh start policy, then what is? More particularly, how much beyond the injunction against indirect collection activities should the *Perez* anti-discrimination theory reach? I have revealed some of my answers. Private employers, in my opinion,

185. *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 31 & H.R. 32, 94th Cong., 2d Sess.* 1369 (1976).

186. H.R. REP. No. 595, 95th Cong., 1st Sess. 366-67 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6321-23; S. REP. No. 989, 95th Cong., 2d Sess. 81 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5867.

187. See Comment, *supra* note 125; text accompanying notes 125-128 *supra*.

188. COMM'N REP., *supra* note 9, pt. II, § 4-508 at 143.

189. See *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975). *But cf.* *Marshall v. District of Columbia Gov't*, 559 F.2d 726 (D.C. Cir. 1977) (no jurisdiction).

190. *Cf.* Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1970) (employer prohibited from discharging employee whose wages are garnished "for any one indebtedness"); VA. CODE § 34.29(f) (1976).

191. 11 U.S.C.A. § 525 (West 1979). "Entity" is defined at *id.* § 101(14), and refined in *id.* § 101(30).

should be forbidden from firing bankrupt employees.¹⁹² Suppose a licensing authority or an employer rejected an application solely because of bankruptcy, stating that whether the applicant had reaffirmed or repaid was irrelevant. Although that does not coerce payment from the particular applicant, it should be forbidden because it interferes with fresh starts generally. Similarly situated debtors will not file bankruptcy, and the occupational choices of those who do file will be circumscribed.¹⁹³ Suppose similarly that an agency or employer rejects all applicants who discharged a certain type of debt—for example, educational loans. This would discourage people who do file from discharging this class of debt, and it would leave bankrupts burdened with dischargeable debts. Thus, in addition to indirect collection activities, the law should, I believe, forbid adverse treatment that will deter others from filing bankruptcy, cause bankrupts to omit certain dischargeable debts from schedules, or interfere with bankrupt's occupational choices.¹⁹⁴

C. *Expanded Jurisdiction*

The bankruptcy court's expanded jurisdiction under the 1978 Code will allow the court to better protect a bankrupt's fresh start. In many of the lawsuits under the 1898 Act in which the bankrupt raised *Perez* issues, the courts either seemed to deny that federal jurisdiction existed¹⁹⁵ or struggled to find jurisdiction.¹⁹⁶ *Perez* itself failed to cite a jurisdictional statute.¹⁹⁷ The struggle was probably unnecessary, for under *Local Loan* the bankruptcy court possessed indisputable jurisdiction to enjoin creditors from collecting discharged debts and to se-

192. The reasoning in *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975) and *In re Loftin*, 327 So. 2d 543 (La. App. 1976), *appeal denied*, 331 So. 2d 851 (1976), should apply to private as well as public employment. The courts in those cases argued that a recent bankrupt will be less tempted to perform some dishonest or irresponsible act than a heavily burdened debtor. This reasoning should also be relevant in the decisions facing a question unresolved by the 1978 code: whether a private employer may discharge an employee who files a rehabilitation bankruptcy. Compare *In re Jackson*, 424 F.2d 1220 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970) with *In re Sparks*, 306 F. Supp. 676 (N.D. Ala. 1969).

193. See *Grimes v. Hoschler*, 12 Cal. 3d 305, 312, 525 P.2d 65, 69, 115 Cal. Rptr. 625, 629 (1974).

194. *Id.*

195. *Marshall v. District of Columbia Gov't*, 559 F.2d 726 (D.C. Cir. 1977); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977). See also *Porter v. Gaston*, 362 F. Supp. 370 (E.D. Ark. 1978).

196. See *Girardier v. Webster College*, 563 F.2d 1267, 1270 (8th Cir. 1977) (28 U.S.C. § 1331); *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1364-65 (D.N.J. 1978) (28 U.S.C. §§ 1331, 1343).

197. *Marshall v. District of Columbia Gov't*, 559 F.2d 726, 731 n.2 (D.C. Cir. 1977) (Kaufman, J., concurring in part and dissenting in part).

cure for the bankrupt the advantages of the discharge.¹⁹⁸ That confusion and uncertainty existed, however, bears witness to the muddled state of bankruptcy jurisdiction under the 1898 Act.

