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Subjectivity, Good Faith and the Expanded Chapter 13 Discharge

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Subjectivity, Good Faith and the Expanded Chapter 13 Discharge

*Robert J. Bein*¹

TABLE OF CONTENTS

I.	INTRODUCTION	656
A.	<i>Good Faith and Dischargeability</i>	656
B.	<i>Concepts of Objectivity and Subjectivity in Legal Discourse</i>	657
II.	OVERVIEW OF THE BANKRUPTCY DISCHARGE.....	658
A.	<i>History of the Discharge in American Bankruptcy Law</i>	660
B.	<i>The Discharge Under the Bankruptcy Code</i>	663
C.	<i>The Discharge Exceptions</i>	664
D.	<i>The Expanded Chapter 13 Discharge</i>	667
III.	THE GOOD FAITH REQUIREMENT	670
A.	<i>Good Faith in Filing Under 11 U.S.C. § 1307(c)</i>	670
B.	<i>Good Faith in Plan Confirmation</i>	672
1.	Burdens	673
2.	Good Faith Under 11 U.S.C. § 1325(a).....	675
IV.	THE GOOD FAITH REQUIREMENT AND THE EXPANDED CHAPTER 13 DISCHARGE	677
A.	<i>Application of the Quid Pro Quo</i>	677
B.	<i>Moralism, Subjectivity, and Good Faith</i>	684
V.	CONCLUSION	688

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I. INTRODUCTION

A. Good Faith and Dischargeability

Individual consumer debtors most commonly seek bankruptcy relief under one of two chapters of the Bankruptcy Code: “straight bankruptcy” under Chapter 7, or an individual reorganization plan under Chapter 13. The Bankruptcy Code permits Chapter 13 debtors to discharge obligations which would not be dischargeable under Chapter 7. This expanded discharge reflects a congressional bias in favor of Chapter 13, as reflected in the 2005 amendments to the Bankruptcy Code. This bias stems from a belief that Chapter 13 cases yield a higher recovery for unsecured creditors and require debtors to accept a greater degree of responsibility for their financial obligations.

Under Section 1325 of the Bankruptcy Code, a Chapter 13 plan cannot be confirmed unless it is filed in good faith. However, courts are divided as to the extent to which they can weigh a debtor’s attempt to take advantage of the expanded Chapter 13 discharge in considering a debtor’s good faith in plan confirmation.

Congress offered the expanded Chapter 13 discharge as a *quid pro quo* for Chapter 13 debtors. Chapter 13 debtors receive an expanded discharge in exchange for the sacrifices they make in their plans. This exchange is fair to creditors, as they receive a distribution under Chapter 13 which they could not realize in Chapter 7. Accordingly, in order for a Chapter 13 plan seeking to discharge otherwise non-dischargeable debt to satisfy the good faith confirmation requirement, the plan must include sufficient distribution to unsecured creditors. The fact that the debtor seeks to discharge an otherwise non-dischargeable debt is a necessary factor in considering the adequacy of distribution and the overall good faith of the plan. Where the debtor seeks to take advantage of the expanded discharge, the Chapter 13 plan must go beyond best efforts; in other words, a plan which proposes to discharge debts that would not be dischargeable in Chapter 7 may, in many cases, need to provide a greater return to unsecured creditors than one that does not take advantage of the expanded discharge.

This application of the good faith requirement satisfies not only Congress’ intent in enacting the broad Chapter 13 “superdischarge,” but also the principle of shared sacrifice that underlies bankruptcy policy, and is consistent with the historical emphasis in American bankruptcy law on reserving the benefit of the bankruptcy discharged to the “honest but unfortunate” debtor.²

This article considers the good faith requirement in the confirmation of a Chapter 13 plan that seeks to discharge debts which would be nondischargeable in a Chapter 7 case. Part II of the article examines issues of discharge

2. See *infra* note 63-64 and accompanying text.

and dischargeability under American bankruptcy law, both in the historical development of bankruptcy law and under the Bankruptcy Code. Part III examines the good faith requirement applicable in Chapter 13 cases, both in the filing of the case under Section 1307(c) of the Bankruptcy Code and in presentation of the Chapter 13 plan under Section 1325(a). Part IV of the article examines the application of the good faith standard when a plan proposes to take advantage of Chapter 13's "superdischarge." This section explores the *quid pro quo* inherent in the "superdischarge," and the ways in which questions of good faith expose bankruptcy law's dependence on moral judgments and subjective assessments of debtors' conduct and motivations.³ Part V concludes that application of the *quid pro quo*, although characterized by subjective judgment, is consistent with the purposes underlying the "superdischarge" and fundamental bankruptcy policy.

B. Concepts of Objectivity and Subjectivity in Legal Discourse

The analysis of good faith exposes the interplay of notions of subjectivity and objectivity in bankruptcy law. The concepts of "subjectivity" and "objectivity," in this context, refer to the manner in which a court assesses the determinative facts in a given case. An objective judgment relies upon readily ascertainable and undisputed facts, such as the date upon which a given event occurred. A subjective judgment, in contrast, relies upon the court's assessment of facts which are inherently unknowable, such as the motivations which lead an individual to engage in certain conduct. The evaluation of a debtor's good faith, which relies not on the application of a mechanical or mathematical test, but instead on a judge's assessment of whether the facts and circumstances, in their totality, meet a broadly defined conceptual standard, is inherently subjective.

This conception of objectivity and subjectivity parallels tensions in traditional contract doctrine, where an emphasis on the plain language of an agreement is at odds with the overarching goal of understanding a metaphysical "meeting of the minds" between the contract parties.⁴ Gerald Frug, in *The Ideology of Bureaucracy in American Law*,⁵ characterizes the tension between objectivity and subjectivity in the law as a tension between neutrality and the common good on the one hand, and individuality and the search for individual freedom on the other.⁶

This definition of objectivity and subjectivity may be contrasted with post-structuralist understandings of the concepts. Modern schools of criticism distinguish between ideas which have objective existence – existing inde-

3. See *infra* Section IV.B (discussing bankruptcy's moralistic tendencies).

4. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1040 (1985).

5. 97 HARV. L. REV. 1276 (1984).

6. *Id.* at 1286-87, 1290-91. Frug ultimately questions the possibility of a meaningful distinction between the two notions. *Id.* at 1291.

pendent of our understanding of them – and ideas which have subjective existence, which are essentially dependent on our construction of them.⁷ While the post-structuralist approach to the objective-subjective distinction focuses on fundamental notions of meaning and existence, it provides an instructive parallel to questions of objectivity and subjectivity in legal determinations. In either context, if something is objective, its existence is independent of the judgment of any one person, and will be consistent from one set of circumstances to another, independent of the observer or decision-maker. If the thing in question is subjective, its existence is dependent upon its construction by those who interact with it.

While the law views subjective determinations, in either sense, as inherently less stable, a central element of the post-structuralist enterprise is to challenge traditional hierarchies such as objectivity/subjectivity by showing the inherent instability of objective determinations, and the interdependence or intermixing of subjective and objective analysis.⁸

The assessment of the good faith of a Chapter 13 debtor who seeks to discharge debts which would be nondischargeable in Chapter 7 shows this interdependence at work in bankruptcy law. Bankruptcy's tendency towards objective, impartial judgment must be balanced with an inherently subjective assessment of the debtor's good faith when the debtor seeks a Chapter 13 "superdischarge."⁹

II. OVERVIEW OF THE BANKRUPTCY DISCHARGE

Fundamental to relief under the Bankruptcy Code is the concept of the "fresh start." The "central purpose" of the Code is "to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."¹⁰

The discharge is a critical component of the "fresh start" policy, and is the ultimate goal of the consumer debtor because it will generally protect the debtor from collection efforts on account of pre-petition debt. When an obligation is discharged, collection of the discharge debt is enjoined, and all personal liability on account of any judgment is voided.¹¹

7. See TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 100-03 (2d ed. 1996).

8. *Id.* at 115-16; JONATHAN CULLER, *FRAMING THE SIGN: CRITICISM AND ITS INSTITUTIONS* 145 (1988).

9. See generally Part IV.B, *infra*.

10. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quotation omitted); *Local Loan Co. v. Hunt*, 292 U.S. 244 (1934).

11. 11 U.S.C. § 524(a) (2000 & Supp. 2005). The discharge injunction will not bar secured creditors from foreclosing upon their liens *in rem*. See *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991).

An individual debtor¹² is generally entitled to receive a discharge at the conclusion of her bankruptcy case. In a Chapter 7 case, this will occur when the time for objections to the discharge has passed.¹³ In a Chapter 13 case, the discharge is granted only after the Chapter 13 plan has been consummated.¹⁴

There are two questions at issue when considering dischargeability: the debtor's entitlement to a discharge of her debts generally and the dischargeability of a particular debt. Entitlement to a discharge is governed by Sections 727¹⁵ and 1328¹⁶ of the Bankruptcy Code.¹⁷ An individual Chapter 7 debtor will be entitled to a discharge absent fraud or misconduct in the course of the bankruptcy case.¹⁸ A Chapter 13 debtor will receive a discharge upon completion of plan payments absent fraud.¹⁹

Notwithstanding a debtor's satisfaction of the requirements for discharge, not all obligations can be discharged. As discussed more fully be-

12. The Chapter 7 and 13 discharge is available only to natural persons, and not to entities such as corporations. Only individuals are entitled to a discharge under Chapter 7. 11 U.S.C. § 727(a)(1) (2000). Only individuals may be debtors under Chapter 13. 11 U.S.C. § 109(e) (2000).

13. 11 U.S.C. § 727(a) (2000).

14. 11 U.S.C. § 1328(a) (2000 & Supp. 2005); *see also* 11 U.S.C. § 1228(a) (2000 & Supp. 2005) (Chapter 12 debtor entitled to discharge upon completion of plan payments). A Chapter 11 debtor receives a discharge at the time the plan is confirmed. 11 U.S.C. § 1141(d) (2000 & Supp. 2005). Chapter 12 and 13 debtors may, upon an appropriate showing, receive a hardship discharge without completing the plan. 11 U.S.C. §§ 1228(b) & 1328(b) (2000 & Supp. 2005); *see also infra* notes 148-150 and accompanying text.

15. 11 U.S.C. § 727 (2000 & Supp. 2005).

16. 11 U.S.C. § 1328 (2000 & Supp. 2005).

17. The discharge provisions under Chapters 9, 11, and 12, are, respectively, 11 U.S.C. §§ 944(b), 1141(d)(1)(A), and 1228 (2000 & Supp. 2005).

18. 11 U.S.C. § 727(a) (2000 & Supp. 2005). Section 727(a) enumerates several grounds for denial of the discharge, including (1) the debtor is not an individual; (2) the debtor has damaged or concealed property with intent to hinder, delay, or defraud; (3) the debtor has failed to keep business records, or has destroyed or falsified such records; (4) the debtor has made false oath, attempted to pay a bribe, or withheld information; (5) the debtor has failed to explain the disappearance of assets; (6) the debtor is in contempt of court; (7) the debtor was guilty of any of the foregoing in a prior bankruptcy case in the preceding year; (8) the debtor received a Chapter 7 discharge in the preceding six years; (9) the debtor received a Chapter 12 or 13 discharge in a case commenced in the preceding six years, absent significant payment to creditors in the prior case; and (10) a court-approved waiver of discharge. *Id.*

19. 11 U.S.C. § 1328 (2000 & Supp. 2005). The debtor is entitled to a discharge "[a]s soon as practicable after completion by the debtor of all payments under the plan." *Id.* § 1328(a). The discharge can be revoked if obtained through fraud. *Id.* § 1328(e).

low,²⁰ the Bankruptcy Code excepts certain obligations from the discharge under Section 523.²¹

A. History of the Discharge in American Bankruptcy Law²²

While bankruptcy relief under Anglo-American law has roots dating back to the Sixteenth Century,²³ the discharge is a relatively modern innovation. The first discharge provisions were introduced in English law in the early Eighteenth Century.²⁴ Under the early English statutes, it was available only with creditor consent and only in the absence of fraudulent conduct.²⁵

The first American bankruptcy law was passed in 1800.²⁶ Under the original law, discharge was available only with creditors' consent, and could be denied if the debtor was found to have engaged in certain conduct, including failure to disclose a fictitious claim, gambling losses, or successive bankruptcies.²⁷

The Bankruptcy Act of 1841 expanded the grounds for denial of discharge.²⁸ Under the 1841 Act, a court could deny a discharge upon proof of fraud, willful concealment of property, preferential payments, contempt of court, non-compliance with the Act, admitting false debts, or misappropriation of trust funds.²⁹ A limited range of specific debts were made categorically non-dischargeable, including debts for "defalcation as a public officer," misconduct as a fiduciary, and debts due to the United States or a state.³⁰ The Act retained the consent of creditors as a prerequisite to discharge, though it made consent somewhat easier to obtain.³¹

20. See *infra* Section II.C.

21. 11 U.S.C. § 523 (2000 & Supp. 2005).

