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*Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*[1]

*[A]ll acts [and] laws . . . by virtue of which an attempt shall be hereafter made to establish, maintain or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.*[2]

## I. Introduction

The concept of slavery plays a potent role in our thought and history.[3] We set the concept of slavery against the opposing notions of autonomy, freedom and equality.[4] Slavery separates individuals from the benefits of their own labor.[5] It represents the ultimate subordination to the other—an obliteration of the reciprocal relations of mutual recognition.[6]

Debtor/creditor relations present a similar break-down in reciprocity when individual debtors find themselves entangled in obligations

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1 U.S. CONST. amend. XIII, § 1.

2 42 U.S.C. § 1994 (1988).

3 *See* M. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY (1980); M. FINLEY, ECONOMY AND SOCIETY IN ANCIENT GREECE (1953); E. FONER, NOTHING BUT FREEDOM (1983); G. HEGEL, PHENOMENOLOGY OF SPIRIT (A. Miller trans. 1979); J. LOCKE, TWO TREATISES OF GOVERNMENT (G. Laslett trans. 1960); E. MORGAN, AMERICAN SLAVERY—AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975); O. PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982); M. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860 (1981); T. WIEDEMANN, GREEK AND ROMAN SLAVERY (1981).

4 For an understanding of the dichotomy between these concepts in recent jurisprudence, see Binder, *Mastery, Slavery and Emancipation*, 10 CARDOZO L. REV. 1435 (1989); Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989); Westphal, *Hegel on Slavery, Independence and Liberalism*, 10 CARDOZO L. REV. 1565 (1989). Slavery and freedom have not always been viewed as polar opposites. For an historical perspective, see Bush, *Hegelian Slaves and the Antebellum South*, 10 CARDOZO L. REV. 1517 (1989).

5 *See* J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES (1858); Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in an Age of Emancipation*, 75 J. AM. HIST. 471 (1988).

6 Rosenfeld, *Hegel and the Dialectics of Contract*, 10 CARDOZO L. REV. 1199 (1989).

from which they have no respite.[7] If we required individual debtors with no assets to repay their creditors out of future earnings, then debtors would be separated from their own labor and subordinated to creditors. The bankruptcy laws would become a means of enslaving debtors to their creditors.

It is perhaps for these reasons that the debates in this country surrounding bankruptcy discharge invoke a slavery metaphor.[8] Debtors have been portrayed as slaves to debts they can never repay and debtors view themselves as slaves to their past mistakes.[9] The bankruptcy discharge is compared, then, to emancipation in its ethical tenor—it accords debtors freedom *from* debt enslavement and freedom *to* work for their own benefit.[10]

Slavery has now moved from metaphor[11] to actuality in contemporary bankruptcy law thanks to judicial interpretations of recent amendments to the Bankruptcy Code.[12] In 1984, as part of the Consumer Credit Amendments,[13] Congress authorized bankruptcy courts to dismiss

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7 Discussion of debtor/creditor relations in terms of reciprocity is by no means new. *See* L. GREENE, THE LAW OF DEBTOR AND CREDITOR (1948).

8 *See* CONG. GLOBE, 27th Cong., 1st Sess. 318 (1841) (statement of Rep. Roosevelt) ("Talk of slavery and abolition! What slavery was to compare with the bondage of the mind and heart?"); *Bankruptcy Reform: Hearings Before Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 257 (1983) (statement of Lawrence P. King, Professor of Law, New York University Law School) [hereinafter King Statement] (the "proposal while perhaps not violative of the 13th Amendment to the Constitution comes very close to it in word and spirit"); *Bankruptcy Reform: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 142 (1981) (statement of Vern Countryman, Professor of Law, Harvard University Law School) [hereinafter Countryman Statement] ("[w]e would be turning our backs on history . . . if we were to enact a mass peonage statute whereby a debtor's discharge is to be delayed for a 15 year period of bondage").

9 *See* Hallinan, *The 'Fresh Start' Policy in Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 RICH. L. REV. 49, 56-58 (1986); H. OLECK, DEBTOR-CREDITOR LAW, A TREATISE (1953).

10 There has been recent scholarship seeking to justify bankruptcy's fresh start policy. *See* Hallinan, *supra* note 9; Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987); Jackson, *The Fresh Start Policy in Bankruptcy*, 98 HARV. L. REV. 1393 (1985) [hereinafter Jackson, *Fresh Start*]; T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986) [hereinafter JACKSON, LOGIC AND LIMITS]. *See also* Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982).

11 The slavery metaphor has been prevalent in debtor/creditor relations from the first legal attempts to devine those relations. As an historical matter, non-paying debtors were imprisoned, and some creditors even held a deceased debtor's body hostage until family or friends repaid the outstanding debts. Some debtors and their wives were actually sold into slavery by their creditors. Other debtors were required to work for their creditors to repay outstanding obligations. *See* C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); B. WEISS, THE HELL OF THE ENGLISH (1985); Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153 (1982); Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U.L. REV. 809 (1983); Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1926). Indeed, a link between slavery and debtors can be found in the Bible. Both conditions were considered sufficiently burdensome that individuals were to be released from these states every seven years—in the year of Jubilee. *Deuteronomy* 15:1-2, 12. *See* G. HOROWITZ, THE SPIRIT OF JEWISH LAW (1973); Olmstead, *Bankruptcy as Commercial Regulation*, 15 HARV. L. REV. 829 (1902).

12 The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *as codified at* 11 U.S.C. §§ 101-1326 [hereinafter Bankruptcy Code], *as amended by* the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 [hereinafter 1984 amendments], and the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) [hereinafter 1986 amendments].

13 The Consumer Credit amendments constitute subtitle A of Title III of the 1984 amendments. For a general discussion of the Consumer Credit amendments, see Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L.

Chapter 7 liquidation cases if an individual debtor is seen as substantially abusing the liquidation process.[14] Courts have increasingly used this power to suggest that if individual debtors want a discharge, they must utilize Chapter 13, the reorganization chapter[15] in which the debtor *works*[16] to obtain the income needed to repay creditors over time.[17] If the debtor refuses to *work* and only wants to liquidate, the court can dismiss the case and deprive the debtor of a discharge.[18]

Requiring a debtor to work to repay his creditors to obtain a discharge is strikingly close to the condition of peonage, a form of involuntary servitude violative of the thirteenth amendment. Peonage is the prohibited condition in which individuals are forced to work to repay

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REV. 59 (1986); Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments of 1984*, 27 WM. & MARY L. REV. 91 (1985).

14 For a general discussion of the options available to the individual debtor, see M. GIRTH, BANKRUPTCY OPTIONS FOR THE CONSUMER DEBTOR (1981); R. AARON, BANKRUPTCY LAW FUNDAMENTALS (1984); R. GINSBERG, BANKRUPTCY: TEXT, STATUTES, RULES (2d ed. 1989). The key provision is 11 U.S.C. § 707(b) (1988). This section provides in relevant part: "the court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a *substantial abuse* of the provisions of this chapter." *Id.* (emphasis added).

For a discussion of the application of § 707(b), see Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, (pts. 1 & 2) 59 AM. BANKR. L.J. 327 (1985), 60 AM. BANKR. L.J. 33 (1986); Proia, *The Interpretation and Application of Section 707(b) of the Bankruptcy Code*, 93 COM. L.J. 367 (1988); Comment, *Bankruptcy, Chapter 7 Dismissal Section 707(b): The Impact Upon the Consumer Creditor, the Bankrupt, and the Court. Proposals for the Future*, 16 CAP. U.L. REV. 547 (1987); Note, *Section 707(b) of the Bankruptcy Code: A Roadmap with a Proposed Standard for Defining Substantial Abuse*, 19 U. MICH. J.L. Ref. 1011 (1986); Gross, *supra* note 13. *See infra* note 52 and accompanying text.

15 Chapter 13 was specifically designed for individual debtor reorganization. It was added to the former Bankruptcy Act of 1898 as part of the Chandler Amendments of 1938. *See generally* J. WEINSTEIN, THE BANKRUPTCY ACT OF 1938 (1938); Connors, *Bankruptcy Reform: Relief for Individuals with Regular Income*, 13 U. RICH. L. REV. 219, 219 (1979). For a general overview of Chapter 13, see A. COHEN & M. MILLER, CONSUMER BANKRUPTCY MANUAL (1985 & Supp. 1987); R. AARON, *supra* note 14, at §§ 13.01-13.05; R. GINSBERG, *supra* note 14, 1333-1435; M. GIRTH *supra* note 14.

16 Under Chapter 13, if creditors are not to be paid in full and object to the debtor's plan as filed, the debtor must commit all of his disposable income to plan payments. Section 1325(b) provides in relevant part: "the court may not approve the plan unless . . . the plan provides that all of the debtor's projected disposable income to be received in the three year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." 11 U.S.C. § 1325(b) (1988).

This subsection, like § 707(b), was added as part of the 1984 amendments. For a general discussion of § 1325(b), see Gross, *supra* note 13; Breitowitz, *supra* note 14; Corish & Herbert, *The Debtor's Dilemma: Disposable Income as the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47 (1986); Herbert, *Once More Unto the Breach, Dear Friends: The 1986 Reforms of the Reformed Bankruptcy Reform Act*, 16 CAP. U.L. REV. 325 (1987); Note, *The Effect of the Disposable Income Test Under Section 1325(b)(1)(B) Upon the Good Faith Inquiry of Section 1325(a)(3)*, 5 BANKR. DEV. J. 267 (1988).

There is no explicit requirement that the income necessary to satisfy § 1325(b) be derived from the debtor's labor. Such income could be generated from passive sources (*e.g.*, investments, trusts, and gifts). However, given the current understanding of the characteristics of individual debtors, the likelihood of a plan funded from sources other than labor-generated income seems remote. *See* D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (1971); J. SULLIVAN, E. WARREN & J. WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989) [hereinafter AS WE FORGIVE OUR DEBTORS]; Sullivan, Warren & Westbrook, *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 AM. BANKR. L.J. 293 (1986) [hereinafter Sullivan, Warren & Westbrook, *Folklore and Facts*]; Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288 (1983); Shuchman, *New Jersey Debtors 1982-1983: An Empirical Study*, 15 SETON HALL L. REV. 541 (1985).

17 *See* 11 U.S.C. § 1322(c) (1988).

18 *See supra* note 14.

their creditors.[19] By permitting a discharge in bankruptcy only *if* a debtor works to obtain this benefit, Congress may have imposed an unconstitutional condition on bankruptcy discharge.[20]

There has been a growing recognition that, in a host of situations, Congress cannot condition a benefit on an individual's waiver of a constitutional right—even if Congress could withhold the benefit in the first instance.[21] Transposing this issue to the bankruptcy context,[22] the question is whether Congress has the power to grant a discharge subject to certain conditions, namely the debtor's working for his creditors in Chapter 13.

As Professor Sullivan has pointed out in her recent article, not all choices confronting individuals present the problem of unconstitutional conditions.[23] First, the government must have chosen to accord individuals a benefit, as opposed to being under a duty to supply a benefit. Second, the benefit must infringe prospectively on a recognized constitutional right protected by strict judicial scrutiny. Finally, if the foregoing elements are present, the doctrine of unconstitutional conditions must be applied—which has presented courts with considerable difficulty.[24]

The purpose of this Article is to look at the choices confronting individual debtors from the perspective of unconstitutional conditions. Although a linkage between bankruptcy and the thirteenth amendment has been raised in a variety of contexts,[25] it has never been fully analyzed

19 For a discussion of peonage, see Misner & Clough, *infra* notes 76 and 85 and accompanying text.

20 The doctrine of unconstitutional conditions has been the subject of considerable recent scholarship. *See* Epstein, *The Supreme Court, 1987 Term—Forward: Unconstitutional Conditions, State Powers and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 143 U. PA. L. REV. 1293 (1984); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175-345 (1989).

21 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958). For the difficulty of developing a consistent jurisprudence that explains these and similar cases, see Sullivan, *supra* note 20, at 1439-442.

22 Apparently, the issue of unconstitutional conditions has never been raised in the bankruptcy context. Professor Sullivan does not implicate thirteenth amendment issues in the context of discussing the inadequacy of justifying unconstitutional conditions based on inalienability. *See* Sullivan, *supra* note 20, at 1477-489.

23 *See* Sullivan, *supra* note 20, at 1421.

24 These three steps are clearly and carefully articulated by Professor Sullivan. *See* Sullivan, *supra* note 20, at 1421.

25 Congress, courts and commentators have all, at various times over the last fifty years, expressed concerns about the thirteenth amendment and anti-peonage laws in situations involving individual debtors. Proposals for a statutorily mandated Chapter 13, imposition of a threshold future income level for access to Chapter 7, and suspension of discharge pending repayment have all given rise to concerns about this issue. Courts have expressed thirteenth amendment concerns over creditors' motions to convert individual debtor cases from Chapter 7 to Chapter 11 to obtain benefits not available through involuntary conversion to Chapter 13. *See* 11 U.S.C. §§ 706(b) and (c) (1988). Thirteenth amendment and peonage concerns have surfaced in situations involving individual debtor use of Chapter 11. *See, e.g.*, *In re* Brophy, 49 Bankr. 483 (Bankr. D. Haw. 1985); *In re* Ironsides, 34 Bankr. 337 (Bankr. W.D. Ky. 1983); *In re* Noonan, 17 Bankr. 793 (Bankr. S.D.N.Y. 1982); *In re* Graham, 21 Bankr. 235 (Bankr. N.D. Iowa 1982); *In re* Markman, 5 Bankr. 196 (Bankr. E.D.N.Y. 1980). For Congressional testimony and commentary on these issues, see H.R. REP. No. 595, 95th Cong., 1st Sess. 120, 322 (1977); S. REP. No. 989, 95th Cong. 2d Sess. 32 (1978); King statement, *supra* note 8; *The Bankruptcy Act: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 105 (1976). *See also* Countryman, *supra* note 11; Howard, *supra* note

and has apparently not been addressed at all in the context of unconstitutional conditions.

The first step of the analysis—whether the bankruptcy discharge is a right or a benefit—can be addressed summarily.[26] The Supreme Court has made it abundantly clear that there is no constitutionally guaranteed right to a discharge.[27] Indeed, there have been considerable periods when there has been *no* federal bankruptcy law in this country.[28] However, the doctrine of unconstitutional conditions permits individuals to complain about the denial of benefits even if they had no entitlement to the benefit in the first instance.[29]

This Article begins with an analysis of a much harder question: an assessment of whether the bankruptcy laws do, in fact, implicate the thirteenth amendment through the peonage laws. To this end, the Article uses a hypothetical fact pattern—based on an amalgam of cases and facts known about debtors generally[30]—to develop the link between bankruptcy and the thirteenth amendment. The Article examines the Bankruptcy Code, state law and the elements most frequently present when a finding of peonage is made—indebtedness, an employment relationship, and coercion. The Article suggests that the hypothetical debtor has sufficient aspects in common with a peon to find a thirteenth amendment infringement and implicate the doctrine of unconstitutional conditions.

Even if the unconstitutional condition argument is implicated, there remains the troubling issue of its application. This aspect of the analysis requires a broader investigation into the justification for the doctrine of unconstitutional conditions. I also believe it raises questions about the theoretical justifications for the fresh start policy in bankruptcy jurisprudence.[31] In the end, we are left to consider the price we are willing to pay to preserve a debtor's fresh start.[32]

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10; Ayers, *Reforming the Reform Act: Should the Bankruptcy Reform Act be Amended to Limit the Availability of Discharge to Consumers*, 17 New Eng. L. Rev. 719 (1982); Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. Rev. 953 (1981); Gross, *supra* note 13; McCafferty & Bubis, *Criminal Restitution and the Bankruptcy Discharge: Should We Reopen Debtors' Prison*, 10 Crim. Just. J. 27 (1987).

26 Of course, it is possible to argue that all the cases on this matter are, in fact, in error and the discharge has become a right rather than a privilege. This may be a worthwhile venture but is certainly beyond the purview of this Article.

27 *See* United States v. Kras, 409 U.S. 434 (1973). *See also* McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977); and C. Warren, *supra* note 11. Professor Eisenberg argues that there are no thirteenth amendment implications in mandatory Chapter 13 cases for this very reason. *See* Eisenberg, *supra* note 25, at 989. For Professor Eisenberg, the greater power to deny the discharge includes the lesser power to condition its receipt. The doctrine of unconstitutional conditions reveals the inadequacy of this approach. *See also* Epstein, *supra* note 20; Sullivan, *supra* note 20.

28 *See* C. Warren, *supra* note 11.

29 *See* Epstein, *supra* note 20, at 7.

30 *See infra* note 33 and accompanying text.

31 Professor Howard acknowledges that the issues addressed in this Article have not, as yet, been resolved. "A more difficult case arises when the debtor has post-petition income and the question is whether it is 'better' for creditors to be allowed to reach it as a matter of course. *No ethical formulation that has yet appeared resolves this mandatory Chapter 13 problem*." Howard, *supra* note 10, at 1056 (footnotes omitted) (emphasis added).

32 In many respects, this Article is a sequel to my earlier article construing the Consumer Credit amendments. *See* Gross, *supra* note 13. The earlier article suggests a method of interpreting the 1984 amendments that avoids implicating the thirteenth amendment. This Article suggests the consequences of not adopting that suggested approach.

## II. The Hypothetical[33]

Smith is employed as a bank teller, with yearly earnings of $25,000. Smith contemplates receiving promotions and accompanying salary increases over the next several years as he has pursued a continuing education program provided by his employer.[34] Smith is the custodial parent of two young children who are enrolled in a parochial nursery school/day care center. Smith's only assets are exempt. Smith owes $10,000 to his unsecured creditors, consisting mainly of consumer debts, including major dental bills for one of his children which are not covered by his insurance. Suppose a judgment of $5,000 has been entered against Smith in a non-job related tort action arising out of his negligence for which he has no insurance. Among Smith's unsecured creditors is a finance company to which Smith delivered a payment check of $100 that was returned for insufficient funds.