The jurisdictional questions that previously seemed so difficult should be easy under the 1978 Code. Statement of the *Perez* rule in the Code will help the courts that questioned whether they had jurisdiction to proceed under a nonstatutory federal policy.¹⁹⁹ The bankruptcy court now possesses jurisdiction to issue any order or process necessary or appropriate to carry out the provisions of the Code.²⁰⁰ The court also has the power of an equity court to declare and enjoin,²⁰¹ as well as the power to issue all necessary writs.²⁰² Moreover, the court's power to enjoin exceeds the automatic stay; for example, criminal actions against the debtor are not stayed,²⁰³ but we have seen that the court may enjoin an NSF check prosecution that is an indirect collection technique.²⁰⁴ That power continues under the 1978 Code.²⁰⁵

The bankrupt may need a sympathetic tribunal to prevent a hostile factfinder from frustrating federal rights.²⁰⁶ Because the way the facts are found often dictates the way federal claims are decided, limiting the litigant to ultimate review by the United States Supreme Court denies the debtor a sympathetic factfinder.²⁰⁷ Does the bankruptcy court's power extend far enough, for example, to allow a bankrupt bar applicant to enjoin state bar examiners from ruling that the fact of bankruptcy shows the applicant lacks good moral character? I assume it does. The court possesses "the powers of a court of equity" to declare and enjoin, as well as "original" jurisdiction over matters "related" to bankruptcy.²⁰⁸ Although the bankruptcy court "may not enjoin an-

198. 292 U.S. at 238-39; see *Helms v. Holmes*, 129 F.2d 263 (4th Cir. 1942); BANKR. R. 765.

199. See *Marshall v. District of Columbia Gov't*, 559 F.2d 726, 728-30 (1977); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 929 (1977).

200. 28 U.S.C.A. § 1471 (West 1979); 11 U.S.C.A. § 105(a) (West 1979); Kennedy, *supra* note 92, at 279.

201. 28 U.S.C.A. § 1481 (West 1979).

202. *Id.* § 1651.

203. 11 U.S.C.A. § 362(b)(1) (West 1979).

204. See text accompanying notes 84, 100 *supra*; Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J. L. REF. 3, 24-25 (1978).

205. H.R. REP. NO. 595, 95th Cong., 1st Sess. 342 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6298; 2 COLLIER ON BANKRUPTCY, ¶ 362.04[1] (15th ed. 1979); Kennedy, *supra* note 204, at 47.

206. See, e.g., *Florida Bd. of Bar Examiners re Groot*, 365 So. 2d 164 (Fla. 1978) (bar examiners' "factfinding" reversed).

207. See *England v. Louisiana Bd. of Med. Examiners*, 375 U.S. 411 (1964).

208. 28 U.S.C.A. §§ 1471(b), 1481 (West 1979).

other court,"²⁰⁹ bar examiners are not judges, and the bankruptcy court may enjoin litigants.²¹⁰ Similarly, the criminal defendant may sue the prosecuting attorney to enjoin a prosecution—for example, for an NSF check—that impinges on the discharge.²¹¹

The bankruptcy court's power to enforce the discharge injunction, however, is less plenary. Assume that after receiving the discharge injunction a creditor with an unperfected security interest tows the bankrupt's car away and, when called in to explain, refuses to tell where the vehicle is. The judge may want to 1) use criminal contempt to give the creditor three days of punishment, which is stayed while 2) the creditor is coercively imprisoned until he reveals the location of the vehicle, and 3) grant a compensatory contempt money judgment to benefit the bankrupt that is measured by his legal damage from being without the car. The 1978 Code, unfortunately, continues²¹² to withhold full contempt power from the bankruptcy court. Almost all violations of the discharge injunction will occur out of the courtroom, but the Code forbids a judge of the new bankruptcy court from punishing a criminal contempt not committed in the judge's presence.²¹³ Nor may the judge punish contempts by imprisonment.²¹⁴ In the example above, the judge cannot impose criminal contempt at all. Moreover, the candid observer must question whether coercive imprisonment would be proscribed as punishment.²¹⁵ The judge may enter a compensatory contempt award but the present Rule limits the referee's power to "fine" to \$250.²¹⁶

Perhaps Congress remembered the previous reluctance to grant contempt power to referees and thought that bankruptcy judges might certify more serious contempts to district judges as under the 1898 Act.²¹⁷ Because of the bankruptcy court's ambiguous status and the compromises that occurred without considering this question, the answers are not altogether clear. The better view is that the district judge

209. *Id.* § 1481.

