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THE BANKRUPT'S MORAL OBLIGATION TO PAY HIS DISCHARGED DEBTS: A CONFLICT BETWEEN CONTRACT THEORY AND BANKRUPTCY POLICY*

Douglass G. Boskoff†

Section 87 of the Restatement (Second) of Contracts provides:

An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.²

In his treatise on bankruptcy, Professor Daniel Cowans discusses the problem that this reaffirmation rule poses for the unwary bankrupt and his attorney:

Few things can be more frustrating to an attorney for a bankrupt than having to inform his client that he has given away the protection the attorney obtained for him by the filing of the petition. Yet it happens. Those not experienced in bankruptcy work might think that, having endured the unpleasant experiences with creditors which culminated in bankruptcy, the bankrupts would think twice in any contact with a former creditor. Bankrupts are not so wary. A few learn from their experiences but a surprisingly large number . . . consent to almost any request or demand of a creditor. If the bankrupt is to derive the benefits sought from his bankruptcy, he must be carefully warned in advance against either voluntarily or inadvertently giving away the advantage of his position. . . . [T]he point attempted to be made here is that such repayment should be left within the control of the bankrupt. Control is lost if the bankrupt's acts put collection procedures within the power of many creditors.

Repayment of discharged debts is a salutary thing but the fact is that few bankrupts ever earn enough after bankruptcy to handle both present living expenses and payments on past

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*My colleagues, Patrick Baude and Alan Schwartz, criticized an early draft of this article. I am grateful for their suggestions, as well as for the help of David Rose, J.D., Indiana University, 1971, who served as my research assistant. Finally, another faculty colleague, Morris Arnold, read this article shortly before publication and corrected some references to the British courts as they existed in the nineteenth century.

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debts. An attempt to do so will usually result in inadequate funds for either effort. Occasionally, the bankrupt will have some funds with which to make some payment. He should not be counseled against making a payment but against putting himself into a situation in which a creditor can levy on his wages even when he cannot pay.\(^2\)

Other writers have joined Professor Cowans in pointing out the dangers of gratuitous reaffirmations.\(^3\) This practice certainly injures bankrupts, although the magnitude of the injury is unclear. In a recent study, Herbert Jacob asked a number of bankrupts whether their standard of living had improved after the initiation of bankruptcy proceedings. Only eight per cent responded affirmatively while 54 per cent felt that their standard of living had actually been impaired. More than half the bankrupts reported reaffirmations and attributed lower post-bankruptcy living standards, at least in part, to this practice.\(^4\) These figures suggest that the damage caused by reaffirmations is indeed substantial. It becomes difficult, therefore, to understand how a gratuitous assumption of obligation could ever benefit a bankrupt. Some debts, of course, have to be reaffirmed. For example, if the bankrupt wants his car, he must come to terms with the creditor holding a security interest in it.\(^5\) The bankrupt who wishes to buy food on credit will have to satisfy his grocer's pre-bankruptcy claim. These commitments to old creditors are binding because the debtor receives new value for his promise. The rule announced in the quoted section of the Restatement is needed to make a commitment binding only when the bankrupt has received no value through reaffirmation; that is, when the transaction runs entirely in favor of the creditor. Nothing in the rule benefits the bankrupt.

Despite the extreme one-sidedness of the moral obligation theory, no commentator has ever seriously suggested that it should be either changed by legislative action or invalidated by judicial decision. Gerrard Glenn had some doubts about the rule,\(^6\) but most writers have accepted

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4. Jacob, supra note 3, at 106-12.
5. Even this type of reaffirmation may be damaging. If the value of the automobile has declined since purchase by more than the amount by which the principal balance of the loan has been reduced, the bankrupt should not reaffirm. Instead he should purchase another car of equivalent quality and realize the savings.
it without question. The editors of Collier, for instance, who have, on occasion, taken a skeptical view of state law, apparently concede the power of states to adopt whatever rule of contract they deem most appropriate.

The general rule is that a discharge affects only the remedy of the creditor and the obligation itself is not cancelled.

. . . The law in the various states governs this matter, and it is generally agreed that the bar of a discharge may be waived by the making of a new promise. In reaching this decision, the courts have employed various theories; some courts have found consideration for the new promise in the form of a past legal obligation plus a present moral obligation, while other courts have declared that no new consideration is necessary to support the waiver.

Since the turn of the century, however, numerous state laws have been challenged in the courts, although not always with success, on the theory of pre-emption. Perhaps the most celebrated example of a suc-

7. There is no provision in the Bankruptcy Act for the revival of debts released by discharge, and whether they are revived depends entirely upon local law. Actually, the subject is a branch of the law of contracts rather than of the law of bankruptcy. While the Bankruptcy Act does not state that discharged debts can be revived, it does not state or imply that they cannot; so, assuming that the original debt is, or can be, a sufficient consideration for a new promise, the primary question is whether a new promise was, in fact, made.

8 H. Remington, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 3288 (6th ed. J. Henderson 1955) [hereinafter cited as REMINGTON] (footnote omitted). After discharge in bankruptcy, the bankrupt, upon making a new promise to pay a discharged debt, will be bound, without new consideration. While it would be within the power of Congress to enact provisions in the Federal Bankruptcy Act governing the matter, there is no such provision and each state is at liberty to apply its own rule.


From the date of Lord Mansfield it has been settled that notwithstanding a discharge, the original obligation to pay a discharged debt furnishes a "moral consideration" sufficient to make enforceable a new promise to pay the debt.

J. MacLachlan, HANDBOOK OF THE LAW OF BANKRUPTCY § 111 (1956) [hereinafter cited as MACLACHLAN].


cessful attack is *Local Loan Co. v. Hunt*,10 where the Supreme Court of the United States held that Illinois law on the effect of wage assignments was in conflict with the discharge feature of the Bankruptcy Act. It is somewhat surprising that *Local Loan Co.* has not been invoked in a challenge to the reaffirmation rule. Although the doctrine has never been subject to serious attack11 and has persisted for 150 years in this country, it is not too late to question the soundness of the moral obligation theory. We may look at its origin, try to understand how the rule came to be so widely accepted in this country and ask whether the rule makes sense in the light of contemporary discharge policy.

**Origins of the Reaffirmation Theory**

Whatever one's view about the merits of the reaffirmation rule, the story of its birth and death in England, followed by its reincarnation in the United States, is an interesting one. The story is one of hesitant movement toward a principle which, when adopted in England, soon became unpopular and was eventually repudiated. The treatise writers and historians tell us the story is one of contract, not one of the distribution of insolvents' estates.12 This contractual characterization evidences a viewpoint accounting, at least in part, for the passive acceptance of state law typified by the excerpt from *Collier*.

Lord Mansfield is credited with authorship of the reaffirmation doctrine in 1777,13 but the story of its development begins some eighty years earlier at the close of the seventeenth century. Two decisions of the King's Bench, one in 169714 and the other in 1699,15 established that a defendant would be liable in assumpsit, both for a promise to pay a debt contracted during infancy and for a promise to pay a debt barred by the statute of limitations. These two types of promises, along with the promise to pay a debt discharged in bankruptcy, were eventually to be

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12. Holdsworth, for instance, treats the rule in a section devoted to contract law. No mention of it appears in his discussion of bankruptcy law. S W. HOLDsworth, A HISTORY OF ENGLISH LAW 26-29, 240-45 (1926); 12 id. 541-42 (1938); see REMINGTON, supra note 7.
13. 1 A. CORBIN, CORBIN ON CONTRACTS § 211 n.2 (1963) [hereinafter cited as CORBIN] (citing Trueman v. Fenton); MACLACHLAN, supra note 7, at 98.
grouped together under the theory of moral obligation. Imposition of liability in the discharge situation was not, however, to follow immediately upon the first two cases since the reaffirmation rule had a long period of gestation.

The first judicial discussion of the bankrupt's moral obligation to satisfy discharged obligations is found in *Lewis v. Chase*, a 1720 decision. There the bankrupt had persuaded a creditor to withdraw his objection to the granting of the bankrupt's certificate, and, in return, the creditor received a bond for the entire amount of the debt. Later, the debtor sought a bill to restrain enforcement of the bond. Lord Chancellor Parker was most unsympathetic to the petition. His opinion dismissing the bill places considerable emphasis on the bankrupt's moral duty to pay the discharged obligation.

