1984

Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy

David C. Williams
Indiana University Maurer School of Law, dacwilli@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Bankruptcy Law Commons

Recommended Citation
Williams, David C., "Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy" (1984). Articles by Maurer Faculty. Paper 917.
http://www.repository.law.indiana.edu/facpub/917

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
TOWARD A REFORM OF THE SIX-YEAR BAR TO DISCHARGE IN BANKRUPTCY

Since early in this century, the six-year bar to discharge has been a familiar feature of bankruptcy law: a debtor who has once been adjudicated a bankrupt and granted a discharge has traditionally been unable to obtain another discharge for six years afterwards.¹ The continued vitality of the measure, originally applicable to all forms of bankruptcy available, is now uncertain and controversial under the new chapter proceedings. The confusion surrounding the six-year bar suggests the need for a fresh consideration of the purposes of the rule. This Note examines the bar’s animating rationale and the status of the bar under the current Bankruptcy Code;² it argues that Congress should precisely define the policy goals behind the bar and revise the measure to serve only those goals rather than a vague hostility toward multiple discharge.

I. HISTORICAL RATIONALES FOR THE SIX-YEAR BAR

Historically, there have been three principal understandings of the bar's purpose. First, the bar’s supporters have justified it as a means of curbing fraudulent behavior. The bar’s original sponsor, Congressman Ray of New York, argued that it would control “professional bankrupts,” men in the “great cities... who make it a business to run in debt and then take advantage of the bankruptcy act.”³ Similarly, when Congress amended the measure in 1927 to direct that discharge in involuntary as well as voluntary proceedings should trigger the bar, proponents justified the change on the ground that many of “the so-called involuntary proceedings are really instituted with the knowledge and at the behest of the debtor.”⁴

Second, the bar has been seen as merely a limit on discharge itself—a limit that implies no moral condemnation of the debtor. In Perry

---


v. Commerce Loan Co., the most authoritative judicial explanation to date of the bar's purpose, the Supreme Court insisted that the rationale for the measure was "the prevention of recurrent avoidance of debts," and noted in passing that "a prior bankruptcy is hardly a 'guilty' act within the usual meaning of that word." The legislative history of the bar's amendment in 1970 echoes this assertion: the Judiciary Committee report explained that, whereas most other grounds for denying discharge involved "some form and degree of dishonesty or lack of cooperation," the bar was "entirely distinct from such type of activity.

A third perception of the purpose of the bar, never bluntly articulated or acknowledged, combines elements of the other two: the bar is designed to limit repeated discharge regardless of particular circumstances, because seeking frequent discharge is itself a form of misconduct. According to this view, fraudulent behavior by persons requesting multiple discharge is but a particularly egregious instance of the misconduct that inheres in all requests for repeated forgiveness. Thus, a prior bankruptcy becomes misconduct if it is part of a pattern of repeated discharge.

The first manifestation of this third view was Congressman Ray's assertion that "it is quite clear that no person should have the benefit of the act" too often. The use of the word "benefit" is significant: it reflects a notion that the bar limits discharge not to protect creditors or the general economy, but to deny the social largesse to debtors who beg mercy with undue frequency.

The majority in Perry expressed the same view. "The unmistakable purpose of the six-year provision," the Court wrote, "was to prevent the creation of a class of habitual bankrupts — debtors who might repeatedly escape their obligations as frequently as they chose by going through repeated bankruptcy." This view seems to have been the standard judicial policy defense of the bar: language nearly identical to that in Perry appeared in virtually all contemporaneous cases construing the purpose of the provision. By using the specific

---

5 383 U.S. 392 (1966). The Court held that prior discharge did not bar later confirmation of a plan that provided only for an extension of time for repayment, because no actual discharge was involved.
6 Id. at 402.
7 Id. at 400. The dissent also acknowledged that a prior discharge is not "morally reprehensible." Id. at 407 (Harlan, J., dissenting).
8 See supra note 1.
11 383 U.S. at 399 (citing H.R. REP. No. 1698, 57th Cong., 1st Sess. 2 (1902)).
12 See Turner v. Boston, 393 F.2d 683, 685 (9th Cir. 1968); Barnes v. Maley, 360 F.2d 922, 924 (7th Cir. 1966); In re Mayorga, 355 F.2d 89, 90 (9th Cir. 1966); In re Holmes, 309 F.2d 748, 748 (10th Cir. 1962); In re Jensen, 200 F.2d 58, 62 (7th Cir.) (Lindley, J., dissenting), cert. denied, 345 U.S. 926 (1952); In re Hardy, 287 F. Supp. 40, 45 (S.D. Ohio 1967); In re Mahaley,
value-charged words "habit," "chose," and "escape," the Court suggested that repeating applicants suffer from a lack of self-discipline or even that they are willfully irresponsible. When these words are read together with the Court's simultaneous assertions that seeking a fresh start is not itself reprehensible, the implications become clear: one failure every six years is understandable, but any more than one is a "free ride" that our system will not tolerate.

This third view has, over the years, been the central animus underlying the six-year bar. The plight of the "honest but unfortunate" debtors who have been swept into the bar's wide nets has been noted since floor debate on the provision in 1902, but Congress has never amended the measure to exempt such applicants. Despite judicial assertions that the bar's purpose is not punitive, the bar does function as a punishment, if not for obtaining one discharge in the past, at least for requesting or needing another discharge too soon thereafter. Moreover, since its creation, the six-year bar has been included in statutory sections that list various bars to discharge involving "some form and degree of dishonesty." The legislative and judicial mind, apparently focused on a vision of especially abusive or fraudulent reapplications, seems to have settled on an irrebuttable presumption that all reapplication is itself misconduct. A close examination of the present Bankruptcy Code reveals that this attitude also underlies the recent alterations of the bar.

