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REFLECTIONS ON THE BANKRUPTCY LAWS OF THE UNITED STATES: The Debtor's Fresh Start

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I. INTRODUCTION

A few years ago the *Readers' Digest* ran a story with the arresting title, "Planned Bankruptcy: The Racket That Cheats Us All." A subtitle explained: "Loopholes in our bankruptcy law enable swindlers to fill their pockets—and rob consumers of millions of dollars a day."¹ The opening gambit was a reference to an appliance store owner in the midwest who, within six weeks of starting business, "reached his unrespectable goal: bankruptcy." He testified that his appliances had been "stolen," his books "misplaced," and the bank deposits "gambled away." Since the story could not be disproved, according to the *Readers' Digest* account, the owner "had to be declared bankrupt, discharged from debts of \$220,000 for items ordered from wholesalers, and compelled to surrender his assets to creditors. His assets? A desk, a chair and six toasters."

Readers' Digest does not carry case citations, and the full story cannot be checked. However, the lion's share of the inventory and other assets probably was recovered by the distributors and financiers who made it possible for the owner who started on credit.² In

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¹READERS' DIGEST, May 1966, at 125. The author was Bill Surface. William Surface is identified as an "American sports writer, columnist, and author" in 2 H. SHARP, HANDBOOK OF PSEUDONYMS AND PERSONAL NICKNAMES 979 (1972).

²Security interests in inventory effective against the trustee in bankruptcy are exceedingly easy for distributors and financiers to obtain. See, e.g., Coogan, *Operating Under Article 9 of the Uniform Commercial Code Without Help or Hindrance of the "Floating Lien,"* in 1 P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER U.C.C. 782-809 (1963); Hogan, *Future Goods, Floating Liens, and Foolish Creditors*, in 2 *id.* 1907-29 (1966).

any event, the Bankruptcy Act would not prevent their recovering their investment to the extent that it was secured by the collateral furnished by them or bought with their money. I shall discuss in the second lecture the question of how far such creditors should be able to protect themselves against loss by security arrangements and force other creditors—employees and suppliers of services and consumable items—to absorb the brunt of the business failure. The point I make now is that there is nothing in the Bankruptcy Act that would keep the creditors from access to these assets.

Without saying what happened in the case described in his opening paragraphs, the *Readers' Digest* author wrote that "[s]uch deliberate bankruptcy is an alarming new nationwide phenomenon."³ The story then went on to describe what are called "scam" operations and "planned bankruptcies," with the implication that the Bankruptcy Act not only permits but countenances such conduct. The point was then made that the creditors who lose money as a result of planned bankruptcies of their customer debtors must recoup these losses as costs passed on ultimately to consumers who pay the final bill. There can be no contesting the essential correctness of the point that credit losses are passed on in one way or the other to those of us who pay the bills in our economic and political system.

We all know that bad debt losses, like those resulting from shoplifting and floods and fires, increase the cost of doing business. But how do the bankruptcy laws come in for blame? Because, according to the *Readers' Digest* story: "Under the National Bankruptcy Act of 1938, designed to protect innocent victims of financial reverses, anyone hopelessly indebted can legally dismiss liabilities without being punished."⁴

II. NONPAYMENT OF DEBT AS AN OFFENSE

A. Punishment of Delinquent Debtors

The twin notions that the bankruptcy laws of the country were designed only for persons who have been overwhelmed by indebtedness without fault and that persons who fail to pay their debts ought to be punished have an ancient lineage and come from a hardy stock. The Romans, under the laws of the Twelve Tables,

³Surface, *Planned Bankruptcy: The Racket That Cheats Us All*, READERS' DIGEST, May 1966, at 125.

⁴*Id.* at 126.

allowed a creditor of a delinquent debtor to confine him in chains of fifteen pounds in weight for sixty days at the creditor's house but without any duty on the part of the creditor to feed him.⁵ After subjection to certain public indignities, which may have been justified as guaranties of due process,⁶ the delinquent debtor could be put to death or sold in bondage beyond the Tiber. If two or more creditors prosecuted their claims simultaneously against a debtor, the body of the debtor could be divided among them "according to the amount of their respective demands."⁷ As Professor Jolowicz has observed:

The frightful severity of this process of execution, which is vouched for by the fragments of the Tables, shows clearly that

⁵W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 618-19 (3d ed. 1963); H. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE ROMAN LAW* 190-91 (2d ed. 1954); Washer, *Imprisonment for Debt*, 7 GREEN BAG 410, 411 (1895).

⁶During the interlude between confinement in the creditor's house and disposition of the debtor's body, the debtor was conveyed to the marketplace before the praetor, and his debts proclaimed for three consecutive days. If a vindex appeared for him, he was liberated. This intervenor was a third person, who came forward, attacked the claim and judgment as invalid, and agreed to pay double the amount of the indebtedness if he should not prove it so. If no vindex presented himself, the person of the debtor was restored to the custody of the creditor, who could dispose of him as he pleased. Washer, *supra* note 5, at 411. See also W. BUCKLAND, *supra* note 5; T. MACKENZIE, *STUDIES IN ROMAN LAW* 374-75 (5th ed. 1880).

⁷Washer, *supra* note 5, at 411. The author of the chapter on assignments for the benefit of creditors and voluntary compositions (Seymour Lieberman of the Houston, Texas, bar), in *CREDITORS' RIGHTS IN TEXAS* (1963), introduces his subject (at p. 115) by this quotation from the Twelve Tables, Table III, 6 (c. 450 B.C.): "If the debtor be insolvent to serve creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity. Or, if his creditors, consent to it, let him be sold to foreigners beyond the Tiber."

Washer was so outraged by the reports that he was quoting (see *supra* notes 5 & 6 and accompanying text) that he added this impassioned paragraph:

If this account be true, the practice, for diabolicalness, finds no parallel in the history of the world. Men have, in the insanity engendered by intense religious enthusiasm, committed deeds of blood at which we shudder, but the barbarity of their acts becomes insignificant when compared to an officer of justice, calmly and in the performance of the duty imposed on him by the positive law of the land, condemning a man to be quartered, and the reeking parts to be delivered to the Shylocks who stood ready to receive their portion in return for a few pieces of silver.

