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THE FRESH−START POLICY IN BANKRUPTCY IN MODERN DAY ISRAEL

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Abstract

Throughout the world, as greater consumer credit becomes available to more individuals, many become overly indebted and fall into financial trouble. The continuous and persistent collection pursuits by creditors demoralize many financially troubled debtors and, at times, eliminate their desire to remain productive members of the economy. Faced with such overwhelming pressures, many despondent debtors see no other choice but to resort to personal bankruptcy protection.

To deal with the global trend of rising personal bankruptcy rates, some countries have adopted a fresh−start policy in their bankruptcy laws. Under this policy, the bankruptcy regime attempts to provide the financially troubled individual with opportunities to re−join society as a productive member of the economy, free from some or all of the burdening pre−existing debts. Although increasing numbers of countries have adopted some form of a fresh−start policy, many have not yet incorporated any such policy into their bankruptcy systems.

This Article begins with an overview of the normative objectives of the fresh−start policy in personal bankruptcy. The Article then explores the global contemporary status of the fresh−start policy in personal bankruptcy cases. Following a survey of various countries' approaches to a financial fresh−start, this Article focuses on the fresh−start policy in Israel. This Article then examines whether Israel's fresh−start policy provides a meaningful opportunity for the financially troubled individual to begin a new financial chapter in life.

Introduction

Every modern society should provide an opportunity for a meaningful fresh−start to financially troubled individuals who have acted responsibly and fairly towards their creditors. [1] The notion that such individuals should be able to promptly and effectively re−join economic life through an unduly punitive and certain bankruptcy system is an essential component of any progressive and industrialized society.

The scope of a fresh−start policy is debatable. To be meaningful, legislation relating to this financial relief must include a reasonably prompt, certain and fair debt−forgiveness concept, [2] and should enable the individual to keep certain items deemed essential for a self−sufficient, productive member of society. [3] Next, such legislation must eliminate all unnecessary punitive obstacles that may severely handicap the financially troubled individual from once again becoming a productive member of society. [4] Lastly, the legislation must acknowledge and provide for adequate treatment of the causes and symptoms of the debtor's financial failure. [5]

A meaningful fresh−start policy is essential because it promotes economic efficiency in the credit market. [6] Furthermore, a fresh−start policy for a responsible yet insolvent individual safeguards the fundamental dignity interests of the individual. [7]

Different nations have adopted widely contrasting approaches to the fresh−start policy. While the United States has had a relatively broad fresh−start policy for a long period of time, [8] a number of countries today do not even recognize the existence of such a policy. [9] Taking a middle of the road approach, some countries have adopted a fresh−start policy in their bankruptcy systems, but have significantly restricted its scope and availability. [10] This Article evaluates the fresh−start policy
of a country that belongs in the latter category.

Inheriting its bankruptcy system from England in 1948, Israel always provided for debt−forgiveness of financially troubled individuals. [11] Nonetheless, while acknowledging the importance of a fresh−start policy, the Israeli legislators have opted to narrowly construe the promise of a financial fresh−start by limiting the benefits of debt−forgiveness to very few cases, and embracing punitive, and sometimes draconian, features to deter perceived opportunistic conduct by debtors. [12]

Israel's fresh−start policy partly reflects its traditional emphasis on personal responsibility as opposed to individual choice. This is demonstrated by the many grounds for denying debt−forgiveness to debtors for pre−petition acts that display lack of personal responsibility and accountability towards creditors. [13] In contrast, in other societies that concentrate on individual choice and freedom, minimal attention is placed on the debtor's pre−petition conduct; instead, the focus is on assuring that the debtor's choice and liberty will not be encumbered by pre−petition debts. [14]

This Article will evaluate whether the bankruptcy law in Israel provides financially troubled individuals with a meaningful fresh−start. It will begin by exploring the objectives and justifications of the fresh−start policy. Before analyzing the fresh−start policy in Israel, this Article will examine various countries' approaches to a financial fresh start for individual debtors. Armed with those normative and comparative perspectives on the fresh−start policy in bankruptcy, this Article will evaluate whether there is a meaningful fresh−start policy in Israel. To do so, this Article will first describe the relevant provisions in the Israeli bankruptcy system concerning its fresh−start policy. Next, this Article will analyze which objectives of the fresh−start policy the Israeli bankruptcy system promotes. Lastly, this Article will demonstrate how the bankruptcy laws in Israel fail to fulfill several fundamental objectives of the fresh−start policy. Based on that assessment, the author concludes that while the Israeli legislature acknowledges the importance of a fresh−start policy, the laws and practice in Israel effectively deny the financially troubled individual a *meaningful* fresh−start.

I. The Objectives Of The Fresh−Start Principle

The fresh−start policy in bankruptcy grants a financially troubled individual the opportunity to begin a new and unencumbered financial chapter in his or her life. [15] The fresh−start policy has various fundamental concerns and objectives. [16] First, it has distributive objectives as it attempts to promote economic efficiency in the credit market. Second, the fresh−start policy aims to advance several dignity related objectives.

A. Distributive Objectives of the Fresh−Start Principle

The existence and extent of the availability of a discharge should promote efficient allocation of risk of loss connected with non−payment between debtor and creditor. [17] Under this theory, the party who can best protect herself against the risk of loss should bear that risk. [18] The party's ability to protect herself from the risk of loss depends both on her capacity to prevent the risk from ever materializing and her capacity to insure efficiently against the risk of loss. [19] Some contend that since the debtor is the party best able to bear the risk of loss, [20] economic efficiency considerations support a limited system of discharge. [21] By limiting the discharge provisions, the bankruptcy system would encourage the parties to have the debtor bear the risk of loss, thereby promoting efficient allocation of risk in the market place. [22] Some argue, however, that the creditors are the superior risk bearers, and therefore, a more liberal approach to the concept of fresh−start would promote efficient risk allocation between the parties. [23]

Regardless of the most efficient way to allocate risk between the parties, scholars agree that a fresh−start policy can promote several important economic goals. The discussion below addresses these important

economic objectives.

1. Provide Incentives to an Individual to Remain Economically Productive

A fresh−start policy aims at encouraging financially troubled individuals to remain productive members in the market place. A financially troubled individual may have little incentive to remain productive since he may feel that he does not get to realize the fruits of his labor as most of his earnings are used to repay his creditors. [24] Further, a financially troubled individual may have difficulties remaining productive due to the emotional strain arising out of the uncertainty and the pressure for repayment from creditors. [25]

Without the incentive to produce, financially troubled individuals may simply prefer to consume leisure, a consumption item that creditors cannot attach. [26] An individual who opts for more leisure rather than work decreases her economic productivity and overall contribution to society. [27]

One way to increase the likelihood that a financially troubled individual will become, once again, a productive member of society is to provide for her rehabilitation. Rehabilitation furnishes guidance to financially troubled individuals on how to avoid the pitfalls of a future financial failure. [28] This guidance is received through educational or therapeutic programs that identify the underlying causes of consumer financial failures. [29] The rehabilitation process assists the insolvent individuals by enabling them to learn from past mistakes as they reposition themselves for a new and productive chapter in their lives.

Another way to provide a financially troubled individual with the incentive to remain economically productive is by forgiving the debtor some or all of his debts. By doing so, the overly indebted individual has more incentive to work harder as she can actually get to enjoy the fruits of her labor. [30] Also, by forgiving the debtor some or all of her past debts, the demoralized, financially troubled individual will obtain relief from some of the adverse psychological consequences associated with a high level of debt. Indeed, some studies have demonstrated that financial ruin causes psychological trauma and gives rise to adverse conditions such as health problems, marital difficulties, depression, alcohol abuse, suicides and criminality. [31] A fresh−start policy, which forgives the debtor of some or all of her past debts, tends to reduce the financial calamity and trauma associated with financial trouble, [32] thereby making it easier for the individual to once again become a productive unit of society.

2. Minimize Reliance on Public Support

A corollary to the goal of maximizing the individual's productivity in the market place is the objective of minimizing the individual's reliance on public support. In the absence of a fresh−start policy, over−extended debtors may elect to rely on costly public welfare programs for support. [33] Moreover, the mere existence of public welfare support may cause certain potential borrowers to disregard or underestimate the inherent risks of over−borrowing. As certain potential borrowers become aware that they are protected by the safety net of the public welfare system, they are less likely to exercise caution in assuming new debt. [34]

By adopting a fresh−start policy, the bankruptcy system increases the risk of bad−debt loss to the creditors. [35] This increased risk presumably would cause creditors to take extra steps to minimize such losses by continuously monitoring their relationship with the debtor. [36] Undoubtedly, a more conservative lending policy would reduce risky extensions of credit, defaults and bankruptcy filings. Accordingly, a fresh−start policy would reduce overextension of credit and the need for bankruptcy protection, thereby reducing the use of public welfare programs by financially troubled individuals. [37]

3. Efficiently Monitor the Volitional and Cognitive Deficiencies of the Individuals

In addition to minimizing the burden on public welfare programs, the fresh−start policy provides an efficient method to monitor the debtor's uncontrolled urges for the consumption of credit. Some scholars have suggested that individuals are inherently unable to control their credit decisions. [38] This lack of control over credit decisions may be explained by the impulsive nature of humans [39] and by their cognitive failure. [40]

Once again, placing the burden on creditors seems to be an efficient approach to monitor and regulate this human tendency. [41] By adopting a fresh−start policy, creditors who fear bad−debt losses arising out of discharge have an incentive to closely monitor [42] the individual's uncontrolled urges for consumption of credit. Since creditors are in the business of extending credit, they are in the best position to regulate and safeguard against uncontrolled consumption behavior. [43]

4. Preserve the Sanctity of Contract Law

While recognizing the importance of the fresh−start policy, some have argued that a broad fresh−start policy may jeopardize the sanctity of contract law. [44] Under traditional contract law, a party to a contract can only be excused from her contractual obligations under limited circumstances. [45] Some fear that liberally excusing contractual obligations under a broad fresh−start policy would entail significant costs to the market, as the uncertainty of future performance would drastically increase. [46] To minimize the harm that a liberalized fresh−start policy may have on the freedom to contract, some have suggested limiting the scope of the fresh−start policy. [47]

5. Maximize the Value of the Debtor's Estate

One of the original objectives of the fresh−start policy was to achieve the greatest possible repayment to creditors. Laws forgiving the debtor of her debts were first introduced, not for humanitarian concerns, but to address the problem of asset concealment by the debtors. It was thought that by giving the debtor a debt−forgiveness incentive to surrender all of her assets for distribution, the creditors would receive a higher dividend yield. It was believed that by conditioning discharge on the full disclosure of the debtor's assets, the discharge provision would serve as way to maximize the value of the debtor's estate. [48]

6. Encourage Efficient Entrepreneurship

Consistent with a capitalist oriented economy, a fresh−start policy encourages individuals to take risks in starting new business ventures. [49] A fresh−start policy provides individual entrepreneurs a valuable cushion from the potentially devastating consequences of unlimited liability in the event their sole−proprietorship business venture fails. This safeguard provides entrepreneurs an incentive to start new business ventures. [50] However, while a discharge policy provides incentives to individuals to undertake business risks, a broad and liberal policy may encourage investment in inefficient and wasteful business ventures. [51]

7. Minimize the Cost of Credit and Maximize its Availability

Some believe the scope of a fresh−start policy should be limited in order to spur economic growth. It is argued that a limited fresh−start policy positively affects growth as it minimizes the cost of credit and maximizes its availability.

Specifically, some economists have argued that a liberal discharge policy would increase the benefits and reduce the costs associated with bankruptcy filings. This cost versus benefit analysis would prompt more individuals to file for bankruptcy relief and discharge their debts. [52] This increase in the rate and amount of debt−forgiveness through the bankruptcy system would increase creditors' losses and would promote more extensive monitoring of debtors by creditors. [53] Together, the increase of losses and the increase in monitoring activities would increase the cost of credit. [54] An increase in the cost of credit would be passed from the creditors to future potential borrowers through higher interest rates. [55] This increase in the cost of credit would make credit less attractive to borrowers. [56] Additionally, some potential borrowers would be excluded from the credit market due to the increase in cost. [57] As a result, some contend that there would be less overall financial stimulation in the economy, thereby deterring growth. [58]

B. Dignity−Related Objectives of the Fresh−Start Principle

Some have suggested that a central justification for the fresh−start policy is the promotion of moral values in society. [59] While economic considerations of the fresh−start policy focus on the efficient allocation and use of resources, the moral view of the fresh−start policy focuses on "the moral dimension of the interaction between debtors and creditors in the community . . . . The moral approach stresses that human dignity is of a higher value than the economic benefits or costs associated with achieving a desired economic result." [60] The moral dimension of the fresh−start policy encompasses two related considerations: (1) society's commitment to the individual debtor; and (2) the individual debtor's commitment to society. [61]

1. Society's Commitment to the Individual

First, the moral dimension is concerned with society's humanitarian commitment to the fundamental dignity of the individual debtor. [62] To preserve her dignity, an individual must be given the opportunity to earn a living, have control over her life, keep a certain degree of personal autonomy, and retain basic means of survival. [63]

Forgiving the debts of a financially troubled individual frees the individual from the burden of repaying overwhelming debts and enables the individual to more easily support herself and earn a living. [64] Furthermore, the debt−forgiveness concept is viewed as a tool, which may restore the debtor's independence, control, and choice over her life activities. [65] When creditors relentlessly pursue an insolvent debtor for repayment, debtor is perceived as unable to fully control her affairs since the creditors influence her choices. [66] This lack of individual control is inconsistent with the values of personal freedom and personal autonomy. [67]

An additional humanitarian gesture in bankruptcy toward the financially troubled individual is the debtor's ability to protect certain assets from the collection efforts of creditors, and thus retain basic means of survival. [68]

Further, some contend that another humanitarian goal of society, with respect to the financially troubled individual, is the alleviation of the perceived unequal bargaining power between creditors and debtors in the market place. Frequently, debtors are viewed as a weak and vulnerable group unduly taken advantage of by overly aggressive and powerful creditors. [69] By granting debtors the right to discharge their debts, debtors are given a valuable protection and safeguard from potential abuse by creditors. [70] Similarly, society's humanitarian commitment to the individual purportedly attempts to promote fairness in the sense that it redistributes wealth from the allegedly fortunate creditors to the allegedly deserving and less fortunate individuals in society. This goal is justified by some as advancing the general public welfare. [71]

Finally, a fresh−start policy furthers society's humanitarian objectives by providing the financially troubled individual with some sort of safety net for consequences of adverse changes in circumstances, such as catastrophic illness, prolonged unemployment, or family break−up. [72]

2. The Debtor's Commitment to Society

Secondly, the moral dimension focuses on the debtor's commitment to deal fairly and responsibly with individual members of society. [73] When a debtor violates certain social norms, he may lose some of the humanitarian benefits stemming from the fresh−start policy. [74] Thus, the moralistic approach to the "fresh start policy has acknowledged both the humanitarian response of a nation to the impoverished debtor and the realization that there is a covenant between a debtor and society that requires a certain level of fair dealing on the part of the debtor." [75]

Having discussed the broad normative framework of the fresh−start policy, this Article will utilize that framework to evaluate the fresh−start policy in Israel. However, to place the Israeli fresh−start policy in context, the next section will briefly discuss the contemporary prevalence of the fresh−start policy in various parts of the world.