210. Kennedy, *supra* note 92, at 282.

211. Evans v. Godfrey, 472 F. Supp. 364 (M.D. Ala. 1979). See also Younger v. Harris, 401 U.S. 37 (1971).

212. See notes 67-74 and accompanying text *supra*.

213. 28 U.S.C.A. § 1481 (West 1979).

214. *Id.*

215. Professor Kennedy says that this section "does not appear to limit the power of the bankruptcy court to impose imprisonment or a fine of any amount for civil contempt." Kennedy, *supra* note 204, at 65, n.267. See generally Kennedy, *supra* note 92, at 282.

216. FED. R. BANKR. 920(a)(3).

217. Bankruptcy Act §§ 2a(16), 41a, 11 U.S.C. §§ 11, 69 (1976) (repealed 1978); FED. R. BANKR. 920(a)(4).

may use criminal contempt to punish indirect bankruptcy contempts even by imprisonment,²¹⁸ and that the bankruptcy judge possesses plenary power to impose coercive and compensatory contempt remedies.²¹⁹ Even under this view, however, the confusion is unsatisfactory.

This split in the exercise of the contempt power is unsatisfactory for two reasons. First, the same judge should exercise the full arsenal of contempt power to coordinate and articulate an effective remedy. Second, because even experts sometimes disagree on what is civil and what is criminal contempt,²²⁰ the bifurcated process will multiply expense, delay, and reversals.

Congress should start over in defining the bankruptcy court's contempt power.²²¹ The Supreme Court has said of the contempt power, "[F]or while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."²²² The limitations on and divided authority for the contempt power in bankruptcy are anachronistic vestiges of a subordinate status that is incompatible with the bankruptcy court's prestige, dignity, and expanded jurisdiction under the 1978 Code.²²³ Congress should, therefore, delete the restrictions on the bankruptcy court's contempt power and grant it full power to impose contempt.²²⁴ In the meantime, the Rules Advisory Committee should promulgate a Rule that 1) distinguishes the in-court cut-up from the violator of the discharge injunction or automatic stay, 2) describes the procedure for civil and criminal contempt, and 3) defines the judges' power to impose coercive, compensatory, and criminal contempt.

Finally, discharged debtors should be careful to avoid litigating all discharge issues in contempt. Debtors would often be wiser to seek declaratory judgments or further injunctions from the bankruptcy court than to file show cause motions for contempt. Only creditors will re-

218. See 18 U.S.C. § 401 (1976); Kennedy, *supra* note 92, at 258-59 n.24, 280-81 n.114.

219. Kennedy, *supra* note 204, at 65; Kennedy, *supra* note 92, at 280 n.114.

220. Compare Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 235-39, 267-82 (1971) with *Developments in the Law: Injunctions*, 88 HARV. L. REV. 994, 1087 (1965).

221. *But. cf.* Kennedy, *supra* note 204, at 65 (present limitation "more symbolic than real"). See also Kennedy, *supra* note 92, at 282.

222. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

223. Kennedy, *supra* note 204, at 65.

224. COMM'N REP. *supra* note 9, pt. II, §§ 2-201(d), 2-209 at 30.

ceive the discharge injunction, which is a general form that lacks the appearance of full judicial dignity; it does not obligate noncreditors to obey. An assignee of a creditor would be bound by the discharge under *res judicata*,²²⁵ but normally, unless on notice, an assignee should not be subject to criminal contempt.²²⁶ Discharged debtors may fare better tactically in close cases by enjoining a creditor to "go forth and coerce no more" than by seeking to punish.

Under the broad interpretation of *Perez* asserted above, even conduct not clearly intended to collect and people not specifically enjoined from collecting may illegally frustrate the debtor's fresh start, but the discharge injunction fails to forbid this conduct. A judge may be less willing to rule in a debtor's favor when he is asked to sanction a contemnor who lacked clear notice that the challenged conduct was forbidden. If a declaration will admonish sufficiently, the debtor should avoid the potential pitfalls of contempt and ask the judge to declare whether questionable conduct violates the discharge or the *Perez* provision instead of whether it violates the discharge injunction. In short, despite the legislative history's statement that the discharge injunction will "give complete effect to the discharge,"²²⁷ the discharge will probably remain broader than the discharge injunction.

