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# Post-Discharge Coercion of Bankrupts by Private Creditors

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# CASE COMMENTS

## POSTDISCHARGE COERCION OF BANKRUPTS BY PRIVATE CREDITORS: *Girardier v. Webster College*

The incidence of nonbusiness bankruptcy has risen significantly since the Second World War, and in the past decade a new variety of consumer bankrupt has emerged — the student who petitions for a discharge of federally guaranteed student loans.[1] These developments have raised the question whether the "fresh start" policy embodied in the national bankruptcy act[2] prohibits creditors or third parties from coercing bankrupts to repay discharged debts. The Supreme Court addressed this issue in a 1971 decision, *Perez v. Campbell*,[3] and struck down a provision of the Arizona motorists' financial responsibility law because it afforded creditors "a powerful weapon with which to force bankrupts to pay their debts despite their discharge."[4] In *Girardier v. Webster College*,[5] the Court of Appeals for the Eighth Circuit concluded that *Perez* and the bankruptcy act prohibited only coercion through governmental action and did not encompass the informal debt-collection tactics of *private* creditors. The court therefore held that a private college may refuse to release transcripts to

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[1] The number of personal bankruptcies increased from 8,566 in 1946 to 211,348 in 1976. V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 263 (2d ed. 1974) (1976 statistic on file with author). *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, PT. I, 93d Cong., 1st Sess. 33 (1973); D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 18-20 (1971).

Student bankruptcy claims paid by the federal government and other guarantee agencies rose from 943 (totalling $1.0 million) in 1971, to 4,559 (totalling $6.8 million) in 1975. *Bankruptcy Act Revision: Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 1076-77 (1976) [hereinafter cited as *Judiciary Hearings*].

[2] 11 U.S.C. §§ 1-1103 (1976). The Supreme Court has explained that one of the primary objectives of the act is to provide the debtor with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[3] 402 U.S. 637 (1971).

[4] *Id.* at 654. The Court invalidated under the supremacy clause a provision of the statute that suspended the driver's license and automobile registration of an individual who failed to satisfy a motor vehicle tort judgment, even though this liability had been discharged in bankruptcy.

[5] 563 F.2d 1267 (8th Cir. 1977).

former students who had obtained discharges in bankruptcy of their National Defense Education Act (NDEA) loans.

In *Girardier*, the two plaintiffs had procured NDEA loans from Webster College, a private educational institution in Missouri. After receiving their bachelor's degrees they filed petitions in bankruptcy and were discharged from repayment of their student loans. They subsequently applied for transcripts of their undergraduate credits, tendering the required two-dollar fee, but the college refused to furnish the transcripts on the ground that the plaintiffs had failed to repay their educational debts.[6] The plaintiffs sued for injunctive and monetary relief,[7] claiming that the defendant had violated their rights under the federal bankruptcy act.[8] The district court dismissed the suit for lack of subject matter jurisdiction.[9] On appeal, the Eighth Circuit remanded the action with instructions to dismiss for failure to state a claim on which relief could be granted.[10]

Judge Urbom, writing for the majority, began his opinion by noting that prior to 1970 the courts had sanctioned the imposition of various hardships on bankrupts that induced the repayment or reaffirmation[11] of discharged debts.[12] He ac-

[6] *Id.* at 1269. The college conceded that if the plaintiffs paid their obligations, the transcripts would be furnished. *Id.*

[7] The Girardier complaint sought damages only, while the Luzkow complaint requested declaratory, injunctive, and monetary relief. *Id.*

[8] *Id.* at 1270. The plaintiffs had also sought relief under the "Buckley-Pell Amendment," 20 U.S.C. § 1232g (1976), which authorizes students to inspect and review their educational records. However, the court held that the amendment did not create a private right of action since § 1232g(f) placed enforcement exclusively in the hands of the Secretary of the Department of Health, Education, and Welfare. 563 F.2d at 1276–77.

[9] 421 F. Supp. 45 (E.D. Mo. 1976).