22. For an excellent overview of the history of the discharge in Anglo-American law, see Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 329 (1991).

23. See *id.* (identifying 34 & 35 Hen. 8, c. 4 (1542) as the first English bankruptcy law).

24. 4 Anne, c.17 (1705).

25. Tabb, *supra* note 22, at 331-44 (discussing 4 Anne, c.17, § 16 (1705), 5 Anne, c.22, § 2 (1706), and 5 Geo. 2, c.30 (1732)).

26. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (1800) (repealed 1843). Several of the colonies had laws providing for discharge of debt. See Tabb, *supra* note 22, at 345 n.135. The Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

27. Bankruptcy Act of 1800, ch. 19, §§ 37 & 57 (repealed 1843); see also Tabb, *supra*, note 22, at 350-51.

28. Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (1841) (repealed 1843).

29. *Id.* § 4 (repealed 1843).

30. *Id.* § 1 (repealed 1843); see also Tabb, *supra* note 22, at 352; 1A COLLIER ON BANKRUPTCY ¶ 17.13, at 1611 (1978).

31. Bankruptcy Act of 1841, ch. 9, § 4 (repealed 1843).

In the aftermath of the Civil War, the Bankruptcy Act of 1867³² substantially altered the structure of the discharge. Under the 1867 Act, discharge was available if the debtor either obtained the consent of a majority of the creditors, or paid a dividend of at least fifty percent.³³ Courts, however, had an expanded number of grounds upon which to deny discharge, including false testimony, fraud, misrepresentation, waste, fraudulent transfers, destruction or falsification of records, preferences, gambling, or admitting a false debt.³⁴ Like the Act of 1841, the 1867 Act excepted from discharge debts for fraud, embezzlement, and defalcation by a public officer or a fiduciary.³⁵

Modern American bankruptcy law has its roots in the Bankruptcy Act of 1898.³⁶ The Congressional formulation of the discharge in the 1898 Act departed in several respects from the prior statutes, and established the essential approach to discharge in place today under the Code. The Act eliminated creditor consent, and placed the responsibility for deciding issues of discharge and dischargeability squarely on the court, applying specific statutory standards.³⁷

The 1898 Act recast the discharge question as one fundamentally focused on the debtor's honesty. The committee report states:

If the debtor has acted dishonestly by committing certain acts forbidden in the bill he will not be discharged; if he has acted honestly he will be. The granting of a discharge is justified by a wise public policy. The granting or withholding of it is dependant upon the honesty of the man, not upon the value of his estate.³⁸

32. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867) (repealed 1878).

33. *Id.* § 33 (repealed 1878). Delays in the effective date of the requirement, along with subsequent amendments and the eventual repeal of the Act in 1878, prevented the dividend/consent requirement from having a significant effect. *See* Tabb, *supra* note 22, at 356-57.

34. Bankruptcy Act of 1867 § 29 (repealed 1878).

35. *Id.* § 33 (repealed 1878); *see* *Wilmot v. Mudge*, 103 U.S. 217 (1880); *see also* Tabb, *supra* note 22, at 359 n.269.

36. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

37. *See* Tabb, *supra* note 22, at 364. Tabb notes the contrast between the American approach to dischargeability disputes, in which rules are fixed by statute, and the English approach, in which the court has broad discretion to grant or deny a discharge. *Id.* at 363-64.

38. H.R. REP. NO. 55-65, at 43 (1897). Congressman David Henderson, the floor manager of the bill in the House, stated: "Dishonest debtors may reasonably dread such a law, as its enactment would greatly curtail their opportunities of committing fraud and doubtless result in great numbers of them being put into the penitentiaries." *An Interview With the Hon. David B. Henderson*, reprinted from the *Bankruptcy Magazine*, in *A NATIONAL BANKRUPTCY LAW*, at 30 (Sept. 30, 1897) (University of Illinois Law Library) (quoted in Tabb, *supra* note 22, at 368).

The Act limited the grounds for denial of discharge under the 1898 Act to fraud or misconduct in connection with the bankruptcy case. A debtor could be denied a discharge for bankruptcy crimes,³⁹ or for fraudulently destroying, concealing or neglecting financial records with the intent to hide his true financial condition in a bankruptcy case.⁴⁰

The grounds for excepting a particular debt from discharge under the 1898 Act display a similar concern for the debtor's misconduct: debts incurred through fraud, false pretenses, willful and malicious injury, and fiduciary misconduct were all nondischargeable.⁴¹ Also excepted from discharge were taxes and claims that were not scheduled in the bankruptcy case.⁴²

In 1903, in response to concern that the 1898 Act was too lenient in its treatment of unscrupulous debtors,⁴³ Congress amended the Act to add four new grounds for denial of discharge: obtaining credit by materially false writing; fraudulent transfers in the four months prior to the bankruptcy case; refusing to obey a court order or answer a material question in the bankruptcy case; and discharge in a voluntary case in the preceding six years.⁴⁴ It also expanded the discharge exception for manipulating financial records to encompass situations where fraudulent intent or conscious contemplation of bankruptcy could not be proven.⁴⁵ The amendments were intended to address dishonest debtors who were perceived as exploiting the discharge.⁴⁶

The 1903 amendments also expanded the grounds for the non-dischargeability of particular debts. They broadened the fraud exception to include all liabilities, not merely judgments.⁴⁷ Debts for alimony, maintenance and support,⁴⁸ were also excluded from the discharge, as were debts

39. Bankruptcy Act of 1898 § 14b(1) (repealed 1978). "Bankruptcy Crimes" were defined to include knowingly and fraudulently concealing property from the trustee or making false oath or account in the bankruptcy case. *Id.* § 29 (repealed 1978).

40. *Id.* § 14b(2) (repealed 1978).

41. *Id.* § 17a (repealed 1978).

42. *Id.* (repealed 1978).

43. See Tabb, *supra* note 22, at 366.

44. Ch. 487, § 4, 32 Stat. 797 (1903).

45. *Id.*

46. H.R. REP. NO. 57-1698, at 2-3 (1902). The committee report for the amendment opines:

No person who has been guilty of any of these fraudulent acts should be discharged, and a person who has refused to obey the order of the court ought not to be discharged, and it is quite clear that no person should have the benefit of the act as a voluntary bankrupt oftener than once in six years. Some men in some of the large cities have made bankruptcy a profession, and it is proposed by the amendment to stamp out these practices.

Id.

47. § 5, 32 Stat. at 798.

48. *Id.*

arising from the “seduction of an unmarried female” or from “criminal conversation.”⁴⁹

The development of the discharge in American bankruptcy law displays a consistent strain of moralism. A court may deny discharge, or exclude a particular debt from discharge, based upon the debtor’s misconduct in the bankruptcy case,⁵⁰ or the debtor’s pre-petition conduct.⁵¹ Seen in this light, the focus on the “honest but unfortunate debtor” under the Bankruptcy Code⁵² is a clear outgrowth of the historical evolution of the discharge.⁵³

B. The Discharge Under the Bankruptcy Code

The Bankruptcy Code of 1978⁵⁴ replaced the 1898 Act and established modern bankruptcy law. Following the basic structure of the 1898 Act, the Code provides individual debtors with a general discharge of their debts, but provides for denial of that discharge,⁵⁵ or the nondischargeability of particular debts,⁵⁶ based upon the debtor’s pre- or post-petition misconduct or the nature of the particular debt in question.⁵⁷ Creditor consent is not required for a discharge. While creditors may raise objections to the discharge or to dischargeability, the ultimate determination regarding discharge is left to the bankruptcy court.⁵⁸

49. *Id.*

50. See Bankruptcy Act of 1898 §§ 14b(1) & (2); Ch. 487, § 4, 32 Stat. 797 (1898) (repealed 1978); Bankruptcy Act of 1867, ch. 176, § 29, 14 Stat. 517 (1867) (repealed 1878); Bankruptcy Act of 1841, ch. 9, § 4, 5 Stat. 440 (1841) (repealed 1843); Bankruptcy Act of 1800, ch. 19, § 57, 2 Stat. 19 (1800) (repealed 1843).

51. See Bankruptcy Act of 1898 § 17a; Ch. 487, § 4, 32 Stat. 797; Ch. 487, § 5, 32 Stat. 798 (repealed 1978); Bankruptcy Act of 1867 §§ 29 & 33 (repealed 1878); Bankruptcy Act of 1841 § 1 (repealed 1843); Bankruptcy Act of 1800 § 57 (repealed 1843).

52. See *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991); *Brown v. Felsen*, 442 U.S. 127, 128-29 (1979).

53. See *infra* Section IV.B (discussing implications of moralism in discharge jurisprudence).

54. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978).

55. See *infra* notes 65-67 and accompanying text.

56. See *infra* notes 68-79 and accompanying text.

57. See *infra* notes 65-79 and accompanying text.

58. The power to grant the discharge is vested in the court, and the grant of the discharge is mandatory if the statutory requirements for discharge have been met. See 11 U.S.C. § 727(a) (2000 & Supp. 2005) (“The court shall grant the debtor a discharge”); 11 U.S.C. § 1328(a) (2000 & Supp. 2005) (same). Creditors have standing to object to the grant of the discharge or the dischargeability of particular debts. See *id.* § 727(c) (“The trustee, a creditor, or the United States trustee may object to the granting of a discharge”); FED. R. BANKR. P. 4007(a) (“A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.”).

Dischargeability has been a question of Federal law, governed by the language of the Bankruptcy Code, since 1970. *Grogan v. Garner*, 498 U.S. 279, 284 &

A court may deny the grant of a discharge under the Bankruptcy Code based on a debtor's fraud or misconduct. A Chapter 7 debtor may also be denied a discharge for a variety of reasons, including:

- (1) The debtor is not an individual;
- (2) The debtor has damaged or concealed property with the intent to hinder, delay or defraud creditors;
- (3) Failure to keep business records, or destruction or falsification of such records;
- (4) Making false oath, attempts to bribe officials, or withholding information, in connection with the case;
- (5) Failure to adequately explain the disappearance of assets;
- (6) Contempt of the bankruptcy court;
- (7) Occurrence of any of the forgoing in a prior bankruptcy case in the preceding year;
- (8) A Chapter 7 discharge in the prior six years;
- (9) A Chapter 12 or 13 discharge in the prior six years, unless the creditors in the prior case received a significant dividend;
- (10) A waiver of discharge which has been approved by the court;
- (11) Failure to obtain credit education;
- (12) Abuse of state law exemptions by a debtor guilty of specified felonies or securities fraud.⁵⁹

The enumerated grounds for denial of a Chapter 13 discharge are more limited, encompassing only the failure to complete plan payments or fraud.⁶⁰ Because the debtor's good faith must be considered for the plan to be confirmed, the Code does not require an independent assessment of good faith upon discharge.⁶¹

C. The Discharge Exceptions

The right to a discharge, while fundamental to modern bankruptcy relief, is limited. There is no constitutional right to a discharge; it is a privilege bestowed by statute.⁶² The opportunity to use the discharge to obtain a fresh

n.10 (1991) (noting that, prior to the 1970 amendments to the Bankruptcy Code, discharge questions were generally decided in state court). Questions of dischargeability are "core proceedings" falling within the jurisdiction of the bankruptcy court. 28 U.S.C. § 157(b)(2)(I) (2000).

59. 11 U.S.C. § 727(a) (2000 & Supp. 2005). The last two exceptions were added to Section 727(a) in the 2005 bankruptcy amendments.

60. 11 U.S.C. § 1328 (2000 & Supp. 2005).