## III. The Choices and Consequences for Smith

Congress created two basic choices for our hypothetical Smith under the federal bankruptcy laws: he can seek relief under Chapter 7, or reorganize under Chapter 13.[35] It seems logical to assume that chapter selection by a debtor was structured by Congress in a manner designed to accomplish certain goals. Indeed, one expects that Congress had certain

33 The hypothetical has been inspired by several cases and represents an amalgam of same, together with some hypothetical material. Moreover, certain information used in developing the hypothetical debtor has been drawn from Sullivan, Warren & Westbrook. *See generally* AS WE FORGIVE OUR DEBTORS, *supra* note 16. My goal here is to develop a hypothetical that is not so far-fetched as to make the argument raised herein remote at best. Stated differently, I am trying to ground my theoretical arguments in reality.

For cases which have contributed significantly to the hypothetical's formation, see *In re* Krohn, 78 Bankr. 829 (Bankr. N.D. Ohio 1987), *aff'd*, 87 Bankr. 926 (N.D. Ohio 1988), *aff'd*, 886 F.2d 123 (6th Cir. 1989); *In re* White, 49 Bankr. 869 (Bankr. W.D.N.C. 1985); *In re* Noonan, 17 Bankr. 793 (Bankr. S.D.N.Y. 1985); *In re* Jones, 55 Bankr. 462 (Bankr. D. Minn. 1985); *In re* Graham, 21 Bankr. 235 (Bankr. N.D. Iowa 1982).

Sullivan, Warren and Westbrook point out key data about prototypical debtors based on an empirical study of 2400 cases. *See* AS WE FORGIVE OUR DEBTORS, *supra* note 16, at 4. Several of the book's findings can be summarized as follows: Most bankrupt debtors are remarkably *similar* to the rest of us. *Id.* at 84. Most debtors are employed; they generally hold the same jobs in the same industries and with the same prestige as the rest of us. *Id.* at 85. However, they earn less doing so. *Id.* Debtors had a mean income of $15,800, compared to a national mean outside bankruptcy of $25,800. *Id.* at 64-65. Thirteen percent of all debtors owe more than one half their annual income in credit card debt. *Id.* at 184. Medical bills constituted 11% of the mean total unsecured debt, although they did not represent the crushing overall impact many thought existed. *Id.* at 168. However, medical debt represented 41% of the total reluctant debt. *Id.* at 295. The lack of insurance is obviously an issue, albeit difficult to quantify. *Id.* at 171. Tort claimants are owed the highest per-debtor amount of all reluctant creditors. *Id.* at 295. In the sample studied, there were only 33 tort claimants but they were owed 18% of the reluctant debt. *Id.* at 295.

34 The use of the male pronoun is generic. However, there remains considerable question as to the degree to which women access the bankruptcy system, an issue which is discussed at length in Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. (1990) [hereinafter Gross, *Re-Vision*]. *See also* AS WE FORGIVE OUR DEBTORS, *supra* note 16, at 147. For additional information about the characteristics of individual debtors, see generally AS WE FORGIVE OUR DEBTORS, *supra* note 16.

35 In reality, the choice is somewhat more complex. Smith could elect not to seek relief under the federal bankruptcy laws at all. For a fuller discussion of this option, see *infra* note 138 and accompanying text. Smith could also seek relief under Chapter 11, the chapter traditionally utilized by corporate debtors. For a fuller discussion of this option, see *infra* note 73 and accompanying text.

prototypical debtors in mind when it developed the options for individual debtors.[36]

Congress sought to balance two relatively uncontroverted (although competing) goals: the need to see that creditors are repaid and the need to preserve the debtor's ability to obtain a fresh start. Under this rationale, whichever chapter will ensure maximum creditor recovery while simultaneously preserving the debtor's fresh start should be the preferred choice.[37]

Another way of explaining the underlying rationale of chapter choice is to look at the characteristics Congress might have hypothesized for debtors in each chapter. Stated most simply, a debtor's ability to repay his creditors can be measured from the perspective of his current non-exempt assets and/or his future income.[38] A given debtor could have few assets but high future income; conversely, a debtor could have high assets and no future earning capability. These factors produce four possible combinations: a debtor could be (1) high asset/low income; (2) high asset/high income; (3) low asset/low income; or (4) low asset/high income.[39]

Chapter 7, the liquidation chapter, is well suited for the high asset/low income debtor. Creditors would realize greater sums in this instance from Chapter 7 (by liquidating existing assets) than Chapter 13 (which would yield little disposable income).[40] Chapter 7 would also be suited for the low asset/low income debtor because this individual would not be able to repay creditors significant sums in either Chapter 7 or 13 and the chapter best suited for an early fresh start is Chapter 7.[41]

Conversely, Chapter 13 is particularly suited to the low asset/high income debtor such a debtor as could generate considerable repayment to creditors in a Chapter 13 case, whereas liquidation would yield little

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36 Obviously, it is difficult to determine legislative intent, a problem acutely felt in bankruptcy. *See* Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275 (1980). Moreover, to the extent that legislative intent can be garnered, there are no assurances that, in fact, the law could operate to effectuate that intent. Sullivan, Warren and Westbrook ably demonstrate that a number of our working hypotheses were developed without adequate empirical foundation and are, as a factual matter, erroneous. *See generally* AS WE FORGIVE OUR DEBTORS, *supra* note 16; Gross, *Re-Vision*, *supra* note 34.

37 Indeed, Congress added certain incentives to help promote certain choices. To encourage what it perceived as greater repayment to creditors in Chapter 13 than Chapter 7, more debts are dischargeable in Chapter 13 than Chapter 7. *See* 11 U.S.C. §§ 523, 1328 (1988). *See also generally* AS WE FORGIVE OUR DEBTORS, *supra* note 16, at 199-270.

38 The calculation of the amount a debtor can actually repay is considerably more complex, as the interests of secured and priority creditors must be accounted for as well as the interests of reclaiming creditors. This complexity is discussed in AS WE FORGIVE OUR DEBTORS, *supra* note 16, at 208-09.

39 Obviously, this explanation does not take into account debtors with medium assets and medium income or some combination thereof. Clearly, various combinations can be formulated for these debtors as well.

40 Indeed, a debtor is only eligible for relief under Chapter 13 if creditors would receive at least as much in repayment as they would receive in a Chapter 7 case. *See* 11 U.S.C. § 1325 (1988).

41 This type of debt exemplifies one stereotype of debtors—poor, unemployed individuals. *See* Gross, *Re-Vision*, *supra* note 34. For a select category of debtors, Chapter 13 may be better suited *if* debts that are non-dischargeable in a Chapter 7 case are dischargeable in a Chapter 13 case. *See* 11 U.S.C. §§ 523, 1328 (1988).

recovery for creditors in Chapter 7.[42] Chapter 13 is also more suitable for high asset/high income debtors as creditors would likely receive more from the debtor's future labors over a three year period than from a forced sale of the debtor's assets under Chapter 7. These combinations are reflected in the following diagram:

| Chapter 7 | Chapter 13 |
|---|---|
| high assets<br>low income | high income<br>low assets |
| low assets<br>low income | high assets<br>high income |

Returning to the Smith hypothetical, Smith presents a situation involving a high earner with low assets, the prototypical candidate for Chapter 13—at least in terms of some of the underlying rationale for chapter choice.[43] This Article suggests that this particular category of debtor (appearing in the upper right hand quadrant of the diagram) can and should have access to relief under Chapter 7. Indeed, what is significant about the options currently available to this low asset/high income debtor is that the Chapter 7 option is not only curtailed but eliminated.

Chapter 7 would provide Smith with what many might perceive to be a much too painless opportunity for a fresh start. Since all of his assets would be exempt,[44] his case is considered a "no asset" Chapter 7,[45] and there would be nothing available to liquidate for distribution to creditors. Smith would be discharged of his obligation to repay his general unsecured creditors, including the tort judgment[46] and the finance company.[47] Smith's future income would not be considered property of the

42 This type of debtor reflects another stereotypic image of debtors—the rogue. *See* Gross, *Re-Vision*, *supra* note 34. The hypothetical Smith falls into this category of debtor although his classification as a rogue is certainly debatable. *See supra* note 33 and accompanying text.

43 It is worth noting that Congress is not the only body that shares this perspective. It is a view shared by many creditors, judges, lawyers and commentators. *See* As WE FORGIVE OUR DEBTORS, *supra* note 16, at 223.

44 An individual debtor is entitled to retain his exempt property under 11 U.S.C. § 522(b), although the determination of what precise property the debtor can retain will most likely be determined by state rather than federal law. *See* 11 U.S.C. § 522(b) (1988).

45 *See* Herbert & Pacitti, *Down and Out in Richmond Virginia: The Distribution of Assets in Chapter 7 Proceedings Closed During 1984-1987*, 22 U. RICH. L. REV. 303 (1988).

46 Since it is assumed in the hypothetical that the tort judgment was not a consequence of drunk driving and that there was no willful or malicious injury, it is dischargeable. *See* 11 U.S.C. §§ 523(a)(6), (9) (1988).

47 This general statement is supported by 11 U.S.C. §§ 523 and 727 (1988). However, several assumptions and caveats are in order. First, it is assumed that the debtor's issuance of the bad check will not be the basis for denial of a discharge based on fraud. *See* 11 U.S.C. §§ 523(a)(2)(A), 727(a)(2) (1988). Further, it is possible that, notwithstanding the filing, a state could decide to prosecute the debtor on the criminal offense of issuing a bad check during the bankruptcy case. *See* 11 U.S.C. § 362(b)(1) (1988). Some courts have used their equitable powers to reinstate the stay in such instances. *See, e.g.*, *In re* Taylor, 16 Bankr. 232 (Bankr. M.D. Md. 1981), *rev'd*, 44 Bankr. 548 (M.D. Md. 1984); *In re* Whitaker, 16 Bankr. 917 (Bankr. M.D. Tenn. 1982). *See also* 11 U.S.C. § 105. Some states have even tried to prosecute the debtor after discharge. *See, e.g.*, United States v. Carson, 669 F.2d 216 (5th Cir. 1982). However, these types of prosecutions have been the subject of considerable controversy. Indeed, even if the state were permitted to proceed, they could not exact

estate, and, following the filing of his case, would be available to him to fund his family living expenses.[48]

Unfortunately for Smith, a bankruptcy court could determine that granting Smith relief under Chapter 7 would be an abuse of the provisions of Chapter 7,[49] and as such, his case should be dismissed. This result is the consequence of an expansive judicial interpretation of Section 707(b) of the Bankruptcy Code, which was added in 1984 as part of the Consumer Credit Amendments.[50] Section 707(b) permits and even encourages dismissal in cases of "substantial abuse," but does not define "substantial abuse."[51] Although an expansive interpretation of Section 707(b) is by no means mandated by the Bankruptcy Code,[52] this ap-

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payment during the case or after discharge. They could only seek to punish the debtor for the wrong itself. *See infra* notes 176 and 181 and accompanying text.

Second, if a restitution order had been entered by a state court, the outcome in Chapter 7 would be different and not all of Smith's obligations would be dischargeable. *See* Kelly v. Robinson, 479 U.S. 36 (1986) (criminal restitution excepted from discharge in Chapter 7). However, the dischargeability of the restitution order in Chapter 13 cases is by no means clear-cut, and the issue was not specifically decided by the Supreme Court. However, the Supreme Court recently heard argument on this issue. *See* Pennsylvania Dept. of Public Welfare v. Johnson-Allen, 871 F.2d 421 (3d Cir. 1989), *cert. granted, sub nom.*, Pennsylvania Dept. of Public Welfare v. Davenport, 110 S. Ct. 49 (nondischargeable); Cancel v. City of Schnectady (*In re* Cancel), 85 Bankr. 677 (N.D.N.Y. 1988) (restitution dischargeable in Chapter 13). *See also* McCafferty & Bubis, *supra* note 25; Mehler, *Bankruptcy II—Criminal Prosecution and Restitution Under the Bankruptcy Code*, 1983 ANN. SURV. BANKR. L. 107; Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477 (1988); Comment, *The Second Circuit's Novel Approach to Defining Debt Under the Bankruptcy Code:* In re *Robinson*, 60 ST. JOHN'S L. REV. 344 (1986); Note, *The Dischargeability of Criminal Restitution Obligations in Chapters 7 and 13 Bankruptcy Proceedings: Is there any Standard After* Kelly v. Robinson*?*, 56 UMKC L. REV. 713 (1988). *See also infra* notes 183, 187 and accompanying text.

48 *See* 11 U.S.C. § 541(a)(6) (1988).

49 *See Id.* at § 707(b).

50 *See supra* note 13.

51 Courts dealing with this section have recognized the definitional void. *See, e.g.*, *In re* Walton, 866 F.2d 981 (8th Cir. 1989); *In the Matter of* Booth, 858 F.2d 1051 (5th Cir. 1988); *In re* Kelly, 841 F.2d 908 (9th Cir. 1988); *In re* Braley, 103 Bankr. 758 (Bankr. E.D. Va. 1989); *In re* Gyurci, 95 Bankr. 639 (Bankr. D. Minn. 1989); *In re* Wegner, 91 Bankr. 854 (Bankr. D. Minn. 1988); *In re* Keniston, 85 Bankr. 202 (Bankr. D.N.H. 1988); *In re* Krohn, 78 Bankr. 829 (Bankr. N.D. Ohio 1987), *aff'd*, 87 Bankr. 926 (N.D. Ohio 1988), *aff'd*, 886 F.2d 123 (6th Cir. 1989); *In re* Cord, 68 Bankr. 5 (Bankr. W.D. Mo. 1986); *In re* Edwards, 50 Bankr. 933 (Bankr. S.D.N.Y. 1985).

The absence of a definition has led one leading consumer credit industry group to suggest yet another amendment to § 707(b) (§ 707(b) was previously amended, as part of the 1986 amendments, to permit the trustee to seek dismissal under the section). The American Financial Services Association recommends adding language to § 707(b) that would indicate that dismissal for substantial abuse is required "if a petition is filed in bad faith or if the debtor has the ability to pay his debts when they are due or the ability to confirm a plan under Chapter 13 of this title." Conversation with Salinger, Esq., AFSA, Washington, D.C. As will be noted, *infra* note 54, the last phrase represents (I suspect unbeknownst to AFSA) two standards not one.

52 *See* Gross, *supra* note 13; *see also In re* Tefertiller, 104 Bankr. 513 (Bankr. N.D. Ga. 1989); *In re* Braley, 103 Bankr. 785 (Bankr. E.D. Va. 1989); *In re* Keniston, 85 Bankr. 202 (Bankr. D.N.H. 1988); *In re* Wegner, 91 Bankr. 854 (Bankr. D. Minn. 1988); *In re* Deaton, 65 Bankr. 663 (Bankr. S.D. Ohio 1986). The court in *In re* Gyurci, 95 Bankr. 639, 642-43 (1989), recognized the two distinct approaches to interpreting § 707(b). In deciding in favor of dismissal, Judge Dreher stated: "[i]n this case dismissal is appropriate because debtor meets both the more restrictive test espoused in *Wegner* and similar [cases] and the much more expansive reading set forth in *Kelly* and its line of cases." 95 Bankr. at 642-43.

Avoiding the impact of § 707(b) has been achieved by other courts. The court in *In re* Antal, 85 Bankr. 838 (Bankr. W.D. Mo. 1988), suggested that § 707(b) was a "dead letter" since, for purposes of calculating possible repayment of debts in a Chapter 13 case, exempt property is not to be considered. Therefore, there will virtually never be any future income—even if one believes (as perhaps this court did) that the future income test is the correct standard to apply.

proach has been adopted by an increasing number of courts.[53] The courts have suggested that if an individual debtor is capable of confirming a Chapter 13 plan by repaying his creditors at least a portion of what is owed them, that debtor may not proceed under a liquidation mode (*i.e.*, a Chapter 7 case).[54]

Applying this expansive interpretation to the Smith hypothetical,[55] a determination must be made as to whether Smith would be able to repay at least a portion of the $15,000 he owes his creditors over a three year period—the duration of a repayment plan under Chapter 13.[56] Resolution of the issue depends on how one determines the projected economic needs of Smith and his family.[57] If, in the eyes of the court, Smith could set aside some money each year (*e.g.*, $3,000 annually) by, for example, moving to a less expensive apartment, enrolling his children in public rather than parochial school, and curtailing or differing family expenditures for clothing, restaurants and entertainment expenses, he could be denied access to relief under Chapter 7.[58] Since Smith could then repay

53 *In re* Walton, 866 F.2d 981 (8th Cir. 1989); *In re* Kelly, 841 F.2d 908 (9th Cir. 1988); *In re* Herbst, 95 Bankr. 98 (W.D. Wis. 1988); *In re* Krohn, 78 Bankr. 829 (Bankr. N.D. Ohio 1987), *aff'd*, 87 Bankr. 926 (N.D. Ohio 1988), *aff'd*, 886 F.2d 123 (6th Cir. 1989); *In re* Gaskins, 85 Bankr. 846 (Bankr. C.D. Cal. 1988); *In re* Andrus, 94 Bankr. 76 (W.D. Pa. 1988); *In re* Struggs, 71 Bankr. 96, 99 (Bankr. E.D. Mich. 1987); *In re* Newsom, 69 Bankr. 801 (Bankr. D.N.D. 1987); *In re* Bell, 56 Bankr. 637 (Bankr. E.D. Mich.), *vacated on other grounds*, 65 Bankr. 575 (E.D. Mich. 1986); *In re* Hudson, 64 Bankr. 73 (Bankr. N.D. Ohio 1986); *In re* Colton, ABI Newsl., June, 1986 at 10 (Bankr. W.D.N.Y. March, 1985), *aff'd*, ABI Newsl., June 10, 1986, at 12 (W.D.N.Y. Nov. 1985); *In re* Cord, 68 Bankr. 5 (Bankr. W.D. Mo. 1986).