Here is an honest creditor, and the bankrupt if he pay him all, still pays but what in conscience he ought. He that comes into equity to avoid the payment of a just debt, ought to come with a very clear case if he hopes to succeed...

Suppose the present bill were to be dismissed, the consequence would only be that the plaintiff must pay what he justly owes; but were he to be relieved, the defendant would thereby be put into a worse condition than any of the other creditors; for the bankrupt's estate being distributed, he cannot now have his proportion thereof, so that he must lose his whole debt; and it is the plaintiff's fault to come so late: which makes the case still the stronger against him; nor does the law make any distinction whether the bankrupt became so by his own extravagant way of living or by misfortunes; and therefore he is the less to be favoured. It is hard enough to bar creditors of the full remedy which the law gives for the recovery of debts. . . . And it would not be fair to put the defendant, who has the law on his side, in a worse condition than any of the other creditors whose debts are extinguished by the statute. . . .

In the Lord Chancellor's opinion there is no reliance on the infancy and statute of limitation cases. The turn of the century decisions are not cited. While there is some language which might be construed as upholding the validity of a gratuitous reaffirmation, the fact that the creditor had substantially changed his position in reliance on the bankrupt's

17. Id. at 543.
promise makes the case no more than a traditional withholding of equitable relief from a petitioner with a non-meritorious claim.

More than twenty years were to pass before the report of another case in which the consequence of a reaffirmation was a major issue. Then in 1742 the King's Bench held that a bankrupt could be discharged upon common bail when a creditor sought to enforce a reaffirmation. All this meant was that the reaffirming bankrupt was not required to post property to secure his freedom pending a judgment on the merits. The validity of the reaffirmation was not at issue. Nevertheless, the case is evidence that even at this early date creditors were seeking to enforce reaffirmations. There is no way of telling, however, how widespread was the practice of seeking such reaffirmations.

By 1759 a creditor's attorney had perceived that the infancy and statute of limitation cases might provide support for an argument that a bankrupt's reaffirmations were enforceable. In Bailey v. Dillon the creditor sought to hold a bankrupt responsible for a subsequent promise "to pay [the discharged obligation] to the plaintiff when he should be able." At issue was the proper form of bail. To support his request for special bail, the creditor argued that the action was on the new obligation, invoking an analogy to the infancy and limitation cases. Noting that it would be improper to "enter into the general and principal question" upon the motion before it, the court declined to reach the creditor's argument and ruled that the bankrupt should be discharged upon common bail.

In Bailey the conscientiousness of the bankrupt had worked in his favor; this was not so twenty years later when Lord Mansfield offered his opinion in Trueman v. Fenton, a case which provides a series of sharp contrasts with Bailey. Again a bankrupt was sued on his reaffirmation. This time, however, the court directly faced the question of whether the promise should be enforced. On the eve of his bankruptcy a debtor had purchased linen on credit and had given his vendor two notes in payment of the purchase price. After the bankruptcy proceedings were commenced,
the parties agreed that the bankrupt would give the plaintiff a new note for approximately half of the purchase price of the linen in exchange for the two old notes. It appears that the new notes were enforceable without reference to a theory of moral obligation because a consequence of the exchange was that the plaintiff did not prove a claim in the bankruptcy proceeding and therefore did not receive any dividend. Lord Mansfield did note the creditor's non-participation in the proceeding as part of the bargain:

That brings it to the general question, whether a bankrupt after a commission of bankruptcy sued out, may not, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement?22

Nevertheless, Lord Mansfield avoided a traditional resolution of the controversy and proceeded to assimilate the reaffirmation of the bankrupt's discharged debt to the other two well-established types of moral obligation.23

22. Id. at 1234 (emphasis added).
23. Even after almost two hundred years Mansfield's haste to announce the moral obligation theory seems extraordinary. Not only did very traditional grounds exist for deciding the case, but there was a procedural problem in the litigation. Recall the court's unwillingness to give a decision on the merits in Bailey, and compare Lord Mansfield's comments on the procedural issue.

The plea put in, in this case, is, that the debt was due at the time of the act of bankruptcy committed; and on that plea, in point of form, there was a strong objection made at the trial, that the allegation was not strictly true: because at the time of the sale, credit was given to a future day; which day, as it appeared in evidence, was subsequent to the act of bankruptcy committed. To be sure, on the form of the plea, the defendant must fail. But I never like to entangle justice in matters of form, and to turn parties around upon frivolous objections where I can avoid it. It only tends for the ruin and destruction of both. I put it therefore to the counsel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the Court, whether according to the facts and truths of the case, the defendant could have pleaded his certificate in bar of the debt in question: and in case they had refused to do so, I should have left it to the jury upon the merits. The counsel for the plaintiff very properly gave up the point of form.

Id. at 1233 (emphasis added).

There is, of course, a good explanation for Mansfield's determination to avoid what he felt were procedural niceties and to place the decision on the broadest possible grounds. Between the cautious decision in Bailey and the broad holding in Trueman stands his opinion in Pillans v. Van Mierop, 97 Eng. Rep. 1035 (K.B. 1765), where he argued that consideration had only evidentiary value. This approach was too radical for his time, and was soon discredited by the House of Lords [Rann v. Hughes, 2 Eng. Rep. 18 (H.L. 1778)], but Lord Mansfield's effort to reform the doctrine of consideration was not limited to one approach:

Lord Mansfield, when in 1756 he became Chief Justice, set himself to prune the 'Gothick' superfluities which marred the symmetry of the common
Trueman stands as the high water mark of the reaffirmation rule in England. During the next thirty years no new developments occurred, but beginning in 1805 some of the reported cases hint at dissatisfaction with the doctrine. The bankrupt was given some protection through judicial scrutiny of evidence offered to support the allegation of a promise, and the courts allowed conditions to be attached to the promise. In 1812 the Common Pleas was willing to draw a sharp distinction between the promise of a bankrupt and one of a debtor who agreed to honor an obligation where enforcement was barred by the statute of limitations. Evidence that would be sufficient in the latter case would not necessarily satisfy the standard applicable to a bankrupt's promise. This decision, Mucklow v. St. George, seems to indicate a sharp break with the Mansfield tradition of unquestioned enforceability.

The final relevant litigation occurred in 1823. Even though the creditor prevailed, the unsuccessful argument of the bankrupt's counsel is worth noting. For the first time Lord Mansfield was directly challenged.


In this favourable environment Lord Mansfield led two assaults upon the doctrine. In his first and bolder attempt he sought to destroy the status of consideration as an essential and independent element in the action of Assumpsit and to reduce it to the level of evidence. This decision [Trueman v. Fenton], while it must be set against, could still be recognized with the judgment in Rann v. Hughes delivered in the following year. The rebuff which Lord Mansfield there received enhanced rather than diminished the charm of his alternative approach to the problem. The debtor who acknowledged a statute-barred debt, the adult who recognized a youthful liability, the discharged bankrupt who found himself in unexpected if precarious affluence—all these were bound in honour, and law should add its more prosaic sanction. The House of Lords had not defined the doctrine upon the pre-eminence of which they insisted, and, by supplying the omission on his own terms, Lord Mansfield would kiss the rod and yet avoid humiliation.

Id. at 409-10. See also Holdsworth, The Modern History of the Doctrine of Consideration, 2 B.U.L. Rev. 174, 186-97 (1922).

It was argued that Trueman was not controlling because the bankrupt in that case had in fact received new consideration. The Common Pleas rejected the argument and applied Lord Mansfield's doctrine to a clearly gratuitous reaffirmation.

Further attempts to undercut the precedential value of Trueman were subsequently rendered unnecessary by three acts of Parliament, the first enacted in 1824, followed by similar legislation in 1825 and 1842:

And be it enacted, That no Bankrupt after his Certificate of Conformity shall have been allowed under any Commission of Bankrupt already issued, or hereafter to be issued, shall be liable to pay or satisfy any Debt, Claim or Demand from which he shall have been discharged by virtue of such Certificate, or any Part of such Debt, Claim or Demand, upon any Contract, Promise, or Agreement made or to be made after the suing out of the Commission, unless such Promise, Contract or Agreement be made in Writing, signed by the Bankrupt, or by some Person thereto lawfully authorized, in Writing, by such Bankrupt.\(^\text{28}\)

There is no need to speculate on the reasons behind this legislation. The disenchantment with Lord Mansfield's reaffirmation doctrine is well documented in a book on bankruptcy legislation published in London in 1827. With a few changes in style it would be possible to imagine that the author was writing about the 1971 American scene:

Under the old laws there were some very hard cases as regarded liability of the bankrupt upon new promises after certificate obtained. It had become the frequent practice to entrap the bankrupt into these acknowledgments, or conditional promises, as compelled the Courts to hold them liable for their old debts. In order to remedy this mischief, it is now most usefully enacted by the 131st section of the new Bankrupt Act [that a written promise is required]. . . .\(^\text{29}\)

There was no significant litigation under the 1824 statute and in 1849 Parliament went even further and made all reaffirmations, written and oral, unenforceable.\(^\text{30}\) From this time on the reaffirmation doctrine was completely dead in England.\(^\text{31}\)

\(^{28}\) 5 Geo. 4, c. 98, § 128 (1824); accord, 6 Geo. 4, c. 16, § 131 (1825); 5 & 6 Vict., c. 122, § 43 (1842).