Professors Buckland, Jolowicz, and Lord Mackenzie have noted that some writers have thought that the relevant clause of the Laws of the Twelve Tables is not to be taken literally but to mean that the property of the debtor or the proceeds of the sale of the debtor as a slave was divided. W. BUCKLAND, *supra* note 5, at 620; H. JOLOWICZ, *supra* note 5, at 192 n. 1; J. MACKENZIE, *supra* note 6, at 374. All these writers refer to Roman authorities who knew of no instance of debtor dissection.

the law of debt was still regarded as part of the law of delict; the creditor who is not paid what is owed him has suffered a wrong; he desires to take vengeance on his debtor and the law permits him to have his way. The process described is, clearly, merely a regulation of vengeance, of the primitive seizure of the debtor by the creditor.⁸

Largely because of the solicitude of the feudal law for preserving the availability of the lord's subjects for military and other services, imprisonment and other sanctions against the body of the debtor did not flourish in the Middle Ages. As feudalism declined, however, imprisonment for debt was increasingly resorted to with the blessings of the Church, "debt and insolvency being considered sinful."⁹

Debtors were excommunicated; persons who died without leaving sufficient estate to discharge their obligations were denied Christian burial. In some regions the priest who absolved the dying debtor became liable for the latter's debts. Many debtors who escaped imprisonment were compelled to wear a distinguishing garb.¹⁰

The employment of arrest and imprisonment of debtors by creditors seeking collection of their claims was greatly facilitated in England by Parliamentary enactments in the fourteenth and fifteenth centuries, and by the time of Blackstone all common law courts were allowing arrest and body execution routinely in civil actions for collection of debts.¹¹ Charles Dickens, whose father was often heavily in debt—"partly by his misfortunes and partly by his fault"—and often moved the family in Charles' early years to a new address to escape creditors until he settled down in the Debtors' Prison of the Marshalsea,¹² has enabled us to experience vicari-

⁸H. JOLOWICZ, *HISTORICAL INTRODUCTION TO ROMAN LAW* 192 (2d ed. 1954). A similar observation is made in the first chapter on "Early Forms of Liability" in O. HOLMES, *THE COMMON LAW* 14 (1938): "[T]he right to put to death looks like vengeance, and the division of the body shows that the debt was conceived very literally to inhere in or bind with a *vinculum juris*."

⁹Ford, *Imprisonment for Debt*, 26 MICH. L. REV. 24, 25 (1926).

¹⁰*Id.* at 25-26.

¹¹3 W. BLACKSTONE, *COMMENTARIES* *281 *et seq.*; 8 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 231-32 (1926); Ford, *Imprisonment for Debt*, 2 TEMP. L.Q. 330-50 (1928); Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 61-63 (1968); cf. Fox, *Process of Imprisonment at Common Law*, 39 L.Q. REV. 46 (1923).

¹²G.K. Chesterton, *Charles John Huffam Dickens* in 7 ENCYC. BRITANNICA 376 (1970). See also notes 66-67 *infra* and accompanying text.

ously the poor debtor's misery in the merrie old England of the nineteenth century. Like the distinction between law and equity,¹³ imprisonment for debt has been on the way out in both England¹⁴ and the United States¹⁵ for the last one hundred fifty years, but

¹³See C. CLARK, CODE PLEADING 17-31 (2d ed. 1947); F. EVERSLED, ASPECTS OF ENGLISH EQUITY 47-48 (1954); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.50[1] (2d ed. 1959).

¹⁴An Act of Parliament passed in 1869, 32 & 33 Vict., c. 62, abolished all arrest on *mesne* process, and this was supposed to have done away with the *capias* writs under which debtors were imprisoned. The English courts were authorized, however, to require any judgment debtor to pay an unsatisfied judgment in installments, and if it was believed that the debtor had the means of paying during the interval allowed for the payment of an installment, the debtor might be imprisoned for up to six weeks. Subsequent defaults could be the basis for further imprisonment. Under this procedure thousands of consumer debtors have been imprisoned every year. REPORT OF THE COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS, CMD. No. 3709, at 249-50 (1969); Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 31 (1926).

A twelve-man committee, appointed in 1965 and chaired by Mr. Justice Payne, came to a unanimous conclusion that committal to prison under the Debtors Act of 1869 should be abolished but by a divided vote recommended retention of imprisonment of defaulters on orders to provide maintenance of a wife and family. REPORT OF THE COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS, CMD. No. 3709, at 246-89 (1969). The committee summarized its reasons for abolition as follows:

The large majority of debtors received in prison are inadequate, unfortunate, reckless or irresponsible persons in need of help, not dishonest or plausible debtors

The present judgment summons practice does not enable the debtor's means and circumstances to be properly investigated before the issue of or execution of a committal order

The defects in this procedure . . . are due not to the judges, registrars and their staff but to the system itself

One cannot justify sending inadequate persons to prison in order to extract money from the recalcitrant

Suppliers must be persuaded to enquire about the credit worthiness of potential customers before concluding transactions with them

Id. at 261. For a wry comment on the rationale underlying the English law of 1869, see T. ARNOLD, SYMBOLS OF GOVERNMENT 204 (1935).

¹⁵About the year 1830 a wave of reform swept the country. . . .

In consequence of constitutional provisions and supplementary statutes, imprisonment for debt is generally abolished in contract cases. There is a great variation in the practice of the various states in tort and fraudulent contract cases. . . . Constitutional provisions against imprisonment, for debt are usually construed as applying to the common law writs of *capias ad respondendum* and *capias ad satisfaciendum*, but not to equity and admiralty process.

Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 29, 33-34 (1926).

According to Comment, 80 YALE L.J. 1679 (1971), "Imprisonment for debt as a method of enforcing commercial obligations is now banned in every state," and

correspondence received by the Commission on Bankruptcy Laws of the United States suggests that the attitudes that animated the builders of debtors' prisons still survive. That, indeed, imprisonment for debt is not a matter of concern only to historians is evidenced by an examination of current legal literature.¹⁶

B. Fault as a Bar to Bankruptcy Relief of the Debtor

Correspondence received by the Commission sometimes stated or assumed as a fundamental premise of bankruptcy laws that benefits should be available only to a debtor victimized by misfortune for which he was in no way accountable or, in any event, benefits should be denied to a debtor found to be blameworthy. There are interesting though elusive antecedents for this view that still survive in some quarters.

The origins of bankruptcy can be traced to the Roman processes, *missio in bona* and *cessio bonorum*.¹⁷ The latter was in the nature of a voluntary composition effected by a debtor with his creditors but required judicial authorization,¹⁸ and it may have been available only to a debtor whose insolvency was not due to his own fault.¹⁹ By opting for this course the debtor obtained an immunity from arrest and imprisonment, escaped the badge of infamy, and was allowed to retain so much of his after-acquired property as was necessary for his subsistence.²⁰ The corollary is

relevant constitutional and statutory provisions are cited. 80 YALE L.J. at 1679 n. 1. The Supreme Court has not found imprisonment for debt forbidden by the Constitution of the United States. *Cf. Gotthill v. Sills*, 375 U.S. 79 (1963) (certiorari to review order authorizing body execution held to have been improvidently granted). See *Carter v. Lynch*, 429 F.2d 154, 157-58 (4th Cir. 1970), for a recent instance of an unsuccessful challenge to imprisonment for nonpayment of a civil judgment. The case is criticized in 24 VAND. L. REV. 621 (1971).

¹⁶See, e.g., Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power & the Effectiveness of Notice Provisions in the State of New York*, 24 SYRACUSE L. REV. 1217 (1973); Rogge, *Treatment of Debtors*, 22 BUFF. L. REV. 45, 49-55 (1972); Comment, *Imprisonment for Debt & the Constitution*, 1970 LAW & SOC. ORDER 659; Note, *Imprisonment for Debt in 1969*, 4 N. ENG. L. REV. 227 (1969); Comment, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679 (1971); Annot., 48 A.L.R.3d 1324 (1973).

¹⁷S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 386 (1967).