54 The precise standard, even among those courts adopting an expansive approach, is not clear. The court in *In re Kelly, supra* note 53, at 914, suggests that the proper test is whether a debtor can pay his debts. This is frequently couched in terms of whether the debtor can fund a Chapter 13 plan. Other courts have adopted this approach. *See In re* Walton, 866 F.2d 981 (8th Cir. 1989); *In re* Gaskins, 85 Bankr. 846 (Bankr. C.D. Cal. 1988); *In re* Hudson, 56 Bankr. 415, 420 (Bankr. N.D. Ohio 1985).

The ability to fund a Chapter 13 plan does not mean, *a fortiori*, that creditors will be repaid all or even a substantial portion of what is owed them. This is because, under § 1325(b) and the disposable income requirement, a debtor could confirm a plan that does not provide for full repayment. *Kelly* suggests that any repayment is better than no repayment. *See* 841 F.2d at 915.

Other courts have articulated a standard which does not rely on Chapter 13 confirmation alone. These courts look to whether the debtor can not only confirm a Chapter 13 plan, but also make "meaningful" or "substantial" payments to creditors through a Chapter 13 plan. *See, e.g.*, *In re* Walton, 866 F.2d 981, 985 (8th Cir. 1989), where the court, although purporting to adopt the *Kelly* test, observed that the debtor could repay two-thirds of his obligations over three years and all of his obligations over five years. *See also In re* Cord, 68 Bankr. 5, 6 (Bankr. W.D. Mo. 1986) (substantial amounts of monthly income which are more than sufficient to pay a substantial portion of the existing unsecured debt).

Under the standard articulated in this latter group of cases, fewer cases will be dismissed than under the *Kelly* standard. For purposes of this Article, I have assumed that the $9,000 which Smith would have to repay creditors in a Chapter 13 plan would satisfy the expansive interpretation of substantial abuse, regardless of whether the *Kelly* standard or the "substantial payment" standard were applied.

55 Whether there are a large number of debtors who are able to repay creditors some or all of what they are owed has, in and of itself, been a matter of considerable debate. *See* Sullivan, Warren & Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091; Shuchman, *supra* note 16; Sullivan, Warren & Westbrook, *Rejoinders: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087; AS WE FORGIVE OUR DEBTORS, *supra* note 16.

56 *See* 11 U.S.C. §§ 1322(c), 1325(b)(1)(B) (1988).

57 *See* 11 U.S.C. § 1325(b)(1)(B) (1988). *See also* Breitowitz, *supra* note 14; Gross, *supra* note 13.

58 *See In re* Sutliff, 79 Bankr. 151 (Bankr. N.D.N.Y 1987); *In re* Chrzanowski, 70 Bankr. 447 (Bankr. D. Del 1987); *In re* Kitson, 65 Bankr. 615 (Bankr. E.D.N.C. 1986); *In re* Rogers, 65 Bankr. 1018 (Bankr. E.D. Mich. 1986); *In re* Jones, 55 Bankr. 462 (Bankr. D. Minn. 1985); *In re* Gunn, 37

to his creditors a significant portion of what he owes them in a Chapter 13 case, he is considered to be substantially abusing the provisions of Chapter 7 by seeking to liquidate when he is capable of reorganizing.[59]

If we assume that a court were to adopt this expansive approach, resulting in the dismissal of Smith's Chapter 7 case under Section 707(b), then Smith is confronted with two basic alternatives. He can proceed under Chapter 13 of the Code or he could deal with his creditors under state law outside the Federal bankruptcy system. If Smith wants the benefit of a discharge of indebtedness and hence a fresh start, then he is limited to seeking relief under the bankruptcy laws, as discharge is generally unavailable at the state level.[60]

To confirm a Chapter 13 plan and subsequently obtain a discharge, the Bankruptcy Code requires that a debtor commit all income not reasonably necessary to support himself and his family to plan payments.[61] Since all of Smith's income would be labor-generated, a Chapter 13 approach would require Smith to continue working.[62] Unlike Chapter 7, income received in the course of a Chapter 13 reorganization is considered property of the estate and, as such, is available for distribution to creditors.[63] If, as postulated earlier, Smith's labors would generate up to $9,000 in non-essential income over the next three years, these amounts would be paid over to creditors in a Chapter 13 reorganization plan.[64] At the end of the plan's term, Smith would obtain a discharge.[65] This discharge would be broader in scope than the discharge available in Chapter 7, although for Smith this increase in scope is largely immaterial as he has no non-dischargeable debts.[66]

If, on the other hand, Smith refuses to proceed under Chapter 13 and subsequently suffers dismissal of his Chapter 7 case, creditors could obtain a portion of his earnings under state collection laws, including garnishment.[67] To the extent the tort judgment was unsatisfied, Smith,

Bankr. 432 (Bankr. D. Or. 1984). For a recent decision wrestling with the degree to which courts should interject their own subjective sense of what are appropriate expenditures, see *In re* Bien, 95 Bankr. 281 (Bankr. D. Conn. 1989) (expenditures for religious tithes).

59 *See supra* note 14.

60 What is unique about bankruptcy discharge is that it binds consenting and non-consenting creditors. A debtor can obtain a discharge of debts in some jurisdictions at the state level if creditors voluntarily accept the debtor's proposed treatment of their claims. However, this is not the broad-based discharge created by the bankruptcy laws. *See* R. AARON, *supra* note 14, at § 1.02[2]; R. GINSBERG, *supra* note 14, at 847-1026; H. LEBOWITZ, BANKRUPTCY DESKBOOK (1986).

61 *See* 11 U.S.C. §§ 1325(b)(1)(B), (b)(2)(A) (1988).

62 *See* Gross, *supra* note 13.

63 *See* 11 U.S.C. § 1306(a)(2) (1988).

64 *See id.* at § 1325(b)(1)(B).

65 *See id.* at § 1328.

66 *Compare* 11 U.S.C. § 523 (1988) *with* 11 U.S.C. § 1328 (1988). *See supra* note 37. *See also* R. AARON, *supra* note 14, at §§ 11.02[4], 11.03 & 11.06; M. GIRTH, *supra* note 14; R. GINSBERG, *supra* note 14, at 847-1026. As noted earlier, this presumes that no restitution order was entered and there was no fraud. If either of these situations existed, Smith could still obtain a discharge in Chapter 13, but his Chapter 7 discharge would be limited. Moreover, it is at least theoretically possible for the state to pursue criminal charges on the bad check *after* discharge although this would be difficult to sustain in view of 11 U.S.C. § 524(a) (1988).

67 For an overview of state and federal garnishment laws, see 1-6 T. EISENBERG, DEBTOR-CREDITOR LAW (1988); S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION (1987). *See also* Shimm, *The Impact of State Law on Bankruptcy*, 1971 DUKE L.J. 879; D. STANLEY & M. GIRTH, *supra* note 16.

at least in some states, could theoretically be subjected to imprisonment for failing to satisfy that judgment.[68] To obtain repayment for the bad check, the finance company could try to utilize the state criminal law under which Smith could be convicted of a crime and ordered to make restitution.[69] To avoid a criminal law prosecution which could result in the loss of his job at the bank,[70] Smith might elect to repay the finance company through his labor.

If Smith wants relief from his indebtedness, he is presented with what appears to be a Hobson's choice, namely no choice at all.[71] First, Smith wants and needs to work to support his family. Hence, while unemployment is in some sense a possible alternative, it is not an acceptable option for Smith. Moreover, unemployment still exposes Smith to the possibility of imprisonment for the bad check. The dismissal of Smith's Chapter 7 case threatens Smith by leaving him no alternative to imprisonment other than working to repay his creditors—either inside or outside Chapter 13. Even if Smith works outside of Chapter 13, he still runs the risk of imprisonment for the bad check.[72] It is only by proceeding in a Chapter 13 case that Smith can avoid imprisonment for his unpaid obligations. Therefore, in the absence of the liquidation option, the only way for Smith to obtain relief from all of his obligations, including the risk of imprisonment, is for him to work to repay creditors in a Chapter 13 plan.[73] We turn then to a determination of whether the absence of

68 *See, e.g.*, ILL. CONST. art. I, § 14; H. OLECK, *supra* note 7, at 38-39.

69 Indeed, it is customary for state prosecutors to use the criminal process to exact payment for the complainant/creditor. *See* Kratsch & Young, *Criminal Prosecutions and Manipulative Restitution: The Use of State Criminal Courts for Contravention of Debtor Relief*, 1984 ANN. SURV. BANKR. L. 107; Rice, *When Bankruptcy Courts Will Enjoin State "Bad Check" Proceedings: The Decline of the Primary Motivation Standard in Favor of the Younger Abstention Doctrine*, 93 COM. L.J. 111 (1988). *See also infra* notes 174, 178-180, 186 and accompanying text.

70 *See, e.g.*, 12 U.S.C. § 1829 (1988) ("[e]xcept with the written consent of the [Federal Deposit Insurance] Corporation no person shall serve as an . . . employee of an insured bank, who has been convicted . . . of any criminal offense involving dishonesty or a breach of trust"). Failure to pay a check constitutes criminal fraud in most jurisdictions and as such, our hypothetical Smith would fit within the confines of this section.

71 "Hobson's choice" is a term that dates back to a 16th-century individual named Thomas Hobson who leased horses and permitted his customers to choose a horse so long as it was the horse nearest the door. *See* T. BERNSTEIN, THE CAREFUL WRITER (1965); W. SAPHIRE, SAPHIRE'S POLITICAL DICTIONARY (1978); 7 OXFORD ENGLISH DICTIONARY 279 (2d ed. 1989). The term refers to a situation in which an individual effectively has no choice, rather than one in which the individual is confronted with a difficult choice. It has been said that peonage creates such an "Hobson's choice" for individuals. *See* Note, *Twentieth Century Slavery Prosecutions: The Sharpening Sword*, 8 CRIM. JUST. J. 47, 60 (1985).

72 Smith does not run a risk of imprisonment for the unpaid tort because in most instances, imprisonment occurs only when the debtor is able to repay the judgment and elects not to do so.

73 Professors Jordan and Warren recognize the difficulty of the choice confronting individual debtors in the most recent edition of their casebook on bankruptcy. "If a debtor whose Chapter 7 petition has been dismissed needs protection from creditors, only Chapters 11 and 13 are available. In this sense we have, if not an involuntary Chapter 13 for the consumer debtor, at least a somewhat *coerced* one." R. JORDAN & W. WARREN, BANKRUPTCY 662 (2d ed. 1989) (emphasis added). This observation is rendered more poignant with the realization that not all courts are so willing to permit individual debtors to seek relief under Chapter 11. *See* Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503 (8th Cir. 1986). Moreover, because of the amount of their debts, other individuals are ineligible for relief under Chapter 13. *See, e.g., In re* Krohn, 87 Bankr. 926 (N.D. Ohio 1988), *aff'd*, 886 F.2d 123 (6th Cir. 1989).

free choice for the debtor is tantamount to peonage. That requires an analysis of the meaning of peonage.

## IV. Peonage

At the time of their passage, neither the framers of the thirteenth amendment nor the authors of the anti-peonage laws had bankruptcy in mind. No federal bankruptcy law existed when the thirteenth amendment was adopted in 1865,[74] and when the anti-peonage laws were enacted two years later,[75] attention was directed to debt repayment only in the limited context of a particular form of peonage prevalent in Mexico and the surrounding territories—not indebtedness in the bankruptcy context.[76]

However, unless one adopts the position of a strict interpretivist,[77] the fact that the framers of the thirteenth amendment had no cognizance of bankruptcy issues does not eliminate conceptual parallels,[78] nor does it rule out the possibility that there are situations in which the thirteenth amendment or anti-peonage laws can be implicated in situations arising under the federal bankruptcy laws.

While there have been fewer cases under the thirteenth amendment than under the other civil rights amendments,[79] the Supreme Court has recently addressed the applicability of the thirteenth amendment's ban on involuntary servitude to white, mentally impaired farm laborers, circumstances wholly different from those existing in 1865.[80] Indeed, as

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74 *See* H. OLECK, *supra* note 9; C. WARREN, *supra* note 11.

75 The anti-peonage laws contain a civil and criminal component. At one time, they were contained in a single act. *See* The Anti-Peonage Act of 1867, ch. 188, 14 Stat. 546 (1867). They are now contained in two separate titles of the United States Code. The civil anti-peonage law, which appears at the beginning of this Article, is contained in 42 U.S.C. § 1994 (1988). The criminal anti-peonage component is contained in 18 U.S.C. § 1581 (1988) and provides, in relevant part:

> (a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1581(a) (1988).

76 For a general overview of the anti-peonage laws, see B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART I (1970); 2 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON (1968) [hereinafter B. SCHWARTZ, COMMENTARY]; 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE (1980); 1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW (1969) [hereinafter ANTIEAU, MODERN LAW]; II T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 517-20 (1979); Means, *Surrogacy v. The Thirteenth Amendment*, 4 N.Y.L.S. HUM. RTS. ANN. 445 (1987); Misner & Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 (1977); Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era—Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982).

77 *See* GARNER, DICTIONARY OF MODERN LEGAL USAGE 308 (1987); Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984).

78 *See* White, *Constructing A Constitution: 'Original Intention' in the Slave Cases*, 47 MD. L. REV. 239 (1987); Chang, *Conflict, Coherence and Constitutional Intent*, 72 IOWA L. REV. 753 (1987).

79 *See* EMERSON, HABER & DORSEN, *supra* note 76, at 577-520.

80 United States v. Kozminski, 108 S. Ct. 2751 (1988). There has been a growing movement to apply the thirteenth amendment and anti-peonage laws to a variety of situations (*e.g.*, abortion and surrogate motherhood) that could not have been within the contemplation of the framers. *See generally* Stone, *Neoslavery—"Surrogate" Motherhood Contracts v. The Thirteenth Amendment*, 6 LAW & INEQUALITY 63 (1988); Means, *supra* note 76; Misner & Clough, *supra* note 76; Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 576 (1974); Delgado, *Religious Totalism as Slavery*, 9 N.Y.U. REV. L. & SOC. CHANGE 51 (1980); Note, *The Thirteenth Amendment and Education: An*

expressed by the Court in *Bailey v. Alabama*,[81] "Congress was not concerned [in the anti-peonage laws] with mere names and manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced." Peonage addresses a narrower range of conduct than that encompassed by the broader term "involuntary servitude" contained in section 1 of the thirteenth amendment; however, because the anti-peonage laws were enacted pursuant to section 2 of the thirteenth amendment, a violation of the anti-peonage laws constitutes a *per se* violation of the thirteenth amendment.[82]

The term "peon" is derived from the Spanish word for "foot soldier," the lowest rank in the military.[83] Indeed, the word itself is value-laden, carrying negative connotations.[84] The term "peonage" refers to the practice of requiring an individual (peon) to work for a particular employer (frequently a creditor) to repay indebtedness.[85] Like slavery, peonage was offensive because it deprived individuals of the ability to work for themselves; it took away the individual's ability to profit from his own labor.[86] Peons were not, however, considered slaves in the traditional sense. Peons were free to come and go as they chose prior to entering into the peonage relationship and indeed, in most instances, had agreed to enter into the peonage relationship voluntarily.[87] Even while in a state of peonage, the peon remained free to vote and exercise the rights of citizenship.[88]

The system of peonage was considered so offensive and difficult to eradicate that it required separate legislation in addition to the broad-based ban on involuntary servitude contained it the thirteenth amendment.[89] Peonage entitled a creditor, as a matter of law, to require a defaulting debtor to work; the debtor's failure to do so could result in fine

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*Unfulfilled Promise*, 20 S.D.L. REV. 418 (1975); Note, *North Carolina's New Involuntary Servitude Statute: Inadequate Relief for Enslaved Migrant Laborers*, 62 N.C.L. REV. 1186 (1984). *See also* Cottrol, *The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage*, 11 NAT'L BLACK L.J. 198 (1989).

81 *See* 219 U.S. 219, 242 (1911). *See* SCHWARTZ, COMMENTARY, *supra* note 76; ANTIEAU, MODERN LAW, *supra* note 76.

82 Section 1 of the thirteenth amendment appears at the beginning of this Article. *See* text accompanying note 1. Section 2 of the thirteenth amendment provides as follows:

> Section 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, § 2. *See also* Clyatt v. United States, 197 U.S. 207, 218 (1905) (upholding the congressional authority to enact the Anti-Peonage laws).

83 OXFORD ENGLISH DICTIONARY 503 (1989 ed.); ENCYCLOPEDIA AMERICANA 679 (1985 ed.).

84 The word "bankrupt" was deleted from the bankruptcy laws in 1978 as the term was considered too derogatory. It has been replaced by the word "debtor," which is considered to create less of a stigma. *See* H. REP. No. 595, 95th Cong., 1st Sess. 310 (1977); S. REP. No. 989, 95th Cong., 2nd Sess. 23 (1978); Chatz, Costello & Gross, *An Overview of the Bankruptcy Code*, 84 COM. L.J. 259 (1979); 2 COLLIER BANKRUPTCY MANUAL § 101.12 (3rd ed.).

85 *See* Misner & Clough, *supra* note 76, at 721.

86 *See* Schmidt, *supra* note 76, at 656.

87 The distinction between slavery and involuntary servitude is a troubling one from a philosophical perspective. *See infra* note 96 and accompanying text.

88 *See* B. SCHWARTZ, *supra* note 76; Misner & Clough, *supra* note 76.