61. See *infra* Section III.B.2 (discussing the good faith requirement under 11 U.S.C. § 1325 (2000 & Supp. 2005)).

62. See *Grogan*, 498 U.S. at 286; *United States v. Kras*, 409 U.S. 434, 445-47 (1973).

start free of all prior debts is limited to the “honest but unfortunate” debtor.⁶³ This limitation does not demand a broad inquiry into the debtor’s morals; rather, it requires the court to consider specific statutory exceptions from the discharge.⁶⁴

Section 523 of the Bankruptcy Code enumerates a number of exceptions to the general entitlement to discharge.⁶⁵ Continuing the historical emphasis on moralism, the discharge exceptions are rooted in the fundamentally equitable nature of bankruptcy relief.⁶⁶ Consistent with these equitable principles, questions of dischargeability are construed liberally in favor of the debtor.⁶⁷

The specific debts excepted from discharge reflect Congressional choices in balancing the importance of the fresh start with matters of non-bankruptcy policy. The obligations excepted from discharge can be loosely grouped into two categories: those implicating overriding policy issues and those implicating the debtor’s own misconduct.⁶⁸

Many, though not all, of the discharge exceptions focusing on policy issues are designed to protect the public fisc.⁶⁹ These exclusions include certain tax obligations,⁷⁰ spousal or child support obligations,⁷¹ student loans,⁷² and court fees.⁷³

63. *Grogan*, 489 U.S. at 286-87; *Brown v. Felsen*, 442 U.S. 127, 128-29 (1979).

64. See *McCrary v. Spigel (In re Spigel)*, 260 F.3d 27, 32 (3d Cir. 2001) (“Nevertheless, the Bankruptcy Code does not condition discharge upon a generalized determination of the moral character of the debtor. Instead, it specifies the types of debts that the Code deems exempt from discharge.”).

65. 11 U.S.C. § 523(a) (2000 & Supp. 2005).

66. See *Heckathorn v. United States (In re Heckathorn)*, 199 B.R. 188, 194 (Bankr. N.D. Okla. 1996) (discharge equitable in nature).

67. See *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301 (11th Cir. 1994); *Boroff v. Tully (In re Tully)*, 818 F.2d 106 (1st Cir. 1987).

68. Cf., *Rutanen v. Baylis (In re Baylis)*, 313 F.3d 9, 19 (1st Cir. 2002) (dividing nondischargeable debts into debts for which policy reasons place great importance on repayment, and debts arising from fault). Some of the exceptions do not fit neatly into this classification scheme. Section 523(a)(3) excepts from discharge unscheduled debts. 11 U.S.C. § 523(a)(3) (2000). Section 523(a)(16) excepts certain fees owed to condominium and cooperative associations (an exception which reflects the susceptibility of discharge exceptions to careful lobbying of industry groups as much as it reflects any overarching policy goals). 11 U.S.C. § 523(a)(16) (2000 & Supp. 2005).

69. See Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 540 (1991).

70. 11 U.S.C. §§ 523(a)(1) & 523(a)(14) (2000 & Supp. 2005).

71. 11 U.S.C. §§ 523(a)(5), 523(a)(15) & 523(a)(18) (2000 & Supp. 2005). Stephen Joseph, in “How Courts Have Interpreted the Phrases ‘Ability to Pay’ and ‘Outweighs the Detrimental Consequences’ Under 11 U.S.C. § 523(a)(15)(A) and (B) of the Bankruptcy Code in Cases Involving Non-Dischargeable Divorce Obligations,” 103 COM. L.J. 67 (1998) suggests that the exclusion of alimony and child support from discharge is intended to further the “policy that only ‘honest debtors’ are entitled to a fresh start.” *Id.* at 68. Alimony and child support obligations, however, do not

The other category of discharge exceptions is designed to advance the fundamental policy of affording relief only to the “honest but unfortunate” debtor.⁷⁴ A number of classes of debt arising from the debtor’s misconduct are non-dischargeable in Chapter 7, including: debts arising from the debtor’s fraudulent conduct;⁷⁵ claims arising from willful and malicious injury caused by the debtor;⁷⁶ criminal fines and restitution obligations;⁷⁷ claims arising from injury or death caused by the debtor while driving while intoxicated;⁷⁸ and claims for which discharge was denied in a prior bankruptcy case.⁷⁹

The balancing inherent in the exception of certain classes of debt from the scope of the discharge reflects a congressional conclusion “that the creditors’ interest in recovering full payment of debts in these categories outweighed the debtors’ interest in a complete fresh start.”⁸⁰

Where the debt excepted from discharge relates to debtor misconduct, the discharge exceptions also have a punitive nature. Excepting a debt from discharge does not mean that the creditor will ever be paid; the debtor may be judgment-proof, or may successfully evade collection efforts. Even if the creditor is never compensated for its loss, the exclusion of the debt from the scope of the discharge means that the debtor will be unable to escape the consequences of her actions and will not be permitted to realize the full benefit of the fresh start.

The Supreme Court’s decision in *Cohen v. de la Cruz* illustrates the punitive character of the discharge exceptions.⁸¹ In *Cohen*, the Court ruled that the exception from discharge of debts incurred due to fraud includes not merely the compensatory portion of the debt, but exemplary damages as well.⁸² Exemplary damages, by their very nature, serve not to compensate the

inherently implicate the debtor’s honesty; a debtor may incur such obligations regardless of his or her honesty. The policy implications of this discharge exception are better understood as ensuring that the responsibility for the support of the dependants remains on the debtor, rather than falling upon the larger societal safety net.

72. 11 U.S.C. § 523(a)(8) (2000 & Supp. 2005).

73. 11 U.S.C. § 523(a)(17) (2000 & Supp. 2005).

74. *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998); *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

75. 11 U.S.C. §§ 523(a)(2) (2000 & Supp. 2005) (debt for money obtained through false pretenses), 523(a)(4) (2000) (fraud or defalcation while acting as a fiduciary, embezzlement, or larceny), 523(a)(11) (2000) (fraud while acting as a bank fiduciary), 523(a)(12) (2000) (malicious or reckless failure to maintain the capital of an insured depository institution), & 523(a)(19) (2000) (securities fraud).

76. 11 U.S.C. § 523(a)(6) (2000).

77. 11 U.S.C. §§ 523(a)(7) & 523(a)(13) (2000); see *Kelly v. Robinson*, 479 U.S. 36, 50 (1986).

78. 11 U.S.C. § 523(a)(9) (2000 & Supp. 2005).

79. 11 U.S.C. § 523(a)(10) (2000).

80. *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

81. 523 U.S. 213 (1998).

82. *Id.* at 222.

creditor, but to punish the debtor and to deter future misconduct.⁸³ Including this component of damages in the discharge exception serves a punitive, rather than compensatory, purpose. The debt is nondischargeable not merely because society demands that the victim be made whole, but also because society will not permit the debtor to evade the consequences of her misconduct.

D. *The Expanded Chapter 13 Discharge*

Congress enacted Chapter 13 to encourage debtors to repay some portion of their debts.⁸⁴ In a Chapter 13 proceeding, the debtor subjects her disposable income to the jurisdiction of the court, and proposes a plan under which that income will be used to repay some or all of her debts over a period of three to five years.⁸⁵

Congress plainly believes that Chapter 13 cases are better than Chapter 7 for all creditors and most debtors.⁸⁶ In its estimation, a partial payment through a Chapter 13 plan is better for creditors than little or no distribution in Chapter 7, and provides the debtor with a greater sense of satisfaction.⁸⁷

83. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.”) (citations omitted); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

84. Chapter 13 relief was first added to the Bankruptcy Act in the Chandler Act of 1938. Ch. 575, 52 Stat. 840, 930-41 (1938) (repealed 1978); see Walter Chandler, *The Wage Earners’ Plan: Its Purpose*, 15 VAND. L. REV. 169 (1961).

85. See 11 U.S.C. §§ 1306(a)(2), 1322, & 1325 (2000 & Supp. 2005).

86. Notwithstanding this Congressional bias, Chapter 7 filings are statistically more common than Chapter 13. See Non-Business Bankruptcy Filings by Chapter, 1990-2005, at http://www.abiworld.org/Template.cfm?Section=Filings_by_Chapter&CONTENTID=10996&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

87. See *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 427 (7th Cir. 1982); see also S. REP. NO. 95-989, at 13 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5799.

Empirical research is divided as to the accuracy of this Congressional belief. See Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 12 J. BANKR. L. & PRAC. 3, 21 (2003). Several studies conclude that many Chapter 7 debtors could afford to fund significant repayment of their obligations. See, e.g., J. BARRON & M. STATEN, PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS’ ABILITY TO PAY (Credit Research Center, Georgetown University 1997); Gordon Bermant & Ed Flynn, “Executive Office for U.S. Trustees, Incomes, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors” (1999), at <http://www.usdoj.gov/ust/press/articles/ch7trends-01.htm>; Marianne B. Culhane & Michael M. White, “Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors” 7 AM. BANKR. INST. L. REV. 22 (1999). Other studies however, conclude that the majority of debtors lack the ability to repay their

Thus, Congress sought to encourage more debtors to seek relief under Chapter 13 instead of Chapter 7.⁸⁸

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 quite plainly reflects the Congressional preference for Chapter 13 over Chapter 7.⁸⁹ Congress designed the 2005 Act to cause the majority of consumer debtors to proceed under Chapter 13, rather than Chapter 7.⁹⁰

To encourage more debtors to pursue relief under Chapter 13, the discharge available to Chapter 13 debtors is broader than the discharge available in Chapter 7. Prior to the enactment of the 2005 Act, the Chapter 13 "super-discharge" was extremely broad. The only debts excluded from the Chapter

debts. See TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 199-229 (1989); see also 1 REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 89-91 (1997).

88. H.R. REP. NO. 95-595, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5966 ("In the consumer area, proposed Chapter 13 encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge.").

89. Pub. L. No. 109-8, 119 Stat. 23 (2005) (the "2005 Act").

90. See 2005 Act § 102. The Congressional preference for Chapter 13 filings, reflected in legislative efforts to make it more difficult for consumers to qualify for Chapter 7 relief and to force more debtors to proceed under Chapter 13, dates back to 1964. See H.R. 5771, 90th Cong. (1967) (requiring an affirmative showing that relief under Chapter 13 would not be adequate for a debtor to qualify for Chapter 7 relief); H.R. 1057, 90th Cong. (1967) (same); S. 613, 89th Cong. (1965) (same); H.R. 292, 89th Cong. (1965) (same); H.R. 12,784, 88th Cong. (1964) (same). The 1973 Bankruptcy Commission recommended against imposition of a mandatory Chapter 13. See Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 411-12 (1973), reprinted in COLLIER ON BANKRUPTCY, at App. Pt. 4-412 (Lawrence P. King ed., 15th ed. Rev. 2001) (Appendix 4(c)).

Efforts to restrict Chapter 7 filings were renewed in 1978, and continued through the 1980s. See Act of Nov. 6, 1978, § 721, 92 Stat. at 2606; H.R. 4786, 97th Cong. § 2 (1981); S. 2000, 97th Cong. § 2(c) (1981); Omnibus Bankruptcy Improvements Act of 1983, S. 445, 98th Cong. (1983); H.R. 5174, 98th Cong. (1984).

The 2005 Act is the product of several years of legislative effort, dating directly from the Bankruptcy Reform Act of 2000. Gekas-Grassley Bankruptcy Reform Act of 2000, H.R. 2415, 106th Cong. (2000). Throughout the five year gestation of the 2005 Act, each iteration of proposed reform legislation has featured an enhanced emphasis on Chapter 13 as a centerpiece. Reform proposals in 2000, 2001, 2002, 2003, and 2004 all included means test provisions which would permit a debtor to obtain relief under Chapter 7 only upon an affirmative showing that the debtor lacks the means to fund a Chapter 13 plan. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 109th Cong. § 102 (2003) (passage of which was debated during both 2003 and 2004); Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.R. 333, 108th Cong. § 102 (2002); Bankruptcy Reform Act of 2001, H.R. 5745, 107th Cong. § 102 (2001); Bankruptcy Reform Act of 2000, S. 3186, 106th Cong. (2000); H.R. 2415, 106th Cong. (2000).

13 discharge prior to the 2005 Act were those arising from spousal and child support obligations, student loans, injury or death caused by the debtor while driving while intoxicated,⁹¹ and restitution and criminal fines included in a sentence of the debtor's conviction of a crime.⁹² Debts for willful and malicious torts,⁹³ fraud,⁹⁴ and fines and penalties not relating to a conviction,⁹⁵ were all dischargeable in Chapter 13.