II. Global Contemporary Prevalence Of The Fresh−Start Policy

While the fresh−start policy has now been in existence, in some form or another, for almost three hundred years, [76] many of the countries of the world today have not yet adopted such a principle into their bankruptcy systems. [77] A cursory examination of the present state of the fresh−start policy in different parts of the world indicates roughly three types of approaches. [78]

First, there is the liberal camp. The countries in this category attempt to protect and preserve the prospects of financially insolvent individuals by allowing them to begin a new chapter in their lives. This is accomplished primarily through the automatic granting of discharge. The most liberal country in this camp is the United States. [79] According to title 11 of the United States Code, any individual, whether a consumer or a business person, may voluntarily commence bankruptcy protection. [80] The individual debtor generally may elect to proceed under either chapter 7 [81] or under chapter 13 of the United States Bankruptcy Code (the "U.S. Code"). [82] Under chapter 7, the debtor's unencumbered non−exempt assets owned at the time of the bankruptcy petition are distributed among her unsecured creditors. [83] Additionally, most of the debts that were incurred pre−petition will be forgiven [84] and the debtor will keep all of her post−petition earnings. [85] Unless there are specifically designated non−dischargeable claims, [86] or it is proven that the debtor engaged in certain prohibited conduct, [87] the debtor will obtain a discharge approximately four months after the commencement of the bankruptcy petition. [88] In practice, "[i]n the great majority of bankruptcies, at least in recent years, no one bothers to press objections, and the debtor receives the discharge when the prescribed period expires." [89]

In the alternative, the debtor may elect to proceed under chapter 13 of the U.S. Code. [90] In contrast to the liquidation nature of the chapter 7 option, chapter 13 allows the debtor to keep all the assets she possessed at the time of the bankruptcy petition. [91] In exchange, the debtor must give up some of her post−petition monthly income, which will be distributed to her creditors under a court−confirmed repayment plan. [92] An expanded chapter 13 discharge will be granted upon the completion of payments under the plan. [93] The term of the repayment under a chapter 13 plan is usually three years. [94]

In addition to the automatic discharge, the U.S. Code provides the debtor additional help to start with a clean slate. For example, the broad exemption provisions in the U.S. Code provide additional assistance to the debtor in her attempt to start over again. [95] Moreover, the U.S. Code prohibits certain discriminatory conduct against the bankrupt. [96]

While not as liberal as the fresh−start policy in the U.S., there are a few other countries (mostly countries that were former British colonies or influenced by British law) that provide the bankrupt with automatic debt−forgiveness. In England, for example, an individual who voluntarily commences bankruptcy protection automatically obtains a discharge of her pre−petition debts within two or three years. [97] The debtor, however, gets to keep a limited amount of exempt assets. [98] Furthermore, during those two or three years, the debtor is subject to various penalties and disabilities. [99] Also, until the discharge order is issued, the debtor's post−petition income is part of the bankruptcy estate. [100]

The insolvency laws of Canada, Australia, New Zealand, Taiwan, Russia and Scotland follow approaches similar to that of England. In Canada, an individual debtor who files a bankruptcy petition for the first time will automatically obtain a discharge within nine months after the commencement of the bankruptcy petition, unless an objection is made beforehand. [101] However, where the individual debtor previously filed for bankruptcy protection or where a timely objection to the discharge is made, a judge has discretion in deciding whether to grant, suspend, condition or deny the debtor a discharge order. [102] Until the debtor receives his discharge, various penalties are imposed on him. [103]

In Australia, the bankrupt will automatically obtain a discharge three years after commencing his bankruptcy proceedings, unless a timely objection is made or the court rules otherwise. [104] Similarly, in New Zealand, the bankrupt will automatically obtain a discharge three years after the commencement of a bankruptcy petition, unless the debtor independently applies for and obtains a discharge earlier. [105] In Taiwan [106] and Russia, [107] the unpaid debts of the bankrupt are extinguished upon the conclusion of the bankruptcy process. Lastly, in Scotland, the bankrupt receives an automatic discharge three years after filing a bankruptcy petition. [108]

While the liberal camp is characterized by some form of automatic statutory discharge provision, the middle ground camp provides for debt−forgiveness pursuant to judicial discretion. These countries (some Scandinavian, several with a strong British legacy and more recently some from continental Europe) allow the financially troubled individual to voluntarily commence bankruptcy protection. However, the judge is given guidelines in exercising discretion as to whether, and under what circumstances, debts should be forgiven. In this category are India, [109] Denmark, [110] Norway, [111] Finland, [112] Sweden, [113] South Africa, [114] Austria, [115] Germany, [116] Hong Kong, [117] Singapore, [118] Kenya, [119] Uganda [120] and Israel. [121]

The conservative camp is distinguished from the other two by the conspicuous absence of a debt−forgiveness provision in its bankruptcy law. [122] The policies of these countries take one of two forms. In the first form, countries such as China, Ukraine, Belgium and Italy simply hold that non−merchant individuals are ineligible to file for bankruptcy protection and therefore are not entitled to any debt−forgiveness. [123]

Under the second form, countries such as the Netherlands, Egypt and Switzerland allow all individuals to commence bankruptcy protection, but the individuals are not entitled to obtain forgiveness of their debts as part of the process. [124] It appears that under both of these approaches in the conservative camp, the common theme is that bankruptcy is a creditor−oriented mechanism and is not designed to serve the interests of financially troubled individuals.

While some countries have clearly banished the traditional anti−debtor sentiments from their bankruptcy law, it seems equally clear that many countries still retain a bankruptcy regime that either does not recognize any of the debtors' interests or is largely intolerant and punitive towards them.

Equipped with a general understanding of the normative and comparative perspective of the fresh−start policy, the balance of this Article will focus on an evaluation of the Israeli fresh−start policy.

III. The Bankruptcy Law In Israel And Its Fresh−Start Policy

This section attempts to evaluate the contemporary fresh−start policy in Israel. The evaluation will begin with a broad outline of the different stages of the Israeli bankruptcy process and the opportunities for a financial fresh−start. [125]

Armed with an understanding of the laws relating to the fresh−start policy in Israel, the next section will then assess whether the laws in Israel fulfill the normative objectives of the fresh−start policy. The evaluative standard of these bankruptcy laws will be the various distributive and dignity related objectives of the fresh−start policy, as discussed in Part I. Evaluation of the relevant laws will demonstrate that there are significant deficiencies in the existing bankruptcy laws which effectively deprive a financially troubled individual in Israel of an opportunity for a meaningful fresh−start.

A. Commencement of Personal Bankruptcy

A court will generally approve an individual debtor's application for commencement of bankruptcy proceedings (commonly referred to as an application for a receiving order). [126] Following the issuance of a receiving order, the debtor is divested of control of her property, [127] and some of the creditors' collection activities are stayed. [128] Furthermore, the Official Receiver commences an investigation of the debtor in order to gather as much information as possible in regard to the debtor's assets, her business activities, and her pre and post−bankruptcy behavior. [129]

To facilitate the gathering of information, the Official Receiver may initiate a formal examination of the debtor. [130] The purpose of the public examination is twofold: (1) to ascertain the likely distribution to the creditors from the debtor's existing assets and anticipated earnings; and (2) to determine whether the debtor's conduct prior to or after the bankruptcy application supports denial or conditioning of the debtor's discharge. [131]

To further facilitate and enforce the powers of the Official Receiver in conducting the required investigation of the debtor's affairs and assets, the court is empowered to order the debtor's arrest and the repossession of any of her assets. [132] Furthermore, the court has the power to deny the debtor the right to leave the country until the end of the bankruptcy process. [133] Lastly, the court may order that the debtor's mail be re−directed to the Official Receiver or to the trustee for inspection. [134] In contrast, a bankruptcy court in the United States generally does not have such powers.

Concurrently, the debtor and the creditors may pursue avenues to resolve the financial troubles of the debtor through a compromise. [135] Where a settlement proposal is approved by the creditors, the proposal is submitted to the court for approval. [136] The court has discretion in deciding whether to approve it. [137]

B. Adjudicating the Debtor as Bankrupt

In the absence of a settlement agreement, the next phase of the bankruptcy process will proceed, beginning with the formal adjudication of the debtor as bankrupt. Six months after the issuance of a receiving order, the court must conduct a hearing to determine whether the debtor should be adjudicated and declared bankrupt. [138] A court will generally declare the debtor bankrupt unless it finds that the debtor was acting in bad faith when she applied for bankruptcy protection, or that the debtor can repay her debts. [139]

Once the debtor is formally declared bankrupt, a trustee is appointed. The trustee acquires legal title to all of the debtor's assets, except for those that are exempt. [140] Thus, the trustee becomes the legal owner of the debtor's non−exempt assets for the purpose of distributing the assets equally among the creditors. [141]

The trustee's arms reach the assets or rights the debtor had at the time of commencement of the bankruptcy proceedings, [142] as well as all assets or rights the debtor acquires after the commencement of the bankruptcy petition, until the debtor obtains a court order discharging her from her pre−petition debts. [143] Thus, the debtor's post−petition earnings do not belong to the debtor, but rather are part of her estate under the control of the trustee. [144] This practice is in sharp contrast with the approach taken in the United States, where the debtor's post−petition earnings generally belong to the debtor. [145]

To provide for the debtor's post−petition livelihood, a court allows the debtor to keep a portion of her post−petition earnings to support herself and her family's minimum financial monthly needs. [146]

While the bankruptcy laws do not prohibit a bankrupt from entering into post−petition contractual relations, [147] the civil law imposes many specific financial restrictions on a bankrupt. First, such an individual is precluded from certain professions, occupations, associations and business trades. [148]

Second, a debtor who is declared bankrupt is restricted in her entrepreneurship opportunities. For example, such a debtor is prohibited from starting a new corporate business venture. [149] Along the same lines, unless a court orders otherwise, a bankrupt is precluded from serving as a director of a private or public corporate entity or from participating directly or indirectly in the management of such an entity. [150] Moreover, a bankrupt is denied the right to open a checking account to assist herself in conducting her business activities or other financial affairs. [151] Furthermore, an offer automatically becomes unenforceable if either the offeror or the offeree is under bankruptcy protection. [152] Lastly, an agency relationship automatically terminates upon the declaration of bankruptcy against either the agent or the superior. [153]

Third, a debtor who is declared bankrupt is restricted in her ability to obtain new consumer credit. That is, once a debtor is declared bankrupt she is prohibited from both using existing credit cards and obtaining any new credit cards. [154] These penalties continue until the conclusion of the bankruptcy process. [155]

In contrast to the wide range of penalties and restrictions that are imposed on bankrupts in Israel, in the United States the law prohibits governmental units and private employers from discriminating against a debtor in employment, licensing, or when making other similar grants, solely because the individual has been in bankruptcy. Thus, most of the limitations described above would be a violation of the law in the United

States. [156]

C. Forgiveness of the Debtor's Pre−Petition Debts

1. Initiating the Discharge Hearing

Unlike the automatic discharge provision in the United States, in Israel the debtor's right to receive a discharge is a matter of judicial discretion. [157] Generally, to have the court consider granting the debtor a discharge, the debtor must formally submit an application for a hearing on the matter. [158] Therefore, in the absence of the debtor's discharge application, a court, generally, will not conduct a hearing on the matter and the debtor may not receive a discharge for an indefinite period of time. However, the debtor may obtain a discharge order without specifically applying for it if the court finds during a regularly scheduled hearing that there is no likely benefit from the continued administration of the bankruptcy estate. [159]

Thus, whereas in Israel an application and a hearing must usually take place before a debtor can obtain a discharge, no such applications or hearings are conducted in the United States since the discharge order is typically granted automatically within approximately four months after a liquidation−type petition is filed. [160]

2. The Discharge Hearing and the Judge's Discretion in Granting a Discharge

Before the discharge hearing date, the Official Receiver must submit a comprehensive report regarding the findings of its investigation to the court. [161] The report must include the Official Receiver's opinion regarding the circumstances leading up to the debtor's financial failure, the ability of the debtor to repay her debts, and the recommended course of action against the debtor. [162] At the hearing, the court may consider the Official Receiver's report, [163] and may hear the debtor, the Official Receiver, the trustee, or any creditor. [164]

Generally, the court has broad discretion in evaluating an application for a discharge. In making a decision, the judge is expected to take into consideration the interests of the debtor, the creditors, and the public. [165] One of the court's most important considerations, however, is the debtor's conduct before, as well as after, the petition's filing. [166]

In exercising discretion, the judge may unconditionally grant the discharge application, suspend it, condition it, or deny it in its entirety. [167] Furthermore, where the debtor has committed a bankruptcy−related offense, [168] or where specific grounds exist, [169] the judge may deny the debtor's application for an unconditional discharge by rejecting the discharge application in its entirety, [170] suspending the discharge for an appropriate period of time, or conditioning the discharge. [171]

3. Grounds for Denial of an Unconditional Discharge

The following are the grounds that may result in a denial of an unconditional discharge application:

a. The debtor's lack of good faith during the bankruptcy proceedings. [172]

b. The debtor's failure to maintain, for the three years immediately preceding her bankruptcy, such records as are usual and proper in the business carried on by her. [173]

c. The debtor continued to conduct her business affairs and undertake additional debts while knowing that she was insolvent and having no reasonable ground to believe that she would be able to repay the additional debts. [174]

d. The debtor cannot provide reasonable justifications for her loss of assets or her inability to repay her debts. [175]

e. The debtor has brought on, or contributed to, her bankruptcy adjudication by rash and hazardous transactions, by an unjustifiably extravagant lifestyle, gambling, or reckless abandonment of her business affairs. [176]

f. The debtor brought on, or contributed to, her bankruptcy adjudication by incurring unjustifiable costs in bringing a frivolous lawsuit or where she caused her creditors to incur unnecessary costs by putting forth a frivolous defense to an action justly brought against her. [177]

g. Where an insolvent debtor prefers one creditor over another within three months prior to the commencement of a bankruptcy petition. [178]

h. Where the debtor filed a bankruptcy petition less than five years before the commencement of the pending case. [179]

i. Where the debtor is found guilty of fraud or any fraudulent breach of trust. [180]

4. The Consequences of a Discharge Order

a. The scope of the discharge order

Similar to the bankruptcy system in the United States, an unconditional discharge order in Israel cancels all of the allowed claims that arose prior to the court's granting of the receiving order. [181] However, unlike the broad interpretation of allowed claims in the bankruptcy system in the United States, [182] Israel defines allowed claims very narrowly. In Israel there are several claims that are not allowed. First, a creditor's claim against the debtor that arises before the issuance of the receiving order is not deemed an allowed claim if it is an unliquidated tort claim. [183] Second, where a creditor extends credit to a debtor after knowing that the debtor has committed an act of bankruptcy, that debt is not an allowed claim. [184] Lastly, where a court finds that the amount of an unliquidated claim cannot be reasonably estimated, the court may disallow the claim. [185]

In addition, certain otherwise allowed claims are specifically designated as non−dischargeable. [186] For example, fines owed by the debtor to the government, [187] debts that were incurred through the debtor's fraud, [188] and debts arising out of alimony or maintenance obligations are all non−dischargeable. [189]

b. The discharge order serves as an affirmative defense to subsequent judicial enforcement

In sharp contrast to the practice in the United States, the discharge order in Israel is of limited effect. In Israel, despite a discharge order, a creditor with a discharged claim is not prohibited from bringing a judicial action to enforce its claim against the debtor. To stop the judicial action from proceeding, the burden is placed on the debtor to assert the affirmative defense of discharge. [190] Moreover, a creditor may resort to any *non−judicial* action to collect a debt even after the debt has been discharged in bankruptcy. [191] In the United States however, the discharge order acts as a permanent injunction against any judicial or non−judicial collection action against the debtor. [192]

Armed with a general description of the normative objectives of the fresh−start policy, and with a description of the bankruptcy laws in Israel, the following section will attempt to analyze whether the Israeli bankruptcy laws provide financially troubled individuals with an opportunity to obtain a meaningful financial fresh−start.

IV. A Meaningful Fresh−Start Policy: Is There One In Israel?

In the following section, I will argue that Israeli law fails to provide the responsible but financially unfortunate individual a meaningful fresh−start. While the bankruptcy laws promote several normative objectives of the fresh−start policy, they fail to provide responsible but financially troubled individuals with a

meaningful opportunity to effectively re−integrate into the economic mainstream as a productive member of society.

First, I will analyze the objectives of the fresh−start policy which the laws in Israel aim to fulfill. Next, I will demonstrate how the laws in Israel fail to satisfy other fundamental objectives of the fresh−start policy. In particular, I will address the failure of the laws in Israel to provide incentives for individuals to remain economically productive and to promptly and effectively re−integrate financially troubled individuals into the mainstream economy.

A. Objectives of the Fresh−Start Policy Promoted by the Israeli Law

1. Maximize Recovery for Creditors

Traditionally, bankruptcy laws in Israel, including laws that affect the ability of individuals to obtain a fresh−start, have been structured primarily to maximize recovery and distribution for creditors. [193] Until very recently, a financially troubled individual would have been disqualified from bankruptcy protection altogether if a judge found that the *creditors* would not benefit from the bankruptcy process. [194] Furthermore, a financially troubled individual, who did not have assets which could have been used to repay a significant portion of her unsecured debts, was precluded from obtaining an unconditional discharge. [195]

While these provisions were deleted from the bankruptcy laws in 1996, the general emphasis of conditioning debtor's relief to the debtor's extent of repayment remains very strong. For example, section 63 of the existing bankruptcy law provides that the court may suspend or condition the discharge of the debtor on the repayment of at least fifty percent of the outstanding debts to the creditors. [196] As this provision suggests, an underlying theme and motivation in the existing fresh−start policy in Israel still centers around providing the creditors with the highest dividend yield possible.

2. Preserve the Sanctity of Contract

Second, the existing bankruptcy laws in Israel aim to protect and promote the sanctity of the contract principle. According to the rather conservative Israeli approach to fresh−start, a party should be excused from contractual obligations only under limited circumstances. [197] In adopting a narrow approach to debt−forgiveness, the Israeli legislators have effectively limited the frequency of excusing contractual obligations, thereby protecting and preserving traditional contractual principles. [198]

3. Minimize the Costs of Credit and Maximize its Availability

An implicit theme in the Israeli bankruptcy system is its purported minimization of the costs of credit and the maximization of its availability to all. By making discharge of debt an infrequent event in commercial life, [199] the legislature manifested its wishes to minimize the bad−debt losses to creditors. [200] In reducing the bad−debt expense, it was thought that the total cost of credit would not increase and, as a result, would remain affordable to many. [201]

It is questionable, however, whether the limitations placed on obtaining debt−forgiveness actually reduce the bad−debt expense to creditors. In many documented Israeli bankruptcy cases that withheld discharge, the actual recoveries from the debtors were nonetheless very limited. [202] This suggests that in certain cases, whether or not a discharge is granted, the creditor is not going to recover the amount of its claim.

4. Promote the Debtor's Personal Responsibility

Fourth, and probably the most dominant normative underpinning of the law relating to debt−forgiveness in Israel, is the emphasis on the debtor's obligation to deal fairly and responsibly with other individuals (including creditors), and society as a whole. Under this school of thought, the bankruptcy system may preclude an individual who violates certain social norms from some of the fundamental humanitarian benefits

of the fresh−start policy. In addition to penalizing the debtor who engages in unethical or fraudulent conduct, [203] there are numerous sections in the existing Israeli bankruptcy laws that penalize a debtor who engages in *irresponsible* behavior.

This focus on responsibility is widely reflected in section 63(b) of the Israeli bankruptcy law. [204] The section lists a variety of factors that may lead a court to deny a debtor discharge. Many of these provisions allow the court to deny discharge in its entirety if the debtor acted irresponsibly and without due care towards her creditors. These provisions attempt to limit the benefit of an unconditional discharge to situations where the debtor's financial failure arose out of an event beyond her control.

