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The Evolution of the Fresh-Start Policy in Israeli Bankruptcy Law

Rafael Efrat

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The Evolution of the Fresh-Start Policy in Israeli Bankruptcy Law

Rafael Efrat*

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*I only want you to know that there are a lot of people like me who fell into financial problem not due to their own fault. These people are depressed, humiliated and have lost their dignity. They cannot look in the eyes of their relatives. What will happen when they will be arrested? Will they be able to continue to function and live with their relatives after it? . . . Is the country looking for more bankruptcies and/or suicides? . . . I love my wife, my children, my grandchild, the world, please let me continue living . . ., do not cause me to . . .*¹

A fresh-start policy in bankruptcy provides the honest but financially troubled individual some form of financial relief in an attempt to provide him with an opportunity to productively reintegrate into the economy and society. While some countries today provide broad financial relief to individuals who resort to bankruptcy protection, many countries have retained a largely limited as well as punitive fresh-start policy.

This Article explores the evolution of the fresh-start policy in Israel. While it briefly examines the attitudes and practices adopted towards financially troubled individuals historically in the Jewish tradition, it focuses on tracing those attitudes and practices to the modern day State of Israel. It demonstrates that the attitudes and practices historically held by Jewish communities towards financially troubled individuals have progressively evolved from an obsession with protecting the dignity and freedom rights of the individual debtor to preoccupation with preserving morality in the credit market and neutralizing perceived opportunistic behavior on the part of debtors.

However, most recently, bold legislative and judicial steps suggest that a new philosophy towards financially troubled individuals may be emerging in Israel. This philosophy may not only promote and safeguard fundamental tenets of human dignity and freedom, but it may also produce a fresh-start policy in Israel

1. Letter from David Dahan, a retired police officer, to Dan Meridor, Justice Minister, 1-2 (Nov. 12, 1991) (on file with author).

that is more consistent with the original thinking on this matter in the Jewish tradition.

I. INTRODUCTION

In the early 1990s, Israel experienced a massive increase in imprisonment orders being issued and executed against financially troubled debtors who were routinely disqualified from the bankruptcy system. Partly in response to the plights of those individual debtors, the Israeli legislators passed a bankruptcy reform law in 1996 that aimed at revolutionizing the fresh-start policy for financially troubled individuals.² It indeed marked the first ideological shift in Israeli history from a relatively conservative view to a more liberal view of the fresh-start policy.³ One of the purported goals of the reform law was to provide a meaningful opportunity for responsible and honest financially troubled individuals to successfully re-establish their place in society free from overwhelming debts.

While much has been written and discussed in academic circles about the bankruptcy fresh-start policy in the United States, very little attention has been given to the experiences of financially troubled individuals in the bankruptcy context in other countries. This Article attempts to begin to bridge that gap by examining the historical evolution of the fresh-start policy in Israel. An appreciation of the historical evolution of the fresh-start policy in the Israeli bankruptcy law may not only provide an important insight into the evolutionary process of Israeli laws in other important fields, but it also may provide valuable comparative perspectives for the evolution of the fresh-start policy in other countries.

One theme that is dominant in the historical evolution of the fresh-start policy in Israeli bankruptcy law is the paternalistic orientation of the Israeli government. This orientation to a large extent shaped the traditional formulation of the fresh-start

2. This Article will focus only on Israeli bankruptcy laws as they affect the opportunities of individuals to obtain a financial fresh-start. Bankruptcy proceedings of business enterprises in Israel will not be addressed. For more information on business enterprise insolvency in Israel, see Irit Haviv-Segal, *Insolvency Law*, in INTRODUCTION TO THE LAW OF ISRAEL 327-46 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

3. In this Article, a conservative view of the fresh-start policy refers to bankruptcy legislation that provides limited or no financial relief to the bankrupt individual, whereas a liberal view of the fresh-start policy refers to bankruptcy legislation that provides broad financial relief to the bankrupt.

policy.⁴ This paternalistic attitude is reflected in the bankruptcy context in the system's heavy-handed and punitive (both civil and criminal) approach to treating the bankrupt,⁵ while at the same time providing him with generous welfare benefits and a broad level of property exemptions.⁶

The Israeli government's paternalistic orientation is also reflected in the rationale the government advanced for restricting debtors' access to bankruptcy. On several occasions opponents to a liberalization of the fresh-start policy in the legislative body contended that it would not be in the debtors' best interests to file for bankruptcy and that the limited access to bankruptcy is justified as a way of preventing debtors from harming themselves.⁷

Moreover, government paternalistic orientation manifested itself in the active role the government undertook and continues to undertake in the debtor-creditor relationship. To that end, the government has undertaken the de facto responsibility of collecting unpaid debts in the marketplace.⁸ The government perceives that it has a duty to engage in the business of collecting debts even on behalf of private creditors as a way of instilling morality and integrity in the commercial system of the country.⁹ The government had done so by subsidizing the costs of the debtor's prison system and by fully subsidizing the costs of the Official Receiver, which is a governmental agency partly engaged in what one would expect creditors to do: investigate the reasons for the financial failure of the bankrupt and vigorously search for his concealed assets.¹⁰

While government officials have continuously complained about the rising costs of administering the bankruptcy system, they have not considered turning over the enforcement role to the creditors. Instead, they have placed the blame of cost overruns on the bankrupts by severely curtailing their access to the system.¹¹

4. Others have also referred to Israeli government policies in other fields as paternalistic. See D.K. (1994) 8465; YAIR AHARONI, *THE ISRAELI ECONOMY: DREAMS & REALITIES* 328 (1991); SAM N. LEHMAN-WILZIG, *WILDFIRE: GRASSROOTS REVOLTS IN ISRAEL IN THE POST-SOCIALIST ERA* 22-31 (1992); Leslie Sebba, *Sanctioning Policy in Israel—An Historical Overview*, 30 *ISR. L. REV.* 234, 249-56 (1996) (describing the penal system in Israel as both welfarist and paternalistic).

5. The term "bankrupt" can be used both as a noun and an adjective. See *THE AMERICAN HERITAGE DICTIONARY* 156 (2d ed. 1985).

6. See *infra* notes 192-94 and accompanying text.

7. See *infra* notes 141, 173-78 and accompanying text.

8. See *infra* notes 144-54 and accompanying text.

9. See *infra* notes 110, 168, 275 and accompanying text.

10. See *infra* notes 142, 144-54, 172, 236 and accompanying text.

11. See *infra* notes 172, 271 and accompanying text.

In essence, the government approach to the bankruptcy system has caused the bankruptcy regime to become a system of government vs. debtors as opposed to creditors vs. debtors. Indeed, throughout the bankruptcy process we witness that the government takes the lead role in collecting funds from the bankrupts, whereas the creditors passively sit on the sideline while delightfully accepting the bankruptcy estate's distributions, generated primarily through the labor intensive work of the government.¹² This active role of debt collector, which the government has undertaken in the bankruptcy system, has caused the government to become practically an interested party in the debtor-creditor relationship. Because of this development, the government's objectives have become aligned with those of the creditors, which has resulted in the government taking a biased position detrimental to the bankrupts.

To put the Israeli fresh-start policy in perspective, this Article will first briefly address the origin of the fresh-start principle in general. The Article will then shift its focus to the value of debt-repayment in the Jewish tradition and the practices historically undertaken by various Jewish communities with respect to debtors' default. Before beginning to address its evolution in Israel, this Article will review the fresh-start policy during the pre-statehood years under the British Mandate authority. The next section will trace the evolution of the rather conservative and punitive fresh-start policy in Israel during its first thirty years of existence. The last section will address the changes in the Israeli bankruptcy law during the last twenty years that have, in a way, revolutionized the fresh-start policy by re-acknowledging the fundamental and important interests of financially troubled individuals.

II. THE ORIGIN OF THE FRESH-START PRINCIPLE

In order to appreciate the unique nature of the contemporary fresh-start policy in general and the one in Israel in particular, it is necessary to have some knowledge of the way the fresh-start policy has evolved historically.¹³ The historical evolution of the fresh-start policy in England is particularly important since England is the country where the modern fresh-start policy was first developed.¹⁴ Furthermore, since the Israeli bankruptcy law

12. See *infra* notes 115, 144-54, 172, 236-38 and accompanying text.

13. Much has been written on the origin of the fresh-start principle in bankruptcy. The following discussion provides a brief summary of the main historical developments of the principle, focusing primarily on England.

14. See *infra* notes 33-35 and accompanying text.

is largely patterned after the English Bankruptcy Act of 1914,¹⁵ and since the decisions of the English courts were very influential in Israel until 1980,¹⁶ an understanding of the historical evolution of the fresh-start policy in England is especially important.¹⁷

England adopted its first formal bankruptcy regime in the sixteenth century.¹⁸ Bankruptcy schemes in other parts of the world, however, had existed long before then.¹⁹ While some ancient legal devices provided some relief to debtors,²⁰ most institutions adopted an extremely punitive treatment of bankrupts.²¹

15. See Celia W. Fassberg, *Cross-Border Insolvency in Israeli Law*, in ISRAELI REPORTS TO THE XIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW 113, 115 (Celia W. Fassberg ed., 1990) ("[T]he bankruptcy law of Israel is barely distinguishable from its English forebear, embodied in the 1914 Act . . .").

16. Before 1980, the courts were instructed to rely on English precedent as binding in Israel. In 1980 the Israeli legislature cut off its direct link to British precedent. See H. KAZIR, PSHITAT-REGEL [BANKRUPTCY] 179-80 (1995). However, even after 1980, courts continue to rely to some extent on English jurisprudence in the bankruptcy context. See, e.g., C.A. (B.S.) 44/82, *In re Asal*, 1983(1) P.M. 485, 490.

17. Also, most countries that have a debt-forgiveness provision in their bankruptcy law were influenced, at least originally, to a large extent by English bankruptcy law. For example, the first federal bankruptcy law in the United States was based on the bankruptcy system of England in 1732. See Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995). Also, the original Canadian bankruptcy law was largely patterned after the English Bankruptcy Act of 1914. See 1 L. W. HOULDEN & C. H. MORAWETZ, *BANKRUPTCY AND INSOLVENCY LAW OF CANADA* 1-1 (3d ed. 1993). The bankruptcy system in India is based on the English system as well. See D.S. CHOPRA, *MULLA ON THE LAW OF INSOLVENCY IN INDIA* 11 (3d ed. 1977).

18. See Tabb, *supra* note 17, at 7.

19. Bankruptcy law has its origin in Roman Law and later in the law governing Italian medieval cities. See Vern Countryman, *Bankruptcy and the Individual Debtor and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 809-10 (1983).

20. See, e.g., 1 CREDIT RESEARCH CENTER, *CONSUMER BANKRUPTCY STUDY: CONSUMERS' RIGHT TO BANKRUPTCY ORIGINS AND EFFECTS* 2 (1982) ("During the Old Babylonian period it was customary for the king to proclaim a general amnesty or act of 'equity' . . . at the beginning of his reign and at intervals of seven years thereafter. This act resulted in the remission of debts . . .").

21. See 2 WILLIAM BLACKSTONE, *COMMENTARIES* 472 ("[Under Roman law], creditors might cut the debtor's body into pieces, and each of them take his proportionate share . . ."); Jan. H. Dalhuisen, *Historical Development of Bankruptcy Remedies*, in *EUROPEAN BANKRUPTCY LAWS* 1, 3-4 (I. Arnold Ross ed., 1974) (prior to the early bankruptcy laws, insolvent debtors would either be "killed, made a slave, imprisoned or exiled."); Tabb, *supra* note 17, at 7 ("History's annals are replete with tales of draconian treatment of debtors. Punishments inflicted upon debtors included forfeiture of all property, relinquishment of the consortium of a spouse, imprisonment, and death. In Rome, creditors were apparently authorized to carve up the body of the debtor . . ."). For more on the

While medieval England did not employ the same harsh measures towards its insolvent debtors,²² it nonetheless had no concern for the bankrupt's welfare.²³ During the medieval period, individual debtors in England who were unable to repay their debts were simply imprisoned until their debts were somehow repaid.²⁴ However, the debtors' ability to circumvent imprisonment,²⁵ as well as the perceived inequities in the existing race-based collection remedies,²⁶ gave rise to the first bankruptcy law in England in 1542.²⁷ This piece of legislation and subsequent bankruptcy legislation adopted during the sixteenth and the seventeenth centuries were all exclusively creditor oriented.²⁸ For example, the bankruptcy process could only be initiated by creditors²⁹ and only against merchants.³⁰ Furthermore, the bankruptcy process

Roman practices with regard to insolvent debtors, see J.A.C. THOMAS, *TEXTBOOK OF ROMAN LAW* 109, 121-22 (1976).

22. See Countryman, *supra* note 19, at 810-11 ("Debtor dissection, detention of deceased debtors, and, originally, debt slavery were not sanctioned in England . . .").

23. See Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 327 (1991) ("In the Middle Ages English law had no solicitude for the debtor's interests. Only the creditor's interests were of concern.").

24. See Countryman, *supra* note 19, at 811 ("But methods were early developed [in England during the 13th century] by which the creditor could have his debtor imprisoned and, in effect, held for ransom until the debt was paid."); Tabb, *supra* note 17, at 7 ("Early English law had a distinctly pro-creditor orientation, and was noteworthy for its harsh treatment of defaulting debtors. Imprisonment for debt was the order of the day . . .").

25. See Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 155 (1982) ("By the early fourteenth century debtors had devised various means of evading coercive imprisonment . . . Debtor's ability to circumvent imprisonment gave rise to the earliest bankruptcy law.").

26. See Louis E. Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 3-14 (1919); Tabb, *supra* note 23, at 328 (arguing that the inequities created by race-based collection remedies gave rise to the enactment of the first bankruptcy law in England).

27. See SIR KENNETH CORK, *INSOLVENCY LAW AND PRACTICE: REPORT OF THE REVIEW COMMITTEE* 16 (1982); Tabb, *supra* note 23, at 329.

28. See Tabb, *supra* note 23, at 331 ("The century and a half following the 1542 act saw episodic English legislation on the subject of bankruptcies, in 1570, 1604, 1623, and 1662. Each law focused in considerable part on means to improve the lot of creditors vis-à-vis the offender debtor . . .").

29. See *id.* at 330 ("Under this act (and almost three centuries hence) bankruptcy was purely involuntary as to the debtor."). See also Countryman, *supra* note 19, at 811.

30. See IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 7 (1st ed. 1990); ("Indeed, this restricted application of the English bankruptcy law to persons engaged in a trade or business persisted until as late as 1861 . . ."); Countryman, *supra* note 19, at 811 ("Save for the first, [the bankruptcy acts in England during the sixteenth and the seventeenth centuries] were confined to merchant debtors . . ."). For a discussion of the reasons for limiting the bankruptcy process only to merchants, see Cohen, *supra* note 25, at 160-62.

retained many of its punitive elements.³¹ Lastly, the various bankruptcy laws did not include a provision for forgiving the debtor his prepetition debts.³²

The first trace of the debt-forgiveness concept was introduced in England in 1705 when Parliament passed a provision making it possible for cooperative and honest debtors to get a discharge of their prepetition debts.³³ Although some contend that the discharge provision was introduced out of humanitarian concerns,³⁴ it seems that the main motivation of the legislators was to assist creditors' collection.³⁵ While the discharge provision was an important departure from previous practices,³⁶ the bankruptcy system still retained its punitive elements.³⁷

31. See Tabb, *supra* note 23, at 330 ("[The Act of 1542 in England] along with all of the early bankruptcy laws, was quasi-criminal in nature, and provided for the imprisonment of the offender, if necessary."); *id.* at 332 n.41 ("[The Act of 1604] provided that perjuring debtors be pilloried and lose an ear. The next statute . . . [of 1623] extended this severe punishment to any bankrupt convicted of making a fraudulent conveyance or even just of failing to explain satisfactorily why he or she became bankrupt.");

32. See *id.* at 332 ("No discharge was available under any circumstances: the laws reiterated that unpaid creditors retained their non-bankruptcy collection rights after the conclusion of a bankruptcy case.");

33. See CORK, *supra* note 27, at 16 ("It was not until the Act of 1705 that discharge from bankruptcy in any real sense was made possible."); see also Tabb, *supra* note 23, at 333 ("The first watershed event in the Anglo-American history of the bankruptcy discharge occurred in 1705 . . .").

34. See Cohen, *supra* note 25, at 156 ("Holdsworth believes that . . . [the discharge provision] was devised in response to mercantile difficulties existing immediately prior to the passage of the 1705 act . . . [it] was made in consideration of two long wars which had been very detrimental to traders, and rendered them incapable of paying their creditors."); see also Levinthal, *supra* note 26, at 18-19 ("The discharge was the result of the gradual realization of the fact that in many cases the bankrupt might be properly an object of pity.");

35. See Cohen, *supra* note 25, at 157 ("This language [of the acts] suggests that discharge developed more out of a wish to induce traders to submit voluntarily to bankruptcy proceedings for the benefit of creditors . . ."); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 54 (1986) ("Even the centerpiece of the modern 'fresh start,' the bankrupt's discharge from further liability for prebankruptcy debts, was originally conceived not as a relief measure but as a reward for the debtor's efforts to maximize the return to his creditors."); Tabb, *supra* note 17, at 10-11 ("[T]he main focus [of the English legislators] was on assisting creditors; the title and preamble to the act reflect as much. Indeed, the fact that only creditors could file a bankruptcy petition negates any serious argument that the 1705 law was intended as a debtor relief measure.");

36. See Cohen, *supra* note 25, at 156.

37. See CORK, *supra* note 27, at 16 ("At the same time [of passing the 1705 Act], as if to make up for this apparent relaxation, the fraudulent trader, who had become bankrupt, faced the death penalty. It is reported that in November 1761 a bankrupt was hanged in Smithfield for concealing part of his effects."); FLETCHER, *supra* note 30, at 8 ("Although some provision for discharge was introduced by an Act of 1705, the generally unfavorable policy of the law towards

Following the revolutionary adoption of the debt-forgiveness provision in the bankruptcy laws, English legislators enacted a number of other provisions that expanded the scope of the fresh-start policy. Some of the more dramatic changes include the Bankruptcy Act of 1861, where the plight of non-trader debtors was somewhat alleviated when they finally became eligible for involuntary bankruptcy relief.³⁸ Furthermore, in the middle of the nineteenth century, the legislators made it possible for the first time for individual debtors to voluntarily commence bankruptcy protection.³⁹

These changes along with a reform in the early twentieth century⁴⁰ formed the foundations of the modern bankruptcy law as it is generally known today in England and other countries, including Israel.⁴¹

III. DEBT-REPAYMENT AND THE FRESH-START POLICY IN THE JEWISH TRADITION

With the exception of family law, the civil law in contemporary Israel is not based on religious law.⁴² However, the Jewish tradition clearly impacts the way the legislature⁴³ enacts

bankrupt traders, . . . continued to be reflected in the rigorous penalties to which they were subject including the death penalty, which was available in cases of fraud.”).

38. See CORK, *supra* note 27, at 17.

39. See *id.*

40. The English Bankruptcy Act of 1914.

41. See FLETCHER, *supra* note 30, at 8.

42. See Aharon Barak, *The Tradition and Culture of the Israeli Legal System*, in EUROPEAN LEGAL TRADITIONS AND ISRAEL 473, 474 (Alfredo M. Rabello ed., 1994).

43. See H.C. 5304/92, *Perach Foundation v. Justice Minister*, 47(4) P.D. 715, 754 (in surveying legislative developments in the debtor's prison law in Israel, the Associate Supreme Court Justice asserted that the Jewish law served as an important source of legislation in this matter); D.K. (1994) 4755 (statement of Knesset member Ezran) (citing Biblical verses on how the Jewish religion views a defaulting debtor); SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 32 (1994) (“[I]t should be noted that some principles of Jewish law have been incorporated into the Israeli legal system through legislation and have thus become a part of the modern Israeli criminal and civil law.”); Barak, *supra* note 42, at 473-74 (“Jewish law applies in Israel by virtue of secular legislation It should be clear . . . that the Israeli legal system is not part of the culture of Jewish law, although the latter does influence it.”); Itzhak Zamir & Sylviane Colombo, *Preface to THE LAW OF ISRAEL: GENERAL SURVEYS* 3 (Itzhak Zamir & Sylviane Colombo eds., 1995) (“[The Jewish Law] serves as a source of inspiration to the legislature and the courts [in Israel].”); Sinai Deutch, *Jewish Law in the State of Israel*, *JUSTICE*, Feb. 1994, at 21, 21 (“Jewish Law influences Israeli law in several areas.”). Furthermore, in 1980 the Israeli legislators formally proclaimed the abandonment of the judiciary's previous mandatory reliance on British precedent in interpreting Israeli law. Instead, the legislators urged the judiciary

and the judiciary⁴⁴ interprets the law. Therefore, in order to have a better understanding of the evolution of the fresh-start policy in Israeli bankruptcy law, it is important to briefly examine perspectives of Jewish law and tradition.

While the Jewish tradition has not developed a bankruptcy mechanism per se, it has developed several principles regarding debt repayment.⁴⁵ Jewish tradition does not favorably view an individual who assumes onerous debt to finance an extravagant lifestyle. To that end, the Jewish tradition favors a reduced level of individual consumption.⁴⁶ In the event that an individual has become indebted to finance his consumption, there is a very strong moral obligation to repay that debt in full.⁴⁷ While the

to interpret the law consistent with the principles of Jewish law and tradition. See URIEL PROCACCIA, DINE PSHITAT-REGEL VE'HACHAKIKA HA'EZRACHIT BE'YISRAEL [BANKRUPTCY AND CIVIL LEGISLATION IN ISRAEL] 13-18 (1984). However, some scholars dispute the link between the Jewish tradition and contemporary Israeli law. See electronic mail from Dr. Assaf Likhovski, Tel-Aviv University School of Law, to the author (Oct. 6, 1998) (on file with author) ("Israeli law is (still) an English-type legal system whose doctrines and history should be understood in a western rather than a Jewish-law context. Any talk which tries to link contemporary Israeli law and the Jewish legal system . . . is legally (and historiographically) misleading.").