V. FRONTIERS OF FRESH START

No one knows what discharge issues will emerge under the 1978 Code. I predict that it will take some time to coordinate the bankruptcy discharge with the state criminal process. For example, Virginia has a statute that allows the payee of an NSF check to "warn" the drawer of the possibility of prosecution in order to establish prima facie evidence of intent to defraud in the criminal prosecution.²²⁸ In addition, Virginia prosecutors and trial judges may interpret this evidentiary statute substantively to mean that, unless the payee warns the drawer that a criminal prosecution is imminent, there can be no prosecution for fraud. Coercion to collect discharged debts, however, is barred

225. F. JAMES & G. HAZARD, *supra* note 49, § 11.27; RESTATEMENT (SECOND) OF JUDGMENTS § 89(1)(b), Comment b (Tent. Draft No. 3, 1976); A. VESTAL, RES JUDICATA ISSUE PRECLUSION 323-29 (1969).

226. FED. R. CIV. P. 65(d); Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 919 (1975).

227. H.R. REP. NO. 595, 95th Cong., 1st Sess. 365-66 (1977) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5963, 6320-22; S. REP. NO. 989, 95th Cong., 2d Sess. 80 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5787, 5865-67.

228. VA. CODE § 18.2-183 (1975).

under the 1978 Code's discharge injunction.²²⁹ Thus, after the drawer's bankruptcy, the Virginia payee now faces a dilemma: a warning may violate the discharge injunction, but without the warning there will be no prima facie evidence of intent or possibly even no prosecution. Similarly, restitution as an alternative to incarceration may be a good theory,²³⁰ but ordering a bankrupt to pay debts or go to jail perverts the criminal process.²³¹

Educational loan problems will continue to be litigated. Loans discharged in proceedings filed before September 30, 1977, will continue to present licensing issues under the Code. Whether the "exceptional circumstances" prerequisite for licensing will survive the Code remains to be seen.²³² Loans discharged under the Higher Education Act in bankruptcies filed between September 30, 1977 and November 6, 1978 will present fewer licensing difficulties, however, because during that time period borrowers could discharge educational loans less than five years old only by showing "undue hardship."²³³ Nevertheless, bankruptcy judges will develop standards to show "undue hardship,"²³⁴ and whether this standard will be congruent with the "exceptional circumstances" standard applied by licensing authorities is an open question.

The Higher Education Act amendments were inadvertently repealed on November 6, 1978, the date the Reform Act was passed,²³⁵ leaving student loans arguably dischargeable without qualification from that date until the effective date of the new Code, October 1, 1979. Congress caught its error, however, and, on August 14, 1979, restored the Higher Education Act provisions on nondischargeability to the old Bankruptcy Act for the remaining month and a half before the new Code became effective.²³⁶ Loans for higher education discharged in proceedings filed in this moratorium from November 6, 1978 to August

229. 11 U.S.C.A. § 524(a)(2) (West 1979).

230. See MODEL PENAL CODE § 224.5(b) (Proposed Official Draft 1962).

231. Cf. *Hutchinson v. Jones*, 477 F. Supp. 51 (N.D. Ga. 1979) (order to pay restitution immediately rather than allowing installments discriminates against indigents).

232. See text accompanying note 118 *supra*.

233. Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081 (repealed 1978) (formerly codified at 10 U.S.C. § 1087-3).

234. See, e.g., *In re Johnson*, 5 B.C.D. 532 (E.D. Pa. 1979) (comprehensive opinion); *In re Kohn*, 5 B.C.D. 419, 423 (S.D.N.Y. 1979).

235. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2672 (1978); *In re Amadori* 5 B.C.D. 187 (W.D.N.Y. 1979); *In re Payton*, 4 B.C.D. 1126 (E.D. Pa. 1979).

236. Act of August 14, 1979, Pub. L. No. 96-56, 93 Stat. 387 (1979) amended § 17(a) of the Bankruptcy Act to restore the nondischargeability provision for student loans. See notes 237-238 *infra*. The legislative history shows that the gap in nondischargeability was inadvertent. See S.

14, 1979, however, will cause the same licensing and dischargeability problems as loans discharged before September 30, 1977. The Code, effective in bankruptcies filed on and after October 1, 1979, reinstates the Higher Education Act's standard²³⁷ of allowing the creditor five years to collect absent undue hardship.²³⁸ Thus, discharge and licensing issues with regard to educational loans may decrease, but they will not disappear.