\(^{29}\) F. Holt, The Bankrupt Laws as Established by the New Act 511 (1827).

\(^{30}\) 12 & 13 Vict., c. 106, § 204 (1849); accord, 24 & 25 Vict., c. 134, § 164 (1861).

\(^{31}\) The 1849 statute was repealed in 1869 during the course of a general revision.
Thomas Jefferson once suggested a restriction on the use of British case authority in American litigation. Writing to Federal Judge John Tyler of Virginia in June of 1812 he referred to this matter.

... On our arrival here, the question would at once arise, by what law will we govern ourselves? The resolution seems to have been, by that system with which we are familiar, to be altered by ourselves occasionally, and adapted to our new situation ... But the state of the English law, at the date of our emigration, constituted the system adopted here. We may doubt, therefore, the propriety of quoting in our courts English authorities subsequent to that adoption, still more the admission of authorities posterior to the Declaration of Independence, or rather to the accession of that king whose reign *ab initio* was that very tissue of wrongs which rendered the Declaration at length necessary.

The reason for it had inception at least as far back as the commencement of his reign. This relation to the beginning of his reign would add the advantage of getting us rid of all Mansfield's innovations, or civilizations of the common law. For, however I admit the superiority of the civil over the common law Code, as a system of perfect justice, yet an incorporation of the two would be like Nebuchadnezzar's image of metals and clay,—a thing without cohesion of parts. ... 32

of the bankruptcy laws. Subsequently, a creditor argued that the repeal had reinstated the law of Lord Mansfield's time. His argument was not sympathetically received:

The argument is, that because the Act is silent on this matter, therefore the debtor is remitted to the position in which he stood before 6 Geo. 4, c. 16, and the whole policy of the bankruptcy law since that Act has been absolutely reversed. That would be a startling conclusion ... .

The present Act in its general scope was obviously intended to make bankruptcy proceedings more completely effect the object of winding up a man's previous liabilities and giving him an altogether fresh start. I am not prepared to hold that, as it were by a side wind, and by reason of the omission of particular provisions with regard to the effect of such promises as these, the Act has reversed the whole course of legislative policy on this subject since 6 Geo. 4, c. 16. It therefore appears to me, both on the reason of the thing and such authority as there is, the reply is bad and our judgment must be for the defendant.

Heather & Son v. Webb, 2 C.P.D. 1, 6-7 (1876).

However, the promise is enforceable today if there is new consideration. Jakeman v. Cook, 4 Ex. D. 26 (1873).

32. Letter from Thomas Jefferson to John Tyler, June 17, 1812, quoted in 1 R. Tyler, The Letters and Times of the Tylers 265 (1884).
If Jefferson’s view had prevailed, the development of the reaffirmation doctrine in this country, relying as it did on English precedent, would have been severely hampered. However, the history of that doctrine here is a tribute to Lord Mansfield. Trueman and its progeny dominate the scene. The first reported attempt to enforce a bankrupt’s reaffirmation is Scouton v. Eislord, an 1810 New York decision. Short and typical of nineteenth century opinions on the topic, the complete text stated:

Per Curiam. The debt of an insolvent or bankrupt is due in conscience, notwithstanding his discharge. He may, therefore, revive the old debt by a new promise, and the old debt will be a sufficient consideration. This was so declared in the case of Trueman v. Fenton (Cowp., 544). But the question here is, whether this was anything more than a conditional promise, and whether it was not incumbent on the plaintiff to have shown that the defendant was of sufficient ability to pay without distressing his family. It has been repeatedly held, and seems now to be a settled principle (2 H. Bl., 126., Besford v. Saunders; 3 Esp. N. P. Rep., and 159 Cole v. Saxby; 4 Esp. N. P. Rep., and 36, Davies v. Smith), that a promise to pay when able, a debt barred by the statute of limitations, or by a certificate under the bankrupt law, was not an absolute but a conditional promise, and it lay with the plaintiff to prove the defendant able. This appears, in the case before us, to have been a conditional promise; and taken together and in connection what the defendant was proved to have said before the suit was brought, or what he is stated to have said upon the trial, he promised to pay the debt, provided only he could do it without distress. The justice ought, then, to have required proof of his ability to pay; it would be equally illegal and unjust to compel the defendant to pay without such proof.

There being no cause of action shown as to the promise upon the note, the judgment below ought to be reversed. Judgment reversed.

Notice the court’s perfunctory acceptance of the reaffirmation rule. Since British authorities appeared to embrace the moral obligation

33. 4 N.Y. Com. L. Rep. 241, 7 Johns. 36 (1810).
34. Id.
35. Another good example of the importance attached to English authorities is the opinion in Corliss v. Sheperd, 28 Me. 550 (1848).
theory without reservation, American lawyers of this era did not directly challenge the rule. Instead they argued that the rule was not applicable to their clients’ promises. They challenged the sufficiency of the pleadings, sought to establish that the promise was a conditional one, argued the bar of estoppel or asserted that the plaintiff was not the proper party to enforce the promise. This uncritical acceptance of Lord Mansfield’s dogma created an ironic situation. At the very moment that the reaffirmation rule was dying in England it was being born in the United States. Decisions that were soon to be of only historical interest in England were cited without hesitation here and provided the foundation for the rule in effect today.

Developments in England during the second quarter of the nineteenth century could have provided the materials for a good argument against importation of Lord Mansfield’s rule. The parliamentary actions of 1824, 1825 and 1842, requiring reaffirmations to be evidenced by a writing, and the complete abolition of the doctrine in 1849, if noted, might have convinced a court that the rule was not a wise one. However, only one American attorney invoked an argument based on the parliamentary action, and he was content to argue that the courts of Vermont should require written evidence of the reaffirmation.

A number of factors contributed to the successful transfer of the dying doctrine to this country. Initially, from a present-day viewpoint it is easy to review the English cases and see that the demise of the reaffirmation rule began as early as 1805. Such a development could not have been readily recognized by American lawyers and judges of that period. It took time for changes in British law to be communicated to the American bar. Many lawyers did not have access to treatises and it

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40. Farmers & Mechanics Bank v. Flint, 17 Vt. 508 (1845). The 1849 statutory change is cryptically noted in a Massachusetts decision but is not invoked in opposition to the reaffirmation rule. Lerow v. Wilmart, 89 Mass. 463, 466 (1863).

See also Craig v. Seitz, 63 Mich. 727, 30 N.W. 347 (1886), in which the court refused to require a written reaffirmation when there was no statutory requirement to that effect.
is far from clear that the available treatises accurately portrayed what was happening.\footnote{41} Furthermore, the changes in English law, even if immediately perceived and completely understood, probably came too late to affect developments in the United States. The most significant fact was the abolition of the doctrine by Parliament in 1849, and by that time the rule had secured a strong foothold in this country.