89 *See* B. SCHWARTZ, *supra* note 76; Means, *supra* note 76; Misner & Clough, *supra* note 76.

or imprisonment.[90] Peonage ran counter to the then existing (and current) case law which prohibited specific enforcement of personal service contracts; peonage represented the employment contract from which one had no reprieve.[91] It is for this reason that the anti-peonage laws prohibited not only the existence of the condition of peonage but the enforcement of the peonage contract as well.[92]

Peonage requires forcing an individual to work against his will. Yet, until the recent Supreme Court decision in *United States v. Kozminski*,[93] there was little judicial consensus as to what constitutes impermissible force or coercion. At one end of the spectrum was the narrow view, exemplified by the Second Circuit's opinion in *United States v. Shackney*,[94] that an individual's labor is being coerced only if he is confronted with the possibility of physical punishment or imprisonment if he fails to work. Thus, threatening illegal immigrants with deportation is not coercive. At the other end of the spectrum, in a position espoused by the Ninth Circuit in *United States v. Mussry*,[95] is an expansive view of coercion which finds objectionable the less overt, and by definition, more subjective forms of coercion, such as denial of a deeply desired reward or value or other forms of psychological pressure. For our purposes, however, it is enough to adopt the view of coercion now most likely to be taken in the peonage context—work coerced upon threat of physical harm or imprisonment.[96]

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90 An example of such a provision appears in Jaremillo v. Romero, 1 N.M. (Gild., E.W.S. ed.) 190 (1857). The Act of 1852, enacted in the applicable territory, provided: "By this [act the peon] must abide by and fulfill his agreement according to its terms . . . . Unless he can get his master's consent . . . , he may be prosecuted for a failure [to perform]."

91 *See* Means, *supra* note 76, at 455; Schmidt, *supra* note 76, at 646. *See also* E.A. FARNSWORTH, CONTRACTS § 12.7, at 835-36 (1982); H. HUNTER, MODERN LAW OF CONTRACTS (1986); Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

92 An earlier version of the Anti-peonage Act, dated January 26, 1867, included the following language: Peons "shall never be held liable to any person for the recovery of the same or for any other consequences resulting from, or pertaining to, their former state of peonage." *See* Means, *supra* note 76, at 461 (footnotes omitted). This language, had it been added, would have precluded all forms of recovery, including damages and negative injunctions. As passed a year later, the anti-peonage laws do not preclude all forms of recovery.

93 108 S. Ct. 2751 (1988).

94 333 F.2d 475 (2d Cir. 1964). The court stated its view quite simply:

> [W]e see no basis for concluding that because the statute can be satisfied by a credible threat of imprisonment, it should also be considered satisfied by a threat to have the employee sent back to the country of his origin, at least absent circumstances that would make such deportation equivalent to imprisonment or worse.

*Id.* at 486.

95 726 F.2d 1448 (9th Cir. 1984), *cert. denied sub. nom.* Singman v. United States, 469 U.S. 855. As expressed by the court:

> Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion—or may be even more coercive. . . . The crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person. A holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor.

726 F.2d at 1453.

96 The Sixth Circuit, in *Kozminski*, adopted a position midway between those expressed by the Second and Ninth Circuits by suggesting that there could be a finding of coercion if an employer used fraud or deceit to obtain services from a minor, an immigrant or one who was mentally im-

What separates peonage from other forms of servitude is its focus on indebtedness.[97] Peonage refers only to forced labor in the context of the liquidation of a debt or obligation. As expressed by the Court in *Clyatt v. United States* and repeated with frequency elsewhere, peonage "may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness."[98]

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paired. United States v. Kozminski, 821 F.2d 1186 (6th Cir. 1987), *aff'd in part*, 108 S. Ct. 2751 (1988).

In reversing the Sixth Circuit's decision, the Supreme Court in *Kozminski* revealed an unwillingness to go beyond the narrow construction propounded by the Second Circuit in *United States v. Shackney*, concluding that the level of coercion necessary to a finding of involuntary servitude is limited to that resulting from physical force or legal restraint. As expressed by the Court, "as the Government would interpret the statutes, the type of coercion prohibited would depend entirely upon the victim's state of mind. Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit . . . ." *Kozminski*, 108 S. Ct. at 2763.

The Court seemed fearful of opening the floodgates of litigation if a more subjective approach to a determination of coercion were adopted. It expressly limited its ruling so as to avoid a finding of peonage in the context of cult groups, communes, and religious orders. As the concurring opinions noted, the *Kozminski* decision effectively eliminates the possibility that an individual could be deemed to have been coerced by placement in an unfamiliar setting, by verbal abuse, by alcohol dependency, or by denial of access to medical treatment. The Court, it seems, was much more comfortable with bright-line distinctions that avoid that considerably harder problem of probing psychological state and motivation.

Both Justices Brennan and Stevens, in their respective concurring opinions, recognized the difficulty inherent in defining coercion. As expressed by Justice Brennan, "[h]appily, our task is not to resolve the philosophical meaning of free will . . . ." *Id.* at 2768. Justice Stevens observed: "these hypothetical cases present interesting and potentially difficult philosophical puzzles . . . ." *Id.* at 2772.

Despite the narrow view of coercion adopted by the Supreme Court in *Kozminski*, it recognized that a finding of coercion could be affected by the particular vulnerabilities of the victim. While this does not change the Court's articulated standard of coercion as an element of involuntary servitude, these vulnerabilities (*i.e.*, mental capacity, social status) can assist in determining whether the standard has been met.

Because of Smith's family situation (*i.e.*, his need to work to support his children), he is particularly vulnerable to the effect of the state criminal laws and the efforts of creditors both to extend credit and collect what is owed. Smith clearly does not have the traditional indicia of vulnerability contemplated by the Court in *Kozminski* (*e.g.*, minority, mental infirmity, immigrant status). However, as a debtor with a family to support, a lower level of income, and a less prestigious job than he might otherwise want and need, he is vulnerable.

Smith wants to provide for his family and has expectations of how to accomplish those ends (*i.e.*, private versus public education). He wants to better himself so that he can raise his income level and perhaps his status as well (*e.g.*, obtaining continuing education from his employer). He wants to give his family certain basics of life (*e.g.*, clothes, a home in a safe neighborhood). All these things come at a price, in Smith's case at a price above his ability to pay.

It may be easier, then, for Smith to succumb to pressures to repay in a Chapter 13 case than say another individual with professional status and high earning potential. Indeed, what produces a sense of Hobson's choice for one individual (*e.g.*, Smith) creates only a choice between undesirable alternatives for another individual (*e.g.*, the high status professional). This recognition is one identified in the contract doctrine of unconscionability where the status of the party alleging unfairness is a key factor to be considered. *See generally* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

97 *See, e.g.*, Clyatt v. United States, 197 U.S. 207 (1905); *Peonage Cases*, 136 F. 707 (E.D. Ark. 1905). As expressed in the *Peonage Cases*, "Peonage . . . is the holding of any person to service or labor for the purpose of paying or liquidating an indebtedness due from the laborer or employe [sic] to the employer, when such employee desires to leave or quit the employment before the debt is paid off." 136 F. at 708.

98 197 U.S. at 215. *See also* Pollack v. Williams, 322 U.S. 4 (1944); Bailey v. Alabama, 219 U.S. 219 (1911); Bernal v. United States, 241 F. 339 (5th Cir. 1917); United States v. Reynolds, 235 U.S. 133 (1914).

The cases under the peonage laws fall into two general categories—those regulating the kind of statutes a state may enforce and those directed to private employer/creditor conduct.[99] The statute-directed cases involve a challenge to particular statutory provisions that, either directly or indirectly, accord criminal status to an individual's failure to perform labor for the party with whom he contracted or to whom he owes money.

The creditor/employer-directed cases generally arise when one person (usually an employer who is also a creditor) holds another person (the debtor) in his employ against his will in an effort to obtain satisfaction of an outstanding obligation owed by the debtor. The private relationship between a debtor and his creditors is also of importance in the bankruptcy context in terms of looking at the methods used, both within and outside federal bankruptcy laws, for collection of outstanding obligations.

### A. *Building the Case for Peonage*

There are certain obvious similarities between peonage and bankruptcy. Both involve indebtedness.[100] Both are concerned with the price that should be exacted from debtors who owe their creditors.[101] Both reveal an antipathy toward forced labor. In the peonage context, the master benefits from the peon's labor although the peon is not deprived of the necessities of life (*i.e.*, room and board).[102] Similarly, in Chapter 13, a debtor works for the benefit of his creditors to obtain a discharge while not being deprived of reasonable income to support himself and his family.[103]

The anti-peonage laws establish a prohibition, namely that employment contracts, even if voluntarily made, cannot be enforced by a threat of imprisonment.[104] If the source of peonage is a statute, then the stat-

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99 For examples of statute-directed cases, see Pollack v. Williams, 322 U.S. 4 (1944); United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Robertson v. Baldwin, 165 U.S. 275 (1897); Butler v. Perry, 240 U.S. 328 (1916); *Ex parte* Drayton, 153 F. 986 (D.S.C. 1907); Opinion of the Justices, 121 N.H. 531, 431 A.2d 144 (1981).

For examples of the creditor-directed cases, see United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984), *cert. denied sub nom.* Singman v. United States, 469 U.S. 855; Bernal v. United States, 241 F. 339 (5th Cir. 1917), *cert. denied*, 245 U.S. 672 (1918); Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873 (1945); United States v. Gaskin, 320 U.S. 527 (1944); *Peonage Cases*, 123 F. 671 (M.D. Ala. 1903); *Peonage Cases*, 136 F. 707 (E.D. Ark. 1905); United States v. Shackney, 333 F.2d 475 (2nd Cir. 1964); United States v. Kozminski, 108 S. Ct. 2751 (1988).

100 The term indebtedness in the peonage context has been broadly construed to encompass any debt or obligation. *See* Misner & Clough, *supra* note 74, at 729-30, 732-33. The term "debt" is broadly defined in the bankruptcy context. *See* 11 U.S.C. § 101(11). This definition refers to the term "claim," which is also broadly defined. *See id.* at § 101(4). *See generally* Ohio v. Kovacs, 469 U.S. 274 (1985); United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).

101 In the peonage context, this is evidenced by the unenforceability of laws creating or maintaining forced labor. In the bankruptcy context, this is revealed by the availability of relief to debtors and the existence and scope of the relief that can be obtained in the form of a discharge.

102 *See* United States v. Kozminski, 108 S. Ct. 2751 (1988); United States v. Reynolds, 235 U.S. 133 (1914). Although money for room and board was given to the individuals asserting the claim of involuntary servitude, there is considerable dispute as to the adequacy of that which was given.

103 *See* 11 U.S.C. § 1325(b)(2)(B) (1988).

104 The irrelevancy of the distinction between voluntary and involuntary peonage was expressed by the Court in Bailey v. Alabama, 219 U.S. 219, 243 (1911):

ute can be invalidated.[105] If the source is creditor conduct, the offending conduct can be stopped and the creditor punished.[106] As will be discussed in substantial detail later, if freedom of chapter choice is eliminated and a debtor refusing to work under a Chapter 13 plan forfeits a bankruptcy discharge and faces imprisonment under state law, then an unconstitutional condition has been placed on discharge.[107] In both peonage and bankruptcy, striking down a statutory provision creates a shield that protects individuals from being held in a condition of peonage.[108] Striking down creditor conduct gives peons and debtors a sword with which to fight oppressive behavior.[109]

Further parallels can be found. The anti-peonage laws can be seen to provide a specific freedom for individuals trapped by indebtedness—namely, the freedom from forced labor. The bankruptcy laws provide an analogous freedom. The Bankruptcy Code establishes the opportunity for individual debtors to obtain freedom through the statutorily created right to a discharge.[110] The discharge embodies bankruptcy's fresh start policy and creates the circumstances under which individuals can be relieved of obligations.[111] Peonage and bankruptcy can be seen as analogous when bankruptcy coerces work through imprisonment; the anti-peonage laws and bankruptcy can be seen as the same when bankruptcy supplies a freedom from debt.

Returning to the factual pattern posed at the beginning of this Article, Smith owes money to his creditors. Hence, his situation fulfills one of the basic elements of peonage—indebtedness.[112]

The next aspect of peonage—the employment relationship—can also be found. In the peonage cases, a direct employment relationship between the debtor and his creditor can almost always be found, hence the frequent reference to the peon and his master.[113] The debtor is,

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> Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude.

105 *See* 42 U.S.C. § 1994 (1988).

106 *See* 18 U.S.C. § 1581 (1988). The foregoing description also reveals a significant distinction between the application of the thirteenth and fourteenth amendments. Both the thirteenth amendment and the anti-peonage laws address private as well as state action while the fourteenth amendment only addresses state action. From the standpoint of individual debtors, there are increased possibilities for relief under the thirteenth as opposed to fourteenth amendment.

107 *See infra* note 197 and accompanying text.

108 The sword/shield distinction is prevalent in the peonage literature—both cases and law reviews. *See, e.g.*, Pollack v. Williams, 322 U.S. 4, 8 (1944).

109 *See supra* note 108.

110 *See* 11 U.S.C. §§ 727, 1141, 1228 & 1328 (1988).

111 *See* Gross, *supra* note 13; Hallinan, *supra* note 9; Howard, *supra* note 10; Jackson, *supra* note 10.

112 The terms "debt," "claim," and "creditors" are broadly defined in the Bankruptcy Code. *See* 11 U.S.C. §§ 101(4), (9) & (11) (1988).

113 *See* United States v. Reynolds, 235 U.S. 133 (1914). That case exemplifies the situation in which a peon entered into an employment agreement with his creditor. The "labor contract," as the document was labelled, provided:

> Now in consideration of the premises [repayment of fine by surety], I, the said Ed. Rivers [the peon], agree to work and labor for him, the said J.A. Reynolds, on his plantation . . . as a farm hand to pay fine and cost for the term of 9 months and 24 days, at the rate of $6.00 per month, together with my board, lodging, and clothing during the said time of hire.

then, literally forced to work for his creditors. In most instances, the relationship is evidenced by a written contract, and the peon is considered to have voluntarily entered into his commitment to work for the master.[114]

The employment relationship has a bankruptcy analogue. A Chapter 13 repayment plan creates a relationship between the debtor and his creditors which has the equivalent effect of an employment agreement. The plan represents an implicit contract made by the debtor to repay his creditors. In a reorganization plan, the debtor proposes an arrangement pursuant to which a specified portion of his future earnings will be utilized to fund payments to creditors.[115] A Chapter 13 plan binds the debtor and his creditors to certain express provisions, such as the debtor's commitment to allocate his disposable income to plan payments.[116] The terminology used in reference to a plan parallels that used in the contract context.[117] It is often stated that the debtor makes an offer in the plan to which creditors agree or object. Upon confirmation by the court, a plan is binding on the debtor and his creditors,[118] and if the terms of the plan are not met, the plan will be deemed to have been breached.[119] As such, the debtor will not be entitled to the benefits of a completed plan, namely a discharge.[120] Thus, if Smith enters into a Chapter 13 plan and utilizes his future income to repay creditors, Smith is implicitly contracting to work for his creditors.

However, creditors in the bankruptcy context are not literally the debtor's employer, for the debtor is employed by a third party who is, in many instances, not a party to the bankruptcy case. As a technical matter, a debtor in a Chapter 13 case is paying the trustee, not the creditors.[121] Indeed, it has been suggested that the debtor's creditors are not creditors of the estate; rather, they are parties entitled to a distributive share of the estate.[122] Creditors of the estate are said to be those post-petition parties who contract with the estate—that is, creditors who are entitled to administrative priority.[123] Creditors who contracted with the debtor (before the bankruptcy) have only a beneficial interest in the estate.[124]

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*Id.* at 145.

114 *See id. See also* Bailey v. Alabama, 219 U.S. 219 (1911); Delgado, *supra* note 80; Misner & Clough, *supra* note 76. What is relevant, indicated the Court in *Bailey*, is not the mode of origin of peonage but the character of the servitude. *See* 219 U.S. at 243. As expressed by Delgado, *supra* note 80, at 54, "[a] further advantage of the slavery analysis is that it avoids the issue of initial voluntariness."

115 *See* 11 U.S.C. § 1325 (1988).

116 *See id.* at §§ 1322, 1325.

117 For a general discussion of contract law and its key terms, see E.A. FARNSWORTH, *supra* note 91. *See also* A CONTRACTS ANTHOLOGY 3-91 (P. Linzer, ed. 1989).

118 *See* 11 U.S.C. §§ 1327, 1328 (1988).

119 *See id.* at § 1307(c).

120 *See id.* at § 1307, 1328.

121 *See id.* at § 1325.

122 *See* Andrews, *Executory Contracts in Bankruptcy: Understanding 'Rejection,'* 59 U. COLO. L. REV. 845 (1988).

123 *See id.* at 852-53.

124 *See id.*

The foregoing distinctions can be dismissed as formalistic. While the Bankruptcy Code as written may not create a threat of imprisonment, the Code as applied—in light of state law—creates such a threat.[125] From the perspective of outcome for the individual debtor, there is no meaningful distinction between peonage and bankruptcy. Acontextually, then, Chapter 13 may not be offensive; it does not *per se* require a debtor to work. It is in the context of other aspects of the Bankruptcy Code and more particularly state law that Chapter 13 must be examined.

As to the debtor's creditors, they are the direct beneficiaries of the debtor's labors. The debtor in a Chapter 13 case is working, for the most part, for the benefit of his creditors. As noted, at least one commentator thinks that creditors of the debtor are not creditors of the estate; only the trustee and post-petition creditors are true creditors.[126] On this basis, one can argue that the debtor is not being coerced into working for creditors. But, such an argument in no way diminishes the reality of payment. It is true that Chapter 13 involves special administrative costs. All payment systems involve administrative costs. For example, a payment by check requires the debtor to reimburse a bank, and the payment is processed through a series of intermediaries.[127] That does not mean that the creditor is not being paid by the debtor.

Accordingly, the fact that Smith's employer is not Smith's creditor does not alter the substance of the transaction, namely that Smith's income, over and above that necessary to support himself and his family, is being allocated to his creditors. The fact that the allocation is through a Chapter 13 trustee does not negate the result; the ultimate recipients of Smith's income are his creditors.