44. See *Perach Foundation*, 47(4) P.D. at 719-20 (in a landmark decision on the merits of debtor's prison in Israel, the Israeli Supreme Court relied on at least twenty biblical or traditional interpretations of Jewish law); C.A. (T.A.) 435/80, *Fragin v. Yisaschar*, 1982(1) P.M. 409, 412-13 (the district court judge reviewed several verses of the Bible in addressing the treatment of financially troubled individuals); SHETREET, *supra* note 43, at 32 ("Jewish law is also frequently resorted to and applied by some judges in the regular courts."); Zamir & Colombo, *supra* note 43, at 3-4 ("[W]hen faced with a problem which has no answer in statutory or case law and cannot be solved by way of analogy, courts must resolve it by reference to the principles embodied in Jewish heritage.").

45. See Jonathan Lewis, *Neither a Borrower nor a Lender Be*, JUSTICE, Dec. 1995, at 41, 41, 43, 45.

46. See MEIR TAMARI, *THE CHALLENGE OF WEALTH: A JEWISH PERSPECTIVE ON EARNING AND SPENDING MONEY* 236-37 (1995); *id.* at 132 ("Thou shall walk modestly before thy God' is a spiritual demand by prophet Amos. This is reflected in the simplicity in furniture, clothing and lifestyle of Jews throughout the centuries, a simplicity that has always been an integral part of Jewish living."). The prophet Amos made other stern warnings against luxurious standards of living among the Jewish people. He criticized people who "have built houses of hewn stone." *Amos* 5:11. He denounced "those who lie upon beds of ivory, and stretch themselves upon their couches, and eat lambs from the flocks, and calves from the midst of the stall; who sing the songs to the sound of the harp . . . who drink wine in bowls, and anoint themselves with the finest oils." *Id.* at 6:4-6.

47. The same moral code that obligates a Jew to lend money to another obligates the latter to repay his debts While the debtor may claim protection against paying interest forbidden by the Torah, he cannot escape paying the debt [T]here is a distinct moral demand that the debtor repay his debts out of his private assets in order to be 'clean before God and men[]' After all, the debtor does not possess any moral right that would absolve him from repayment of his debts *Halakhah*

Jewish Bible provides for the cancellation of debts owed by poor people after seven years,⁴⁸ the moral obligation to repay the debt despite the forgiveness resurfaces when the debtor subsequently obtains the financial means to repay the discharged debt.⁴⁹

However, the interpretations and actual implementations by Jewish community leaders of these commandments has not been uniform throughout Jewish history. While the moral obligation of debt-repayment remained important, the communities' actual treatment of debtors who failed to repay their debts dramatically changed over time. It has evolved from a perception that the debtor's freedom should not be unduly restricted for failure to pay his debts, to a conception that some infringements on the debtor's personal freedom should be tolerated for purposes of debt-collection, as long as the infringements are not punitive in nature.⁵⁰

defines as a form of robbery, the arrangements for part payment in settlement of debt. This is an additional expression of the moral obligation of people to meet their responsibilities in the marketplace.

TAMARI, *supra* note 46, at 206, 209.

48. "At the end of seven years thou shall make a release . . . every creditor shall release that which he hath lent unto his neighbor; he shall not exact it of his neighbor and his brother" *Deuteronomy* 15:1-2. However, this financial relief mechanism was limited to the benefit of the most needy debtors. See GEORGE HOROWITZ, *THE SPIRIT OF THE JEWISH LAW* 495 (1953) ("As the Scriptural passages plainly show, the basic intent was to relieve needy persons, poor debtors struggling under a burden of debt."). Moreover, not all debts were to be forgiven. See *id.* ("Obligations in the nature of fines or penalties, loans not due until after the Seventh Year; claims already reduced to judgment but not collected before the Seventh Year, and any loan secured by a pledge; were not released.").

49. See HOROWITZ, *supra* note 48, at 496 ("The Mishnah states plainly that avoidance of an obligation by virtue of the statute was not favored; for 'whoever repays a debt in the Seventh Year, the spirit of the Sages is pleased with him.'"); Lewis, *supra* note 45, at 45 ("But debtors remained under a moral obligation to repay their debts one day if they could, 'in order to be clean before God and men.' In the end, '[t]he wicked man borrows and does not repay.'").

50. Originally, the Jewish law adopted an ideal legal and moral approach of prohibiting, in some form or another, the infringement of the debtor's freedom. Along its way, however, the Jewish law was not deterred from adjusting itself to the existing socio-economic conditions at different periods of time, as long as the adjustment did not violate its fundamental premise against punishing the debtor. In contrast, in most other legal institutions, we have witnessed the exact opposite: originally, a severe infringement of the debtor's personal freedom occasionally motivated by retribution against the debtor who failed to live up to his obligation and as a punishment for failing to pay his debt; and after a long process, relaxation of these laws until it resulted in their complete or partial elimination of the imprisonment for unpaid debt, or the retaining of such mechanism as part of the collection efforts and not for punitive purposes.

MENACHEM ELON, HERUT HAPRAT BEDARCHE GVEYAT HOV BAMISHPAT HA'TVRI [FREEDOM OF THE DEBTOR'S PERSON IN JEWISH LAW] 267-68 (1964) [hereinafter ELON, FREEDOM OF THE DEBTOR'S PERSON].

Between the Talmudic and the beginning of the Rabbinic eras of Jewish history, most non-Jewish legal institutions regularly employed imprisonment as a way of dealing with defaulting debtors.⁵¹ In contrast, the practice in the Jewish communities at that time prohibited undertaking such actions against a defaulting debtor.⁵² Debtor's prison was prohibited out of recognition of the need to protect the individual's personal freedom and dignity from creditors' intrusive actions.⁵³ The practices in the Jewish communities during those eras even prohibited other less intrusive personal invasions for purposes of debt collection. Specifically, Jewish communities precluded the creditor from entering the debtor's house in an attempt to search for his assets in the hope of getting repaid.⁵⁴ Further, to preserve the debtor's dignity, a creditor was prohibited from obtaining a security interest in the debtor's basic and essential assets.⁵⁵

Social and economic changes brought about more tolerance in many Jewish communities towards intrusive debt-collection activities. In the seventh century, the growth of commerce inevitably led to the dependence on credit and to the perceived increase in debtors' concealment of assets.⁵⁶ For the first time in the Jewish tradition, a debtor who claimed that he was unable to repay a debt was required to undertake an oath that he did not have any assets to repay the debt and that he would promise to repay the debt with any assets he acquired in the future.⁵⁷

In the thirteenth century, the oath was no longer deemed sufficient to deter debtors from deceiving their creditors. As such, creditors began demanding that they be allowed to inspect the debtor's house to confirm the absence of the debtor's assets. Faced with the conflicting demands between traditional Jewish interpretations prohibiting entry to the debtor's house and the commercial realities of the time, Jewish scholars were able to

51. See Menachem Elon, *The Sources and Nature of Jewish Law and its Application in the State of Israel: Part II*, 3 ISR. L. REV. 88, 107-08 (1968) [hereinafter *Elon, The Sources and Nature of Jewish Law*].

52. See *id.* at 108; see also ELON, FREEDOM OF THE DEBTOR'S PERSON, *supra* note 50, at 16, 255-56. However, despite its formal prohibition, debt-slavery was practiced for some time during the period of the Biblical kings of Israel until it was finally abolished in 5,000 B.C. *Id.* at 8-9, 255. For a detailed description of those practices, see GREGORY C. CHIRICHIGNO, DEBT-SLAVERY IN ISRAEL AND THE ANCIENT NEAR EAST 101-342 (1993).

53. See *Elon, The Sources and Nature of Jewish Law, supra* note 51, at 103 & 108.

54. See *id.* at 104-07.

55. See ELON, FREEDOM OF THE DEBTOR'S PERSON, *supra* note 50, at 17; *Elon, The Sources and Nature of Jewish Law, supra* note 51, at 103.

56. See *Elon, The Sources and Nature of Jewish Law, supra* note 51, at 105.

57. See ELON, FREEDOM OF THE DEBTOR'S PERSON, *supra* note 50, at 257.

devise an interpretation of the Bible which allowed creditors, upon a court's approval, to enter the debtor's house to collect an overdue debt.⁵⁸

Despite this initial erosion of several safeguards of the debtor's person, the Jewish communities continued to maintain their steadfast opposition to the widely used practice in the Diaspora of debtor's prison.⁵⁹ However, in the second half of the thirteenth century, the continuing growth of commerce and the persisting custom of debtor's prison outside the Jewish communities led to doubt concerning the future viability of the prohibition against debtor's prison in the Jewish communities.⁶⁰ These pressures culminated in the breakthrough formal announcement by a leading Jewish scholar in the fourteenth century that it was acceptable to imprison a debtor who has the means to repay his debts, but nonetheless refuses to do so.⁶¹ By the fifteenth and sixteenth centuries, imprisonment of financially able but defaulting debtors was adopted by most Jewish communities.⁶²

Contrary to most legal systems of medieval Europe and despite the widespread acceptance of debtors' imprisonment in the Jewish communities, the intent of the new policy was non-punitive and non-retributive.⁶³ Instead, the purpose of this new policy in the Jewish communities was to provide an effective debt collection mechanism. Unlike most other legal systems of that time, the remedy of imprisonment in the Jewish communities was limited to cases where the debtor had the means to repay the debt

58. See *id.*; Elon, *The Sources and Nature of Jewish Law*, *supra* note 51, at 106-07.

59. See Elon, *The Sources and Nature of Jewish Law*, *supra* note 51, at 108-09.

60. See *id.* at 109.

61. See *id.* at 110. One Jewish spiritual leader in the fourteenth century justified his acquiescence of debtor's prison as follows: "I wished to object to [the debtor's prison amendment], since it is not in accordance with the Torah, but was told that it is a commercial acquirement because of deceitful persons and so that the door be not bolted against borrowers, and I have acquiesced in this custom." *Id.* at 112.

62. See *id.* at 114. The Jewish scholars justified this departure from well-established tradition by arguing that since repayment of a debt is a religious act, one can be compelled to obey it just as one can be compelled to perform other types of religious acts. Further, since certain religious acts can be compelled by means such as flogging, imprisonment should be permitted as a means of compelling compliance. Moreover, since Jewish law already permits imprisonment to compel obedience for certain religious matters, imprisonment should be similarly employed as a mechanism to discover the defaulting debtor's assets. *Id.* at 112-13.

63. See *id.* at 113.

but failed to do so.⁶⁴ Moreover, to assure adequate conditions for the debtors who were sent to prison, many prisons were under Jewish communal control where Jews served as the prison officers.⁶⁵ This practice assured humane and reasonable imprisonment conditions for the debtors.⁶⁶

IV. THE BANKRUPTCY LAWS AND THE FRESH-START POLICY DURING THE BRITISH MANDATE PERIOD

Following the end of World War I, Britain gained military control over Palestine, parts of which are now Israel.⁶⁷ In 1922, the League of Nations Council approved British control over that area pursuant to what is known as the British Mandate.⁶⁸ Among other things, the Mandate directed the British government to encourage Jewish immigration to the land.⁶⁹ Accordingly, the Jewish community in Palestine grew from only 84,000 in 1922⁷⁰ to 700,000 by 1948.⁷¹

In the 1920s, the British authorities in Palestine began taking an active role in formulating legislation in the field of commercial law.⁷² Most of the legal reforms in the commercial fields were based on the then-existing British law in England.⁷³ Bankruptcy law was no exception. In 1936, the British High

64. Use of imprisonment was allowed . . . "only where there is a presumption that the debtor possesses chattels but has fraudulently conveyed them away . . . Where, however, he is a pauper and has nothing with which to pay, it is clearly prohibited to imprison him and make him suffer." . . . [I]mprisonment for debt was upheld . . . for the single purpose only of effective debt collection in the case of a defaulting debtor with means. Imprisonment for debt was never in any way a means of punishment or retribution against the borrower for his wrongful behaviour.

Id. at 113.

65. *See id.* at 114.

66. *See id.* at 114-15.

67. *See* Mark A. Lewis, *Historical Setting, in ISRAEL: A COUNTRY STUDY* 1, 35 (Helen C. Metz ed., 3d ed. 1990).

68. *See id.* at 35-36.

69. *See* NADAV SAFRAN, *ISRAEL, THE EMBATTLED ALLY* 26 (1978).

70. *See* Lewis, *supra* note 67, at 38.

71. *See* SAFRAN, *supra* note 69, at 24.

72. *See* Ron Harris, *Neflato Ve'aliyato Shel Ma'asar Ha'chayavim* [The Fall and Rise of Debtors' Prison], 20 TEL-AVIV U. L. REV. 439, 461 & n.50 (1996).

73. *See id.*

Commissioner for Palestine adopted a bankruptcy law⁷⁴ modeled after the British Bankruptcy Act of 1914.⁷⁵

The adopted British bankruptcy system served primarily as a creditors' collection mechanism.⁷⁶ While the law did allow a debtor to voluntarily commence a bankruptcy petition, the main aim of the bankruptcy process was to provide creditors with an additional collection tool.⁷⁷ Also, while the debtor had the right to apply for an order of discharge,⁷⁸ debt forgiveness was linked to payments that the debtor made or might make to creditors in the future.⁷⁹ Specifically, pursuant to § 26(3) of the 1936 Bankruptcy Ordinance, a court was precluded from granting the debtor an unconditional discharge if the debtor's assets were "not of a value equal to five hundred mills in the pound on the amount of his unsecured liabilities"⁸⁰

The creditor-oriented bankruptcy regime in the pre-statehood years paralleled the pro-creditor debt collection practices outside of bankruptcy. Since the British Mandatory government in Palestine failed to adopt a new law regarding debt collection,⁸¹ the prevailing law in Palestine was based on debt collection law from the Ottoman period.⁸² As a result, a debtor who failed to repay his debts despite having the ability to do so was subject to imprisonment for up to ninety-one days. Importantly, the debtor had the burden of proving that he did not have the current ability to repay the debt. Lastly, the debt was not discharged after the debtor served his imprisonment term.⁸³

While local British authorities attempted, on several occasions, to liberalize the debtor-imprisonment statute,⁸⁴ none of

74. See Bankruptcy Ordinance, 1936, Official Gazette, Supp. 1, at 21 [hereinafter the 1936 Bankruptcy Ordinance].

75. See SHLOMO LEVIN, PSHITAT-REGEL [BANKRUPTCY] 13 (1984). See generally Fassberg, *supra* note 15.

76. See Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 105-06 (1982).

77. See *id.* at 106.

78. The debtor had the right to submit such an application following the conclusion of the public examination. See 1936 Bankruptcy Ordinance § 26(1).

79. See Boshkoff, *supra* note 76, at 104.

80. 1936 Bankruptcy Ordinance § 26(3).

81. See Harris, *supra* note 72, at 461-62.

82. See *id.* at 460-62.

83. See *id.* at 461.

84. In advocating reform, the British authorities were mainly motivated by cost considerations. Since the costs of imprisonment were borne by the government, the British authorities had to expend the funds necessary to imprison the growing number of defaulting debtors. Since the authorities were not interested in subsidizing the collections costs of the creditors, they believed it was important to reduce the number of debtors detained by reforming the debtor's prison law. See Harris, *supra* note 72, at 461-63.

the attempts was successful.⁸⁵ The resistance to the liberalization attempts came primarily from the Arab institutional organizations and the related powerful interest groups including property owners, businesspersons, and bankers. In addition, the Jewish bar association was strongly against any changes in the status quo.⁸⁶ These groups' main concern was that a liberalization of the debtors' prison law would lead to reduced certainty in debt-collection.

V. THE FRESH-START POLICY IN ISRAEL DURING ITS FIRST THIRTY YEARS

On November 29, 1947, the United Nations adopted the Partition Resolution,⁸⁷ dividing Palestine into two independent states, Jewish and Arab.⁸⁸ The Jewish population accepted the Partition Resolution.⁸⁹ On May 14, 1948, Israel proclaimed the establishment of a Jewish state.⁹⁰ To prevent the creation of a legal vacuum upon establishment of the state of Israel, the Israeli parliament promulgated a general provision under which Mandatory laws that were not repugnant to the existence of the new nation and its form of government would continue in full force.⁹¹ Since the ordinance relating to bankruptcy law belonged to that category, the British law governing this field became the law of the new Jewish state.⁹²

A. *The Legislature's Silence and Hostility Toward the Fresh-Start Policy During the First Twenty-Five Years*

During the early years following the creation of the State of Israel, the Israeli legislature was conspicuously silent on the matter of debtors' fresh-start in bankruptcy. Indeed, even though the Israeli legislature has amended the bankruptcy ordinance several times during that twenty-five year period, it failed to even

85. See *id.* at 461-62, 471.

86. See *id.* at 464.

87. *Future Government of Palestine [the "Partition Resolution"]*, G.A. Res. 133, U.N. GAOR, 2nd Sess., 128th mtg. at 131-50, U.N. Doc. A/519 (1947).

88. See *id.*

89. See *The Acceptance of the Above Resolution by the Representatives of the Jewish Community in Palestine*, U.N. GAOR Ad Hoc Comm. on Palestine Question, 2d Sess., at 12-19 U.N. Doc. A/364 (1947); see also Basheva E. Genut, Note, *Competing Visions of the Jewish State: Promoting and Protecting Freedom of Religion in Israel*, 19 FORDHAM INT'L L.J. 2120, 2138 (1996).

90. See Genut, *supra* note 89, at 2138.

91. See *Law & Administration Ordinance*, 1948, 1 L.S.I. 9.

92. See Shalom Lerner, *Restrictive Terms in Floating Charges: The Israeli Experience*, 39 ST. LOUIS U. L.J. 841, 841 (1995).

address or mention a single time the issue of fresh-start in bankruptcy cases.⁹³

Instead, the Israeli legislature exhibited its concern for the welfare and interests of creditors. Specifically, the second and third amendments to the 1936 Bankruptcy Ordinance dealt exclusively with creditors' distribution priority rights in the debtor's estate.⁹⁴ These two amendments reflected the legislature's concern with the plight of employees' claims for unpaid wages owed by a bankrupt employer. To alleviate the perceived hardship of the unpaid employees, the legislature advocated giving such creditors a priority in distribution from the debtor's estate. Even though the total number of bankruptcy petitions was admittedly low,⁹⁵ the legislature conducted several hearings, sought expert testimony, and engaged in parliamentary debate on the issue of the employees' distribution rights in a bankruptcy context.⁹⁶ Throughout the amendment process, which began in 1953 and ended in 1965, the legislature emphasized the importance of protecting vulnerable employees in bankruptcy proceedings and ignored the plight of the bankrupts.⁹⁷

93. See Bankruptcy Ordinance Amendment Law, 1969, 23 L.S.I. 278 [hereinafter the 1969 amendment to the 1936 Bankruptcy Ordinance]; Bankruptcy Ordinance Amendment Law, 1965, 19 L.S.I. 122 [hereinafter the 1965 Amendment to the 1936 Bankruptcy Ordinance]; Bankruptcy Ordinance Amendment Law, 1953, 7 L.S.I. 78 [hereinafter the 1953 Amendment to the 1936 Bankruptcy Ordinance]; Bankruptcy Ordinance Amendment Law, 1949, 3 L.S.I. 18 [hereinafter the 1949 Amendment to the 1936 Bankruptcy Ordinance].

94. The 1953 Amendment to the 1936 Bankruptcy Ordinance increased the distribution priority for unpaid wages from fifty Pounds to 900 Israeli Liras. The 1965 Amendment to the 1936 Bankruptcy Ordinance increased again the distribution priority for unpaid wages from 900 Israeli Liras to 2,000 Israeli Liras.

95. See *Proposed Amendment of the Company Ordinance and the Bankruptcy Ordinance: Hearings Before a Joint Meeting of the Judicial and Labor Comm.*, 5th Knesset 2 (1964) (statement of Mr. Kadmon, the head of the General Administrator's Office) ("There are not that many bankruptcy petitions. There were approximately 200 bankruptcy petitions . . . Among the 200 bankruptcy petitions there were twenty individual bankruptcy filings . . . And that was in 1963.")

96. See, e.g., *id.*; see also D.K. (1964) 2485; *Proposed Amendment of the Company Ordinance and the Bankruptcy Ordinance: Hearings Before a Joint Meeting of the Judicial and Labor Comm.*, 5th Knesset 2 (March 10, 1965); *Proposed Amendment of the Company Ordinance and the Bankruptcy Ordinance: Hearings Before a Joint Meeting of the Judicial and Labor Comm.*, 5th Knesset 2 (March 3, 1965); *Proposed Amendment of the Company Ordinance and the Bankruptcy Ordinance: Hearings Before a Joint Meeting of the Judicial and Labor Comm.*, 5th Knesset 2 (Jan. 13, 1965); *Proposed Amendment of the Company Ordinance and the Bankruptcy Ordinance: Hearings Before a Joint Meeting of the Judicial and Labor Comm.*, 5th Knesset 2 (Jan. 10, 1964); *Proposed Amendment of the Company Ordinance and the Bankruptcy Ordinance: Hearings Before a Joint Meeting of the Judicial and Labor Comm.*, 5th Knesset 1 (Jan. 3, 1964).