Temporal factors alone, however, do not explain the unquestioned acceptance of Lord Mansfield’s view in the United States. Implicit in this review of developments in England and the United States is the position that Lord Mansfield and others ought not to have been eager to embrace a moral obligation theory. This may be unfair. The reaffirmation rule made some sense as a contract doctrine. During the last century and one-half there has been a trend toward enforcement of an ever-widening range of promissory obligations. In such a milieu the doctrine has appeared to be sound.\footnote{42} It is chiefly from the contemporary bankruptcy perspective that the doctrine appears questionable. If a society wants to free a debtor from his past obligations and protect the reckless spender from the consequences of his improvidence, then it does not make sense to facilitate the assumption of old burdens. But Lord Mansfield and those early American judges who followed his lead did not live in a society which placed much emphasis on the discharge feature of bankruptcy legislation. The first English discharge feature had found its way into the bankruptcy law in 1705,\footnote{43} about seventy years prior to \textit{Trueman}, and it was a most limited one available only to merchants. The non-commercial bankrupt in England did not become eligible for voluntary bankruptcy until 1861.\footnote{44} Not until the ordinary debtor could himself seek relief can it be said that English law placed any substantial emphasis on rehabilitation.\footnote{45}

A similar change in attitude toward debtor discharge can be seen in the United States during the nineteenth century.\footnote{46} There were three

\footnote{41} The third edition of Parsons on Contracts, published in 1857, notes the parliamentary action of 1825 but does not report the complete abolition of the reaffirmation rule by statute in 1849.\footnote{42} 1 T. \textsc{Parsons}, \textsc{The Law of Contracts} 308 n. g (3d ed. 1857). If this is typical of the treatises which were consulted by American attorneys, it is clear that they did not have the information which would have permitted an intelligent challenge to Lord Mansfield’s doctrine.

\footnote{42} H. \textsc{Havighurst}, \textsc{The Nature of Private Contract} 53-54 (1961).

\footnote{43} 4 Anne, c. 17, § 7 (1705).

\footnote{44} 24 & 25 Vict., c. 134, § 69 (1861).

\footnote{45} This argument will not appeal to those who do not believe that merchants and non-merchants have equally meritorious claims to the benefits of discharge legislation. \textit{See}, e.g., \textsc{Note}, \textit{Discharge Provisions in Consumer Bankruptcy: The Need for a New Approach}, 45 \textsc{N.Y.U.L. Rev.} 1251, 1259-66 (1970).

\footnote{46} \textit{See 7 Remington, supra} note 7, § 2993.
federal bankruptcy acts during this period, each in operation for only a short period of time. The discharge feature in each one became more liberal than that found in the preceding statute. But during the first part of the nineteenth century, when Lord Mansfield’s doctrine was taking root here, none of the federal statutory models was sufficiently debtor-oriented to encourage challenge to the moral obligation theory. The state insolvency laws, which controlled when no federal bankruptcy legislation was in effect, were also insufficiently debtor-oriented to encourage a challenge to the premises underlying the reaffirmation rule. Thus in neither eighteenth-century England nor nineteenth-century America could one reasonably expect the debtor-oriented frame of mind that would have led counsel directly to oppose Lord Mansfield’s view.

Even if the conflict between the moral obligation theory and the discharge feature of bankruptcy legislation had been appreciated during the nineteenth century, it does not follow that a pre-emption argument would have met with success. Displacement of the reaffirmation rule


48. State insolvency laws were concerned with two problems. Some regulated the common law liquidation device of an assignment for the benefit of creditors. Others were concerned with all aspects of the insolvent’s affairs. Under some statutes the debtor got a discharge; under others he did not. See S. Reisenfeld, Cases and Materials on Creditors’ Remedies and Debtors’ Protection 349-53 (1967); Glenn, supra note 6, § 338. No case draws any distinction between a promise to pay a debt discharged under a state insolvency law and one where the discharge was received under federal law. Scouton v. Eislord (supra notes 33-34 & text accompanying) involved a discharge received under state law.

49. During the nineteenth century only one American judge took note of the problem of hasty reaffirmations and he believed that a strict evidentiary standard would handle the matter.

When a man has been relieved from the payment of his debts by a legal proceeding without ever having paid one cent of the money, if he be an honest man, he must always feel the influence of this moral obligation, and be willing to express his intentions to pay the debts if he should ever become able thereafter to do so; and under the influence of circumstances, is very liable thoughtlessly and without due reflection, to make loose declarations, which, if strictly construed against him, would constitute valid and binding new promises of payment. The law, in tenderness to his very delicate and embarrassed state of feeling, steps in to his relief and will shield him if possible from the consequences of his heedless and improvident declarations. It therefore declares that a new promise, to be binding, must not be a mere declaration of a wish or intention to pay the debt. [citations] But the promise must amount to a direct, positive, certain and unqualified engagement made with the creditor or his agent to pay the debt, showing also at the same time a willingness to pay it, either then, or at some specified time thereafter, or when able.

because of bankruptcy concerns would have required a judicial persuasion that, in the administration of insolvents' estates, federal laws should be paramount. The sporadic and controversial character of federal bankruptcy legislation during the nineteenth century was not at all likely to encourage such an attitude. As Charles Warren notes:

The trail of [the Bankruptcy Clause] is strewn with a host of unsuccessful objections based on constitutional grounds against the enactment of various provisions, all of which are now regarded as perfectly orthodox features of a bankruptcy law. Thus, it was at first contended that, constitutionally, such a law must be confined to the lines of the English statute; next, that it could not discharge prior contracts; next, that a purely voluntary law would be non-uniform and therefore unconstitutional; next, that any voluntary bankruptcy was unconstitutional; next, that there could be no discharge of debts of any class except traders; next, that a bankruptcy law could not apply to corporations; next, that allowance of State exemptions of property would make a bankruptcy law non-uniform; next, that any composition was unconstitutional; next, that there could be no composition without an adjudication in bankruptcy; next, that there could be no sale of mortgaged property free from the mortgage. All these objections, so hotly and frequently asserted from period to period, were overcome either by public opinion or by the Court.50

Until the constitutional debate had subsided (and Warren suggests that it had ended by 1898)51 a successful pre-emption argument was not a reasonable possibility.52 By this time the reaffirmation rule had been around for almost 100 years and uncritical acceptance of it was commonplace.

Even though the reaffirmation doctrine has been before the Supreme Court on two occasions, it has never been fully evaluated. In the first case Allen & Co. v. Ferguson,53 the Court acknowledged the existence of the rule but did not in fact hold the bankrupt to his promise, finding that there was insufficient evidence of the new obligation. The other pronouncement of the Court is found in Zavelo v. Reeves,54 a 1913

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51. Id. 144.
52. For an argument that state law could not be overridden by federal law, see Lawton, Another Question Under the Bankruptcy Act of 1867, 4 ALBANY L.J. 294 (1871).
53. 85 U.S. (18 Wall.) 1 (1874).
54. 227 U.S. 625 (1913).
BANKRUPT’S MORAL OBLIGATION

decision, commonly cited today in support of the rule. Such citation of Zavelo, however, is arguably off the mark. Subsequent to the filing of a petition in bankruptcy, the debtor managed to effect a composition with his creditors which was confirmed by the bankruptcy court. Part of the funds used to pay the creditors participating in the composition was advanced by one of the participating creditors. This advance was made in the interval between the filing of the petition and the confirmation of the composition. To obtain the loan the bankrupt promised the creditor that he would repay the principal sum plus an amount equal to what was already owed, less any sums received by the creditor through the composition plan. The issue before the Supreme Court was whether the creditor might enforce a reaffirmation made in the interval between adjudication and discharge. The Court held that it made no difference whether the reaffirmation took place prior to or after the discharge as long as it occurred after the petition. In this context, it approved the reaffirmation doctrine.

It is settled, however, that a discharge while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. . . . 55

Zavelo is certainly correct. Because the debtor received new consideration for his uncoerced promise, the promise should have been enforced. As MacLachlan points out:

Once in bankruptcy, it is desirable to let the bankrupt mobilize any remaining credit he may have based upon his friendships, his character, and his prospective resources. Through making an effective waiver of a discharge in relation to specific new debts, a bankrupt may sometimes raise the necessary funds to effectuate a composition or a similar arrangement with his old creditors . . . . 56

However, this has nothing to do with the merits or demerits of

55. Id. at 629.
56. MACLACHLAN, supra note 7, at 98. In Schuman Bros. v. First Nat’l Bank, 115 Okla. 23, 240 F. 647 (1925), appeal dismissed, 274 U.S. 716 (1927), without challenging the rule, the court noted the presence of new consideration and stated that this strengthened the case for enforceability. Cf. American Thrift and Fin. Plan, Inc. v. Potter, 157 So. 2d 297 (La. App., 1963), where the court expressed the belief that it would be most unlikely that a man would agree to pay an old debt to secure new credit.
gratuitous reaffirmations. The Supreme Court in Zavelo did not direct the slightest attention to the bankruptcy consequences of Lord Mansfield's doctrine. Those with a taste for the ironic will note the parallels between Trueman and Zavelo. Both are, or were, the main cases cited in support of the reaffirmation doctrine in their respective jurisdictions. In each case the moral obligation theory was not essential for enforcement of the promise, yet the eagerness of the court to invoke it established precedent for the principle that gratuitous reaffirmations are binding. In both cases the reaffirmation was made by a businessman seeking commercial advantage, yet much of the litigation today involves persons who have received nothing for their promise. In neither decision is there any discussion of whether the rule announced is consistent with the objectives of bankruptcy legislation. Thus, what began as part of Lord Mansfield's effort to remake the law of consideration has, over the years and in a most subtle fashion, become unquestioned dogma with serious bankruptcy consequences.