[10] 563 F.2d at 1277. The court of appeals found jurisdiction under 28 U.S.C. § 1331(a) (1970), pointing out that the plaintiffs alleged a violation of rights afforded them by a federal act, and then proceeded to the merits. 563 F.2d at 1270.

Chief District Judge Urbom, sitting by designation, wrote the majority opinion, which was joined by Judge Ross. Judge Bright filed a concurring opinion.

[11] The common law reaffirmation theory followed in many jurisdictions postulates that a moral obligation to pay a debt survives a discharge and permits a state to grant recovery to a creditor on the basis of a new promise, even though this promise is not supported by new consideration. *See* Zavelo v. Reeves, 227 U.S. 625, 629 (1913) ("[T]he discharge destroys the remedy but not the indebtedness."). *See generally* 1A COLLIER ON BANKRUPTCY ¶¶ 17.33–.38 (14th ed. J. Moore 1978); Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36 (1971).

[12] Judge Urbom referred primarily to the Supreme Court decisions of Reitz v. Mealey, 314 U.S. 33 (1941), and Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962), which upheld New York and Utah financial responsibility laws that suspended the driver's license and automobile registration of an individual who had not paid a motor vehicle tort judgment even though this debt had been

knowledged that the 1970 amendments to the bankruptcy act[13] and *Perez* had expanded the protection of bankrupts against creditor harassment, but distinguished these developments as inapplicable to the facts of *Girardier*. According to Judge Urbom, the 1970 amendments precluded only the initiation by creditors of legal proceedings in state courts and did not extend to informal methods of collecting or reviving discharged debts. In his view, pending legislative proposals to prohibit both the discriminatory treatment of bankrupts and the reaffirmation of discharged debts[14] confirmed that the present bankruptcy law did not fully implement a "fresh start" policy.[15] Judge Urbom also observed that *Perez* and subsequent cases had gone no further than to proscribe certain forms of *governmental* penalization of bankrupts.[16] Drawing a distinction between state and

discharged in bankruptcy. (These cases were virtually overruled by *Perez*, 402 U.S. at 652 (1971).) He also pointed out that private creditors were permitted great latitude in their efforts to revive discharged debts. 563 F.2d at 1270–72.

[13] 11 U.S.C. § 32(f)(2) (1976) enjoined creditors from "instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt." Prior to 1970, a debtor who had obtained a general discharge from a bankruptcy court could be sued on a debt in a state court and was required to plead the bankruptcy discharge as an affirmative defense. Even when the defense was properly pleaded, the creditor could thereafter assert that his debt was included in one of the statutory exceptions to discharge. Thus the effect of the general discharge on any given debt was ultimately decided by a state court. This "dual court" procedure often produced default judgments for creditors; bankrupts failed to contest state court suits either because of improper service, inadequate financial resources, or a naive reliance on the general discharge. Section 32(f)(2) of the 1970 amendments abolished this bifurcated system in an attempt to "effectuate more fully the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors." S. REP. No. 91-1173, 91st Cong., 2d Sess. 2 (1970); H. REP. No. 91-1502, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4156, 4156. *See generally* Countryman, *The New Dischargeability Law*, 45 AM. BANK. L.J. 1, 2–21 (1971); Note, *Bankruptcy — 1970 Amendments to the Bankruptcy Act — An Attempt to Remedy Discharge Abuses*, 69 MICH. L. REV. 1347, 1352–55 (1971); Comment, *Section 14f(2) of the Bankruptcy Act: Half a Loaf to the Bankrupt*, 14 HOUS. L. REV. 486, 489–93 (1977); Comment, *Bankruptcy: Effect of the 1970 Bankruptcy Act Amendments on the Discharge That Never Was*, 1971 WIS. L. REV. 1174, 1175–77.

[14] Two revised bankruptcy proposals were drafted, one by the Commission on the Bankruptcy Laws of the United States, H.R. 31, 94th Cong., 2d Sess. (1976); S. 236, 94th Cong., 1st Sess. (1975), and the other by the National Conference of Bankruptcy Judges, H.R. 32, 94th Cong., 2d Sess. (1976); S. 235, 94th Cong., 1st Sess. (1975). *See Judiciary Hearings, supra* note 1; *The Bankruptcy Reform Act: Hearings on S. 235 & S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). For subsequent developments, see note 45 *infra*.