The crucial but as yet unestablished element of peonage involves an assessment of whether the repayment to Smith is being made under circumstances which give rise to coercion—as that term is used in the peonage context. It is to this issue that we can now direct our attention.

### B. *The Meaning of Coercion*

It is not peonage when an individual *chooses* to work for his creditors, even if the choice is induced by somewhat disadvantageous consequences.[128] To be peonage, the disadvantageous consequences must be

125 *See infra* note 176 and accompanying text.

126 *See* Andrews, *supra* note 122.

127 *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE (3d. ed. 1988).

128 As expressed by the court in United States v. Shackney, 333 F.2d 475 (2d Cir. 1964), involuntary servitude is "not a situation where the servant knows he has a choice between continued service and freedom, even if the master led him to believe that the choice may entail consequences that are exceedingly bad." *Id.* at 486. A similar view is espoused in 45 AM. JUR. 2d 936:

> A clear distinction exists between peonage and the voluntary performance of labor or rendering services in payment of debt. In the latter case, the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. Coercion of such service by constant fear of imprisonment under criminal laws renders work compulsory . . . .

*Id.* A similar point is made by Misner & Clough, *supra* note 76, at 719 n.24, where they state: "An easy way to avoid a finding of involuntary servitude is to find the individual has a choice of some sort, however undesirable." It must be recognized that while the foregoing distinction is made, and dedire. Specifically, the essence of peonage is an employment relationship that is enforced through a threat of imprisonment.[129]

Even in the peonage context, there is, at some level, a choice for the individual debtor—he can choose to continue working or go to jail.[130] From this perspective, the essence of peonage is not the absence of any choice *per se* but the absence of a tolerable choice or an acceptable alternative to working for the creditor.

If obtaining labor in such a fashion is objectionable, a key element of such a reaction is the connection between the threat and labor, as opposed to some other commodity.[131] This is because coercion, as an abstract concept, tells us little. Finding coercion is a judgment about a particular state of things. It is the determination of "what state of things is offensive" that raises the difficulties. Such an assessment entails the development of norms, not conclusions.[132]

Suppose, for example, the law said to an individual who owed money to a creditor, "give over any savings you now have in the bank or we will send you to prison." We are, in this situation, also forcing a debtor to make a choice in a coercive context. However, the intolerability of the choice is diminished because the alternative (turning over savings) is not offensive in the same way as requiring a debtor to work. A savings account is not so inextricably linked with personal identity as is future labor.[133] To be sure, the savings may have been generated by labor, but it is the nexus to ongoing labor that is troubling.

That labor must not be extorted by threats of imprisonment can be seen in contract law.[134] In particular, a person who breaches an employment agreement will not be exposed to a decree of specific performance (*i.e.*, forced to work on threat of imprisonment), even though his commitment to work was entered into voluntarily.[135] A person who agrees to

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scribed as "easy" and "clear," it is a matter of considerable debate whether indeed individuals making difficult choices are coerced.

129 *See supra* note 113.

130 Consider the following example. If someone points a gun at a laborer's head and says: "Work or I'll blow your brains out," there is a choice. The laborer could choose to die rather than continue to work for the gunman. Whether we want individuals to have to make that choice is a different issue and one that calls into question notions of individualism and paternalism. *See generally* Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) [hereinafter Kronman, *Paternalism*]; Rosenfeld, *Contracts and Justice: The Relation Between Classical Contract Theory and Social Contract Theory*, 70 IOWA L. REV. 769 (1985). For an interesting recent critique of Kronman's position, see Note, *Paternalism and Contract*, 10 CARDOZO L. REV. 593 (1989). *See also* Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79, 85-86 (1981).

131 *See* Stanley, *supra* note 5.

132 This point is made by Professor Sullivan in the context of determining whether coercion is a sufficient basis for finding a condition unconstitutional. *See* Sullivan, *supra* note 20.

133 *See* Radin, *supra* note 80; Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Professor Radin distinguishes between fungible and personal property, suggesting that alienability is intuitively more problematic in the context of personal attributes. Radin also points out that to separate labor from ourselves is to "do violence to our ideal of personhood." Radin, *supra* note 80, at 1918 n.248. Indeed, she links personhood and labor with freedom and identity. *Id.* at 1919 n.250.

134 *See generally* E.A. FARNSWORTH, *supra* note 91; Schmidt, *supra* note 76.

135 *See* J. DAWSON, W. HARVEY & S. HENDERSON, CONTRACTS (1987); E.A. FARNSWORTH, *supra* note 91; Bosch, *Enforcement Problems of Personal Service Contracts in Professional Athletics*, 6 TULSA L.J. 40 (1969); Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law; With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Kronman, *Paternalism*, *supra*

work for another upon threat of imprisonment, however, can be said to be under duress.[136]

At least prior to the addition of sections 707(b), 1325(b) and 1329(a), the Bankruptcy Code revealed the distinction between tolerable and intolerable choices and a sensitivity toward coerced labor.[137] As noted earlier, individual debtors were free to choose[138] whether they wished to liquidate under Chapter 7 (and obtain a narrower discharge) or reorganize under Chapter 13 (and obtain an expanded discharge).[139] This position is reinforced by provisions of the Code which have not been amended. The Code, then and currently, gives the debtor an absolute right to convert his own Chapter 13 case[140] to a Chapter 7 case and to convert his Chapter 7 case to a Chapter 13 case.[141] The debtor has the right, except in limited situations, to obtain dismissal of his Chapter 13 case.[142] Only a debtor can propose a Chapter 13 plan,[143] and creditors, who do not vote on a Chapter 13 plan, are bound by its terms if the plan comports with the requirements of the Bankruptcy Code.[144]

In addition, debtors cannot be forced into Chapter 13, because to do so would be to coerce labor from the debtor.[145] Thus, a creditor can only initiate a case under Chapters 7 and 11. No involuntary Chapter 13 case is allowed.[146] The Code also prohibits creditors from converting the individual debtor's case from Chapter 7 to Chapter 13, as that would be tantamount to accomplishing indirectly what the Code explicitly prohibits under section 303.[147]

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note 130; Kronman, *Specific Performance*, *supra* note 91; Linzer, *supra* note 117, at 381-82; Means, *supra* note 76.

136 There is a rich contract literature on duress. *See* RESTATEMENT (SECOND) ON CONTRACTS §§ 174-76. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. LAW & ECON. 293 (1975); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Murphy, *supra* note 130.

137 Choice is still recognized as important by some of the 1984 amendments. *See* 11 U.S.C. § 342(b) (1988) and Official Form One.

138 The Code may not be the only factor that militates in favor of particular debtor choices. Seeking relief under a particular chapter may be a matter of geography—Chapter 13s are more prevalent in some areas of the country than others. *See* Bermant, The Psychology of Bankruptcy: Constitutional and Statutory Background (unpublished manuscript on file with author). Attorney counselling may also affect choice. *See* Neustadler, *When Lawyer and Client Meet: Observation of the Interviewing and Counselling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986). For a range of considerations in choosing bankruptcy relief, see Sullivan, Warrent & Westbrook, *Folklore and Facts*, *supra* note 16; *see also* AS WE FORGIVE OUR DEBTORS, *supra* note 16.

139 11 U.S.C. §§ 109, 301. R. JORDAN & C. WARREN, BANKRUPTCY 662-63 (1989); B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL (1986).

140 *See* 11 U.S.C. § 1307 (1988).

141 *See id.* at § 706.

142 *See id.* at § 1307(b).

143 *See id.* at § 1321.

144 *See id.* at § 1325.

145 *See id.* at § 303(a). There is an anomaly created by § 303(a) which only permits involuntary Chapter 7 and 11 cases. Because an individual is eligible, at least in some jurisdictions, for relief in Chapter 11, a creditor can force a debtor to reorganize and the protection accorded from involuntary Chapter 13 cases is lost. Courts confronting this issue have been reluctant to permit a result that creates something tantamount to an involuntary reorganization of an individual debtor. *See In re* Noonan, 17 Bankr. 793 (Bankr. S.D.N.Y. 1982); *In re* Graham, 21 Bankr. 235 (Bankr. N.D. Iowa 1982).

146 *See* 11 U.S.C. § 303 (1988).

147 *See id.* at § 706. Again, a problem arises in the context of conversion of an individual's case from Chapter 7 to Chapter 11. Courts treating creditor efforts to convert have treated the conver-

Like the anti-peonage laws, the Code restricts the debtor's ability to waive certain freedoms by contract.[148] That is, one freedom is sacrificed so that another freedom is preserved.[149] Under the Bankruptcy Code, the debtor is explicitly precluded from waiving his right to affect conversion and to obtain a discharge.[150] A debtor cannot, in advance, acquiesce to an involuntary Chapter 13 proceeding.[151] A debtor can only reaffirm his prior obligations if certain standards—designed to promote fairness and prevent strong-arming—are satisfied.[152]

These limitations are based, at least in part, on thirteenth amendment concerns; we do not want debtors to be enslaved to their creditors.[153] There is a recognition that requiring debtors to work for creditors in an involuntary Chapter 13 case, even if they agreed to do so, is not tolerable. What makes an involuntary Chapter 13 case particularly troubling is that plan confirmation requires a debtor to work.

Much of the foregoing analysis is contradicted by the 1984 amendments to the Bankruptcy Code which, as applied by some courts, eliminate free choice for debtors and consequently coerce entry into Chapter 13.[154] The underlying rationale for debtor choice has been forgotten. It is the addition of Section 707(b) that provides the instrument of coercion.[155] Section 707(b) allows dismissal of Chapter 7 cases for "substantial abuse."[156] By denying some (but not all) debtors access to Chapter 7 under this standard, the level of coercion on debtors has been greatly expanded. Although before 1984 the Code encouraged use of Chapter 13 by the promise of an expanded discharge, now bankruptcy courts are encouraging the use of Chapter 13 by threatening to deny any discharge at all.

This is evident in the Smith hypothetical. Under the 1984 amendments, Smith can be denied access to Chapter 7. For Smith, the issue is whether he should reorganize under Chapter 13 (thereby allocating his

sion as if it were from Chapter 7 to Chapter 13, thereby avoiding an involuntary reorganization case against a debtor. *See In re* Noonan, 17 Bankr. at 799-800; *In re* Graham, 21 Bankr. at 239; *In re* Brophy, 49 Bankr. 483, 484 (Bankr. D. Haw. 1985); *In re* Ironsides, 34 Bankr. 337, 338 (Bankr. W.D. Ky. 1983); *In re* Worthington, Bench Order, Feb. 2, 1983, *aff'd*, Order dated Aug. 8, 1983; *In re* Freunscht, 53 Bankr. 110, 112 (Bankr. D. Vt. 1985).

148 *See* 11 U.S.C. §§ 524(a)(1), 706(a) & 1307(a) (1988).

149 There is obviously a degree of paternalism in this situation. *See* Kronman, *Paternalism*, *supra* note 130.

150 *See* 11 U.S.C. §§ 706(a), 1307(a) (1988). For an effort to justify these prohibitions on waiver from a libertarian perspective, see *supra* note 10, at 1398-1424, which offers justifications based on a variety of theories, including heuristics. *See* JACKSON, LOGIC AND LIMITS, *supra* note 10. *See also* Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647 (1988).

151 *See* 11 U.S.C. § 303(a) (1988).

152 *See id.* at § 524(c). *See* Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36 (1971).

153 There are, of course, other normative values supported by making certain debtor options non-waivable. For example, one can argue based on an economic rationale that creditors are likely to recover more rather than less if debtors choose to reorganize rather than being forced to do so. Moreover, there is an administrative burden that is placed on the bankruptcy system if we must police involuntary reorganizations with no assurance that we could motivate and monitor consistently or well.

154 11 U.S.C. §§ 707(b), 1325(b). *See* Gross, *supra* note 13; R. JORDAN & C. WARREN, *supra* note 73.

155 *See* R. JORDAN & C. WARREN, *supra* note 73.

156 *See supra* note 14.

income to creditors and obtaining a discharge) or submit to state law. But, Smith's situation is more extreme than this. Because of the tort judgment and bad check, Smith could be imprisoned under state law.[157] Moreover, working outside of Chapter 13 would not eliminate the threat of imprisonment. Smith, then, must use Chapter 13 if he is to avoid imprisonment. The Smith hypothetical suggests that there is a criminal law threat for certain individual debtors. If that is so, then using the threat of section 707(b) dismissal to coerce entry into Chapter 13 violates the antipeonage laws.

It is true that Chapter 13, unlike the statute-directed peonage cases,[158] does not, in and of itself, create a criminal law threat.[159] As written, Chapter 13 does not punish debtors by imprisonment.[160] At least facially, the consequence of not working in a Chapter 13 case, in light of section 707(b), is that a debtor forgoes a discharge.[161] Moreover, a change in what are and are not tolerable alternatives for financially troubled individuals is not, in and of itself, constitutionally offensive or impermissible. Congress can, at any time, reassess the balance of rights between debtors and creditors. Congress could decide to eliminate either or both Chapters 7 and 13 without constitutional law problems. Limitations on the scope of the bankruptcy discharge have been the subject of congressional action since the existence of the first federal bankruptcy laws.[162] However, if debtor choice entails criminal law exposure, an unconstitutional condition has been created; the greater power does not include the lesser. Stated differently, Congress cannot accomplish indirectly what it could not achieve directly (*i.e.*, mandatory Chapter 13).

157 A Chapter 7 case would not eliminate this possibility *in toto*. *See supra* note 47.

158 *See* Pollock v. Williams, 322 U.S. 4 (1944); United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911).

159 Earlier versions of our federal bankruptcy laws did contain criminal law components, and such a linkage had historical antecedents. In fact, the removal of the bankruptcy crimes provisions from the Bankruptcy Act was not intended to have substantive impact.

Until 1948, all crimes involving bankruptcy were contained in the applicable bankruptcy statute. *See* Act of April 4, 1800, 2 Stat. 19, §§ 21-23; Act of 1867, 14 Stat. 517, §§ 44-46; Bankruptcy Act of 1898, 30 Stat. 544, § 29. In 1948, after amendment on several occasions, § 29 was deleted from the federal Bankruptcy Act and transferred, as part of a general codification of the federal criminal laws, to Title 18 of the United States Code. *See* H.R. 5221, 69th Cong., 1st Sess. (1926); *See also* 2A COLLIER ON BANKRUPTCY, ¶ 29.01 (14th ed. 1978); H.R. 3190, 80th Cong., 2d Sess. (1948). The provisions of the old § 29 formed §§ 151-55 of Title 18. The bankruptcy crimes have remained in Title 18, although certain conforming changes were required upon passage of the Bankruptcy Code in 1978. *See* 2A COLLIER ON BANKRUPTCY, ¶ 29.15 (14th ed. 1978).

160 The bankruptcy crimes sections within Title 18 also do not punish debtors by imprisonment for failure to partake of the benefits of Chapter 13. *See* 18 U.S.C. §§ 151-55 (1988).

161 *See* 11 U.S.C. § 1307 (1988). The court in *In re* Doyle, 11 Bankr. 110 (Bankr. E.D. Pa. 1981), explicitly held that a creditor's remedy for failure of a debtor to complete his plan payments is dismissal or denial of discharge. Mandatory injunctions and contempt orders are not, the court observed, available options.

Indeed, there is a specific provision, 11 U.S.C. § 1328(b) (1988), which permits a debtor to obtain a discharge even if he cannot complete plan payments if there are exceptional circumstances. This hardship discharge is narrower than the standard completion discharge of Chapter 13. *See* 11 U.S.C. § 1328(c). *See also In re* Doyle, 11 Bankr. at 110; *In re* Marrero, 7 Bankr. 589 (Bankr. D.P.R. 1980).

162 For example, in 1984, Congress added two new exceptions to discharge. *See* 11 U.S.C. §§ 523(a)(2)(C), (a)(9). There is also proposed legislation to change § 523(a)(8) to provide that loans made within the last 7 as opposed to 5 years are non-dischargeable. *See* S. 84, introduced by Sen. Joseph Biden, passed Senate on Nov. 3, 1989; referred to House Comm., Nov. 8, 1989.

At that point, the 1984 amendments pass beyond coercive-but-constitutional measures into the realm of peonage.

### C. *Criminal Law Exposure*

There is an important exception to the thirteenth amendment that must be considered before a judgment can be made that Smith or similar debtors were coerced. Under the thirteenth amendment, individuals convicted of crimes can be made to work against their will.[163] Thus, it has been held that incarcerated prisoners can be made to work as part of their punishment.[164] Moreover, the exception to the thirteenth amendment has been extended beyond the literal language of the amendment to what have been termed exceptional circumstances.[165] For example, merchant sailors and public utility workers can be compelled to work.[166] Persons can be required to perform public work, such as building roads and bridges.[167] Parents can be required to support their children and spouses can be compelled to work to pay alimony.[168]

The exceptions to the thirteenth amendment make clear that in certain circumstances the values sought to be preserved by the amendment (*i.e.*, freedom from coercion) can be subordinated to other values. One method for effecting this subordination is by criminalizing the conduct deemed offensive. Thus, if certain conduct is criminalized, requiring personal labor as punishment for that conduct does not violate the thirteenth amendment.[169]

However, in cases under the thirteenth amendment and statutes barring imprisonment for debt, courts have wrestled with whether all conduct can be criminalized, thereby avoiding the thirteenth amendment's

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163 *See* U.S. CONST. amend. XIII, § 1. As expressed by the Court in United States v. Reynolds, 235 U.S. 133, 149 (1914): "There can be no doubt that the State has authority to impose involuntary servitude as punishment for crime." *See also* United States v. Kozminski, 108 S. Ct. 2751, 2760 (1988); Misner & Clough, *supra* note 76; ANTIEAU, MODERN LAW, *supra* note 76; SCHWARTZ, COMMENTARY, *supra* note 76.