97. See D.K. (1963) 2636 (statement of Justice Minister, Mr. Yoseph).

The fourth amendment of the 1936 Bankruptcy Ordinance focused on providing safeguards for creditors' interests from the debtor's potential fraudulent transfers of his assets. Once again, there was no mention of the debtor's interests in general or bankruptcy's fresh-start policy in particular.⁹⁸

While the Israeli legislature did not adopt amendments to the 1936 Bankruptcy Ordinance that addressed the fresh-start policy, the legislature and other quasi-governmental agencies actively adopted provisions in other areas of the law that aimed at impairing the financially troubled debtor's ability to start a new chapter in his life. In the 1950s, the government banned all individuals who were declared bankrupt from serving as a member of any city council or municipality.⁹⁹ In the early 1960s, a regulation was adopted revoking the license of any attorney who was declared bankrupt.¹⁰⁰ Later on in that decade, the legislature declared that any contractual agency relationship automatically terminated upon the bankruptcy declaration of either the agent or the superior.¹⁰¹ In the early 1970s, the Israeli legislature declared that an offer would automatically become unenforceable if either the offeror or the offeree was under bankruptcy protection.¹⁰² Lastly, during that period, the legislature precluded an individual who had been declared bankrupt within the last seven years from being appointed as a member of the trade association for fruits and vegetables.¹⁰³

The resolution of the problem [of repaying unpaid wages where the employer filed for bankruptcy protection] is not easy, since [there are several conflicting claimants], all of which are justified—social interests of the workers, others who depend on the bankrupt to pay their alimony, the interests of the government to collect taxes . . . and the interests of the regular creditors.

Id.

98. See Draft bill amending the Bankruptcy Ordinance & the Company Ordinance (no. 657), 1965 H.H., 248.

99. See MUNICIPAL ORDINANCE CODE (new edition) § 120(7) (1964) (such an individual will be able to resume his position two years after obtaining the order of discharge); see also the Local Municipal Ordinance § 11(a)(8) (1958); the Local Municipal Ordinance (a) § 101(8) (1950).

100. See The Chamber of Advocates Law, 1961, 15 L.S.I. 48(3) (1961).

101. See The Agency Law, 1965, 19 L.S.I. 14(a) (1964-1965).

102. See The Contracts (General Part) Law, 1973, 27 L.S.I. 4 (1972-73).

103. The Association for Fruits and Vegetable Law (Production and Export), 1973, § 8(b) (1973); see also LEVIN, *supra* note 75, at 147.

B. *The Judicial Bias Against the Debtor's Interests and in Favor of the Creditors' Interests During the First Twenty-Five Years*

Apparently, as people in Israel viewed the bankruptcy system primarily as a creditor-oriented repayment mechanism, many bankruptcy petitions during the early days of the nation were evidently initiated by creditors against debtors. However, in time, a significant number of individuals began opting for bankruptcy protection voluntarily.¹⁰⁴ Most did so for two reasons. Many hoped to avoid imprisonment for not paying their debts, as imprisonment was an integral part of the civil judgment execution process.¹⁰⁵ Others hoped to take advantage of a better repayment plan in the bankruptcy process.¹⁰⁶

Despite the growing trend in voluntary bankruptcy petition, it was not until 1962 that the Israeli Supreme Court first formally recognized the legitimate interests of a financially troubled individual in pursuing a financial fresh-start in bankruptcy. The Supreme Court held that individuals without assets are "entitled to seek bankruptcy protection to avoid debtors' prison and to begin a new chapter in their lives without being pursued up to their heads by pre-petition creditors."¹⁰⁷

While that was clearly an important pronouncement in favor of a financial fresh-start policy in Israel, the Supreme Court, at the same time, placed significant restraints on a liberal

104. The decline in the numbers of involuntary commencement of personal bankruptcy petitions and the corresponding increase of voluntary petitions during the late 1960s and the early 1970s was pointed out by some legislators. See, e.g., Draft bill amending the Bankruptcy Ordinance (no. 8), 1975 H.H. 279 ("The main purpose of the proposed amendments is . . . to reduce the growing number of bankruptcy filings which are against public order and commercial norms. A clear example is that during the last few years, the vast majority of bankruptcy petitions are not initiated by the creditors, but rather by the debtors . . ."); D.K. (1975) 311 ("Today the bankruptcy process is used by many for illegitimate purposes. During the past few years, more than ninety percent of the bankruptcy petitions were initiated by the debtors, and not by the creditors.").

105. The judgment execution process is a government run system that facilitates the collection of debts in Israel pursuant to the [Judgment] Execution Act, 27 L.S.I. (1967).

106. For example, in the following cases, the debtor sought bankruptcy protection to avoid imprisonment: C.A. 97/68, *Mazwi v. Official Receiver*, 22(2) P.D. 899, 900; C.A. 501/67, *Official Receiver v. Valenci*, 22(1) P.D. 23, 23; C.A. 16/62, *Helver v. Sepormas*, 15 P.D. 1311, 1311. In one case the court explained how some debtors find it beneficial to commence bankruptcy protection in order to obtain more convenient repayment terms. See C.A. 75/74, *Levin v. Kutner*, 29(2) P.D. 14, 16-17.

107. *Helver*, 15 P.D. at 1315; see also *Mazwi*, 22(2) P.D. at 900; *Valenci*, 22(1) P.D. at 25-26.

interpretation of that policy.¹⁰⁸ The Supreme Court justified its adopted restraints as an attempt to preserve the moral values of debt repayment in the commercial system.¹⁰⁹ To safeguard the moral values of debt repayment, the Court implicitly required that creditors' interests receive adequate consideration.¹¹⁰

Several restraints were placed by the Supreme Court on the financially troubled debtor's ability to commence a new chapter in his life. First, while the Court recognized that generally a debtor may legitimately file for bankruptcy protection to avoid imprisonment, the Court urged the lower courts to carefully examine such cases in order to prevent a "further erosion of the powers of the judgment execution system in enforcing debt-repayment."¹¹¹

Second, while the Court acknowledged that it is legitimate for debtors with no assets to file for bankruptcy protection, it also announced that such petitions can nonetheless be dismissed where there is no reasonable likelihood that the debtor will acquire assets in the future for adequate distribution to creditors.¹¹² Another indication that the judiciary was primarily concerned with preserving the creditors' collective interests was the holding that a bankruptcy petition could be dismissed where the debtor has only a single creditor and, hence, that bankruptcy would not promote any collective interests.¹¹³ Lastly, the Court held that judges must also take into consideration the creditors'

108. See *infra* notes 111-14 and accompanying text.

109. For example, despite creditors' approval, the Supreme Court has rejected bankrupts' proposed debt-repayment compromises with their creditors on the ground that such compromises would violate the moral demands of the commercial system, as the compromises purport to distribute inadequate funds to the creditors. See C.A. 303/66, *Official Receiver v. Sagiv*, 20(4) P.D. 368, 371; C.A. 172/57, *Official Receiver v. Nudleman*, 11 P.D. 1177, 1179.

110. *Id.*

111. *Valenci*, 22(1) P.D. at 26-27.

112. The absence of assets that can be distributed among creditors is not, in and of itself, a ground for dismissing the debtor's bankruptcy petition But, if the debtor has no assets and, based on all the circumstances, it is not reasonably likely that the debtor will acquire assets in the near future and the administration of the bankruptcy petition is likely to lead to additional costs and expense without justification and benefit, then the court will be justified in exercising its discretion and refuse, from the beginning, to issue a receiving order

Helver, 15 P.D. at 1314; C.C. (T.A.) 1078/67; *In re Shterman*, 57 P.M. 324, 325 ("Indeed, under certain circumstances, it is permissible for a debtor, who has no assets, to commence bankruptcy protection. But under what circumstances? Only where the debtor wishes to work as an employee and there is a likelihood that his debts to his creditors will be repaid from his earnings.")

113. See C.A. 560/73, *Goldstein v. Official Receiver*, 28(2) P.D. 359, 360-61 (the Supreme Court affirmed a lower court's decision to dismiss the debtor's bankruptcy petition since the debtor had only one creditor).

interests in receiving repayment, even when allocating the debtor a certain portion of his postpetition income to provide for the *minimum* needs of his family.¹¹⁴

It is also interesting to note that while the courts have displayed a great concern for the creditors' interests in the bankruptcy context, the vast majority of the appeals calling for sympathy for creditors' interests have been initiated not by the creditors themselves, but by the government agency of the Official Receiver.¹¹⁵

C. *The Debate on the Debtor's Prison Law During the First Twenty-Five Years and its Connection with the Fresh-Start Policy*

The Israeli legislature's ignorant and at times negative predisposition towards the plight of financially troubled individuals is also reflected in its attitude towards several reform proposals on the debtor's prison law during the first twenty-five years of the Jewish state. As described earlier, the British authorities in Palestine were not successful in their attempts to reform the debtor's prison law. Thus, upon its establishment, Israel inherited the debtor's prison law that originated in the days of the Ottoman Empire.¹¹⁶ Soon after the establishment of the state of Israel, the Israeli Justice Department initiated a proposal to reform the existing debtor's prison law.¹¹⁷ Despite its initial enthusiasm to eliminate the debtor's prison in Israel almost in its entirety, the Justice Department's first formal reform proposal of 1955 did not include such a sweeping provision.¹¹⁸ Instead, the

114. See C.A. 673/69, *Arglazi v. Azulai*, 24(1) P.D. 624, 628.

[T]he court will not abandon the bankrupt to starve, but rather will allocate a portion of the bankrupt's earnings for his support. The amount needed to provide for the bankrupt's support is determined by a judge on a case by case basis by weighing the debtor's needs and the *creditors' interests*.

Id. (emphasis added).

115. See, e.g., *Valenci*, 22(1) P.D. at 27 (the request for dismissing the debtor's bankruptcy petition was initiated by the Official Receiver, while the debtor's only creditor did not even show up for the hearing to support the Official Receiver's position.); *Sagiv*, 20(4) P.D. at 369; *Nudleman*, 11 P.D. at 1177.

116. See Harris, *supra* note 72, at 471.

117. On July 22, 1947, the Attorney General instructed the Legislative Office to prepare a reform proposal for the elimination of debtor's prison in Israel. See *id.* at 471-72.

118. See *id.* at 475. The reform proposal consisted of the following provisions: First, the right to issue an imprisonment order against a defaulting debtor would be transferred from the judgment execution officer to a judge. Second, a judge would issue such an order only after conducting a hearing with the debtor present. Third, a judge would issue such an order only against those debtors who avoid the repayment of the debt in bad faith (i.e., where the debtor has the ability to pay but elects not to do so or where the debtor conceals his

Justice Department was forced to compromise early on in light of significant resistance from the powerful community of judges and the bar association.¹¹⁹ These two groups viewed debtor's prison as the only effective tool to enforce the repayment of outstanding debts in the market place and to effectively deal with the perceived chronic problem of debt repayment avoidance by certain segments of the newly-formed Israeli society.¹²⁰

While not dismantling the debtor's prison altogether, the first proposed reform attempted to liberalize the process. However, that first reform proposal along with three other subsequent liberalization attempts all failed.¹²¹ It was not until 1967 that the Israeli legislature finally adopted a reform to the debtor's prison law and replaced the Ottoman Empire's formulation of debtor's prison law.¹²² However, the reform adopted in the debtor's prison law did not include a liberalization of the system. Instead, it retained many of the punitive elements of the old debtor's prison mechanism. It provided for the imprisonment for up to twenty-one days of certain debtors who defaulted on their debts.¹²³ The

assets). Fourth, the proposal called for a prohibition of imprisoning debtors who are younger than eighteen years, older than seventy years, sick, or pregnant. Lastly, the term of imprisonment would be reduced to fifteen days. It is interesting to note that while this reform proposal was rejected in 1955, a similar proposal was finally adopted almost forty years later. See *infra* note 265 and accompanying text.

119. See Harris, *supra* note 72, at 475.

120. A typical argument against a reform proposal of the debtor's prison law was stated in a letter dated April 24, 1955, from the District Court Judge Kistner to the Attorney General. In the letter the judge asserted that:

[o]ne should not forget that our nation is in a period of massive immigration and that there are many people who do not have permanent jobs and are making a living out of daily temporary jobs and there are not effective avenues available to the creditor to collect the debt.

Id. at 474.

121. The first reform proposal was initiated on March 29, 1955. After harsh criticism by prominent judges and the bar association, a second reform proposal was submitted to the Israeli parliament for consideration. Following a disappointing committee hearing on the proposed reform, the Justice Minister decided in 1956 to abandon the second reform proposal. The third reform liberalization proposal was submitted for a preliminary parliament vote in 1957. However, in the absence of timely legislative action on the proposed bill, the reform proposal was once again abandoned in 1961. Four years later, a much more conservative reform proposal, which retained the debtor's prison regime, was introduced by the new Justice Minister. That reform initiative won parliamentary approval in 1967. See *id.* at 474-83. The primary legislative motivation behind this law was to preserve the sanctity of the credit market from harm caused by perceived low ethical and moral debt repayment standards in society. See C.A. 92/5304, Perach Foundation 1992 v. Justice Minister, 47(4) P.D. 715, 754.

122. See Harris, *supra* note 72, at 485.

123. See *id.*

local administrative judgment execution officers, as opposed to judges, retained the power to issue imprisonment orders.¹²⁴ Their power was limited by two conditions. First, before issuing an imprisonment order, the debtor must have been in default on the terms of a repayment order previously issued by the judgment execution officer.¹²⁵ The terms of the repayment order were based on findings made pursuant to personal examination of the debtor or based on financial information about the debtor supplied by a creditor.¹²⁶ Second, before issuing an imprisonment order, the judgment execution officers had to be convinced that there was no other way to force the debtor to repay the debt.¹²⁷

In the few years following the 1967 reform, new regulations and laws were adopted that dramatically enhanced the power of creditors to bring about the imprisonment of defaulting debtors. First, and most importantly, a regulation was passed in 1968 under which the burden of proof on the issue of whether there was no other way to force the debtor to repay the debt was shifted to the debtor.¹²⁸ To avoid imprisonment following a delinquency on a repayment order, the *debtor* had to prove that there was another way for the creditor to collect the debt.¹²⁹

Second, in the same year the legislature amended the judgment execution law by expediting the collection process, thereby making it easier to imprison a defaulting debtor. The legislature provided that creditors no longer needed to obtain a judgment from a court before resorting to the judgment execution office for the collection of promissory notes, returned checks, or bills of exchange.¹³⁰ Instead, the creditor would simply need to present the judgment execution officer with any of those documents, and such documents became executable as if they represented a final judgment of a court.¹³¹

There were several forces that contributed to the defeat of the attempts to liberalize the debtor's prison regime in Israel between 1955 and the mid-1970s. First, as was discussed earlier, there were the powerful and influential members of the bar association and the judges. Throughout the reform process, attorney groups and prominent judges were instrumental in resisting a

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 486.

130. *See id.*

131. *See* Henry E. Baker, *Legal System*, in *THE ISRAELI YEAR BOOK* 1970 119 (L. Berger et al. eds., 1971).

liberalization of the debtor's prison system in Israel.¹³² In addition to the lobbying power and influence enjoyed by the jurists, the prevailing anti-debtor sentiments were heavily shaped by ideologies, opinions, and biases of members of the Israeli parliament. On the one side, there was a small group of largely left-wing members who advocated the elimination of the debtor's prison system in Israel.¹³³ Those individuals, who were led by the Justice Minister,¹³⁴ were primarily driven by democratic ideals and humanitarian considerations for the debtors and the lower working class.¹³⁵

However, the majority of parliament's members apparently favored the punitive status quo approach primarily because they believed that a relaxation of the debtor's prison laws would be incompatible with the perceived tendencies of certain segments of Israeli society. In particular, several legislators asserted that a liberalization of the debtors' prison law would be incompatible with "existing social conditions."¹³⁶ The existing social conditions to which they referred were the perceptions that most debtors in

132. As early as 1955, the Attorney General publicly acknowledged the impact of the attorneys' and judges' opinions on the reform process. In his testimony before the Committee of Ministers for Legislative Matters, the Attorney General stated that he "abandoned the hope that we will be a progressive country in this area, and on top of that, the Justice Minister . . . decided at the end not to do anything against the position of the attorneys and the judges . . ." Harris, *supra* note 72, at 475. That same influence also contributed to the abandonment in 1961 of the third reform proposal. In 1958, the bar association conducted a symposium dealing exclusively with the proposed debtor's prison reform. The symposium provided a podium to many attorneys who severely criticized the Justice Minister and the Attorney General's attempts to eliminate debtor's prison in Israel. In response to that symposium, the Justice Minister urged the government to consider retaining debtor's prison at least for some debtors. See *id.* at 481-82. Finally, in 1965, the Justice Minister explained why the most recent reform proposal does not advocate elimination of the debtors' prison. He stated that the decision "was made after a thorough and deep analysis and considering the position of many jurists, whose experience is significant in the matters of execution law." *Id.* at 482-83.

133. See *id.* at 478.

134. See *id.*

135. For example, some members argued that debtors' prison should be abolished because it is nothing more than a trace of the feudal and anti-democratic period of the Ottoman Empire and the Medieval periods. Others contended that debtors' prison is unfair and inhumane in practice since most of the debtors who are imprisoned come from the lower, poor working class. Some legislative members advanced this humanitarian argument, stating that "the deprivation of the individual's freedom through imprisonment, due to failure to pay a debt, is among those violations of personal freedom, which the progressive and modern legal thought regards as against the fundamental rights of humans." See D.K. (1967) 2923; D.K. (1960) 1792.

136. See D.K. (1967) 2926; D.K. (1960) 1828; Harris, *supra* note 72, at 476 & 480-81; see also H.C. 5304/92, Perach Foundation v. Justice Minister, 47(4) P.D. 715, 754.

Israel were too opportunistic and unethical.¹³⁷ As a result, some believed that only a formal and punitive mechanism would deter them from avoiding debt repayment.¹³⁸ One legislator was even more specific. When referring to the unethical conduct of the debtors, the legislator specifically referred to Oriental (Sephardic) Jews who, the legislator alleged, effectively concealed their assets from their creditors on a routine basis.¹³⁹

In addition to the perceived need to overcome the opportunistic behavior of certain debtors in Israel, some supported the punitive debtor's prison law as a way of preventing potentially disastrous consequences to the Israeli economy.¹⁴⁰ Lastly, and quite paradoxically, some supported the status quo as a way of helping the debtors themselves,¹⁴¹ or as a way of maintaining the efficiency and effectiveness of the government's collection efforts.¹⁴²

137. See Harris, *supra* note 72, at 476 (quoting one of the ministers in the Israeli government in 1955 as follows: "[The debtor's prison law] must be compatible with existing social conditions. To my great sorrow, our society is not upright.").

138. See *Perach Foundation*, 47(4) P.D. at 754 (alluding to the widely accepted view among parliament members during the early statehood years that debtor's prison should be maintained in order to counteract the lack of strong moral convictions in society to repay one's debts). See also Harris, *supra* note 72, at 480 ("A consistent theme in the arguments of some of the opponents to the elimination of debtor's prison was that while the ideas behind the elimination of debtor's prison are noble, these changes are not suitable to our area and our society at this time.").

139. See D.K. (1957) 96; see also D.K. (1960) 1864 ("I think that debtors' prison should not be abolished in our society, which is still in the formation stage, and where there is no unified moral commitment in certain segments of society; and there is no acknowledgment that people must try hard to repay their debts.") (statement of Zvi Zimmerman); D.K. (1960) 1786. Indeed, based on an empirical study in the early 1970s, it seems that the majority of the individuals who filed for bankruptcy protection during that era were Sephardic Jews. See *infra* note 160 and accompanying text.

140. Some contended that a relaxation of the debtor's prison law would be harmful to the credit industry in the country as fewer creditors would be inclined to lend in the absence of the effective enforcement mechanism of debtor's prison. See D.K. (1960) 1786.

141. Some argued that since creditors will be more hesitant to extend credit in the absence of a debtor's prison regime, the ultimate losers would be debtors who would be unable to obtain necessary credit in the future. See D.K. (1960) 1829.

142. One legislature asserted that debtor's prison should be retained since it is the most efficient way for the government to ensure debt-repayment in the marketplace.

Isn't it simpler to say to a debtor who refuses to repay his debts that instead of employing the police and investigators to search and locate where you hide your assets . . . we will simply put you in prison, and maybe then you will be kind enough to voluntarily disclose to us where are your assets . . .

In accepting defeat of his earlier liberalization efforts of the debtor's prison law in Israel, the Justice Minister comforted himself by pointing out that a financially troubled debtor could at least resort to bankruptcy protection to avoid imprisonment.¹⁴³ As we will see in the next section, the Israeli legislature effectively foreclosed that last avenue a few years later.

D. *The Bankruptcy Reform of 1976: A Move
Away from Fresh-Start*

1. The Financially Troubled Individual in Israel

Before addressing the severe restrictions that were placed on access to bankruptcy protection in 1976, it is insightful to examine the interplay between the debtors and the collection system (referred to as the judgment execution office), the motivations of individuals in Israel to file for bankruptcy protection, as well as the actual demographics of financially troubled individuals in Israel during the 1970s.

To begin the collection process of an unpaid judgment or a bounced check, a creditor would generally open a file with the local branch of the judgment execution office. The job of the judgment execution officer was to conduct an investigation of the debtor's financial affairs to determine the extent of the debtor's ability to repay the outstanding obligation.¹⁴⁴ Faced with a tremendous caseload, the judgment execution officer would rely primarily on a detailed financial questionnaire which he would automatically send to the debtor.¹⁴⁵ In the absence of a prompt reply from the debtor, the judgment execution officer would simply assume that the debtor had the financial ability to pay off the debt.¹⁴⁶ In the event the debtor would return a completed

D.K. (1960) 1784. The implicit thinking in this argument is that the government is the one who should be responsible for ensuring private debt collection as debt-repayment is a public concern. This is another example of the paternalistic attitude of the Israeli government towards debtors in Israel.