[15] 563 F.2d at 1272–73, 1276.

[16] *Id.* at 1273–74; *see, e.g.*, Rutledge v. City of Shreveport, 387 F. Supp. 1277 (W.D. La. 1975) (police department rule subjecting employee to dismissal for

private action, he concluded that the courts could not restrict the use by private creditors of "nonlegal, informal means of inducing the debtor to make payment on or revive the discharged obligation." [17]

Judge Bright concurred in the result but disagreed with the rationale offered by the court. He rejected the distinction between state and private action in the bankruptcy context, observing that the majority's analysis would produce a contrary result if the creditor were a public rather than a private college.[18] In his view, this dichotomy was not mandated by *Perez*, and the sole issue was whether the defendant had violated the "fresh start" principle. According to Judge Bright, since the plaintiffs retained a "fund of knowledge of lifelong value" [19] and suffered only the "loss of an additional benefit," [20] the action of the college in withholding the transcript did not contravene the bankruptcy act.[21]

The arguments of the *Girardier* majority that the bankruptcy statute does not reach the coercive postdischarge actions of private creditors are unpersuasive. Admittedly, the 1970 amendments were directed only at subsequent legal proceedings instituted by a creditor and did not affect the reaffirmation of discharged debts.[22] But the fact that Congress did not void

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filing bankruptcy petition); Grimes v. Hoschler, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974) (en banc) (statute permitting revocation of bankrupt contractor's license), *cert. denied*, 420 U.S. 973 (1975); *In re* Loftin, 327 So. 2d 543 (La. Ct. App.) (en banc) (fire department rule that declaration of bankruptcy warrants automatic dismissal), *appeal denied*, 331 So. 2d 851 (1976); *cf.* Marshall v. District of Columbia Gov't, 559 F.2d 726 (D.C. Cir. 1977) (*Perez* does not prevent police department from taking bankruptcy into account in evaluating an applicant's fitness for employment); House v. O'Grady, 35 Ohio Misc. 20, 299 N.E.2d 706 (C.P. 1973) (*Perez* does not preclude requirement of proof of future financial responsibility to regain driver's license).

[17] 563 F.2d at 1272. The court found support for the state action-private action distinction in a footnote in McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 930 n.57 (5th Cir. 1977) (en banc). The *McLellan* court concluded that the bankruptcy act did not prohibit the defendant, a private utility company, from discharging an employee who filed a bankruptcy petition. *Id.* at 929–30. *See also* Note, *Supremacy of the Bankruptcy Act: The New Standard of* Perez v. Campbell, 40 GEO. WASH. L. REV. 764, 772 (1972).

[18] 563 F.2d at 1277; *see* Handsome v. Rutgers Univ., 455 F. Supp. 1362 (D.N.J. 1978) (public university permanently enjoined from withholding transcripts and denying registration to a former student whose educational loans had been discharged in bankruptcy).

[19] 563 F.2d at 1277.

[20] *Id.* at 1278 n.10.

[21] *Id.* at 1278.

[22] Commentators and judges are in agreement that the phrase "or employing any process" in 11 U.S.C. § 32(f)(2) (1976), *see* note 13 *supra*, refers exclusively to *legal* process such as the use of garnishment or attachment writs. *See, e.g.*,

reaffirmations does not address the permissibility of coercive *means* of inducing them.[23] Indeed, the arguments advanced for retaining the reaffirmation doctrine emphasize the willingness of bankrupts to revive discharged debts in order to further their own interests.[24] Thus congressional silence on the reaffirmation issue does not imply that the courts are precluded from policing the methods by which creditors seek to obtain the repayment or reaffirmation of debts discharged in bankruptcy.[25]