The 2005 Act considerably expanded the list of debts which are non-dischargeable in Chapter 13. The Chapter 13 discharge exclusions now include debts for trust fund taxes, taxes for which returns were never filed or which were filed late, taxes arising from a fraudulent return,⁹⁶ debts arising from fraud and false statements, unscheduled debts, debts for defalcation by a fiduciary, domestic support obligations, student loans, drunk driving injuries, criminal restitution, criminal fines, and debts for harm to persons resulting from willful or malicious conduct.⁹⁷ The expanded discharge is limited to debts for willful and malicious injury to property, debts relating to certain nondischargeable tax obligations, and debts arising from domestic property settlements.⁹⁸

Congress intended the broader Chapter 13 as an incentive to encourage more debtors to seek relief under Chapter 13, rather than Chapter 7, and to complete their Chapter 13 plans.⁹⁹ A debtor faced with an otherwise nondis-

91. 11 U.S.C. § 1328(a)(2) (2000 & Supp. 2005); *see also* 37 U.S.C. §§ 301d(c)(3), 301e(d)(3), 302f, 302g(e), 312(f)(3), 317(f)(3), 318(h)(3), 319(f)(3) & 322(f)(4); 42 U.S.C. § 254o(d)(3), 292f(g), & 656(b).

92. 11 U.S.C. § 1328(a)(3) (2000 & Supp. 2005). The claims of creditors who are not scheduled and who do not receive notice of the case in time to participate in the plan process are also excluded from discharge. *See* *United States v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240 (6th Cir. 1997).

93. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Mason v. Young (In re Young)*, 237 F.3d 1168 (10th Cir. 2001); *Navistar Fin. Corp. v. Stelluti (In re Stelluti)*, 94 F.3d 84,88 (2d Cir. 1996); *First La. Bus. & Indus. Dev. Corp. v. Dyson (In re Dyson)*, 277 B.R. 84 (Bankr. M.D. La. 2002); *United Orient Bank v. Green*, 215 B.R. 916, 930 (S.D.N.Y. 1997); *In re Hood*, 211 B.R. 334 (Bankr. W.D. Ark. 1997).

94. *See, e.g., McClellan v. Cantrell*, 217 F.3d 890, 894-95 (7th Cir. 2000); *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 792-93 (9th Cir. 1997); *In re Britt*, 211 B.R. 74 (Bankr. M.D. Fla. 1997).

95. *See, e.g., Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Hardenberg v. Va. Dep't of Motor Vehicles (In re Hardenberg)*, 42 F.3d 986 (6th Cir. 1994); *Young v. Dep't of Motor Vehicles (In re Young)*, 10 B.R. 17 (Bankr. S.D. Cal. 1980).

96. 2005 Act § 707 (amending 11 U.S.C. § 1328(a) (2000)).

97. 2005 Act § 314 (amending 11 U.S.C. §§ 523(a) & 1328(b) (2000)).

98. *Id.* (amending 11 U.S.C. §§ 523(a) & 1328(b) (2000)). These changes reflect a preference for the "stick" over the "carrot" in encouraging more debtors to seek relief under Chapter 13, reducing the scope of the Chapter 13 "superdischarge" carrot, and introducing a pro-Chapter 13 stick in the form of means testing provisions.

99. *See* H.R. REP. NO. 95-595, at 129 (1977), *reprinted in* 1978 U.S.S.C.A.N. 5963, 6090 ("The fact that a discharge would not be available in a liquidation case

chargeable debt can pursue relief under Chapter 13 as the only route to the discharge of the obligation.

III. THE GOOD FAITH REQUIREMENT

The requirement of good faith has deep roots in American bankruptcy policy: “Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.”¹⁰⁰

The good faith standard is deeply rooted in equitable principles.¹⁰¹ As a court of equity, the Bankruptcy Court must balance the interest of the debtor in a fresh start with the interest of creditors in receiving fair treatment.¹⁰²

The issue of good faith can arise in two very different contexts in a Chapter 13 case. A Chapter 13 case is subject to dismissal for cause under Section 1307(c) if the petition was filed in bad faith.¹⁰³ Confirmation of the Chapter 13 plan may be denied under Section 1325 if the plan is not proposed in good faith.¹⁰⁴

A. Good Faith in Filing Under 11 U.S.C. § 1307(c)

The Bankruptcy Court may convert a Chapter 13 case to one under Chapter 7, or may dismiss a Chapter 13 case for “cause.”¹⁰⁵ “Cause” for Section 1307(c) purposes can include the absence of good faith.¹⁰⁶

should furnish a greater incentive for the debtor to perform under the plan.”); *see also* *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1353 (8th Cir. 1990) (“We recognize that Congress intentionally expanded the scope of the debtor’s discharge in Chapter 13 after he completes his plan in order to encourage more debtors to attempt to pay their debts under bankruptcy court supervision.” (quotation omitted)); *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 428 (7th Cir. 1982); *In re McGovern*, 297 B.R. 650, 661 (Bankr. S.D. Fla. 2003); *In re Barbosa*, 236 B.R. 540, 556 (Bankr. D. Mass. 1999); *In re Thompson*, 224 B.R. 360, 366 (Bankr. N.D. Tex. 1998).

100. *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 (5th Cir. 1986).

101. *See Am. United Mut. Ins. Co. v. City of Avon Park*, 311 U.S. 138, 145 (1940) (questions of good faith in bankruptcy considered based upon principles of “[e]quity and good conscience”).

102. *In re Little Creek Dev. Co.*, 779 F.2d at 1072; *see also In re Carsrud*, 161 B.R. 246, 252 (Bankr. D.S.D. 1993) (“A good faith stance based on public policy should take into account the relationship between the debtor and objecting creditor – personal versus legal; individual versus institution – and then consider the impact of the conduct, not only at the time of infliction, but in the future as well.”).

103. *See infra* Section III.A.

104. 11 U.S.C. § 1325(a) (2000 & Supp. 2005); *see infra* Section III.B.

105. 11 U.S.C. § 1307(c) (2000 & Supp. 2005).

106. *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996); *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470-71 (9th Cir. 1994); *Gier v. Farmers State Bank of Kan. (In re Gier)*,

Good faith, in this context, “must be assessed on a case-by-case basis in light of the totality of the circumstances.”¹⁰⁷ Relevant factors may include, among many others:

- The nature of the debtor’s debts;
- The timing of the petition;
- How the debts in question arose;
- The debtor’s motive in filing the petition;
- How the debtor’s actions affected creditors;
- The debtor’s treatment of creditors both before and after the petition was filed; and
- Whether the debtor has been forthcoming with the bankruptcy court and the creditors.¹⁰⁸

The debtor’s approach to the repayment of creditors in the Chapter 13 plan may also be relevant.¹⁰⁹ The good faith analysis “allows the bankruptcy court to determine whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of the Chapter.”¹¹⁰ If the court finds that the case was not filed in good faith, then the court may find the requisite “cause” under Section 1307(c) either to convert the case to one under Chapter 7 or to dismiss the case altogether.¹¹¹

Courts are divided on whether it is appropriate to consider an attempt to discharge an otherwise non-dischargeable debt when assessing good faith in filing under Section 1307. While all courts that have examined the question agree that the single factor of filing a Chapter 13 petition in order to take advantage of the expanded discharge cannot, by itself, comprise bad faith *per se* warranting conversion or dismissal, a majority of courts have concluded that pursuit of the expanded discharge may be considered as a factor under a totality of the circumstances test under Section 1307.¹¹² However, a number of

986 F.2d 1326, 1329-30 (10th Cir. 1993); *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992); *Andrews v. Kerschner (In re Kerschner)*, 246 B.R. 495, 497 (Bankr. M.D. Pa. 2000).

107. *Lilley*, 91 F.3d at 496; see *In re McGovern*, 297 B.R. 650, 656 (Bankr. S.D. Fla. 2003); N.J. Lawyers’ Fund for Client Prot. v. *Goddard (In re Goddard)*, 212 B.R. 233, 237-38 (D.N.J. 1997).

108. *Lilley*, 91 F.3d at 496; see *Cabral v. Shamban (In re Cabral)*, 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002); *Kerschner*, 246 B.R. at 497; *Goddard*, 212 B.R. at 238.

109. See *In re Covino*, 245 B.R. 162, 169 (Bankr. D. Idaho 2000).

110. *Kerschner*, 246 B.R. at 497 (quotation omitted).

111. See *Eisen*, 14 F.3d at 470; *Gier*, 986 F.2d at 1329; *Love*, 957 F.2d at 1354; *Goddard*, 212 B.R. at 238; *Stathatos v. U.S. Trustee (In re Stathatos)*, 163 B.R. 83, 87-88 (Bankr. N.D. Tex. 1993).

112. See *Davis v. Mather (In re Davis)*, 239 B.R. 573, 579 (B.A.P. 10th Cir. 1999); *Leavitt v. Soto (In re Leavitt)*, 209 B.R. 935, 940 (B.A.P. 9th Cir. 1997); *Love*, 957 F.2d at 1357; *In re Chaffin*, 816 F.2d 1070, 1074 (5th Cir. 1987), *modified on reconsideration*, 836 F.2d 215 (5th Cir. 1988); *In re Herndon*, 218 B.R. 821, 824

courts have concluded that the debtor's desire to take advantage of the expanded discharge can never contribute to bad faith in the filing of the petition, and have rejected the application of this factor in considering motions to convert or dismiss.¹¹³

The later position appears to be, in many respects, the better reasoned approach to the issue. The question of whether or not the plan seeks to discharge an otherwise nondischargeable debt is not a proper factor for consideration under Section 1307(c), as Congress intended the expanded discharge to be an aspect of the relief available in Chapter 13. It is illogical to suggest that a Chapter 13 petition was filed in bad faith because the debtor intends to take advantage of the particular benefits of Chapter 13. While the nature of the debts which the debtor seeks to discharge must be considered as one aspect of the debtor's good faith in plan confirmation, the mere fact that the debtor filed a Chapter 13 petition in order to pursue the benefits offered under Chapter 13 is not evidence of bad faith in filing.¹¹⁴

This does not mean that courts should not consider egregious pre-petition conduct under Section 1307(c). While consideration of the debt's dischargeability *per se* is not a proper factor in considering the debtor's good faith in filing the petition, a number of the other factors, such as the nature of the debt, how it arose, and the debtor's motivation in filing the petition, compel consideration of many of the facts which are, by their nature, also relevant in determining dischargeability of debts in a Chapter 7 case.¹¹⁵

B. Good Faith in Plan Confirmation

Section 1325(a) provides that the Court shall confirm a Chapter 13 plan so long as, *inter alia*, the plan complies with the provisions of the Bankruptcy Code and is proposed in good faith.¹¹⁶ Good faith has been

(Bankr. E.D. Va. 1998); *In re Corino*, 191 B.R. 283, 290 (Bankr. N.D.N.Y. 1995); *In re Griggs*, 181 B.R. 111, 115 (Bankr. N.D. Ala. 1994); *see also In re Smith*, 286 F.3d 461, 465-66 (7th Cir. 2002).

113. *See Lilley*, 91 F.3d at 496 n.2; *In re Gathright*, 67 B.R. 384, 390 (Bankr. E.D. Pa. 1986); *In re Chase*, 28 B.R. 814, 819 (Bankr. D. Md. 1983); *In re Strong*, 26 B.R. 814, 816 (Bankr. D. Ind. 1983); *see also Lewiston Seaport Plumbing & Heating, Inc. v. Prine (In re Prine)*, 10 B.R. 87, 89-90 (Bankr. D. Idaho 1981).

114. *See In re Ashton*, 85 B.R. 766, 770 (Bankr. S.D. Ohio 1988); *Gathright*, 67 B.R. at 388; *Chase*, 28 B.R. at 819; *Prine*, 10 B.R. at 89-90; *see also NMSBPCLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 127 (3d Cir. 2004). Note, however, that consideration of this factor in assessing good faith in plan confirmation may prevent the confirmation of any plan within the debtor's means to successfully fund, *see infra* note 197 and accompanying text, leading ultimately to the same result as conversion or dismissal.

115. *See supra* note 108 and accompanying text.

116. 11 U.S.C. § 1325(a) (2000 & Supp. 2005).

described as “one of the central, perhaps the most important confirmation finding to be made by the court in any Chapter 13 case.”¹¹⁷

While the treatment of creditors in the plan is a fundamental aspect of the good faith analysis, good faith does not necessarily require that unsecured creditors receive a meaningful dividend in every case. The Bankruptcy Code does not contain any express requirement that a Chapter 13 plan provide for substantial repayment to unsecured creditors.