There are a number of reasons why the reaffirmation rule went unchallenged during the nineteenth century. Passive acceptance has continued into the twentieth century, and as the years pass the likelihood of challenge diminishes. Time continues to add luster to Lord Mansfield's moral obligation theory. It is not, however, too late to question whether a bankrupt ought to be able to reaffirm his discharged obligations. There is nothing in the history of the rule to suggest that such an examination is inappropriate. If anything, consideration of its merits is long overdue.

**Cases Under the Bankruptcy Act**

Four times during the last forty years the Supreme Court has considered the question whether a state rule of law was invalid under the supremacy clause because of conflict with the discharge provisions of the Bankruptcy Act. The results are equally divided with two triumphs each for the bankrupt and the creditor. However, the trend of decision, as evidenced by an important opinion at the last term of Court, clearly favors the bankrupt and provides support for an argument that the reaffirmation rule is invalid.

The first of these cases, Local Loan Co. v. Hunt, came before the Court in 1934. A creditor sought to collect, under a pre-bankruptcy wage assignment, wages earned by the bankrupt after the institution of bankruptcy proceedings. Illinois law clearly favored the creditor in this

58. 292 U.S. 234 (1934).
situation, and the state courts had twice held that the lien of the wage assignment attached to such earnings. According to a unanimous court, however, the Illinois rule could not prevail since the bankrupt, not the creditor, was entitled to all wages earned after the initiation of the bankruptcy proceeding. Mr. Justice Sutherland articulated a clear and strong federal policy:

When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor would be of little advantage to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy. . . . [W]e reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and spirit of the bankruptcy act.\footnote{Local Loan Co. was cited only in dissent when, seven years later, the Supreme Court, in \textit{Reits v. Mealey},\footnote{314 U.S. 33 (1941).} upheld the suspension of a bankrupt's driver's license under § 94(b) of the New York Vehicle and Traffic Law.\footnote{N.Y. VEH. \& TRAF. LAW § 332 (McKinney 1970).} According to that statute, both an operator's license and his vehicle registration certificate could be suspended for three years if the holder failed to satisfy any judgment against him for damages resulting from a motor vehicle accident. Prior to the expiration of the three-year period, only satisfaction of the judgment would be grounds for restoration of the suspended privileges. A bankruptcy discharge was}{59. Id. at 245.}
specifically excluded from the definition of satisfaction. When the bankrupt sought to restrain the New York Commissioner of Motor Vehicles from suspending his driver's license, the majority saw no impermissible conflict with § 17 of the Bankruptcy Act.

. . . The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety.⁶²

The relationship between Local Loan Co. and Reitz was for a long time unclear. Perhaps the opinion in Reitz evidenced a shift toward greater deference to state law in all cases of alleged conflict with the Bankruptcy Act. On the other hand, it is possible to perceive a substantial difference in the threat posed to the rehabilitative features of the Bankruptcy Act by the state law in these two cases. It is clear, for instance, that congressional policy was seriously threatened in Local Loan Co. Illinois law stood directly in the path of debtor rehabilitation. If the Supreme Court had held that a wage assignment was effective as to wages earned after the bankruptcy petition it would have invited creditors to make extensive use of wage assignments, thus jeopardizing the future earning capacity of all bankrupts. On the other hand, the danger posed by the provision of the New York law in Reitz was much less substantial. The New York statute could have an adverse effect on the future earning capacity of only one class of bankrupts. Those absolutely dependent upon a motor vehicle for employment would suffer seriously, and only those who could not switch to another profession would be as seriously disadvantaged as the wage assignor. Thus, the facts in Reitz arguably presented a much weaker case for displacement of state law than did those in Local Loan Co.

In a 1962 case, Kesler v. Department of Public Safety,⁶³ the Supreme Court confirmed and extended the holding of Reitz. It refused to set aside the so-called creditor control provisions of Utah's version of the Uniform Motor Vehicle Safety Responsibility Act⁶⁴ even though the power to invoke the suspension provisions of the statute was placed solely in the hands of a creditor holding an unsatisfied judgment arising

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⁶² 314 U.S. at 37.
out of a traffic accident. The creditor's option to suspend the bankrupt's driving privilege was a powerful post-discharge collection device. Nevertheless, the statute was upheld as a legitimate exercise of the state's police power. Justice Frankfurter, writing for the majority, devoted considerable time to an exposition of the history of the statute. Near the close of his opinion he wrote:

Utah is not using its police power as a devious collecting agency under the pressure of organized creditors. Victims of careless car drivers are a wholly diffused group of shifting and uncertain composition, not even remotely united by a common financial interest. The Safety Responsibility Act is not an Act for the Relief of Mulcted Creditors. It is not directed to bankrupts as such. Though in a particular case a discharged bankrupt who wants to have his rightfully suspended license and registration restored may have to pay the amount of a discharged debt, or part of it, the bearing of the statute on the purposes served by bankruptcy legislation is essentially tangential.\(^6\)

The extraordinary deference to state legislative action apparent in the *Kesler* opinion lasted for only nine years. In June, 1971, the Supreme Court, speaking through Mr. Justice White, clearly and forcefully repudiated *Reitz* and *Kesler*. At issue in *Perez v. Campbell*\(^6\) was the validity of the same creditor control provision which had been upheld in *Kesler*. This time the provision was invalidated.

What is at issue here is the power of a State to include as part of this comprehensive enactment designed to secure compensation for automobile accident victims a section providing that a discharge in bankruptcy of the automobile accident tort judgment shall have no effect on the judgment debtor's obligation to repay the judgment creditor at least insofar as such repayment may be enforced by the withholding of driving privileges by the State. . . .

. . . .

The sole emphasis in the Act is one of providing leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent. . . .

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\(^6\) 369 U.S. at 174.

We can no longer adhere to the aberrational doctrine of Kesler and Reitz that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . .

The decision in Perez should encourage a challenge to the reaffirmation doctrine. Mr. Justice White cites Local Loan Co. with approval, and his entire opinion evidences a strong commitment to protecting the utility of the debtor's discharge. This commitment is demonstrated by the Court's willingness to set aside a state law which weakened, but did not entirely destroy, the protective effect of the discharge. The Court clearly indicated that a good motive will not save any state law that is in conflict with the Bankruptcy Act, thus completely undercutting the argument that since the reaffirmation rule had an innocent origin in the law of contracts it cannot be pre-empted by federal law.

The Conflict Between Lord Mansfield's Theory and the Current Discharge Provisions

The fundamental tension between the discharge feature of the Bankruptcy Act and Lord Mansfield's concept of moral obligation can be clearly illustrated by examining the Restatement's formulation of the doctrine of consideration. In common law countries the doctrine of consideration helps to establish the limits of an enforceable obligation. The Restatement (Second) of Contracts, however, adopts a narrow view of consideration. That term is not used to express the legal conclusion that a promise is enforceable. Rather it is clearly associated with bargain transactions. According to § 19(1), "[t]he formation of a contract requires a bargain in which there is . . . consideration." Section 75(1) continues: "To constitute consideration, a performance or a return

67. Id. at 643, 646-47, 651-52.
68. Id. at 648.
69. The possibility of an inquiry into motive is discussed in The Supreme Court, 1961 Term, 76 Harv. L. Rev. 54, 150-52 (1962).
promise must be bargained for." The presence of a bargain provides a substantive basis for the enforcement of a promise, reliance and unjust enrichment being independent but related bases. The draftsmen of the Restatement (Second) discuss various theories of enforceability.

Bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy. The enforcement of bargains rests in part on the common belief that enforcement enhances that utility. Where one party has performed, there are additional grounds for enforcement. Where, for example, one party has received goods from the other and has broken his promise to pay for them, enforcement of the promise not only encourages the making of socially useful bargains; it also reimburses the seller for a loss incurred in reliance on the promise and prevents the unjust enrichment of the buyer at the seller's expense. Each of these three grounds of enforcement, bargain, reliance and unjust enrichment, has independent force, but the bargain element alone satisfies the requirement of consideration....