II. THE SIX-YEAR BAR UNDER THE BANKRUPTCY CODE

A. Operation of the Statute

The new Bankruptcy Code's treatment of the six-year bar is complex and the case law confused, but both rest on a moralistic
attitude toward multiple discharge. The bar is most severe in liquidation proceedings under chapter 7: section 727(a)(8) directs the court not to grant a discharge if the debtor has been granted a discharge in a liquidation or chapter 11 reorganization proceeding commenced within six years before the filing of the instant proceeding. The House and Senate Reports indicate that this provision represents "no change from current law with respect to straight bankruptcy." Section 727(a)(9), however, relaxes the bar by providing that a prior discharge of an individual under chapter 13 does not bar discharge under chapter 7 if the chapter 13 plan either repaid all of the individual's debts or both repaid at least seventy percent of allowed unsecured claims and represented the debtor's "best effort." When a debtor "would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title," section 1141(d)(3) prevents the debtor from obtaining discharge under a plan of reorganization by the court of all of the debtor's nonexempt property, the distribution to creditors of the proceeds, and the discharge of dischargeable debts. Chapter 11 governs all reorganizations and thus replaces old chapters X, XI, and XII and § 77; it provides for the reorganization of a debtor's capital structure and discharge under a plan developed with the participation of the debtor, creditors, trustee, and bankruptcy court. Chapter 13 governs repayment plans for individuals with regular income, as did the old chapter XIII for the narrower class of wage earners, and it provides for the development of a more flexible plan by debtor, trustee, and bankruptcy court for repayment out of future income and discharge of debts without liquidation of property.

18 11 U.S.C. § 727(a)(8) (1982). The provision directs that discharge be granted unless "the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the filing of the petition." Id.

19 S. Rep. No. 989, 95th Cong., 2d Sess. 99 (1978) [hereinafter cited as Senate Report]; H.R. Rep. No. 595, 95th Cong., 1st Sess. 385 (1977) [hereinafter cited as House Report]. The quoted language presumably means that a prior liquidation will continue to give rise to a bar, not that discharge under chapter 7 will still be barred by precisely the same events as before, for the provision does make one change in the law: a discharge in a reorganization will bar a later liquidation discharge under the new Code. Under the old law, discharge in a corporate reorganization would not give rise to a bar, because, as the legislative history of the Chandler Act explained, "it is not believed that public policy requires [such a] provision." H.R. Rep. No. 1409, 75th Cong., 1st Sess. 29 (1937).

20 11 U.S.C. § 727(a)(9) (1982). This section repeals the 1938 amendment of the bar, which provided that any wage-earner plan that failed to repay all debts would give rise to a bar. See supra note 1.

21 Chapter X of the Chandler Act contained no provision analogous to § 656(a)(3) of chapter XIII, Chandler Act, ch. 575, § 1, 52 Stat. 840, 935 (1938) (repealed 1978), which in vague terms made the bars to discharge applicable to a later chapter XIII plan. Chapter XI did contain such a provision in § 566(3), Chandler Act, ch. 575, § 1, 52 Stat. 840, 897 (1938) (repealed 1978), but there are no reported cases reading the six-year bar in particular into chapter XI. Apparently, the "public policy" directing that a reorganization should not give rise to a bar, see supra note 19, also directed that reorganizations should not be barred.

ganization that provides for the liquidation of its assets and termination of its business. Insofar as it affects corporations, this provision, like section 727(a)(1), is apparently designed to discourage "trafficking in corporate shells, a form of bankruptcy fraud."23 With regard to individuals, the apparent purpose of the section is to prevent debtors from filing in chapter 11 simply to avoid the restrictions on discharge applicable in liquidation proceedings.24 Whether the debtor is a corporation or an individual, a reorganization in which the debtor neither remains in business nor preserves his property is essentially a "disguised" liquidation proceeding and hence serves neither of the basic goals of chapter 11 — preserving assets and keeping companies in business.25 Thus, the "public policy" that Congress offered in 1937 to justify its decision not to apply the bar to reorganizations in general26 cannot justify exempting from the bar certain specific reorganizations that do not serve that policy.

Finally, the six-year bar has been entirely omitted from the express provisions of chapter 13, which makes repayment plans available to insolvent individuals with regular income.27 The special treatment of individual repayment plans seems a product of Congress' articulated desire to favor such plans over liquidations.28

The operation of all these provisions is complex. If a "good" chapter 13 plan is defined as one that satisfies the strictures of section 727(a)(9) (one that repays all debts, or that repays at least seventy percent and is a "best effort") and a "bad" chapter 13 plan as one that does not, and if a "bad" chapter 11 plan is defined as one that violates section 1141(d)(3) (one in which a debtor who would be barred under chapter 7 attempts to liquidate and go out of business) and a "good" plan as one that does not, then the operation of the bar can be schematized as in the Table on the following page.

---

23 Senate Report, supra note 19, at 7. If a liquidated, out-of-business corporation wants to discharge its debts, it can simply dissolve. See In re Federal Insulation Dev. Corp., 14 Bankr. 362, 364 (Bankr. S.D. Ohio 1981); Diego v. Zamost, 7 Bankr. 859, 861–62 (Bankr. S.D. Cal. 1980); D. Stanley & M. Girth, Bankruptcy: Problem, Process, and Reform 118 (1971) (report commissioned by Brookings Institution) [hereinafter cited as BROOKINGS REPORT]. Thus, in the congressional analysis, there is no need to grant a discharge to a bankrupt shell, but there is a good reason to deny one: an undissolved shell could be used to shield a corporation and stockholders from liability in bankruptcy. For this reason, § 727(a)(1) forbids the grant of a discharge in liquidation to any debtor that is not an individual, and § 1141(d)(3) extends that bar to reorganizations involving empty corporate forms. But see infra p. 769.

24 Congress clearly contemplated that, because of the expense of seeking reorganization, Chapter 11 would provide a haven primarily for businesses, but that individuals could apply as well. See House Report, supra note 19, at 6.