164 *See, e.g.*, Draper v. Rhay, 315 F.2d 193 (9th Cir. 1963), *cert. denied*, 375 U.S. 915, *reh'g denied*, 375 U.S. 982 (1964); *Opinion of the Justices*, 121 N.H. 531, 431 A.2d 144 (N.H. 1981). *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); SCHWARTZ, COMMENTARY, *supra* note 76; ANTIEAU, MODERN LAW, *supra* note 76.

165 *See* United States v. Kozminski, 108 S. Ct. 2751, 2760 (1988):

> Similarly, the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civil duties. . . . [T]he thirteenth amendment was not intended to apply to "exceptional" cases well established in the common law at the time of the thirteenth amendment.

(citations omitted). *See also* Bobilin v. Board of Ed., 403 F. Supp. 1095 (D. Haw. 1975). *See* SCHWARTZ, COMMENTARY, *supra* note 76; ANTIEAU, MODERN LAW, *supra* note 76.

166 *See* Robertson v. Baldwin, 165 U.S. 275, 282-83 (1897) ("[i]t is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional. . . . From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract").

167 *See* Butler v. Perry, 240 U.S. 328 (1916).

168 *See In re* Marriage of Dennis, 117 Wis. 2d 249, 344 N.W.2d 128 (1984); Johansen v. State, 491 P.2d 759 (Alaska 1971); Hickland v. Hickland, 39 N.Y.2d 1, 382 N.Y.S.2d 475, 346 N.E.2d 243 (1976), *cert. denied*, 492 U.S. 941, *rev'd on other grounds*, 393 N.Y.S. 192 (1977). *But see In re* Jennings, 133 Cal. App. 3rd 373, 184 Cal. Rptr. 53 (1982) (finding involuntary servitude).

169 *See generally* 45 AM. JUR. 2d *Involuntary Servitude and Peonage* §§ 7-10 (1969).

prohibition by fitting within its exception.[170] Suppose, for example, a state sought to criminalize all non-payment of debt. The court in *Drayton*[171] foresaw no problem in enforcing a statute that punished individuals who obtained money fraudulently because, in that context, one is punishing the fraud, not compelling service. However, the court was unwilling to determine whether a statute punishing the mere failure to pay a debt was permissible.[172]

If we were to permit criminalization of an individual's election not to work, thereby fitting within the thirteenth amendment's explicit exception, then the entire purpose of the amendment would be nullified.[173] The exception would become the norm, and the norm the exception. Individuals would, in essence, be required by criminal law to perform their personal service contracts. This runs contrary to both contract law and thirteenth amendment notions.[174] Indeed, the anti-peonage cases have repeatedly held that the utilization of a criminal statute for the purpose of exacting repayment does not eliminate a peonage claim.[175] In fact, the vast majority of statute-directed peonage cases struck down criminal statutes which were vague or utilized to threaten individuals into working—notwithstanding facially acceptable language.[176]

This discussion impacts on our analysis in the following manner. We have to ask whether the hypothetical Smith is required to work in a Chapter 13 case because state law has criminalized the non-payment of the tort judgment and the issuance of checks for insufficient funds.[177] If

170 *See* Schmidt, *supra* note 76, at 704-08; *see also, e.g.*, *Ex parte* Drayton, 153 F. 986 (D.S.C. 1907); *In re* Milecke, 52 Wash. 312, 100 P. 743 (1909); State v. Barklind, 87 Wash. 2d 814, 557 P.2d 314, 318 (1977).

171 153 F. 986 (D.S.C. 1907).

172 *See id.*

173 This is not the view taken by Justice Holmes who observed in a rather vituperative dissent in United States v. Reynolds, 235 U.S. 133 (1914): "There seems to me nothing in the thirteenth amendment . . . that prevents a State from making a breach of contract . . . a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain . . . ." *Id.* at 150. *See also* Schmidt, *supra* note 76.

174 This link is noted in ANTIEAU, MODERN LAW, *supra* note 76, at 639.

175 *See, e.g.*, United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911). As expressed by the Court in *Reynolds*, "[t]he validity of this system of state law must be judged by its operation and effect upon rights secured by the Constitution . . . . If such State statutes, upon their face, or in the manner of their administration, have the effect to deny rights secured by the Federal Constitution or to nullify statutes passed in pursuance thereto, they must fail." *Id.* at 148-49. *See also* Taylor v. Georgia, 315 U.S. 25 (1942).

176 *See supra* note 99.

177 State constitutions generally prohibit imprisonment for debt. For examples of this type of constitutional provision, see, *e.g.*, FLA. CONST. art. I, § 11, which provides: "No person shall be imprisoned for debt, except in cases of fraud"; ILL. CONST. art. I, § 14, which provides in relevant part: "No person shall be imprisoned for debt unless he refuses to deliver up his estate for the benefit of his creditors as provided by law or unless there is strong presumption of fraud . . . ."; TEX. CONST. art. I, § 18, which provides: "No person shall ever be imprisoned for debt."

These general bans, are accompanied by distinct exceptions, however. For example, in Illinois, tort actions have been deemed to fall outside the scope of the applicable constitutional provision. *See* Lipman v. Goebel, 357 Ill. 315, 192 N.E. 203, *cert. denied*, 294 U.S. 712 (1934); Shatz v. Paul, 7 Ill. App. 2d 223, 129 N.E.2d 348 (1955).

There are also "bad check" laws in most jurisdictions. *See* Kratsch & Young, *supra* note 69; Rice, *supra* note 69; McCafferty & Bubis, *supra* note 25; Handel & Reinhardt, *Inhibiting Post Petition "Bad Check" Criminal Proceedings Against Debtors: The Need for Flexing More Judicial Muscle*, 89 COM. L.J. 236 (1984); Lewis & Jennings, *Bad Checks and Bankruptcy: The Federal/State Dilemma*, 57 FLA. B.J. 531 (1983). *See, e.g.*, TEX. PENAL CODE ANN. § 32.41; ALA. CODE §§ 13A-9-13.1 to 13A-9-13.3 (1975);

Smith is being punished for a crime and can permissibly be required to work under state law, then the choice for Smith between working or losing a Chapter 7 discharge and facing prison cannot be considered coercive; it is conduct that falls within the exception to the thirteenth amendment.[178] The doctrine of unconstitutional conditions would not be implicated.

There are several responses to this concern—all of which lead to the conclusion that the situation confronting Smith does not fall within any exceptions and is, indeed, coercive. As a threshold matter, Smith has not yet been convicted of a crime; it is the threat of being prosecuted and convicted that prompts his election into Chapter 13. Therefore, the exception to the thirteenth amendment cannot apply,[179] as under the precise language of that amendment, only convicts can be made to work.[180]

Further, the argument that the hypothetical Smith fits within the thirteenth amendment's exception would have greater appeal if the state statutes in question were both intended and utilized to punish for criminal behavior.[181] There is increasing evidence that, in reality, the state statutes in the hypothetical are utilized as mechanisms for exacting payment.[182] That is, the states are less concerned with the criminal act committed than the realization of proceeds for creditors. These proceeds are generated because debtors fear the consequences of being charged and convicted of a crime. The bad check laws are criminal laws in name but not in purpose.[183]

The recent Supreme Court decision in *Kelly v. Robinson*[184] inadvertently presents an argument that supports peonage implications—at least in the context of restitution orders. Indeed, restitution orders operate in

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FLA. STAT. § 832.05(2)(1981); TENN. CODE ANN. § 39-3-301 (1982). *See also, e.g.*, Colin v. State, 168 S.W.2d 500 (Tex. Crim. App. 1943).

For bankruptcy court treatment of these issues, see *In re* Goodman, 34 Bankr. 23 (Bankr. D. Ore. 1983); Holder v. Dotson (*In re* Holder), 26 Bankr. 789 (Bankr. M.D. Tenn. 1982); Taylor v. Widdowson (*In re* Taylor), 16 Bankr. 323 (Bankr. D. Md. 1981), *rev'd*, 44 Bankr. 548 (D. Md. 1984); Whitaker v. Lockert (*In re* Whitaker), 16 Bankr. 917 (Bankr. M.D. Tenn. 1982).

178 This approach is closer to the *Younger* standard referred to by Rice, a standard which is more favorable to creditors than the primary motivation standard. *See* Rice, *supra* note 69.

179 *See* Misner & Clough, *supra* note 76, who suggest such an argument in the context of informants.

180 A similar argument has been made that government informants are peons. *See* Misner & Clough, *supra* note 76. The argument runs as follows: Individuals who are arrested (not convicted) and who, at the government's request, act as informants do so to avoid imprisonment. Since the informants have not been duly convicted, their working as informants cannot be justified (and indeed required) by the exception to the thirteenth amendment's ban on involuntary servitude. *Id.*

181 While the validity of this statement is ultimately an empirical matter, the current articles on bad check prosecutions support the statement made. *See* Rice, *supra* note 69; Kratsch & Young, *supra* note 69; McCafferty & Bubis, *supra* note 25; Hendel & Reinhardt, *supra* note 176; Lewis & Jennings, *supra* note 176; *In re* Whitaker, *supra* note 176.

182 *See supra* note 47. As expressed by Kratsch & Young, *supra* note 69:

> Use of state criminal laws to coerce the collection of discharged debts is a nationwide problem. [B]ad debt prosecutions in Florida prompted two state district attorneys to warn other state prosecutors of potential conflicts with the federal bankruptcy law and to advise prosecutors to "refrain from plea bargaining in all worthless check cases" to avoid having their actions "deemed debt servicing."

*Id.* at 108. This point is expressed by Judge Paine in *In re* Whitaker, 16 Bankr. 917 (Bankr. M.D. Tenn. 1982). Bad check laws place a debtor between "a rock and a hard place." *Id.*

183 *See* Kratsch & Young, *supra* note 69, at 107-09.

184 479 U.S. 36 (1986).

much the same way state bad check laws operate in terms of their coercive effect on debtors.

Prior to *Robinson*, many Chapter 7 debtors successfully asserted that restitution orders were dischargeable as they were non-punitive and represented repayment of a monetary obligation.[185] Debtors asserted that, while technically a criminal order, restitution orders circumvented discharge by creating a vehicle to collect civil debt in the guise of criminal law.[186] These arguments notwithstanding, the Supreme Court held the obligations under such orders to be non-dischargeable in Chapter 7.[187]

The Supreme Court, however, did not address the dischargeability of such orders in Chapter 13.[188] Given the expanded discharge in Chapter 13, it is possible to discharge a restitution order through working for creditors.[189] For the individual debtor, working in Chapter 13 is a way of avoiding imprisonment.[190] Therefore, the fact that criminal restitution orders can be discharged in Chapter 13 means that the alternative to working (in Chapter 13) is imprisonment.[191] Ironically, then, *Robinson* inadvertently makes a better argument for a finding of peonage in the bankruptcy context than the section 707(b) cases do. If it is accurate that restitution orders are criminal law proceedings, even if in name only, then a debtor is required to work in Chapter 13 to avoid the threat of imprisonment.

A useful historical argument can also be made in respect of restitution orders. In earlier times, bankruptcy was formally treated as a crime.[192] Debtors were, in essence, criminals. The acts of a bankrupt debtor were criminal acts. Under more recent bankruptcy law, at least at the level of appearance, the mere fact of being in debt and seeking relief under the bankruptcy laws has not been criminalized.[193] Seeking relief does not constitute a criminal act. We have ostensibly moved from treating bankrupt debtors as perpetrators of a wrong to being victims of cir-

185 *See, e.g., In re* Robinson, 776 F.2d 30 (2d Cir. 1985).

186 *See supra* note 47.

187 *See* Kelly v. Robinson, 479 U.S. 36, 39 (1986).

188 As noted, *supra* note 47, recent case law has extended the *Kelly* analysis into Chapter 13 cases. Indeed, there has been some movement in Congress to specifically amend § 1328 to preclude discharge of restitution orders.

189 The exceptions to discharge in a Chapter 13 case are substantially narrower than in a Chapter 7 case. *See* 11 U.S.C. § 1328(1) (1988). It is possible that, notwithstanding the expanded Chapter 13 discharge, a state court could still seek to pursue the state criminal laws for issuance of a bad check. *See supra* note 70. Whether this would create a problem in view of 11 U.S.C. §§ 524 and 1328 is an issue that remains unresolved. *See* Pennsylvania Dept. of Pub. Welfare v. Johnson-Allen, 871 F.2d 421 (3d Cir. 1989), *cert. granted, sub nom.*, Pennsylvania Dept. of Pub. Welfare v. Davenport, 110 S. Ct. 49.

190 McCafferty and Bubis suggest that Chapter 13 is a way of circumventing *Kelly v. Robinson*. *See supra* note 25, at 36.

191 This possibility is recognized by McCafferty and Bubis in the context of California's use of restitution as a method of punishment for crimes. A defendant can "purchase" probation during a trial. In asking whether this system is now legitimized by *Kelly*, the commentators drop a footnote referring to the thirteenth amendment and State v. Enloe, 47 Wash. App. 165, 734 P.2d 520 (1987), which invalidated a state statute which used imprisonment to force repayment.

192 *See* Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1926); Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427 (1974); Washer, *Imprisonment for Debt*, 7 GREEN BAG 410 (1895).

193 *See* Gross, *supra* note 13; Hallinan, *supra* note 9; Kennedy, *supra* note 191.

cumstance, including their own bad judgment.[194] The de-criminalization of bankruptcy becomes less meaningful if we start treating the debtor's non-payment of certain categories of debt as criminal. Therefore, the current movement respecting restitution orders and bad check prosecutions moves us back toward treating bankrupt debtors as criminals and less like victims of unfortunate circumstances. This shift, a result of the 1984 amendments, leads us backwards—at least in time and perhaps in moral philosophy as well.[195]

Several observations are in order at this juncture. I am not arguing that Chapter 13 *per se* presents an unconstitutional condition. As noted earlier, the Bankruptcy Code itself does not contain a criminal law component and the Code does not make it a crime for an individual not to carry out a previously agreed-upon plan of reorganization.[196] There are, to be sure, bankruptcy crimes, but these crimes primarily punish parties for fraud and concealment before and during a case.[197] To the extent a debtor is unwilling or unable to carry out a Chapter 13 plan, no criminal penalty exists. Instead, a debtor's case is simply dismissed.[198] Accordingly, an individual debtor who embarks on a Chapter 13 plan can change his mind at any time without fear of prosecution under the federal bankruptcy laws. The sole consequence of the debtor's election not to reorganize—absent state law consequences—is forfeiture of a discharge under Chapter 13. Another chapter of the Code, such as Chapter 7 or 11, might remain available as a route to discharge. If the individual were not eligible for relief under another chapter, he could not obtain a discharge. He would be left with the state law options—and therein lies the rub.

For the debtor (unlike Smith) whose state law options do not involve a state criminal law exposure, there is no legal restraint, at least in the strict sense adopted by the court in *United States v. Kozminski*,[199] and

194 *See* Gross, *supra* note 13; Hallinan, *supra* note 9; Howard, *supra* note 10. The "traditional" notion is that bankruptcy is available to the "honest but unfortunate debtor." The phrase has been attributed to Local Loan v. Hunt, 292 U.S. 234 (1934), by Dean Jackson. *See* JACKSON, LOGIC AND LIMITS, *supra* note 10, at 236. Professor Howard suggests that it dates back to Neal v. Clark, 95 U.S. 704 (1877). *See* Howard, *supra* note 10, at 1047 n.1.

Actually, the phrase can be traced to cases from 1869. *See In re* Muller, 17 F. Cas. 971 (C.C.D. Ore. 1869) (No. 9,912) ("[i]t is intended to relieve the honest but unfortunate debtor from the burden of liabilities"). In fact, similar phraseology can be found in BLACKSTONE'S COMMENTARIES, App. 256-260 (1983), *reprinted in* 1 FOUNDERS CONSTITUTION, 621 (P. Kurland & R. Lerner, eds. 1987) ("but what pretence can justify depriving an innocent, though unfortunate man, of his liberty . . ."). Similar phraseology shows up in the seventeenth century as well. *See* Bermant, *supra* note 138.

195 *See* B. WEISS, *supra* note 11.

196 *See supra* note 159 and accompanying text.

197 *See* United States v. Weinstein, 834 F.2d 1454 (9th Cir. 1988); United States v. Roberts, 783 F.2d 767 (9th Cir. 1985); United States v. Moss, 562 F.2d 155 (2d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); Interstate Finance Corp. v. Scrogham, 265 F.2d 889 (6th Cir. 1959).

There have been flurry of recent cases on false oaths. *See* United States v. Rowland, 789 F.2d 1169 (5th Cir. 1986), *cert. denied*, 479 U.S. 964; United States v. Ballard, 779 F.2d 287 (5th Cir. 1986), *cert. denied*, 475 U.S. 1104; United States v. Jackson, 836 F.2d 324 (7th Cir. 1987).

198 *See* 11 U.S.C. § 1307(b) (1988). If, on the other hand, the debtor lied in his schedules or his monthly statements, the issue would be different.

199 108 S. Ct. 2751 (1988).

hence no coercion.[200] The debtor would choose not to work, which would have no adverse consequences (other than lack of current income), or he could work to find his wages garnished.

Moreover, neither am I arguing that bad check laws are *per se* unconstitutional. I am not arguing that a state's utilization of a restitution remedy is *per se* unconstitutional. What I am suggesting is that there is an elimination of free choice for certain low asset/high income debtors. This elimination and the consequences that flow from it—in light of the intersticial nature of bankruptcy legislation—create an unconstitutional condition.