For example, pursuant to one provision of the bankruptcy law in Israel, a debtor is not likely to obtain the full benefits of debt−forgiveness if she continued conducting business after knowing that she was insolvent and without having a reasonable basis to believe that she could repay her new debts. [205] More dramatically, another section of the Israeli bankruptcy law similarly penalizes the debtor if she "*brought on*, or *contributed* to [her] bankruptcy by rash and hazardous transactions or by unjustifiable extravagance in living or by gambling or by culpable neglect of [her] business affairs." [206] Finally, if the debtor cannot provide reasonable justification for her inability to repay her debts, the court may deny her a discharge. [207]

These provisions reflect the emphasis and demand by the Israeli bankruptcy legislation for responsible and fair conduct on the part of the debtor as a pre−requisite to the benefits of bankruptcy. [208] In contrast, while the fresh−start policy in Israel focuses on a debtor's personal responsibility by treating the debtor harshly if she failed to act responsibly, the bankruptcy system in the United States provides for a fresh−start whether or not the debtor acted responsibly. [209]

B. Objectives of the Fresh−Start Policy Not Promoted by the Israeli

Bankruptcy Law

While the laws relating to the fresh−start policy in Israel purport to advocate maximizing the distribution to creditors, preserving the sanctity of contracts, minimizing the costs of credit, and promoting personal responsibility, the laws fail to promote other fundamental objectives of the fresh−start policy.

The most fundamental problem with the current fresh−start policy in Israel is its failure to provide incentives for insolvent individuals to remain economically productive, and to effectively and promptly re−integrate the insolvent individuals into society and the economy. The laws in Israel fail to promote effective and prompt reintegration for six main reasons. First, financially troubled debtors, who belong to the lower economic class in Israel, are restricted in their access to the bankruptcy system. Second, the bankruptcy laws and the bankruptcy practices effectively postpone serious consideration of debt−forgiveness for some of the financially troubled individuals for an excessive period of time. Third, the bankruptcy laws in Israel unduly penalize the debtor during the bankruptcy process, and limit the ability of the debtor to earn a living. Fourth, the bankruptcy laws provide an uncertain and unrealistic standard for granting an unconditional discharge. Fifth, the bankruptcy laws grant an overly limited debt−forgiveness to the debtors. Lastly, the bankruptcy laws fail to provide any rehabilitation channels for the financially troubled individuals.

Collectively, all these limitations and penalties make it extremely difficult for an individual to rejoin the market place and become an economically productive unit and tax−generating member of society.

1. Financially Troubled Debtors, Who Belong to the Lower Economic Class in Israel, Are Not Effectively Reintegrated into the Mainstream Economy Because They are Restricted in Their Access to the Bankruptcy System

To reintegrate into the mainstream economy, *all* financially troubled individuals must in fact have access to the bankruptcy system. As one empirical study indicates, however, there is a real access problem for debtors in Israel who come from the lower economic class and cannot afford legal representation. The study suggests

that the costs of hiring an attorney for representation throughout the bankruptcy process are considerable. [210] Due to the high costs of legal representation, some financially troubled individuals simply file a petition without representation. [211] While some overcome the obstacle of high costs of legal representation by filing petitions without attorneys, the costs may nonetheless preclude some less sophisticated financially troubled individuals from commencing bankruptcy protection altogether. [212]

2. Insolvent Individuals Are Not Effectively Reintegrated Into the Mainstream Economy Because the Bankruptcy Process Postpones the Decision on Debt− forgiveness for an Unduly Long Period of Time

To effectively reintegrate a bankrupt individual into the economy as a productive member of society, the fresh−start policy must provide for a reasonably prompt and efficient debt−forgiveness mechanism. The Israeli bankruptcy system fails, in some respects, to effectively reintegrate its bankrupt individuals into mainstream economy because it delays the decision of debt−forgiveness of some debtors for an unduly long period of time.

One of the new provisions adopted in the 1996 bankruptcy reform in Israel provided for a discharge hearing for some debtors six months after a petition is filed. [213] This provision aimed at dismantling the old practices in which discharge hearings were conducted largely upon the debtor's application. [214] Since many debtors never bothered applying, [215] many bankrupts remained in that status indefinitely. By alleviating some of the bureaucracy of obtaining discharge, the legislators, in 1996, took a bold step toward improving the chances of some to obtain a financial fresh−start.

The provision, however, allows a judge to grant a discharge at the automatic hearing only if there is no benefit to creditors from continued administration of the bankruptcy case. Thus, a debtor who does not qualify for discharge under that standard still has the bureaucratic burden of applying for a discharge hearing at a later date. As previous experience in Israel and other countries demonstrates, it is these additional bureaucratic obstacles that stand in the way of many debtors from obtaining a financial fresh−start.

Even where a debtor actually submits an application for discharge, in many cases the courts simply postpone their decisions for an indefinite period of time. [216] That is, as long as the court finds that the debtor has some potential for repaying some or all of his debts in the future, the decision regarding discharge is postponed in many cases. [217] Since most debtors presumably have a theoretical chance of repaying some or all of their debts in the future, many individual debtors (who do not get discharge at the six months automatic discharge hearing) do not get serious consideration on the issue for an extended period of time. [218]

There are several reasons for the indefinite postponement of a decision on an application for discharge. First, it is done to provide the court with an opportunity to re−examine whether new assets will subsequently resurface through the Official Receiver's investigation. [219] In addition, judges postpone the hearing on the issue of debt−forgiveness in the hope that the debtor will somehow be able to accumulate assets (either through obtaining a job or through the financial help from family members or friends) during the additional years. Those funds will then be used for distribution to creditors. [220]

Lastly, some judges believe that the bankruptcy system will not achieve its punitive purpose if it forgives the debtor of all pre−petition debts soon after declaring bankruptcy. [221] Since most of the penalties associated with the bankruptcy process generally end once the debtor obtains a discharge, an early discharge order would alleviate the debtor of the burden of those penalties much faster than a discharge order would if granted after several years. Many believe that in order to deter financially troubled individuals from repeating their mistakes, such individuals should be heavily penalized during the bankruptcy process. Hence, many judges find it inconceivable to grant the debtor a discharge soon after declaring bankruptcy. [222]

3. Insolvent Individuals Are Not Effectively Reintegrated Into the Mainstream Economy Because the Bankruptcy System Imposes Excessive Penalties on the Debtor and Severe Limitations on the Debtor's Ability to Earn a Living

Following the commencement of the bankruptcy petition and until the bankruptcy process ends, the bankruptcy process imposes several penalties and/or limitations on the debtor's efforts to earn a living. [223] These penalties and limitations deprive the debtor of the ability to effectively reintegrate into the economy and become a productive unit of society.

a. The bankruptcy system limits the ability of the debtor to earn a living because it precludes the debtor from certain professions, occupations and business trades

By precluding the bankrupt individual from participating in certain professions or occupations throughout the bankruptcy process, the bankruptcy system makes it much more difficult for certain financially troubled individuals to earn a living. As described earlier, a bankrupt individual is precluded from working in such occupations as an attorney, a real estate broker, or a contractor. Moreover, the bankrupt is prohibited from serving as a member of any city council or municipality and is prohibited from serving as a member of the trade association for fruits and vegetables. Lastly, the bankrupt is denied the ability to be a member of the Board for the Air−Traffic Control. [224]

By preventing the debtor from engaging in those activities, the bankruptcy system limits the ability of some individuals to reintegrate themselves into the market place, and to become productive and gainfully employed individuals. These restrictions impose real difficulties on some of the financially troubled debtors in their attempts to obtain a financial fresh−start.

b. The bankruptcy system limits the ability of the debtor to earn a living because it restricts his entrepreneurial opportunities

Moreover, a debtor who is declared bankrupt in Israel is restricted in her entrepreneurial opportunities. As described earlier, the bankrupt individual is prohibited from starting a new corporate business venture until the bankruptcy process ends. The debtor cannot serve as a director of a private or public corporate entity or participate directly or indirectly in its management. The debtor is prohibited from opening a checking account to assist her in conducting business activities and other financial affairs. The individual loses the capacity to enter into enforceable contractual transactions, and cannot act as an agent or master in agency relationships. [225]

These restrictions severely curtail the debtor's options in her attempts to begin a new chapter in her financial life. The debtor's inability to maintain a checking account in the Israeli market−oriented society significantly burdens her from being able to conduct routine business and non−business transactions. Moreover, the termination of all agency relationships, in which the debtor may have been involved at the time of filing the bankruptcy petition, further jeopardizes the only chance the debtor has to start over.

Lastly, the prohibition against starting a new business venture seems to directly contradict the very essence of obtaining an opportunity to begin a new financial chapter in one's life. A bankrupt individual in Israel, who is unskilled and uneducated, may have extreme difficulties getting a job with a company. [226] Her only avenue of financial success may be self−employment in some kind of business venture. The bankruptcy system effectively forecloses that only avenue of potential success.

c. The bankruptcy system limits the ability of the debtor to earn a living because it restricts the debtor's ability to obtain new credit

Next, a debtor who is declared bankrupt is severely restricted in her ability to obtain new consumer credit. That is, once a court declares an individual bankrupt, she is prohibited from obtaining any new credit cards or using existing ones. [227] While a credit card company should be able to elect to terminate a debtor's rights once a debtor declares bankruptcy, a law that mandates this result seems overly intrusive and burdensome on individuals in Israel who increasingly rely on credit cards for personal and business transactions. [228]

d. The bankruptcy system limits the ability of the debtor to earn a living because it restricts the debtor's ability to leave the country and freely access his mail

A debtor who commences bankruptcy protection may be prohibited from leaving the country during the bankruptcy process and may have her mail re−directed to the Official Receiver or to the trustee. [229] These restrictions may interfere with the debtor's ability to conduct business in the global environment. [230] For example, a debtor who conducts business overseas will be unable to foster face−to−face business relations with existing or prospective business clients outside of Israel. Furthermore, a debtor who conducts business, but does not receive her mail on time, may lose important business relations as a result of this interference with the communication channels.

e. The bankruptcy system limits the ability of the bankrupt individual to earn a living because it does not provide the debtor with an adequate breathing spell

Immediately following the commencement of a bankruptcy petition, the financially troubled individual needs some time to reorganize her affairs without the continuous burden of collection efforts from creditors. [231] This temporary time−out is essential in order for the debtor to regain her physical and mental strength and resume productive participation in the marketplace. The lack of a breathing spell in the Israeli bankruptcy system makes it more difficult for the debtor to effectively re−enter the marketplace and earn a living. While the existing bankruptcy law has a stay provision, its numerous exceptions make the stay almost meaningless. Specifically, the stay does not limit the ability of a creditor to pursue judicial action for unliquidated tort related claims, claims that cannot be reasonably estimated, claims of eviction or trespass, non−dischargeable claims and secured claims. [232] Allowing these continuous collection efforts by the creditors at that sensitive period of time dramatically diminishes the debtor's chances of promptly and productively rejoining the work place.

4. Insolvent Individuals Are Not Effectively Reintegrated Into the Mainstream Economy Because the Bankruptcy Law Imposes an Uncertain and Unrealistic Standard for Granting an Unconditional Discharge

A fresh−start policy which effectively reintegrates financially troubled individuals into society must have certain, fair and realistic standards for granting a discharge order. The Israeli bankruptcy regime fails to provide for the effective reintegration of insolvent individuals into the economy because its standards for granting an unconditional discharge are at times uncertain, unfair and unrealistic.

At the discharge hearing, the judge generally has broad discretion over whether to grant the debtor a discharge. [233] Where it is alleged that the debtor violated certain statutorily specified obligations, however, the judge may deny the debtor's application for discharge in its entirety. [234] The statutory limits are at times uncertain, unfair and unrealistic. The list of limiting factors invites arbitrariness and inconsistency, which may unfairly limit the debtor's chances to obtain a fresh−start in the form of debt−forgiveness. [235]

For example, one statutory limiting factor is whether the debtor maintained adequate records of her business' financial affairs for the three years immediately preceding the commencement of her bankruptcy petition. [236] If the debtor does not have such records, the court may deny the debtor's discharge. This standard does not provide an opportunity for a debtor to explain any lack or loss of the required documents. As a result, the debtor may lose the right to a discharge even if the failure to keep the necessary documents was not the debtor's fault.

Moreover, under section 63(b)(6) of the Israeli bankruptcy law, a debtor may be precluded from obtaining an unconditional discharge where "the bankrupt has brought, or contributed to, his bankruptcy by rash and hazardous transactions." [237] This limiting factor is both vague and unrealistic. It is unclear what is meant by "rash and hazardous transactions." This may mean that any entrepreneur who fails, and resorts to bankruptcy, will not be able to obtain an unconditional discharge simply because any new business venture is inherently risky. The broadness of this standard, coupled with its implicit unrealistic assumption that most individuals should engage in a relatively risk free enterprise, create a high degree of uncertainty and may deter individuals

from taking calculated risks in the market place. Additionally, it permits the denial of an unconditional discharge for a responsible, yet unsuccessful individual, whose only fault was the undertaking of risks in the market place.

Lastly, a debtor may be precluded from obtaining an unconditional discharge if she has been declared bankrupt up to five years prior to the commencement of her present petition. [238] This provision is unfair and uncertain because it may deprive an individual of an unconditional discharge order simply because she previously filed a petition within the last five years, regardless of whether she actually received a discharge on that previous petition. This provision does not take into account debtors who have filed for bankruptcy protection and have been declared bankrupt, but who have voluntarily or involuntarily failed to consummate the process and receive a discharge. Such debtors may have entered into out−of−court settlement agreements with their creditors, thereby voluntarily dismissing the bankruptcy petition. Alternatively, some may have been disqualified from the process after failing to live up to a procedural requirement. While these individuals have not received debt−forgiveness for the previous bankruptcy petition, a court may nonetheless deny their application for an unconditional discharge on their present petition.

5. Insolvent Individuals Are Not Effectively Reintegrated Into the Mainstream Economy Because the Bankruptcy Law Grants an Unduly Limited Debt− Forgiveness

A fresh−start policy which effectively reintegrates financially troubled individuals into society must provide for a reasonably broad debt−forgiveness regime. The Israeli bankruptcy system fails to provide for the effective reintegration of the financially troubled individual into the mainstream economy because it provides for an unduly limited debt−forgiveness. It does so by narrowly defining dischargeable claims, and by allowing the benefits of debt−forgiveness to be easily lost in subsequent collection proceedings.

a. The debt−forgiveness in Israel is unduly limited because the law narrowly defines dischargeable claims

An individual who survives the long, uncertain and punitive bankruptcy process is still not assured that she will receive any meaningful debt−forgiveness. The potentially enormous benefits of debt−forgiveness are severely curtailed because the law narrowly defines dischargeable claims. As explained earlier, a discharge order does not cover unliquidated tort claims. [239] That is, a tort claim against the debtor with a value that has not been ascertained prior to the bankruptcy filing is, in essence, a non−dischargeable debt.

In addition, any claim against the debtor that cannot be reasonably estimated will not be discharged. [240] As a result, a creditor may continue to pursue the debtor even after a discharge order is granted on any unliquidated tort claims or on any claims that cannot be reasonably estimated at the time of bankruptcy. This narrow definition of "claims" significantly impairs the adequacy and the value of fresh−start in Israel.

b. The debt−forgiveness is unduly limited because it does not stop all subsequent collection activities

In a post−discharge litigation, the debtor may lose the benefits of debt−forgiveness if she fails to properly plead it as an affirmative defense. Section 69(b) of the existing bankruptcy law provides that where a creditor brings a judicial proceeding against a debtor who previously obtained a discharge with respect to the claim at issue, the debtor has the right to assert the affirmative defense of discharge. [241] Thus, for the discharge order to bar further judicial collection activities by a pre−petition creditor, the debtor must formally raise the discharge order as an affirmative defense. Therefore, an individual who obtained discharge order but failed (due to lack of funds to hire an attorney or due to lack of knowledge) to assert it as an affirmative defense in subsequent litigation may again be liable to the creditor for that debt.

Also, a pre−petition creditor is free to attempt to collect its otherwise discharged claims by resorting to *non−judicial* proceedings. [242] Thus, to enforce an unpaid licensing fee, a local city agency may revoke the

business license of a bankrupt individual if she fails to pay the license fee, even though the license fee debt was previously discharged in bankruptcy. Additionally, a creditor may simply continue to make oral or written demands for repayment even after a discharge order is granted to the debtor. [243]

These loopholes in the bankruptcy system impair the value and adequacy of the debt−forgiveness benefit because the debtor remains subject to potential future liability, despite a discharge order.

6. Insolvent Individuals Are Not Effectively Reintegrated Into the Mainstream Economy Because the Bankruptcy Law Does Not Provide for Their Rehabilitation

Lastly, the Israeli bankruptcy system fails to promote any meaningful rehabilitative objectives. The system lacks any mechanism to provide guidance to bankrupts on how to avoid the pitfalls of a financial failure in the future. [244] Conspicuously absent from the Official Receiver's duties is the task of providing basic financial education or therapeutic programs to bankrupts. As most of the bankrupts in Israel are unsophisticated individuals, [245] the need for some sort of basic financial education or financial counseling program seems especially compelling. Moreover, since many of the individuals who file for bankruptcy protection had to undergo a very unpleasant reality (such as unemployment, welfare dependency, imprisonment, discrimination in the workplace, etc.), some may have sustained psychological trauma. [246] The restrictive debt−forgiveness policy does not help those traumatized individuals. Also, the lack of appropriate counseling further impairs the debtor's rehabilitation potential.

CONCLUSION

Indeed, compared to many other countries in the world today, Israel, which has a debt−forgiveness provision in its bankruptcy law, has a relatively liberalized fresh−start policy. The bankruptcy laws in Israel effectively promote several important normative objectives of the fresh−start policy, such as personal responsibility and sanctity of contract.

The bankruptcy system in Israel, however, retains numerous provisions that effectively eliminate realistic opportunities for a meaningful fresh−start to many of its bankrupts. The most fundamental obstacle bankrupts face in seeking a financial fresh−start in Israel is the failure of the system to effectively and promptly reintegrate the bankrupts into society and the economy. This failure is the result of specific punitive and restrictive provisions in the bankruptcy ordinance, as well as accepted practices and conditions that make the hope for a fresh−start a difficult, if not impossible, proposition.