143. See Harris, *supra* note 72, at 484.

144. See Philip Shuchman, *Field Observations and Archival Data on Execution Process and Bankruptcy in Jerusalem*, 52 AM. BANKR. L.J. 341, 345 (1978).

145. See *id.* at 345. For example, in 1975, there were nearly 8,000 collection cases in Jerusalem alone. See *id.* at 346.

146. See *Proposed Amendment of the Bankruptcy Ordinance (No. 6), 1975: Hearings Before the Judiciary Comm.*, 8th Knesset 5 (1976) (testimony of Dr. Uriel Procaccia).

The execution officers must conduct an investigation as to whether the debtor has the ability to repay the outstanding obligation, a task which they do not fulfill. They send the debtor a questionnaire. He generally

questionnaire, the judgment execution officer would craft a demand for repayment based on the information provided in the completed questionnaire and in the creditors' affidavits regarding the debtor's ability to pay.¹⁴⁷ A demand for repayment was then sent to the debtor with a warning that certain collection actions, including garnishment, attachment of assets, or imprisonment could result from failure to comply with the terms of the repayment demand.¹⁴⁸

In most cases the demand letter itself would not cause the debtor to repay the debt.¹⁴⁹ In the absence of a timely payment, an arrest order would be issued in many cases.¹⁵⁰ Upon receipt of the somewhat threatening arrest order, some debtors would end up paying the debt immediately.¹⁵¹ In the event that payment was not forthcoming, the police would generally execute the arrest order.¹⁵² Upon execution of an arrest order, most individuals would pay off their debts.¹⁵³ However, in a minority of cases, the debtor would not pay the outstanding obligation and as a result would be arrested and imprisoned.¹⁵⁴

These findings seem to indicate that the threat of imprisonment caused most of those individuals who did have the ability to repay their debts to do so at some point during the judgment execution process, but before imprisonment became real. It seems that most of those who were financially unable to

does not fill it up. [The judgment execution officers then] presume that [the debtor] has [the money].

Id.

147. See Shuchman, *supra* note 144, at 346 ("For it appears that orders for monthly payments are based on no information or founded on what little the creditor, an obviously interested party, tells the Execution Officer.").

148. See *id.* at 345-46.

149. See *id.* at 346-47 ("Although some debtors apparently pay or make some arrangement with the creditor's lawyer after receipt of the warning, in most cases there has been no payment.").

150. See *id.* at 347 ("Thereafter, in about 40 percent of the cases an arrest order is issued which is on a police form and contains rather threatening language."). In 1963, there were approximately 10,000 arrest orders issued for civil debts. In 1975, there were almost 100,000 arrest orders issued and executed for civil debt. *Id.* at 348 & n.19.

151. See *id.* at 347. ("When the arrest order is issued and a copy delivered to the debtor, many [debtors] are frightened and pay."). However, the only available actual statistics indicate that only slightly over sixteen percent of the debtors paid their debts following receipt of a notice that an arrest order had been issued. *Id.* at 351.

152. For example, in May 1976, more than eighty percent of the arrest orders were executed by police in Jerusalem. *Id.*

153. See *id.* at 349 ("The most common consequence of the appearance of a police officer at the dwelling place of the debtor is that the debtor then goes to a post office (alone or accompanied by the police officer) and pays the debt.").

154. For example, in the month of May of 1976, among the 912 arrest orders that were issued, there were approximately 98 arrests, or about ten percent. See *id.* at 351; see also D.K. (1960) 1827.

repay their obligations were the ones who resorted to bankruptcy protection in a desperate attempt to avoid imprisonment.¹⁵⁵

The demographics of the average bankrupt tend to confirm that assessment. The average bankrupt was part of the Israeli lower socio-economic class. Almost half of the bankrupts surveyed in the mid-1970s were unemployed.¹⁵⁶ Those who were employed tended to be unskilled and near the poverty line.¹⁵⁷ While the majority of the bankrupts were wage earners, some were self-employed.¹⁵⁸ Most of the bankrupts had several dependents and many of the bankrupts or their spouses had some kind of a health problem.¹⁵⁹ Most of the wage earner bankrupts were of Sephardic ethnic origin.¹⁶⁰ Most of the bankrupts' unpaid debts arose out of purchases of basic goods, although some debts were for less commonly available goods.¹⁶¹

The bankruptcy process itself was not pleasant. It generally involved several years of obligatory monthly payments by the bankrupt to the bankruptcy trustee.¹⁶² During this period, the undischarged debtor was restricted and limited in many aspects of his life and no attempt was made to address the financial and other related problems of the debtor.¹⁶³ At the end of this prolonged bankruptcy period, debtors were not assured a debt forgiveness; in fact, very few discharges were granted to

155. See Shuchman, *supra* note 144, at 344-45.

Nearly all the bankrupts had been subjected to various aspects of execution process. Many of the bankruptcy files in our sample evidenced (some explicitly stated) that the petition in bankruptcy is an escape from what seemed a worse alternative, execution process That is largely because being in bankruptcy effectively prevents the arrest of the bankrupt debtor.

Id.

156. See *id.* at 355 ("At the date of the bankruptcy petition and within a few months thereafter 32 of the bankrupts were employed and 27 unemployed . . .").

157. See *id.* at 354 ("Nearly three-fifths of Jerusalem bankrupts are poor wage earners with monthly family incomes of less than IL. 1,500. Most of them are relatively unskilled . . .").

158. See *id.* at 354.

159. See *id.* at 354 ("Most of [the bankrupts] . . . have three or more dependent children; frequently they or their spouses are ill and disabled.").

160. See *id.* at 355.

161. See *id.* at 364 ("Typically, the scheduled debts that can be identified are for food, clothing, shoes, beds and a closet; the luxuries, if one so labels them, are washing machines, refrigerators, television sets and sewing machines."). Also, the average debt that was being enforced in the execution process was 600 Israeli Liras (approximately \$75). See *id.* at 352.

162. See *id.* at 356. Where a welfare dependent bankrupt had no adequate earnings from employment sources, the bankruptcy process resulted in the attachment of some of the debtor's state funded welfare benefits for the purpose of distributing the funds among the private creditors. See *id.* at 356-61.

163. See *id.* at 356.

bankrupts.¹⁶⁴ Despite the extensive collection efforts by the Official Receiver, recoveries from the bankrupts for the benefit of the creditors were minimal.¹⁶⁵

2. The Reasons for the 1976 Bankruptcy Reform

Acting out of a sense of urgency, in 1976 the Israeli legislature severely restricted the access of individuals to bankruptcy protection.¹⁶⁶ The sense of urgency stemmed from a perceived notion that *voluntary* bankruptcy filings by individuals had dramatically increased in the recent past.¹⁶⁷ Many legislators

164. See *id.* at 356 ("There seem to be very few discharges. In our sample of some 80 cases examined in all, there were four compositions with creditors and only three discharges.").

165. See *id.* at 362 ("In 16 of 71 bankruptcies in Jerusalem and Tel Aviv nothing appeared to have been collected . . . For the remaining bankruptcies . . . it appears that slightly less than one percent a month is collected in Jerusalem . . . and less than two-thirds of one percent a month is collected in Tel Aviv . . .").

166. During a preliminary parliamentary debate on the reform proposal the Justice Minister emphasized the urgency in adopting the proposed amendments which would make the conditions for commencing bankruptcy protection significantly more rigorous. See D.K. (1975) 311. See also Uriel Procaccia, *Pshitat-Regel Al-Pi Ba'Kashat Ha'Chayav* [Voluntary Bankruptcy Petitions], 30 MISHPATIM 271, 272, 279 (1976).

167. See Draft bill amending the Bankruptcy Ordinance (no. 8), 1975 H.H., 279 ("The main purpose of the proposed amendments is . . . to reduce the growing number of bankruptcy filings which are against public order and commercial norms. A clear example is that during the last few years, the vast majority of bankruptcy petitions are not initiated by the creditors, but rather by the debtors . . ."); *Proposed Amendment of the Bankruptcy Ordinance (No. 6), 1975: Hearings Before the Judiciary Comm.*, 8th Knesset 2 (1976) ("The main goal [of this amendment] is to fight the phenomenon which intensified and became pervasive during the last few years—that a debtor, who has a small debt and who could otherwise repay his debts through the regular execution channels, opts to file bankruptcy protection."); D.K. (1975) 384 ("From the statistics in our hands, we learn that in Israel there is a worrisome phenomenon of an increase in the number of bankruptcy petitions and their scope."); D.K. (1975) 311 ("Today the bankruptcy process is used by many for illegitimate purposes. During the past few years, more than ninety percent of the bankruptcy petitions were initiated by the debtors and not by the creditors.").

However, it is unclear whether all key members of the Israeli legislature, who were involved in the bankruptcy reform efforts, did in fact have the statistics about the increase in bankruptcy filings. It was not until a month before the final passage of the proposed amendments that the Chairman of the bankruptcy reform committee asked an expert witness during a committee hearing whether there are statistics about the number of bankruptcy filings by individuals in Israel. The Chairman was advised that during 1973 there were 498 bankruptcy filings by individuals. See *Proposed Amendment of the Bankruptcy Ordinance (No. 6), 1975: Hearings Before the Judiciary Comm.*, *supra*, at 5. Also, the judiciary committee seems to have ignored an expert witness' testimony that suggested that the increase in the number of personal bankruptcy filings is a worldwide phenomenon that resulted primarily from changes in the credit market and the increased availability of consumer credit. See *id.* at 4-5 (statements of Dr. Uriel Procaccia). The legislature's concern with the debtor's

viewed that trend negatively because they believed it violated moral norms, was too expensive for the government, and was injurious to the debtors themselves. Each of these reasons will be discussed below.

The bankruptcy reform initiators wanted to stop the dramatic increase in voluntary bankruptcy petitions because they believed that bankruptcy was morally reprehensible. In their view, bankruptcy inevitably results in an increase in asset concealment, debt forgiveness, or in easier repayment terms.¹⁶⁸ Furthermore, some believed that the bankruptcy system in Israel, which at that time permissively allowed an individual to commence bankruptcy protection, was taken advantage of by certain ethnic groups in Israeli society that had not yet acquired the necessary moral values that would be compatible with such a permissive bankruptcy system.¹⁶⁹ It is interesting to note that

utilization of the bankruptcy process clearly demonstrates that the bankruptcy system in Israel was primarily viewed as a creditor's remedy. See Shuchman, *supra* note 144, at 361-62.

In Israel the bankruptcy law is by legislative intent and administrative practice entirely for the benefit of creditors Given the terms of the Bankruptcy Ordinance and this recent amendment [the 1976 amendment], it is evident that any benefits to the bankrupt debtors are incidental. The proceedings are, obviously, for the benefit of creditors.

Id.

168. See *Proposed Amendment of the Judgment Execution Law, 1974: Hearings Before the Judiciary Comm.*, 8th Knesset 4 (1974) (statement of the chairman, Mr. Verheptig) ("Bankruptcy ruins a person economically. It also ruins the morals in the economy.").

Unfortunately, there were incidents in Israel that constitute a cause of concern. There were businesses that preferred and fraudulently obtained bankruptcy protection while their assets were registered under someone else's name, or by leaving the country or by staying outside of the country for an extended period of time, or by changing their address and a prolonged absence from the place of business. In my opinion, there is a need to apply with full force the laws in those cases, and if these laws are insufficient, then there is a need to initiate amendments to prevent acts of concealment such as these.

D.K. (1975) 383 (statement of member Kliezer Abetbi); *id.* at 385 (the Justice Minister stated that "[t]he main objective of this proposed reform is to prevent abuse of the bankruptcy system by debtors, who know that it is easy to avoid repayment, undertake obligations and then obtain a discharge through the bankruptcy system. I do not support a liberalization of this [bankruptcy] process."); D.K. (1975) 312 ("This growing phenomenon [of increased bankruptcy filings] damages the commercial practices, the public order and the economic life I am looking forward to a comprehensive reform of the bankruptcy system which will improve the commercial practices and the morality of debt-repayment in Israel.").

169. See *Proposed Amendment of the Bankruptcy Ordinance (No. 6), 1975: Hearings Before the Judiciary Comm.*, 8th Knesset 7 (1976). In response to the expert witness testimony about the bankruptcy process in the United States, one

this same ethnic-based justification for limiting financial relief to the debtors was made several years earlier during a legislative debate on a conservative reform proposal of the debtor's prison law.¹⁷⁰

Next, some legislators were in favor of a reform of the bankruptcy process that would restrict individuals' access to it because they wished to avoid the related costs sustained by the government due to increased utilization of the bankruptcy system. First, some pointed to the reduced tax revenues that were caused by increased bankruptcy filings as bankruptcy debt forgiveness led creditors to deduct the amount of their claims from their taxes as a bad debt expense.¹⁷¹ Second, some contended that an increase in bankruptcy filings by individuals inevitably led to the hiring of more government workers to alleviate the caseload congestion in the court system and to address similar hardships experienced by the Official Receiver, the government agency in charge of the administration of the bankruptcy process.¹⁷²

Finally, some argued in favor of restricted access to bankruptcy protection out of concern for the well-being and safety of debtors. One member of the reform committee discussed the

committee member said, "The examples that you gave us are not compatible with the existing moral values of debt-repayment in Israel I am not convinced that what is good in the United States is good in Israel." *Id.*; D.K. (1975) 312 ("It is possible that the people of England have well developed moral tenets with respect to the obligation of debt-repayment But in Israel, in 1975, the law is incompatible with economic developments in our country and the law is presently incompatible with the inhabitants of Israel who gather from different nations with different world perspectives on economic and social issues.").

170. See *supra* note 139 and accompanying text.

171. As a result of the difficulties placed on the creditors in their attempt to collect their debts while the debtor is in bankruptcy, the creditors prefer to act in one of two ways: if they keep proper accounting of their activities, they deduct the amount of the debt as bad-debt loss [for tax purposes] thereby gaining something to the detriment of the government's tax collection efforts.

D.K. (1975) 312.

172. See Draft bill amending the Bankruptcy Ordinance (no. 8), 1975 H.H., 279 ("[Allowing individuals to resort to bankruptcy amounts to] a burden on the courts and the taxpayers."); D.K. (1975) 312 ("The Official Receiver, with its limited resources, is unable to handle the continuous bankruptcy filings The collection efforts and the administrative handling of the bankruptcy petitions cost a lot of money."); Minutes of the Levin's Commission on Bankruptcy Reform 1 (Jan. 3, 1991) (on file with author) (Justice Shlomo Levin explained that the 1976 bankruptcy reform was due to the increased public costs of the bankruptcy proceedings).

adverse impact bankruptcy proceedings have on the bankrupt.¹⁷³ The committee member compared the situation of a bankrupt to a released prisoner and emphasized the negative perception society has of bankrupts.¹⁷⁴ He contended that this perception coupled with the punitive nature of bankruptcy makes it very difficult for the bankrupt to reintegrate into society at the conclusion of the bankruptcy process.¹⁷⁵ To avoid that hardship on the bankrupt, the committee member suggested making it more difficult for the debtor to start the process of voluntarily commencing bankruptcy proceedings.¹⁷⁶

In addition to the direct harm arising out of filing for bankruptcy protection, some legislators were concerned that the bankruptcy process may harm the bankrupt indirectly by encouraging creditors to resort to unlawful and violent collection activities against the bankrupt. The legislators pointed out that by permissively allowing debtors to resort to bankruptcy protection, the unpaid creditors would be more likely to employ some outlawed and potentially violent collection activities against the bankrupts.¹⁷⁷ Concerned with the debtor's safety and well-

173. See *Proposed Amendment to the Bankruptcy Ordinance* (No. 6), 1975: Hearings Before the Judiciary Comm., 8th Knesset 9 (1976) (statement of Mr. Verheptig).

174. See *id.*

175. See *id.*

176. Why should we facilitate the option of bankruptcy for individuals? There are occupations that disqualify individuals who file for bankruptcy. Whoever files for bankruptcy and later attempts again to start a business will find it hard to regain the trust [of the marketplace]. Why should we cut-off individuals as productive members of the labor market . . . We know what the conditions are of prisoners who served their prison terms. They find it very difficult to re-integrate into society.

Id.; D.K. (1976) 1612 (statement of Mr. Verheptig) ("[I]t is unjustified to ruin someone's source of income . . . and to cause him to be left out of the normal course of life once he becomes bankrupt and he cannot do anything."). This is another example of the paternalistic attitude the Israeli legislature has demonstrated toward the bankrupt.

177. See D.K. (1975) 385 ("Recently, we have witnessed a phenomenon where people who get into financial trouble are confronted with different private debt collectors who 'help' the creditors to get repaid . . .").

As a result of the difficulties faced by creditors in their attempts to collect their debts from bankrupts, I have witnessed that creditors prefer to act in one of two ways . . . If they do not keep proper accounting of their activities they turn to criminal and violent actors who are successfully collect the debt, in exchange for a "fee." Recently, we were informed in the media about this negative phenomenon across the public. There is a concern that such methods of debt collection will grow and intensify, especially since we are now facing economic stagnation . . .

being, the committee member advocated limiting the debtor's access to bankruptcy protection altogether as a way of avoiding the overreaching collection efforts of some creditors.¹⁷⁸

3. The 1976 Changes to the Bankruptcy Law

To put an end to the perceived abuse of the bankruptcy process by debtors, the Israeli legislative body passed several provisions that made it very difficult for an individual to voluntarily commence bankruptcy protection. These provisions further tilted the balance of power in favor of creditors.¹⁷⁹ In particular, three provisions were added with the aim of reducing the number of bankruptcy filings. The first provision stated that a debtor may not voluntarily commence bankruptcy protection unless the following conditions occurred: (a) he has liabilities in excess of ten thousand Israeli Liras;¹⁸⁰ (b) he has at least two creditors;¹⁸¹ and (c) he enclosed with his bankruptcy application a report about his financial condition.¹⁸²

D.K. (1975) 312. Unfortunately, some creditors still resort to illegal and violent collection means today. See Shmuel Mitelman, *Ma'Asar Ad 21 Yom [Imprisonment Up to Twenty-One Days]*, MA'ARIV, June 23, 1993, at 7.

178. See *id.*

179. See Ariel Hazak, Mivchanei Shikul Da'at Beit Ha'Mishpat Be'Matan Zav Kinus Le'Bakashat Hachayav [Judicial Discretion in Issuing a Receiving Order Pursuant to the Debtor's Request] 4 (Nov. 1, 1994) (unpublished manuscript, on file with author).

180. See the 1936 Bankruptcy Ordinance, § 7(1) as amended by 797 S.H. 106 (1976) [hereinafter 1976 Bankruptcy Amendment]. In a subsequent edition of the Bankruptcy Ordinance, § 7 became known as § 18. Previously, the amount of the debtor's debts must have exceeded fifty Israeli Lirat. Thus, to significantly reduce the number of debtors eligible for bankruptcy protection, the legislators increased the debt floor amount by two hundred fold. Ten thousand Israeli Lirat amounted to approximately \$1,250 or almost seven month's salary of the average bankrupt. See Shuchman, *supra* note 144, at 354 & n.27. A great deal of debate surrounded this provision. While some advocated requiring debts of at least 2,000 Israeli Lirat, others were in favor of increasing the floor amount to 50,000. Compare D.K. (1975) 312 (statement of Knesset member Meir Cohen) ("In my opinion, the [10,000] sum is not adequate and there is a need to increase the amount to at least 50,000 Israeli Lirat, otherwise we will not accomplish our objective."), with D.K. (1976) 1612 (statements of member Yedidya Bari) ("I agree that there is a need to increase the sum of 50 Israeli Lirat . . . But, in my opinion there is no need to increase the sum to 10,000 Israeli Lirat as a condition for commencing bankruptcy protection. It is adequate if the sum is 2,000 Israeli Lirat."). The sole dissenter, arguing that no increase should be adopted, was the expert witness who argued that it is better for a person who wishes to commence bankruptcy proceedings to have debts in the amount of 50 as opposed to 10,000 Israeli Lirat. Otherwise, the witness contended, the legislature provides an incentive for financially troubled individuals to acquire more unnecessary debts. See *Proposed Amendment to the Bankruptcy Ordinance (No. 6) 1975: Hearings Before the Judiciary Comm.*, *supra* note 146, at 4 (testimony of Dr. Uriel Procaccia).

181. See 1976 Bankruptcy Amendment § 7(1)(b). This provision codifies prior judicial precedent. See C.A. 560/73, *Goldstein v. Official Receiver*, 28(2) P.D. 359,

Second, courts were granted the authority to deny an application for bankruptcy protection unless the court is satisfied that, "taking into consideration the judgment execution proceedings, which have been taken or can yet be taken against the debtor, bankruptcy proceedings are the appropriate course of action."¹⁸³ Lastly, a court was granted the power to annul the bankruptcy adjudication of an individual if it found that the continuation of bankruptcy would not benefit the creditors.¹⁸⁴

360-61. Similar to the previous provision, the aim of this requirement was to place additional obstacles in the face of a debtor who wishes to file for bankruptcy protection. As the Chairman of the reform committee said during legislative debate:

There are times where a man wants to commence bankruptcy protection, and then there will be no opportunity for sending the man to prison for failure to pay a debt and it will be impossible to place other pressure on him to repay his debts This is what we want to avoid as much as possible. That is why we added three small provisions, one of which requires that there will be at least two creditors.

D.K. (1976) 1612 (statement of Knesset member Mr. Verheptig).