25 See id. at 220.

26 See supra notes 19 & 21.


28 See House Report, supra note 19, at 118.
B. Analysis of the Statute's Rationale

The Code's scheme for the six-year bar contains at least one clear inconsistency: the bar operates to preclude discharge in one sequence of chapter proceedings but not in the reverse order. Thus, a chapter 7 discharge or a "disguised 7" (that is, a "bad" chapter 11) discharge will not bar a later "good" chapter 11 discharge, but a "good" chapter 11 discharge will bar a later discharge in chapter 7, real or "disguised." Similarly, a discharge in chapter 7, real or "disguised," will not bar a later "bad" chapter 13 discharge, but a "bad" chapter 13 discharge will bar a later discharge in chapter 7, real or "disguised." This asymmetry is conspicuously at odds with the historical belief that the bar should have the same effect regardless of the sequence of proceedings.29

One explanation for the inconsistency is found in the Code's legislative history, which insists that the six-year bar should not preclude confirmation of a plan under chapters 11 or 13, even though either would bar discharge under chapter 7,30 because "[i]f the debtor wants to pay his debts pursuant to a plan, and if the creditors are willing

---

29 This idea was early suggested by Judge Augustus Hand in In re Kornbluth, 65 F.2d 400, 402–03 (2d Cir. 1933), which held that an earlier composition would bar a later discharge in liquidation. Judge Hand disagreed with In re Goldberg, 53 F.2d 454 (6th Cir. 1931), insofar as that decision, which found no bar in the opposite sequence of proceedings, “implies that confirmation of a composition is not a discharge within the meaning” of the six-year bar. Kornbluth, 65 F.2d at 403. Similarly, the Seventh and Ninth Circuits have held that the “principle” behind the bar is presumably the same regardless whether an extension plan precedes or follows a discharge in liquidation. Barnes v. Maley, 360 F.2d 922, 924 (7th Cir. 1966); In re Mayorga, 355 F.2d 89, 91 (9th Cir. 1966). More significantly, for the 76 years before the adoption of the new Code, the statutory operation of the bar had never depended on the sequence of proceedings.

30 Because confirmation acts as or leads to discharge except in limited circumstances unrelated to the bar, the restrictions on confirmation are effectively the restrictions on discharge. See 11 U.S.C. §§ 1141(d)(3), 1328(a)-(b) (1982).
to go along, he should be allowed to do so.'\textsuperscript{31} This explanation ignores other sections of the Code that make clear that neither chapter \textsuperscript{11} nor chapter \textsuperscript{13} requires that the debtor pay all of his debts\textsuperscript{32} or that all of his creditors agree to the plan.\textsuperscript{33} But even if, on average, more debts will be repaid and more creditors will agree to discharge under a plan than in a liquidation proceeding, just why these considerations indicate that a plan should bar a later liquidation but should not be barred by an earlier one is itself an initially murky question. Because the same amount of debt will be repaid regardless of the order of proceedings, the crucial factor must be creditor approval rather than debt repayment. Under the analysis of the legislative history, when reorganization or individual repayment proceedings follow a liquidation, the creditors agree, despite full knowledge of the debtor's earlier discharge, to release him from his debts. When, on the other hand, liquidation follows a plan, there is no such creditor approval: the court, not the creditor, is responsible for releasing the debtor in a liquidation proceeding.

The only conceivable explanation for the importance of creditor approval is that the bar reflects a moral judgment about repeating bankrupts. If the bar were not based on the notion that "recurrent avoidance of debt" is misconduct, the creditors' forgiveness would be irrelevant. Given that, under the Code, the right to approve or disapprove discharge under chapters \textsuperscript{11} and \textsuperscript{13} is not restricted to creditors who have been disappointed once before, the evil in unapproved discharge in chapter 7 cannot be that the same creditors are twice spurned. Nor can the evil in the discharge be its effect on the economy: if discharge really does harm the economy, the damage is not limited to creditors, and the consent of the creditors alone should therefore not carry decisive weight.

The creditors' consent can thus be of crucial importance only if the evil is in the debtor's own failure to live up to standards of honesty, competence, or success. Civil misconduct frequently has not only a general victim — society — but a specific one as well. If the specific victim declines to press charges or level accusation, the state must also extend forgiveness. By the same token, if the choice repeatedly to "escape" debts is a form of misconduct with a specific victim — the creditor who should not be forced to bear the consequences of someone else's failing — then the victim's consent transforms what

\textsuperscript{31} House Report, supra note 19, at 129 (quoting 1 Report of the Commission on Bankruptcy Laws of the United States 175 (1973) [hereinafter cited as Commission Report]).

\textsuperscript{32} See \textsuperscript{11} U.S.C. §§ 1123(b)(1), 1322(b)(2) (1982).

\textsuperscript{33} See id. §§ 1129(b)(1), 1325(a)(5). Indeed, in chapter \textsuperscript{13}, a vote of unsecured creditors on the plan is not a requirement of confirmation at all. See id. § 1325.
the law would otherwise see as conduct to be prohibited into an act that is at worst neutral.\textsuperscript{34}

Thus, Congress did not believe the six-year bar to be a morally neutral general restraint on discharge. Nor did it believe the bar's purpose to be a moralistic restraint of fraudulent conduct alone. Before the enactment of the new Code, the Commission on Bankruptcy Laws of the United States proposed legislation that would have retained the bar only in liquidation proceedings, reduced the six-year period to five years, and provided for hardship exceptions, "as in cases where a debtor has been victimized by a disabling and expensive illness within the bar period."\textsuperscript{35} In refusing to enact these proposals, and in making "no change"\textsuperscript{36} in the existing law, Congress implicitly reaffirmed its intention to apply the bar to all repeaters, not just fraudulent ones. The Code, it seems clear, reflects a belief that all multiple discharge is blameworthy.