¹⁸*Id.*

¹⁹W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 645 n.2 (3d ed. 1963); H. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 226 (1954). Professor Jolowicz also surmises that *cessio bonorum* was not available in no-asset and nominal-asset cases.

²⁰BUCKLAND, *supra* note 19; Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223-26, 235-36 (1918).

that if the debtor thereafter acquired enough wealth to pay his debts in full, he remained liable therefor.²¹ *Missio in bona*, on the other hand, accorded the debtor no immunity from imprisonment or from infamy,²² though apparently the debtor was protected against seizure for one year.²³

Bankruptcy experienced a revival among the Italian cities during the thirteenth and fourteenth centuries, but one of its distinctive characteristics was stigmatization of the bankrupt.²⁴ Professor Riesenfeld reports that Scotland, which drew more heavily than did England on the civil law of the continent, imported the European practice of compelling a bankrupt to wear degrading apparel.²⁵ It is nevertheless generally acknowledged that the bankruptcy laws of England, the first of which was enacted in 1543,²⁶ were strongly influenced by the precursor institution as it had developed in Italy and spread through France, Spain, and other European countries.²⁷ Lord Coke observed: "We have fetched as well the name as the wickedness of bankruptcy from foreign nations."²⁸

The first English act recited that "divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties."²⁹ It accordingly authorized seizure of the property of such persons, their imprisonment, and distribution of their property among creditors. In 1670-71, Parliament passed an act to enable an imprisoned debtor to be discharged if it appeared that he had no estate exceeding ten pounds and that he had not conveyed away his estate to defraud his creditors.³⁰ The discharge from prison did not, however, discharge his debts.³¹ Professor Holdsworth has referred to the failure to differentiate between the unfortunate and

²¹BUCKLAND, *supra* note 19.

²²*Id.*, T. MACKENZIE, *STUDIES IN ROMAN LAW* 376 n.1 (5th ed. 1880).

²³BUCKLAND, *supra* note 19.

²⁴RIESENFELD, *supra* note 17; Levinthal, *supra* note 20, at 243-44.

²⁵Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 441 n.308b (1947).

²⁶34 & 35 Henry VIII, c. 4.

²⁷W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 230-33 (1926); RIESENFELD, *supra* note 17, at 386-87.

²⁸E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* ch. 63, at 277 (1797).

²⁹34 & 35 Henry VIII, c. 4, as quoted in HOLDSWORTH, *supra* note 27, at 236.

³⁰22 & 23 Charles II, c. 20.

³¹HOLDSWORTH, *supra* note 27, at 235.

the dishonest or reckless bankrupt as a great defect of this early bankruptcy legislation:

The governing idea of the statutes was that the bankrupt is an offender; and the fact that they provided for no discharge from his liabilities, as the result of bankruptcy proceedings, is characteristic of this governing idea. The result was that the rogue often escaped while "plain dealing men were laid hold of."³²

For all the harshness of the English law, Roger Sherman of Connecticut seems to have overreacted when he cast his vote in the Constitutional Convention of 1787 against the proposal to grant Congress the power "to establish uniform laws on the subject of bankruptcy" because "[b]ankruptcies were in some cases punishable with death by the laws of England and he did not choose to grant a power by which that might be done here."³³ Nor is there evidence of any inclination on the part of the colonial legislatures to adopt such harsh sanctions against bankrupts in their enactments patterned on the English laws. They did sometimes regard absence from fault as a prerequisite to bankruptcy as a mode of relief from imprisonment for debt. Thus, Professor William Crosskey, in a summary of the state legislation antedating the Federal Constitutional Convention of 1787, discussed a general "Act for the Regulation of Bankruptcy" adopted in Pennsylvania in 1785, which provided for a discharge of "such honest debtors as in the course of trade and dealing ha[d] without any fault or crime become bankrupt."³⁴ The same Act also extended relief from imprisonment to any debtor on surrender of all his property for the payment of his debts.

III. DISCHARGE

A. A Carrot for the Cooperative Debtor

Although discharge from indebtedness has become the pre-eminent purpose of bankruptcy in this country,³⁵ as we shall see, it was not provided by the English bankruptcy laws until 1705.³⁶

³²*Id.* at 243.

³³2 M. FARRAND, *THE RECORD OF THE FEDERAL CONVENTION OF 1787*, at 489 (1937).

³⁴1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 489 (1953), *citing* 12 PA. STAT. AT LARGE 70.

³⁵"[S]o prominent a feature did it become that in this country . . . the test of a bankruptcy law is that it contains a provision for the discharge of debts." G. GLENN, *LIQUIDATION* 484 (1935). *See also* RIESENFELD, *supra* note 17, at 354, 390, 593.

³⁶Discharge was introduced into the English law by the Statute of 4 Anne, c. 17 (1705).

Moreover, it appears not to be a feature of the bankruptcy laws of continental Europe.³⁷ The Supreme Court recently recognized that the original purpose of the discharge provisions of English law was to reward cooperating debtors,³⁸ in particular. Along with the stick provided by criminal sanctions against fraud and concealment, the discharge was viewed as a carrot to encourage complete and prompt surrender of the debtor's assets.³⁹ If, as a Harvard Law Review article argued seventy years ago, "the true functions of bankruptcy are administration and distribution" for the benefit of creditors,⁴⁰ the discharge feature in our bankruptcy laws has served at least an ancillary role in achieving the objective of full and equitable distribution. In view of trends in the volume and character of bankruptcies in this country, however, this role has a diminishing significance.

The most obvious and dramatic fact about bankruptcy in the United States during the last twenty-five years and the fact of most significance in the genesis and growth of the movement to create a commission to study the bankruptcy laws is the increase of petitions filed by nonbusiness debtors from a nadir of 8,566 in fiscal 1946 to a peak of 191,729 in fiscal 1967.⁴¹ Throughout this period the percentage of cases in which there are no dividends distributed to creditors—the no-asset and nominal-asset cases—has remained fairly stable at about eighty-five percent of all bankruptcies.⁴² Yet, in over ninety-five percent of the cases of

³⁷RIESENFELD, *supra* note 35, at 387.

³⁸United States v. Kras, 409 U.S. 434, 447 (1973), quoting and citing J. MACLACHLAN, BANKRUPTCY 20-21, 88 (1956).

³⁹Although the penalty for failure of bankrupts to surrender themselves and their property was made a felony without benefit of clergy, the reward of discharge and a small allowance from the estate to the cooperative bankrupt was added by the Statute of 4 Anne, c. 17 (1706) to supplement the threat posed by the penal provisions. See S. WILLISTON, CASES ON BANKRUPTCY 2 (2d ed. 1915).

⁴⁰Olmstead, *Bankruptcy as a Commercial Regulation*, 15 HARV. L. REV. 829, 834 (1902).

⁴¹Judge Edward Weinfeld, as Chairman of the Committee on Bankruptcy Administration of the Judicial Conference of the United States, provided data compiled by the Administrative Office of the United States regarding bankruptcy filings at the first hearings on the bill to create the Commission on Bankruptcy Laws of the United States. The figures cited in the text appear in *Hearings Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 60 (1968). Data on bankruptcy filings are published annually by the Director of the Administrative Office.