Educational loans may create several additional discharge issues. Suppose a loan applicant has discharged educational loans. May the lender consider the discharged loan in determining the applicant's limit on federally guaranteed loans?²³⁹ May the loan application compel students to list discharged loans?²⁴⁰ Can lenders with poor collection rates resulting from loan discharges be disqualified from federal insurance on future loans?²⁴¹ May discharged loans even be considered in

REP. NO. 230, 96th Cong., 1st Sess. 2 (1979), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1882, 1883.

Questions about whether and when the standard discharge applied to educational loans came before several bankruptcy judges. "[C]andor requires the observation that there is little uniformity of reasoning in these cases." *In re Piccione*, 5 B.C.D. 1076, 1078 (D. Conn. 1979). Several judges concluded that Congress erred when repealing the Higher Education Amendments and refused to apply the standard discharge to educational loans. See *In re Amadori*, 619 F.2d 216 (2d Cir. 1980); *In re Henry*, 5 B.C.D. 1014 (S.D.N.Y. 1979); *In re Erickson*, 5 B.C.D. 734 (E.D. Wis. 1979); *In re Kohn*, 5 B.C.D. 419 (S.D.N.Y. 1979); *In re Edson*, 4 B.C.D. 1191 (D. Nev. 1979).

Those who favored the statute over Congress's presumed intent differed on when standard discharges governed educational loans. Moreover, "it is not a simple matter to determine from the language of opinions just what date relating to discharge has been chosen." *In re Piccione*, 5 B.C.D. 1076, 1078 n.11 (D. Conn. 1979). Applying the law effective when the bankruptcy is filed are *In re Cothren*, 5 B.C.D. 597 (S.D.N.Y. 1979); *In re Carpenter*, 5 B.C.D. 577 (D. Colo. 1979); *In re Weinstein*, 5 B.C.D. 503 (E.D. Pa. 1979), all of which were filed prior to repeal of the former statute. Applying the law effective when the court decides discharge are *In re Johnson*, 5 B.C.D. 532 (E.D. Pa. 1979); *In re Christopher*, 5 B.C.D. 214 (W.D.N.Y. 1979). Applying the law existing when the discharge order is entered are *In re Piccione*, 5 B.C.D. 1076 (D. Conn. 1979) (careful opinion ruling against discharge); *In re Amadori*, 5 B.C.D. 187 (W.D.N.Y. 1979).

237. The standard actually changed on August 14, 1979. On that date Congress passed PL 95-56, which essentially reenacted the Higher Education Amendments and added it as § 17(a)(9) of the Bankruptcy Act for the ten weeks until the 1978 Code's § 523(a)(8) became effective. See Pub. L. No. 95-56, § 1, 93 Stat. 387 (1979).

238. 11 U.S.C.A. § 523(a)(8) (West 1979) (as amended by Pub. L. No. 95-56, § 3, 93 Stat. 387 (1979)). The Code as amended and the Higher Education Act are phrased somewhat differently: the Code, which includes all educational loans made, insured, or guaranteed by governmental units or nonprofit institutions of higher education, except those owed to private institutions operated for profit, is broader than the Higher Education Act, which covered only loans insured or guaranteed under that Act.

239. Higher Education Act of 1965, 20 U.S.C. § 1087dd (1970) (imposing limits on aggregate loans to individual students made by institutions of higher education from loan funds established under the Act).

240. Cf. *Abbott v. Regents of Univ. of Cal.*, 516 F.2d 830 (9th Cir. 1975) (under 1898 Act, omission of discharged educational loan from loan application excepted new loan from discharge in subsequent bankruptcy).

241. Higher Education Act of 1965, 20 U.S.C. § 1080(d) (1970).

calculating a lender's default rate?²⁴² If a bankruptcy judge finds that repayment will create undue hardship and discharges an educational loan,²⁴³ will occupational licensing authorities be precluded from considering the applicant's discharge as evidence that the applicant lacks good moral character? Does the bankruptcy judge's finding raise a presumption or change the burden of proof on that issue?