FOOTNOTES:

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[1] *See generally* Karen Gross, Preserving a Fresh−Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments, 135 U. Pa. L. Rev. 59, 60 (1986) (opining that fresh−start policy is essential in modern bankruptcy schemes).Back To Text

[2] *See generally* Thomas H. Jackson, *The Fresh−Start Policy in* Bankruptcy Law, 98 Harv. L. Rev. 1393, 1393 (1985)(discussing the characteristics of human behavior that justify nonwaivable right of discharge in bankruptcy law). Back To Text

[3] *See* Richard E. Flint, Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor, 48 Wash. & Lee L. Rev. 515, 529 (1991) (arguing that "[t]he soul of debtor financial relief, the fresh start, is found in the availability of a discharge and in the protection of exempt property."); *see also*

Jackson, supra note 2, at 1435 (stating that ideally debtors would be allowed to protect all durable assets that they feel are essential to their future well−being or that would result in substantial asset loss if turned over to their creditors); William C. Whitford, A Critique of the Consumer Credit Collection System, 1979 Wis. L. Rev. 1047, 1100 (explaining that exemptions reflect idea that debtor should be able to keep some minimum property to enable him to use his skills productively after coercive execution).Back To Text

[4] *See, e.g.*, 11 U.S.C. § 525 (1994) (prohibiting government and private employers from discriminating against individuals who have filed for bankruptcy protection).Back To Text

[5] *See* infra notes 31−32 and accompanying text.Back To Text

[6] *See* infra discussion Part I.A. (discussing distributive objectives of fresh−start policy).Back To Text

[7] *See* infra discussion Part I.B. (explaining dignity objectives of fresh−start policy).Back To Text

[8] *See* Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in* Anglo−American Bankruptcy Proceedings, 131 U. Pa. L. Rev. 69, 103 (1982) (describing relatively expansive fresh−start policy in United States); *see also* F.H. Buckley, *The American Fresh Start*, 4 S. Cal. Interdisc. L.J. 67, 68 (1995) (discussing broad American policy of discharge in relation to countries such as Canada); Charles J. Tabb, The Historical Evolution of the Bankruptcy Discharge, 65 Am. Bankr. L.J. 325, 327 (1991) (stating that United States may have one of most liberal discharge rules in world). Back To Text

[9] *See* infra discussion Part II (analyzing global prevalence of fresh−start policy).Back To Text

[10] Id.Back To Text

[11] *See* Shalom Lerner, *Restrictive Terms in* Floating Charges: The Israeli Experience, 39 St. Louis U. L.J. 841, 841 (1995) (stating that Israel adopted English bankruptcy laws upon its independence).Back To Text

[12] *See* infra Part III (discussing current state of Israeli bankruptcy laws).Back To Text

[13] *See* infra Part III.C.3 (discussing grounds for denying debt−forgiveness in Israel due to debtor's irresponsible behavior).Back To Text

[14] For example, the society existing in the United States is generally rights and choice conscience. That attitude is reflected in its bankruptcy system, which provides broad financial relief and ignores inquiry as to whether the debtor engaged in responsible conduct prior to the petition. *See* Lynn M. LoPucki, Common Sense Consumer Bankruptcy, 71 Am. Bankr. L.J. 461, 461 (1997) (stating that "[t]he [U.S. bankruptcy] system continues to be uninterested in the debtor's conduct in the period before bankruptcy."). *See generally* Lawrence M. Friedman, The Republic of Choice (1993) (exploring pervasive nature of individualism and culture of choice in contemporary American legal system).Back To Text

[15] As stated earlier, this can be accomplished, among other ways, by a provision for debt−forgiveness or by allowing the debtor to retain certain basic properties away from the hands of his creditors. *See* supra notes 2−5 and accompanying text. Back To Text

[16] *See* Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an* Interpretive Theory, 21 U. Rich. L. Rev. 49, 96 (1986) (contending that "the idea of the 'fresh start' has long incorporated and been shaped by a complex multiplicity of policy concerns."); Margaret Howard, *A Theory of Discharge in* Consumer Bankruptcy, 48 Ohio St. L.J. 1047, 1048 (1987) (arguing that "a number of different, sometimes mutually inconsistent, policies have developed to justify isolated aspects of the Bankruptcy Code's discharge rules.").Back To Text

[17] *See* Theodore Eisenberg, *Bankruptcy Law in* Perspective, 28 UCLA L. Rev. 953, 981 (1981) (concluding that "[a] discharge system provides a technique for allocating the risk of financial distress between a debtor and his creditors."); *see also* Howard, supra note 16, at 1048 (postulating that "bankruptcy may be designed to achieve economic efficiency in its allocation of the risk of loss, connected with nonpayment, between debtor and creditor."). *See generally* Richard A. Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757, 764 (1975) (asserting that "these and other important elements of the legal system can be best understood as attempts . . . to promote an efficient allocation of resources.").Back To Text

[18] *See* Eisenberg, supra note 17, at 981 (stating that "the contracting party more able to protect himself against loss resulting from an event should bear the risk of such loss."); s*ee also* Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon*", 135 U. Pa. L. Rev. 1123, 1159 (1987) (stating that "superior risk bearer" is determined by which party is better able to control risk or its consequences); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in* Contract Law: An Economic Analysis, 6 J. Legal Stud. 83, 90 (1977) (contending that "the superior risk bearer" should be party that is more efficient at bearing particular risk in question).Back To Text

[19] *See* Eisenberg, supra note 17, at 981−82 (discussing use of these two factors in deciding which party is superior bearer of risk of financial distress of bankruptcy); *see also* Howard, supra note 16, at 1063 (stating that determination of which party is better able to bear risk of loss depends on which party is better able to prevent risk from occurring and which party is "superior insurer" against risk); Jackson, supra note 2, at 1399 (stating that party's ability to bear risk depends on party's capacity to avoid "deleterious" events and its ability to insure effectively against these events); Posner & Rosenfield, supra note 18, at 90 (stating that "[a] party can be a superior risk bearer for one of two reasons. First, he may be in a better position to prevent the risk from materializing . . . ; the other is insurance.").Back To Text

[20] *See* Eisenberg, supra note 17, at 982−83 (asserting that debtors should be presumed to be superior risk bearers because they are in "greater control of their financial activities than any particular lender . . . . In general, borrowers have greater control of their affairs than lenders do."); Robert A. Hillman, Contract Excuse and Bankruptcy Discharge, 43 Stan. L. Rev. 99, 126 (1990) (stating that "debtors are in control of their financial activities and therefore are arguably in a better position to predict and avoid financial collapse or to insure against it."); Charlene Sullivan, Reply: Limiting Access to Bankruptcy Discharge, 1984 Wis. L. Rev. 1069, 1071 (stating that debtors are in better position to bear risk of loss, as "risk of bankruptcy for an individual could be largely a function of personal characteristics that creditors are not particularly adept at evaluating.").Back To Text

[21] *See* Eisenberg, supra note 17, at 983 (stating that "[i]f bankruptcy law is going to reach a single conclusion with respect to discharge, the single economic answer would most likely be to limit the discharge.").Back To Text

[22] *See* Eisenberg, supra note 17, at 982−83 (suggesting that since debtors should be presumed to be superior risk bearers, discharge should be limited in order to promote efficient risk allocation in bankruptcy); Hillman, supra note 20, at 126 (concluding that in bankruptcy context "consumers may be the efficient risk bearers."); Sullivan, supra note 20, at 1071 (arguing that liberal discharge provision "undermines the efficiency of placing the risk of loss, due to debtors' financial failure on the creditor.").Back To Text

[23] *See* Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in* Perspective, 30 UCLA L. Rev. 327, 362 (1982) (arguing that creditors are superior risk bearers because they can more efficiently evaluate risk of bankruptcy since they do such inquiry more often than debtors and can objectively evaluate risks). Professor Harris also noted that, "[m]any creditors are able to procure insurance against bad debt losses at reasonable cost. Others may self−insure by diversifying their risks, either by extending credit to a pool of debtors and spreading the risk among them or by engaging in diversified lending activities . . . ." Id. at 362−63. *See also* Howard, supra note 16, at 1063−64 (contending that creditors are superior risk bearers because they can predict more accurately, based on prior experience, likelihood of future default, and because they are more aware of need for insurance and can acquire it for lower price); Jackson, supra note 2, at 1400

(suggesting that creditors are superior risk bearers because their experience allows them to better monitor borrower's debt consumption, and they can more efficiently insure against risk of loss by diversifying).Back To Text

[24] *See* Anthony T. Kronman, Paternalism and the Law of Contracts, 92 Yale L.J. 763, 785 (1983) (arguing that "[o]ne reason for giving the debtor a fresh start is to counteract the self−hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets."); Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 Wisc. L. Rev. 403, 410 ("More importantly for the economic system as a whole, discharge might be justified as preserving incentives that a debtor might otherwise lose if his debts essentially mortgaged his future earnings.").

See also Whitford, supra note 3, at 1100, stating:

> a debtor can become so overburdened with debt, and can anticipate such a lengthy period of subsistence living while disposable earnings are used mostly for debt retirement, that he or she loses incentive to exploit personal skills productively. Discharge of debt, . . . therefore, promotes wealth maximization through realization of human skills. *Back To Text*

[25] *See* John C. Weistart, The Costs of Bankruptcy, 41 Law & Contemp. Probs. 107, 111 (1977) (finding that "excessive debt, with its attendant pressure on family and emotional stability and job security. . . [might] so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer−but−wiser debtor a second chance."); *see also* infra notes 30−32 and accompanying text.Back To Text

[26] *See* Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the 'Fresh* Start', 45 Hastings L.J. 175, 207 (1994) (suggesting that one function of discharge policy is to avoid providing incentive to debtor to choose leisure and thus create social cost to insolvency); Jackson, *supra* note 2, at 1420 (describing how payment of debt out of future income provides incentive to devote more time to leisure); Janet M. Link, *When a Sting is Overkill: An Argument For the Discharge of Punitive Damages in* Bankruptcy, 94 Colum. L. Rev. 2724, 2737 (1994) (asserting that "[w]hen the debtor owes so much money that a creditor can garnish a substantial portion of her current wages indefinitely or she can take a lower paying job requiring fewer hours of work, thereby increasing her leisure time, the debtor may choose leisure."); Stewart E. Sterk, Restraints on Alienation of Human Capital, 79 Va. L. Rev. 383, 425 (1993) (describing incentive for debtors to choose leisure rather than work because creditors cannot advance claim against debtor's leisure). However, some have discounted the work−leisure tradeoff. *See Discussion* [in a symposium on the economics of bankruptcy reform], 41 Law & Contemp. Probs. 123, 151 (1977) [hereinafter Discussion] (statement by John Shoven) (suggesting that since elasticity of labor supply curve is small, debtors will continue to work despite fact that more money may go to their creditors); *see also* Hirsch, supra at n.99 (stating "to the extent persons *enjoy* their jobs, or are simply *habituated* to a work routine, their productivity may not suffer (or suffer as badly as we would expect) in the event of insolvency.").Back To Text

[27] The loss of productivity is reflected in some reported cases in the United States. *See, e.g.*, In re Keebler, 106 B.R. 662, 663 (Bankr. D. Haw. 1989) (observing insolvent debtor quit his job). *See also* Francis R. Noel, A History of the Bankruptcy Clause of the Constitution of The United States of America 187 (1918) (stating that "society must be seriously injured by the presence of unproductive or discontented members, who through idleness . . . may eventually become public charges."); Flint, supra note 3, at 536 (observing that "[t]he discharge also reflects an awareness that the productive resources of every individual are significant, and that by releasing the debtor from his past financial obligations, his renewed vigor will benefit society as a whole as well as himself."); Hillman, supra note 20, at 100 (noting "[e]ven if the debtor is somehow at fault, the fresh−start policy prevails because society is better off reintegrating the debtor into its productive ranks than leaving her saddled with unconquerable debt."); Hirsch, supra note 26, at 207−08 (stating that "[b]y restoring the debtor to solvency, the discharge simultaneously removes the debtor's incentive to rely on inefficient state aid and renews her incentive to contribute to the gross national product."); Jackson, *supra* note 2, at 1420 (observing that "[b]y doing less work and enjoying more leisure, the individual undoubtedly decreases his

productive contributions to society.").Back To Text

[28] *See* Hallinan, *supra* note 16, at 80 (noting that important aspect of bankruptcy is to ensure that financial failure does not reoccur).Back To Text

[29] *See* Howard, supra note 16, at 1059−60 (observing that "[s]ubsumed under the concept of rehabilitation" is the policy "that discharge should . . . serve a consumer education function.").Back To Text

[30] *See* supra note 27 and accompanying text (noting that debtor is more likely to work harder if possibility of retaining benefits of work exists).Back To Text

[31] *See* Everett v. Judson, 228 U.S. 474, 477 (1913) (noting that debtor committed suicide); *see also* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93−137, pt. I, at 53 (1973) (noting that "personal problems are intimately related in a great many personal bankruptcy cases."); David Caplovitz, Consumers in Trouble: A Study of Debtors in Default 280−85 (1974) (noting the myriad of social problems associated with personal bankruptcy); Martin Ryan, *Consumer Credit, Debt Poverty and Counseling: The Australian Experience*, 35 Brit. J. Soc. Work 217, 222 (1992) (finding that "physical and emotional problems relating directly to financial problems were extensive with 42 percent feeling tense or anxious and 30 percent who had sleeping problems. At least one−quarter of respondents also reported headaches, loss of appetite and an upset stomach as directly attributable to financial problems."). In investigating the social problems associated with personal bankruptcy, Professor Siporin concluded:

> [M]ost of the dysfunctional reactions [arising out of the financial trouble] were expressed inwardly, against spouses, or against self. Many of the wives turned against their husbands because of the inadequacies as providers . . . . In reaction, a number of men went on spending, gambling, or alcohol binges; some became unfaithful. Several couples separated or threatened to do so . . . . Many described reactive emotional states of intense anxiety, rage, resentment, harassment, depression, desperation, exhaustion and defeat.

Max Siporin, *Bankrupt Debtors and their Families*, 12 Soc. Work 51, 59 (1967). *See also* Teresa A. Sullivan, et al., *Bankruptcy and the Family*, 21 Fam. & Law 193, 209−10 (1995) (describing negative impact of financial trouble on marriage).Back To Text

[32] *See* Ryan, supra note 31, at 224 (concluding that "[m]ost respondents were positive about their bankruptcy: 77% said that it had improved their financial situation, 59% reported that it had improved their health, 60% of married respondents noted an improvement in their marriage and 82% reported that it had a positive affect on their family."); *see also* Hirsch, supra note 26, at 206 n.96 (recognizing that discharge functions to relieve psychological trauma caused by extreme financial difficulty); Weistart, supra note 25, at 115−16 (arguing that fresh−start policy, in form of appropriate exemption level, is necessary since it protects debtor's emotional well−being from undue harassment by creditors).Back To Text

[33] *See* Hirsch, supra note 26, at 207 (noting that "[w]ithout the discharge, a hopelessly insolvent debtor would lose her incentive to produce, preferring instead . . . administratively costly welfare benefits."); *see also* Jackson, *supra* note 2, at 1402 (stating that "[i]f there were no right of discharge, an individual who lost his assets to creditors might rely instead on social welfare programs."); Iain Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 J. Consumer Pol'y 269, 279 (1997) (contending that "[t]hose who favour the bankruptcy fresh start argue that it will prevent individuals [from] relying on welfare . . . . [S]ome economists have argued that different levels of welfare payments will affect the level of bankruptcies, with higher levels of government transfers correlating with higher bankruptcy rates.").Back To Text

[34] *See* Jackson, *supra* note 2, at 1402−03, stating:

> existence of those [public welfare] programs might induce him to underestimate the true costs of his decisions to borrow . . . . He would then have an incentive to incur large debts or undertake risky activities, because he would know he could never fall below the minimum standard of living guaranteed by the government.

See also Discussion, supra note 26, at 142 (statement of Professor Logue) (suggesting that discharge may be warranted as way to reduce reliance on public assistance); Hallinan, *supra* note 16, at 73 n.96 (discussing added costs of social insurance and public assistance programs associated with personal bankruptcy); Eric A. Posner, The Political Economy of the Bankruptcy Reform Act of 1978, 96 Mich. L. Rev. 47, 52 (1997) (arguing that "[b]ecause the welfare system protects people from some of the downside risk of investments, it encourages people to take on too much risk.").Back To Text

[35] *See* Hallinan, supra note 16, at 64 (discussing effect of fresh−start policy as causing uncompensated loss to creditors); Jackson, *supra* note 2, at 1402 (noting that "discharge imposes much of the risk associated with ill−advised credit decisions not on social insurance programs but on creditors.").Back To Text

[36] *See* Jackson, *supra* note 2, at 1402 (noting that "availability of a limited, non−waivable right of discharge in bankruptcy therefore encourages creditors to police extensions of credit and thus minimizes the moral hazard created by safety−net programs."). *See generally* Randal C. Picker, Security Interests, Misbehavior, and Common Pools, 59 U. Chi. L. Rev. 645, 657 (1992) (discussing externalities in creditors monitoring debtors and optimal level of such monitoring).Back To Text

[37] *See* Flint, supra note 3, at 537 (stating that "exemption of certain property from execution also benefits society as a whole by preventing debtors from becoming public charges."); Posner, supra note 34, at 52 (contending that "[t]he right to discharge, however, forces creditors to raise interest rates, discouraging some debtors from engaging in risky investments whose cost is externalized on the taxpayer."). In addition to the burden a financially troubled individual may cause on public welfare in the absence of discharge;

> one must also consider the impact of the discharge on creditors, who are thereby denied satisfaction of their debts [as a result of the bankruptcy discharge provision]. Such denial may render some creditors dependent on state support, which again entails social costs . . . . *[A]ll* creditors who suffer bad debt losses as a result of the discharge pass part of them on to society, *inter alia*, by deducting them from their taxable income.

Hirsch, supra note 26, at 208−09 n.101.Back To Text

[38] Professor Hallinan argues:

> [C]onsumer financial difficulties . . . were ordinarily a product of the debtor's failure either to accurately judge his repayment capacity or to make adequate provision for adverse changes in his financial circumstances. Those failures were in turn attributed to several causes. First, many consumers were said to underestimate both the risk and the consequences of default, while overestimating the value of immediate credit.