⁴²D. STANLEY, M. GIRTH, *et al.*, BANKRUPTCY: PROBLEM, PROCESS, REFORM 20 (© 1971 Brookings Institution, Washington, D.C.).

individual debtors discharge is granted.⁴³ Witnesses at the congressional hearings on the bills to create the Commission on Bankruptcy Laws and correspondents writing letters to the Commission darkly suggested that the escalation of consumer bankruptcies posed a threat for the nation's economy, social structure, and moral fiber.⁴⁴ The Commission called in a group of economists with special competence in the field of credit to get expert advice as to the seriousness of the threat presented by the annual statistics to the operation of the bankruptcy system.⁴⁵ They confirmed the correctness of the conclusions that had been reached by a Brookings Institution task force and that were subsequently published in December of 1971.⁴⁶ The Brookings report's statement bears repeating here:

A willingness to seek and extend credit is essential to the smooth functioning of the U.S. economy, whose institutional structure efficiently accumulates the nation's savings and channels them into the hands of borrowers. In the process, situations inevitably arise in which the borrower is unable or unwilling to repay. Indeed, the absence of credit losses would be an indication of economic inefficiency, since it would suggest that the marketplace was not being allowed to work and that lenders were withholding funds from marginal borrowers as a class, even though such borrowers would be willing and able to pay interest rates sufficient to cover losses on bad debts.

Total private debt has grown rapidly in the last two decades but there is little empirical evidence that the debt burden is too great for borrowers as a whole. Unless there is a downturn in economic activity considerably worse than anything the United States has experienced in almost thirty years—a possibility that most economists think unlikely—the existing and expected debt level is not alarming.

⁴³V. COUNTRYMAN, *CASES AND MATERIALS ON DEBTOR AND CREDITOR* 327-28 (1964) ("Bankrupts receive discharges in 95 per cent of the cases—in 80 per cent of the asset cases and in 90 per cent of the cases in which nothing is available for creditors").

⁴⁴*Hearings on S. J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 5 (1968) (hereinafter cited as *Sen. Hearings*); *Hearings on S. J. Res. 88 and H.R. 6665 and H.R. 12250 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 9, 43 (1968) (hereinafter cited as *House Hearings*).

⁴⁵REPORT OF THE COMMISSION ON BANKRUPTCY LAWS OF THE UNITED STATES pt. 1, at xiii (1973) [hereinafter cited as COMMISSION REPORT].

⁴⁶D. STANLEY, M. GIRTH, *et al.*, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 39-40 (©1971 Brookings Institution, Washington, D.C.).

Some \$2 billion of debts were discharged in the bankruptcy courts in 1968—about .2 per cent of the private debt outstanding—a cost that is widely diffused throughout the economy, being borne partly by borrowers as a whole, through higher interest rates, but principally by customers of business borrowers, through higher prices.

Business bankruptcy rates have been relatively stable for the past decade. Personal bankruptcies, however, have sharply increased in number since World War II, though at a diminishing rate, and actually decreased in 1968 and 1969. The growth apparently resulted primarily from the increase in the amount of indebtedness of the population rather than from deteriorating credit standards or a greater willingness of persons to enter bankruptcy.

Bankruptcy, then, is not so much a problem to the American economy as it is a human problem, and a problem in court procedure and in government administration⁴⁷

The Commission on Bankruptcy Laws came to the same conclusion, and its recommendations reflect this orientation.

Witnesses at the congressional hearings on the bill to create the Commission and correspondents writing the Commission frequently made the entirely plausible point that the sponsors of the Bankruptcy Act of 1898 could not have contemplated that the Act would be so extensively used by consumer debtors and that so large a portion of the cases would involve no assets or only nominal assets.⁴⁸ The point does not, however, prove the conclusion frequently attached to it, *viz.*, that the Act should be amended to cut down access by consumer debtors to relief under the Act. In particular, the Commission heard or received arguments renewing a proposal made by the American Bar Association's Consumer Bankruptcy Committee in the 1960s that a wage earner should not be granted a discharge unless the referee found that the debtor could not obtain adequate relief under Chapter XIII by proposing a plan for payment of his debts out of future earnings.⁴⁹ The Committee's proposal for what was generally denominated a compulsory Chapter XIII was supported by the American Bar

⁴⁷*Id.*

⁴⁸*Sen. Hearings, supra* note 44, at 5, 47, 48, 91; *House Hearings, supra* note 44, at 43, 85.

⁴⁹The proposal was embodied in H.R. 1057 and H.R. 5771, introduced into the First Session of the 90th Congress.

Association, the American Bankers Association, and creditor-oriented spokesmen⁵⁰ and opposed by labor unions, the National Bankruptcy Conference, and the Judicial Conference of the United States.⁵¹ The Judicial Conference and other opponents thought it made an invidious distinction between wage earners and businessmen whose access to relief by way of discharge would remain unimpaired by the proposal.⁵² Moreover, the opponents were convinced that no wage earner plan stood much chance of successful performance if the debtor was forced to accept it.⁵³ Presumably convinced by the opponents' arguments, the House Committee on the Judiciary did not report out the bill for a compulsory Chapter XIII, and no bill proposing such a measure has been introduced since 1967.

B. Discharge as Salvation for the Debtor

The foregoing account of the origin of the discharge of the debtor in bankruptcy falls considerably short of explaining how it has come to its present importance as a means of extricating debtors from financial distress. Since there has been no parallel development in other countries, the tracing of its evolution requires resort primarily to American sources.

Daniel Webster, himself no stranger to financial stringency,⁵⁴ supported enactment of the Bankruptcy Act of 1840 with this word picture of the need for debtor relief:

There are probably one or two hundred thousand debtors, honest, sober, and industrious, who drag out lives useless to themselves, useless to their families, and useless to their country, for no reason but that they cannot be legally discharged from debts in which misfortunes have involved them, and which there is no possibility of their ever paying. I repeat, again, that these cases have now been accumulating for a whole generation.⁵⁵

It is true they are not imprisoned;⁵⁶ but there may be, and

⁵⁰*Hearings on H.R. 1057 and H.R. 5771 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 12-44, 112-14, 121-34, 136-37 (1967).*

⁵¹*Id.* at 9-11, 45-112, 115-21, 134-35.

⁵²*Id.* at 9, 22-23, 47, 74, 105.

⁵³*Id.* at 10, 50.

⁵⁴23 ENCYC. BRITANNICA 470, 471-72 (1954).

⁵⁵The first National Bankruptcy Act, enacted in 1800, 2 Stat. 19, had been repealed on December 19, 1803, 37 years before Webster's speech, by 2 Stat. 248.

⁵⁶Webster later in this speech alluded to the progress of the previous ten years "on another connected subject; I mean the abolition of imprisonment for debt."

there are, restraint and bondage outside the walls of the jail, as well as in. Their power of earning is, in truth, taken away; their faculty of useful employment is paralyzed, and hope itself becomes extinguished. Creditors, generally, are not inhuman or unkind; but here will be found some who hold on, and the more a debtor struggles to free himself, the more they feel encouraged to hold on. The mode of reasoning is, that, the more honest the debtor may be, the more industrious, the more disposed to struggle and bear up against his misfortunes, the greater the chance is, that, in the end, especially if the humanity of others shall have led them to release him, their own debts may be finally recovered.