A number of courts have considered the “substantial repayment” issue in the context of good faith in cases involving plans that provide for little or no distribution to unsecured creditors. A majority of these cases conclude that the failure to provide for substantial repayment of creditors is a factor to be taken into account in considering good faith, but does not constitute bad faith *per se*.¹¹⁸ However, a debtor proposing a zero dividend plan assumes a “heavy burden” to show that the plan is proposed in good faith.¹¹⁹

1. Burdens

A critical distinction between the good faith inquiry under Section 1307(c) and Section 1325(a) is the allocation of burdens. Where a party moves to convert or dismiss a Chapter 13 case for cause under Section 1307(c), the movant bears the burden of proof and persuasion.¹²⁰

117. *Fid. & Cas. Co. of N.Y. v. Warren (In re Warren)*, 89 B.R. 87, 90 (B.A.P. 9th Cir. 1988) (quoting *Ga. R.R. Bank & Trust Co. v. Kull (In re Kull)*, 12 B.R. 654, 658 (Bankr. S.D. Ga. 1981)); *In re McGovern*, 297 B.R. 650, 656 (Bankr. S.D. Fla. 2003).

118. *See Downey Sav. & Loan Ass'n v. Metz (In re Metz)*, 820 F.2d 1495, 1498-99 (9th Cir. 1987); *In re Hines*, 723 F.2d 333, 335 (3d Cir. 1983); *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983); *Kitchens v. Ga. R.R. Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885, 887-89 (11th Cir. 1983); *United States v. Estus (In re Estus)*, 695 F.2d 311, 316 (8th Cir. 1982); *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 969-72 (4th Cir. 1982); *Barnes v. Whelan*, 689 F.2d 193, 198-200 (D.C. Cir. 1982); *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 431-32 (7th Cir. 1982); *In re Quiles*, 262 B.R. 191, 195 (Bankr. D.R.I. 2001); *In re Fields*, 190 B.R. 16, 18 (Bankr. D.N.H. 1995); *In re Farmer*, 186 B.R. 781, 783 (Bankr. D.R.I. 1995); *In re Anderson*, 173 B.R. 226, 231 (Bankr. D. Colo. 1993); *In re Murrell*, 160 B.R. 128, 131 (Bankr. W.D. Mo. 1993); *see also Public Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983). *Cf. Tenney v. Terry (In re Terry)*, 630 F.2d 634 (8th Cir. 1980) (Chapter 13 plan which proposes no distribution to any creditors *per se* bad faith). A minority of cases find a zero percent plan to be *per se* indicative of bad faith. *See, e.g., In re Lattimore*, 69 B.R. 622, 625-26 (Bankr. E.D. Tenn. 1987); *see also In re Seman*, 4 B.R. 568 (Bankr. S.D.N.Y. 1980).

119. *See In re Smith*, 286 F.3d 461, 468 (7th Cir. 2002); *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990); *Quiles*, 262 B.R. at 195; *Farmer*, 186 B.R. at 783.

120. *In re Love*, 957 F.2d 1350, 1355 (7th Cir. 1992); *see also Alt v. United States (In re Alt)*, 305 F.3d 413, 420 (6th Cir. 2002); *In re Dickerson*, 232 B.R. 894,

Under Section 1325, in contrast, the debtor has the burden of showing that the plan was proposed in good faith.¹²¹ This burden is “especially heavy” when the debtor seeks to discharge a debt which would be nondischargeable in a Chapter 7 proceeding.¹²² The particular weight of this “heavy” burden will be profoundly influenced by the court’s moral assessment of the underlying facts:

Whenever a debtor seeks a Chapter 13 “superdischarge” of a debt that would be nondischargeable in Chapter 7, and whenever that debtor has engaged in prefiling conduct that is criminal and/or repugnant to societal standards, the Court will subject any proposed plan to a closer degree of scrutiny than might otherwise be the case. This is particularly true where the victim of the proscribed conduct and the parties injured as a direct result of that conduct have raised valid questions about the debtor’s good faith in seeking Chapter 13 relief.¹²³

The practical effect of this difference in the allocation of burdens is to make it much more difficult for a creditor to obtain the dismissal of a case based on the absence of good faith than to block the confirmation of a plan on those same grounds. Placing the burden of proof on the debtor under Section 1325 prevents the debtor from sitting back and putting the objecting creditor to its proof. To meet its burden, the debtor must come forward with affirmative evidence of good faith – typically requiring, among other things, the debtor’s testimony regarding the underlying debt and the proposal of the plan. Such testimony establishes a context for the bankruptcy court to make a moral judgment about the debtor’s conduct and her entitlement to the relief requested in the plan.

897 (Bankr. E.D. Tex. 1999); N.J. Lawyers’ Fund for Client Protection v. Goddard (*In re Goddard*), 212 B.R. 233, 237 n.1 (Bankr. D.N.J. 1997); *In re Johnson*, 191 B.R. 179, 182 (Bankr. D. Ariz. 1995).

121. See *Ed Schory & Sons, Inc. v. Francis* (*In re Francis*), 273 B.R. 87, 91 (B.A.P. 6th Cir. 2002); *Caldwell*, 895 F.2d at 1126; *Dickerson*, 232 B.R. at 897; *Johnson*, 191 B.R. at 182. *But see Goddard*, 212 B.R. at 239 n.7.

122. *Leavitt v. Soto* (*In re Levitt*), 209 B.R. 935, 940 (B.A.P. 9th Cir. 1997); *In re Dicey*, 312 B.R. 456, 458 (Bankr. D.N.H. 2004); *In re Virden*, 279 B.R. 401, 407 (Bankr. D. Mass. 2002); *Warren*, 89 B.R. at 93; see also *Caldwell*, 895 F.2d at 1126; *Francis*, 273 B.R. at 91-92; *Johnson*, 191 B.R. at 182.

123. *In re Lancaster*, 280 B.R. 468, 482 (Bankr. W.D. Mo. 2002); see also *Caldwell*, 895 F.2d at 1126; *Francis*, 273 B.R. at 91-92; *Warren*, 89 B.R. at 93; *Johnson*, 191 B.R. at 182.

2. Good Faith Under 11 U.S.C. § 1325(a)

The inquiry into whether a Chapter 13 plan has been proposed in good faith focuses on a number of factors, including:

- The amount of the proposed plan payments and the amount of the debtor's surplus;
- The duration of the plan;
- The percentage of payment to unsecured creditors;
- Whether the debtor has stated his debts and expenses accurately;
- The debtor's employment history, ability to earn, and likelihood of future increases in income;
- The frequency with which the debtor has sought relief under the Bankruptcy Code;
- The existence of special circumstances (such as inordinate medical expenses);
- The nature of the debt sought to be discharged;
- The debtor's motivation and sincerity in seeking Chapter 13 relief;
- The extent of preferential treatment between classes of creditors;
- Whether the debtor has unfairly manipulated the Bankruptcy Code;
- Whether the debt to be discharged would be nondischargeable in a case under Chapter 7;¹²⁴
- Whether the debtor has made any fraudulent misrepresentations to mislead the bankruptcy court;
- The extent to which secured claims are modified; and
- The burden which the plan's administration would impose on the trustee.¹²⁵

124. Section 1325 requires that a Chapter 13 plan, to be confirmable, pay creditors at least as much as they would receive in a Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4) (2000 & Supp. 2005). The holder of a claim which would not be dischargeable can not rely on this provision to bar confirmation; the fact that a claim would be nondischargeable in Chapter 7 does not mean that a Chapter 13 plan must pay it in full to satisfy the Chapter 7 test for confirmation. *See Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 430 (7th Cir. 1982).

125. *See Mason v. Young (In re Young)*, 237 B.R. 791, 298 (B.A.P. 10th Cir. 1999); *Solomon v. Cosby (In re Solomon)*, 67 F.3d 1128 (4th Cir. 1995); *Gier v. Farmers State Bank of Kan. (In re Gier)*, 986 F.2d 1326 (10th Cir. 1993); *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1349 (8th Cir. 1990); *Caldwell*, 895 F.2d at 1126-27; *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030 (6th Cir. 1988); *United States v. Estus (In re Estus)*, 695 F.2d 311, 317 (8th Cir. 1982); *In re McGovern*, 297 B.R. 650, 656-57 (Bankr. S.D. Fla. 2003); *Francis*, 273 B.R. at 91-92; *Goddard*, 212 B.R. at 240; *In re Carsrud*, 161 B.R. 246, 250 n.11 (Bankr. D.S.D. 1993); *see also Cabral v. Shamban (In re Cabral)*, 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002); *In re Smith*, 848 F.2d 813 (7th Cir. 1988); *In re Scotten*, 281 B.R. 147, 149 (Bankr. D. Mass. 2002). *But see In re Gathright*, 67 B.R. 384, 386

The overarching goal of this inquiry is to determine whether under the circumstances of the entire case “there has been an abuse of the provisions, purpose, or spirit of Chapter 13 in the proposal or plan.”¹²⁶ Put differently, the court must ask of the debtor: “Is he really trying to pay the creditors to the reasonable limit of his ability or is he trying to thwart them?”¹²⁷ Good faith must be considered on a case-by-case basis, in light of the totality of the circumstances.¹²⁸

The debtor’s pre-petition conduct is highly relevant to an examination of the debtor’s good faith.¹²⁹ Nonetheless, “a Chapter 13 plan may be confirmed despite even the most egregious pre-filing conduct where other factors suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditor’s claims.”¹³⁰ For the debtor to satisfy Section 1325(b)’s good faith requirement, such pre-petition conduct “must be accompanied by other factors which suggest that the plan, nevertheless, represents a good faith effort by the debtor to satisfy his creditors’ claims.”¹³¹

The reason for this is plain: there is a *quid pro quo* for the expanded Chapter 13 discharge. Good faith requires balancing the interests of the debtor and her creditors: “[The] [r]equirement of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefiting them in any way or to achieve reprehensible purposes.”¹³² To propose a plan in good faith and obtain the expanded discharge, the debtor must attempt to repay at least a portion of his debts through his plan.¹³³

(Bankr. E.D. Pa. 1986) (rejecting *Estus* factors in light of the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353).

126. *Neufeld v. Freeman* (*In re Freeman*), 794 F.2d 149, 152 (4th Cir. 1986) (quotation omitted); *Goddard*, 212 B.R. at 240.

127. *In re Smith*, 286 F.3d 461, 466 (7th Cir. 2002); *In re Schaitz*, 913 F.2d 452, 453 (7th Cir. 1990); *In re Ristic*, 142 B.R. 856, 861 (Bankr. E.D. Wis. 1992).

128. See *Smith*, 286 F.3d at 466; *Mason v. Young* (*In re Young*), 237 F.3d 1168, 1174-75 (10th Cir. 2001); *Solomon*, 67 F.3d at 1134; 550 West Ina Road Trust v. Tucker (*In re Tucker*), 989 F.2d 328, 330 (9th Cir. 1993); *LeMaire*, 898 F.2d at 1349; *In re Okoreeh-Baah*, 836 F.2d at 1031; *Public Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983); *Rimgale*, 669 F.2d at 432.

129. *Goddard*, 212 B.R. at 241; see also *LeMaire*, 898 F.2d at 1352.

130. *Freeman*, 794 F.2d at 153; see *Smith*, 286 F.3d at 467; *Young*, 237 F.3d at 1177; *LeMaire*, 898 F.2d at 1352; *Longmont v. Rasmussen* (*In re Rasmussen*), 888 F.2d 703, 705 (10th Cir. 1989); *Smith*, 848 F.2d at 819.

131. *In re Ristic*, 142 B.R. 856, 859 (Bankr. E.D. Wis. 1992); *LeMaire*, 898 F.2d at 1352; see also *Freeman*, 794 F.2d at 453; *Goddard*, 212 B.R. at 241 n.10.

132. *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re Little Creek Dev. Co.*), 779 F.2d 1068, 1072 (5th Cir. 1986).

133. *Keach v. Boyajian* (*In re Keach*), 243 B.R. 851, 857 (B.A.P. 1st Cir. 2000); see *Ed Schory & Sons, Inc. v. Francis* (*In re Francis*), 273 B.R. 87, 92 (B.A.P. 6th Cir. 2002); *In re Cook*, 3 B.R. 480, 484-85 (Bankr. S.D.W. Va. 1980).