Hallinan, *supra* note 16, at 77−78. *See also* Jackson, *supra* note 2, at 1405 (noting that "available evidence suggests that many people systematically fail to pursue their own long−term interests when making decisions about whether to spend today or save tomorrow . . . . [I]ndividuals *systematically* misjudge (or ignore) their own interests and that this bias leads them to consume too much and save too little."); Russell Ben−Ali, *Urge to Spend Money Can Lead to Ruin, Therapy*, L.A. Times, May 6, 1991, at B1 (discussing compulsive overspending nature of millions of Americans); Zan Dubin, *To Their Credit; They're Mired in Debt−−Now What?*, L.A. Times, Apr. 22, 1997, at E1 (observing that although more research is needed in this area, "'there's a huge amount of data showing a biological underpinning' of certain forms of the [impulsive spending] behavior.").Back To Text

[39] *See* Jackson, *supra* note 2, at 1408 (stating that "[w]hen presented with an either−or choice, people, like animals, exhibit a tendency to choose current gratification over postponed gratification, even if they know that the latter holds in store a greater measure of benefits.").Back To Text

[40] *See* Jackson, supra note 2 which states:

> [B]ecause of systematic failures in their cognitive processes, individuals appear to make choices in which they consistently underestimate future risks . . . . Like impulsiveness, [this problem] . . . may lead the individual to favor present consumption in a way that does not give due regard to his long−term desires and goals . . . . Much evidence indicates that the errors associated with [this cognitive problem] . . . lead decisionmakers systematically to overestimate chances of success and to underestimate the corresponding risks.

Id. at 1410−12.Back To Text

[41] *See* supra notes 35−36 and accompanying text (explaining reasons for placing burden of risk on creditors to promote efficiency).Back To Text

[42] *See* William H. Meckling, Financial Markets, Default, and Bankruptcy: The Role of the State, 41 Law & Contemp. Probs. 13, 23 (1977). Professor Meckling notes:

> [I]n a response to a higher likelihood of a bad−debt expense arising out of discharge provisions, [financial institutions] will increase expenditures on those activities which reduce bad−debt losses. They will establish stricter standards for loan recipients, rejecting some applications they would otherwise have taken. They will spend more resources collecting information about applicants. They will monitor loans more carefully, notifying debtors more promptly when their payments become overdue, or perhaps imposing higher penalties for late payments. They will insist more on pledges of specific collateral.

Id.Back To Text

[43] *See* Jackson, *supra* note 2, at 1426 (noting that discharge policy "leaves the determination of whether to extend credit to *creditors*, who presumably are better trained in credit policy than are legislators, and who are better able, by observing individual debtors or by employing specific contractual covenants, to monitor individuals' consumption of credit.") (emphasis added); *see also* Hallinan, supra note 16, at 68 (identifying fresh−start policy as punitive action towards creditors in order to promote exercise of greater care in extension of credit); Bruce E. Kosub & Susan K. Thompson, Note, *The Religious Debtor's Conviction to Tithe as the Price of a* Chapter 13 Discharge, 66 Tex. L. Rev. 873, 893 (1988) (recognizing that based on creditors' superior ability to control over−extension of credit, fresh−start policy forces creditors to limit individuals' excessive access to consumer credit).Back To Text

[44] *See* Hillman, supra note 20, at 134 (noting that "[a]n ungenerous discharge policy disserves debtors and society. At the other extreme, however, bankruptcy discharge available on demand undermines the sanctity of contract."); *see also* Howard, supra note 16, at 1047−48 (arguing that "[d]ischarge of legal obligations is an extraordinary exception to the usual obligation orientation of the law and it must have equally extraordinary justification."); Weistart, supra note 25, at 107 (stating that "some would regard government intrusions into the area of private contract as a transgression of the highest order.").Back To Text

[45] *See* Halpern, supra note 18, at 1125 & n.8 (alluding to traditional constrained interpretation of excuse principle). *But see* Thomas Wilhelmsson, *"Social Force Majeure"− A New Concept in Nordic Consumer Law*, 13 J. Consumer Pol'y 1, 12 (1990) (advocating expansion of excuse principle in context of consumer contracts to instances where consumer could not repay outstanding debt due to illness, unemployment or changes in family circumstances). For an in depth discussion of the traditional approaches to the doctrine of contract excuse, *see* Hillman, supra note 20, at 102−09. Back To Text

[46] *See* Sir Kenneth Cork, Insolvency Law and Practice: Report of the Review Committee 13 (1982) (stating that "[t]he foundation of the whole credit world . . . rests upon a belief in the sanctity of contract; the parties involved, as borrower, as guarantor, or in any other capacity, must clearly understand that a failure to repay can result in the application of some form of effective sanction."); *see also* Posner, supra note 34, at 52 (suggesting that right of discharge forces creditors to raise interest rates). Back To Text

[47] *See* Hillman, supra note 20, at 134 (stating that "[contract] excuse courts consider whether a contract promisor was at fault in failing to perform in order to encourage prudence and ensure fairness. Likewise, a debtor's blameworthiness in purposely or even carelessly incurring excess obligations should be relevant to whether a discharge [should be granted].").Back To Text

[48] *See* Discussion, *supra* note 26, at 148 (statement of Philip Shuchman) ("I think discharge was a reward offered by the creditors to the debtors for assembling their property and not concealing anything . . . . It was thought to be a benefit to the creditors."); Hallinan, *supra* note 16, at 54 (stating that debtor's discharge was initially viewed as reward for debtor's efforts to maximize return to creditors); *see also* Hillman, supra note 20, at 109−10 (stating that "[s]ome evidence suggests that discharge was primarily aimed at facilitating debt collection by inducing debtors to cooperate in collection process, not at rehabilitating unfortunate merchant debtors."); Howard, supra note 16, at 1049 (stating that initial intent of discharge was to encourage cooperation of debtors in distribution of his assets to creditors); Lawrence Shepard, Personal Failures and the Bankruptcy Reform Act of 1978, 27 J.L. & Econ. 419, 421 (1984) (stating that remission of debts was not offered as humane gesture to grant bankrupts' clean slate but rather to counter bankrupts' potential asset concealment); Id. at 421 (describing how first discharge provisions in English law were adopted as way of providing debtors incentive to disclose all of their assets for benefit of creditors). *But see* Jackson, *supra* note 2, at 1395 n.5 (stating that "[i]t is difficult to argue that creditors would view discharge as a necessary part of a collective system for debt collection."). In addition to maximizing the value of the debtor's estate, the discharge may be viewed as facilitating a more cost−effective collection mechanism for creditors. *See* Hallinan, *supra* note 16, at 82 (stating that "[f]or creditors, the discharge would remove uncertainty as to the value of continued collection effort and permit collection resources to be devoted to more productive uses.").Back To Text

[49] *See* Hallinan, *supra* note 16, at 64 (stating that primary objective of fresh−start policy was to encourage undertaking of business risks); s*ee also* Hillman, supra note 20, at 125 (contending that "[b]ankruptcy discharge, we also believe, encourages beneficial, albeit risky, business activity by merchants and manufacturers."); Doug Rendleman, The Bankruptcy Discharge: Toward a Fresher Start, 58 N.C. L. Rev. 723, 726 (1980) (contending that debt−forgiveness provision in bankruptcy "encourages people to take risks by removing some of failure's permanent sting."). Back To Text

[50] *See* Michelle J. White, *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 L. & Soc'y Rev. 685, 694 (1991) (stating that "[t]he availability of bankruptcy is a valuable cushion to self−employed, for if the business fails, bankruptcy can be used to discharge the firm's debts. The availability of bankruptcy as a downside cushion thus increases the attractiveness of starting a new business.").Back To Text

[51] *See id*. at 694−95 (noting that "cushion [of bankruptcy discharge] has an undesirable side effect −− that of making economically inefficient business ventures attractive.").Back To Text

[52] *See* John M. Moore, *Foreword* [to a symposium on the economics of bankruptcy reform], 41 Law & Contemp. Probls. 1, 4−5 (1977) (contending that "[l]ower bankruptcy costs will cause a higher rate of bankruptcy election by debtors."); Sullivan, supra note 20, 1072−73 (explaining that increased cost of bankruptcy controls bankruptcy filings); Michelle J. White, Personal Bankruptcy Under The 1978 Bankruptcy Code: An Economic Analysis, 63 Ind. L.J. 1, 16 (1987) (explaining that low bankruptcy costs encourage bankruptcy filings regardless of amount owed).Back To Text

[53] *See generally* Meckling, supra note 42, at 22−23 (discussing cost increases for creditors arising from activities which would reduce bad−debt losses such as collecting more information from loan applicants, monitoring loans more carefully and imposing higher penalties for delinquency); Moore, supra note 52, at 4−5 (arguing that increased rate of bankruptcy filing "will cause higher bad−debt write offs or more extensive screening of debtors by creditors"). Back To Text

[54] *See* Jackson, *supra* note 2, at 1427 (concluding that "the more readily available the benefit [of discharge], the higher the cost of credit."). Moreover, a more liberal fresh−start policy will make credit more demanded by borrowers, which will translate into higher interest rates. *See* Eisenberg, supra note 17, at 981 (contending that "[i]f a lenient discharge rule is in effect, one expects creditors to charge higher interest rates that offset any increased demand for funds by debtors who seek to avail themselves of a too liberal discharge rule."); Hallinan, supra note 16, at 81 (stating that rise in discharge rates increases creditors' cost and results in increased cost of borrowing). Back To Text

[55] *See* Hallinan, supra note 16, at 81 (pointing out that "the impact of those costs would not be borne by creditors but would be directly reflected in the cost of credit to borrowers in the form of interest rates, credit availability, security requirements, and the like."); *see also* Meckling, supra note 42, at 23 (concluding that "all increases in lending costs as perceived by lenders will in the long run be borne by potential borrowers. No doubt much of the market adjustment will take the direct form of higher interest rates."); Moore, supra note 52, at 5 (asserting that "if the supply [of credit] is perfectly elastic (as they believe it is), and if creditors don't subdivide loan applicants into risk categories to which they lend on different terms, the full costs of increase in bad−debt losses will be borne by debtors as a group."); J. Fred Weston, *Some Economic Fundamentals for an* Analysis of Bankruptcy, 41 Law & Contemp. Probs. 47, 47 (1977) (concluding that "[s]ince the supply curve of credit is perfectly elastic, the full costs of increased investigation and monitoring, increased bankruptcy loss, and increased nonpayment loss will all be shifted to borrowers and prospective borrowers.").Back To Text

[56] *See* White, supra note 52, at 2 (suggesting that "[c]reditors make up their losses on loans by raising the interest rates they charge to all borrowers and reducing the amount they are willing to lend, thus reducing the attractiveness of borrowing and the amount borrowed by debtors generally."); *see also* Hillman, supra note 20, at 126 (stating that increased cost of credit by creditors may reduce debtors' incentive to borrow).Back To Text

[57] *See* Buckley, supra note 8, at 67 (stating that "[w]here debtors cannot pledge post−petition earnings, less will be lent them, and they must rely more heavily on self−financing."); Hillman, supra note 20, at 127 (concluding that "[c]reditors unable to pass on the costs of discharge due to limited information or other deficiencies may be discouraged from lending at all."); Meckling, supra note 42, at 23 (asserting that "[b]orrowers will also find that the total amount of credit available to them as individuals is reduced. Finally, some potential borrowers will be forced out of the market entirely by higher interest or more stringent screening."). *But see* Howard, *supra* note 16, at 1066−67 (contending that "no empirical support exists for the proposition that persons (obviously of high risk) are currently excluded from the credit market who should not be. Furthermore, the argument is hard to square with the commonly held belief that credit is too easy to get.").Back To Text

[58] *See* Buckley, supra note 8, at 83 (stating that "[b]y invalidating a pledge of future earnings, fresh−start rules prevent debtors from granting an interest in their most valuable asset. Less will be borrowed, and more financed out of the debtor's residual interest in his earnings. For some debtors, this means passing up profitable opportunities.").Back To Text

[59] *See* Flint, supra note 3, at 519−20 (suggesting "that the central justification for the debtor financial relief provisions . . . is founded in a natural law theory of morality."); *see also* Karen Gross, The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions, 65 Notre Dame L. Rev. 165, 200 (1990) (suggesting that fresh−start policy is partly based on social, religious and philosophical values); Hirsch, supra note 26, at 203 (stating that fresh−start policy may be addressed from many varied angles including natural law,

libertarian philosophy and moral philosophy).Back To Text

[60] Flint, supra note 3, at 525.Back To Text

[61] *See* id. at 531 (discussing two facets comprising fresh−start policy's moral dimensions as community's commitment to debtor and debtor's commitment to his community).Back To Text

[62] *See* id. at 542 & 573 (identifying human dignity and humanitarianism as core values comprising justification of fresh−start policy); s*ee also* Weistart, supra note 25, at 110−11 (stating that fresh−start principle is primarily grounded in humanitarian concerns). Back To Text

[63] *See* Flint, supra note 3, at 539, 543 (discussing balance between benefits of distributive justice and duties imposed on debtor through values and responsibility inherent in commutative justice).Back To Text

[64] *See* id. at 536 (explaining debt forgiveness as congressional recognition that human dignity dictates debtor be given opportunity to earn living).Back To Text

[65] *See* Noel, supra note 27, at 182−83 (suggesting that "[o]ne of the first duties of legislation . . . certainly is . . . to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from a fair enjoyment of the common benefits of society."). Alluding to the connection between the fresh−start policy in the United States and the individual's personal freedom, Professor Weistart notes:

> [I]t's true that for political reasons we can't go back and change the ban on imprisonment. I think there's a reason for that, and the reason is that as a society we have reached the conclusion that we place a high value on personal freedom and the individual's prerogative to have his personal freedom. . . . [Consumer advocates] are suggesting that there are different types of infringement at stake − infringements on emotional well−being of the debtor, infringement on his relationship with his family. The implication is that if our value system forbids infringement upon personal freedom, it ought also to forbid these other infringements.

Discussion, *supra* note 26, at 144.Back To Text

[66] *See* Hirsch, supra note 26, at 203 n.90, asserting:

> [w]ere the debtor to remain indefinitely in bankruptcy without a discharge, she would lose her right to enjoy income or to sue for personal wrongs, except for the benefit of the bankruptcy estate. . . . [T]his state of affairs would leave the debtor 'an outlaw, a mere slave to the trustee,' which is contrary to natural justice.

See also Kronman, supra note 24, at 785−86 ("The bankruptcy discharge has a moral purpose as well to restore to the debtor some measure of confidence in his capacity to change his future as he wishes free from the dead hand of the past.").Back To Text

[67] *See* Buckley, *supra* note 8, at 95 (arguing that "in leveling America, the loudest voice in the bankruptcy debates was always that of the debtor who[se] . . . plea for financial freedom was explicitly tied to political libertarianism."); Jackson, *supra* note 2, at 1395 (proclaiming that "the Article focuses on how to implement the fresh−start policy in a society committed both to maintaining a credit economy and to preserving a basic degree of individual autonomy."); *id*. at 1404 (suggesting that "we should not be surprised to learn that the normative underpinnings of discharge largely reflect the justifications for maintaining social insurance programs within a system that takes individual autonomy as a fundamental premise.").Back To Text

[68] In discussing society's moral obligations towards a financially troubled individual, Professor Flint contended that:

> Exemptions are steeped in principles of social justice and exemplify an awareness that the distributions −− or for that matter the redistribution −− of wealth . . . should insure that each individual's very basic needs are met. The retention of some minimum level of assets, freed from one's general creditors, is in fact the ultimate humanitarian response of the community to a debtor, and this response is firmly rooted in reason.

Flint, supra note 3, at 537−38. *See also* Whitford, supra note 3, at 1101 (noting that "[m]any provisions in exemption statutes and much of bankruptcy law reflects basic humanistic relief−of−hardship concerns. Such concerns seem the most obvious reason for those exemption statutes designed to prevent a drastic decline in a debtor's standard of living.").Back To Text

[69] *See* Hallinan, *supra* note 16, at 67−68 ("That vision of the consumer debtor as not necessarily very sensible was complemented by a vision of many consumer lenders as driven by competitive necessity to 'exploit' their customers' weaknesses and incapacities through the hard selling of 'easy' credit."); Hillman, supra note 20, at 124 (observing that "[t]he parties in a bankruptcy discharge, we generalize, are sympathetic though fallible wage−earners, essential merchants, or, in the case of reorganizations, potentially productive businesses, battling aggressive and powerful banking or other creditor interests in a consumption−oriented, volatile economy.").Back To Text

[70] *See* Hillman, supra note 20, at 125 (noting that "it is easy to assert that bankruptcy discharge shields wage−earners from the ravages of bargaining power imbalances and other market imperfections."). Back To Text

[71] *See* Hallinan, *supra* note 16, at 64 (discussing generally held assumptions about redistributive impact of debtor discharge). However, as described earlier, the transfer of wealth is not from the creditor to the debtor but rather it takes the form of debtor−debtor transfers. *See* supra note 54 and accompanying text (suggesting that liberal discharge provisions result in higher costs of credit); s*ee also* William C. Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. Consumer Pol'y 179, 194 (1997) ("Consumer bankruptcy has never been a program that shifted significant amounts of income between classes, however.").Back To Text

[72] *See* In re Sumerell, 194 B.R. 818, 826 (Bankr. E.D. Tenn. 1996) (stating that one goal of exemptions in bankruptcy law is "to act as a safety net, so that the debtor and his family are not completely impoverished due to creditor collection action or bankruptcy such that they become wards of the state."); Ramsay, supra note 33, at 278 ("Bankruptcy may also be a safety net for financial consequences associated with changes in employment opportunities, family breakup, failure as an entrepreneur, and may be a side−effect of accidents or illness."); Whitford, supra note 71, at 191(suggesting that "[a] second justification for the fresh−start is as a kind of social insurance against financial exigency.").Back To Text

[73] *See* Flint, supra note 3, at 531 (stating two facets of moral dimension of debtor relief as community commitment to debtor and vice versa); *see also* Ian F. Fletcher, The Law of Insolvency 33 (1st ed. 1990) (asserting that bankruptcy process serves as incentive to debtors to behave "responsibly and honestly" towards their creditors); Hallinan, *supra* note 16, at 139 (stating "a vision of moral norms as relevant to the 'fresh start' also arises in a more general way, in the view that limits on the availability or extent of the discharge are warranted out of regard for the moral value of one's obligation to pay one's 'just debts'").Back To Text

[74] *See* Fletcher, *supra* note 73, at 34 (stating "the bankruptcy law is also designed in part to protect the honest but unfortunate debtor, as well as to discipline and if necessary punish one who has been incompetent or even dishonest."); Flint, supra note 3, at 538 (noting that when debtor does not comply with societal norms, he may lose ability to discharge his debts); *see also* id. at 552 (arguing that "release from the legal obligation to pay one's debts always must be tempered with society's concerns of social justice for all its members."); Raymond T. Nimmer, Consumer Bankruptcy Abuse, 50 Law & Contemp. Probs. 89, 99 (1987) (stating "to obtain relief in bankruptcy, the debtor must deal honorably with his creditors.").