. . . Many of these insolvent persons are young men with young families.⁵⁷ Like other men, they have capacities both for action and enjoyment. Are we to stifle all these for ever? Are we to suffer all these persons, many of them meritorious and respectable, to be pressed to the earth for ever, by a load of hopeless debt? . . . The insolvent persons have not the power of locomotion. They cannot travel from State to State. They are prisoners. To my certain knowledge, there are many who cannot even come here to the seat of government to present their petitions to Congress, so great is their fear that some creditor will dog their heels, and arrest them in some intervening State, or in this District, in the hope that friends will appear to save them, by payment of the debt, from imprisonment. These are truths; not creditable to the country, but they are truths. I am sorry for their existence. Sir, there is one crime, quite too common, which the laws of man do not punish but which cannot escape the justice of God; and that is, the arrest and confinement of a debtor by his creditor, with no motive on earth but the hope that some friend, or some relative, perhaps almost as poor as himself, his mother as it may be, or his sisters, or his daughters, will give up all their own little pittance, and make beggars of themselves, to save him from the horrors of a loathsome jail. Human retribution cannot reach this guilt; human feeling may not penetrate the flinty heart that perpetrates it;

⁵⁷The Brookings Institution's team of investigators studied four hundred debtors chosen at random from files of bankruptcy cases closed in fiscal year 1964 and interviewed two years later. Over half were still under forty years of age, and 76% were married. D. STANLEY, M. GIRTH, *et al.*, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 41-42 (1971 Brookings Institution, Washington, D.C.). Other studies examined by the Commission on Bankruptcy Laws indicated that "the ages of nonbusiness debtors in cases under the Act tend to cluster in the late 20's and early to mid 30's," with "mean ages ranging from 30 years to slightly over 34 years." COMMISSION REPORT, pt. I, at 42.

but an hour is surely coming, with more than human retribution on its wings, when that flint shall be melted, either by the power of penitence and grace, or in the fires of remorse.⁵⁸

It is bad to the public and to the country, which loses the effort and the industry of so many useful and capable citizens. It is bad to creditors, because there is no security against preferences, no principle of equality, and no encouragement for honest, fair, and reasonable assignments of effects. As to the debtor, however good his intentions or earnest his endeavors, it subdues his spirit, and degrades him in his own esteem; and if he attempts any thing for the purpose of obtaining food and clothing for his family, he is driven to unworthy shifts and disguises, to the use of other persons' names, to the adoption of the character of agent, and various other contrivances, to keep the little earnings of the day from the reach of his creditors. Fathers

⁵⁸Arrest and confinement for such unworthy and ulterior purposes occur less often nearly 150 years later, but the flinty hearts beat on. Twenty-five years ago the United States Supreme Court, in *Maggio v. Zeitz*, 333 U.S. 56 (1948), dealt with a fairly common phenomenon in bankruptcy, the turnover order directed against a bankrupt or an officer of a bankrupt company who could not comply and who therefore had to be punished for his disobedience of the court's order. In the opinion of the court being reviewed, Judge Jerome Frank had said, "[a]lthough we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which direct Maggio 'to do an impossibility, and then punish him for refusal to perform it.'" *In re Luma Camera Service, Inc.*, 157 F.2d 951, 955 (2d Cir. 1946). The reason for this blatant stultification of the legal process was that Maggio was proven to have taken possession or control of a bankrupt corporation's assets several months before the bankruptcy and, in the absence of a credible explanation by him of what happened to them, he was presumed by a rule of law declared and enforced by the courts in the Second Circuit to have continued in possession of the assets or their proceeds. The Supreme Court found a way of letting the Court of Appeals for the Second Circuit off the hook on which it had impaled itself so that poor Joe Maggio could get out of jail before rotting there. Mr. Justice Jackson felt obliged to observe in passing: "It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed." 333 U.S. at 64. One occasionally reads and hears laments about the difficulty of collecting bankrupt estates since the Supreme Court decision in *Maggio v. Zeitz*.

The quotation from Webster also brings to mind a report received by the staff of the Commission on Bankruptcy Laws that some credit unions require borrowers to furnish a cosigner for every \$100 lent. Under such circumstances a discharge or even a wage earner plan confirmed for such a debtor is unlikely to give him and his family any relief from the irresistible pressure to take care of the debt to the credit union. The Commission proposed that during the term of any plan of payment confirmed for a debtor with regular income pursuant to Chapter VI of the Proposed Act, creditors should be enjoined from pursuing their remedies against sureties. COMMISSION REPORT, pt. I, at 167; *id.*, pt. II, § 6-208.

act in the name of their sons, sons act in the name of their fathers; all constantly exposed to the greatest temptation to misrepresent facts and to evade the law, if creditors should strike. All this is evil, unmixed evil. And what is it all for? Of what benefit to anybody? Who likes it? Who wishes it? What class of creditors desires it? What consideration of public good demands it?⁵⁹

Daniel Webster's oratory, with support from such distinguished statesmen as Henry Clay of Kentucky and John Quincy Adams and Rufus Choate of Massachusetts, was instrumental in persuading Congress to enact the Bankruptcy Act of 1841.⁶⁰ Theophilus Parsons was to say in 1857 that although the law was repealed one year, six months, and fourteen days after it was enacted,

it affected more property, and gave rise to more numerous and more difficult questions, than any other law has ever done, in the same period. It was repealed because it had done its work. The people demanded it, that it might settle claims and remove encumbrances and liens and sweep away an indebtedness that lay an intolerable burden on the community.⁶¹

While the philosophy that a distressed debtor should be afforded relief by way of a discharge in bankruptcy seems to have flourished only in this country, it is to be remembered that the English law introduced the discharge, albeit for another reason, in 1705.⁶² We have earlier noted that imprisonment for debt has been undergoing a contemporaneous process of decline on both sides of the Atlantic for more than a century.⁶³ This phenomenon of parallel developments was observed and eloquently described in 1888 in a paper I once serendipitously discovered in the Reports of the American Bar Association. The paper was delivered as an address by Mr. J.M. Woolworth, an Omaha lawyer, to the meeting of the

⁵⁹*Speech of May 18, 1840*, reprinted in *SPEECHES AND ORATIONS OF DANIEL WEBSTER* 471 *et seq.* (Whipple ed. 1879), and under the title *The Fault Is Not in the Constitution*, in *THE GOLDEN AGE OF AMERICAN LAW* 373, 377-79 (Haar ed. 1965).

⁶⁰C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 67-68, 70-72, 79-80 (1935); Olmstead, *Bankruptcy a Commercial Regulation*, 15 *HARV. L. REV.* 829, 838-39 (1902). For further references to the role of Daniel Webster in connection with the Act of 1841, see J. MACLACHLAN, *BANKRUPTCY* 22-23 n.9 (1956).