This *quid pro quo* is plainly evidenced in the legislative history relating to Chapter 13 in the drafting of the Bankruptcy Code. Chapter 13 debtors are afforded a broader discharge because their creditors receive, in exchange, the benefit of distributions under a plan:

If the debtor wants to pay his debts pursuant to a plan, and if the creditors are willing to go along, he should be allowed to do so. The fact that a discharge would not be available in a liquidation case should furnish a greater incentive for the debtor to perform under the plan.¹³⁴

Two points are essential to this proposition: first, that “the creditors are willing to go along;” and second, that, in exchange for the expanded discharge, the debtor provides the creditors with some reasonable return through the plan. “The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.”¹³⁵ Where neither creditor consent nor a return to creditors is present, the *quid pro quo* essential to the expanded discharge has not been satisfied, and the plan cannot be confirmed.

Recognizing the essential link between the expanded discharge and the *quid pro quo* comports well with fundamental principles of bankruptcy policy. Underlying American bankruptcy policy is a commitment to the principle of shared sacrifice.¹³⁶ Debtors subject their disposable income and non-exempt assets to the jurisdiction of the court; creditors, in exchange, accept the discharge of that portion of their claims which remain unsatisfied following the application of these sources. Balancing these sacrifices lies at the heart of the ongoing struggle to craft fair and equitable bankruptcy laws.

IV. THE GOOD FAITH REQUIREMENT AND THE EXPANDED CHAPTER 13 DISCHARGE

A. Application of the Quid Pro Quo

The expanded discharge in Chapter 13 is justified on policy grounds only when the creditors, as a group, realize a benefit from the Chapter 13 proceeds: “The super discharge of Chapter 13 was provided by Congress as

134. H.R. REP. NO. 95-595, at 129 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6090.

135. H.R. REP. NO. 95-595, at 118, 129 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079, 6090 (quoted in *Fid. & Casualty Co. of N.Y. v. Warren (In re Warren)*, 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988)).

136. See Robert J. Bein, Comment, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103, 149 (1995); Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 336 (1994).

an incentive for the debtor to commit to a repayment plan under Chapter 13, as an alternative to providing creditors nothing under Chapter 7.”¹³⁷ The expanded discharge is a privilege, not a right; a debtor must propose a plan that shows she is entitled to enjoy that privilege.¹³⁸ “[T]he special benefits bestowed upon a Chapter 13 debtor are premised upon his willingness to repay at least some portion of his debts.”¹³⁹

The Congressional policy choices in structuring this expanded Chapter 13 relief reflect a subtle appreciation of the benefits realized by all parties under such a system. As the United States Supreme Court recognized in *Pennsylvania Department of Public Welfare v. Davenport*, quoting with approval from COLLIER ON BANKRUPTCY:

[T]he dischargeability of debts in chapter 13 that are not dischargeable in chapter 7 represents a policy judgment that [it] is preferable for debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives.¹⁴⁰

Debtors who come to court with a history of inequitable conduct can take advantage of this expanded discharge in good faith *only* if they do, in fact, “attempt to pay such debts to the best of their abilities.”¹⁴¹ To permit a Chapter 13 “superdischarge” in a case where the Chapter 13 plan provides unsecured creditors, including the creditor holding the nondischargeable claim, with no more than they would receive in a Chapter 7 liquidation makes a mockery of Congressional goals in providing for an expanded discharge in Chapter 13. In short, it is an abuse of the provisions of Chapter 13.¹⁴²

137. *Warren*, 89 B.R. at 95; see also *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1353 (8th Cir. 1990).

138. *In re Schaitz*, 913 F.2d 452, 455 (7th Cir. 1990); *In re Ristic*, 142 B.R. 856, 860 (Bankr. E.D. Wis. 1992).

139. *Warren*, 89 B.R. at 92 (quoting *Bank of Am. Nat’l Trust & Sav. Ass’n v. Slade (In re Slade)*, 15 B.R. 910, 912 (B.A.P. 9th Cir. 1981)).

140. 495 U.S. 552, 563 (1990) (quoting 5 COLLIER ON BANKRUPTCY ¶ 1328.01[1][c] (15th ed. 1986)).

141. *Id.* (quoting 5 COLLIER ON BANKRUPTCY, *supra* note 140 ¶ 1328.01[1][c] (15th ed. 1986)).

142. This proposition is only reinforced by the changes in the Chapter 7/Chapter 13 balance in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The 2005 Act’s increased emphasis on Chapter 13, embodied principally in the “means testing” provisions of the Act, mean that far fewer debtors will be able to proceed under Chapter 7. Under the 2005 Act, the expanded Chapter 13 discharge will have significance only to the limited number of debtors who will qualify for relief under Chapter 7, but who nonetheless elect to proceed under Chapter 13 in order to take advantage of the “superdischarge.” Given the limited scope of debtors to whom it will apply, the only policy justification for preserving the expanded dis-

This *quid pro quo* cannot be satisfied merely by a showing that the debtor has devoted all available disposable income to the plan.¹⁴³ The commitment of all disposable income is a confirmation requirement in every Chapter 13 case.¹⁴⁴ Good faith requires more than minimal compliance with the other criteria for confirmation, such as substantiality and best efforts.¹⁴⁵ Those criteria must be present for a plan to be confirmed in any event, and are among the factors considered as part of the court's overall inquiry into good faith in every case.¹⁴⁶ Unless the court has the discretion to consider the totality of the circumstances in examining good faith, "the danger exists that Chapter 13 plans could become shams that would emasculate the safeguards that Congress has included in Chapter 7 to prevent debtor abuse of the bankruptcy laws."¹⁴⁷ To satisfy the policy concerns underlying the Chapter 13 "superdischarge" *quid pro quo*, a debtor whose conduct has given rise to a nondischargeable debt must make a meaningful attempt to actually repay his debts through the plan – including the nondischargeable debt.

This principle is supported by the distinction between the "full compliance" discharge available upon consummation of the plan under Section 1328(a) and the "hardship" discharge available under Section 1328(b). A debtor who is unable to complete her plan payments due to circumstances beyond her control may nonetheless receive a hardship discharge under Section 1328(b), provided that the funds already distributed under her plan exceed the distribution her creditors would have received in a Chapter 7 liquidation.¹⁴⁸ However, the expanded "superdischarge" is not available to a debtor receiving a hardship discharge. Only a debtor who completes her plan pay-

charge at all (which Congress plainly elected to do, *see supra* note 59 and accompanying text) is either to reward Chapter 13 debtors for their greater contribution to creditor recovery, or to provide an incentive to motivate debtors who could proceed under Chapter 7 to elect Chapter 13. Under either theory, the *quid pro quo* is essential to the expanded discharge.

143. *See Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990) ("Best efforts under 11 U.S.C. § 1325(b), without more, are not enough."); *Warren*, 89 B.R. at 93-94; *In re Games*, 213 B.R. 773, 779 (Bankr. E.D. Wash. 1997) ("It may be helpful to first define what good faith is not. It is not the equivalent of best efforts which requires only that a debtor fund the plan with his/her disposable income for a minimum three year term."); *Ristic*, 142 B.R. at 861.

144. 11 U.S.C. § 1325(b)(1) (2000 & Supp. 2005). A Chapter 13 plan may be confirmed over an objection only if the debtor has either committed all disposable income to the plan or proposes to pay her claims in full. *Id.*

145. *See Davis v. Mather (In re Davis)*, 239 B.R. 573, 577 (B.A.P. 10th Cir. 1999); *In re Caldwell*, 895 F.2d at 1126; *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 432 (7th Cir. 1982); *Ristic*, 142 B.R. at 861; *In re Stewart*, 109 B.R. 998, 1006 (D. Kan. 1990); *In re Burrell*, 6 B.R. 360, 366 (N.D. Cal. 1980).

146. *See Rimgale*, 669 F.2d at 432.

147. *Id.* at 432; *see also Burrell*, 6 B.R. at 366; *In re Marlow*, 3 B.R. 305, 307 (Bankr. N.D. Ill. 1980).

148. 11 U.S.C. § 1328(b) (2000 & Supp. 2005).

ments and receives a Section 1328(a) “full compliance” discharge can discharge otherwise nondischargeable debts.¹⁴⁹

This limitation on the scope of the hardship discharge underscores the importance of viewing good faith, in the context of a plan which seeks to take advantage of the expanded discharge, as something more than compliance with the minimum standards for confirmation under Section 1325. Under Section 1325, a plan cannot be confirmed unless the distribution satisfies a Chapter 7 liquidation test.¹⁵⁰ The fact that a hardship discharge – requiring distribution which satisfies the same test – does not provide as broad a discharge as a full compliance discharge implies that the expanded discharge requires something more than satisfaction of the Section 1325 minimum confirmation standards.

The traditional list of factors to be considered in the Section 1325 good faith analysis, often referred to as the *Estus* factors,¹⁵¹ includes whether the debt to be discharged under the proposed plan would be nondischargeable in a Chapter 7 proceeding.¹⁵² However, a few courts have concluded that the dischargeability of particular debts in Chapter 7 may not be considered as a factor in the context of plan confirmation.¹⁵³ For example, in *In re Goddard* the United States District Court for the District of New Jersey concluded that the non-dischargeability of debts is not a factor in considering the confirma-

149. 11 U.S.C. § 1328 (2000 & Supp. 2005); see *W. Sur. Co. v. Dauterman (In re Dauterman)*, 156 B.R. 976, 981 (Bankr. N.D. Ohio 1993); *Overland Park Dodge, Inc. v. Graff (In re Graff)*, 7 B.R. 426, 429 (Bankr. D. Kan. 1980); see also COLLIER ON BANKRUPTCY, *supra* note 140 ¶ 523.02 (15th ed. 1986); *Castilla v. Gonzalez Seijo (In re Gonzalez Seijo)*, 76 B.R. 11, 13 n.1 (Bankr. D.P.R. 1987); *Ill. Dep’t of Pub. Aid v. Hudson (In re Hudson)*, 9 B.R. 363, 365 (Bankr. N.D. Ill. 1981); *In re Smith*, 8 B.R. 543, 545-46 (Bankr. D. Utah 1981).

150. 11 U.S.C. § 1325(a)(4) (2000 & Supp. 2005).

151. See *United States v. Estus (In re Estus)*, 695 F.2d 311, 317 (8th Cir. 1982); see also *Ed Schory & Sons, Inc. v. Francis (In re Francis)*, 273 B.R. 87, 91-92 (B.A.P. 6th Cir. 2002); *Mason v. Young (In re Young)*, 237 B.R. 791, 298 (B.A.P. 10th Cir. 1999); *Solomon v. Cosby (In re Solomon)*, 67 F.3d 1128 (4th Cir. 1995); *Gier v. Farmers State Bank of Kan. (In re Gier)*, 986 F.2d 1326 (10th Cir. 1993); *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1349 (8th Cir. 1990); *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126-27 (6th Cir. 1990); *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030 (6th Cir. 1988); *In re McGovern*, 297 B.R. 650, 656-57 (Bankr. S.D. Fla. 2003); *N.J. Lawyers’ Fund for Client Prot. v. Goddard (In re Goddard)*, 212 B.R. 233, 240 (D.N.J. 1997); *In re Carsrud*, 161 B.R. 246, 250 n.11 (Bankr. D.S.D. 1993).

152. See *supra* notes 124-125 and accompanying text.

153. See *Bank of Am. Nat’l Trust & Sav. Ass’n v. Slade (In re Slade)*, 15 B.R. 910 (B.A.P. 9th Cir. 1981); *In re Goddard*, 212 B.R. at 240 n.9; *In re McGinnis*, 18 B.R. 525 (Bankr. N.D. Ga. 1982); also *Ellen M. Horn, Note, Good Faith and Chapter 13 Discharge: How Much Discretion is Too Much?*, 11 CARDOZO L. REV. 657 (1990) (arguing that nondischargeability should not be considered when assessing good faith).

tion of a plan under Section 1325(a).¹⁵⁴ The *Goddard* court reached this decision without discussion, relying on the Third Circuit Court of Appeals' examination of good faith in filing under Section 1307(c) in *In re Lilley*.¹⁵⁵

Goddard's application of *Lilley* to Section 1325(a) is fundamentally flawed and at odds with the policy goals underlying Chapter 13 and its expanded discharge. The non-dischargeability of debts under Chapter 7, and their treatment in the Chapter 13 plan, are essential factors in considering the debtor's good faith in proposing the plan.