182. See 1976 Bankruptcy Amendment § 7(1)(c). One legislator warned that the detailed reporting requirement would place an undue hardship on unsophisticated and financially unable debtors who could not get help in fulfilling this eligibility requirement. See D.K. (1975) 385 (statement of Knesset member Mr. Plomin):

Another problem: the requirement that was added to commencing bankruptcy of enclosing financial reports about the debtor's assets and liabilities In the past, while I was being trained as a lawyer and I dealt with these matters, I faced numerous problems that are associated with completing this financial report. Believe me, this financial report is not simple, it is cumbersome and difficult to complete. I think it would be especially difficult for those small bankrupts that are not bookkeepers . . .

183. The 1976 Bankruptcy Amendment § 7. This rather vague provision gave the court unfettered discretion to disqualify a debtor from the bankruptcy process where it found that the judgment execution process could provide an appropriate alternative to the bankruptcy filing. While courts have already judicially adopted a similar standard, *see, e.g.*, C.A. 501/67, *Official Receiver v. Valenci*, 22(1) P.D. 23, 26-27, this provision aimed at shifting the burden of proof to the debtor. That is, under this provision the burden is on the debtor to convince the court that the alternative in the judgment execution process is not the appropriate course of action for the debtor to undertake. One legislator protested this change in the law:

Another comment I have is with respect to the burden of proof. We are proposing a rather extreme reform under which [the debtor] must positively convince the court that the bankruptcy process is indeed the only available option. It seems to me that it is preferable to leave the matter for the full discretion of the court . . . I understand that the aim here is to reduce the case load on the judicial system, but we must still be firm to protect the interests and the rights of the individual.

D.K. (1975) 385 (statement of Knesset member Mr. Plomin).

184. See 1976 Bankruptcy Amendment § 29(1)a. In a subsequent edition of the bankruptcy ordinance § 29(1)a became known as section number 55(b).

These provisions, and especially the provision that allowed a court to annul a bankruptcy petition if it found that *creditors* were unlikely to benefit, further reflected the Israeli legislature's view that the bankruptcy system's primary aim is to serve the creditors.¹⁸⁵ Some of these provisions also reflect the paternalistic attitude of the Israeli legislature toward small debtors. As was repeatedly stated by some legislators during the hearings and debates on the reform proposal, access limitations were placed on debtors, in part, to protect them from suffering the negative consequences of pursuing bankruptcy protection.¹⁸⁶

However, it seems that the overriding concern and objective of the legislative body was to put a stop to a perceived growth of opportunistic behavior in Israeli society as manifested through the increase in voluntary commencement of bankruptcy cases.¹⁸⁷ The legislators were so determined to put an end to that perceived negative trend that they practically ignored expert witness testimony suggesting that the increases in bankruptcy filings were a result of dramatic changes in the credit industry and that the contemplated changes would be ineffective and in fact counterproductive.¹⁸⁸ In fact, in light of the actual demographics of the bankrupts at that time, it seems that the legislators acted either out of complete ignorance or out of reckless disregard of the fact that their reform proposal would have the most adverse impact on the unemployed, welfare dependent, unskilled, and the politically powerless Sephardic debtors.¹⁸⁹

Again, this provision codifies prior court precedent. See C.A. 16/62, *Helver v. Sepormas*, 15 P.D. 1311, 1314.

185. See also *Proposed Amendments of the Judgment Execution Law, 1974: Hearings Before the Judiciary Comm.*, 8th Knesset 3 (1974) (statement of Meir Shmagar) ("At any event, the standard that the court must adopt is that if a debtor does not have any assets [to distribute to creditors], he should not be eligible to file bankruptcy.").

186. See *supra* notes 173-78 and accompanying text.

187. See *supra* notes 168-70 and accompanying text.

188. See *supra* note 167.

189. See *supra* notes 156-61 and accompanying text. Further, since the average debt that was being collected in the judgment execution office was 600 Israeli Liras and since most bankrupts initiated bankruptcy proceedings in an attempt to avoid imprisonment ordered by the judgment execution officers, it seems reasonable to deduce that most bankrupts also had a similar size of indebtedness. See Shuchman, *supra* note 144, at 352. Thus, it seems clear that most bankrupts had debts that were far below the newly-created floor of 10,000 Israeli Liras. Therefore, as a result of this provision, many debtors who would otherwise have elected to pursue bankruptcy were disqualified from the process altogether.

VI. THE FRESH-START POLICY IN ISRAEL DURING THE LAST TWENTY YEARS

A. *The 1983 Reform*

The next major bankruptcy reform came in 1983. It followed an eight year evaluation and debate process which included two government-appointed bankruptcy reform commissions.¹⁹⁰ While numerous changes were adopted, the reform did not significantly affect the overall scope of the individual's opportunities for a fresh-start.¹⁹¹ Nonetheless, this reform endeavor provides important perspectives on the mindset of the Israeli legislators with respect to the fresh-start policy in bankruptcy during the late 1970s and early 1980s.

On the one hand, the Israel legislators adopted several provisions that in fact expanded the scope of the fresh-start. They did so by significantly enhancing the bankrupt's property exemption rights.¹⁹² The proponents of broader exemption levels

190. See Draft bill amending the Bankruptcy Ordinance (no. 1507), 1981 H.H., 145.

191. See Henry E. Baker, *Israel's Legal System*, in THE ISRAEL YEAR BOOK 1984 69 (Ovadia Feld et al. ed., 1985) ("Although the amendments of the principal [Bankruptcy] Ordinance, contained in eighty one of the 242 sections of that Ordinance, are numerous they do not make any substantial changes in the principles of Israeli bankruptcy law.")

192. Before the 1983 reform, the non-farmer bankrupt was entitled to keep his clothes, beds, bedding, and eating implements that were necessary for the debtor and his family, as well as books and tools of trade "the value of which shall not exceed *two shekels*." (emphasis added). See the Bankruptcy Ordinance, 1980, 34 L.S.I. 637 (1980) [hereinafter the 1980 Bankruptcy Ordinance] § 86. After the 1983 reform, the bankrupt got to keep:

. . . foodstuffs sufficient, for a reasonable period, for the subsistence of the debtor and the members of his family living with him; wearing apparel, beds, bedding, eating implements, kitchen utensils and other household effects essential to the debtor and the members of his family living with him; things required as devotional articles by the debtor and the members of his family living with him; machines operated by the debtor himself, implements, instruments, and other movables . . . provided that their value does not exceed a prescribed amount; if the debtor is an invalid - implements, instruments, machines, other movables, and animals, required by him because of his invalidity.

The 1980 Bankruptcy Ordinance, § 86, as amended by 37 L.S.I. 67 (1983) [hereinafter 1983 Bankruptcy Amendment]. Further, the bankrupt got to exempt his residence from liquidation, unless the court was convinced that the bankrupt and his family members could find reasonable accommodations elsewhere. See *id.* § 86(a).

seem to have been genuinely concerned with the well-being of the average bankrupt in Israel.¹⁹³ They were concerned that the then-existing exemption scheme was too archaic, as it could have been traced back to the laws in England from the beginning of the century.¹⁹⁴

While the legislative body adopted several provisions which expanded the scope of the fresh-start, its overriding objective seems to have been to make the bankruptcy system more cost-effective. Hence, many provisions that were beneficial as well as harmful to bankrupts seem to have been inspired largely out of an attempt to make the process more efficient. Indeed, the interests of both the bankrupts and the creditors seem to have been placed in the back seat while the main objective of streamlining the process was pursued aggressively.¹⁹⁵

For example, in what seems on its face to be a piece of pro-debtor legislation, the Knesset adopted a provision that enabled the bankrupt to obtain the benefits of a discharge without actually applying for it.¹⁹⁶ Pursuant to the newly-adopted § 67a, a court was permitted to grant the bankrupt a discharge upon the request of the Official Receiver.¹⁹⁷ However, upon a closer examination of the related legislative history, it becomes apparent that the main goal was to reduce the accumulating and burdening caseload of the Official Receiver, and not to assist the financially troubled individual.¹⁹⁸ In one legislative hearing, the head of the

193. See *Proposed Amendment of the Bankruptcy Ordinance, 1982: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 10th Knesset 9 (1982) (comments of Eliza Elizur, a staff attorney with the Justice Department).

194. See *id.* (statement of Mr. Virshobski); see also Draft bill amending the Bankruptcy Ordinance (no. 1507), 1981 H.H., 145, 155.

195. See D.K. (1981) 1701 (in introducing the proposed bankruptcy reform, the Justice Minister proclaimed that one of the major objectives of this proposed law was to "simplify the bankruptcy process, to make it more efficient and to save time of the courts."). A similar sentiment was displayed by the head of the Judiciary Committee when he presented the proposed reform for a final vote to the Knesset. "I wish to point out to you the main features of the [proposed] reform . . . the efficiency and simplification of the bankruptcy process in the courts and outside the courts, as well as, reduction of the administrative costs . . ." See D.K. (1983) 1873 (statement of Knesset member Eliezer Kolez).

196. See 1983 Bankruptcy Amendment § 67a.

197. See *id.*

198. See Draft bill amending the Bankruptcy Ordinance (no. 1507), 1981 H.H., 145, 152 (in the explanatory comments, the proponents of the legislation stated: "It is proposed that in cases where the Official Receiver believes that there is no further benefits to the bankruptcy process, the court will be allowed to grant the bankrupt a discharge order based on the Official Receiver's request, even without such a request by the debtor."); D.K. (1981) 1702 (in introducing the proposed amendments, the Justice Minister suggested that the objective of the provision, which grants a debtor a discharge upon the Official Receiver's request, is to avoid prolonged, inactive bankruptcy cases from accumulating).

Official Receiver office hinted at the motivation of this amendment. Apparently, the national auditor criticized the Official Receiver's administrative procedure for keeping open files of many bankruptcy cases that had been inactive for a number of years.¹⁹⁹ This practice developed because many bankrupts did not meet the stringent requirements for obtaining a discharge, and bankruptcy cases remained open until the discharge of the debtor.²⁰⁰ As a result, many bankruptcy cases simply remained open but inactive for many years. Indeed, some cases reportedly remained open for as long as twenty years during which time the debtor remained an undischarged bankrupt with all the penalties and stigma associated with that status.²⁰¹

In part to alleviate the concerns of the national auditor, the Official Receiver proposed a procedure by which it would reduce its inactive files. Since the only way to reduce the burdening caseload was to grant more debtors a discharge, the Official Receiver suggested that it have the authority to recommend to a judge that the court grant a particular bankrupt a discharge, thereby closing the case.²⁰²

While the legislator was sympathetic to the bureaucratic needs of the Official Receiver, it narrowly restricted that discharge avenue to cases where there would not likely be a future distribution to creditors.²⁰³ In testimony before the subcommittee on bankruptcy reform, the head of the Official Receiver vividly described the scenario under which he believed this provision would be used by the Official Receiver in the future:

If we see that the creditors no longer have an interest in the [debtor's bankruptcy petition, and where] the man filed for bankruptcy petition five or twenty years ago, and refuses to formally apply for a discharge . . . the Official Receiver could come and say: the debtor is already ninety five years old, and there are such cases, he has already repaid half of his debts, and he could not repay any more, as he resides in a retirement home, why should he remain under bankruptcy protection . . . ?²⁰⁴

199. See *Proposed Amendment of the Bankruptcy Ordinance, 1982: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 193 (statement of Amram Blum, the head of the Official Receiver).

200. See *id.*

201. See *id.*

202. See *id.*

203. See 1983 Bankruptcy Amendment § 67a (permitting a court to issue an order of discharge only when it is convinced that future administration of the bankruptcy case will not bring a benefit to the creditors).

204. See *Proposed Amendment of the Bankruptcy Ordinance, 1982: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 193 (statement of Amram Blum, the head of the Official Receiver).

As the previous passage demonstrates, the overriding goal of the legislature in adopting that provision was not to broaden the scope of the fresh-start for financially troubled individuals by making it easier to obtain a discharge. Rather, the objective was to facilitate administrative efficiency by getting rid of veteran cases that are likely to cost more for the government without any corresponding benefit to the creditors.

Other provisions in the 1983 bankruptcy reform related to the ability of an individual to have a fresh-start were also motivated mainly by efficiency considerations. For example, the elimination of the mandatory public examination of the bankrupt²⁰⁵ was not motivated by considerations of alleviating the pressure on or embarrassment of the bankrupt. Rather, the objective was to reduce the administrative costs of conducting such examinations.²⁰⁶ Similarly, a newly-adopted provision, which allowed the court to issue an order in the beginning of a bankruptcy case prohibiting the bankrupt from leaving the country while the bankruptcy process was pending,²⁰⁷ was not primarily concerned with punishing the bankrupt. Rather, the legislator's goal was to streamline the existing bankruptcy process which previously required the court to reissue such an order every year while the debtor was in bankruptcy.²⁰⁸

B. *Judicial Interpretation of the Bankruptcy Reforms*

While the 1983 bankruptcy reform did not significantly alter the scope of the bankrupt's fresh-start, the 1976 bankruptcy

205. "Where a receiving order has been made, the Official Receiver may, if he finds it necessary to do so, apply to the Court for a public examination of the debtor." The 1983 Bankruptcy Amendment § 27. Regardless of the public examination, the bankrupt is still required to undergo a private examination conducted by the Official Receiver. See Bankruptcy Rule 111a, 1985, K.T. 17047, 17062.

206. See Draft bill amending the Bankruptcy Ordinance (no. 1507), 1981 H.H., 145, 147 ("The experience proved that in most cases the public examination in court of the debtor does not bring any benefit, and it is adequate to have the earlier investigation conducted by the Official Receiver in its offices, thereby saving the time of the courts."); see also D.K. (1981) 1701-02.

207. See 1983 Bankruptcy Amendment § 57a.

208. Another way to make the process more efficient is in § [57a], which authorizes the court to instruct the debtor not to leave the country until the end of the bankruptcy process. This amendment is necessary since . . . the judges are presently routinely issuing such orders, but the term of such orders is only for a year and the [court] has to return and examine the matter every year. The proposed amendment will eliminate those [extra] procedures and will assure the debtor's presence in the country at any time deemed necessary.

D.K. (1981) 1702 (statement of the Justice Minister).

reform was successful in dramatically restricting the availability of bankruptcy protection to financially troubled individuals. Following the 1976 legislative reform, bankruptcy protection was no longer available to debtors who had few assets or had limited postpetition earnings potential. For the next twenty years, the bankruptcy mechanism did not serve as a protection and as a last resort to financially troubled individuals. Rather, the bankruptcy process became a mechanism almost entirely for the benefit of creditors.

While some courts found the bankruptcy reform of 1976 somewhat vague and difficult to apply,²⁰⁹ most judges recognized that the Israeli legislature had laid out a new vision for the bankruptcy process, one that was dramatically different from previous practice.²¹⁰ The judges recognized that while previously a debtor's application for bankruptcy protection was routinely granted, the legislature now provided new discretionary guidelines, with the goal of restricting individuals' access to the bankruptcy process.²¹¹

209. See C.A. 5178/92, *Eliyahu v. Official Receiver*, 49(1) P.D. 435, 438 ("When, then, are bankruptcy proceedings appropriate? It is doubtful if we can give a full answer.").

210. The prevailing thought in the past was that one of the main objectives of the bankruptcy process was the advancement of the debtor's interests of fresh-start . . . on the account of the creditors' interests Today, the creditors' interests for repayments of their claims outweigh the debtors' interests, that is, it is not in the public's interests to have bankruptcy proceedings, which are expensive, in cases where the proceedings would not benefit the creditors.

C.A. 5503/92, *Kirtzman v. Official Receiver*, 49(1) P.D. 749, 754.

211. See 4892/91, *Ashkenazi v. Official Receiver*, 48(1) P.D. 45.

[I]n the past, the voluntary bankruptcy process has become a tool for debtors who unjustifiably sought to avoid repayment of their debts [T]his development arose, historically, from the fact that pursuant to § 7 of the 1936 Bankruptcy Ordinance a debtor's application for commencement of bankruptcy proceedings would routinely be granted without judicial discretion in the matter. This abuse brought about the changes in the bankruptcy law As a result, a judge is now empowered to exercise broad discretion before approving a debtor's application for bankruptcy relief.

Id. at 55; see C.A. 849/79, *Social Security Agency v. Swaid*, 35(1) P.D. 762, 766 ("Today a court is no longer required, as it was before, to approve the debtor's application for commencement of bankruptcy proceedings, rather a court may refuse to grant such application unless it finds that . . . the bankruptcy process is appropriate."); C.A. (Hi.) 1250/76, *Hosisi v. Official Receiver*, 1977(2) P.M. 86, 89 ("We see that the amendment [in the bankruptcy ordinance] changed the legal standard from one extreme to the other extreme. In the past, it was enough for the debtor to submit an application for the commencement of bankruptcy proceedings for the court to automatically grant such application, without discretion.").

In interpreting this new mandate, the judges developed a four-prong test for determining when to permit an individual to commence bankruptcy protection. By far the most important factor in the minds of judges, when ruling on the debtor's application for bankruptcy protection, was whether the bankruptcy process would be beneficial to the creditors.²¹² The standard interpretation of the 1976 reform was to require the debtor to demonstrate that he could repay a reasonable portion of his total debts in the bankruptcy process.²¹³ This interpretation of the 1976 reform foreclosed the door of bankruptcy to numerous overly-encumbered, financially distressed individuals who were unable to repay a reasonable portion of their debts within a reasonable period of time.²¹⁴ Instead, the courts that turned

212. See *Kirtzman*, 49(1) P.D. at 754 ("As stated earlier, the first and main consideration [in deciding on a debtor's application for bankruptcy protection] mandated by the [Bankruptcy] ordinance is the consideration of the benefits to creditors . . .").

213. See, e.g., C.A. 3488/93, *Official Receiver v. Almochtasev*, 95(2) T.E. 1330, 1330 (The court of appeals reversed a lower court's decision granting the debtor's application for commencement of bankruptcy protection. The court of appeals reasoned that since the debtor lacks any significant assets for distribution to creditors, there was no place for the debtor in bankruptcy.); C.A. 5877/92, *Shafir v. Official Receiver*, 47(4) P.D. 710, 712 ("When are [bankruptcy proceedings] appropriate. . . ? The intent is [that the bankruptcy process is appropriate] where it assures the creditors of at least a reasonable repayment of their claims in a process that will eventually be beneficial to the entire group of creditors."); *Eliyahu*, 49(1) P.D. at 438-39 (The court of appeals affirmed the lower court's decision to dismiss the debtor's bankruptcy application partly because there was no benefit to the creditors from the bankruptcy proceedings as the debtor offered an insufficient monthly repayment sum); *Ashkenazi*, 48(1) P.D. at 60 (In a concurring opinion, Justice Levin proclaimed that "one of the factors that must be considered in evaluating a debtor's application for bankruptcy protection is whether the debtor proposes a reasonable repayment plan to his creditors . . ."); see also *Hazak*, *supra* note 179, at 17 ("In addressing an application for commencement of bankruptcy, courts are primarily concerned with the benefits to creditors.").

214. See C.A. 5335/92, *Sayag v. Official Receiver*, 94(3) T.E. 721, 721 (The bankrupts, one of which was 100% disabled and welfare dependent, requested that the court reduce by approximately \$700 the monthly payments that they had to make to the trustee. The court of appeals affirmed the lower court's denial of the application primarily on the ground that such reduction would mean that the principal amount of the debts would be paid off within 400 months instead of 130 months); C.A. 2629/92, *Abu Shadid v. Official Receiver*, 47(1) P.D. 388, 390 (The debtors, one of whom claimed to have a psychological disability and the other of whom was illiterate, supported nine dependents. The court of appeals affirmed the lower court's decision to dismiss the debtors' bankruptcy application partly because there was no benefit to the creditors from the bankruptcy proceedings as the debtors lacked assets and did not have any earnings which could be used to repay their creditors.); C.A. 2584/92, *Amsalem v. Official Receiver*, 47(4) P.D. 1, 2 (The court of appeals affirmed the lower court's denial of the bankrupt's motion to reduce the postpetition monthly payments. The court cited the lower court's reasoning: "[t]he bankrupt must have nerves to submit this motion. This motion

down such applications for bankruptcy relief redirected debtors back to the judgment execution process.²¹⁵

In addition to assessing whether the bankruptcy process will benefit the creditors, the courts have interpreted the 1976 reform to deny access to bankruptcy protection to individuals who have acted in bad faith towards their creditors.²¹⁶ Courts have broadly interpreted bad faith behavior to include conduct that suggests that the debtor acted irresponsibly in incurring his debts,²¹⁷

amounts to fraud against the court, as the court would not have approved the debtor's bankruptcy application without the debtor's consent to repay at least 2,000 New Israeli Shekels (NIS) per month relative to his large debts of 580,000 NIS."); C.A. 5752/91, *Harzan v. Official Receiver*, 93(2) T.E. 1445.

With all the compassion that can be conveyed to the financial distress of the debtor, the courts must not forget the interests of the creditors . . . in deciding on the debtor's application for bankruptcy protection. In the case at hand, it is clear that the bankruptcy process will not benefit the creditors Thus, there was no error in the lower court's decision to deny the debtor's application for bankruptcy protection.

Id. at 1445; C.C. (Hi.) 292/95, *Ben-Jamal v. Official Receiver*, 96(1) T.E. 499 (The debtors, who jointly earned 2,600 NIS and who had three dependents, proposed to pay 800 NIS per month as part of the bankruptcy process. The court denied the debtors' bankruptcy application on the ground that the debtors did not have any significant assets to distribute to the creditors and the debtors' proposed repayment plan would not benefit the creditors who were owed approximately half a million NIS.). See also Memorandum from Davida Lachman-Messer, Deputy Attorney General, to Dan Meridor, Justice Minister 2-3 (Aug. 5, 1992) (the 1976 bankruptcy reform resulted in denying access to bankruptcy relief for insolvent individuals without assets).