The same attitude is implicit in the other apparent reason for the inapplicability of the traditional bars to discharge in chapter 13 proceedings: Congress' desire to encourage the debtor to file under chapter 13 rather than chapter 7.\textsuperscript{37} The legislative history offers two explanations for this preference for chapter 13. First, the "benefit to creditors is self-evident: their losses will be significantly less than if the debtors opt for straight bankruptcy."\textsuperscript{38} Second, most consumers "would rather work out a repayment plan than opt for straight bankruptcy,"\textsuperscript{39} because such a plan preserves their nonexempt assets and leaves their reputations less damaged.\textsuperscript{40}

Regarding the first rationale, although creditors' losses may generally be lower under chapter 13 than under chapter 7, liberalizing the availability of discharge seems an implausible or at least inefficient way to promote debt repayment.\textsuperscript{41} The more likely explanation for

\textsuperscript{34} On the other hand, although the creditors' approval of a "bad" chapter 11 plan that is filed to discharge a corporate shell used in bankruptcy fraud may transform that particular plan into a neutral act, in the congressional analysis it fails more generally to discourage the perpetration of such fraud, the goal of § 1141(d)(3). Congress thus imposed an absolute bar in that provision. For similar reasons, it is possible that creditor consent does not always wholly forgive misconduct by individuals in repeated discharge. See infra note 79. Nevertheless, Congress must have considered multiple discharge to be misconduct, given that it believed such conduct needed forgiveness.

\textsuperscript{35} 1 COMMISSION REPORT, supra note 31, at 11--12.

\textsuperscript{36} SENATE REPORT, supra note 19, at 99; HOUSE REPORT, supra note 19, at 385.

\textsuperscript{37} See HOUSE REPORT, supra note 19, at 117--18.

\textsuperscript{38} Id. at 118.

\textsuperscript{39} Id. at 117 (citation omitted).

\textsuperscript{40} Id. at 118.

\textsuperscript{41} Repeal of the bar would produce greater repayment only if it would lead some debtors to file under chapter 13 rather than chapter 7, and only if, as Congress believed, wage earner plans would repay more than liquidations and the total creditor gains thus produced would
the omission of the bar from chapter 13 is that consumers prefer repayment plans to liquidations. Of course, some debtors — those who either have no regular source of income or do not want to be subject to the dictates of a plan for a number of years — would likely prefer to file for liquidation, but are unable to do so because the Code makes available only one fresh start every six years. For two apparent reasons, however, consumer debtors who want to work out a plan are given special consideration. First, their desires dovetail with the prediction of greater creditor recovery under chapter 13. Second, the perceived good character of these debtors seems particularly important to the legislative mind.

As the legislative history demonstrates in some detail, the contemplated beneficiaries of congressional largesse under chapter 13 were responsible consumers overburdened with debt and unable to save for such financial crises as serious illness or loss of employment. The concern for honest but unfortunate debtors is familiar: these are apparently the same people that the Commission on Bankruptcy Laws had in mind when it recommended a hardship exception to the bar, and that the bar's opponents in the 1902 floor debates pointed to as undeserving victims of the bar.

If the purpose of the bar were simply to prevent recurrent avoidance of debts without moralistic considerations of the debtor's behavior, "responsible" debtors would presumably be no more exempt from the bar's operation than would any other repeat applicants. But given that the bar aims to control misconduct in the form of repeated discharge, its repeal in chapter 13 is comprehensible. Because of the special merit of chapter 13 debtors, the extenuating circumstances they face, and the fact that alternative to discharge for them would be subjection to "[h]arsh collection practices," such debtors are for-

42 In many cases, a young family of two, both working, incur a large amount of debt. If the wife stops working because of pregnancy, the family loses nearly half of its income, and has an extra member to feed and shelter. The family will go deeper and deeper into debt to support themselves until finally the roof falls in.

43 See supra p. 761.

44 House Report, supra note 19, at 116.
given what would otherwise be reprehensible. Conversely, the Code suggests that debtors likely to file under chapter 7 lack redeeming merit because they simply want to escape their honest debts — because they are closer to being “deadbeats.”

Most of the case law construing the current version of the six-year bar is similarly based on the perception that the bar’s purpose is to control misconduct in the form of individual redischarge. This perception is evidenced by the fact that a number of bankruptcy courts have decided to read some modified version of the six-year bar into section 1325(a)(3)’s requirement that all chapter 13 plans be proposed in good faith.45 Likewise, two circuit courts have held that to be in good faith, a plan must not be an abuse of the spirit or purpose of chapter 13, and that the nondischARGEability of a debt under chapter 7 is one relevant factor in the equitable analysis of whether a plan constitutes “abuse.”46 Another circuit has held that a relevant consideration in the good-faith calculus is “the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors.”47 Moreover, a number of lower courts have specifically held that nondischARGEability in chapter 7 on the ground of the six-year bar may preclude confirmation of a minimal repayment plan.48 These cases have revived the moralistic viewpoint of the old law: they refuse full forgiveness to individuals seeking repeated discharge under any chapter.49

The bar's inapplicability to corporations reflects the same moralistic attitude. Under both statute and case law, the bar censures only individual misconduct in multiple discharge; pursuant to section 1141(d)(3), a corporation may obtain repeated discharge unless it goes out of business and liquidates its assets. Even if the corporation goes out of business, its dissolution will guarantee for it effective relief from