In fact, the Supreme Court in *Perez* resolved the very question of creditor coercion when it interpreted the bankruptcy statute to prohibit postdischarge actions that made "it more probable that the debt will be paid despite the discharge."[26] Although *Perez* involved a state law, the Court appealed broadly to the "fresh start" policy[27] and considered that policy sufficiently important to override federalism and comity concerns and to warrant the invalidation of a state statute that promoted an otherwise laudable public objective.[28] There is no indication in

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Wood v. Fiedler, 548 F.2d 216, 219 (8th Cir. 1977); *In re* Thompson, 416 F. Supp. 991, 994–96 (S.D. Tex. 1976); 1A COLLIER ON BANKRUPTCY, *supra* note 11, ¶ 14.69. Furthermore, the explanatory memorandum accompanying the 1970 amendments clearly states that the proposed legislation "does not affect in any way a bankrupt's obligation upon a discharged debt which is subsequently revived by a new promise." 116 CONG. REC. 34,818, 34,819 (1970).

[23] This distinction between reaffirmation or repayment and the coercive methods employed to obtain them is reflected in § 144.32 of the HEW Proposed Rules for the National Direct Student Loan Program, which states that "[a]n institution shall refrain from collection activity with respect to a loan in the event the borrower is adjudicated a bankrupt." However, any payment "shall revive the borrower's obligation for repayment of his loan." 40 Fed. Reg. 48,252, 48,262 (1975). *See also* 20 U.S.C. § 424 (1976); *id.* § 1087cc.

[24] *See* note 42 *infra*.

[25] Indeed, certain authorities have contended that the 1970 amendments do not preclude the judiciary from completely invalidating reaffirmations. They have noted that the reaffirmation doctrine has never been seriously challenged in the federal courts, and have suggested that state common law doctrines should be subjected to the same scrutiny that *Perez* applied to a state statute. *See* Boshkoff, *supra* note 11, at 60–69; Countryman, *The Use of State Law in Bankruptcy Cases* (pt. 2), 47 N.Y.U. L. REV. 631, 670–71 (1972).

[26] 402 U.S. at 650 (quoting Kesler v. Department of Pub. Safety, 369 U.S. 153, 173 (1962)).

[27] *Id.* at 648.

[28] These considerations suggest that the federal "fresh start" policy extends as liberally to private creditor actions as it does to state legislation. When a state law is invalidated under the supremacy clause, state-federal comity concerns are implicated and a presumption of legislative constitutionality must be overcome. In contrast, the policing of private creditor actions presents no issues of federalism or constitutionality, but merely the direct application of federal law to private conduct in an area where Congress has undoubted regulatory power. In addition, the Supreme Court in *Perez* interpreted the bankruptcy act to require the abrogation of any state law that frustrates the "fresh start" policy, no matter how

*Perez* that federal objectives can be frustrated only by state legislatures, and the majority in *Girardier* offered no sound reason for restricting the application of the "fresh start" policy to cases of "state action." Bankruptcy is a highly developed federal statutory scheme based on an explicit and comprehensive grant of constitutional power.[29] The very function of the national bankruptcy act is to regulate private relations between debtor and creditor. Thus, there is no justification for introducing a state action limitation on the power of the courts to protect the efficacy of the discharge when in the predischarge context such a distinction is wholly untenable.

Although *Girardier* did not refer specifically to the fourteenth amendment, the court's advocacy of a "state action" requirement seems to reflect an inappropriate engrafting of a distinction drawn from fourteenth amendment analysis onto the federal bankruptcy law. The fact that the rationale of the *Girardier* majority would lead to a different result if the educational institution were public rather than private is not as troublesome as Judge Bright assumed,[30] for that anomaly is a pervasive characteristic of our legal system.[31] Rather, what is particularly disquieting in *Girardier* is the court's reflexive extension of the dichotomy between state and private action into an area where

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well intentioned or beneficial that law may be in other respects. If an otherwise commendable and legitimate exercise of the police power is insufficient to override the "fresh start" principle, it would seem that the economic interest of a private party would be equally inadequate.

[29] The constitutional provision states that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Unlike the commerce provision of clause 3, which has developed into a sweeping grant of federal legislative power despite its formal limitation to "interstate" commerce, *see, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1941), the bankruptcy clause contains no inherent federalism constraint that might suggest the propriety of a narrow construction of legislation promulgated under its authority.