215. See C.A. 3038/92, *Eli v. Official Receiver*, 95(3) T.E. 531, 531; C.A. 2562/92, *Shalom v. Official Receiver*, 95(1) T.E. 585, 585 (The court of appeals affirmed a lower court's decision denying the debtor's application for bankruptcy protection on the ground that the creditors would not benefit from the bankruptcy process. Under those circumstances, it was proper for the district court to refer the debtor back to the judgment execution office, where the debtor would be allowed to repay the debts following an inquiry regarding his financial ability). A similar experience was reported in the late 1970s in what was then West Germany. See Volkmar Gessner et al., *Three Functions of Bankruptcy Law: The West German Case*, 12 L. & Soc'y Rev. 499, 523 (1978) ("About 70 percent of applications to initiate [bankruptcy] proceedings are rejected because the estate is not large enough to cover the cost of the proceedings and 40 percent of those that are filed are quashed during the course of the proceedings for the same reason.").

216. See *infra* notes 217-20 and accompanying text.

217. See *Kirtzman*, 49(1) P.D. at 756 (An additional factor that must be considered in deciding on a debtors' application for bankruptcy protection is the extent of the debtor's good faith, including the circumstances surrounding the undertaking of debts); *Shadid*, 47(1) P.D. at 390 (The court of appeals affirmed the lower court's decision denying the debtors' application for commencement of bankruptcy protection. Part of the court's reasoning was that the debtors' undertaking of debts in the amount of 156,000 NIS for family consumption purposes amounted to bad faith, despite the fact that the debtors had a nine member household); *Ashkenazi*, 48(1) P.D. at 58 (The court of appeals stated that the court's attitude to a debtor's application for bankruptcy protection changes

displays an attempt to avoid diligent repayment to creditors,²¹⁸ and suggests concealment of the debtor's assets.²¹⁹

The third factor that courts weighed in deciding whether to grant the debtor's application for bankruptcy protection was the debtor's need for a discharge and the likelihood of his obtaining one. While recognizing the value of debt-forgiveness to financially troubled individuals,²²⁰ the courts regarded it merely as secondary to the overriding purpose in bankruptcy of benefiting the creditors.²²¹

where the debtor acted in bad faith. The court suggested that bad faith can arise where the debtor irresponsibly incurs debts, such as through gambling).

218. See *Eliyahu*, 49(1) P.D. at 440 (The court of appeals affirmed the lower court's decision to deny the debtor's application for bankruptcy protection. Part of the court's reasoning was that the debtor acted in bad faith because after his bankruptcy filing he chose to work as an employee instead of being self-employed, which might have generated more income to be used for greater distribution to his creditors.); *Ashkenazi*, 48(1) P.D. at 45 (Bad faith can arise where the debtor attempts to avoid repayment to his creditors at a time when he has assets); C.A. 149/90, *Klar v. Official Receiver*, 45(3) P.D. 61, 64 ("[T]he nature of the debtor's conduct is an important consideration when deciding whether to grant the debtor's application for bankruptcy protection. A debtor, whose conduct suggests that he attempted to avoid repayment of his debts, is not among the type of debtors that the bankruptcy process aims to assist . . .").

219. See Cr.A. (Jm.) 588/91, *Tachan Products v. Ventura* at 4 (unpublished) ("In light of the debtors' conduct of assets concealment as an attempt to avoid his creditors and the denial of such concealments until the end, this lack of good faith . . . precludes the debtor from bankruptcy protection."); Cr.A. (B.S.) 44/82, *In re Asal*, 1983(1) P.M. 485, 495 (An additional factor that a court must consider in deciding whether to grant the debtor's application for bankruptcy protection is "whether the applicant is a 'professional' bankrupt, or whether his debts were incurred impulsively or fraudulently with anticipation of bankruptcy protection, or whether he requests [bankruptcy] protection in an attempt to avoid full repayment of his debts, or to conceal his assets from his creditors.").

220. See *Ashkenazi*, 48(1) P.D. at 55 ("It is true that a legitimate and fundamental objective of the bankruptcy law is the debt-forgiveness of a financially troubled individual and the granting of an opportunity for opening a new chapter in his life."); *Klar*, 45(3) P.D. at 64 (A legitimate purpose of a voluntary bankruptcy proceeding is to enable the debtor to open a new chapter in his life); *In re Asal*, 1983(1) P.M. at 495 (Even after the 1976 amendment of the bankruptcy ordinance, the objective of protecting the debtor still remains).

221. See C.A. 1647/93, *Slomovich v. Official Receiver*, 95(1) T.E. 1068.

[T]he anticipated benefit to creditors from the bankruptcy proceedings is not the only factor to be evaluated. Rather, the interests of the debtor to obtain a discharge and begin a new chapter in his life are worth considering by the courts. However, it seems that the existing laws do not allow the use of the bankruptcy process for the advancement of the interests of the debtor, where it is clear that the creditors will minimally, or not at all, benefit from the bankruptcy process The debtor's financial trouble in and of itself is not adequate justification for [commencement of bankruptcy proceedings].

C.A. 2447/92, *Koroniv v. Official Receiver*, 94(1) T.E. 1353, 1353; Cr.A. (T.A.) 2463/81, *Aloni v. Sabirski*, 1986(2) P.M. 45, 50 ("[T]he goal of bankruptcy is not

However, this third factor was not much help to the average financially troubled individual in Israel. Courts regularly denied an individual access to bankruptcy protection where judges determined that the debtor was unlikely to obtain a discharge at the conclusion of the bankruptcy process.²²² According to this rationale, when the debtor is unlikely to get a discharge in bankruptcy there is no purpose in starting a bankruptcy process in the first place.²²³ The courts' assessment of whether the debtor was likely to get a discharge was generally based on the anticipated repayment level of the debtor's debts. That is, where courts found that the debtor was unlikely to repay at least *fifty percent* of his debts in bankruptcy, courts denied the debtor's application for bankruptcy protection on the ground that the debtor was unlikely to meet one of the statutory prerequisites for debt forgiveness.²²⁴ Here again, the standard adopted by the courts favored the creditors and primarily had an adverse impact on the lower socio-economic class of debtors who had limited assets and earnings capacity.

The last factor that courts considered in deciding on the debtor's application for bankruptcy protection was whether the bankruptcy process was truly the last resort available, or whether there were any further steps that could be taken against the debtor in the judgment execution process. That is, where a court found that further collection activities could be taken by the judgment execution officer against the debtor (such as garnishment, attachment, imprisonment, etc.), it would deny the debtor's application for bankruptcy protection.²²⁵ On the other

to forgive the debtor his debts, rather it is to make it possible for the creditors to proportionately collect at least part of their debts").

222. See *infra* note 223.

223. See *Kirtzman*, 49(1) P.D. at 757; *Ashkenazi*, 48(1) P.D. at 58 ("[T]he debtor's likelihood of eventually obtaining a discharge should be considered by a judge in weighing the debtor's interest against the creditor's interest [in commencing bankruptcy protection]. [Once a judge determines] that the debtor's chances of obtaining a discharge in bankruptcy are remote . . . [i]t is doubtful that a debtor's application for bankruptcy protection will be granted.").

224. Pursuant to § 63(b)(1) of the 1976 Bankruptcy Amendment, a judge was prohibited from granting the bankrupt an unconditional discharge where the bankrupt's assets were not of a value equal to fifty percent of his unsecured debts. See also C.A. 2629/92, *Shadid v. Official Receiver*, 47(1) P.D. 388, 390 (In affirming a lower court's decision to deny the debtor bankruptcy protection, the court of appeals relied in part on the fact that the debtor was unlikely to obtain a discharge since there was no likelihood of repayment to the creditors); Cr.A (Jm.) 810/91, *Levi v. Official Receiver at 2* (unpublished) (The court denied the debtor's application for bankruptcy protection partly because the judge found that the debtor was unlikely to obtain a discharge since the value of his assets was less than fifty percent of his unsecured liabilities).

225. See *Stomovich*, 95(1) T.E. at 1068 (The court of appeals affirmed the lower court's decision denying the asset-less debtors' application for bankruptcy

hand, where a court found that the judgment execution officer exhausted all available collection means, and determined that the debtor had neither assets to levy or garnish nor any present or realistic future means to repay the debts, then, and only then, would it deem the bankruptcy process to be appropriate.²²⁶

To those financially troubled individuals who managed to overcome the obstacles of commencing bankruptcy protection, the ordeal was not yet over. As was stated earlier, while some judges formally acknowledged the importance of granting a financially troubled individual an opportunity for a fresh-start, most courts tied such relief to adequate repayment of the debtor's debts.²²⁷ Despite objective difficulties of some bankrupts, such as advanced age or illness, courts stayed away from a liberal granting of discharge applications.²²⁸ As a result, some bankrupts remained in that status without receiving a discharge for a period that sometimes extended up to fifteen or even twenty-five years.²²⁹

protection partly on the ground that there were still actions that could be taken against the debtor outside of bankruptcy).

226. See *Kirtzman*, 49(1) P.D. at 756; *Ashkenazi*, 48(1) P.D. at 56 ("An important factor in deciding whether to allow a debtor to file bankruptcy is whether further steps can still be undertaken in the judgment execution process. This does not mean that as long as *formal* execution steps are available, the judgment execution system and only it should be pursued.").

227. See C.A. 206/88, *Greenberg v. Eizenberg*, 45(3) P.D. 397, 399 (The debtor's application for discharge was denied partly because the creditors received only three percent of their claims and the value of the debtor's assets did not amount to fifty percent of the amount of the unsecured claims); C.A. 380/76, *Ganzel v. Official Receiver*, 31(3) P.D. 278 (The court of appeals affirmed the lower court's decision to deny the debtor unconditional discharge since the creditors received a mere nine percent dividend from the debtor's estate and since the value of the debtor's assets did not amount to at least fifty percent of the amount of the debtor's unsecured debts).

228. See, e.g., C.A. 542/76, *Shlayer v. Official Receiver*, 31(2) P.D. 838 (The debtor, who allegedly was unable to find a job due to his bankruptcy status, was sixty-eight years old. The debtor's assets had already been liquidated and the creditors received a twelve and a half percent dividend. Nonetheless, the court of appeals denied the debtor's application for an unconditional discharge. Instead, the court conditioned the discharge on the debtor repaying the remaining balance owed).

229. See, e.g., C.A. 374/89, *Masrawi v. Official Receiver*, 93(2) T.E 1577 (The court annulled the debtor's fifteen-year-old bankruptcy petition without granting the debtor a discharge because the debtor did not pay his creditors); *Greenberg*, 45(3) P.D. at 398 (The debtor's application for discharge was denied six years after commencement of bankruptcy protection); *Shlayer*, 31(2) P.D. at 839-40 (Despite repeated attempts to obtain a discharge for five years, the sixty-eight-year-old debtor, who had been in bankruptcy for twelve years, was denied an unconditional discharge since his creditors had not yet received adequate repayment); *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 26 (Oct. 1, 1995) (statement of Davida Lachman-Messer, Deputy Attorney-General) ("There are many cases, which the Official Receiver can tell us about, where an

C. *The Alternative to Bankruptcy: The Judgment Execution Process*

As the courts routinely turned away financially troubled debtors who sought bankruptcy protection, those debtors found themselves back in the judgment execution process. The judges deciding applications for bankruptcy protection were acting under the assumption that the judgment execution process would be most suitable for the needs of these financially troubled individuals because, presumably, repayment orders would be issued only after an investigation into the debtor's ability to repay.²³⁰ Accordingly, the judges assumed that, following such an investigation by the judgment execution officer, individuals who truly did not have assets or earnings would not be subjected to the remedies available in the judgment execution process (including imprisonment), and that the repayment orders would be specifically tailored to the debtors' financial abilities.²³¹

Unfortunately for those financially troubled individuals who were disqualified from the bankruptcy process, the judgment execution process was not much more hospitable to their needs. First, in practice, the judgment execution system did not properly take into account the debtor's financial ability to repay his outstanding debts before subjecting him to various collection procedures, such as garnishment, attachment or imprisonment.²³² While a debtor who demonstrated that he did not have the means to repay his debts could be exempted from further collection activities, in practice that exemption was largely unavailing.²³³ Since the burden was placed on the debtor to initiate a formal request for a hearing to determine his financial ability to repay his debts, many financially unable and unsophisticated debtors simply did not have such a hearing.²³⁴

individual remained bankrupt for twenty-five years."); *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 37 (Sept. 13, 1995) (statement of Mr. Zuriel, Deputy Head of the Official Receiver) (Individuals used to remain bankrupts for fifteen years).

230. See *Ashkenazi*, 48(1) P.D. at 61; C.A. 5877/92, *Shafir v. Official Receiver*, 47(4) P.D. 710, 714 (The debtor raised a concern that in the absence of bankruptcy protection he would inevitably find himself imprisoned in the judgment execution process for failing to pay the outstanding debts, which he could not afford. The court dismissed that concern as unfounded, contending that since the debtor was entitled to request a hearing to determine his financial ability, he would not be subjected to the threat of imprisonment unless he was found to have the capability to pay but nonetheless failed to do so).

231. See *id.*

232. See *infra* notes 234-35 and accompanying text.

233. See *id.*

234. See C.A. 5304/92, *Perach Foundation v. Justice Minister*, 47(4) P.D. 715, 723-24.

Many of them did not know of their obligations to initiate the hearings or could not afford the help needed to formally initiate or prepare for such hearings.²³⁵ Even if a debtor did request such a hearing, the swamped judgment execution office could not schedule a prompt hearing on the matter.²³⁶

Second, many debtors who did have some financial ability to repay their debts simply could not cope with the stringent repayment orders issued by the judgment execution officers. Several legislative changes made it increasingly difficult for debtors to live up to the terms of repayment orders, as the demands made in those orders were increasingly detached from the specific needs and circumstances of the particular debtor. Correspondingly, legislative changes also made it increasingly easier to send debtors who failed to fulfill the unrealistic terms of the repayment orders to prison.

For example, in 1983, a newly-adopted regulation made it easier and increasingly more attractive for creditors to zealously pursue the collection mechanism of imprisoning a defaulting debtor. The legislature waived the payment of a fee that was previously demanded from the creditors before the debtor's imprisonment proceedings could commence. Instead, the regulation provided that the fee would be collected in the future directly from the debtor as part of the collection process.²³⁷ In essence, the regulation transformed the imprisonment system in Israel to a fully subsidized bad-debt collection vehicle. Thus, whereas creditors were no longer

235. See *id.*

One reason why many debtors [find themselves imprisoned for not paying their debts in the judgment execution process] is their lack of knowledge and ignorance. Many debtors, especially those that cannot repay the debts and cannot afford legal help, do not know that they can reduce their monthly payments if they apply for a hearing on their financial ability or complete a questionnaire. Those debtors, once they receive a warning and a repayment order, which from their perspectives are nothing more than incomprehensible pieces of paper, are overwhelmed and do not react in the way that is known to us to be the best way to handle their situation. Rather, they choose the only path that is known to them to address the problem, that is, they try to avoid the creditors, hide away, change their address, etc. . . . At any event, it is not at all strange that many debtors who are brought before the judgment execution officer following their arrest are surprised to learn that they are entitled to a hearing on their financial ability.

See *id.* See also Minutes of the Levin's Commission on Bankruptcy Reform 6-7 (Nov. 5, 1991) (on file with author) (statements of Davida Lachman-Messer, Amram Blum and Judge Bar-Ofir).

236. See Minutes of the Levin's Commission on Bankruptcy Reform 1 (Nov. 5, 1991) (on file with author) (statement by Judge Bar-Ofir) (Hearings on the financial ability of the debtors were regularly scheduled for a year from the time such requests were made).

237. See Harris, *supra* note 72, at 488.

required to pay for the fees associated with imprisoning their defaulting debtors, they were still required to pay for different collection efforts such as garnishment or attachment. As a result of this change, creditors routinely began to view the fully subsidized debtor imprisonment mechanism as the preferred collection tool.²³⁸

In 1989, in an attempt to expedite the judgment execution process and to relieve the process from an overwhelming caseload, the legislators adopted a particularly harmful provision towards defaulting debtors. The provision formally provided that before a judgment execution officer issued a repayment order, he no longer needed to conduct a careful review and examination of the particular circumstances of each application.²³⁹ Thus, from then on, a repayment order, which generally preceded an imprisonment order (in the event of default), was routinely issued by a low-level clerk or by a computer program irrespective of the particular hardships of the defaulting debtor.²⁴⁰

As the debtor's prison mechanism became the preferred collection device in Israel during the 1980s, the police, who were in charge of carrying out the imprisonment orders, became overburdened by the flood of debtor's imprisonment requests. The significant increase in the caseload caused long delays in the actual execution of the imprisonment orders by police.²⁴¹ In its obsession for expediency in the debtor's prison process, the Israeli legislature passed a new law in 1990 with the aim of expediting the imprisonment process by police, at least for the more privileged and well-off creditors.²⁴² Namely, the legislature made it possible for creditors to pay a special fee which would enable those creditors to bypass the long lines and delays in the execution of imprisonment orders by police.²⁴³ To do so, a special police unit was created which was mandated by law to execute the special fee imprisonment orders within thirty days of the date of issuance.²⁴⁴

Lastly, in 1991, the legislators adopted another reform of the judgment execution process that had the effect of further restricting the ability of financially troubled individuals to

238. *See id.* Apparently, debtor's prison became the preferred method of collection also because it proved to be the most effective method of getting a repayment. *See Minutes of the Levin's Commission on Bankruptcy Reform 5 (Nov. 5, 1991) (on file with author) (statements of Judge Bar-Ofir).*

239. *See Harris, supra note 72, at 488-89.*

240. *See id.* at 489. *See also Minutes of the Levin's Commission on Bankruptcy Reform 5 (Sept. 4, 1991) (on file with author) (statement of Mr. Kibelvich, staff attorney of the Official Receiver).*

241. *See Harris, supra note 72, at 489.*

242. *See id.*

243. *See id.*

244. *See id.*

reorganize their affairs outside of the bankruptcy system. Traditionally, debtors who defaulted on their obligations and owed money to several creditors had to face and defend against several concurrent repayment orders obtained pursuant to the independent collection efforts of the various creditors.²⁴⁵ To avoid the expense and inconvenience of several formal hearings on the debtor's financial ability, and the threat of repeated collection activities (including the threat of repeated imprisonments), such debtors generally applied to have their several debt-repayment orders consolidated into a single comprehensive order.²⁴⁶

However, in 1991, legislative changes made it practically impossible for financially troubled individuals with no significant assets or income to meet the stringent requirements of a consolidated debt-repayment order. The legislative reform conditioned the issuance of a consolidated debt-repayment order on the debtor's *full* repayment of the outstanding debts within two or, under special circumstances, three years. Furthermore, the law reform required the debtor to tender five percent of his total outstanding debts at the time of his application for a consolidated debt-repayment order, as well as to continue to make a similar monthly repayment until his application for consolidation was approved by the judgment execution officer.²⁴⁷

In enacting this reform, the purported legislative goal was to prevent a debtor from taking advantage of the system by avoiding his obligations to repay his debts.²⁴⁸ Moreover, and in a sharp contradiction to their previous pronouncements in 1976, the legislators announced that the place of insolvent debtors who could not make meaningful payments to their creditors was not in

245. See *infra* note 246.

246. See 4892/91, *Ashkenazi v. Official Receiver*, 48(1) P.D. 45, 56-57 (Consolidation of various debt-repayment orders is especially helpful to a debtor who has several creditors who are concurrently executing imprisonment orders against him); see also Memorandum from Amiram Blum, the head of the Official Receiver, to Professor David Libayi, Justice Minister 1 (Nov. 15, 1992) ("Unless the debtor is able to consolidate all of his debts into a single comprehensive repayment order, he has to undergo a hearing for each of the outstanding debts, which very few debtors are able to do.").

247. See *Harris*, *supra* note 72, at 490. While these restrictions were formally adopted in 1991, some evidence suggests that the actual practice was in place for over a decade. For example, in 1980 in C.A. (T.A.) 435/80, *Fragin v. Yisaschar*, 1982(2) P.M. 409, 414, the judge pointed out that the existing practice in the judgment execution process was to reject any request for issuing a consolidated repayment order covering debt repayment obligations for several debts unless the debtor was able to demonstrate that he could repay all of his outstanding debts within the reasonable period of time of approximately two years.

248. See D.K. (1994) 4754 (statements of Justice Minister, David Libayi).

the judgment execution process, but rather in the bankruptcy system.²⁴⁹

Indeed, following this reform, most financially troubled individuals could not meet the stringent demands of the new law and were forced to resort to the bankruptcy system as the only alternative for avoiding imprisonment.²⁵⁰ However, as explained earlier, the bankruptcy system was largely foreclosed to such individuals by the 1976 reform and by its subsequent interpretations.²⁵¹ Thus, whereas in 1976 financially troubled individuals who had no significant assets or meaningful income potential were precluded from taking advantage of the bankruptcy process and were sent to the judgment execution process, in 1991, the judgment execution process was formally foreclosed to the same individuals and paradoxically those debtors were re-directed to the bankruptcy process closed to them some sixteen years earlier.²⁵²

As a result of the various legislative reforms that began in 1976, by the late 1980s financially troubled individuals with limited assets and low incomes were in practice barred from the bankruptcy process as well as from the repayment options traditionally available in the judgment execution process.²⁵³ Consequently, the threat of the "expeditious" and fully subsidized imprisonment became ever more real for those financially troubled debtors. Indeed, as the numbers of debtors subjected to the threat of debtor's prison dramatically increased, the judgment

249. See Draft bill amending the [Judgment] Execution Law (no. 224), 1991 H.H.

250. See, e.g., C.A. 5503/92, *Kirtzman v. Official Receiver*, 49(1) P.D. 749, 755-56. Immediately following the 1991 reform, there was a dramatic increase in the number of bankruptcy filings. See Minutes of the Levin's Commission on Bankruptcy Reform 7 (Sept. 4, 1991) (on file with author) (statements of Amram Blum). This predicament was anticipated by the head of the Official Receiver. See Memorandum of Amram Blum to the reform committee of the Judgment Execution Law 2 (1991) (on file with author).