But see Charles J. Tabb, *The Scope of the Fresh Start in* Bankruptcy: Collateral Conversions and the Dischargeability Debate, 59 Geo. Wash. L. Rev. 56, 98 (1990), stating:

> [W]ho cares if debtors take advantage of the discharge law? If letting people who are hopelessly in debt regain their sense of self−worth and identity through debt forgiveness is justifiable on a humanitarian basis, the justification remains valid whether the debtor is a commercial Mother Theresa [sic] or Saddam Hussein.Back To Text

[75] Flint, supra note 3, at 554; *see also* Cork, *supra* note 46, at 16−17, stating:

> The penal side of the [bankruptcy] legislation, . . . seems to have been motivated by a desire to maintain acceptable standards of conduct in the commercial community, such as honest and fair dealing. . . . Such defaulters must forfeit the privileges of, and incidental to, earning their livelihood in commercial society whose structure and fabric was put at risk by any trader who failed to fulfill his commitments.

See also Flint, supra note 3, at 574 (stating that "[t]ogether these intertwined strands form the roots of an underlying moral foundation for debtor financial relief."); Hirsch, supra note 26, at 227−28, noting:

> [i]n general, those advocates who continue to posit a moral obligation to repay debts nonetheless are prepared to acknowledge countervailing moral imperatives sufficient to justify the discharge; sympathy for the 'honest but unfortunate' debtor, coupled with a concern for basic human dignity, call for the grant of a fresh start.Back To Text

[76] The concept of debt−forgiveness is generally traced to England and the passage of the first discharge provision in 1705. *See* Shepard, supra note 48, at 421−22.Back To Text

[77] *See* 1 Credit Research Center, Consumer Bankruptcy Study: Consumers' Right to Bankruptcy Origins and Effects 4 (1982) ("In contrast to the laws of England, Commonwealth countries, and the United States, most countries in Europe and Latin America do not provide for the discharge of the unpaid portion of debts incurred prior to bankruptcy.").Back To Text

[78] Comparative discussions of the contemporary fresh−start principle have been given little attention by scholarly writing. While the following analysis aims to shed some light on the subject by examining various contemporary trends and approaches to the fresh−start policy in different parts of the world, it is not meant to be a comprehensive comparison or even a representative sample of the fresh−start policy in the world today.Back To Text

[79] *See* Tabb, supra note 8, at 325 ("[T]he United States may well have the most liberal discharge laws in the world.").Back To Text

[80] *See* 11 U.S.C. §§ 109(a), 101(41) (1994) (stating only persons may be debtors, but defining "person" as individual, partnership, and corporation).Back To Text

[81] Id. §§ 701−766 (describing procedures for liquidation−type bankruptcy).Back To Text

[82] Id. §§ 1301−1330 (describing procedures for payment plan, non−liquidation−type bankruptcy).Back To Text

[83] *See* id. § 726(a) (describing distribution priorities under chapter 7). Back To Text

[84] *See* id. § 727(a) & (b) (listing exceptions to debtor's discharge of pre−petition debts).Back To Text

[85] *See* 11 U.S.C. § 541(a)(6).Back To Text

[86] Non−dischargeable claims include certain tax claims, fraudulently incurred obligations, claims arising out of fraud or embezzlement, spousal and child support debts, claims arising out of willful and malicious injuries, government fines, educational loans, and claims arising out of injuries caused by driving while intoxicated. *See* id. at § 523(a).Back To Text

[87] The prohibited conduct includes circumstances where: (1) the debtor, within one year before bankruptcy, fraudulently transferred or concealed property "with intent to hinder, delay, or defraud a creditor"; (2) the debtor failed to keep adequate financial records; (3) the debtor engaged in certain criminal misconduct during the bankruptcy proceedings; (4) the debtor was unable to explain satisfactorily any losses or deficiency of assets; (5) the debtor obtained a discharge in a previous bankruptcy petition filed less than six years before the commencement of the pending case. *See* id. at § 727(a). The burden is placed on the creditors, the trustee or the United States trustee to file a timely complaint and object to the discharge order. *See* id. at § 727(c)(1); Fed. R. Bankr. P. 4004.Back To Text

[88] Unless a timely objection to the discharge is made, a discharge order is automatically issued to the debtor within sixty days after the creditors' meeting. The creditors' meeting must take place within forty days after the bankruptcy petition is filed. *See* Fed. R. Bankr. P. 4004(a), 2003(a).Back To Text

[89] George M. Treister, et al., Fundamentals of Bankruptcy Law 367 (4th ed. 1996). In the case where the debtor has no assets, the trustee has a strong economic disincentive to discover fraud by the debtor because the trustee is paid by the debtor's estate. This is a reason why less objections to discharge are lodged today. *See* LoPucki, supra note 14, at 467−70 (discussing strong economic disincentives in Bankruptcy Code that prevent trustees and creditors from objecting to debtors' discharge).Back To Text

[90] 11 U.S.C. §§ 1301−1330 (1994) (reflecting adjustment of debts of individual with regular income).Back To Text

[91] *See* id. § 1306(b). Back To Text

[92] *See* id. § 1306(a); *see also* Treister, supra note 89, at 385. Back To Text

[93] For example, upon the successful completion of chapter 13 plan payments, the debtor is relieved from any liability arising out of fraud or intentional injuries. *Compare* 11 U.S.C. § 1328(a) *with* 11 U.S.C. § 523(a).Back To Text

[94] *See* 11 U.S.C. § 1325(b)(1)(B) (noting Chapter 13 discharge is not subject to exceptions of fraud and malicious injury discussed in §§ 523(a)(2) and (a)(6)).Back To Text

[95] *See* id. § 522. The exemption provisions in the United States are relatively generous. *See* Michelle J. White, Creditors' Remedies and Debtors' Right to File for Bankruptcy: Why Don't More Households Go Bankrupt? 1 (Feb. 7, 1996) (unpublished manuscript, on file with author) ("Since many states [in the U.S.] have high exemption levels, most debtors who file for bankruptcy [under chapter 7] can obtain a discharge from their debts without giving up any of their future income or any of their assets."). For example, this exemption scheme is generally broader than the one provided in England. *See* David Caplovitz, *Personal Bankruptcy in America*, *in* Banking for People: Social Banking and New Poverty Consumer Debts and Unemployment in Europe − National Reports 277, 277 (Udo Reifner & Janet Ford eds., 1992) ("In England, the bankruptcy law is harsh because the consumer has to give up practically everything he owns in order to apply for bankruptcy. In contrast, the American bankruptcy law is very generous."); G. Stanley Joslin, The Philosophy of Bankruptcy – A Re−Examination, 17 U. Fla. L. Rev. 189, 194 (1964) (stating that the exemption scheme "has expanded tremendously in the United States . . . . The bankruptcy law of the United Kingdom provides for extremely small exemptions.").Back To Text

[96] For example, 11 U.S.C. § 525(a) prohibits governmental units from discriminating against a debtor in employment, in licensing, or in making similar grants solely because the debtor has been in bankruptcy.

Section 525(b) prohibits a private party from discriminating against a debtor with respect to employment on bankruptcy−related grounds.Back To Text

[97] *See* Fletcher, supra note 73, at 37 (stating that those who may be regarded as "first−time" bankrupts may experience discharge automatically after an interval time of three years). However, where the debtor previously received a discharge in a bankruptcy petition that was commenced fifteen years before the pending petition, then the debt−forgiveness can only be obtained through an application to the court. *See* id. at 37−38. In exercising her discretion, the judge may grant the application for discharge, refuse to grant it or make the discharge subject to conditions with respect to any subsequent income due the debtor, or with respect to property given to or acquired by debtor. *See* id. at 291.Back To Text

[98] *See* Insolvency Act 1986, § 283(2) (creating two categories of assets exempt from bankruptcy estate); *see also* supra note 95.Back To Text

[99] Among the disabilities that are imposed on the undischarged debtor are the following: (1) the debtor may not acquire or dispose of property on his own account; (2) the debtor is unable to freely enter into contractual relations or obtain credit; (3) the debtor cannot be elected to the House of Parliament or any local authority; (4) the debtor cannot be appointed, or act as, a Justice of the Peace; (5) the debtor cannot hold a solicitor's practicing certificate; (6) the debtor cannot act as a director of, or directly or indirectly take part in the management of, a company without leave of court. *See* Fletcher, supra note 73, at 298−300.Back To Text

[100] *See* Insolvency Act 1986, § 307 (1) (giving trustee of bankruptcy estate power to claim any property acquired by debtor after bankruptcy commencement); Fletcher, supra note 73, at 188 (discussing trustee's right to claim property acquired by debtor post−petition). However, the bankrupt is allowed to retain a portion of her post−petition income to the extent deemed necessary for her and her dependents' support. *See* id. For a detailed comparison between the fresh−start policy in the United States and England *see* Boshkoff, supra note 8, at 69−125. Back To Text

[101] *See* 2 L. W. Houlden & C.H. Morawetz, Bankruptcy and Insolvency Law of Canada 6−31 − 6−32 (3d. ed. 1993) (stating "[i]f an individual bankrupt has never been bankrupt before…he or she is entitled to make use of the procedure for automatic discharge."); *see also* Jacob S. Ziegel, *Canadian Perspectives on the Challenges of Consumer Bankruptcies*, 20 J. Consumer Pol'y 199, 212 (1997); Jacob S. Ziegel, Canada's Phased−In Bankruptcy Law Reform, 70 Am. Bankr. L. J. 383, 401 (1996) (recognizing that Bankruptcy Advisory Committee recommended that bankrupt be discharged automatically after nine months).Back To Text

[102] *See generally* 2 Houlden & Morawetz, supra note 101, at 6−33 − 6−100. A court is prohibited from granting such a debtor an unconditional discharge where, among other things, the debtor's assets are not of a value of at least fifty percent of the debtor's unsecured liabilities, the debtor failed to keep proper books, the debtor continued to trade after knowing that she is insolvent, or the debtor engaged in rash and hazardous speculations, unjustifiable extravagance of living, gambling or culpable neglect of business affairs. *See* id. at 6−84 − 6−100.Back To Text

[103] For example, in many provinces such debtors are ineligible to serve as a member of a municipal council. In addition, the undischarged debtor is precluded from initiating an action to enforce her property rights; she cannot serve as a director of a corporation; she may not engage in trade without disclosing to all those with whom she transacts that she is an undischarged bankrupt; and she cannot obtain credit for more than $500 for a purpose other than the supply of necessities without informing the potential lender that she is an undischarged bankrupt. *See* id. at 1−2 − 1−3.Back To Text

[104] *See* C. Darvall et al., Australian Bankruptcy Law & Practice 4033 (Katie Florance, ed., 1992); Dennis Rose, Australian Bankruptcy Law 226 (10th ed. 1994); Joan Carr, *Business Failure and Social Inequality*, 29 Austl. J. Soc. Issues 195, 212 (1994) (stating "[a]lthough the period of bankruptcy is usually three years, it may be extended to five years or to an indefinite period if the Court so orders."); Ryan, supra note 31, at 219;

William J. Tearle, *Consumers in Debt: The Reform of Debt Recovery Procedures in Australia, in* Debtors and Creditors: A Socio−Legal Perspective 241, 249 (Iain Ramsay ed., 1986) (noting that amendment to Australian bankruptcy law in 1980 provided for automatic discharge of bankrupt's debts three years after commencement of bankruptcy petition).Back To Text

[105] *See* F.C. Spratt & P.D. McKenzie, Spratt & McKenzie's Law of Insolvency 265 (2d ed. 1972); *see also* J.A.B. O'Keefe & W.L. Farrands, Introduction to New Zealand Law 566−67 (3d. ed. 1976).Back To Text

[106] *See* Bankruptcy Law, (English ed.) Chapter III, Section 6, Article 149 (Taiwan) (stating "[i]f the creditors in bankruptcy have received repayment in accordance with the reconciliation or bankruptcy procedure, their claims for those portions which have not yet been repaid shall be deemed extinguished [unless the bankrupt has been sentenced for the commission of fraudulent bankruptcy].").Back To Text

[107] *See* Tom Cumming, *Bankruptcy Law Reform in Russia*, 4 Parker Sch. J.E. Eur. L. 379, 391 (1997).Back To Text

[108] *See* Bill McBryde, *The Scottish Experience of Bankruptcy, in* Insolvency Law: Theory & Practice 117, 124 (Harry Rajak, ed., 1993). *See also* W.M. Gloag & R. Candlish Henderson, Introduction To The Law of Scotland 889−90 (A.B. Wilkinson & W.A. Wilson eds., 9th ed. 1987).Back To Text

[109] *See* D.S. Chopra, Mulla on the Law of Insolvency in India 299−300 (3d ed. 1977) (discussing factors judge should consider in deciding whether to grant debtor discharge). Back To Text

[110] *See* Iain Ramsay, Consumer Law in the Global Economy: National & International Dimensions 287 (1997) (noting that in Denmark "[i]f the debtor is employed, discharge will only be granted if he or she pays a portion of the debts during a certain time, usually five years; if the debtor is unemployed or retired, it is possible to get a discharge without payments."); *see also* Hans Petter Graver, *Consumer Bankruptcy: A Right or a Privilege? The Role of the Courts in Establishing Moral Standards of Economic Conduct*, 20 J. Consumer Pol'y 161, 170 (1997) (stating that "[i]n the Danish Consumer Bankruptcy Act, the conditions for a discharge are that the consumer is hopelessly indebted, and that a discharge is warranted by the circumstances of the debtor."); Johanna Niemi−Kiesilainen, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA*, 20 J. Consumer Pol'y 133, 134 (1997) (noting that "[t]he Danish bankruptcy law was amended to include a specific procedure for consumer debt adjustment and discharge already in 1984."). Back To Text

[111] According to Norwegian law, "debtors who are permanently incapable of paying their debts, may be accorded a discharge of debts." *See* Graver, *supra* note 110, at 165. However, a "court may at its discretion refuse to give the debtor a discharge of debts, if such a solution would be morally offensive." *Id.* at 166.Back To Text

[112] *See* Ramsay, *supra* note 110, at 287 (noting that pursuant to Adjustment of Debts of Private Individuals' Act from 1993, debtors in Finland may obtain discharge for unsecured debts).Back To Text

[113] *See id*. at 288 (according to 1994 Debt Insolvency Act of Sweden, "complete or partial discharge is possible if the debtor has no hope of paying his or her debts in the foreseeable future.").Back To Text

[114] A court in South Africa "may in its discretion, . . . either grant or refuse the application [for discharge], or may postpone the hearing of the application, or attach such conditions to the order [of discharge] . . . as it thinks fit . . . ." Harold E. Hockly, Mars: The Law of Insolvency in South Africa 447 (7th ed. 1980). *See also* Catherine Smith, The Law of Insolvency 288 (1973). However, a bankrupt automatically receives a discharge ten years after the commencement of the bankruptcy proceedings, unless the court orders otherwise beforehand. *See* 11 The Law of South Africa 269 (Wa Joubert & Ja Faris eds., 1st ed. 1998). Back To Text

[115] In 1995, Austria revised its bankruptcy law making it possible for the first time for debtors to obtain a discharge. However, "[d]ischarge is only possible for debtors in 'good faith' who abide by the repayment schedule and who did not benefit from the bankruptcy procedure in the preceding twenty years." Ramsay, *supra* note 110, at 298.*Back To Text*

[116] Under a new law that went into effect in Germany in 1997, a debtor may obtain a discharge if he "had paid all of his or her seizable income over a seven−year period and made an effort to increase his or her income." *Id*. at 288.Back To Text

[117] See Christopher J. Osborn, *Hong Kong*, *in* International Corporate Insolvency Law 250, 271 (Dennis Campbell ed., 1992) (court may grant, suspend, condition or deny bankrupt's application for discharge).Back To Text

[118] See Tan W. Tiang, *Singapore*, *in* International Corporate Insolvency Law, supra note 117, at 488, 489, 503 (debtor who is able to voluntarily commence bankruptcy petition, "may apply for an order of discharge after being adjudicated a bankrupt. On the hearing of the bankrupt's application, the court . . . may either grant or refuse an order of discharge, or suspend the order for a specified time or grant or discharge on terms.").Back To Text

[119] *See* Ian R. MacNeil, Bankruptcy Law in East Africa 152−56 (1966).Back To Text