[30] 563 F.2d at 1277.

[31] Owing to the fourteenth amendment "state action" requirement, students in public educational institutions are granted constitutional protections unavailable to students in private schools, and attempts to characterize private institutions as "state action" because of public funding, tax exemptions, and grant programs have proved largely unsuccessful. *See, e.g.*, Hendrickson, *"State Action" and Private Higher Education*, 2 J.L. & EDUC. 53 (1973); Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1973); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974). *See generally* Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

neither the constitutional provision, the statute, nor the decisions of the Supreme Court support any limitation of federal authority to instances of "state action."

The *Girardier* court also insisted that pending legislative reforms in the areas of debt reaffirmation and discrimination against bankrupts mandated a strict construction of the bankruptcy act. The Supreme Court, however, has consistently stated that the "various provisions of the bankruptcy act were adopted in the light of [the 'fresh start' policy] and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act." [32] Moreover, *Perez* and its progeny, in proscribing certain forms of postdischarge harassment, have already elaborated the bare statutory language. The implicit premise in *Perez* was that Congress intended to implement a more broadly efficacious "fresh start" policy than a narrow reading of the statute and the 1970 amendments might suggest, and that therefore the Court could attack the problem of coerced repayments in the absence of a specific statutory mandate.[33] Subsequent lower court cases have gone even further than *Perez* in addressing, without explicit legislative sanction and in the face of related Congressional deliberations, the larger issue of discriminatory treatment of bankrupts.[34] In addition, bankruptcy judges have recognized the statute's application to postdischarge actions by claiming jurisdiction over private creditor reaffirmation agreements.[35] Thus many courts, including the Supreme Court, have rejected the *Girardier* notion that impending legislative reform requires a constricted interpretation of the language of the bankruptcy act rather than adherence to its broader principles and purposes.

For these reasons, *Girardier* does not convincingly demonstrate that actions by private creditors are beyond the scope of

[32] Local Loan Co. v. Hunt, 292 U.S. 234, 244–45 (1934). *Accord*, Lines v. Frederick, 400 U.S. 18, 19–20 (1970) (per curiam); Harris v. Zion's Sav. Bank & Trust Co., 317 U.S. 447, 451 (1943); Stellwagen v. Clum, 245 U.S. 605, 617 (1918); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554–55 (1915).

[33] Indeed, the comment to one of the revised bankruptcy acts acknowledged that *Perez* had anticipated explicit statutory authorization by stating that one of the sections was intended to "codif[y] the principle in *Perez*." REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93–137, PT. II, 93d Cong., 1st Sess. 144 (1973).

[34] *See, e.g.*, Rutledge v. City of Shreveport, 387 F. Supp. 1277, 1280–81 (W.D. La. 1975); *In re* Loftin, 327 So. 2d 543, 546–47 (La. Ct. App.) (en banc), *appeal denied*, 331 So. 2d 851 (1976). Presumably the regulations struck down in these cases fulfilled a deterrent or punitive rather than a compliance function. The fact situation in *Girardier* apparently represents an attempt both to coerce repayment and to deter prospective defaulters.

[35] *See Judiciary Hearings, supra* note 1, at 921 (statement of Linn K. Twinem).

judicial examination. On the contrary, implementation of the broader purposes of the bankruptcy act requires that private actions, as well as state laws, be scrutinized for violations of the "fresh start" principle.[36] Any coercive act imposing such hardship on a bankrupt as to create a likelihood that the debt will be repaid despite the discharge must be considered a violation of the bankruptcy statute, since the very purpose of the bankruptcy proceeding is to free an individual from "the pressure and discouragement of preexisting debt." [37] The factual situation in *Girardier* indicates that certain private creditors are in a position to exert the same coercive effect on the bankrupt as did the state law in *Perez*. The refusal to release a transcript is the functional equivalent of the revocation of a state license in terms of its efficacy in securing repayment of a discharged debt and thus is equally violative of the federal "fresh start" policy.