251. See *supra* Parts V.D. & VI.B.

252. See Harris, *supra* note 72, at 490. In enacting the 1991 reform, the legislators were well aware that they had also created similar access restrictions in the bankruptcy system in 1976. The legislators contemplated a reform in the bankruptcy law to address that conflict. However, they failed to do so for four years. See *Ashkenazi*, 48(1) P.D. at 57.

253. See *Ashkenazi*, 48(1) P.D. at 57; C.C. (T.A.) 2404/90, *Official Receiver v. Ron*, 1992(2) P.M. 182, 184 ("This case is an example of many cases . . . of financially troubled debtors where one judicial system turns them to another judicial system and the other judicial system returns them back to the first, in a continuing cycle. This situation resulted from the recent reform in the judgment execution law . . . "); Harris, *supra* note 72, at 490. In contrast, financially troubled individuals, who had meaningful assets or potential for adequate future income could have easily resorted to the repayment options under the judgment execution system or, worse, under the bankruptcy system.

execution officers were overwhelmed with such applications.²⁵⁴ To cope with the increased caseload, the judgment execution officers continued, with a higher frequency, to regularly issue imprisonment orders against debtors without having any information about their financial ability to pay, sometimes causing the imprisonment of the wrong people.²⁵⁵ Moreover, as the process of issuing imprisonment orders become routine, the overburdened judgment execution officers began to issue imprisonment orders in massive numbers.²⁵⁶

254. See C.A. 5304/92, *Perach Foundation v. Justice Minister*, 47(4), P.D. 715, 730 (describing the monumental burden placed on the court's clerks who had to handle an enormous number of applications).

255. Uncontradicted testimony indicates that the judgment execution officers granted imprisonment applications without even having the debtor's file in front of them. In some cases, due to bureaucratic mistakes, imprisonment orders were issued against debtors without the debtors first receiving the formal demand for payment. Other bureaucratic mishaps caused imprisonment orders to be issued against individuals who obtained a formal stay of collection activities against them, or against individuals who were dutifully making their regular monthly payments as previously ordered. In one case, an imprisonment order was mistakenly issued against a ten-year-old girl. Some debtors were repeatedly imprisoned for a period of up to twenty-one days per month for failing to pay a single creditor each of the monthly installment payments that became due. Other debtors faced repeated imprisonment by several creditors for delinquent principal on one occasion, as well as, for unpaid accrued interest on a different occasion. Those debtors that were imprisoned were not always kept separate from some of the criminal prisoners. Lastly, in many cases, the prison authorities failed to bring the imprisoned debtor in front of a judge within three days as the law required. See C.A. 5304/92, *Perach Foundation v. Justice Minister*, 47(4) P.D. 715, 723-32; see also Harris *supra* note 72, at 492-93.

256. The number of imprisonment orders and the number of imprisoned debtors was significant. For example, in the years between 1990 and 1992, approximately 300,000 files were opened in the judgment execution offices around the country. In 1988, the judgment execution office in Tel-Aviv received 176,000 applications for imprisonment orders. The judgment execution office in Tel-Aviv issued all but 1,000 of these imprisonment applications. In 1992, 24,000 individual debtors were imprisoned in Israel (to compare, in 1963, thirty individuals were imprisoned for not repaying their debts). See D.K. (1965) 2528. While almost two-thirds of them were released within one day, almost seven percent of them were imprisoned for more than seven days and one percent for more than thirty days. However, in at least one documented case from the early 1980s, a debtor was imprisoned for more than a year and a half. See Letter from Judge Uri Shtruzman to Judge Kenneth 1 (July 15, 1982) (on file with author). The value of the majority of the outstanding debts handled by the judgment execution system in Israel was relatively small. The findings of government statistical analysis of the data indicates that almost a third of the debts handled by the judgment execution system was for less than 1,000 NIS, or approximately \$300. Thus, the data suggests that in a significant portion of the collection cases opened in the judgment execution system, an imprisonment order was requested by the creditors. The data also suggests that the judgment execution officer granted such applications in a vast majority of the cases. However, the data indicates that most debtors, against whom an imprisonment order was issued, were not in fact imprisoned at all or were imprisoned for an insignificant period of

The difficulties faced by these financially troubled individuals were severe, and their desperate plight was vividly described in some detail in letters sent to various government officials. The typical letter portrays a blue collar head-of-household whose business failure or personal health led him to financial ruin.²⁵⁷ The letters describe the desperate attempts of these debtors to repay their creditors by selling their houses and other personal belongings, by borrowing from extended family members, by stealing,²⁵⁸ or by their unwavering attempts to find any job that would give them some income.²⁵⁹ The letters also describe the sterile and blinded bureaucracy of the collection and bankruptcy systems.²⁶⁰ Lastly, the letters depict the shame and humiliation

time. Lastly, the data points out that most debts handled by the judgment execution system were for relatively small amounts. See *Perach Foundation*, 47(4) P.D. at 723-32; see also Harris *supra* note 72, at 492-93.

257. See Letter from David Dahan, *supra* note 1, at 1-2 (describing Mr. Dahan's difficulties trying to comply with the draconian monthly repayment requirements now mandated by law as a way to avoid imprisonment. He explains that his debts arose from a failing business venture he joined in which he lost all of his life savings); Letter from Israel Itchkovich, a father of two, to Haim Hertzog, President of Israel 1 (Dec. 1991) (following twelve years of service in the army, Mr. Itchkovich started a business which failed largely due to his inexperience).

258. See Zvi Harel, *Gneva Le'Hachzarat Ha'Chov [Theft to Repay the Debt]*, HAARETZ, July 22, 1992, at 3 (describing an embezzlement scheme undertaken by a financially troubled debtor, who believed it was the only way for him to avoid the continuous threatening collection tactics of his creditors. The debtor embarked on the embezzlement scheme after realizing that the judgment execution and the bankruptcy processes do not afford him any protection).

259. See Letter from David Dahan, *supra* note 1, at 1-2 (describing Mr. Dahan's efforts, despite his partial disability and diabetes condition, to find a job as a watchman in a parking lot in order to comply with the monthly payment order of the judgment execution office. To make up the difference, Mr. Dahan received small monthly support from his seventy-seven-year-old mother. Due to his inability to fully comply with the repayment order, his telephone line and the electricity have been disconnected several times. He is afraid that water will soon be cut off to his apartment); Letter from Israel Itchkovich, *supra* note 257, at 1 (the debtor sold his house and all of his personal belongings to repay his creditors).

260. See Letter from Moshe Miller, an unemployed individual from northern Israel, to Justice Meir Shamgar, Chief Justice of the Israeli Supreme Court 1-3 (Nov. 6, 1991) (on file with author) (The Judgment Execution Officer ordered Mr. Miller to make an initial payment of approximately 33,000 NIS (approximately \$10,000) plus monthly payments such that the total obligation of approximately \$50,000 would be paid within two years. Mr. Miller described the order as "totally dis-attached from reality" and impractical since he is unemployed. An attorney, who offered to appeal that decision and seek a stay of execution proceedings, demanded a 3,000 NIS fee (approximately \$1,000), which Mr. Miller could not afford. He then sought help from a local legal aid office. The office turned down Mr. Miller's plea for help, saying that he belonged in jail for failing to repay his debt. Mr. Miller then sought bankruptcy protection. However, his application was rejected by a judge); Letter from Israel Itchkovich, *supra* note 257, at 1 (After continuous collection activities by his creditors, the debtor attempted

those individuals experienced and the desperate alternatives being considered by them.²⁶¹

The massive and routine utilization of debtor's prison as a collection vehicle irrespective of the debtor's financial condition came almost to a complete halt in August of 1993. In a landmark opinion, Justice Elon of the Supreme Court held that the judgment execution officer could no longer issue an imprisonment order without first conducting an adequate examination and an investigation of the debtor's financial affairs to determine whether the debtor indeed had the financial ability to repay the outstanding debts.²⁶²

This appeal to the Israeli Supreme Court was brought in 1992 by a newly-created private grassroots organization which

to resort to bankruptcy. He was surprised to learn that since he does not have any assets to distribute to his creditors he is ineligible to file for bankruptcy, even though he thought that bankruptcy is supposed to serve those most in need).

261. See Letter from Moshe Miller, *supra* note 260, at 1-3 (Mr. Miller describes his family situation as desperate since he is unable to find a solution to his financial problem. To avoid imprisonment for not paying his debts, he no longer resides with his family as he has been in hiding for the past eight months. Mr. Miller reiterated that his condition is unbearable, and as a result, he is completely unproductive and unable to support his family. Further, the financial problem destabilizes his marital relations and precludes him from being a good father to his daughters. In summary, Mr. Miller urged the Justice Minister to save his family from a total collapse, to give him an opportunity to repay his debts under reasonable conditions, and to once again be a productive citizen); Letter from Israel Itchkovich, *supra* note 257, at 1 (Mr. Itchkovich stated that he has paid a high price for his condition, including the shame of hunger, the shame of seeing a psychologist, and the humiliation of arrests. He describes his options as: (a) committing suicide; (b) life long imprisonment; or (c) fleeing the country).

I only want you to know that there are a lot of people like me who fell into financial problem not due to their own fault. These people are depressed, humiliated and have lost their dignity. They cannot look in the eyes of their relatives. What will happen when they will be arrested? Will they be able to continue to function and live with their relatives after it? . . . Is the country looking for more bankruptcies and/or suicides? . . . I love my wife, my children, my grandchild, the world, please let me continue living . . . do not cause me to . . .

Letter from David Dahan, *supra* note 1, at 1-2.

262. *Perach Foundation*, 47(4) P.D. 715, 763-64. In reaching his decision, Justice Elon concluded, through interpretation of Jewish Law, that the legislative intent of the judgment execution law was to prohibit imprisonment of a debtor for punitive purposes and to allow it only for collection purposes. The Justice also justified his position on the ground that the regulation which allows the issuance of an imprisonment order without prior examination of the debtor's financial ability to repay violates the fundamental law of dignity and freedom of the individual. *Id.* at 760-63. In ruling this way, the Supreme Court invalidated the regulation, adopted back in 1968, that shifted the burden of proof to the debtor on the issue of whether there is any other way to force the debtor to repay the debt. That is, the Court held that in order to avoid imprisonment, the debtor no longer needs to prove that there is another way to collect the debt.

had the formal objective of assisting the poorest of financially troubled individuals to whom the law did not provide financial relief.²⁶³ The impact of the *Perach Foundation* decision was significant. Since the judgment execution system was not set up to handle the hearings and conduct examinations of the debtors' financial abilities, the use of debtor's prison vanished almost in its entirety following the decision.²⁶⁴ In 1994, the Israeli legislature formally adopted the ruling of the Supreme Court and made it mandatory for the judgment execution officer to personally examine the debtor before issuing an imprisonment order. The legislature also reduced the length of the imprisonment time from twenty-one days to seven days. However, unlike the Supreme Court's ruling, the legislature once again placed the burden of persuasion on the debtor to demonstrate that he indeed lacks the means of repayment.²⁶⁵

Hence, while the practice of debtor's prison in Israel has been significantly curtailed and diminished in scope, it still remains an available and sometimes powerful collection tool.²⁶⁶

D. *The 1996 Reform of Personal Bankruptcy Law: The Beginning of a Revolution*

The massive increase in the utilization of debtor's prison in the early 1990s triggered an ad hoc protest by many who perceived the system to be inherently unfair. The protest took the form of a letter writing campaign, the formation of an interest group dedicated to helping financially troubled debtors, a litigation strategy, and apparently some suicides.²⁶⁷ The public pressure resulting from this ad hoc protest movement was the catalyst of the landmark decision and the legislative reform on the debtors' prison law in 1994. Evidently, the same public pressure was also the catalyst of the reform of the bankruptcy law in 1996.

Occasioned by these growing pressures, in 1991 the Justice Minister empowered and directed a high profile bankruptcy

263. See Dorit Gabayi, *La'Kcha Et Ha'Chov La'Lev* [Took the Debt to Her Heart], MA'ARIV, June 23, 1993, at 6-7; Harris, *supra* note 72, at 500.

264. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 193, at 11 (statement of Mr. Zurieli, the deputy head of the Official Receiver) ("The Supreme Court's decision in the *Perach Foundation* case in essence dismantled the debtor's prison law."); Harris, *supra* note 72, at 502.

265. See Harris, *supra* note 72, at 504. Relative to the ruling of the Supreme Court in 1993, the 1994 reform of the judgment execution law demonstrates, once again, a favoritism of the creditors' interests. *Id.* at 505.

266. *Id.* at 504-05.

267. See *supra* notes 262-63 and accompanying text. See also *infra* note 269.

reform commission to focus on reform of personal bankruptcy law.²⁶⁸ Indeed, the members of the commission made repeated references to the desperate conditions of the poor and insolvent individuals who were excluded from any financial relief under the then-existing legal system.²⁶⁹

Nonetheless, while some members of the commission argued in favor of strengthening the fresh-start policy as part of the reform process,²⁷⁰ there was strong opposition. The main opposition to liberalization reform came from representatives of the Official Receiver and some judges, who advanced several arguments in support of their position. The dominant argument against broadening the fresh-start policy was its threatening costs and burdens on the legal system without the necessary corresponding benefits to creditors.²⁷¹ Another reason for the opposition was the

268. See Minutes of the Levin's Commission on Bankruptcy Reform 1 (Sept. 4, 1991) (on file with author) (Justice Shlomo Levin stated that the Justice Minister requested the commission to focus on personal bankruptcy reform due to the urgency of the matter).

269. See *id.* at 6. (One of the commission's members, Mr. Kibelvich, stressed the need of generating reform that will take into account the needs of the financially troubled individuals, some of whom have committed suicide due to the lack of available financial relief); Minutes of the Levin's Commission on Bankruptcy Reform 1 (Dec. 17, 1991) (on file with author) (Justice Levin acknowledged that the "suicide letters," which many of the commission's members have received, have given rise to a significant public outcry on the matter). Also in a letter from the head of the Official Receiver to the Justice Minister, Mr. Blum reiterated the urgent need for a bankruptcy reform. Mr. Blum described the suicidal and desperate conditions of many financially troubled individuals. See Letter from Amram Blum, the head of the Official Receiver, to Dan Meridor, the Justice Minister 1 (Nov. 22, 1991).

270. See Minutes of the Levin's Commission on Bankruptcy Reform 2 (Sept. 4, 1991) (on file with author) (Justice Shlomo Levin stated that there is a need to address the right of bankrupts to open a new chapter in their lives as part of the reform).

271. When the debtor has no income and assets, there is no point in having him resort to bankruptcy proceedings since that will cause the system to give him a discharge without giving the creditors any benefit In Tel-Aviv, too, there are old [bankruptcy] cases and there is nothing to do with them. There is no benefit to creditors. [But] it does generate work for the courts and the Official Receiver.

Id. at 3 (comments made by Judge Vinograd).

We have a bankrupt who is eighty-one-years-old, who once had a hot dog factory, but he ran into financial problems He has nothing. He is in bankruptcy. They take part of his social security benefits. He pays 100 NIS per month [approximately \$30]. Is it for those kinds of cases, which require the courts and the judicial system's involvement, that we need bankruptcy? . . . This [practice] will convert judges to serve as judgment execution officers for the poor. Our proposal is to amend the bankruptcy system to limit the population that can resort to it.

Id. at 8 (comments of Mr. Blum, the head of the Official Receiver).

fear of the pressure and complaints likely to be raised by various creditors' lobbying groups.²⁷² Next, the opponents strenuously argued that any liberalization attempts would result in the abuse of the system by unscrupulous debtors.²⁷³ Similar to arguments made by legislators almost twenty years earlier, some opponents of a liberalization reform argued that a broad fresh-start policy would be incompatible with the existing mentality of Israeli society.²⁷⁴ Furthermore, some opponents of the proposed reform emphasized the likely injurious effect to the market economy that a liberalization of the fresh-start policy could bring.²⁷⁵ Lastly, one active participant and a very influential actor in the reform process implied that further reform of bankruptcy law in Israel was inappropriate, as it was already too liberal.²⁷⁶

272. See Letter from Amram Blum, to Dan Meridor, *supra* note 269, at 2.

273. See Letter from Hana Yanun, a staff attorney of the Official Receiver, to Amram Blum, the head of the Official Receiver 4 (Apr. 9, 1992) (on file with author) ("[An expansive discharge provision] is likely to give incentives to the general public to incur debts in the hope that the debts will be forgiven . . . Even today, under the present bankruptcy ordinance, there are people who abuse the bankruptcy system . . ."); Letter from Amram Blum, to Dan Meridor, *supra* note 269, at 1 ("[I]t is likely that public knowledge about the opening of the doors of bankruptcy will quickly spread, and the number of debtors that will take advantage of the situation in order to avoid their creditors may rise to a startling proportion."); Minutes of the Levin's Commission on Bankruptcy Reform 4-5 (Sept. 4, 1991) (on file with author) (To illustrate the threat of bankruptcy abuse, Justice Levin alluded to a case in which a bankrupt, who received a conditional discharge, was later found to own a luxurious apartment and a jewelry business with twelve employees).

274. See Minutes of the Levin's Commission on Bankruptcy Reform 4 (Dec. 17, 1991) (on file with author) (statement of Amram Blum, the head of the Official Receiver) (In explaining the reason for an allegedly successful broad fresh-start policy in the United States, Mr. Blum suggested that the social mentality in the U.S. is different than the social mentality in Israel, and, hence, a similar policy would not be successful in Israel).

275. See Letter from Joseph Zilberg, Deputy Director of Tel-Aviv's Official Receiver, to Shmuel Zur, the head of the Official Receiver 1 (Nov. 20, 1994) (on file with author) ("The idea of debt forgiveness may be a noble idea, . . . but it is necessary to take into consideration the reality of life and needs of the economy. It is possible that discharge may create a situation wherein lenders will not extend credit or loans."); Letter from Amram Blum, the head of the Official Receiver, to Professor David Libayi, the Justice Minister 2 (Nov. 15, 1992) (on file with author) ("The central problem that concerns us is whether making access to bankruptcy easier will encourage people to incur debts irresponsibly, in the hope that eventually, they will receive a discharge. There is no need to mention how injurious such a perception may be to the commercial life and the debt repayment morality in our country.").

276. See Minutes of the Levin's Commission on Bankruptcy Reform 5 (Jan. 13, 1992) (on file with author) (statement of Amram Blum, the head of the Official Receiver) ("The reality [in Israel] is that it is beneficial to file for bankruptcy. In the U.S., it is not a great pleasure to do so. We should import that practice to our country.").

Despite numerous meetings and consultations, the appointed commission on bankruptcy reform failed to come up with any concrete reform proposal.²⁷⁷ Nonetheless, the discussions of the commission seem to have cultivated some of the basic ideas of the next bankruptcy reform. Indeed, the fundamental changes to the fresh-start policy, which were finally adopted in 1996, were outlined in a memorandum to the Justice Minister written in August 1992 by Davida Lachman-Messer, a Deputy Attorney General and a participant of the commission.²⁷⁸

The proposed reform law was introduced in the Israeli Parliament for a preliminary approval in 1994.²⁷⁹ Following the first of its three required parliamentary approvals, it was referred to a judicial subcommittee in preparation for a final approval of the bill. There was only one representative from the Knesset present at the subcommittee hearings.²⁸⁰ In light of the little attention the bill received from other members of the Knesset, it became evident that whatever shape the bill would take at the conclusion of the subcommittee hearings would likely constitute the next bankruptcy reform law. Hence, in essence, the key for a liberalization of the fresh-start policy was left in the hands of Mr. Yitzhak Levi, the single Knesset member who participated and chaired the subcommittee's hearings.²⁸¹ The main proponent of the liberalization reform and the most dominant figure during the seven subcommittee hearings was Davida Lachman-Messer, the Deputy Attorney General, who also directed crafting the details of the reform proposal.²⁸² Since the chair of the subcommittee was generally favorably predisposed towards the liberalization process,

277. See Interview with Davida Lachman-Messer, Deputy Attorney-General, in Jerusalem, Isr. (June 27, 1997).

278. See Memorandum from Davida Lachman-Messer, Deputy Attorney-General, to Dan Meridor, the Justice Minister (Aug. 5, 1992) (on file with author).

279. See D.K. (1994) 9894. The bill was introduced at 2:10 a.m. while there were three Knesset members present. The preliminary approval of the bill was obtained with all three members voting in its favor. *Id.* at 9896. The other two votes on the bill, including its final approval, did not attract that much attention either. During the other two votes, there were five members of the Knesset present, and all voted in favor of the proposed reform. See D.K. (1996) 101.

280. The single representative from the Knesset present at the subcommittee hearings was Mr. Yitzhak Levi, a member of one of the religious parties in Israel. See, e.g., *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 229 (Sept. 13, 1995).