Whenever a creditor relies solely upon the rule of Restatement (Second), § 87, there will have been no bargain with the creditor, no reliance by the creditor and no unjust enrichment of the debtor except insofar as one of these bases of enforcement is established by events occurring prior to the effective date of the bankrupt's discharge. The enforceability of the promise is, of course, not determined entirely by events occurring prior to bankruptcy. There is a post-bankruptcy event (the reaffirmation) which is an essential part of the obligation; but it is one which normally would not be sufficient to create contractual responsibility. It is this discriminatory departure from the basic concept of consideration that creates the conflict with federal law.

The draftsmen of the Restatement note the relationship between consideration and legal formalities:

Consideration furnishes a substantive rather than a formal basis for the enforcement of a promise. Many bargains, particularly when fully performed on one side, involve acts in the course of performance which satisfy some or all of the func-

72. Id., § 76, comment b.
tions of form and thus may be thought of as natural formalities. Four principal functions have been identified which legal formalities in general may serve: the *evidentiary* function, to provide evidence of the existence and terms of the contract; the *cautionary* function, to guard the promisor against ill-considered action; the *deterrent* function, to discourage transactions of doubtful utility; and the *channeling* or signalizing function, to distinguish a particular type of transaction from other types and from tentative or exploratory expressions of intention in the way that coinage distinguishes money from other metal. But formality is not essential to consideration; nor does formality supply consideration where the element of exchange is absent. . . .

As indicated by the draftsmen, the presence of a bargain transaction, a natural formality, may provide the promisor with some of the protections commonly associated with legal formalities. Bargain transactions, for instance, are less likely to be inconsiderate engagements than those in which the promises are gratuitous. However, there are situations in which other social goals are so important that a decision is made to set aside the protections of form. This willingness to dilute the protections available to the bankrupt promisor is made explicit by Professor Fuller:

Courts have frequently enforced promises on the simple ground that the promisor was only promising to do what he ought to have done anyway. These cases have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic must inevitably make at times with sentiment. I believe that these decisions are capable of rational defense. When we say the defendant was morally obligated to do the things he promised, we in effect assert the existence of a substantive ground for enforcing the promise. In a broad sense, a similar line of reasoning justifies the special status accorded by the law to contracts of exchange. Men *ought* to exchange goods and services; therefore when they enter contracts to that end, we enforce those contracts. On the side of form, concern for formal guarantees justifiably diminishes where the promise is backed by a moral obligation to do the thing promised. What does it matter that the promisor may have acted without great deliber-

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73. *Id.*, comment c.
ation, since he is only promising to do what he should have done without a promise? For the same reason, can we not justifiably overlook some degree of evidentiary insecurity?

In refutation of the notion of "moral consideration" it is sometimes said that moral obligation plus a mere promise to perform that obligation can no more create legal liability than zero plus zero can have any other sum than zero. But a mathematical analogy at least equally appropriate is the proposition that one-half plus one-half equals one. The court's conviction that the promisor ought to do the thing, plus the promisor's own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient. . . .

Even though Professor Fuller was not concerned with the bankruptcy implications of the moral obligation theory, his formulation of its rationale reveals its weakness. State policy favoring enforcement of the reaffirmation is so strong that the bankrupt is to be deprived of whatever evidentiary and cautionary safeguards the bargain concept of consideration would ordinarily provide. This aberration of state law facilitates the debtor's assumption of an obligation and conflicts with bankruptcy policy in two respects. These conflicts can be illustrated by examining one of the justifications commonly offered for the discharge feature found in contemporary bankruptcy legislation.

It seems that discharges were first introduced in the English Bankruptcy Acts as a means of inducing bankrupts to make a clean disclosure and delivery of their assets, and to comply otherwise with the Bankruptcy Laws. The later development of the discharge represents an independent though not unrelated public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse. A business man may sometimes get new credit after a failure, if

74. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 821-22 (1941).
75. Corbin also expresses hostility to forgiveness of obligation when he discusses the moral obligation theory.
A few of the earlier cases held that a new promise by the debtor was not binding, distinguishing between bankruptcy and statute of limitations in that the former discharged the debt while the latter merely barred the remedy. This distinction did not survive, for the reason that there are equally strong grounds for enforcing the new promise in the two cases. The creditor has not been paid; and he has been deprived of his remedy by compulsion of law . . . .

1A Corbin, supra note 13, § 222 (emphasis added; footnote omitted).
it is of such a nature as not to discredit his ability or character too seriously, but not if his prospective earnings are to be consumed in trying to meet old debts. If an employee's wages are not exempt from garnishment, he may not feel that he can afford to work anywhere his creditors can reach him. There is no public policy in favor of permitting creditors to bring such pressure upon a man that he feels moved to migrate or to proceed under an assumed name . . . . A debtor doomed to spend the rest of his life working for his old creditors is discouraged from trying to accumulate any property, and the motive which leads many a man to productive effort may thus be destroyed. Furthermore, there is no need to deprecate sympathy for the honest debtor who may merely have made a mistake in judgment, or who may have been overwhelmed by a slander, a strike, an automobile accident, a general depression or some other cause beyond his control. Thus, the prospect of a discharge serves legitimate social and economic ends as well as serving to induce compliance with the Bankruptcy Act as a branch of collection law.\textsuperscript{76}

The motive to engage in productive effort will not be found in a bankrupt if the discharge does not facilitate a substantial disengagement from past obligations. Furthermore, any restoration of such motive may be only temporary if bankruptcy was caused by poor planning.\textsuperscript{77} The reaffirmation doctrine tends to tie the debtor to past mistakes, and the operation of the doctrine aggravates the problem of the bankrupt who does not have habits of consumption which match his means. In both respects, there is impermissible conflict with bankruptcy objectives.

In both \textit{Local Loan Co.}\textsuperscript{78} and \textit{Peres}\textsuperscript{79} the Supreme Court struck down state laws which established post-bankruptcy consequences for pre-bankruptcy conduct. This is exactly what application of the moral obligation theory does when applied to bankruptcy situations. There is no significant post-bankruptcy conduct that can justify enforcement of

\textsuperscript{76} MAcLACHLAN, \textit{supra} note 7, at 88; see also 1A COLIER, \textit{supra} note 8, \S 14.02[1]; 7 REMINGTON, \textit{supra} note 7, \S 2993.

\textsuperscript{77} Many bankruptcies are caused by financial reverses that could not be reasonably anticipated. Medical expenses, marital difficulties and personal injury litigation fall in this category. However, a substantial portion of bankruptcies are attributable in whole or in part to poor money management. H. MATHEWS, \textit{CAUSES OF PERSONAL BANKRUPTCIES} 73-80 (1969); Comment, \textit{Discharge Provisions in Consumer Bankruptcy: The Need for a New Approach}, 45 N.Y.U.L. Rev. 1250, 1264 (1970). The reaffirmation rule exploits the poor planning ability of this group.

\textsuperscript{78} 292 U.S. 234 (1934).

\textsuperscript{79} 402 U.S. 637 (1971).
the promise. Moral obligation is not consideration unless one adopts a definition that equates consideration with enforceability. Such a definition allows states to change rules of property or contract whenever there is disagreement with bankruptcy policy. The Bankruptcy Act establishes a procedural system for the termination of insolvents' affairs resting upon a foundation of state law. Implicit in the interstitial character of this statute is the requirement that state law not discriminate against the effective operation of any provision of the federal act. The Act does not require that the states adopt a particular methodology for drawing the line between enforceable and unenforceable promises. But the system chosen should be consistently applied to the promise of a bankrupt. Since the moral obligation theory is not a generally applied theory of enforceability, it may not be used discretely to create post-bankruptcy consequences for pre-bankruptcy conduct.

The use of a special rule of contract for bankrupts undercuts the value of the discharge. A discharge does not change a man; it only gives him the chance to avoid the repetition of past mistakes. If his instinct for self-preservation is strong, he will use his discharge to ward off old creditors and will be cautious about acquiring new ones. Even if he makes a hasty promise, commonly applied principles of contract law will permit him to escape from many engagements: there will be no obligation unless the bankrupt has received consideration for his promise. There is, however, no leeway for change of mind when the moral obliga-

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80. The Restatement (Second) of Contracts does not use the term in that sense. See § 75, comment a (Tent. Draft No. 2, 1965).