46 See Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 432 (6th Cir. 1982); United States v. Estus, 695 F.2d 311, 317 (8th Cir. 1982).
49 In one sense, however, these cases are also revolutionary, because a long, authoritative, contrary line of opinions has established that the right to a discharge is statutory and therefore must be construed strictly in favor of the debtor. See Gleason v. Thaw, 236 U.S. 558, 562 (1915); Bank of Pa. v. Adlman, 541 F.2d 999, 1003 (2d Cir. 1976); Friendly Fin. Discount Corp. v. Jones, 490 F.2d 452, 456 (5th Cir. 1974); In re Kokoszka, 479 F.2d 990, 997 (2d Cir.), aff’d sub nom. Kokoszka v. Belford, 417 U.S. 642 (1973); In re Tabibian, 289 F.2d 793, 795 (2d Cir. 1961); In re Poch, 235 F.2d 903, 905 (3d Cir. 1956). Consistent with this tradition, one court has recently held that § 1325(a)(3) should not be read to include any form of the bar as a condition to discharge, In re Ciotta, 4 Bankr. 253, 255-56 (Bankr. E.D.N.Y. 1980), and another has held that a prior discharge can constitute grounds for a denial of discharge only in a truly “extraordinary circumstance,” GFC Corp. v. Bixby, 10 Bankr. 456, 459 (Bankr. D. Kan. 1981) (emphasis omitted).
all its debts. Moreover, in construing sections 727(a) and 1141(d)(3), several courts have held that the concept of nondischargeability is entirely inapplicable to corporate reorganizations. These courts have interpreted section 727(a)(1) to provide that the restrictions of section 727(a) do not apply at all to debtors other than individuals in liquidation, rather than that debtors other than individuals are specifically barred from chapter 7 discharge under all circumstances and from chapter 11 discharge under the circumstances listed in section 1141(d)(3). Thus, a corporation can obtain repeated discharge in chapter 11 without restriction and without dissolving. By contrast, lower courts have subjected individuals to some form of the bar not only in chapter 7 proceedings, but also in chapter 13 proceedings, despite the noticeable absence of any express statutory authority for the bar in the latter.

Taken together, the individual and corporate cases thus reexpress the attitude of the old Bankruptcy Act — an attitude even more moralistic than that of the present statute. All repeating individuals have committed a guilty act, but because of the totemic appeal to "public policy," either the concept of misconduct is inapplicable to corporations or corporate culpability is offset by the importance to the economy of corporate rejuvenation.

C. Substantive Analysis

The bar, as it currently exists under statute and case law, is crucially flawed: it is an arbitrary measure that serves only crudely its policy ends. This arbitrariness is apparent in the bar's function as a "bright line." Debtors a few weeks on one side of the line can receive a new discharge; debtors a few weeks on the other cannot. The original defense for the use of any discharge-limiting line and for this line in particular remains the only defense: the line is the average of suggestions received over eight decades ago in response to a letter survey of "leading lawyers, judges, and business houses," which was prompted by a contemporary scandal involving a rash of fraudulent bankruptcies. Because bankruptcy cases typically involve in-

---

50 See supra note 23.
52 The legislative history is explicit: "A change from current law will prevent corporations from being discharged in liquidation cases." SENATE REPORT, supra note 19, at 7.
53 See supra pp. 762-63.
54 See supra note 19.
56 Id. at 6939.
57 The original authors of the bar drafted it as an absolute line only because "present policy" at the time, based on a feared "scandal" about abusive bankrupts, favored "a rigid time limit" over discretion. REPORT OF THE EXECUTIVE COMMITTEE OF THE NATIONAL ASSOCIATION OF REFEREES IN BANKRUPTCY CONCERNING PROPOSED AMENDMENTS TO THE BANKRUPTCY ACT
individuals or corporations hovering on the brink of catastrophe, the bright line's arbitrariness seems especially severe, and the defense of the six-year line especially feeble.\textsuperscript{58}

A second element of arbitrariness — and the bar's most significant flaw — is the bar's overbreadth relative to its purpose.\textsuperscript{59} The real rationale for the bar has always been the prevention of misconduct by individuals, but for eighty years Congress has failed to articulate precisely why "it is quite clear"\textsuperscript{60} that every request for discharge within six years of a prior request is misconduct. Indeed, by recently removing the bar from chapter 13, Congress has tacitly acknowledged that there may be cases in which two or more discharges within six years are not too many. And the attention paid to the class of professional or habitual bankrupts suggests that the bar is really designed to curb the activities of only a few abusive repeaters.

\begin{flushright}
\textsuperscript{58} This arbitrariness is well illustrated by an incident on the floor of the House in 1926. When asked why his committee did not make the period 20 years instead of six, Congressman Michener of Michigan replied with commendable accuracy: "Because we made it six." 67 CONG. REC. 7676 (1926) (remarks of Rep. Michener). (For comparison, Deuteronomy, with apparently equal arbitrariness, commands creditors to release all debts once every seven years. See Deuteronomy 15:1-3.)
\end{flushright}

\begin{flushright}
\textsuperscript{59} The relevant empirical studies, few and limited as they are, suggest that the need for any bar based on censurable past discharge, however defined, is not pressing, because multiple discharge in general has never been an acute problem. The most recent such study is the Brookings Institution's comprehensive review of the operation of bankruptcy. See BROOKINGS REPORT, supra note 23, at 1. Only three percent of the liquidation cases studied involved earlier state or federal insolvency proceedings. Id. at 59. Although this figure might be artificially deflated by the voluntary choice of debtors not to reapply within six years because of their knowledge that a creditor could object to discharge, the deflation is probably negligible, because even when creditors could object to discharge, they rarely bother to do so. Id. at 90-91. Of the chapter XIII cases, fully 23% involved repeaters, but this statistic was skewed by a fantastically high proportion of repeaters — about two-thirds of all those filing — in Birmingham, Alabama, one of the few areas in the country where bankruptcy judges made chapter XIII relief easily available. Id. at 104. On the other hand, a much larger percentage of repeaters than of first-time filers completed payments under their plans; apparently, previous bankruptcy had taught them how to handle their finances when they again became subject to a plan. Id. at 104-05. Among business bankrupts, "recidivism" was rarer — occurring in only about one percent of the cases studied, id. at 114 — but this figure may be skewed for purposes of comparison to individual bankruptcies, because two-thirds of the already unhealthy businesses that had filed under chapter XI ceased operations within two years, id. at 115, and if they had stayed open, such businesses might have been repeaters many times over.