The coercive power of the creditor in *Girardier* derived from three critical factors also present in *Perez*. First, the bankrupt seriously needed the certificate that was withheld by the creditor.[38] A transcript, like a state license or other form of official documentation, is frequently a prerequisite to utilizing the training and expertise to which it attests. Despite the insistence of the *Girardier* concurrence that the "lifelong value" of an education remains with the student, its practical utility is frequently contingent on its certification [39] — just as the "lifelong value" of knowing how to drive is useless without a driver's license. Access to a college transcript acquires added significance in a period when undergraduate study is increasingly viewed as a preliminary to professional training, and the transcript is a requirement for admission to most graduate programs.[40] Because of the certification function of the transcript, the situation of

[36] *Cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal rights of private parties inferred from general federal labor policy).

[37] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[38] 563 F.2d at 1269; Brief for Appellant at 28; *see* Handsome v. Rutgers Univ., 445 F. Supp. 1362 (D.N.J. 1978).

[39] The courts have recognized the importance of educational documents in compelling their release in other situations. *See, e.g.*, State *ex rel.* Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N.W. 294 (1908) (institution compelled to issue diploma); People *ex rel.* O'Sullivan v. New York Law School, 75 N.Y. Sup. Ct. 118, 22 N.Y.S. 663 (1893) (school required to release certificate of attendance and satisfactory passing of examinations); Strank v. Mercy Hospital, 383 Pa. 54, 117 A.2d 697 (1955) (equity court has jurisdiction to compel college to issue certificate of student's credits).

[40] This is evident from the facts of *Girardier*. Plaintiff Luzkow alleged that she required her transcript in order to complete applications to graduate school; Girardier claimed that he needed his undergraduate transcript to obtain a master's degree, to which he was otherwise entitled, from the University of Missouri-St. Louis. 563 F.2d at 1269.

the student in *Girardier* can be easily distinguished from that of the typical consumer bankrupt.

Second, the debtor could obtain the necessary documentation only from the creditor. The college in *Girardier*, like a state licensing agency, possessed monopoly power over the required certificate. There existed no acceptable substitute for the transcript and no means of obtaining access to it apart from an appeal to the college itself. It is improbable that an ordinary commercial creditor has this degree of monopoly control.

Third, the college, like the creditor who might have benefited from the state law struck down in *Perez*, puts nothing new at risk in releasing the official document to the bankrupt. The position of Webster College was quite distinct from that of the usual commercial creditor, and hence *Girardier*'s invocation of the reaffirmation analogy was inappropriate. Bankrupts generally revive commercial debts in order to retain the collateral that secured the loan or to procure further credit,[41] and the creditor therefore incurs some degree of additional risk — either the loss of his collateral or default on the further loan.[42] Even conceding the inequality of bargaining power and the minimal worth of the collateral in many cases, *some* quantum of creditor risk is present when a debtor reaffirms the usual commercial debt. A college, by contrast, incurs no added risk of any kind in furnishing a transcript in exchange for reaffirmation or repayment; indeed, like the creditor in *Perez*, it suffers no additional risk even when the document is released merely for the required fee. This complete absence of any potential creditor harm further undermines the legitimacy of the action of the college in *Girardier*.

*Girardier* thus illustrates that certain private creditors enjoy substantial advantages in seeking repayment of discharged debts and can exert pressures on a bankrupt that effectively vitiate the

[41] These are the major reasons for reviving discharged debts, though bankrupts may also reaffirm to protect a co-obligor from liability or to honor a moral obligation. *See* sources cited note 42 *infra*.