81. A brief discussion on the relationship between state and federal law in bankruptcy proceedings will be found in 2 G. Gilmore, Security Interests in Personal Property § 45.2 (1965). Professor Gilmore is interested in the distributive function of bankruptcy, but his remarks are also appropriate to the discharge feature.

A very limited footnote discussion in Collier suggests that because Congress has not acted, the nature of the bankrupt's obligation following reaffirmation is to be determined by state law.

The Bankruptcy Act does not attempt to deal with the effect of a new promise or the revival of the discharged debt. Accordingly, one must look to state law, just as one must look there to see whether a contract is made, a note issued, a judgment entered, or the like.

1A Collier, supra note 8, ¶ 17.33 n.3.

82. Only three cases have been found in which the moral obligation inherent in a bankrupt's obligation was found to have any significance outside bankruptcy. Livesey v. First Nat'l Bank, 57 S.W.2d 86 (Tex. Comm'n App. 1933) (creditor with claim discharged in bankruptcy has insurable interest in life of debtor even though debtor did not reaffirm obligation); Arkansas Baptist State Conv'n v. Board of Trustees of Baptist State Hosp., 209 Ark. 236, 189 S.W.2d 913 (1945) (payment by hospital trustees on account of discharged obligation is not breach of fiduciary duty); Greenspon v. Comm'r, 8 T.C. 431 (1947) (payment of obligation of bankrupt corporation by its shareholders deductible as a bad debt). None of these cases holds that a promissory obligation is valid. Instead the moral obligation theory is cited to support related, yet distinct, rights.
tion theory is invoked. Bankruptcy is not a pleasant experience, and it is understandable that debtors wish to rid themselves of shame by reassuring old creditors. The reaffirmation rule, however, converts reassurance into obligation and permits creditors to exploit the temporary lack of caution which may follow the initiation of bankruptcy proceedings. Insofar as legal sanctions exist for the enforcement of such promises, the bankrupt’s chances for permanent financial rehabilitation are jeopardized.

For a long time it has been recognized that infants, intoxicated persons and those who are mentally ill may not, in certain situations, have the capacity to contract. Arguably, a bankrupt’s capacity to incur obligation should be limited in some fashion for a period following the institution of bankruptcy proceedings. The adjudication of bankruptcy bears some similarity to a declaration of incompetency, since in many cases it is the recognition that a debtor has not been able to protect himself against the imposition of others. The states, however, have relaxed the requirement of consideration for this one type of promise. Instead of no capacity, or limited capacity, the bankrupt has extra capacity. The slick verbalizations traditionally offered to rationalize results produced by this doctrine cannot conceal the fact that it is easier for the recent bankrupt to create contractual responsibility than it is for most other types of promisors.

Some states have recognized the potential for injury to a debtor implicit in the reaffirmation doctrine and by legislative act or judicial decision have attempted to provide compensating protection for him. A few jurisdictions, beginning with Massachusetts in 1856, have adopted

84. See note 100 infra.
85. The note was a debt provable in the bankruptcy proceedings. The legal obligation which it created or evidenced was, by virtue of the confirmation of the composition offer and the discharge in the proceedings, discharged by force of the statute, and the remedy of plaintiff existing at the time the discharge was granted to recover her debt by action barred. The right of action is given by a new and efficacious promise. The practice of bringing the action upon the original demand is, however, sanctioned by usage. The discharge in bankruptcy is, under such practice, regarded as a discharge of the debt sub modo only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. The new promise with such other facts as are essential to constitute it a valid cause of action may, however, be alleged. [citations]

The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action . . . .

a statutory requirement that the reaffirmation be in writing. In these jurisdictions it may be argued that there is no conflict with the Bankruptcy Act since the statutory formality of a writing is functionally equivalent to the natural formality of a bargain. This argument is not persuasive. If a writing could provide much the same protection as a bargain, one would expect that a writing would be sufficient to create promissory liability in a large variety of situations. However, the writing requirement is not a generalized alternative to the requirement of a bargain, and its use to create post-bankruptcy consequences for pre-bankruptcy conduct must still be suspect.

Special treatment for the bankrupt can also be found in some judicial decisions. A promise to pay a debt barred by the statute of limitations may be inferred from part payment of the barred obligation. No such implication is found in a bankrupt's partial payment of his old debt. Several courts have applied a standard of proof to the bankrupt's promise which is substantially more demanding than the one applied when the promise is to pay a debt barred by the statute of limitations. However, in the great majority of states which have no requirement of a writing, special evidentiary standards should not save the rule. Judging from reported litigation, the main problem with reaffirmations is that they are ill-considered. High standards of proof give no substantial protection to the debtor who clearly makes a promise and later changes his mind. Thus, only in those states where the reaffirmation is most suspect.

Let us recapitulate these arguments. The bargain concept of consideration plays an important role in setting the limits of enforceable obligations. Bargain is a generalized theory of enforceability, while moral obligation theory has a very limited area of application. The Bank-


87. Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957); Alper v. Republic Inv. Co., 82 F.2d 619 (D.C. Cir. 1936); Polk v. Stephens, 118 Ark. 438, 176 S.W. 689 (1915); Lupinski v. Fischer, 255 Wis. 182, 38 N.W.2d 429 (1949).

The Bankruptcy Act, like any interstitial statute, cannot function effectively if there is one set of state rules applicable when the statute is not in issue (normal contract situations) and another set when the protections of the statute are invoked (moral obligation situations). When one understands how closely the effectiveness of a debtor's discharge is dependent upon the degree of caution exhibited by the bankrupt in his post-discharge actions, the harm caused by a state rule which permits bankrupts to commit future earnings becomes apparent. The bargain theory of enforceability is related to predictable patterns of human behavior, as is the discharge provision of the Bankruptcy Act. Hence, the moral obligation theory conflicts with the Act because it creates promissory liability in situations where normal contracting conduct does not exist.

The Reaffirmation Theory in Contemporary Society

The primary focus thus far has been on the conflict between state law and bankruptcy policy. This is not to suggest, however, that concern at the state level about the consequences of Lord Mansfield's view is inappropriate. His views encourage debt collection practices which, although conventionally acceptable, may be undesirable or burdensome to specific categories of debtors. Many attorneys with bankruptcy practice are concerned with the constant pressure for reaffirmation experienced by their clients. The little empirical evidence available suggests that the practice is a common one and that finance companies are foremost among creditors seeking reaffirmations. One can also suspect that the bankrupt credit consumer most likely to make an inconsiderate reaffirmation is also the least equipped by education and circumstance in life to make a wise consumer choice. The reaffirmation rule in contemporary society may thus be revealed as just another aspect of victimization of the poor. In any event, state officials ought to be concerned with what type of creditor is seeking the reaffirmation and what kind of debtor is making the reaffirmation. After all, states have traditionally been concerned with harmonizing debtor and creditor interests. Excessively exuberant collection efforts lead to civil liability. Statutes authorizing creditors' remedies are filled with limitations and restrictions. Even though the control of the collection process is unsystematic, the totality of ad hoc judgments made by legislators and judges does represent society's view of a debtor's

moral obligation to repay the credit advanced to him. Deference to a doctrine, now almost two hundred year old, obscures the point that the reaffirmation rule is part of the collection process. The relevant question, therefore, is whether it is an appropriate rule for contemporary society. Although it has been argued that the federal interest is so strong and the conflict so direct that the challenge of pre-emption should succeed, there is no impediment to state action designed to increase the value of the discharge. If the reaffirmation rule is not changed at the state level, however, it will eventually be changed by federal action.\(^91\)

**The Relationship Between the Doctrine and Recent Bankruptcy Act Amendments**

Recent amendments to the discharge provisions of the Bankruptcy Act may make the reaffirmation doctrine even more of a problem than in the past. Until recently a sharp distinction was drawn between the bankrupt's eligibility for discharge and the effect of his discharge. Although eligibility was determined by the bankruptcy court, the effect was determined by any court chosen by the creditor to enforce a discharged obligation. Certain policy considerations supported a division of responsibility between these two forums,\(^92\) but there are serious shortcomings in an arrangement which remits the decision as to the effect of a discharge to a forum other than the original bankruptcy court. Foremost among these shortcomings was the temptation for a creditor to sue on an obligation, although it was unquestionably discharged, in the hope that the bankrupt would not appear to plead his affirmative defense.\(^93\) Such post-petition litigation was often successful in cases where the bankrupt would have had a complete defense if he had only contested the creditor's claim.