As early as 1936, then-Professor William O. Douglas reported similar statistics after a prolonged study by a combined academic and governmental team during the bankruptcy-ridden Great Depression. Douglas, Some Functional Aspects of Bankruptcy, 41 YALE L.J. 329 (1932). Although the investigation surveyed hundreds of cases in Boston and New Jersey, Douglas found only eight cases in which the six-year bar would have prohibited discharge had the creditors objected, and only 118 cases — 3.3% of the New Jersey cases and 10.8% of the Boston cases — that involved any repetition. Id. at 353-54.
\end{flushright}

\begin{flushright}
\textsuperscript{60} 35 CONG. REC. 6940 (1902) (remarks of Rep. Ray); see supra p. 760.
\end{flushright}
The root of the confusion is the ambivalence or even disingenuousness with which the courts and Congress have approached the task of justifying the bar. The sole defense of the new bar is that it represents "no change" from old law.\textsuperscript{61} In historical context, this defense contains its own refutation: eighty years after the introduction of the bar, in an age of pervasive welfare legislation, no one has openly asserted that every recurrently insolvent debtor struggling against a turbulent economy has committed a blameworthy act. Yet this unarticulated belief has exercised a very considerable sway over the minds of judges and legislators in recent years.

The bar therefore remains intact under chapter 7 — still for reasons that appear dubious in light of the overall goals of bankruptcy law. If the "fresh start" policy underlying chapter 7 favors restoring a debtor to productivity by freeing him from oppressive debt,\textsuperscript{62} the same policy calls for such a result even after an earlier discharge. Although it is true that a repeating bankrupt's record may suggest that his first fresh start did not in fact restore him to full productivity, his discharge may still have raised his productivity somewhat, and individual circumstances may suggest that another fresh start might help even more. On the other hand, even if the breadth of the bar in chapter 7 is not reduced, the present Code does offer some relief to a debtor who has received a prior discharge in liquidation: he can still file under chapter 13. Indeed, the discipline of a plan may recommend itself to the consumer with a history of bankruptcy. The chapter 13 option, however, does not go far enough, for it is available only to debtors with regular income of some form.\textsuperscript{63} Moreover, a repayment plan will probably prove unattractive and unhelpful to a debtor who resents the imposition of such a plan and wants instead a genuine "fresh start." If there is an independent reason for making chapter 7 available at all as an alternative to chapter 13, that reason, for at least some applicants, should remain even after an initial discharge.\textsuperscript{64}

III. A PROPOSAL

The apparent remedy for the flaws in the six-year bar is a more flexible provision that would allow a court, in individual cases, sensitively to apply a bar based on misconduct evident in a history of discharge. Application would not involve a bright line; rather, the court could consider the particular facts of the case in deciding

\textsuperscript{61} See supra p. 762.
\textsuperscript{64} Although two recently introduced bills would further encourage the use of chapter 13 rather than chapter 7, neither would deny all independent justification for an initial liquidation. See S. 1013, 98th Cong., 1st Sess. § 503 (1983); H.R. 4786, 97th Cong., 1st Sess. § 2 (1981).
whether to deny or grant a discharge to a debtor who had previously received one. Further, the new measure would allow the court to discriminate between particularly malfeasant debtors and the more meritorious ones who can and should still be helped by the “fresh start” policy of liquidation.65

Similarly discretionary provisions that exist in other areas of bankruptcy law could provide a model for a reformulated bar. The Bankruptcy Commission’s 1973 report proposed a “hardship” exception to the bar in liquidation proceedings.66 Section 1325(a)(3), as interpreted by the courts, already directs consideration of prior discharge as one factor in a good-faith analysis.67 And in England, a prior discharge has for decades been a statutory “fact”68 that must inform the judge’s sweeping discretion to deny discharge or to grant it and then to mold its exact form.69

Two obstacles stand in the way of the passage and effective application of such a flexible provision. First, the specter of abuse of discharge that haunted the legislative mind in 1978 presumably still exists.70 To respond to that concern, the new provision should be drafted to forbid abuse. The task of drafting, however, raises the second and crucial obstacle: the history of the bar suggests no consensus on exactly what constitutes abuse, and unless Congress can generate a clearer rationale for the bar than the conflicting and conclusory assertions of the past, the courts will either be left in confusion71 or

65 In his report on bankruptcy during the 1930’s, see supra note 59, William O. Douglas reached a similar conclusion. Of all the cases of repeaters in bankruptcy that he studied, only 25% involved instances of fraud, speculation, gambling, or gross extravagance. Another 11% involved misfortune. Of the remainder, Douglas wrote: “[T]hese cases involve apparently honest persons fighting a losing battle against a militant economic order.” Douglas, supra note 59, at 358. He concluded that the availability of discharge should depend on the type of economic failure in each case, not on whether the application falls on the nether side of a magical six-year line. Id. at 360–61.
66 See supra p. 766.
67 Although these cases are probably wrongly decided as interpretations of the present statute, see infra note 71, they are nonetheless examples of a flexible bar based on a history of discharge, albeit a bar that is applied without the benefit of a clear legislative purpose. See infra pp. 772–73.
68 Bankruptcy Act, 1914, 4 & 5 Geo. 5, ch. 59, § 26(3)(k).
70 Repeated use of chapter 7 might, in fact, present a greater potential for abuse than would use of chapter 13, because chapter 7 limits the debtor’s liability to the value of his nonexempt property, whereas § 1325(a)(4) forbids confirmation unless the unsecured creditors would receive at least as much as they would in liquidation. On the other hand, in the vast majority of cases, the unsecured creditors of a chapter 13 debtor would receive nothing in chapter 7, because the chapter 13 debtor has no unencumbered nonexempt assets; as a result, § 1325(a)(4) offers little additional protection to creditors.
71 The cases described earlier construing § 1325(a)(3), the flexible “good faith” provision for wage earner plans, see supra p. 768, illustrate well the dangers of confusion involved in replacing the six-year bar with a new flexible provision. Virtually all of the circuit courts have hold that a plan is filed in good faith if it serves the “spirit and purpose” of chapter 13, see Kitchens v.
be allowed unbridled discretion. Cultural values will supply little guidance. Our courts are unaccustomed to the direct application of whatever cultural values relating to multiple discharge may exist, and those values have in the past been informed by the absolute command of the six-year bar itself. If Congress and the courts have for decades been unable to enunciate a clear justification for the bar, there is little reason to expect the courts to be able to do so now.