This position is not altered by the realization that the threat of prosecution under the applicable state law is remote. A subjective fear (or the lack of it) does not legitimate the coercion of Chapter 13 plans. Coercion ought not to be defined by whether the local prosecutor effectively implements state law, but whether the possibility (remote or not) of prosecution exists.[201] Even if the bad check laws are truly civil remedies masquerading as criminal laws, it is not for debtors to decipher the intended use of the criminal laws or to guess at prosecutorial discretion. The existence of these criminal laws is enough to justify a threat.[202]

The argument can be restated forcefully in the following way. One of the roles the anti-peonage laws play is to strike down statutes that provide for imprisonment for failing to work. If, as shown, section 707(b), in concert with state criminal law, is used to coerce debtors into Chapter 13, then an unconstitutional condition is created. The offending statutory provision, in this instance section 707(b), should be struck down. It cannot be an adequate objection to this conclusion that it is two laws—one federal and one state—which combine to create the peonage relationship. Nor can apathy (or, indeed, discretion) of local prosecutors be cited to say there is no federal component to the alleged peonage system. Federal courts must see to their own bailiwick and interpret the federal law—section 707(b)—in a way that avoids the fatal combination.

In any case, who can say that the possibility of criminal prosecution is remote? For a debtor, the threat of imprisonment may be very real. If

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200 Consider the young doctor who incurred substantial credit card debts while in medical school and now seeks to liquidate. Assume he has no tort judgment entered against him and has issued no bad check. If the doctor is denied an opportunity to liquidate because of an expansive interpretation of § 707(b), his future income will be applied to creditor payments in a Chapter 13 case—if he wants to obtain the benefits of the Chapter 13 discharge. Since some of his debts might be non-dischargeable in a Chapter 7 case, the doctor's discharge in a Chapter 13 case would be more expansive and the added scope of discharge can be viewed as the *quid pro quo* for his election to work for his creditors. Alternatively, the doctor can forego bankruptcy relief altogether, whereupon the creditors will seek collection under state law (*e.g.*, through attachment, garnishment). Even if he stops working, the doctor does not risk imprisonment.

Under the scenario presented, at no time is the doctor forced to work. He may want a discharge in which event he will have to work for the benefit of his creditors. However, the choices confronting the hypothetical doctor are not intolerable in the same way as those confronting the hypothetical Smith. The choices may be considered draconian or improper as a matter of policy (*i.e.*, we want to encourage, not discourage, doctors to work for the sake of the public good) but they are not readily parallel to the legal restraint reflected in the peonage cases.

201 *See In re* Taylor, 16 Bankr. 323 (Bankr. D. Md. 1981), *rev'd*, 44 Bankr. 548 (D. Md. 1984); *In re* Whitaker, 16 Bankr. 917 (Bankr. M.D. Tenn. 1982).

202 *See* Hendel & Reinhardt, *supra* note 177; Lewis & Jennings, *supra* note 177.

the thirteenth amendment stands for the freedom and autonomy of every person, we can hardly suggest that a peonage situation cannot exist because state law officials, as an objective matter, are unlikely to prosecute. Moreover, it is not an acceptable solution to say that Smith's situation is not coercive as long as states conduct themselves appropriately and only use the bad check laws to punish rather that simply collect. That is too risky a proposition. Given potential imprisonment for debt and construction of section 707(b) in an expansive as opposed to narrow fashion, then the situation confronting Smith is coercive. And it will remain coercive until either state law is reformed or the liquidation option under the federal bankruptcy laws is restored.

## V. Application of the Unconstitutional Condition Doctrine

It is beyond the purview of this Article to assess the completeness of the existing arguments used to justify the finding of an unconstitutional condition.[203] For our purposes, it is sufficient to observe that a host of theories have been asserted to justify finding a condition unconstitutional: coercion of the beneficiary,[204] manipulation of the legislative process,[205] preservation of choice, including the inalienability of certain rights,[206] and government encroachment on private autonomy.[207]

Interestingly, strands of each of these theories can also be found in efforts to establish the theoretical justifications of fresh start policy. Like the doctrine of unconstitutional conditions, the foundation of the fresh start policy has, to date, not received satisfactory discussion; however, a full exploration of these issues will have to await another day. Several preliminary observations can be made though. These observations serve two functions. They support the finding of an unconstitutional condition in the situation presented by the Smith hypothetical. They also suggest some of the deep-seeded values underlying the fresh start policy—values we should not dismiss inadvertently through judicial interpretation.

In *United States v. Kozminski*, the Supreme Court articulated a narrow definition of coercion for purposes of peonage but debtors can be coerced in a variety of ways other than by physical and legal restraint.[208] Identifying constitutional but still coercive conduct in debtor/creditor relations is not at all uncommon.[209] We forbid dunning letters designed

203 *See* Epstein, *supra* note 20, and Sullivan, *supra* note 20, for examples of this type of analysis.
204 *See* Epstein, *supra* note 20, at 7.
205 *Id.*
206 *Id.*
207 *Id.*
208 108 S. Ct. 2751 (1988).
209 Indeed, there is an entire body of federal and state law designed to protect debtors from the actions of their creditors. These include the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1988); Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1988); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681f (1988); Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (1972) (as codified at 15 U.S.C. §§ 1666-1666j (1988)); Regulation M, Truth in Lending Regulations, 12 C.F.R. § 213 (1989); Federal Trade Commission Credit Practice Rules, 16 C.F.R. § 444 (1989); Federal Trade Commission Regulations for Door-to-Door Sales, 16 C.F.R. § 429 (1989); and the UNIFORM CONSUMER CREDIT CODE, 7 U.L.A. 17 (1974 & Supp. 1989) (adopted by approximately nine states). *See also* T. EISENBERG, *supra* note 67; H. ALPERIN & R. CHASE, CONSUMER LAW (1986); J. FONSECA, HANDLING CONSUMER CREDIT CASES (1986); J. FONSECA, CONSUMER CREDIT COMPLIANCE MANUAL

to exact swift repayment.[210] We forbid usurious interest rates as a way of facilitating early repayment.[211] We restrict a creditor's ability to exercise self-help in repossessing a debtor's property.[212] We require disclosure in credit transactions and mandate cooling off periods in selected consumer dealings.[213] In sum, our existing legal structure reveals a sensitivity toward debtors who may be coerced into repayment. This sensitivity is manifested by identifying and then curtailing the situations involving excessive force by creditors in their collection of what is owed them.

The notion of an expanded view of coercion is not unique to bankruptcy. Indeed, the contract notion of duress is considerably more expansive than the concept of coercion in the thirteenth amendment cases, and in recent years has been extended to include economic duress.[214] In contract cases, courts have permitted rescission where individuals are coerced into conduct from which they had no reasonable alternative—even though there was no legal or physical restraint.[215]

Such an expanded view of coercion has been used in the application of unconstitutional conditions.[216] The Bankruptcy Code's treatment of individual debtors can then, be seen as coercive—in the context of finding a condition unconstitutional. Like contract law's remedy of rescission, if debtors are coerced into reorganization, then that choice should be rescinded and the debtor permitted to liquidate.

The presence of coercion (from a bankruptcy as well as constitutional perspective) suggests the absence of autonomy, reciprocity and equality. It is these very values which are preserved by the anti-peonage laws and the fresh start policy—and by striking down unconstitutional conditions. At least part of what makes slavery so offensive is that it dehumanizes; it treats individuals as objects. As such, autonomy is absent. By forcing peons to work for the master, reciprocity is destroyed and equality is conspicuously absent in the master/slave relationship.

Like slavery's obliteration of self, the 1984 amendments to the Bankruptcy Code erode the debtor's self by denying him an opportunity to liquidate.[217] By forcing the use of Chapter 13 to obtain a discharge, which entails allocation of the debtor's labor to creditors,[218] the 1984

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(1986). As expressed by Alperin and Chase, "it can be said generally that in the debt collection context, harassment involves the use by a collector, often persistently, of intimidating or annoying behavior designed to *coerce* desired action by the debtor." 2 H. ALPERIN & R. CHASE, *supra*, at 371 (emphasis added).

210 *See generally* H. ALPERIN & R. CHASE, *supra* note 209; J. FONSECA, *supra* note 209; J. EISENBERG, *supra* note 6; MILLER & CLARK, CASES AND MATERIALS ON CONSUMER PROTECTION (1980).

211 *See id.*

212 *See* U.C.C. § 9-503; 3A U.L.A. 211 (1988). *See* Stone Machinery Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970). Moreover, there is considerable concern for due-process rights. *See* Fuentes v. Shevin, 407 U.S. 67 (1972). Some states have severely limited self-help repossession rights. *See* WIS. STAT. §§ 425.203-.206 (1987-1988); Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607.

213 *See supra* note 208.

214 *See* E.A. FARNSWORTH, *supra* note 91; Linzer, *supra* note 117, at 343-43. *See also* Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (Ct. App. N.Y. 1971).

215 RESTATEMENT (SECOND) OF CONTRACTS §§ 175-76 (1979).

216 *See* Sullivan, *supra* note 16.

217 The culprit is § 707(b). *See supra* note 14 and accompanying text.

218 *See supra* note 15 and accompanying text.

amendments move toward treating the individual as an object capable of generating income.[219] In so doing, the debtor's autonomy is curtailed. Reciprocity is also destroyed because the debtor must work rather than have the choice to work. The debtor also becomes subordinate, not equal, to the creditor for an extended period.

The case is not that simple, however. Absent competing or more significant values, the Bankruptcy Code appears objectionable because it erodes fundamental values which underlie the anti-peonage laws and contract law as well. It curtails individual choice. Yet, restrictions on debtor choice may, at some level, create other choices for debtors. For example, denying a discharge limits a debtor's ability to choose between liquidating and reorganizing. However, it may free up access to credit to individual debtors before the onset of financial trouble. As such, debtor choice in accessing credit may be one of the trade-offs for limiting discharge of that credit later. Therefore, the issue is not just one of limiting choice. The issue is one of optimizing a universe of contradictory choices.

Moreover, our analysis has focused only on the debtor's perspective. As such, it presents only part of the picture of debtor/creditor relations. The treatment of debtors is part of the larger question of what, as we noted earlier,[220] justifies the Chapter 7 discharge. That analysis requires that the interests of creditors and society at large be considered.[221]

One way to look at the competing principles in bankruptcy—fresh start and creditor recovery—is in terms of contract and tort paradigms.[222] Bankruptcy reflects elements of both contract and tort law. Like contract law, bankruptcy is concerned with commitments that cannot be fulfilled and the remedy, to use contract parlance, for the breach of these commitments.[223] Like tort law, bankruptcy is also concerned about the wrong committed by breaching and the impact of that wrong on the particular person affected (the creditor).[224]

Within this general framework, debtors have been treated more along a contract paradigm and creditors more along a tort paradigm.

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219 In addressing prosecution, baby-selling and surrogate motherhood, Professor Radin addresses the difficulty in commodifying certain things, and this leads her to suggest that, notwithstanding a market-based economy, certain items are inalienable. These ideals have relevance to the preservation of the liquidation option for individual debtors and seem to provide one of the building blocks in the development of the fresh start policy. *See* Radin, *supra* note 88. *See also* Sullivan, *supra* note 16.

220 *See supra* note 14 and accompanying text.

221 *See* AS WE FORGIVE OUR DEBTORS, *supra* note 15, at 273-327; Gross, *supra* note 13. In his book, *Bankruptcy Reorganizations*, Martin Bienenstock notes similar dual purposes in business cases which he articulates in terms of the equity policy (favoring equitable distribution to creditors of like rank) and the reorganization policy (favoring debtor restructuring). *See* M. BIENENSTOCK, BANKRUPTCY REORGANIZATIONS (1987).

222 This is obviously a topic which, to be fully developed, requires more space and attention than is allocated here. I suspect the paradigms will prove helpful in developing a better understanding of the fresh start policy.

223 *See generally* J. DAWSON, W. HARVEY & S. HENDERSON, *supra* note 135; E.A. FARNSWORTH, *supra* note 91.

224 *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON, ON TORTS (5th ed. 1984) [hereinafter PROSSER AND KEETON]; Stone, *Touchstones of Tort Liability*, 2 STAN. L. REV. 259 (1950).

This alignment can be explained as follows. Contract law generally permits breach without penalty.[225] Punitive damages are still the exception rather than the rule.[226] Specific performance is the unusual remedy and is virtually never granted in the context of personal services.[227] Breachers are required to pay damages out of existing assets although creditors can attach future earnings to the extent they are earned.[228]

The liquidation option in bankruptcy is equivalent to the payment of damages in the contract context. Debtors are required to pay creditors the equivalent of damages from existing assets.[229] Debtors are not punished for being unable to repay their creditors (*i.e.*, imprisonment).[230] Debtors, at least until passage of the 1984 amendments, were not required to work for their creditors.[231] However, if they choose to do so, some of the income generated by debtors would go to repay their obligations.[232]

At least in some conceptualizations, contract law at its core rests on principles of autonomy, reciprocity and equality.[233] To the extent the treatment of individual debtors most closely parallels a contract paradigm, the bankruptcy laws, *vis-á-vis* their treatment of individuals, seek to preserve the same values.[234]

On the creditor part of the equation, the creditors' belief in entitlement to repayment most closely resembles a tort paradigm. Tort law establishes the range of conduct we consider socially acceptable and punishes those who move outside the norms.[235] Denial of the liquidation option and the requirement that a debtor "pay the piper" is akin to as-

225 *See generally* J. DAWSON, W. HARVEY & S. HENDERSON, *supra* note 135; E.A. FARNSWORTH, *supra* note 91; Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

226 *See* Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31 (1989); Sebert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565 (1986); Sullivan, *Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977).

227 *See* J. DAWSON, W. HARVEY & S. HENDERSON, *supra* note 135. E.A. FARNSWORTH, *supra* note 91; Kronman, *Specific Performance supra* note 91. *See also* Schwartz, *The Case for Specific Performance*, 89 YALE L. J. 271 (1979).

228 *See* T. EISENBERG, *supra* note 67.

229 That is the heart of the Chapter 7 liquidation case. *See* 11 U.S.C. §§ 541, 726 (1988).

230 *See supra* notes 159 and accompanying text.

231 This is because § 707(b) had not been added. *See supra* note 14 and accompanying text.

232 This is the heart of Chapter 13. *See* 11 U.S.C. §§ 1306, 1323, 1325 (1988).

233 *See* P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); Rosenfeld, *supra* note 130; Symposium, *Jurisprudential Perspectives on Contract: A Symposium*, 17 VA. L. REV. 613 (1983).

234 In suggesting the denial of specific performance in the context of individuals, Professor Schwartz addressed the notion of liberty:

> A moral objection . . . can be raised on the ground that requiring performance interferes with the promisor's liberty more than requiring the payment of money. If this liberty interest takes precedence over the goals that specific performance serves, the equitable remedy should be prohibited or restricted . . . . Liberty interests are affected, however, in the case of an individual promisor who performs personal services.

Schwartz, *Specific Performance*, *supra* note 227, at 296-97.

235 PROSSER & KEETON, *supra* note 224; T. WILLIAMS, THE AIMS OF THE LAW OF TORT (1951); Cooter, *Unity in Tort, Contract and Property: The Model of Precaution*, 73 CALIF. L. REV. 1 (1985); Havighurst, *Private Reform of Tort-law Dogma: Market Opportunities and Legal Obstacles*, 49 LAW & CONTEMP. PROBS., 143 (1986); Radin, *A Speculative Inquirty into the Nature of Torts*, 21 TEX. L. REV. 697 (1943).

sessment of punitive damages in the tort context.[236] The creditors assert, in essence, that it is morally wrong not to repay one's creditors when one is capable of doing so.[237] It is morally problematic to incur debt above one's ability to repay. Indeed, limitations on discharge also suggest tort as opposed to contract notions[238] in that certain categories of debt are so significant to the recipient and society that debtors must repay them.[239]

Bankruptcy law achieved, until passage of the 1984 amendments, a tense but overall satisfactory balance of the contract and tort paradigms. However, the adoption of the 1984 amendments represents a realignment—and a troubling one from my perspective. The treatment of debt repayment is now fashioned more according to a tort rather than a contract paradigm. Like the alleged usurpation of contract law into tort law,[240] the treatment of debtors under the 1984 amendments suggests that the tort paradigm is overtaking the contract paradigm in bankruptcy jurisprudence. Stated differently, the balance between the competing goals of debtors and creditors is now decidedly more inclined toward creditors.

Any realignment of rights respecting bankruptcy's inherent contradiction takes place in the context of larger societal issues. These issues have an impact on whether the balance should shift more decidedly in favor of debtors or creditors. As noted above, the same values that underlie the antipathy to peonage and that are at the heart of contract law as well—autonomy, reciprocity, equality—are significant in the bankruptcy context. But, the establishment of their significance is not enough. Their importance and role must be measured in the context of values in bankruptcy (*i.e.*, the moral obligation to repay), many of which may be competing. Ultimately, the resolution of these competing values forms the basis for our discharge policy.

This quest for resolution suggests that recent bankruptcy scholarship, which has attempted to explain bankruptcy in terms of an economic model, is flawed.[241] Because of the conceptual parallels between peon-

236 *See generally* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987); Walther & Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369 (1965); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); PROSSER & KEETON, *supra* note 224. *See generally* Symposium, *Punitive Damages*, 40 ALA. L. REV. 687-1261 (1989).

237 Bankruptcy recognizes the moral aspect of repayment by permitting debtors to repay even discharged debt. *See* 11 U.S.C. § 524(f) (1988). Indeed, one court recently went so far as to recite this section to the debtor, even though the court was unwilling to dismiss the case under § 707(b). *See In re* Bowling, unpublished decision, April 11, 1988 (Bankr. D. Md.).

238 *See* 11 U.S.C. § 523 (1988). These limitations also resemble the increasing use of tort damages in the contract context. *See supra* note 235.

239 The traditional category is alimony and child support. Other categories of debt have proliferated. *See* 11 U.S.C. § 523(a) (1988). *See also supra* note 60 and accompanying text; *supra* note 161.

240 The key architect of this view, Grant Gilmore, expressed it in his book, G. GILMORE, DEATH OF CONTRACT (1974). While this book has been the subject of considerable controversy, the premises of his book have generated an abundance of legal scholarship. *See generally* P. ATIYAH, *supra* note 233; P. ATIYAH, PROMISES, MORALS AND THE LAW (1981); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373; Matheson & Farber, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903 (1985); E. FARNSWORTH, *supra* note 91.