281. See D.K. (1996) 72.

282. In advocating for a liberalization of the fresh-start policy in Israel, Mrs. Lachman-Messer was following up on her own masters thesis recommendations which she wrote on the subject twelve years earlier. See Davida Lachman-Messer, *Shichrur Me'Chovot Be'Halichei Pshitat Regel* [Debt Forgiveness in Bankruptcy] (1983) (unpublished M.A. thesis, Hebrew University, Jerusalem, Israel) (on file with author and with the Hebrew University Law Library).

Mrs. Lachman-Messer did not face an uphill battle convincing him to support much of her reform agenda.²⁸³

Other participants in the subcommittee hearings included officials from other branches of the government, the head of the Official Receiver,²⁸⁴ representatives of the bar association, and representatives of the banking industry.²⁸⁵ Conspicuously absent from any of the subcommittee hearings were representatives of consumer or debtor groups.

The reform proposal, which was characterized by some in the subcommittee as revolutionary,²⁸⁶ attempted to achieve two seemingly contradictory objectives. On the one hand, it attempted to broaden the fresh-start opportunities for certain financially troubled individuals, while at the same time, it aimed to penalize the financially troubled individuals who resorted to bankruptcy.²⁸⁷ This double-edged reform approach emerged out

283. See, e.g., *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 45 (July 18, 1995) (Mr. Levi expressed his support for the humanitarian objectives of the bankruptcy reform).

284. Prior to the formal debate on the proposed bankruptcy reform, Shmuel Zur replaced Amram Blum as the head of the Official Receiver. This replacement seems to have made it significantly easier for the reform proponents to advance their agenda since Mr. Zur was much more amenable to the liberalization of the bankruptcy process than was his predecessor. See, e.g., *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 8 (May 23, 1995) (statement of Shmuel Zur, the head of the Official Receiver) ("The Justice Department came forward and said 'let us consider the interests of the debtor and not only the interests of the creditors' . . . [W]hen I received this proposed reform I thought that the basic conception of the Justice Department was acceptable . . .").

285. See, e.g., *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 1 (May 30, 1995).

286. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 27 (June 6, 1995) (statement of Davida Lachman-Messer, Deputy Attorney-General); *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 284, at 7 (statement of Mr. Zur, the head of the Official Receiver) ("This [bankruptcy reform] proposal, and I do not want to sound extreme, is a quasi-revolution in matters relating to bankruptcy.").

287. In her introductory comments to the bankruptcy reform subcommittee, the Deputy Attorney General generally described the objectives of the proposed bankruptcy reform to include broadly expanding the debt-forgiveness mechanism for the financially troubled individual who has acted in good faith in incurring his debts and who has no assets to distribute to his creditors. While broadening the fresh-start policy,

we are not covering our eyes with respect to the fraudulent debtors, and in this [reform proposal] we want to worsen the condition of the debtors in general, and to worsen the condition of fraudulent debtors in particular On the one hand we give the debtor access to bankruptcy but on the other hand, we demand from him many and serious things.

of a recognition of the legitimate interests of a financially troubled and honest debtor to begin a new chapter in his life.²⁸⁸ At the same time, the subcommittee's reason for adopting numerous punitive and restrictive provisions was to discourage any attempt by individuals to take unfair advantage of a more liberalized bankruptcy system.²⁸⁹

The support of a more liberal fresh-start policy in bankruptcy was based on four main rationales. First, the proponents asserted that by alleviating some of the pressure that overwhelming debts cause a financially troubled individual, society provides that individual a valuable incentive to become more productive and to contribute more back to society.²⁹⁰ Also,

Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra note 284, at 4 (statement of Davida Lachman-Messer, Deputy Attorney General).

288. See D.K. (1996) 72 (statement of Yitzhak Levi, chair of the bankruptcy reform) (urging the Knesset members to approve the proposed bankruptcy reform as it not only considers the creditors' interests but also serves the legitimate interests of financially troubled individuals).

289. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., 13th Knesset 2 (May 30, 1995)* (statement of Davida Lachman-Messer, Deputy Attorney General) (In arguing in favor of imposing rigorous reporting requirements on the bankrupt, Ms. Lachman-Messer stated "[i]t seems to me that this is the way we can accomplish the balance that is needed between the dignity and respect of the individual on the one hand, and the need to deter people from abusing the bankruptcy system"); *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra note 284, at 29* (statement of Davida Lachman-Messer) (In arguing in favor of imposing a rigorous reporting requirements on the bankrupt, Ms. Lachman-Messer stated to the subcommittee members that they "must understand that the phenomenon of assets concealment is very problematic."); D.K. (1996) 83 (statement of Yitzhak Levi, chair of the bankruptcy reform subcommittee) ("In order to prevent abuse of the benefits provided to the debtors by this bankruptcy reform, and most importantly to prevent assets concealment and the granting of discharges without justification, this proposal grants new investigatory powers to the Official Receiver relating to their assets, income and expenditures.").

290. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra note 229, at 37* (Oct. 1, 1995) (statement of Davida Lachman-Messer) ("[The discharge] is an incentive to go to work and earn since [the bankrupt] is already discharged [I]f we do not give [the bankrupt] this incentive, . . . he may give up.").

The idea behind the concept of discharge is that with a debtor who disclosed all of his assets and acted properly, and there is nothing more that you can extract from him, it is then appropriate to forgive the balance of his debts and to return him to the cycle of life. Then his incentive to contribute is greater than if he were to remain under bankruptcy protection indefinitely or for ten more years.

Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra note 284, at 4 (statement of Davida Lachman-Messer); D.K. (1996) 73 (statement of Yitzhak Levi, chair of the bankruptcy reform subcommittee) (One of the objectives of the bankruptcy law

some proponents of the reform have argued that a liberalization of the discharge provisions in some cases should proceed, since denying an asset-less and financially troubled individual a discharge promotes no interest of the creditors, who are not likely to recover any further payments from the debtor anyway.²⁹¹ Moreover, debt-forgiveness was viewed by some as a mechanism to encourage individuals to take entrepreneurial risks because their exposure is limited.²⁹² Lastly, some argued in favor of broadening the debt-forgiveness concept out of concerns for individual rights and human dignity.²⁹³

Indeed, the approved reform of the bankruptcy law broadened an individual's opportunities for a fresh-start in various fundamental ways. First, and most importantly, it lifted the severe access limitations to bankruptcy relief that were imposed on financially troubled individuals twenty years earlier. In particular, the reform law no longer conditioned bankruptcy eligibility on a bankrupt's ability to generate a meaningful benefit

under certain circumstances is to "to allow the debtor to open a new chapter and return to productive life . . .").

291. See D.K. (1996) 72-73 (statement of Yitzhak Levi, chair of the bankruptcy reform committee). In justifying the discharge under certain circumstances, Mr. Levi said:

There are times that no benefit will come out to the creditors from the debtor, no matter how they squeeze him. They can try to squeeze payments from him from all different ways, from attachment, from arrests, through the judgment execution process . . . they will not be able to get him to repay the debts The basic idea underlying our reform proposal is that there is no benefit to creditors from preventing an assetsless individual, who has no earnings, to be eligible for bankruptcy relief and to receive a discharge, except for the benefit of pursuit or revenge, but no real benefit exists.

Id.

292. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 284, at 9 (statement of Davida Lachman-Messer, Deputy Attorney General) ("[The idea of discharge] is to allow an economic unit to have limited liability since that is a requirement of entrepreneurship. For some reason, society accepted the idea that to encourage entrepreneurship, one must be provided with limited liability.").

293. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 283, at 45 (statement of Yitzhak Levi, the chairman of the bankruptcy reform subcommittee) (Mr. Levi referred to the proposed changes in discharge in bankruptcy as important humanitarian changes with which he strongly identifies); D.K. (1996) 96 (statement of Yitzhak Levi, chair of the bankruptcy reform subcommittee) ("In summary, I am calling upon you to give final approval for this proposal that balances between the dignity and the rights of the financially troubled individual who desires to open a new chapter in his life, and the property rights of the creditors.").

to the creditors.²⁹⁴ From now on most individuals who claim that they are unable to fully pay off their debts become eligible for bankruptcy relief.²⁹⁵

Second, the reform law eliminated the need for certain debtors to formally apply for a discharge. Instead, six months after a bankruptcy petition is filed, a court will automatically consider whether to grant certain bankrupts an absolute or a conditional discharge.²⁹⁶ However, only bankrupts who have incurred their debts in good faith, have no assets to distribute to creditors, and have no meaningful projected income stream are entitled to automatic consideration.²⁹⁷ Presumably bankrupts who have acted irresponsibly in incurring their debts or who are deemed likely to be able to make future distributions to their creditors will not receive discharge at that time. Instead, those individuals will have to formally apply for discharge at a later time.

Third, the standard by which a court must decide whether to grant a bankrupt an unconditional discharge was significantly liberalized. For example, whereas prior to the reformed law, a judge was precluded from granting the debtor an unconditional discharge where the debtor engaged in certain prohibitory

294. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 289, at 7 (May 30, 1995) (statements of Davida Lachman-Messer, Deputy Attorney General and Yitzhak Zuriel, the deputy head of the Official Receiver) ("In twenty-five court decisions . . . , the courts concluded that if a person has no assets, there is no benefit to creditors in a bankruptcy proceeding, and hence [the courts] did not permit people who were in need of its protection to access it [The proposed reform invalidates those rulings] This change is the essence of the reform proposal in front of us.")

295. See the 1980 Bankruptcy Ordinance, §§ 17(b), 18, *as amended in* 1560 S.H. 60, (1996) [hereinafter 1996 Bankruptcy Amendment]. However, new conditions and restrictions have been imposed on voluntarily commencing a bankruptcy petition. In particular, together with his bankruptcy application, the debtor must submit a detailed written report of his financial affairs and must waive certain rights of confidentiality and privacy. Moreover, while previously any debtor who owed more than 1,000 NIS could have applied for bankruptcy protection, the reformed law increased the minimum amount of debt by ten fold. See 1996 Bankruptcy Amendment § 17(a).

296. See 1996 Bankruptcy Amendment § 18e(a)(3).

297. See *id.* The concept of granting the debtor a discharge without having him formally apply for one was initially viewed with skepticism by some of the subcommittee members. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, *supra* note 286, at 41-42 (June 6, 1995) (In addressing the proposed change of automatically deciding whether to grant the debtor a discharge, some committee members referred to it as untimely and too revolutionary). Prior to this modification, a debtor could have also obtained a discharge where the bankruptcy process would not bring a benefit to creditors, but only upon the initiative of the Official Receiver. See 1983 Bankruptcy Amendment § 67a(a).

conduct, under the reformed law such prohibitory conduct only influences the judge's overall discretion in the matter, and does not absolutely preclude him from granting the bankrupt the unconditional discharge.²⁹⁸ Also, whereas prior to the reform law a bankrupt would not be entitled to receive an unconditional discharge if he failed to pay the creditors at least fifty percent of his debts,²⁹⁹ that requirement has now been deleted. Instead, the court may decide not to grant the debtor an unconditional discharge where he acted in bad faith or abused the bankruptcy process.³⁰⁰ Moreover, prior to the reform law a judge was precluded from granting the bankrupt an unconditional discharge where the bankrupt had undertaken additional debts while he was insolvent.³⁰¹ Under the reformed law that limitation is only discretionary, and it only applies where it can be demonstrated that the bankrupt did not have a reasonable basis to believe at the time of incurring the additional debt that he would be able to repay it.³⁰²

Fourth, the length of time under which a bankrupt may be required to make monthly payments to his creditors as a condition of getting a discharge has been significantly altered. Whereas prior to the reform, a judge could have required the bankrupt to make monthly payments to his creditors for an indefinite period of time as a condition for getting a discharge,³⁰³ under the reformed law a judge can only limit such conditional discharge for a period not exceeding four years.³⁰⁴

Fifth, the legislators expanded the opportunity of a financially troubled individual to begin a new chapter in his life by making it somewhat easier to enter into an out-of-court binding workout agreement.³⁰⁵ Lastly, the fresh-start of the individual was

298. Compare 1983 Bankruptcy Amendment § 63(a), with 1996 Bankruptcy Ordinance § 63(a).

299. See 1980 Bankruptcy Ordinance § 63(b)(1); 1936 Bankruptcy Ordinance § 26(3)(a).

300. See 1996 Bankruptcy Amendment § 63(b)(1).

301. See 1936 Bankruptcy Ordinance § 26(3)(c); 1980 Bankruptcy Ordinance § 63(b)(3).

302. See 1996 Bankruptcy Amendment § 63(b)(3).

303. See Memorandum from Davida Lachman-Messer, Deputy Attorney General, to Dan Meridor, Justice Minister 5 (Aug. 5, 1992) (on file with author). The Deputy Attorney argued that the then-existing laws, requiring repayment of at least fifty percent of the unsecured debts as a condition of discharge, led to situations where bankrupts who had no assets remained undischarged for a long period of time.

304. See 1996 Bankruptcy Amendment § 62(b).

305. See *id.* § 19a. To encourage compromises, the reform permitted debtors, whether or not they filed for bankruptcy protection, to submit a repayment proposal for the court's approval. See also *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the*

enlarged through the expansion of the available property exemptions.³⁰⁶

As was said earlier, the reformed law had a dual objective. In addition to enhancing the fresh-start of certain financially troubled individuals, the new law adopted various provisions aimed at further penalizing the bankrupts. First, consistent with their view that the government should play an active role in the debtor-creditor relationship,³⁰⁷ the legislators significantly expanded the investigative powers of the Official Receiver relating to the bankrupt's financial affairs.³⁰⁸ The Official Receiver was directed to assume an even more dominant role in the bankruptcy process. To that end, the bankrupt is required to sign a waiver of his confidentiality rights and to allow the Official Receiver to conduct a thorough examination of the circumstances

Judiciary Comm., *supra* note 229, at 47 (Sept. 13, 1995) (statement of Davida Lachman-Messer, Deputy Attorney General) ("[W]e now want to allow any [debtor] who so desires to reach a compromise with his creditors using § 19a, whether he commences bankruptcy protection or not."); *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. On Bankruptcy Reform of the Judiciary Comm.*, *supra* note 229, at 2 (Oct. 1, 1995) (statement of Davida Lachman-Messer, Deputy Attorney General) ("[One of our goals is] to encourage compromises . . ."); see also D.K. (1996) 92 (statement of Yitzhak Levi, chair of the bankruptcy reform) ("[The proposed reform found in § 19a] permits the debtor and his creditors to reach a compromise more easily than is presently done in our country."). One of the ways by which the legislators eased the out-of-court restructuring process was by reducing the minimum payments to be made under a proposed compromise from fifty to thirty percent of the unsecured debts. Compare 1983 Bankruptcy Amendment § 19a, with 1996 Bankruptcy Amendment § 19a(c). However, the legislators limited this incentive to debtors with levels of debts totalling at least 20,000 NIS (approximately \$6,000). This was done despite some protest that such a requirement would hurt the poor and the lower class. See D.K. (1996) 92 (statement of Dan Tichon, a Likud Knesset member).

306. The Amendment exempts certain pensions and saving accounts of the bankrupt unless the court or the Official Receiver orders otherwise. See 1996 Bankruptcy Amendment § 85.

307. In a letter written to the head of the government-funded Official Receiver, one staff attorney strongly argued against liberalizing the fresh-start policy in bankruptcy. Instead, the government attorney advocated retaining the traditional role of the government in the creditor-debtor arena, which is to perform collection activities. See Letter from Hana Yanun, to Amram Blum, *supra* note 273, at 4.

308. See 1996 Bankruptcy Amendment § 18c(a). See also *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm.*, 13th Knesset 3 (Nov. 22, 1995) (statement of Yitzhak Levi, chairman of the bankruptcy reform subcommittee) ("This Law gives much more investigative powers [over the bankrupt] to the Official Receiver"); D.K. (1996) 83 (statement of Yitzhak Levi, chairman of the bankruptcy reform subcommittee) ("To avoid the debtors from taking an unfair advantage of the bankruptcy reform, and primarily to prevent debtors from concealing their assets and receiving a discharge without a justification, the reform grants the Official Receiver new investigative rights relating to the assets, earnings and expenses of the debtor.").

surrounding his financial failure, as well as the likely resources that may become available for distribution to the bankrupt's creditors in the future.³⁰⁹ At the conclusion of the government sponsored investigation, the Official Receiver is required to submit an exhaustive report to the court on its findings and recommendations regarding a future course of action against the bankrupt.³¹⁰

However, most dramatically, the legislators adopted several rather punitive provisions aimed at severely restricting the bankrupt's ability to engage in further business transactions upon the filing of his bankruptcy petition.³¹¹ In particular, the reformed law denies any bankrupt the right to continue using his current credit cards.³¹² Lastly, the reformed law prohibits a

309. See 1996 Bankruptcy Amendment §§ 17(a)(3), 18c(a) & (d).

310. See *id.* § 18d.

311. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra* note 229, at 4 (Oct. 1, 1995) (statement of Davida Lachman-Messer, Deputy Attorney General) ("The objective of [these new provisions] . . . is not to penalize but rather to put restrictions on the bankrupt that are consistent with the term bankrupt."). While several new prohibitions and penalties have been imposed by the new law, other penalties were also suggested earlier on in the reform process but failed to win final approval. These other penalties include denying the bankrupt who acted irresponsibly the right to obtain or retain a driver's license or the right to vote, and preventing the bankrupt from being elected to the government or from having any other license. See Letter from Amram Blum, the head of the Official Receiver, to Justice Shlomo Levin, the chair of the bankruptcy reform commission 3 (Apr. 3, 1992) (on file with author).

312. The bankrupt can use existing credit cards with the trustee's prior written consent. See 1996 Bankruptcy Amendment § 42a(b)(1). Prohibiting the bankrupt from having a credit card during bankruptcy was predicted to have an adverse long term impact on the bankrupt. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra* note 284, at 13 (statement of A. Sela, counsel for the banking industry) ("Once they cancel [the bankrupt's] credit card . . . , you will not find a credit card issuer that will grant him a new credit card [This law] in its nature has long term consequences."). Also, this restriction was viewed as severely limiting the bankrupt's ability to engage in even the most routine and basic activities in life. *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., 13th Knesset 14-15* (Oct. 25, 1995) (statement Yitzhak Levi, chairman of the bankruptcy reform subcommittee) (A credit card is necessary for serving the basic needs of the bankrupt's family, including registering for a university, hospitalization, and use of a hotel); *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra* note 229, at 9 (statement of S. Shoham, legal advisor to the Knesset) (A bankrupt would not be able to go with his family for a vacation and stay in a hotel during the many years that he may be designated as bankrupt). The prohibition on credit card use was justified as a way to protect credit card companies from continued reckless use of credit by the debtor and as a way to protect the debtor from his own excessive tendencies to use a credit card. See *id.* at 8 (statement of Davida Lachman-Messer, Deputy Attorney General) ("[A person

bankrupt individual from founding or having a direct or indirect interest in any corporate entity.³¹³ Moreover, under the new law the bankrupt can no longer have the right to open or maintain a checking account.³¹⁴

The 1996 reform of the bankruptcy laws clearly marked an important departure from the traditionally conservative approach to the fresh-start policy. Nonetheless, the reform retained and even increased the number and the severity of penalties imposed on an individual who opts to commence bankruptcy protection.

VII. CONCLUSION

Modern western legal institutions have generally followed the trend of liberalizing their approach to dealing with financially troubled individuals in the bankruptcy setting. In contrast, the legal institutions in various Jewish communities in the Diaspora and now in Israel have followed a somewhat different trend. While initially the Jewish tradition was largely obsessed with promoting the dignity and freedom of the financially troubled individual debtor, it has gradually adopted more restrictions, limitations, and penalties against such an individual. Unfortunately, this trend has been reinforced and vigorously pursued in Israel during most of the last fifty years. The paternalistic drives of the Israeli legislature to punish the "sinning" defaulting debtors, to instill high moral values of debt-repayment in the marketplace, and to safeguard financially troubled individuals from harming themselves by filing for bankruptcy protection, have all contributed to the retention of a very punitive fresh-start policy in Israel.

who is adjudicated as bankrupt] is probably sick in the sense of taking credit beyond his means We are now trying to help him, unless the court rules otherwise. And therefore, this provision is not draconian."); *id.* at 11 ("To permit a person to continue using credit cards when he is bankrupt, . . . seems to me to be harmful to the creditors' interests, because you allow the bankrupt to deplete the bankruptcy estate. If [the bankrupt] uses a credit card, and the bank honors that charge, then the bankrupt accumulates more and more debt, until a second bankruptcy petition will ensue.").

313. See 1996 Bankruptcy Amendment § 42a(c).

314. See *id.* § 42a(a). One subcommittee member voiced her concerns regarding this punitive measure. See *Proposed Amendment of the Bankruptcy Ordinance: Hearings Before the Subcomm. on Bankruptcy Reform of the Judiciary Comm., supra* note 312, at 10 (Oct. 25, 1995) (statement of Davida Lachman-Messer, Deputy Attorney General) ("To me it looks very problematic. When you decide that a person, who is bankrupt, cannot open a checking account in a bank for a year, for two years, for three years, for four years, for five years. To me this looks rather draconian.").

The 1996 reform of the bankruptcy laws clearly marked an important departure from the traditionally conservative approach to the fresh-start policy in Israel. It formally acknowledged for the first time the need to protect the basic dignity and freedom of a financially troubled individual. While the reform retained and even increased the number and the severity of penalties imposed on an individual who opts to commence bankruptcy protection, overall the departure may signal a new philosophy towards financially troubled individuals. Potentially, the tenets of this emerging philosophy may eventually become consistent with the traditional Jewish views originally held on this matter hundreds of years ago.**

** All translations of the Israeli sources cited in this Article are the author's.