Several other general discharge issues come to mind. Suppose that after discharge the bankrupt pays a discharged debt. May a post-discharge creditor show that "gift" to be a fraudulent conveyance?²⁴⁴ Suppose that after a tenant bankrupt discharges a debt for rent, a landlord seeks to evict. Is that coercion to collect²⁴⁵ or to obtain reaffirmation²⁴⁶ of a discharged debt? Does it make any difference if it is public housing?²⁴⁷ Assume the bankrupt discharged family support, which, because his former spouse draws aid to dependent children, she had assigned to the state.²⁴⁸ May the bankrupt be convicted of criminal nonsupport?

Beyond the 1978 Code, protection of the debtor's discharge may move in several speculative directions. First is the clean slate. With limitations for scandalous or defamatory matters, bankruptcy records are public documents²⁴⁹ that may be disseminated freely.²⁵⁰ The publicity may affect a bankrupt's employment prospects as well as his opportunities to secure credit.²⁵¹ Almost half the states have statutes that provide for the sealing or expunging of selected criminal records,²⁵²

242. A casenote on *Girardier v. Webster College* assumes "yes." 12 GA. L. REV. 143, 151-52 (1977). So apparently did the Minnesota court in *In re Gahan*, — Minn. —, —, 279 N.W.2d 826, 831 (1979).

243. 11 U.S.C.A. § 523(a)(8) (West 1979).

244. See generally 1 G. GLENN, FRAUDULENT CONVEYANCES & PREFERENCES §§ 214d, 289a, 291b, at 497-98 (rev. ed. 1940).

245. See 11 U.S.C.A. § 524(a)(2) (West 1979); notes 161-163 and accompanying text *supra*.

246. See 11 U.S.C.A. § 524(c) & (d) (West 1979); notes 164-172 and accompanying text *supra*.

247. See 11 U.S.C.A. § 525 (West 1979); notes 179-188 and accompanying text *supra*.

248. 11 U.S.C.A. § 523(a)(5)(A) (West 1979) allows discharge of assigned alimony, maintenance and support in connection with a separation agreement, property settlement agreement or divorce decree. The Bankruptcy Reform Act, Pub. L. No. 95-598, § 328, 92 Stat. 2679 (1978) repealed Social Security Act § 456(b) (formerly codified at 42 U.S.C. § 656(b) (1976)), which had exempted assigned child support obligations from discharge.

249. 11 U.S.C.A. § 107 (West 1979); FED. R. BANKR. 508, 510, 918.

250. 15 U.S.C.A. § 1681(a)(1) (West 1979) (credit bureau may keep bankruptcy on file for 10 years).

251. Cf. *Scott v. Illinois*, 440 U.S. 367, 380-81 (1979) (Brennan, J., dissenting) (collateral consequences of a criminal conviction).

252. See, e.g., VA. CODE § 16.1-299 (Cum. Supp. 1979) (juvenile court records); Ober, *Expungement of Criminal Arrest Records: The State of the Law in Pennsylvania*, 83 DICK. L. REV. 425

and courts have ordered records expunged in the absence of statutes.²⁵³ Moreover, a California court recently held that disseminating nonconviction data that stigmatized job applicants tortiously invaded their privacy.²⁵⁴ Under the clean-slate theory of discharge, bankruptcy records would be closed or destroyed. Employers, creditors, and others would be forbidden from asking about past bankruptcy,²⁵⁵ and if they should learn about a past bankruptcy, they could not consider it.²⁵⁶ If asked, the bankrupt could legitimately reply that he had never been bankrupt.²⁵⁷

To focus attention on related questions, let us ask whether a clean slate would have helped the bankrupt in *United States v. Kras*?²⁵⁸ Kras filed bankruptcy with no property available to creditors and no reasonable likelihood of obtaining any. Many bankruptcy lawyers would have advised him to sit on his exemptions and make appropriate gestures at his creditors until the running of the statutes of limitations. Kras, however, sought surcease from creditor harassment. A former employer had fired him because of his failure to repay money of the employer that someone had stolen from Kras's home. The employer's unfavorable references, which falsely accused him of theft, prevented Kras from finding another job. Kras sought bankruptcy to discharge the debt because he thought this would stop the bad references and enable him to find a job.²⁵⁹ History fails to record how he expected the discharge order to extirpate rancor and vindictiveness. Although a creditor nasty and dimwitted enough to hurl false charges that prevent a debtor from earning money to repay the debt might well be expected

(1979); Comment, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1110-12 (1979).