⁶¹*THE LAWS OF BUSINESS FOR BUSINESS MEN* 235 (1857), reprinted in *THE GOLDEN AGE OF AMERICAN LAW* 380-81 (Haar ed. 1965).

⁶²See note 36 *supra* and accompanying text.

⁶³See notes 14 & 15 *supra* and accompanying text

Association at Saratoga Springs, New York, and its subject was "Jurisprudence Considered as a Branch of the Social Science."⁶⁴

Now mark how the law in a single one of its branches, that for instance of debtor and creditor, corresponded with the character of Englishmen of the 17th Century.⁶⁵ In the land whose boast it was that the moment the slave planted his foot upon its soil he became free, the body of the debtor was the property of the creditor; not to be sure, as it was in old Rome, where the usurer held in his hand the life of his victim, but hardly less so, when imprisonment was the penalty of unpaid debt. Poor debtors were confined with the vilest of criminals, loaded with irons and racked with tortures. Covered with filth and vermin they were left to die without pity, of cold, hunger, and jail fever. We read with horror of a woman dying in Devon County jail after an imprisonment of forty-five years for a debt of £ 19. But the parallel between the public morals and the law of debtor and creditor does not end here. Shortly after the beginning of this century English character began a radical reform. The renovation of morals has been growing and spreading and penetrating and dominating the social life of England, until today to get drunk, to gamble, to fight, to be debauched is to be ill-bred; which is the highest offence known to society. And with this improved morality has come also a charity, a kindness, a pity and sympathy for misfortune, until benevolence has assumed the guardianship, not of the poor and sick only, but of the vicious and criminal as well.

Note now the correspondence in the law of debtors. In 1813 insolvents were placed under the jurisdiction of a court, and upon rendering a true account of their property were entitled to seek their discharge.⁶⁶ This was the period of Dickens' Marshal-

⁶⁴11 A.B.A. REP. 21, 279-300 (1888).

⁶⁵In a previous passage, Mr. Woolworth had described that character in the following terms:

In the eighteenth century, English character was brutal. Dissoluteness, extravagance and debauchery were general and excessive. In drinking, oceans were drained; in gambling, colossal fortunes were staked and lost; in dueling, the dearest lives were sacrificed; in pugilism, the best men were maimed. From society, decency had fled; from commerce, honesty; from the Church, piety; from the heart, charity; from literature, chastity. With what exquisite sarcasm Thackeray pictured this in the first chapters of the *Virginians*. In his article on Chatham, Macaulay has told us what was the political morality of those days.

Id. at 293-94.

⁶⁶Mr. Woolworth refers here to 53 George 3, c. 102. Professor Holdsworth says that the court created by this act, situated in Portugal Street, Lincoln's Inn Fields,

sea and Little Dorrit. Thirteen years later the law provided that any one should be released upon surrendering all his goods.⁶⁷ In 1861 the imprisonment of common debtors was altogether repudiated, and the old building was condemned to destruction.⁶⁸ In our country the parallel runs further. Sympathy for distress, charity for the fallen, have been nowhere else so active, efficient and pervading as in America. Debts have almost lost their obligation: misfortune exempts the debtor in the public estimation. Laws have intervened for his protection: the homestead and exemption statutes, in violent contrast to the Common Law, attest the higher, purer, more beneficent morality of our day and people.⁶⁹

It thus appears that the wellsprings for the movements of the last century toward abolition of imprisonment for debt and the establishment of exemptions from creditor processes contributed to the development of discharge from debt as a value independent of the leverage it provided for encouraging debtor cooperation. It is plausible to believe that this process was not dissociated from the humanitarian impulses that animated the support for such causes as the abolition of slavery and prison and hospital reform.

Needless to say the tendency in the bankruptcy law was deplored by some observers. When the question of whether to retain or repeal the Bankruptcy Act of 1898 was being debated in 1902 in Congress and in the press, James Monroe Olmstead of the Boston bar wrote in the *Harvard Law Review* that in a predominantly commercial nation like the United States a bankruptcy law was absolutely indispensable.⁷⁰ But he could not refrain from adding these animadversions of its character as a debtor relief measure:

In America, unfortunately, bankruptcy has come to be regarded as a sort of poor-debtor law, as a species of clearing house for the liquidation of debt, or, as some have expressed it, a "Hebrew Jubilee" whereby the people at intermittent periods receive emancipation from their debts, are rehabilitated, and

is the one described so vividly by Dickens in *Pickwick Papers*. 11 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 598 (1938).

⁶⁷George 4, c. 57.

⁶⁸Mr. Woolworth must have intended reference here to the Debtors Act of 1869, which, however, as pointed out in note 14 *supra*, has failed to eliminate imprisonment for debt in England.

⁶⁹11 A.B.A. REP. 279, 294-95 (1888).

⁷⁰Olmstead, *supra* note 60, at 829. Mr. Olmstead's article was duly cited by Congressman Powers of Massachusetts in a speech to the House of Representatives, June 17, 1902. 35 CONG. REC. 459.

the "dead wood" of the community is thereby eliminated. That the rehabilitation theory was farthest from the minds of the Constitution, it has heretofore been attempted to be shown.⁷¹

The showing consisted of snatches from the records of the Constitutional Convention and the Federalist Papers evidencing simply a concern by the founding fathers with the need for uniformity of the bankruptcy laws and the connection of bankruptcy laws with commercial regulations in general.

Hostility to bankruptcy laws including provisions for discharge has frequently been attributed to agrarian interests.⁷² And it was curious how often witnesses speaking at the hearings conducted by the Commission on Bankruptcy Laws referred to the persistence of the Puritan ethic and rejection of the legitimacy of a discharge in bankruptcy among the people of the midwest.⁷³ Perhaps this "midwestern" attitude is illustrated by the brief that appeared in the case of *Bever v. Swecker*,⁷⁴ decided by the Supreme Court of Iowa in 1908, in which the counsel for the defendant was arguing that his client's liability for conversion of the plaintiff's cattle had been discharged in bankruptcy. His brief said in part:

We are not especially struck with the bankrupt law, but it is the law of the sovereign legislature of the U.S., and, as such, parties taking advantage of its benefits are entitled to just such benefits as it offers.

The year of Jubilee of the old Jews came once in 50 years and lasted just one year, and during its existence there was always a spontaneous "outburst" and era of good feeling, because everybody was square with everybody else. We are more humane and have continued this blessed year since July 18th,

⁷¹*Id.* at 834-35.

⁷²W. COLLIER, *BANKRUPTCY* 8 (14th ed. 1974); C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 15-16, 21, 32-34, 42-43, 136-37 (1935).

⁷³*See, e.g.*, Transcript of Public Hearing Before the Commission on Bankruptcy Laws of the United States, Los Angeles, Calif., May 12-13, 1972, at 159, 209, 234. The transcript is filed with the National Archives. *See* COMMISSION REPORT, pt. I, at xviii. The Commission undertook no systematic study of the correspondence it received, but a substantial portion of the letters stressing the theme that bankruptcy affords too easy access to discharge came from the midwest.

For a disquisition on the moral and ethical aspects of nonpayment of debt and discharge in bankruptcy, see Shuchman, *An Attempt at a "Philosophy of Bankruptcy,"* 21 U.C.L.A.L. REV. 403, especially 428-41, 449-58 (1973).