[120] *See* id.Back To Text

[121] *See* discussion infra Part III.Back To Text

[122] However, in some of these countries, a debtor may get part or all of her pre−petition debts forgiven if the majority of her creditors consent. *See* Boshkoff, *supra* note 8, at 70 n.6 (noting that "some civil law countries do have a discharge system as part of their bankruptcy law, but discharge is always conditional on the approval of some majority of the bankrupt's creditors."). *See, e.g.*, Ronald W. de Runk, *The Netherlands Questionnaire in Creditors' Rights Against Business Debtors*, *in* International Loan Workouts and Bankruptcies 551, 567 (Richard A. Gitlin & Rona R. Mears eds., 1989) (stating that debts are not automatically discharged by bankruptcy, but can be discharged through composition).Back To Text

[123] China and the Ukraine, for example, do not provide any bankruptcy mechanism for individuals, whether they operate a business or not. *See* Cao Siyuan, Tantan Qiye Pochan Fa [On Enterprise Bankruptcy Law] 45 (1986) (stating "[i]n China, there has not been any recent discussion about individual bankruptcy law; hence, the Chinese bankruptcy law is limited to enterprises.") (Qizhi Luo trans.); Kevin P. Block, *Ukranian Bankruptcy Law*, 20 Loy. L.A. Int'l & Comp. L.J. 97, 99 (1997) (noting that in Ukraine, law does not allow individuals to declare bankruptcy). In contrast, Belgium and Italy provide bankruptcy relief for individuals, but only if they operate or engage in business or trade. *See* Fletcher, *supra* note 73, at 7 & n.17 (stating that some countries, including Belgium and Italy, have retained a "purely mercantile application" of bankruptcy laws); Nick Huls, *Prospects for Statutory Consumer Debts Arrangement in the Netherlands*, *in* Banking for People: Social Banking and New Poverty Consumer Debts and Unemployment in Europe − National Reports, *supra* note 95, at 287, 288 (stating that "[i]n some countries (such as Belgium) private individuals cannot be adjudged bankrupt at all."); P.J. Serulus & Leen Greenens, *The Bankruptcy Laws of Belgium*, *in* European Bankruptcy Laws 17, 17 (David A. Botwinik & Kenneth W. Weinrib eds., 2d ed. 1986) ("In Belgium, only merchants can be declared bankrupt."). In these systems, the merchant individuals who end up in bankruptcy are subject to rigorous penalties. For example, in Belgium the debtor may no longer manage her estate. Her mail is forwarded to the trustee. Moreover, throughout the bankruptcy process the debtor may not hold any managerial position in a commercial company and she may not work as a banker, an auditor, or a bookkeeper. Huls, *supra*, at 120. Italy is no different. Individuals who are eligible for bankruptcy relief are subjected to significant penalties. *See* Mourizio Bernardi, *The Bankruptcy Laws of Italy*, *in* European Bankruptcy Laws, *supra*, at 95, 103 (explaining that bankrupt merchant in Italy can go to prison for period of six months to two years if during three year period prior to bankruptcy declaration she did not keep or irregularly kept her

business books, or if prior to bankruptcy she spent excessively, or if she wasted a significant part of her assets in imprudent activities). On top of the penalties that are imposed on the bankrupt in Belgium and Italy, the bankrupt is not entitled to debt−forgiveness. *See* P.J. Serulus & Greenens, *supra*, at 120 (indicating that at conclusion of bankruptcy proceedings in Belgium, creditors may continue their collection efforts against debtor for any unpaid portion of their claims); Renato Viale, *Questionnaire on Creditors' Rights against Business Debtors*, *in* International Loan Workouts and Bankruptcies, supra note 122, at 441, 456 (asserting that debts are not discharged under Italian bankruptcy law).Back To Text

[124] In the Netherlands, any individual may commence a bankruptcy petition on the ground that he has ceased paying his debts when due. At the conclusion of the bankruptcy process, however, the debtor remains liable to pay all of his remaining debts in full, unless the majority of the creditors consent to forgive part or all of the debts. *See* de Runk, supra note 122, at 551, 564, 567−68. Moreover, like many other continental countries, the bankruptcy regime in the Netherlands is very punitive toward the debtor. *See, e.g.*, A.J.F. Hoek, *The Bankruptcy Laws of Holland*, *in* European Bankruptcy Laws, *supra* note 123, at 89, 94 (stating "[t]here is no criminal penalty for going bankrupt. There are, however, provisions in Dutch law that make it possible to initiate criminal proceedings against persons who . . . spend disproportionately large amounts of money on private consumption."). Similarly, in Egypt, individuals are not entitled to debt−forgiveness at the conclusion of the bankruptcy process. *See* Frederick W. Taylor, Jr. *Questionnaire on Creditors' Rights Against Business Debtors, in* International Loan Workouts and Bankruptcies, *supra* note 122, at 245, 273 (noting that "bankruptcy [in Egypt] does not eliminate the debt and, after bankruptcy, individual creditors can bring actions against the debtor for the amount of the debts that are not settled in bankruptcy."). Finally, in Switzerland, at the conclusion of the bankruptcy process, each creditor gets a certificate showing the unpaid balance of its claim. The creditor can resume enforcement of the unpaid balance once the debtor gains enough income to start payments. *See* Peter Grundler, *'Good' and 'Bad' Debts − Debtors' Protection and Pressure for Reform in Switzerland, in* Banking for People: Social Banking and New Poverty consumer Debts and Unemployment in Europe− National Reports, supra note 95, at 627, 633−34.Back To Text

[125] To place the Israeli bankruptcy process in some comparative perspective, various references will be made to the United States bankruptcy system.Back To Text

[126] The court will approve the debtor's application as long as: (a) the debtor has debts that amount to no less than 10,000 NIS (approximately $2,500); (b) the debtor attached to her application a detailed financial report relating to her family's assets, liabilities, income and expenses; and (c) the debtor attached a written waiver allowing the Official Receiver to obtain from any source any confidential data on the debtor's financial affairs. *See* § 17(a) of The 1980 Bankruptcy Ordinance, as amended in 1560 S.H. 60, (1996) [hereinafter The 1996 Bankruptcy Amendment]. In addition, the debtor must allege in his application that she is unable to repay her debts. *See* id. at § 17(b). However, a court may deny debtor's application where it determines that the debtor is able to repay her debts or for any other sufficient cause. *See* id. at § 14.Back To Text

[127] While the debtor remains the title holder, she may not dispose of any assets. Instead, the Official Receiver, as an interim trustee, becomes temporarily in charge of the debtor's assets as part of the overall process of transferring assets from the debtor to the creditors for eventual distribution. The Official Receiver generally remains in that position until the debtor is formally adjudicated as bankrupt, at which point a permanent trustee is appointed. *See* Shlomo Levin, Pshitat−Regel [Bankruptcy] 88−89 (1984).Back To Text

[128] Only a creditor who has an allowed claim against the debtor is stayed from commencement or continuation of an action against the debtor. *See* The 1996 Bankruptcy Amendment, supra note 126, at § 20(a). According to sections 72 and 73 of the 1996 Bankruptcy Amendment, an allowed claim does not include an unliquidated claim arising out of tort, or any other claim that cannot be reasonably estimated. Hence, the stay does not limit the creditors' post−petition collection actions with respect to those matters. Also, where the action against the debtor is an eviction for not paying her rent or for trespassing, the stay does not preclude the landowner from pursuing a post−petition legal action against the debtor. *See* Levin, *supra* note 127, at 89−90. Similarly, since post−petition claims are not deemed as allowed claims, a creditor may commence or continue a suit post−petition against the debtor for any claim arising after a court issues a receiving order. *See* H. Kazir,

Pshitat−Regel [Bankruptcy] 241 (1995). In addition, while a creditor is stayed from commencing an action against the debtor for claims arising out of a non−dischargeable debt, a creditor who has *already* initiated such action prior to the approval of the application for the commencement of the bankruptcy petition, may continue its litigation post−petition. *See* The 1996 Bankruptcy Amendment, supra note 126, at § 22(d)(1). Lastly, a secured creditor of the debtor is not stayed from exercising its rights post−petition as against its collateral. *See* id. at § 22(d)(2); s*ee also* Uriel Procaccia, Dine Pshitat− Regel Ve'Hachakika Ha'ezrachit Be'yisrael [Bankruptcy and Civil Legislation in Israel] 163 (1984). In contrast, the stay provision in the United States is much broader. It enjoins a creditor from taking any action against the debtor or the estate's assets for any pre−petition claim. A claim includes any contingent or unliquidated right to payment. *See* 11 U.S.C. §§ 362(a), 101(5) (1994).Back To Text

[129] *See* The 1996 Bankruptcy Amendment, supra note 126, at §§ 140, 141. The information is collected for two primary purposes. First, the data is evaluated by creditors at the creditors' meeting while considering the acceptance or rejection of any proposal for settling the debtor's outstanding obligations. *See* Levin, supra note 127, at 99. Second, the information is used by the Official Receiver to substantiate a written recommendation to the court regarding the scope of the debtor's discharge. *See* The 1996 Bankruptcy Amendment, supra note 126, at § 140(1). Back To Text

[130] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 27. At the public examination, the Official Receiver, the judge, the trustee, if any, or any creditor may examine the debtor on any matter relating to her business activities, her assets, her family's assets, and her conduct or circumstances relating to her financial failure. *See* id. at § 29. Similarly, in the United States, a debtor submits to an examination under oath at a creditors' meeting. At this meeting the creditors, any trustee, the examiner, or the United States trustee may examine the debtor. *See* 11 U.S.C. § 343 (1994). Back To Text

[131] *See* Levin, supra note 127, at 103−04. Similarly, in the United States, the purpose of examining the debtor is to "enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge." S. Rep. No. 95−989, at 43 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5758, 5829.Back To Text

[132] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 57(a).Back To Text

[133] *See* id. *Back To Text*

[134] *See* id. § 58.Back To Text

[135] *See* id. §§ 19(a), 52 (debtors may propose repayment settlement of their debts at any time prior to or after issuance of receiving order). Back To Text

[136] *See* id. § 35(a).Back To Text

[137] *See* id. § 35(f) (court may refuse to approve settlement proposal despite its approval by majority of creditors, if it finds that proposal will not benefit general body of creditors). Back To Text

[138] *See* id. §§ 18a(a), 18e(a). Before the hearing, the Official Receiver provides the court with a detailed report relating to the debtor's financial resources and behavior.Back To Text

[139] *See* id. § 18e(a)(2). A similar provision exists in the United States, where a court may dismiss a chapter 7 consumer bankruptcy case if it perceives the filing to be a substantial abuse of the spirit of the law. *See* 11 U.S.C. § 707(b) (1994).Back To Text

[140] *See* The 1996 Bankruptcy Amendment, supra note 126, at §§ 42, 85, 113.Back To Text

[141] *See* Levin, supra note 127, at 143. Back To Text

[142] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 85(1). Back To Text

[143] *See* id.Back To Text

[144] *See* Philip Shuchman, *Field Observations and Archival Data On Execution Process and Bankruptcy in* Jerusalem, 52 Am. Bankr. L.J. 341, 343 (1978) (explaining that post−petition earnings of bankrupt are distributed to bankrupt's creditors).Back To Text

[145] *See* 11 U.S.C. § 541(a) (1994). However, where the debtor elects to proceed under chapter 13 of the Bankruptcy Code, her post−petition income for the next three years belongs, in theory, to the trustee. *See* id. at § 1306(a). Back To Text

[146] *See* C.A. 341/82, 818/82, 289/83, Bar Dror v. Kasif, 37(3) P.D. 729, 734 (holding that judge is in charge of debtor's post−petition earnings and court has power to make decision regarding disposition of said earnings).Back To Text

[147] *See* Levin, supra note 127, at 145−46.Back To Text

[148] For example, the Israeli Bar Association revokes the license of any attorney who is declared bankrupt. *See* Chamber of Advocates Law, 1961, 15 L.S.I. 48(3) (1961). An individual who is declared bankrupt is precluded from serving as a member of any city council or municipality. *See* The Municipal Ordinance Code (new edition), 1964 § 120(7) (such individual will be able to resume his position two years after obtaining order of discharge); *see also* The Local Municipal Ordinance, 1950 § 101(8); Local Municipal Ordinance, 1958 § 11(a)(10). An individual who has been declared bankrupt within the last seven years may not be appointed as a member of the trade association for fruits and vegetables. *See* The Association for Fruits and Vegetable Law (Production and Export), 1973 § 8(b). An individual who is a member of the Board for the Air−Traffic Control will be forced to resign immediately from her post once she is declared bankrupt. *See* The Air−Traffic Control Act of 1977, 1977 § 10(a)(3), § 11(a)(4). A bankrupt individual may not be appointed to serve as a member of the Postal Authority. *See* The Postal Authority Law, 1986 § 10(a)(3). A bankrupt individual may not be appointed to serve as a member of the Airport Association. *See* The Airport Association Law, 1977 § 10(a)(3). A bankrupt individual may not be appointed to serve as a member of the Television and Radio Association. *See* The Second Association of Television and Radio, 1990 § 9(6). A bankrupt individual must cease acting as a committee member of any foundation. *See* Foundations Law, 1980 § 13(b). A bankrupt individual's license to work with gas is revoked. *See* The Gas Law, 1989 § 17(a)(7). A bankrupt individual's contractor's license is revoked. *See* The Law of Contractor's Registration, 1969 § 8a(1). Lastly, a bankrupt individual is ineligible to become a real estate broker. *See* Real Estate Broker Law, 1996, 1560 L.S.I. 5(a)(3); *see also* Levin, supra note 127, at 147.Back To Text

[149] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 42a(c).Back To Text

[150] *See* The Companies Act (new edition), 1983 § 84(a); *see also* The 1996 Bankruptcy Amendment, supra note 126, at § 42a(d). A bankrupt who violates this last prohibition is subject to a criminal penalty of two years imprisonment. *See* The Companies Act (new edition), 1983 § 84(c). "The degree to which the legislators harshly viewed such a violation can be learned from the fact that a director who was *knowingly* part of a conspiracy to operate a corporate business with the purpose of defrauding its creditors or for any *fraudulent purpose* is subject to one year imprisonment!" Nevot Tel−Zur, Hefter Be'Pshitat Regel [Discharge in Bankruptcy] 32 (1992) (unpublished M.A. thesis, Tel−Aviv University, Israel) (on file with author). Back To Text

[151] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 42a(a).Back To Text

[152] *See* The Contracts (General Part) Law, 1973, 27 L.S.I. 4, (1972−73). Back To Text

[153] *See* The Agency Law, 1965, 19 L.S.I. 14(a) (1964−65).Back To Text

[154] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 42a(b).Back To Text

[155] *See* id. at § 42a(e). The bankruptcy process concludes upon the occurrence of any of the following events: (a) the debtor obtains a discharge of her pre−petition debts; (b) the court approves a settlement agreement between the bankrupt and her creditors; (c) the court annuls the debtor's adjudication as bankrupt; or (d) the appeal of the debtor's adjudication as bankrupt. *See also* Levin, supra note 127, at 149.Back To Text

[156] *See* 11 U.S.C. § 525 (1994). *See generally* John C. Chobot, Anti−Discrimination Under the Bankruptcy Laws, 60 Am. Bankr. L.J. 185 (1986) (discussing decisions of federal courts in the United States relating to the anti−discrimination provision in U.S. Bankruptcy Code).Back To Text

[157] *Compare* 11 U.S.C. § 727(a) *with* The 1996 Bankruptcy Amendment, supra note 126, at § 62.Back To Text

[158] Such application may be made at any time. *See* The 1996 Bankruptcy Amendment, supra note 126, at § 61(a).Back To Text

[159] There are two ways for this to take place. First, the Official Receiver, at its discretion, may formally request the court to do so. *See* id. at § 67a(a). Second, the court, on its own motion, may decide to do so during the bankruptcy adjudication hearing. However, that decision can only be made at least six months after the commencement of the bankruptcy petition. *See* id. at § 18e(a)(3).Back To Text

[160] The granting of a discharge order may be postponed if a timely objection to the discharge is filed. *See* Treister, supra note 89, at 367. Back To Text

[161] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 18d(b).Back To Text

[162] *See* id. § 18d(a).Back To Text

[163] *See* id. § 62(a). For the high degree of reliance placed by courts on the Official Receiver's report regarding the issue of discharge, *see* C.A. 206/88, Greenberger v. Eisenberg, 45(3) P.D. 397, 398−99. Back To Text

[164] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 62(a). The costs associated with the discharge hearing are borne by the debtor. *See* Bankruptcy Rule 52, 1985 K.T. 17047, 17054.Back To Text

[165] *See* Levin, supra note 127, at 160.Back To Text

[166] *See* id.Back To Text

[167] Among other conditions, the court may require the debtor to continue making payments to the creditors for a period that shall not exceed four years from the time the conditional discharge order is granted. However, under appropriate circumstances, the judge may impose a longer repayment period. *See* The 1996 Bankruptcy Amendment, supra note 126, at § 62(b).Back To Text

[168] *See* id. §§ 212−229 (listing various bankruptcy offenses).Back To Text

[169] *See* id. § 63(b); *see also* infra notes 172−180.Back To Text

[170] In the United States, any findings of debtor's specific misconduct will *require* the court to deny the discharge. In contrast, in Israel, debtor's misconduct *may* preclude her from getting a discharge. *Compare* 11 U.S.C. § 727(a) (1994) *with* The 1996 Bankruptcy Amendment, *supra* note 126, at § 63(a).Back To Text

[171] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 63(a). Under § 63(a)(3), the court may suspend or condition the discharge on the repayment of 50% of the outstanding debts to the creditors. Under §

63(a)(4), the court may condition the discharge on the debtor's consent to enter a judgment against him in favor of the Official Receiver or the trustee for the remaining balance outstanding at the date of the conditional discharge order. The judgment is to be paid from the debtor's future income or from assets he acquires after adjudication.Back To Text

[172] *See* id. at § 63(b)(1). No similar provision exists in the United States.Back To Text

[173] *See* id. at § 63(b)(2). In contrast, a parallel provision in the United States does not specify the period of time for which records must be produced. Furthermore, the United States' parallel provision excuses the debtor if she shows that the failure to keep such records was justified under the circumstances. *See* 11 U.S.C. § 727(a)(3).Back To Text