253. *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973), cert. denied, 414 U.S. 880 (1973); *Kowall v. United States*, 53 F.R.D. 211, 213 (W.D. Mich. 1971); *Commonwealth v. Malone*, 244 Pa. Super. Ct. 62, 69, 366 A.2d 584, 588 (1976).

254. *Central Valley Chapter of Seventh Step Foundation, Inc. v. Younger*, 95 Cal. App. 3d 212, 157 Cal. Rptr. 117 (Ct. App. 1979).

255. Cf. VA. CODE § 19.2-392.4 (Cum. Supp. 1979) (prohibits employers and others from requiring applicant disclosure of expunged charge or arrest); Equal Credit Opportunity Regulations, 12 C.F.R. § 202.5(d)(1) (1979) (creditor shall not ask applicant's marital status); *id.* § 202.5(d)(2) (creditor shall not ask if income derived from family support payments); *id.* § 202.5(d)(3) (creditor shall not ask applicant's sex), *id.* § 202.5(d)(4) (creditor may not require information about applicant's race, religion or national origin).

256. See 12 C.F.R. § 202.6(b) (1979) (creditor may not consider various information about applicant's age and income sources).

257. Cf. MO. ANN. STAT. § 610-110 (Vernon 1979) (no one who denies closed or expunged records is guilty of perjury); VA. CODE § 19.2-392.4 (Cum. Supp. 1979) (applicant need not disclose expunged charges or arrests resulting in no conviction); Ober, *supra* note 252, at 435.

258. 409 U.S. 434 (1973).

259. *Id.* at 438.

to continue this conduct even after the debtor's discharge in bankruptcy, Kras naively assumed that a bankruptcy discharge would nullify human cussedness and shortsightedness. Because the creditor seems to have been after Kras for something other than money,²⁶⁰ however, application of the clean-slate theory in this case would have provided no relief.

The clean-slate theory is inadequate for other reasons. Under the 1978 Code, creditors will receive notice, the automatic stay and the discharge injunction, as they must for the process to operate.²⁶¹ After thus broadcasting the discharge, efforts to suppress it completely by sealing or expunging a court document seem futile.²⁶² Sealing, moreover, has an eerie aspect of unreality because it attempts to erase a historical fact and condones dishonest answers.²⁶³ Finally, bankruptcies should not be concealed to the public in all cases. Although bankruptcy is designed primarily for the honest but unfortunate, its coverage is not limited to that group. The Code contemplates that some undesirable characters will be discharged,²⁶⁴ and creditor apathy in failing to oppose discharges and moving to bar dischargeability allows more rascals to obtain discharges. Thus, unlike a wrongful arrest or a finding of innocence, a past bankruptcy or the conduct that led to it may be relevant to many future decisions.

A more moderate and restrained approach than the clean-slate theory may emerge. The slate will probably never be erased completely and immediately. Information about bankruptcy will be used at least when relevant to a decision.²⁶⁵ For example, a Minnesota statute forbids public employers and licensing agencies to consider prior criminal convictions unless they "directly relate" to the position or occupation.²⁶⁶ Bankruptcy is less relevant to a life insurance application than to one for unsecured credit. Similarly, the more time that has passed since the bankruptcy the less relevant the information would be to any

260. Kras's intentions were also vague. The litigation tested whether the filing fee was constitutional. *Id.* at 435. The Court held it was. Perhaps Kras's attorneys realized that the relief from harassment Kras expected was not realistic and filed to test the statute because Kras was a litigant with standing who would be harmed less by losing than most indigents.

261. 11 U.S.C.A. §§ 342, 362(a)(2) (West 1979).

262. *Cf.* Comment, *supra* note 252, at 1112-13 (unsealing criminal records).

263. *Id.*

264. *See* 11 U.S.C.A. §§ 523, 727 (West 1979).

265. *See* *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (qualification must be rationally connected with fitness to practice law).