The expanded Chapter 13 discharge is rooted in the tradeoff between the interests of the debtor and her creditors embodied in the Chapter 13 plan.¹⁵⁶ This *quid pro quo* is precisely why the bankruptcy court in *Goddard* was wrong in applying *Lilley* to the Section 1325(a) analysis. The *Lilley* Court concluded that, because Congress offers Chapter 13 debtors an expanded discharge, the fact that a debtor seeks to take advantage of that discharge should not be considered evidence that the Chapter 13 petition was filed in bad faith for Section 1307(c) purposes.¹⁵⁷

The *Goddard* court, however, assumed, without discussion, that this conclusion could be transplanted to the determination of good faith in the context of *plan confirmation* under Section 1325(a).¹⁵⁸ This application of the *Lilley* analysis of bad faith filings is fundamentally flawed. The essence of the expanded Chapter 13 discharge is the *quid pro quo*: the debtor gets an expanded discharge, but in exchange, must make a meaningful attempt to repay his debts through the plan. In other words, it is fair to ask more of a Chapter 13 debtor who seeks to take advantage of the "superdischarge" than of a debtor whose debts would be dischargeable in a Chapter 7 proceeding, but instead elects to file a Chapter 13. Elimination of the dischargeability of the debt as a factor hamstringing the court's ability to consider the totality of the circumstances, and the debtor's good faith in proposing the plan, thereby frustrating the policy goals Congress sought to advance in creating a broad Chapter 13 discharge. *Goddard* is, on this point, plainly wrong.

154. *Goddard*, 212 B.R. at 240 n.9.

155. *Id.* n.9 (citing *In re Lilley*, 91 F.3d 491, 496 n.2 (3d Cir. 1996)).

156. *See supra* notes 139-140 and accompanying text.

157. *See Lilley*, 91 F.3d at 496 n.2.

158. 212 B.R. at 240 n.9. The decision of the Bankruptcy Court for the Northern District of Georgia in *In re McGinnis* is similarly devoid of analysis. The *McGinnis* court rejects application of nondischargeability as a factor, citing an unpublished decision. *McGinnis*, 18 B.R. at 526. The only reasoning offered on the issue is the court's observation that "the nondischargeability of a debt in a Chapter 7 case cannot automatically result in a determination that a plan was not proposed in good faith." *Id.* at 527. While this proposition is plainly correct, *cf. supra* note 112, it sheds little light on the question of whether such nondischargeability should be considered as a factor in the analysis.

The 1981 decision of the Ninth Circuit Bankruptcy Appellate Panel in *In re Slade*¹⁵⁹ contains a more thorough analysis, but suffers from similar flaws. The *Slade* panel acknowledges the *quid pro quo* underlying Chapter 13's expanded discharge,¹⁶⁰ but goes on to reject the nondischargeability of debts as a factor to be considered in assessing good faith.¹⁶¹

The *Slade* court concludes that:

[T]he fact that a debtor's plan represents his best effort is a significant indication of good faith on his part. Absent any showing of a willful attempt to misuse Chapter 13 in defraud of creditors, best efforts plans should normally satisfy the good faith requirements of 11 U.S.C. § 1325(a)(3).¹⁶²

This conclusion ignores two fundamental principles of Chapter 13 plan confirmation. First, the requirement that the debtor exert her best efforts in funding the plan is an independent confirmation requirement, separate and distinct from the requirement of good faith.¹⁶³ Second, the *Slade* decision seems to imply that the burden of showing bad faith rests upon the objecting creditor. To the contrary, the debtor bears the burden of establishing good faith to obtain confirmation of her plan.¹⁶⁴ *Slade's* suggestion that it rests upon the creditor to show willful misuse of Chapter 13 to challenge good faith, particularly in a case involving a minimal dividend to unsecured creditors, seems particularly ill-reasoned, given the extensive law supporting the proposition that the debtor bears a heavy burden of showing good faith when she seeks to discharge debt which would be nondischargeable in a Chapter 7 proceeding,¹⁶⁵ and the sound policy underlying that burden.

In contrast to the conclusions reached in *Goddard* and *Slade*, a majority of courts have concluded that the debtor's efforts to discharge otherwise non-dischargeable debt is properly considered as a factor impacting the finding of good faith in confirmation under Section 1325.¹⁶⁶ Under this reasoning, a higher return for creditors may be the price of plan confirmation.¹⁶⁷

159. Bank of Am. Nat'l Trust & Sav. Ass'n v. Slade (*In re Slade*), 15 B.R. 910 (B.A.P. 9th Cir. 1981).

160. *Id.* at 912 ("The tenor of the [legislative history] makes it clear that the special benefits bestowed upon a Chapter 13 debtor are premised upon his willingness to repay at least some portion of his debts . . .").

161. *Id.*

162. *Id.*

163. See *supra* notes 143-147 and accompanying text.

164. See *supra* Section III.B.1.

165. See *supra* notes 122-123 and accompanying text.

166. See *In re Smith*, 286 F.3d 461, 467 (7th Cir. 2002); *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1350 (8th Cir. 1990); *Street v. Lawson (In re Street)*, 55 B.R. 763, 765 (B.A.P. 9th Cir. 1985); *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 433 n.22 (7th Cir. 1982); *In re McGovern*, 297 B.R. 650, 658 (Bankr. S.D. Fla. 2003); *In re Scotten*, 281 B.R. 147, 149 (Bankr. D. Mass. 2002); *In re Herndon*, 218

The equity of this approach is illustrated by cases addressing the most egregious pre-petition conduct. In *In re LeMaire*, for example, the creditor held a civil judgment against the debtor resulting from the debtor's deliberate attempt to kill the creditor.¹⁶⁸ Following a twenty-seven month prison sentence, the debtor obtained his doctorate in experimental behavioral pharmacology.¹⁶⁹ When the creditor obtained a judgment against him based on the assault, the debtor filed a Chapter 13 petition, with a plan that provided for a 42% distribution to his unsecured creditors.¹⁷⁰

The Eighth Circuit Court of Appeals, considering the creditor's challenge to confirmation of the plan, concluded that the type of debt the debtor sought to discharge and the fact that the debt would be nondischargeable in a Chapter 7 case were properly considered as factors in assessing the debtor's good faith.¹⁷¹ Observing that a Chapter 13 plan may be confirmed "despite even the most egregious pre-filing conduct,"¹⁷² the court concluded that confirmation under such circumstances required a higher degree of scrutiny, and remanded the case to consider the totality of the circumstances, including the pre-petition conduct and the non-dischargeable nature of the debt.¹⁷³

The court in *In re Lancaster*¹⁷⁴ considered similar facts. The creditor in *Lancaster* held a claim against the debtor based upon the latter's acts of van-

B.R. 821, 824 (Bankr. E.D. Va. 1998); *In re Carsrud*, 161 B.R. 246, 253 (Bankr. D.S.D. 1993); *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985); *In re Cook*, 3 B.R. 480, 486 (Bankr. S.D.W. Va. 1980) ("I believe the adequacy of the plan depends upon the extent to which the debtor is invoking the special relief afforded by the Chapter. Where otherwise nondischargeable debts are provided for by the plan and will be discharged, a more significant percentage should be required."); *In re Marlow*, 3 B.R. 305, 308-309 (Bankr. N.D. Ill. 1980) ("It is possible that a plan proposing a 1% payment to unsecured creditors could be found to lack good faith even without the motive to avoid a Chapter 7 non-dischargeable debt. Here, the combination of a 1% plan plus the additional bona fide threat of a non-dischargeable debt is fatal.").

167. *See, e.g., In re Lancaster*, 280 B.R. 468, 482-83 (Bankr. W.D. Mo. 2002) ("the Debtor has not proposed his Plan in good faith because he has not proposed to pay the victim of his criminal conduct and the parties injured by his conduct a substantial enough amount through the Plan"). *But see Smith*, 286 F.3d at 468 ("it is difficult to see how the low percentage of the payout adds anything to the other good faith factors and the other statutory requirements. The percentage repayment is a function of the size of the debt relative to the debtor's anticipated earnings; this factor is not relevant to determining whether the debtor has acted in good faith.").

168. *LeMaire*, 898 F.2d at 1347.

169. *Id.*

170. *Id.* It is worth noting that 42% is an unusually high dividend for unsecured creditors in a Chapter 13 case.

171. *Id.* at 1349.

172. *Id.* at 1352 (quoting *Neufeld v. Freeman (In re Freeman)*, 794 F.2d 149, 153 (4th Cir. 1986)).

173. *Id.* at 1353.

174. 280 B.R. 468 (Bankr. W.D. Mo. 2002).

dalism which had resulted in the destruction of the creditor's house.¹⁷⁵ The debtor served no time in prison,¹⁷⁶ made no payments to the creditor on account of the civil judgment the creditor obtained against him,¹⁷⁷ and proposed a Chapter 13 plan that would pay the creditor less than three percent of the amount owed to him.¹⁷⁸ Considering the pre-petition conduct and the minimal distribution under the plan, the court refused to confirm the debtor's plan based on the absence of good faith.¹⁷⁹

Lancaster and *LeMaire* illustrate the application of bankruptcy law's emphasis on moralism in considering questions of good faith. A debtor whose pre-petition conduct brands her a "bad actor" comes to the court of equity tainted by her conduct. Bankruptcy relief will be available to such a debtor, but she will be held to a demanding standard if she seeks the benefit of Chapter 13's "superdischarge."¹⁸⁰

B. Moralism, Subjectivity, and Good Faith

The evaluation of a debtor's good faith, particularly where the debtor has engaged in reprehensible conduct giving rise to an obligation which would be nondischargeable under Chapter 7, reflects a strong moralist strain in bankruptcy law. The classification of certain debts as nondischargeable, and the consideration of the attempt to discharge such debts as an element of good faith, betrays fundamental moral judgments essential to the norms established in the Bankruptcy Code.¹⁸¹ In the dialectic of bankruptcy ethics, the discharge of ordinary debts by an "honest but unfortunate" debtor is morally sound, so long as the debtor complies with the requirements of the Code, while the discharge of otherwise nondischargeable debts is morally suspect. The "superdischarge," while still within the universe of acceptable conduct, lies at the margin. Thus, a debtor who would carry her case to that limit will be held to a stricter standard.¹⁸²

175. *Id.* at 472-73. The creditor testified that his house "was blown up" as a result of the debtor's tampering with the furnace. *Id.* at 473. The debtor's conduct was motivated by his anger at a relationship between the creditor and the debtor's former spouse. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 480-81.

179. *Id.* at 482-83.

180. It bears noting that the conclusion in *LeMaire* is, to a certain extent, rendered moot by the 2005 Amendment, which make claims arising from willful or malicious harm to persons nondischargeable even in Chapter 13. See 2005 Act § 314 (amending 11 U.S.C. §§ 523(a) & 1328(b) (2000)). The outcome in *Lancaster* would be no different under the 2005 Act, as the amendments leave damage resulting from willful or malicious damage to property as dischargeable in Chapter 13. *Id.*

181. See Flint, *supra* note 69, at 538-39.

182. Courts and commentators, especially those favoring an economic model of legal analysis, tend to regard approaches to the law based on morality as inherently

The moralistic underpinnings of the law of discharge and good faith test the law's traditional commitment to objectivity and impartiality.¹⁸³ To be effective, a system of laws must be objective, uniform, and dispassionate. Those governed by the law must have confidence that they will be judged fairly, without regard to their wealth, influence, or standing in the community.¹⁸⁴ The law must be sufficiently objective as to be predictable, so that individuals can order their affairs with some confidence in how they will be treated by the law.¹⁸⁵ Without objectivity, the law devolves into disorder.¹⁸⁶

suspect. *See, e.g.,* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978); Charles G. Hallinan, *The "Fresh Start Policy" in Consumer Bankruptcy: A Historical Inventory & an Interpretive Theory*, 21 U. RICH. L. REV. 49, 138-39 (1986); Richard Posner, *Law & Economics is Moral*, 24 VAL. U.L. REV. 163, 173 (1990). Issues, such as dischargeability, which are inherently rooted in moral judgments, demonstrate the inability of economic models to fully describe the operation of the law in all contexts. Many cases involving questions of dischargeability concern circumstances in which parties may act contrary to their economic interests due to the moral and emotional implications of the circumstances giving rise to the debt in question. *See, e.g., supra* notes 167-180 and accompanying text (discussing *Lancaster* and *LeMaire*).