241 *See* Sullivan, Warren & Westbrook, *supra* note 16.

age and bankruptcy, the use of an economic model to determine the discharge policy presents an incomplete picture and hence is an inadequate methodology.[242]

This is not to say that economics has no place in considering discharge. On the contrary. As we think about discharge of indebtedness, we obviously need to consider the economic impact of such a discharge. We need to consider the consequences of a credit economy and who should bear the risk of non-payment in such a system—debtors, creditors, the community at large or some combination thereof.[243] We must measure how much is lost as a consequence of liquidation and how much is saved by reorganization. We must also determine whether the price of one option versus another is appropriate.

In the end, however, these appeals to instrumental reasoning fall short of providing an adequate basis for policy-making. Such cost/benefit analyses presuppose a completely autonomous self which is then considered to determine its wants and desires.[244] These data are then netted out, and the result becomes the basis for legislation. Yet, it ought to be apparent that the law is not merely instrumental to the self. On the contrary, to a very important extent, the self is a legal concept—the creation of the law.

More specifically, relations of mutual recognition and reciprocal symmetry are legal ideas that help create the autonomous self. The autonomous self is not necessarily a natural phenomenon but rather a social construct. Bankruptcy can be seen as a fundamental legal idea that helps create the very self that cost/benefit analysis must consult to establish what the optimal law should be. For that reason, law and economics can be seen as a circular enterprise.

If the foregoing is true, the policies relating to bankruptcy discharge cannot simply be a matter of instrumental reasoning. Instead, the discharge policy must be based upon non-instrumental (deontological) truths. The establishment of these types of truth is something economics cannot help us with. We must look elsewhere—to philosophy or religion or social custom—for the bases of such normative truths.[245]

Consider, for example, the preservation of the essential self—evidenced in the anti-peonage laws and in bankruptcy by the ability to obtain relief from indebtedness without allocating human labor. Preser-

242 For examples of use of an economic model in bankruptcy, see Meckling, *Financial Markets, Default, and Bankruptcy: The Role of the State*, 41 LAW & CONTEMP. PROBS. Autumn 1977, at 13; Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J. LAW. & ECON. 419 (1984); White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1 (1987).

243 *See* Sullivan, Warren & Westbrook, *supra* note 16.

244 Sullivan, Warren and Westbrook express this concern by suggesting that economic theorists start from the following position, "Suppose we're on a desert island and you have a nickel and I have a banana . . . ." *Id.* at 662. *See also* AS WE FORGIVE OUR DEBTORS, *supra* note 16, at 230-270.

245 Sullivan, Warren and Westbrook do suggest non-economic factors that should be considered including marital status, stability and local legal culture. Their revised "model", however, does not address the philosophical substrate. *See* Gross, *Re-Vision*, *supra* note 34. It does not articulate, nor does it profess to, the normative values of why we permit individual bankruptcy. My particular interest is not simply in trashing the economic model. It is to suggest that there is a different model which requires that we identify the underlying social values that permit us to create and perpetuate the bankruptcy system.

vation of self is a fundamental value which cannot be too ruthlessly comodified.[246] The problem with the treatment of debtors is not that we cannot value human labor—a monetary value can be placed on inanimate and human assets. Economics can come into play in this sense. However, the alienation of human labor involves dimensions different from the alienation of other assets. Although human labor can be valued as an economic commodity, society could determine that factors other than economics should affect its alienability.[247]

## VI. Addressing the Consequences

The development of the unconstitutional condition argument—based on the forced labor confronting debtors—suggests guideposts for determining how the Bankruptcy Code should be interpreted. If courts and Congress continue to adopt an expansive interpretation of section 707(b),[248] the unconstitutional condition argument becomes more pronounced.

The parallelism between bankruptcy and peonage suggests that section 707(b) and other similar sections should be narrowly construed.[249] Rather than suggesting that individuals who can repay their creditors cannot liquidate, the courts should take into account a myriad of factors, including whether the debts were incurred through improper means, whether the debtor has accurately disclosed relevant information to the court, and the nature of the debtor's situation before, during and after bankruptcy.[250] The ability to repay creditors should not be considered *per se* bad faith and the basis for dismissal of a Chapter 7 case.

The foregoing result flows from the realization that, while the 1984 amendments may reveal a shift in the balance between debtors and creditor rights, Congress has not overturned the fresh start policy.[251] Given the legal system's general reluctance to curtail autonomy and reciprocity, courts should use the power to eliminate the liquidation option sparingly. Stated differently, the identified conceptual similarities sends out a cautionary message about elimination of the liquidation alternative.

Underlying the Smith hypothetical is also the realization that not all individual debtors are confronted with the same choices confronting Smith. As presently drafted, the Bankruptcy Code frequently treats different debtors differently and there is nothing inherently wrong with this.

246 This point is developed at length by Professor Radin in the context of surrogate motherhood. *See supra* note 80.

247 While Professor Sullivan finds this argument ultimately unpersuasive in the context of unconstitutional conditions, she does recognize its appeal. *See* Sullivan, *supra* note 16.

248 *See supra* note 54 and accompanying text. There is no reason to believe that this trend will diminish. If anything, it is likely to continue. There are now two circuits (8th and 9th) which have specifically adopted the expansive approach.

249 *See* Gross, *supra* note 13. As expressed in the dissent of Judge McMillian in *In re* Walton, 866 F.2d 981 (8th Cir. 1989): "[s]uch a conclusion [denial of liquidation option] is so result-oriented as to do violence to the spirit of the entire Bankruptcy Code." *Id.* at 987; *see also In re* Braley, 103 Bankr. 758 (Bankr. E.D. Va. 1989).

250 *See* Gross, *supra* note 13; *In re* Keniston, 85 Bankr. 202 (Bankr. D.N.H. 1988); *In re* Deaton, 65 Bankr. 663 (Bankr. S.D. Ohio 1986). *See also In re* Antal, 85 Bankr. 838 (Bankr. W.D. Mo. 1988).

251 *See* Block-Lieb, *Using Legislative History to Interpret 1984 Amendments to Sections 548 and 707(b)*, NORTON BANKRUPTCY LAW ADVISOR, No. 10 (October, 1986).

For example, corporate debtors cannot obtain a discharge in Chapter 7;[252] railroads cannot liquidate at all;[253] stockbrokers cannot reorganize;[254] individual debtors cannot be relieved of their alimony and child support payments;[255] and bankruptcy cannot be a safe-haven from criminal conduct.[256] Indeed, the issue is not the existence of distinctions but whether the distinctions that are made can be justified.

Section 707(b), by its terms, applies only to individuals with consumer debts.[257] Indeed, it is limited to a group within this broader category—it is essentially low asset/high earners who are impacted. From this, one can infer that cases of other types of consumer debtors and individual debtors with nonconsumer debts cannot be dismissed on the basis of substantial abuse.[258] Indeed, some courts have struggled to find that a debtor's debts are not primarily consumer debts so as to avoid the application of section 707(b) and the accompanying expansive substantial abuse standard.[259]

This leads to the following anomalies. The distinction between which debtors' cases can be dismissed may depend solely on the correlation between assets and income. Given that a debtor can legitimately engage in pre-bankruptcy planning and exemption loading,[260] a debtor could turn himself into a low asset/high earner only to find himself without a discharge. This would be a way of indirectly penalizing pre-bankruptcy planning. If that is the intended result, then we should be explicit about it. Indirectness permits Congress to accomplish an end run around existing bankruptcy legislation.[261]

Similarly, a debtor could decide not to work, thereby converting himself into a low asset/low income individual to avoid the consequences that flow from expansively interpreting section 707(b). Again, this seems to encourage a manipulation of the existing system, this time by a debtor. Moreover, as a matter of social and economic policy, we must wonder whether we want to discourage continued employment.[262] If what we are concerned about is the low asset/high income individual, then Congress will have to be forthright about seeking to eliminate the bankruptcy option for this category of individuals. Maybe one reason judges have interpreted section 707(b) expansively and Congress has been satisfied

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252 *See* 11 U.S.C. § 727(a)(1) (1988).

253 *See id.* at § 109(b)(1).

254 *See id.* at § 109(d).

255 *See id.* at § 523(a)(5).

256 *See* 11 U.S.C. §§ 101(11), 362(b)(1), 727(a)(2) (1988).

257 *See id.* at §§ 101(7), 707(b).

258 This observation does call for a negative inference and the sensibility of that inference has been questioned by at least one commentator. *See* Boshkoff, *Private Parties and Bankruptcy-Based Discrimination*, 62 IND. L.J. 159, 169 n.40 (1986). A view more sympathetic to the indicated inference appears in *In re* Young, 92 Bankr. 782 (Bankr. N.D. Ill. 1988).

259 *See In re* Almendinger, 56 Bankr. 97 (Bankr. N.D. Ohio 1985).

260 *See* Miller, *Consumer Planning for Bankruptcy Relief*, 63rd Annual Meeting of the Nat'l Conference of Bankruptcy Judges (Nov. 1-4, 1989), at 5-7. *See also* Norwest Bank Nebraska, N.A. v. Treten, 848 F.2d 871 (8th Cir. 1988); *In re* Daniels, 771 F.2d 1352 (1985), *cert. denied*, 475 U.S. 1016 (1986).

261 This is a point made by Professor Sullivan in the context of unconstitutional conditions. *See* Sullivan, *supra* note 16.

262 *See In re* Graham, 21 Bankr. 235 (Bankr. N.D. Iowa 1982).

with ambiguity in respect to this section is that all efforts to mandate Chapter 13 have failed—and explicitly at that.[263]

It seems equally unjustified to determine dismissal based on the differing nature of the debtor's obligations—business vs. consumer. There is denial of access to the liquidation option for the consumer debtor, resulting in a peonage-like state for him.[264] Other debtors, whose debts are business debts, will be permitted to liquidate and hence avoid the peonage-like state.

Prior to 1984, the Bankruptcy Code did not distinguish between business and consumer debts for purposes of determining discharge for individuals. Sections 523 and 727 specifically identify debts that cannot be discharged. In most instances, the non-dischargeable debt involves either criminal or fraudulent conduct or situations in which the societal value to be gained by non-dischargeability exceeds the value to be gained by discharge (*e.g.*, payment of taxes, alimony). After 1984, the distinction between business and consumer debts appears in two instances: sections 707(b) and 523(a)(2)(C), sections which presume that debts for luxury goods purchased immediately before bankruptcy were obtained through fraud and hence are non-dischargeable. Not surprisingly, both sections were added as part of the 1984 amendments.

The business/consumer dichotomy most closely parallels a distinction between corporate and individual debtors, and the Bankruptcy Code does accord differing treatment to individual and corporate debtors.[265] By applying section 707(b) to only a limited category of individual debtors, it is as if the Bankruptcy Code is treating individuals with business debts as if they were corporate debtors.

Permitting liquidation with a discharge is tantamount to creating limited liability, the opportunity accorded to corporate debtors.[266] This is so even though the corporate entity dissolves as a legal entity under corporate law.[267] In essence, then, the individual with business-related debt may be accorded limited liability like individuals who own corporations that experience financial trouble. They can liquidate and obtain a discharge.

The non-business debtor has no such protection from liability. Stated in terms of the peonage motif, the consumer debtor can be placed in a slave-like situation while the individual business debtor cannot. The consumer debtor cannot obtain a discharge and can only garner that protection by working for his creditors.

The distinction between individual and corporate liability can be justified on a variety of grounds, not the least of which is the creditor expec-

263 *See supra* note 250. *See also In re* Braley, 103 Bankr. 758, 762-63 (Bankr. E.D. Va. 1989).

264 This argument has been framed as an equal protection analysis. However, efforts to curtail application of § 707(b) on this basis have been unsuccessful. *See In re Keniston*, 85 Bankr. 202 (Bankr. D.N.H. 1988).

265 *See In re* A.H. Robins Co., Inc., BANKR. L. REP. (CCH) ¶ 71,060 (Bankr. E.D. Va., March 14, 1986).

266 *See generally* W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS (6th ed. 1988); H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES (1983).

267 *See id.*

tation in lending money.[268] When lending to a corporate entity, there is a recognition that absent a personal guarantee or a piercing of the corporate veil, shareholders will be shielded from liability.[269] The lender lends on either the level of existing assets or contemplated future income streams. On the other hand, when lending to individuals, lenders understand and expect that the debtor cannot shield himself from liability and indeed, many such lenders lend on the basis of the debtor's future income.[270]

It is hard to believe that, prior to the 1984 amendments, a lender had differing repayment expectations depending on whether the non-corporate debtor incurred debts for his personal or business needs. In both instances, the creditor anticipates the individual debtor will make repayment from future income. Congress did not pay particular attention to the potential for non-payment by individual business (as opposed to consumer) debtors. Indeed, the consumer credit industry was not particularly concerned with this category of debtor. However, if creditor repayment is at least one of the principal goals behind the elimination of the liquidation option,[271] then the nature of the indebtedness should not be the key; the nature of the circumstances regarding repayment should be at the heart of the analysis. Phrased differently, if both the hypothetical Smith with consumer debts and the hypothetical Smith with business debts can repay creditors, then there is no basis to distinguish these debtors unless creditor expectation of repayment in these two situations is different or (and this is the more likely scenario) it is somehow more offensive not to repay your consumer debts than your business debts.

Indeed, individuals may incur indebtedness without any designation as to whether it is for consumer or business purposes. As money is fungible, it is problematic whether an individual debtor uses borrowed money to invest in his business, and hence uses his own money to pay for family necessities, or conversely uses his own money to invest in a business venture and borrowed money to purchase necessities. The same result occurs. There are insufficient funds to pay obligations. Because these individual debtors are indistinguishable, section 707(b) is under-inclusive, assuming this section is going to be applied utilizing an expansive interpretation. Smith's access to Chapter 7 should not hinge, then, on the characterization of his indebtedness.[272]

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268 There is a certain circularity in this argument in that creditors come to expect what the law provides for them. Therefore, creditor behavior may not be viewed as free-standing.

269 There are limited exceptions to this general principle. For example, under Section 630 of the New York corporation law, the largest shareholders can be subjected to personal liability for unpaid wages due the employees.

270 *See* A. Corrigan & P. Kaufman, How to Use Credit and Credit Cards (1985).

271 *See In re* Walton, 866 F.2d 981 (8th Cir. 1989); *In re* Kelly, 841 F.2d 908 (9th Cir. 1988).

272 There is an additional problem in interpreting § 707(b) expansively in that it results in over-inclusivity. Suppose that the hypothetical Smith were not a resident of a state with criminalization for unpaid tort judgments and bad checks. In this instance, a hypothetical Smith would be subject to less coercion than Smith in the presented hypothetical. Without the risk of criminal law exposure, Smith's situation less resembles that of a peon and the situation is akin to that involving the hypothetical doctor discussed earlier. *See supra* note 199.

The expansive interpretation should only be applied, then, to debtors for whom there is no risk of coercion because there is no state law threat of imprisonment. This would, then, curtail applica-

## VII. Conclusion

This Article suggests distinct parallels between debtors and peons.[273] Both the bankruptcy and the anti-peonage laws address how individuals obtain relief from obligations. The anti-peonage laws reveal that debtors cannot be forced to work to repay debt—on pain of imprisonment. This raises, quite clearly, the issue of whether individual debtors in the bankruptcy system should be required to work in a Chapter 13 case to obtain relief from their creditors. Debtors like the hypothetical Smith can be considered modern day peons because they are working under coercion—the threat of imprisonment coupled with the absence of any liquidation option. This directly implicates the doctrine of unconstitutional conditions.

The potential elimination of the liquidation option as a consequence of the recent amendments to the Bankruptcy Code has moved us away from many of the values that are at the heart of the anti-peonage laws.[274] Whether that is justified requires placing that deprivation in a broader context—namely an understanding of the substantive norms underlying discharge. Therefore, before courts and Congress cavalierly discard the liquidation option through indirect means and move debtors as a group closer to peons, we ought to think about the price to be exacted for being in debt. Until that investigation can be completed, we ought to avoid interpreting the 1984 amendments expansively. Moreover, we should closely scrutinize the state laws relating to debt collection, as they are drafted and as they are applied.

The possibility of finding debtors confronted with a condition that is unconstitutional, while perhaps ultimately non-falsifiable, is profoundly troubling. It draws us back to thinking about debtors in ways many of us thought we had left behind. It makes us realize that, as in Victorian times, debt for many individuals is the ultimate social and personal humiliation.[275] The humiliation of being in debt is compounded by an inability to obtain relief from debt. Whether to give or deny a liquidation option as a way of approaching the problem of individual debt repayment in a growing credit economy raises issues that we need to explore and soon. Individual bankruptcy filing rates continue to rise.[276] There are literally millions of debtors in the bankruptcy system at the present time.[277] The possibility of debtors as modern day peons may become the norm rather than the exception.

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tion of an expansive interpretation of § 707(b). However, it would permit its application to the variation of the Smith hypothetical in which there is no threat of imprisonment. This approach would still deny access to Chapter 7 to a considerable number of debtors without running head-long into a peonage problem.

273 *See supra* note 100 and accompanying text.

274 *See supra* note 130 and accompanying text.

275 *See* B. WEISS, *supra* note 11.

276 Overall filing rates are up 7.5% from 1988 to 1989. While this is a slower rate of increase than in prior years, it still represents growth. *See* Gross, *Re-Vision*, *supra* note 34.

277 If one assumes that an individual liquidation case lasts approximately one year and a Chapter 13 case lasts approximately three years, then over the last two years, in addition to the over 600,000 annual new filings, there are at least several hundred thousand cases pending from the prior years. *See* J. KOSEL, BANKRUPTCY DO IT YOURSELF 18-19 (6th ed. 1987); J. KOSEL, CHAPTER 13 6 (3d ed. 1988).