Late in 1970 Congress amended the Bankruptcy Act in an attempt to deal with this problem.\(^94\) The bankruptcy court was given exclusive responsibility for determining whether certain of the bankrupt's obligations were discharged. It was further provided that these debts were to be

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94. 11 U.S.C. §§ 11(a), 12, 32(b), 32(f)-(h), 33, 35(a) (2), 35(a) (5)-(8), 35(b)-(c), 66(4), 94(b) (1970).
deemed discharged unless the creditor secured a ruling that they were non-dischargeable. It is expected that the shift of forum and the new requirement that the creditor take affirmative steps in the bankruptcy court to secure a ruling on dischargeability will substantially increase the protective value of a discharge. A provision added to § 14 of the Bankruptcy Act directs that the discharge when granted shall "enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt." Thus, a creditor who ignores the discharge and continues in the discredited practice of post-bankruptcy litigation runs the risk of a contempt citation.

Unfortunately, there is nothing in the recent statutory change which prevents a persistent creditor from securing a reaffirmation and bringing suit on the subsequent promise. In fact there is a danger that much of the beneficial effect of this recent legislation will be nullified if courts continue to follow Lord Mansfield's theory of moral obligation. Before enactment of the amendments, a creditor who wished to get around the bar of the discharge could either secure a reaffirmation or disregard the discharge and sue, hoping the debtor would not appear in court. The latter alternative is now too perilous, but the former practice is still permissible. Because reaffirmation is now the only alternative, the pressure exerted on bankrupts to reaffirm can be expected to increase. As creditors seek to avoid the impact of the 1970 amendments, the attractions of the moral obligation theory will become apparent to them.

The benefits to bankrupts of the 1970 legislation would have been substantially increased if it had been provided that those types of debts which are deemed discharged, unless specifically determined to be non-dischargeable by the federal court, could not, under any circumstances, be reaffirmed. Instead, the explanatory memorandum of the National Bankruptcy Conference accompanying the Senate Bill notes that legislative action does not touch the reaffirmation rule:

This proposed legislation also does not affect in any way a bankrupt's obligation upon a discharged debt which is subsequently revived by a new promise. In the absence of any statutory directive, the case law has permitted enforcement of such new promise made after the commencement of the bankruptcy proceeding.96

95. 11 U.S.C. § 14(f) (2).
Thus, the recent legislation certainly cannot be interpreted as a mandate to overturn the reaffirmation rule. However, it should be remembered that the pre-emption argument outlined earlier does not in any way rely on the policy articulated in the 1970 amendments. That argument refers instead to the interstitial character of bankruptcy legislation and the implied obligation imposed on the states to construct a law of contract that does not discriminate against federal interests. It is difficult to find anything in the congressional action or in the report on the Senate Bill which is adverse to this analysis of the conflict between state and federal law. The purpose of the statutory change was to make the discharge more meaningful for the bankrupt. If congressional silence is viewed as acceptance of Lord Mansfield's doctrine, then this unusual situation occurs: a bill to increase the protective quality of the discharge legitimizes creditor activity which will eventually erode the protective devices established by the same bill. This would, indeed, be an extraordinary construction of congressional inaction. Therefore, the silence of Congress should be interpreted as irrelevant to the resolution of the controversy.97

CONCLUSION

On July 9, 1923 a debtor executed a promissory note containing a clause which was interpreted as a waiver of the right to plead the defense of a discharge in bankruptcy. Within five days an involuntary petition was filed against the maker of the note and, when the creditor sought to enforce the note, the Supreme Judicial Court of Massachusetts had to decide whether this waiver was binding. It had no difficulty in distinguishing the reaffirmation precedents, including *Zavelo*:

... These decisions do not reach to the facts of the case at bar. One purpose of the bankruptcy act is to enable debtors to secure a release from the legally enforceable obligation of every debt provable against their estates and not of the excepted classes. Its design is both to secure a ratable distribution of the property of the bankrupt among his creditors and to enable an honest and deserving debtor to get a fresh start in life. Plainly the note here in suit was provable in bankruptcy against the estate of the defendants. It would be repugnant to the purpose of the bankruptcy act to permit the circumvention of

97. It appears that the failure to deal with the reaffirmation doctrine was motivated by a desire to avoid controversy. See Countryman, The New Dischargeability Law, 45 Am. Bankr. L.J. 1, 23 (1971).
its object by the simple device of a clause in the agreement, out of which the provable debt springs, stipulating that a discharge in bankruptcy will not be pleaded by the debtor. The bankruptcy act would in the natural course of business be nullified in the vast majority of debts arising out of contracts, if this were permissible. It would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect. The bar of the discharge under the terms of the bankruptcy act is not restricted to those instances where the debtor has not waived his right to plead it. It is universal and unqualified in terms. It affects all debts within the scope of its words. It would be contrary to the letter of § 17 of the bankruptcy act as we interpret it to uphold the waiver embodied in this note. So to do would be incompatible with the spirit of that section. Its aim would largely be defeated.98

Exactly the same criticisms can be made of the reaffirmation doctrine. There is no significant difference between a promise not to plead the discharge made a moment before the petition is filed and a reaffirmation uttered immediately after the petition.99 Both are likely to be reckless engagements which, if often obtained and routinely enforced, would provide creditors with an easy method for evading the discharge feature of the Bankruptcy Act. A state court could refuse to enforce gratuitous reaffirmations on the theory that they are incompatible with § 17 of the Act. Furthermore, Local Loan Co. established that bankruptcy courts could exercise ancillary jurisdiction and restrain enforcement of state laws in conflict with the Bankruptcy Act. This ancillary jurisdiction could be invoked to prevent enforcement of reaffirmations.100 Regardless of the procedure employed, it is time to use the judicial process to challenge this ancient contract doctrine.

It has been almost two hundred years since Lord Mansfield announced the reaffirmation rule. Not once since then has an American


99. Nevertheless, the distinction is accepted without question. 1A COLIER, supra note 8, ¶ 17.36; MacLACHLAN, supra note 7, at 98; 7 REMINGTON, supra note 7, § 2997.

100. In re Patt, 43 F. Supp. 754 (E.D. Tenn. 1941). See also In re Harris, 28 F. Supp. 487 (E.D. Ill. 1939) (ancillary jurisdiction not properly invoked).
court challenged the doctrine; nevertheless, it clearly seems to offend bankruptcy policy. A discharge does not change a man; it only gives him the chance to avoid some consequences of past mistakes if he is resolute. If his instinct for self-preservation is strong, he will use his discharge to ward off old creditors and this, coupled with care to avoid the acquisition of many new obligations, will enable him to regain his financial footing. The discharge alone is not enough. There must also be prudence. The reaffirmation rule permits creditors to exploit the temporary lack of caution which any bankrupt can be expected to feel. It is certainly understandable that debtors may wish to rid themselves of shame by reassuring old creditors that everything will be put right, but reckless assumption of responsibility must be prevented. Except for the moral obligation theory, traditional contract doctrine would protect the debtor in the case of a gratuitous reaffirmation. States have it within their power to determine that gratuitous reaffirmations will never be binding, or at least to require that such reaffirmations be written. Absent such action it would be appropriate for a state or federal court to hold that oral reaffirmations are no longer enforceable, under a pre-emption theory based on *Perez* and *Local Loan Co*. Indeed, these decisions invite such a challenge to state law. If the reaffirmation rule remains in vogue, it may eventually be necessary for Congress to enact legislation restricting its operation.

It would be foolhardy to predict the early demise of Lord Mansfield’s viewpoint. It has been uncritically accepted for so many years that change will be difficult to achieve. But there is so little justification for this one-sided transaction that a de novo consideration of the rule is in order.101

101. Reaffirmations arising out of transactions in which new consideration is received by the debtor present different problems. The debtor may make a reaffirmation which he later regrets, but this is no different from the assumption of any promissory responsibility which he later wishes to evade. If it appears that non-gratuitous reaffirmations are going to be troublesome, one solution might be to require approval by the bankruptcy court of the reaffirmation as a condition to its validity. If this limitation on the power of the bankrupt to contract existed only for the first few months after the filing of the petition, it would not be necessary to hold the estate open for an unreasonable amount of time. This approach would protect the bankrupt without denying him access to likely sources of capital.