183. *See supra* Part I.B.

184. *See* *Barclay v. Florida*, 463 U.S. 939, 986 (1983) ("Fairness and consistency cannot be achieved without clear and objective standards that provide specific and detailed guidance.") (quotations omitted) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)); *see also* Karen Gross, "Preserving a Fresh Start for the Individual Debtor: the Case for Narrow Construction of the Consumer Credit Amendments", 135 U. PA. L. REV. 59, 151 (1987) (arguing for objective approach to bad faith analysis under Section 1325(b)); Clayton T. Tanaka & Larry M. Lawrence, II, *The Felony-Murder Doctrine*, 36 LOY. L. REV. 1478, 1501 (2003); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 298 (2003); *see also* Morton J. Horowitz, *The Transformation of American Law 1780-1860* (1977) at 182-83; David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 42 (2002); Charles L. Barzun, Note, *Common Sense & Legal Science*, 90 VA. L. REV. 1051, 1089 (2004).

185. *See* William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1043 (2004); Kathleen Magone & Steven I. Friedland, *The Paradox of Creative Legal Analysis: Venturing into the Wilderness*, 79 U. DET. MERCY L. REV. 571, 571 (2002); John Tasioulas, *The Legal Relevance of Ethical Objectivity*, 47 AM. J. JURIS. 211, 251 (2002); *see also* *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 391-92 (2002).

186. The law's traditional bias in favor of objectivity is reflected in courts' common response to subjective judgments. Subjective determinations are typically viewed with suspicion and disapproval. *See* *Blakely v. Washington*, 124 S. Ct. 2531, 2539 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002). *Cf.* *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 124 S. Ct. 2140, 2148-49 (2004); *Thornton v. United States*, 124 S. Ct. 2127, 2132 (2004).

This tendency towards objectivity is illustrated by the historical evolution of fraudulent transfer doctrine. Traditionally, the law of fraudulent transfers depended on a subjective assessment of the transferor's intent. *See* GARRARD GLENN, *FRAUDULENT*

A case-by-case assessment of good faith, taking into account the totality of the circumstances, is inherently subjective. A subjective assessment of good faith ensures that each case will be judged on its equities; however, it inhibits the predictability and uniformity towards which the law strives.

Viewed in its historical context, the subjectivity inherent in the Code's approach to evaluating good faith is a reasonable compromise. Under older systems of bankruptcy law, a debtor could not obtain a discharge without the consent of the majority of her creditors, leaving the discharge at the whim of creditors.¹⁸⁷ Because no specific standards were imposed upon the creditors, and their decision was not subject to review the discharge decision was entirely subjective

The Bankruptcy Act of 1898 eliminated the creditor consent requirement from American bankruptcy law.¹⁸⁸ In its place, the bankruptcy court assumed responsibility for deciding all matters of dischargeability. This change introduced an element of objectivity to the discharge determination. While the creditor consent requirement was purely subjective, allowing the creditors to make decisions regarding discharge based on whim or emotion, a judicially based assessment is dispassionate, made by a third party without a personal stake in the grant or denial of discharge. The court becomes the gatekeeper in place of the creditors, standing-in for the conscience of the larger society. If the court's decision is ill-founded, the aggrieved party can seek review on appeal.

The introduction of specific statutory standards governing the court's determination of the debtor's entitlement to discharge enhanced the objectivity of the determination.¹⁸⁹ This approach stands in contrast with the approach

CONVEYANCES AND PREFERENCES 83-86 (1940); *see also* 13 Eliz. Ch. 5 (Eng. 1571). This assessment was supplemented by the adoption of certain "badges of fraud:" easily evaluated factors which could be considered by a fact finder in considering whether a finding of fraudulent intent is appropriate. *See Twyne's Case*, 3 Co. Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601); UNIF. FRAUDULENT TRANSFER ACT § 4(b), 7A U.L.A. 651 (1985). Fraudulent transfer law eventually evolved to encompass two varieties of fraud: actual fraud (where actual intent to defraud is shown) and constructive fraud (where a transfer by an insolvent is shown to have taken place for less than reasonably equivalent value, regardless of intent). *See* UNIF. FRAUDULENT CONVEYANCE ACT § 4 (1985); 11 U.S.C. § 548 (2000 & Supp. 2005); UNIF. FRAUDULENT TRANSFER ACT § 5(a), 7A U.L.A. 651 (1985). The agenda underlying this evolution is unmistakably a desire to render fraudulent transfer law less subjective, shifting the focus from a subjective assessment of the morality of the debtor's conduct towards an assessment of the objective fairness of the transaction from the point of view of the debtor's creditors. *See* UNIF. FRAUDULENT TRANSFER ACT § 3 cmt. 2, 7A U.L.A. 651 (1985); *see generally* Bein, *supra* note 136, 107-12.

187. *See supra* notes 25-33 and accompanying text.

188. *See supra* note 37 and accompanying text.

189. *See generally* Tabb, *supra* note 22.

under English law, which leaves the determination of discharge to the broad discretion of the court.¹⁹⁰

This historical evolution reflects the law's tendency to emphasize principles of objectivity and impartiality. The application of modern principles of "good faith" under the Bankruptcy Code, however, requires this system to engage in an analysis which is inherently subjective and moralistic. Despite the best efforts of law and economics to describe legal systems in objective terms, it is clear that bankruptcy is truly objective only when it is easy to be objective. When put to the test, bankruptcy law turns to the subjective application of moral principles in order to satisfy society's need for the just and equitable balancing of the debtor's interest in a fresh start with society's desire to deny the privileges of discharge to those who have behaved reprehensibly and have failed to act to remedy their wrongdoing.¹⁹¹

Questions of good faith in Chapter 13 strain the balance between objective impartiality and subjective moralism, and bring the tension between them to the surface. Advancing society's interest in promoting Chapter 13 relief elevates the impartial and objective over the moralistic and subjective. This seems to be in keeping with our notions of law as impartial and objective, but it conflicts with the suppressed desire to see law be subjective and moralistic – the desire to know that the law is "fair", taking into account the specific circumstances at hand. By elevating the professed interest in objective impartiality, the subversive agenda – subjective moralism – is forced to the forefront. It is the very push for objective impartiality that results in the triumph of subjective moralism.

Is this necessarily a bad thing? Society does want the law to be capable of addressing moral wrongs. Fairness is not merely neutrality. Fairness also demands the flexibility to address that which shocks the conscience.¹⁹² An extreme case such as *Lancaster*,¹⁹³ involving a debt incurred through an act of violence and a Chapter 13 plan which proposed only a *de minimis* repayment to unsecured creditors, does not merely bring the objectivity/subjectivity tension to the fore; it also tests the Code's ability to address circumstances in which a debtor seeks to abuse its provisions.

Properly understood, the Bankruptcy Code does not suffer from a tension between objectivity and subjectivity. Instead, it depends upon a "relentless intermixing" of objective impartiality and subjective assessment.¹⁹⁴ If the Code successfully promoted a complete triumph of impartiality over moralism, or vice versa, the result would be a system which satisfied neither society's desire for certainty nor society's desire for fairness. If the bankruptcy system is to function and to enjoy public confidence, it must demonstrate the ability to treat all debtors in a manner that is objective and even-handed, and

190. *See id.* at 363.

191. *See* Flint, *supra* note 69, at 541-42.

192. *See* Frug, *supra* note 5, at 1303.

193. *See supra* notes 174-179 and accompanying text.

194. *See* Frug, *supra* note 5, at 1289-90.

also the ability to render judgments that address society's desire to see the law operate in a manner which satisfies moral judgments.

At a fundamental level, the assessment of good faith in a case where a debtor seeks to take advantage of the Chapter 13 "superdischarge" carries the delicate balancing act of the court of equity to its precarious extreme. Rarely is the Bankruptcy Code's undercurrent of moralism more essential to the entire enterprise of the just and equitable adjudication of debtors' rights.

V. CONCLUSION

For a "superdischarge" plan to be proposed in good faith, it must be consistent with the overarching policy goals of Chapter 13. A review of the totality of the circumstances must lead to the conclusion that the plan is intended to promote rehabilitation, which is the fundamental purpose of Chapter 13, and not debt avoidance, which is the purpose of Chapter 7.¹⁹⁵ A plan which seeks to exploit the provisions of Chapter 13 in a manner directly inconsistent with these policy goals is not proposed in good faith, and thus may not be confirmed under Section 1325.

One effect of this assessment of the totality of the circumstances will be to leave some debtors unable to take advantage of a Chapter 13 discharge at all. A debtor who has, through egregious pre-petition conduct, incurred an obligation which would not be dischargeable in Chapter 7, and who lacks the disposable income necessary to fund a plan which pays anything to her unsecured creditors, may be unable to present a plan which satisfies the *quid pro quo* inherent in the good faith confirmation requirement. The Chapter 13 discharge may simply be beyond the reach of such a debtor.

While this result seems harsh, it is consistent with the policies underlying the Bankruptcy Code.¹⁹⁶ The Supreme Court has explained that the very inclusion of discharge exceptions "reflect[s] a conclusion on the part of Congress that the creditors' interest in recovering full payment of debts in these categories outweighs the debtors' interest in a complete fresh start."¹⁹⁷

195. *In re McGovern*, 297 B.R. 650, 658-59 (Bankr. S.D. Fla. 2003); *see also In re Fleury*, 294 B.R. 1, 8 (Bankr. D. Mass. 2003) ("The filing of bankruptcy solely to thwart a creditor claim rather than making a honest effort to pay debts is bad faith."); *In re Virden*, 279 B.R. 401, 407 (Bankr. D. Mass. 2002); *In re Brock*, 47 B.R. 167, 169-70 (Bankr. S.D. Cal. 1985) ("The motivation and sincerity of the debtor in seeking the Chapter 13 relief is not to repay the creditor, but to escape the consequences of the judgment.").

196. *See In re Ristic*, 142 B.R. 856, 860 (Bankr. E.D. Wis. 1992).

197. *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)) (quotation omitted). The *Cohen* decision reflects the Court's willingness to let the discharge exceptions serve a punitive function. *Cohen* holds that the exception of debts incurred due to fraud from discharge includes not merely the compensatory portion of the debt, but the exemplary damages as well. 523 U.S. at 222.

Pre-petition conduct so egregious as to give rise to a debt which is not dischargeable in Chapter 7, and which supports a finding of bad faith under Section 1325, must have consequences. The expanded Chapter 13 discharge offers such a debtor an opportunity for a fresh start, but that opportunity comes at a price. A debtor who is unwilling or unable to pay that price will have to live with a non-dischargeable obligation.¹⁹⁸

Such an inherently moralistic view is at odds with the law's traditional impulse towards objective impartiality. Bankruptcy courts, in recognition of the overarching goal of a fresh start, generally focus on quantifiable economic factors. This tendency towards objectivity must be balanced, however, with subjective, moralistic, case-specific assessment of the debtor's conduct, both pre- and post-petition. Any true consideration of good faith must necessarily involve a subjective assessment of the debtor's conduct, and an application of a moral system. While that assessment can, and indeed must, be rendered more objective and consistent through the application of uniform standards, it will ultimately require one individual – the bankruptcy judge – to pass judgment on the moral soundness of the relief requested by another individual – the debtor – in her Chapter 13 plan. This balancing act reflects the pragmatic functioning of a system which has evolved to recognize the needs of litigants and of a society which relies upon it to render fair and effective justice.

The congressional decision to strike this balance in a manner favorable to the creditor/victim is further reflected in the *Grogan* court's conclusion that the standard of proof applicable in discharge proceedings is no more onerous than preponderance of the evidence: "We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Grogan*, 498 U.S. at 287.

198. See *Brock*, 47 B.R. at 170; *In re Cook*, 3 B.R. 480, 486 (Bankr. S.D. W. Va. 1980) ("We must avoid the notion that this form of relief was intended for all. Some debtors, from either lack of sufficient desire or lack of sufficient means will be left to Chapter 7 for relief from their debts. Congress recognizes this fact. The Courts should not do less."); see also H.R. REP. NO. 95-595, at 125 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6086 ("Some consumer debtors are unable to avail themselves of the relief provided under Chapter 13. For these debtors, straight bankruptcy is the only remedy that will enable them to get out from under the debilitating effects of too much debt.").