⁷⁴138 Iowa 721, 116 N.W. 704 (1908).

1898, and like the book, it still continues to flow and go on.⁷⁵

The Iowa Supreme Court eased the conscience of counsel by holding that the liability was not discharged under the predecessor of section 17a(2) of the present Act and section 4-506(a)(7) of the proposed Act.

IV. THE EXPLICATION AND IMPLICATIONS OF THE FRESH START POLICY

The classic statement of the "fresh start" policy of the bankruptcy laws was made by Mr. Justice George Sutherland, one of the most conservative justices of the conservative Supreme Court of the early 1930s. He spoke for a unanimous Court in striking down the Illinois case law that allowed the enforcement of a wage assignment securing a discharged debt. Decided forty years ago, the case is *Local Loan Co. v. Hunt*,⁷⁶ and it includes the following passages:

One of the primary purposes of the Bankruptcy Act 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." *Williams v. U.S. Fidelity & G. Co.*, 236 U.S. 549, 554-555. This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest in that it gives the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy* a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. . . . The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act.

. . . The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. . . . The new opportunity in life and the

⁷⁵The brief is bound and filed in the library of the University of Iowa College of Law.

⁷⁶292 U.S. 234 (1934).

clear field for future effort, which is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.⁷⁷

The role of the fresh start policy has primarily been one of providing the rationale and thrust for extending increasing protection of the debtor's right to a discharge in bankruptcy. It underlies the considerable expansion of the jurisdiction of courts of bankruptcy by the congressional amendments of the Bankruptcy Act in 1970 to prevent the persistent frustration of the discharge by creditors' litigation in state courts.⁷⁸ It is exemplified by the recent Supreme Court decision in *Perez v. Campbell*,⁷⁹ which overruled two earlier opinions on the issue⁸⁰ of whether revocation of a driver's license for failure to pay an automobile accident judgment conflicts with the discharge provisions of the Act. The recommendations of the Commission on Bankruptcy Laws respecting discharge provisions have been attacked as carrying the implications of the fresh start policy to unacceptable limits.⁸¹

The fresh start policy has also been influential in the construction of other provisions of the Act. Thus, it has been relied on as

⁷⁷*Id.* at 244-45.

⁷⁸84 Stat. 990, amending §§ 2, 14, 15, 17, 38, and 58 of the Act. See Countryman, *The New Dischargeability Law*, 45 Am. B.L.J. 1 (1971). Although rules of procedure promulgated by the Supreme Court pursuant to congressional enabling acts are not supposed to implement substantive policies, the rules should be compatible with, and conducive to the fulfillment of, the policies adopted by the Congress and the courts. Bankruptcy Rules 401, 404, and 409 should contribute in this way to the effectuation of the fresh start policy that has evolved through legislative and judicial processes.

⁷⁹402 U.S. 637 (1971).

⁸⁰*Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962); *Reitz v. Mealey*, 314 U.S. 33 (1941).

⁸¹Apparently losing sight of or ignoring one of the primary purposes of bankruptcy in the United States—to relieve the "honest" but unfortunate debtor from the weight of oppressive indebtedness—the Commission on the Bankruptcy Laws of the United States released its report on July 30, 1973, recommending that the Bankruptcy Act be completely revamped along different lines so as to provide relief for debtors whether honest or not. In its debtor oriented approach, the Commission proposed a new and sweeping "fresh start" policy which substantially infringes upon the present rights of creditors.

Twinem, *Bankruptcy Report: Some Limitations on Creditors' Rights*, 29 Bus. LAWYER 353-54 (1974).

support for a broad construction of the provisions defining provable claims.⁸² Most recently, it appears to have been of crucial significance in construing section 70a, which defines the property of the bankrupt estate.

The Supreme Court has this term granted certiorari to consider a disputed implication of the fresh start doctrine.⁸³ The question is whether the fresh start policy warrants the retention by the bankrupt of an income tax refund representing excessive withholding from his prebankruptcy income pursuant to the formula prescribed by the Internal Revenue Service. Three federal appellate courts have ruled on the question and have disagreed. In *In re Cedor*, the Ninth Circuit Court of Appeals affirmed a district court ruling that the tax refund belonged to the bankrupt rather than the trustee in bankruptcy,⁸⁴ and the Court of Appeals for the Eighth Circuit, in *In re Gehrig*, has rendered a decision in accord.⁸⁵ The Court of Appeals for the Second Circuit has disagreed in *In re*

⁸²See, e.g., *Maynard v. Elliott*, 283 U.S. 273 (1931), holding an indorser's liability provable (and therefore dischargeable); *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916), which held an installment contract for commercial services to have been broken anticipatorily by the bankruptcy of the person obligated to render the service. The result in the last cited case was to give the other party a claim for damages for the anticipatory breach but more importantly to free the bankrupt from the burden of the financial entanglement represented by the service contract. See J. MACLACHLAN, *BANKRUPTCY* 126, 173 (1956). The *Chicago Auditorium* case, however, seems incompatible with the explicit recognition by section 70b of the Act of the trustee's right to assume an executory contract. See V. COUNTRYMAN, *CASES AND MATERIALS ON DEBTOR AND CREDITOR* 437-39 (1964); Broude, *Executory Contracts and Bankruptcy: The Case for a Federal Common Law*, 17 KAN. L. REV. 1, 3-4 (1968); Countryman, *The Use of State Law in Bankruptcy Cases* (pt. 1), 47 N.Y.U.L. REV. 407, 413-20 (1972). The case would be overruled by section 4-602(b) of the Bankruptcy Act of 1973, proposed by the Commission on Bankruptcy Laws. COMMISSION REPORT, pt. II, at 156.

⁸³*Kokoszka v. Belford*, 94 S. Ct. 721 (1973).

⁸⁴470 F.2d 996 (1972), cert. denied, 411 U.S. 973 (1973). The opinion of the court of appeals was a per curiam affirmation of the district court opinion, 337 F. Supp. 1103 (N.D. Cal. 1972). See also *In re Kingswood*, 470 F.2d 996, rev'g 343 F. Supp. 498 (9th Cir. 1972). *Cedor* is approved by Countryman, *The Use of State Law in Bankruptcy Cases* (pt. 1), 47 N.Y.U.L. REV. 407, 460-62 (1972), but sharply criticized by Lee, *Leading Case Commentary*, 47 AM. B.L.J. 239 (1973).

⁸⁵2 CCH BANKR. L. REP. ¶ 65,116 (1974). The court thereby overruled *In re Jones*, 337 F. Supp. 620 (D. Minn. 1971), leave to appeal denied (8th Cir.), cert. denied, 404 U.S. 1040 (1972). The Eighth Circuit agreed with the Second Circuit decision in *Kokoszka*, cited in note 83 *supra*, however, that the limitations of the Consumer Credit Protection Act on garnishment, 15 U.S.C. § 1671, do not apply to a tax refund. This portion is disapproved in Note, 87 HARV. L. REV. 395, 407-10 (1973).