[174] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 63(b)(3). No similar provision exists in the United States.Back To Text

[175] *See* id. § 63(b)(5). A similar provision exists in the United States, except that it does not require the debtor to justify her inability to repay her debts. *See* 11 U.S.C. § 727(a)(5); *see also* La Brioche, Inc. v. Ishkhanian (In re Ishkhanian), 210 B.R. 944, 953 (Bankr. E.D. Pa. 1997) (stating that debtors need only present some credible explanations for missing assets to satisfy their burden of proof under § 727(a)(5)).Back To Text

[176] *See* The 1996 Bankruptcy Amendment, supra note 126, at §§ 63(b)(6), 220(a). No comparable provision exists in the United States.Back To Text

[177] *See* id. §§ 63(b)(7) & (8). No comparable provision exists in the United States.Back To Text

[178] *See* id. § 63(b)(9). No comparable provision exists in the United States as a basis for denying discharge.Back To Text

[179] *See* id. at § 63(b)(11). A somewhat similar provision exists in the United States, except that the term is six years and it only applies if the debtor actually received a discharge in the previous petition. *See* 11 U.S.C. § 727(a)(8) (1994). Back To Text

[180] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 63(b)(12). Whereas § 63(b)(12) in the Israeli Bankruptcy Ordinance does not require the conviction to be related to any existing outstanding debts, a parallel provision in the United States requires the fraudulent act to have occurred in connection with a debt arising out of the present bankruptcy case. *See* 11 U.S.C. § 727(a)(4) (1994).Back To Text

[181] *Compare* 11 U.S.C. § 727(b) (1994) (with exception of specifically designated non−dischargeable claims, pre−petition debts of debtor are discharged) *with* The 1996 Bankruptcy Amendment, supra note 126, at §§ 69(a), 71 (with exception of specifically designated non−dischargeable claims, all allowed claims arising before issuance of receiving order are canceled pursuant to unconditional discharge order).Back To Text

[182] *See*, *e.g.*, Johnson v. Home State Bank, 501 U.S. 78, 83 (1991) (noting that Congress intended the broadest available definition of "claim").Back To Text

[183] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 72(1). Some have stated that this provision aims to reduce the burden of the trustee with the work involved in measuring an unliquidated claim. They contend that such a measuring process may be long and cumbersome, which would impinge on the interests of the creditors in an efficient administration of the bankruptcy estate. *See* Procaccia, supra note 128, at 229. In the United States, pre−petition unliquidated tort claims are generally dischargeable. *See* 11 U.S.C. § 101(5) (1994) (defining "claim" as any unliquidated right to payment). Back To Text

[184] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 72(2). No similar provision exists in the United States. Back To Text

[185] *See* id. § 73(b). In the United States, the court has wide discretion to estimate a claim. *See* 11 U.S.C. § 502(c)(1) (1994) (stating that courts must estimate claims to prevent undue delay); *see also* In re CD Realty Partners, 205 B.R. 651, 656 (Bankr. D. Mass. 1997) (stating that neither difficulty nor impossibility of estimation will disallow claim) (*quoting* Woburn Assoc. v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1, 8 (1st Cir. 1992).Back To Text

[186] The list of non−dischargeable debts is much longer in the United States as compared to the list in Israel. Compare 11 U.S.C. § 523(a) (1994) (listing at least eighteen non−dischargeable allowed claims) *with* The 1996 Bankruptcy Amendment, supra note 126, at § 69(a) (listing three non−dischargeable allowed claims).Back To Text

[187] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 69(a)(1). A similar exception exists in the United States. See 11 U.S.C. § 523(a)(7) (1994) (making fines, penalties, and forfeitures that are payable to government unit non−dischargeable).Back To Text

[188] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 69(a)(2). A similar exception exists in the United States. See 11 U.S.C. §§ 523(a)(2), (4) (1994) (making debts acquired through fraud or false pretenses non−dischargeable and excepting from discharge debts for larceny, embezzlement, or fraud or defalcation while acting in fiduciary capacity).Back To Text

[189] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 69(a)(3). A similar exception exists in the United States. See 11 U.S.C. § 523(a)(5) (1994) (excepting from discharge obligations for alimony and support of debtor's spouse or child).Back To Text

[190] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 69(b).Back To Text

[191] *See* Davida Lachman−Messer, Shichrur Me'Chovot Be'Halichei Pshitat Regel [Debt Forgiveness in Bankruptcy] 59 (1983) (unpublished M.A. thesis, Hebrew University, Jerusalem, Israel) (on file with author & with Hebrew University Law Library).Back To Text

[192] *See* 11 U.S.C. § 524(a)(1) (1994) (stating that discharge order voids *in personam* judgments on dischargeable claims); id. at § 524(a)(2) (creating permanent injunction against judicial proceedings and nonjudicial collection efforts with respect to discharged claims). Back To Text

[193] *See* Shuchman, supra note 144, at 361−62 (stating "[i]n Israel the bankruptcy law is by legislative intent and administrative practice entirely for the benefit of creditors. Given the terms of the Bankruptcy Ordinance ...[t]he proceedings are, obviously, for the benefit of creditors.").Back To Text

[194] *See* The 1980 Bankruptcy Ordinance, amended by 37 L.S.I. 67, 1080 S.H. 66, § 55(b) (1983) [hereinafter The 1983 Bankruptcy Amendment] ("The Court may also annul the [bankruptcy] adjudication if in its opinion the further conduct of the bankruptcy will not benefit the creditors.").Back To Text

[195] *See* id. §§ 63(b)(1) & (10) ("The facts entailing restrictions on the grant of discharge are as follows: (1) the bankrupt's assets are not of a value equal to 50 per cent of his unsecured liabilities . . . (10) the bankrupt...within three months preceding the receiving order, incurred liabilities with a view to making his assets equal to 50 per cent of his unsecured liabilities.").Back To Text

[196] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 63(a)(3).Back To Text

[197] *See* supra Part III. C.Back To Text

[198] *See* Shuchman, supra note 144, at 356 (noting that in Israel "[t]here seems to be very few discharges. In our sample of some 80 cases examined in all, there were four compositions with creditors and only three discharges."). This conservative attitude towards debt−forgiveness was also reflected in statements made by a

member of the legislative sub−committee in charge of the bankruptcy reform in the early 1980s. One legislator voiced his suspicion towards a reform proposal that would make it easier for the debtor to obtain financial relief through a compromise between the debtor and the creditors. The proposed provision would have allowed the court to approve a workout agreement between the debtor and her creditors upon the consent of creditors holding at least 50% (instead of 75%) of the outstanding debts. Such a reform proposal was described by the member of the sub−committee as "too draconian." *See Bankruptcy Ordinance Reform Act, Hearing Before the Sub−Comm. of the Judiciary Comm*. 10th Knesset 10 (Dec., 2, 1981) (statement of Knesset member Mr. Virshobski) (on file with author). Courts have also relied on the sanctity of the contract principle as a basis to narrowly construe the debt−forgiveness provisions in the bankruptcy law. *See Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm*., 13th Knesset 32−33 (Sept. 13, 1995) (statement of Davida Lachman−Messer, Deputy Attorney General) (on file with author).Back To Text

[199] *See* supra note 198.Back To Text

[200] *See* Minutes of the Levin's Commission on Bankruptcy Reform 2 (Sept. 4, 1991) (on file with author) (commenting on proposed reform of fresh−start policy in Israel, Judge Vinagard said: "When the debtor has no income or assets, there is no point in having him resort to bankruptcy proceedings since that will cause the system to give him discharge without giving the creditors any benefit.").Back To Text

[201] *See* Letter from Joseph Zilberg, Deputy Director of the Tel−Aviv's Official Receiver, to Shmuel Zur, the head of the Official Receiver 1 (Nov. 20, 1994) (on file with author) (noting that "[t]he idea of debt forgiveness may be a noble idea, . . . but it is necessary to take into consideration the reality of life and needs of the economy. It is possible that discharge may create a situation wherein lenders will not extend credit or loans.").Back To Text

[202] *See* Shuchman, supra note 144, at 362 (arguing that harsh practices towards bankrupt "are to insure that the bankrupt pays, although, as we contend, there is little benefit to the creditors in a substantial fraction of the cases, probably more than half the sampled cases.").Back To Text

[203] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 63(a) (debtor's conviction of offense); id. § 63(b)(9) (debtor's preference of one creditor over another); id. § 63(b)(12) (debtor's fraud or fraudulent breach of trust).Back To Text

[204] *See* id. § 63 (b).Back To Text

[205] *See* id. § 63(b)(3).Back To Text

[206] Id. § 63(b)(6) (emphasis added). A similar limitation on discharge can be found in The 1996 Bankruptcy Amendment § 220(a) (stating that the bankrupt "shall be guilty of an offense if he has done one of the following: (1) within two years prior to the filing of the bankruptcy petition, has materially contributed to, or increased the extent of, his insolvency by gambling, or by rash and hazardous speculations, unconnected with his business or trade.").Back To Text

[207] *See* id. § 63(b)(5).Back To Text

[208] However, financial personal responsibility is not a theme universally promoted by the government outside of the bankruptcy setting. One scholar has documented several government rescue plans for certain segments of the population when they were in deep financial problems. For example, in one bail−out plan, the government allowed individuals, who had undertaken high interest mortgage loans, to refinance their mortgage loans at lower interest rates, releasing them of the penalty for pre−payment of their old loans. The author concluded:

> [T]hat Israel's governments have been educating the citizens not to assume responsibility for financial decisions, if such decisions turn out to have been the wrong ones . . . [t]he public acquires the notion that the government is in a position to provide it with blanket insurance, regardless of the outcome . . . [a]nd every time the government responds, it reinforces the feeling that no personal responsibility need be assumed.

Yakir Plessner, The Political Economy of Israel: From Ideology to Stagnation 94 (1994).Back To Text

[209] *See* LoPucki, supra note 14, at 462 (concluding that "[t]he [U.S. bankruptcy] system continues to be uninterested in the debtor's conduct in the period before bankruptcy.").Back To Text

[210] *See* Shuchman, supra note 144, at 355−56 (suggesting that bankrupts occasionally retain attorneys to prepare and file bankruptcy petitions, but due to high costs of representation, bankrupts seldom retain attorney for entire bankruptcy process); *see also* Interview with Davida Lachman−Messer, Deputy Attorney−General, in Jerusalem, Isr. (June 27, 1997). Back To Text

[211] *See* Shuchman, supra note 144, at 356 (author points out that in early 1970's, "[v]ery few bankrupts [we]re represented of record by counsel at any stage in the bankruptcy after the initial filing."). This trend, which was first pointed out in the 1970s, seems to have remained part of the practice today. *See Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 9 (May 30, 1995) (statement of Mr. Zurieli, Deputy Head of Official Receiver) (noting that "Most bankrupts are coming to us without attorneys and the clerk helps them out."). Back To Text

[212] A similar observation was deduced from empirical findings of a recent study in the United States. *See* Teresa A. Sullivan, et al., Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981−1991, 68 Am. Bankr. L.J. 121, 132 (1994) (stating "[t]he Pennsylvania data suggest that there are likely to be significant numbers of debtors who would use bankruptcy if they could afford legal representation, and suggests that the unavailability of low−cost legal services may serve as a brake on the number of consumer debtors filing for bankruptcy.").Back To Text

[213] *See* The 1996 Bankruptcy Amendment, supra note 126, at §§ 18a(a), 18e(a)(3).Back To Text

[214] *See* id. § 61(a). Previously, a discharge hearing could have been held upon the application of the Official Receiver as well. *See* The 1983 Bankruptcy Amendment, supra note 194, at § 67a(a).Back To Text

[215] Apparently, one reason for the very few discharges granted in Israel was that very few debtors actually applied for a discharge. In one study the author found that less than five percent of the bankruptcy debtors got a discharge in Israel. The author also found that many bankruptcy petitions remained open but inactive for many years. The fact that many cases simply remained open for years with no activity and with no discharge demonstrates that debtors either did not apply for discharge altogether, or did apply and were denied. *See* Shuchman, supra note 144, at 356, 364. A similar problem took place in England before its 1976 reform of the bankruptcy system. In 1975, the British bankruptcy committee announced that it "considers that the evidence that so many bankrupts appear never to avail themselves of the machinery for obtaining a discharge is one of the most disquieting features of the present system of bankruptcy law in this country." Brit. Sec. of the Int'l. Comm. of Jurists, Justice, Bankruptcy 25 (1975). There were several related reasons why very few individuals applied for a discharge in Israel in the past. First, the discharge hearing was too expensive for the bankrupts. Since the whole bankruptcy mechanism was not particularly user−friendly, an application for discharge may have required the hiring of an attorney. *See* Shuchman, supra note 144, at 364 (noting that the bankruptcy system in Israel, "as it applies to those bankrupts who are indigent wage earners, is cumbersome in application, difficult to administer, and excessively detailed."). Since most bankrupts were poor wage−earners, however, they generally could not afford one. *See* id. at 354−56. On top of the cost of hiring an attorney, the bankruptcy rules provided, and still do, that the bankrupt must bear the costs of the discharge hearing. *See* Bankruptcy Rule 52, 1985 K.T. 17047, 17062. Second, many bankrupts did not avail themselves of the discharge hearing because they simply did not know about it. As most of the bankrupts were not

represented by an attorney and were relatively unskilled, many may not have understood nor knew about their right to apply for a discharge. *See* Shuchman, supra note 144, at 352. Third, some bankrupts who knew about the discharge option may have avoided applying for it because of fear of attracting further publicity to their bankruptcy status. A similar observation was made by a British bankruptcy reform committee in 1982. It found that "[p]rior to the Insolvency Act [of] 1976 [in England] the onus had been on the bankrupt to apply to the Court for discharge. Many did not do so, either through ignorance of the procedure or reluctance to attend open court and thus to attract further publicity." *See* Cork, supra note 46, at 142.Back To Text

[216] Interview with Ariel Hazak, staff attorney with the Official Receiver in Tel−Aviv, Isr. (June 28, 1997); *see also Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 31 (Sept. 13, 1995) (statement of Mr. Sela, counsel for the banking association) (on file with author) ("There are courts that schedule [a discharge hearing] for another year, and then another six months, and then again for another six months.").Back To Text

[217] Telephone Interview with Yaron Arbel, Deputy Attorney with the Official Receiver in Jerusalem, Isr. (June 26, 1997).Back To Text

[218] *See* id.Back To Text

[219] *See* id.Back To Text

[220] *See* Lachman−Messer, *supra* note 191, at 46; *see also* Interview with Ariel Hazak, supra note 216.Back To Text

[221] *See* Interview with Ariel Hazak, supra note 216.Back To Text

[222] *See* Lachman−Messer, *supra* note 191, at 46−47; Tel−Zur, *supra* note 150, at 75; Interview with Ariel Hazak, supra note 216.Back To Text

[223] *See* supra notes 147−55.Back To Text

[224] *See* supra note 148 and accompanying text.Back To Text

[225] *See* supra notes 149−153 and accompanying text.Back To Text

[226] *See* Shuchman, supra note 144, at 354 (indicating that "nearly three fifths of Jerusalem bankrupts are poor wage earners," usually unskilled).Back To Text

[227] *See* supra note 154, and accompanying text (discussing the prohibition of debtor from receiving new credit).Back To Text

[228] *See* Isr. Y.B. & Almanac, 1994, at 154 (Naftali Greenwood et al., eds., 1994) (noting that "[c]redit cards are now widespread; as of December 1993, some one million cards were being used for 10 million transactions per month. The trend in each of these respects . . . is bound to continue."). *see* also A. Barak & A. Friedman, Kartisay Hiyav [Charge Cards] 34−35 (1997) (describing extensive growing use of credit cards in Israel).Back To Text

[229] *See* The 1996 Bankruptcy Amendment, supra note 126, at §§ 57a, 58.Back To Text

[230] One empirical study indicates that almost half of the individuals who file for bankruptcy protection in Jerusalem, Israel were small business owners. *See* Shuchman, supra note 144, at 354 n.28 (finding that 44% of bankruptcies in Jerusalem are related to small business failure).Back To Text

[231] *See* Rafael Efrat, *The Case for Limited Enforceability of a* Pre−Petition Waiver of the Automatic Stay, 32 San Diego L. Rev. 1133, 1141−42 (1995).Back To Text

[232] *See* supra note 128 and accompanying text. Back To Text

[233] *See* supra Part III.C.Back To Text

[234] *See* supra notes 172−80 and accompanying text.Back To Text

[235] However, some contend that the judicial discretion adds valuable flexibility to a bankruptcy system. *See* Boshkoff, *supra* note 8, at 71 (noting that "[i]n the United States, we have chosen to make many of these difficult choices by legislative rule rather than rely on the exercise of judicial discretion. As a result, the discharge process in the United States can be . . . rather inflexible.").Back To Text

[236] *See* supra note 173 and accompanying text.Back To Text

[237] The 1996 Bankruptcy Amendment, supra note 126, at § 63(b)(6).Back To Text

[238] *See* supra note 179.Back To Text

[239] *See* supra note 183 and accompanying text.Back To Text

[240] *See* supra note 185 and accompanying text.Back To Text

[241] *See* The 1996 Bankruptcy Amendment, supra note 126, at § 69(b).Back To Text

[242] *See* Lachman−Messer, *supra* note 191, at 59.Back To Text

[243] *See id.* at 58−60.Back To Text

[244] *See* Shuchman, *supra* note 144, at 356 (stating that "[t]here is no effort at rehabilitation, whatever that might mean as applied to the relatively poor families that make up most Israeli bankrupts.").Back To Text

[245] *See id.* at 354−55 (stating that nearly three−fifths of Jerusalem bankrupts are poor wage earners who are mostly unskilled).Back To Text

[246] *See* supra note 31 and accompanying text.Back To Text