The dangers of flexibility, however, must be evaluated in light of the alternatives. The current general hostility to multiple discharge makes an overly expansive interpretation of the new provision unlikely. At worst, therefore, unfair or confused application of the

Georgia R.R. Bank & Trust Co., 702 F.2d 885, 888 (11th Cir. 1983); Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 431-32 (6th Cir. 1982); United States v. Estus, 695 F.2d 311, 316 (8th Cir. 1982); Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982); Ravenot v. Rimgale, 699 F.2d 426, 431 (7th Cir. 1982); Tenney v. Terry, 630 F.2d 634, 635 n.3 (8th Cir. 1980) (per curiam), but discovering that spirit has proved unusually difficult for the bankruptcy courts. The section has been among the most litigated provisions in the Code, and judges themselves are apparently unable fully to comprehend the purpose of chapter 13's unprecedented liberality. See Van Baalen, Bankruptcy Code Chapter 13 — What Price the "Better Discharge"?, 35 OKLA. L. REV. 455, 459, 466-71 (1982).

More specifically, the courts have diverged on the role that a prior discharge should play in an analysis of good faith. The majority view, that a discharge is a relevant factor, is most likely wrong in light of the House Report's assertion that the creditor consent provision eliminates the need for the old bars to discharge in chapter 13. See supra p. 765. The consideration of prior discharges in good-faith analyses has largely been justified by the claim that a debtor should not be able to obtain multiple liquidation-like discharges simply by filing under chapter 13. See supra p. 768. But the courts, lacking congressional guidance in the matter, have failed to analyze how the bar serves the spirit of chapter 7 and how that rationale also justifies the bar's importation into chapter 13.

The cases construing § 1327(d)(3) illustrate well the dangers of allowing the courts complete discretion. The command of that section is absolute: no liquidated, out-of-business debtor shall be granted a discharge that would be barred under chapter 7. Some courts have ignored this express provision by holding that the bars to discharge in § 727 are entirely inapplicable to corporations. See supra p. 769. By contrast, courts have never ignored the express terms of the six-year bar as applied to individuals. In the same way, although the courts have now found a form of the bar in § 1325(a)(3) despite its express exclusion therefrom, see supra p. 768, they have never considered reading a similar bar into chapter 11's good-faith provisions, §§ 1112(b) and 1129(a)(3). (There are as yet no recorded opinions holding that a history of corporate discharge unmarked by actual fraud might be a relevant factor under §§ 1112(b) or 1129(a)(3). See In re Colony Square Co., 22 Bankr. 92 (Bankr. W.D. Pa. 1982); see also In re Stahl, Asano, Shigetomi Assocs., 6 Bankr. 232 (Bankr. D. Hawaii 1980) (likely success on merits of pending appeal one factor in deciding whether to grant stay); cf. In re Sung Hi Lim, 7 Bankr. 316 (Bankr. D. Hawaii 1980) (finding that actual fraud in past proceedings established lack of good faith). If Congress in fact wishes to limit corporate redischarge, see infra note 79, it will have to say so, and not simply depend on the courts' undirected discretion to discern the "spirit" of chapter 11.

In chapters 7 and 13, the greatest danger in discretion is probably the potential for hidden social or racial biases in the granting of discharges, but this potential resides in any provision authorizing judicial discretion, and such biases have at least been less apparent than the one in favor of corporations.

Courts have, for example, defended importation of the bar into chapter 13 only by analogy to chapter 7 and not by analysis of the purpose of the bar itself. See supra p. 768.

The more realistic danger is that courts might be too restrictive and deny meritorious
new bar might fail to allow a discharge to all the deserving debtors who would currently be denied one. Under chapter 13, the alternatives to a new rule are a return to an absolute bar with the same flaws as those of the chapter 7 bar or continued uncertainty about the vitality of the bar under section 1325(a)(3).

Moreover, objections to open-ended provisions are less at home in bankruptcy than in other areas of the law. Almost by definition, a "fresh start" is a wild card in the present economic system, a game still played largely according to the rules of the will theory of binding contracts. As long as bankruptcy remains an equitable concept padding the stringency of legalism, open-ended provisions will probably be an indispensable component of bankruptcy law. Indeed, as noted above, flexible provisions that specifically allow courts to deny discharge on the basis of past bankruptcies are already familiar.

Finally, the discretion of the courts could at least be cabined if Congress clarified the rationale for the bar. The cures for the dangers of a flexible bar and for the flaws in the present rigid one are thus the same: to limit discretion and to make the bar sensitive to its policy ends, Congress must deliver a clear and definitive statement of the real rationale behind the bar. For these purposes, past legislative and judicial expressions are simply inadequate. The image of a class of abusers cannot justify a blanket bar; Congress must either confess hostility toward all repeaters, narrow the operation of the provision, or justify the bar on some clear ground other than just the prevention of misconduct.

A new statement of the bar's rationale should include several elements. To some extent, such a statement of purpose will necessarily entail a fresh look at the functions of the individual chapters of the Bankruptcy Code. If the bar is to serve the spirit of each chapter, Congress must assess the significance of a record of failures in light of that spirit. As then-Professor William O. Douglas observed in 1936, the problem of distinguishing meritorious from nonmeritorious applicants "is not peculiar to cases of 'repeaters.' It is made perhaps only

---

applications filed well over six years after the prior discharge. For this reason, the Commission's suggestion has much to recommend it: above five years, the discharge is of right, but below that period, it is subject to individual analysis. See supra p. 766.


76 See supra p. 772.

77 In 1978, when it had an ideal opportunity to do so, Congress did nothing to define the purpose of the bar: the Bankruptcy Code retained the bar in chapter 7 with "no change," see supra p. 762, excluded it from chapters 11 and 13 only through an indiscriminate exclusion of a number of bars to discharge, see supra p. 765, and added it in a modified form to "disguised 7's" through a similarly indiscriminate inclusion of a number of bars to discharge, see supra p. 762-63.
somewhat more acute in such cases." Part of the confusion over the significance of the bar is hence only an aspect of the current confusion over the purpose of the individual chapters themselves.