Kokoszka.⁸⁶ At first blush, since the refund represents prepetition wages, it would appear clear that the trustee would be entitled to it, or at least so much of it as would not be exempt. The difficulty for the courts arose out of a 1970 decision of the United States Supreme Court involving a bankrupt's vacation pay accrued but unpaid at the time of the filing of the petition. No exemption law applied to the pay, but the Supreme Court held, in *Lines v. Frederick*,⁸⁷ that the "basic purpose" of the Bankruptcy Act as expounded in *Local Loan Co. v. Hunt* compelled a decision for the bankrupt. In a per curiam opinion, the Court observed that:

The wage-earning bankrupt who must take a vacation without pay or forgo a vacation altogether cannot be said to have achieved the "new opportunity in life and [the] clear field for future effort, unhampered by the pressure and discouragement"

⁸⁶479 F.2d 990 (1973), *commented on in* Note, 87 HARV. L. REV. 395 (1973) (critical); Note, 72 MICH. L. REV. 331 (1973) (approving); and 19 VILL. L. REV. 168 (1973) (approving). All three courts were in apparent agreement that if a taxpayer authorized withholding in excess of the minimum required by law, the excess would be property of the estate. *Accord, In re Wetteroff*, 453 F.2d 544 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972).

⁸⁷400 U.S. 18 (1973). The *Lines* case is criticized by Lee, *Leading Case Commentary*, 45 AM. B.L.J. 115 (1971); 49 N.C.L. REV. 738 (1971). The problems presented by accrued vacation pay are perplexing, however. Consider Judge John Brown's concurring opinion in *Kolb v. Berlin*, 269 F.2d 269, 272 (5th Cir. 1966):

One might assume that the Bankruptcy Court could order the Bankrupt to apply for annual leave. But will his superior grant it? And if he does, then what? Must the Bankrupt "take" this vicarious vacation—only to see the wife and children sit idly by at home while he neither works nor receives any pay? If he stays on the job and works to receive the post-bankruptcy wages with which to support his family, he is not at the same moment on annual leave. The result is that the only way for the creditors to realize on this value is to enforce postbankruptcy idleness without pay for the period represented by accumulated annual leave. Required as it is in the name of law, one wonders in this twentieth century what has happened to the Thirteenth Amendment. What has happened to the policy behind the bankruptcy law that after discharge, one's past economic derelictions are not to be visited on the debtor, and that with a clear conscience, head held high, the former bankrupt can look the world in the face? And for what length of time, what number of years, is the Bankrupt to face this crucial alternative—no recreational vacation or enforced idleness without pay? One year? Two years? Five years? What happens in the meantime to his employer's—the United States government—interest in his employment efficiency? Worse, what happens to the bankruptcy system? Does this case remain open until such time as the Employee-former-Bankrupt makes the hard choice? Until he retires? Until he dies?

ment of pre-existing debt," . . . which it was the purpose of the statute to provide.⁸⁸

Mr. Justice Harlan entered a solitary dissent, suggesting that the Court had given the matter decided inadequate attention and had decided the case on an opaque record.⁸⁹ In giving the bankrupt vacation pay accrued before the petition, the dissenting justice thought he obtained thereby a head start, since a fellow worker starting on the date of the bankruptcy would not have had such an allowance.

The district court thought in the *Cedor* case that:

The collection by the Internal Revenue Service, without the consent or control of the bankrupt, and the belated refund, render[ed] these funds quite similar in a practical sense, to the accrued but unpaid wages which constituted vacation pay. . . . To deprive the wage-earner of that planned-on annually recurring payment, cannot be said to be less severe than the deprivation of two weeks of paid vacation, in terms of a fresh start.⁹⁰

The Court of Appeals for the Second Circuit, however, answered that argument by saying:

Many people may come to rely upon such things as a Christmas Club account or year-end dividends from stock ownership to give them a special source of income at certain times of the year, but this does not make such items immune from a turn-over order in bankruptcy. Permitting a bankrupt to retain his tax refund would not be giving him a 'fresh start' to accumulate new wealth but a 'head start' over others who had no such refund.⁹¹

The court then took note of practicalities, which had been emphasized as controlling by the district court in *Cedor*, by acknowledging that the likely beneficiary of the refund would be the trustee rather than the creditors as a result of its ruling. It suggested that the district court should grant the motion of the debtor for abandonment of the asset

if it is reasonably clear that the assets, otherwise available for creditors, will be entirely consumed by trustee's fees and other

⁸⁸400 U.S. at 20.

⁸⁹*Id.* at 21-22.

⁹⁰337 F. Supp. 1103, 1105 (S.D. Cal. 1972).

⁹¹479 F.2d at 995.

administration expenses, that no creditor has shown that there was a likely opportunity for a trustee to recover additional assets, and that the absence of a trustee will not, under the circumstances, cast a substantial additional burden on the Bankruptcy Court.⁹²

I find the decisions in *Lines*, *Cedor*, and *Gehrig* hard to reconcile with the language of the present Bankruptcy Act,⁹³ but I regard the courts' efforts to read the words and provisions of the Act in the light of its pervasive "fresh start" policy laudable and entirely compatible with accepted canons of judicial construction of statutes.⁹⁴ It is hoped and believed that the constructional difficulties would be ameliorated if not eliminated by the new Bankruptcy Act proposed by the Commission on Bankruptcy Laws of the United States.⁹⁵ These cases illustrate the extent to which the "fresh start" policy has become a dominant factor not only in construing the discharge provisions of the Bankruptcy Act but even in determining the scope of the property of the estate of an individual debtor that is to be administered in bankruptcy. How far the courts have departed from the counsel of James Monroe Olmstead in the *Harvard Law Review* over seventy years ago:

While the humanitarian or relief features are meritorious, it should be constantly borne in mind that this principle of the law is merely an incident to its main purpose, and should not prove a menace to the permanency of a system intended for the perpetual benefit of merchants in general.⁹⁶

The distributive function of the Bankruptcy Act is by no means

⁹²*Id.* at 996.

⁹³These difficulties are pointed out in the critical commentary cited in notes 84, 86, and 87 *supra*.

⁹⁴N. DOWLING, E. PATTERSON, & R. POWELL, *MATERIALS FOR LEGAL METHOD* C. VII (2d ed. H. Jones 1952). Compare Lee, *Leading Case Commentary*, 47 *AM. B.L.J.* 239, 245-46:

In *Cedor* the court contracted the definition of the term "property" as used in § 70a(5) of the Bankruptcy Act and expanded the definition of terms "garnishment" and "disposable earnings" as used in the Consumer Credit Protection Act. And with all that contraction and expansion the court has gone and uprooted the yellow brick road we once traveled to the land of the wizard to seek his assistance in parceling the kingdoms of the wicked trustee and the unfortunate debtor. With the road gone, we are all on our own.

⁹⁵See Note, 72 *MICH. L. REV.* 331, 346-48 (1973).

⁹⁶Olmstead, *supra* note 60, at 843.

an insignificant one, and I propose to discuss that in my second lecture.*

*The second part of Professor Kennedy's Donley Lecture will appear in Volume 77 of the *West Virginia Law Review*.