266. MINN. STAT. ANN. § 364.03 (West Cum. Supp. 1980).

decision.²⁶⁷ Statutes allow convicted criminals to petition to expunge their records after an unblemished period has passed.²⁶⁸ The Fair Credit Reporting Act is a beginning; it requires credit bureaus to purge old bankruptcies from credit files.²⁶⁹ Unfortunately, the bureau may retain the data for ten years, while some criminal convictions may be expunged after mere one- or three-year waiting periods.²⁷⁰

In addition to leaving a little on the slate and erasing it only after a time, Congress might consider affording debtors two types of discharge, which the bankruptcy judge would classify. The honest but unfortunate debtor could receive a sealed discharge or one to be disseminated as "faultless." The improvident or blameworthy debtor, on the other hand, would encounter full publicity and any attending stigma for a longer period of time.²⁷¹ The statute or regulation could tell licensing authorities and creditors whether and how long to consider these decisions as well as how to weigh them.²⁷²

Finally, aside from the discharge and a short sermon,²⁷³ will society do anything for the bankrupt personally? Since the 1930s—about the time the Supreme Court articulated the fresh start policy in *Local Loan*—the United States has been moving toward a social service state. Assuming that the poor are not responsible for their own troubles and recognizing that many of the hazards and vicissitudes of life are caused by forces beyond any one individual's control, the nation today protects the aged, the infirm, the unemployed, and many others. As society ameliorated the hardships caused by illness and unemployment, it might have concluded that people who could not pay their debts were ne'er-do-wells and thus tightened bankruptcy. Instead, it assumed that poor debtors were not responsible for their troubles and progressively liberalized bankruptcy.

The Bankruptcy Commission suggested that government officials

267. Recent bankrupts, however, are often good credit risks because they have fewer creditors and are forbidden from another discharge for six years. 11 U.S.C.A. § 727(a)(8) (West 1979); Shuchman, *supra* note 20, at 425-26.

268. *E.g.*, CAL. PENAL CODE § 1203.4a (Cum. Supp. 1980) (one year waiting period); OHIO REV. CODE ANN. § 2953.32 (Anderson Supp. 1979) (three year waiting period).

269. *See* 15 U.S.C.A. § 1681c(a)(1) (West Supp. 1980).

270. *Id.*; CAL. PENAL CODE § 1203.4a (Cum. Supp. 1980) (one year); OHIO REV. CODE ANN. § 2953.32 (Anderson Supp. 1979) (three years).

271. *Compare* 11 U.S.C.A. § 1328 (West 1979) (Chapter 13 usual discharge) *with id.* § 1328(b)(1) (hardship discharge).

272. *Cf.* Equal Credit Opportunity Regulations, 12 C.F.R. § 202.5(d) (1979) (information a creditor may not request); *id.* § 202.6(b) (rules for using information).

273. *See* 11 U.S.C.A. § 524(d) (West 1979) (hearing after court has decided whether to discharge).

counsel troubled debtors.²⁷⁴ Critics charged, however, that pre-filing counseling was the nose in the tent for compulsory composition-extensions under a rehabilitation chapter, and they bewailed the decline of the adversary system.²⁷⁵ The Commission Report was ahead of its time. Changes in public opinion and legal thought not yet articulated in legislation and opinions compel me to conclude that bankruptcy is evolving toward a social welfare approach. One of the major contemporary problems is to enhance human liberty in the social service state. Providing counseling after the discharge to those bankrupts who volunteer for it would combine help with choice and preserve the adversary system.²⁷⁶ The changes since 1969 have improved bankrupts' lives so much, however, that to suggest professional golf or bowling lessons in addition would be viewed by skeptics as excessive, paternalistic, and bad form.

Observers of bankruptcy too often suffer from excessive attention to labyrinthian complexity and serbian detail, while they often ignore more palpable but perhaps more real change. The social service state that has emerged in the United States seeks to avoid punishing the innocent and to reduce life's unfairness. Parallel legal thinking has shifted from a legalistic, mechanical, rule-oriented jurisprudence to a more realistic view that looks to the law's effect on society. The improvements in the bankrupt's fresh start outlined in this Article have translated those trends into practical policy, and the modest suggestions and speculations in the preceding paragraphs attempt to limn the future as a product of the past.

274. COMM'N REP., *supra* note 9, pt. II, § 4-203 at 73; D. STANLEY & M. GIRTH, *supra* note 9 at 5, 204-05.

275. *Proposed Bankruptcy Reform Act: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 866 (1975) (Prof. Shuchman); *Proposed Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 863 (1975); Rendleman, *supra* note 10, at 1197, 1225-35.

276. *Proposed Bankruptcy Reform Act: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 1320 (1975). See also Lee, *The Counseling of Debtors in Bankruptcy Proceedings*, 45 AM. BANKR. L.J. 387 (1971).