[42] Proponents of the reaffirmation doctrine contend that bankrupts themselves value the right to reaffirm and that voiding such promises would deprive them of the opportunity to strike economically advantageous bargains. *See, e.g., Judiciary Hearings, supra* note 1, at 925, 1049–53; Comment, *Reaffirmation of Debts Discharged in Bankruptcy: An Empirical Study of an Area of Potential FTC Regulation*, 8 CONN. L. REV. 519 (1976). The contrary argument is that bankrupts are easily victimized by overreaching creditors and often find themselves burdened with impossible obligations after reaffirmation; moreover, voiding reaffirmations would only render the promise unenforceable and would not prohibit a bankrupt from repaying a discharged debt if he so wished. *See, e.g.*, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, PT. I, 93d Cong., 1st Sess. 33, 177 (1973); Boshkoff, *supra* note 11; Countryman, *supra* note 25. Whatever the proper resolution of the reaffirmation controversy, it is irrelevant to the creditor coercion in *Girardier*.

discharge. Any creditor who has exclusive control over a necessary form of certification, and who would incur no additional risk in releasing the document to the bankrupt, possesses "a powerful weapon for collection of a debt from which [the] bankrupt [has] been released by federal law." [43] As this was the position of the creditor in *Girardier*, the refusal to release a transcript, like the suspension of a state license in *Perez*, constitutes a clear violation of the "fresh start" policy.

A recent legislative restriction on the availability of student bankruptcy relief will diminish the number of discharges of educational loans,[44] but transcripts are not the only form of private documentation that creditors may attempt to withhold in order to secure repayment. Certain private records of physicians, attorneys and employers might also be used in this fashion. The three enumerated criteria — necessity, monopoly power, and absence of new risk — can thus be generally applied to identify private creditor behavior that significantly and needlessly frustrates the objectives of federal policy.

Congress is currently considering a broad and comprehensive revision of the bankruptcy act that would explicitly protect bankrupts against all creditor attempts to collect a discharged debt.[45] But the majority in *Girardier* incorrectly concluded that

[43] Perez v. Campbell, 402 U.S. 637, 650 (1971) (quoting the dissent in Kesler v. Department of Pub. Safety, 369 U.S. 153, 183 (1962) (opinion of Black, J.)).

[44] A recent amendment to the Higher Education Act of 1965 prohibits students from discharging educational debts in bankruptcy until five years after the date of commencement of the repayment period of the loan, unless the bankruptcy court determines that failure to discharge the debt would "impose an undue hardship on the debtor or his dependents." 20 U.S.C. § 1087-3 (1976). H.R. 8200, 95th Cong., 2d Sess. (1978), incorporates a provision that will continue the restriction contained in the Education Act. 124 CONG. REC. H472 (daily ed. Feb. 1, 1978). This measure should allay the fears of colleges that student borrowers will avoid repayment by declaring bankruptcy immediately after graduation when their liabilities will almost invariably exceed their assets. The current limitation on the availability of bankruptcy relief will not totally eliminate discharges of student loans; such discharges will continue to occur in cases of "hardship" and when an educational debt has not been completely repaid during the five year period. But since colleges are now protected against exploitation of their loan programs, adoption of the *Girardier* position in future cases would be unnecessary as well as wholly inequitable.

[45] The House has recently passed H.R. 8200, 95th Cong., 2d Sess., 124 CONG. REC. H478 (daily ed. Feb. 1, 1978), which voids reaffirmations in § 524(b) and addresses the question of creditor harassment in § 524(a)(2): a discharge "operates as an injunction against the commencement or continuation of any action, the employment of any process, or any act, to collect, recover, or offset any such debt as a personal liability of the debtor." The additional language "or any act" presumably refers to informal creditor tactics aimed at collecting discharged debts, and may well reflect a legislative response to cases such as McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc), and *In re* Thompson, 416 F. Supp. 991 (S.D. Tex. 1976). Section 525

the existing statute does not confer authority on the judiciary to proscribe private creditor actions that contravene the "fresh start" principle. Whether by legislative enactment or by appropriate judicial construction, bankrupts can and should be protected against private creditor coercion that violates the intent and the spirit of the bankruptcy act.

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of the House bill prohibits governmental discrimination with respect to licenses and employment — arguably a validation of certain of the post-*Perez* cases.

A bill with substantially similar provisions is pending before the Senate. S. 2266, 95th Cong., 1st Sess. §§ 524(a)(2), 525 (1977). The major distinction is that the Senate version permits revived debts to be enforced after a thirty-day "cooling off" period, *id.* § 524(b).