The very fact of repeated discharge, however, does raise certain concerns not appropriate to cases involving first-time applicants, because the multiplication of discharges may constitute evidence of misconduct in financial matters. First, repetition of applications lends at least some credibility to a claim that the applicant's overextension was fraudulent. But even without congressional direction, the courts can already give this fact evidentiary consideration under section 1325(a)(3), and they could do so under any provision drafted explicitly to bar bad faith in particular in chapter 7 filings. Thus, to the extent that the six-year bar is intended to curb fraud, its purpose would be better served by a more general good-faith provision, although a flexible bar could also be used to serve this goal.

Second, the need for repeated discharge may also constitute evidence of nonfraudulent misconduct in financial matters — evidence that the applicant has fallen below a minimally acceptable level of financial responsibility or moderation. On reapplication, but not before, distinguishing good discharges from bad discharges may necessitate close scrutiny. This need has been the central rationale for the bar from its inception, and since 1898 Congress has asserted that bankruptcy should not be "framed for . . . scoundrels." Any new statement of purpose must announce without disingenuousness that

---

78 Douglas, supra note 59, at 360.
79 Applying to the individual chapters both the concept of misconduct in multiple discharge and the new flexible bar would itself be a complex task. Thus, one function of the congressional statement of the bar's purpose in chapters 11 and 13 would be to clarify the real significance of creditor consent to multiple discharge. Because the present consent provisions do not guarantee full creditor agreement, especially in chapter 13, see supra p. 765, and because limited consent may not totally transform misconduct with effects on the general economy into a morally neutral act, consent may not justify a total repeal of the bar. A more flexible measure might therefore actually restrict the frequency of discharge allowed in chapters 11 and 13 while liberalizing it in chapter 7.

Further, a flexible bar might be extended to corporate bankruptcy. Congress has never seen fit to explain exactly why, under the present statute, "public policy" justifies exempting from the bar reorganizations that do not involve shell corporations. It is at least possible that misconduct is a meaningful concept in the context of corporate activity and that the goal of discouraging that misconduct may outweigh "public policy" in some cases.

Finally, a new flexible bar would be extended under § 1141(d)(3) to "disguised 7's" — filings by individuals in chapter 11 to escape the bars to discharge under chapter 7. The judge would then be required to determine whether the debtor's behavior would have constituted misconduct had the filing been in liquidation.

80 In this sense, the six-year bar is a kind of acid test for attitudes toward discharge itself. The universal availability of one discharge may be a matter of common acceptance for a variety of reasons, but, as evidenced by the English system, see supra p. 772, the Commission's suggested provision, see supra p. 766, and even implicitly by the six-year bar itself, see infra p. 776, repeated discharge has been seen to require closer consideration of whether the applicant really "deserves" relief.
81 H.R. REP. No. 65, 55th Cong., 2d Sess. 43 (1898).
the real purpose of the bar is the prohibition of misconduct. Thus, the statement must also attempt a defensible definition of the misconduct that inheres in repeated discharge.

To serve the policy goals of bankruptcy law rather than to express irrational hostility toward ex-bankrupts, a definition of misconduct must distinguish between cases of pure misfortune, in which a second fresh start may serve its intended goal of needed rehabilitation, and cases of pure willful irresponsibility, in which a fresh start would only reward conduct that can and should be discouraged. Thus, only cases in which the primary cause of insolvency is behavior that can realistically be deterred by the threat of denial of discharge should be labelled cases of misconduct. Somewhere in the realm of incompetence that lies between ill chance and extreme irresponsibility is the line that Congress must discern between bankruptcies that can fairly be said to have been avoidable and those that cannot. This line may be susceptible of only vague definition; it is a line pressured by the tension between the forgiving tenor of modern social relief legislation and the more stringent, objective level of ordinary care demanded by the common law. Yet whatever the dangers of moralistic paternalism inherent in the search for a standard, that search is unavoidable; the six-year bar itself sets such a standard, but it is a crude and unyielding one.

Empirical evidence can be of little help in the attempts of courts or Congress to flesh out this standard of financial good conduct, because statistics cannot measure the merit in qualities or habits of character that will excuse a history of incompetence. Rather, the enterprise of defining when a request for discharge constitutes misconduct is one of normative imagination, of filling in social context around the bare fact of repeated discharge and altering the imagined facts to determine, on the basis of contemporary notions of what is fairly avoidable and what is not, at what point poor fortune becomes poor conduct. This was Congressman Ray's enterprise when he envisioned "professional bankrupts," and the Perry Court's when it envisioned "habitual bankrupts." The flaw in the six-year bar is not that it is a product of such images, but that it flattens the images and applies them simplistically and rigidly instead of allowing them to inform the discretion of the judge.

IV. CONCLUSION

The six-year bar has been justified by a variety of conflicting

---

82 It has been noted that the bar, as an instance of a rule of "limited" discharge, keeps a court from paternalistically judging the lifestyle of the applicant. See Boshkoff, supra note 69, at 73, 125. The desire to keep the court's hands clean may be bought at too great a cost—the legislature's even more paternalistic and absolute prohibition of all repeated discharge within six years, regardless of the circumstances.

83 See supra pp. 759–60.
rationales and has served only the most intolerant and least articulated of them — the notion that seeking discharge too often is misconduct. To revise the bar to serve only its justifiable policy ends, Congress must directly consider those ends and avoid justifications colored by visions of potential abuse. The resulting measure may well be more flexible and therefore less certain than an absolute bar; a rule applied with even perfect regularity, however, can be no more just than its substance. To ensure that any new bar is both capable of regular application and defensible on policy grounds, Congress must support it with a coherent and consistent statement of purpose embodying a notion of the boundary between financial misfortune and misconduct.