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## Bankruptcy: Dischargeability of Restitutive Conditions of Probation - Criminals Find Refuge in the Provisions of the Bankruptcy Reform Act of 1978

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1986]

## Notes

### BANKRUPTCY: DISCHARGEABILITY OF RESTITUTIVE CONDITIONS OF PROBATION—CRIMINALS FIND REFUGE IN THE PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

*Robinson v. McGuigan*

#### INTRODUCTION

With the rise of rehabilitative sentencing in the United States, the concept of victim restitution has played an increasingly prominent role in the disposition of criminal offenders, particularly as a condition of probation.<sup>1</sup> Under the typical statutory scheme, the criminal offender tenders payments to the state, which then remits the money to the victim in compensation for the losses suffered as a result of the criminal wrongdoing.<sup>2</sup> The victim normally has no right to enforce the restitution order

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1. See generally Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 57 (1982). Approximately two thirds of the states have adopted some sort of victim compensation statute. See ALA. CODE § 15-23-1 to -23 (1985); ALASKA STAT. § 12.55.100(a)(2) (1984); ARIZ. REV. STAT. ANN. § 13-901(a), (f) (Supp. 1985); ARK. STAT. ANN. § 41-1203(2)(h) (1977); CAL. PENAL CODE § 1203.1 (West 1982); COLO. REV. STAT. § 16-11-204(2)(e) (1978); CONN. GEN. STAT. ANN. § 54-201 to -218 (West 1978); FLA. STAT. ANN. § 775.089(1) (West Supp. 1986); GA. CODE ANN. § 17-14-1 to -30 (1985); HAWAII REV. STAT. § 706-624(2)(h) (1976); ILL. ANN. STAT. ch. 38, § 1005-6-3(b)(8) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-7-2-1(a)(5) (Burns 1979); KAN. STAT. ANN. § 21-4610(4) (1981); KY. REV. STAT. ANN. § 533.030(3) (Baldwin 1985); LA. CODE CRIM. PROC. ANN. art. 895(A)(7) (West 1984); ME. REV. STAT. ANN. tit. 17-a, § 1204(2)(B) (1983); MD. ANN. CODE art. 27, § 641(a)(1) (1982 & Supp. 1985); MICH. STAT. ANN. § 28.1133 (Callaghan Supp. 1982); MINN. STAT. ANN. § 609.135 (subd. 1) (West Supp. 1985); MISS. CODE ANN. §§ 47-7-47(4), 99-37-5(2) (1981 & Supp. 1985); NEB. REV. STAT. §§ 29-2219(2)(j), 29-2262(2)(j) (1979); NEV. REV. STAT. § 176.185(3) (1986); N.J. STAT. ANN. § 2c:45-1(B)(8) (West 1982); N.M. STAT. ANN. § 31-20-6(A) (1981 & Supp. 1986); N.Y. PENAL LAW § 65.10(2)(g) (Consol. Supp. 1986); N.C. GEN. STAT. §§ 15a-1343(b1)(6), 15A-1343d (1983 & Supp. 1985); N.D. CENT. CODE § 12.1-32-07(2)(e) (1985); OHIO REV. CODE ANN. § 2951.02(C) (Baldwin 1982 & Supp. 1985); OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(a) (West 1986); OR. REV. STAT. § 137.106 (1985); PA. CONS. STAT. ANN. § 1106 (Purdon 1983); S.D. CODIFIED LAWS ANN. § 23A-28-3 (1979 & Supp. 1986); TEX. CRIM. PROC. CODE ANN. art. 42.12, § 6(a)(8) (Vernon Supp. 1986); UTAH CODE ANN. § 76-3-201 (Supp. 1983); VT. STAT. ANN. tit. 28, § 252(b)(6) (Supp. 1985); VA. CODE § 19.2-305 (1983 & Supp. 1985); WASH. REV. CODE ANN. § 9.95.210(2) (1977 & Supp. 1986); W. VA. CODE § 62-12-9 (1977); Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

2. See, e.g., ARIZ. REV. STAT. ANN. § 13-806(A) (Supp. 1982-83) (authorizing clerk of the court to administer restitutive payments); ARK. STAT. ANN. § 46-

under state law.<sup>3</sup> Rather, the state enforces payment of restitution through the threat of probation revocation proceedings upon default in payment by the criminal offender.<sup>4</sup>

A complication arises with granting probation conditioned upon periodic restitution payments where the probationer subsequently files for bankruptcy and attempts to have the restitution condition discharged.<sup>5</sup> The question of whether a criminal restitution obligation is a dischargeable debt implicates two functionally contradictory policies underlying the Bankruptcy Reform Act of 1978 (Bankruptcy Code).<sup>6</sup>

The Bankruptcy Code was intended, in part, to remedy a perceived inadequacy in the relief afforded to consumer debtors under the old Bankruptcy Act.<sup>7</sup> In an effort to provide the consumer debtor with an

117(c) (Supp. 1985) (authorizing Department of Corrections to collect restitution payments and disburse money to victim); COLO. REV. STAT. § 16-11-212(2) (Supp. 1985) (authorizing collection of restitutive payments by probation officer for deposit in court registry from which victim is paid pursuant to court order). Most courts have held that imposition of restitution along with incarceration is improper unless specifically authorized by statute. *See, e.g., State v. Wright*, 156 N.J. Super. 559, 562, 384 A.2d 199, 201 (1978) (refusing to impose restitution as part of custodial sentence where statutory authority is limited to probation condition).

For a discussion of the rise of restitutive sanctions in the United States, see OFFENDER RESTITUTION IN THEORY AND ACTION (B. Galaway & J. Hudson eds. 1977). For a discussion of the philosophical and jurisprudential justifications for restitutive criminal sanctions, see Barnett, *supra* note 1.

3. *See, e.g., Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 132-33 (Bankr. D. Conn. 1984) (victim has no right to enforce restitution requirement under Connecticut law); *In re Button*, 8 Bankr. 692, 694 (Bankr. W.D.N.Y. 1981) (victim has no right to enforce restitution requirements under New York law); *see also Harland, supra* note 1, at 108-19 (discussing enforcement of restitution awards).

4. *See, e.g., N.J. STAT. ANN. § 2C:45-2(a)* (West Pamphlet 1982) (authorizing probation revocation proceedings upon default on motion of person authorized by law to collect restitution); *see also Harland, supra* note 1, at 108-19 (describing various methods of enforcement employed by states). Although the state must initiate the probation revocation proceedings, victims often accelerate the process through informal pressure on state officials. *See, e.g., United States v. Landay*, 513 F.2d 306, 307 (5th Cir. 1975) (probation revocation proceeding for default in restitution was initiated by government under "immediate pressure" from victim).

5. *See, e.g., Lewis and Jennings, Bad Checks and Bankruptcy: The Federal/State Dilemma*, 57 FLA. B.J. 531 (1983); Mehler, *Criminal Prosecution and Restitution Under the Bankruptcy Code*, 1983 ANN. SURV. AM. L. 817; Schutz, *Bankruptcy and the Prosecutor: When Creditors Use Criminal Courts to Collect Debts*, 59 FLA. B.J. 11 (1985).

6. *See* 11 U.S.C. §§ 101-151326 (1982); *Robinson v. McGuigan (In re Robinson)*, 776 F.2d 30, 31-38 (2d Cir. 1985) (discussing clash of policies underlying Bankruptcy Code where criminal debtor seeks discharge of restitutive condition of probation), *cert. granted sub nom. Kelly v. Robinson*, 106 S. Ct. 1181 (1986). For a discussion of *Robinson*, see *infra* notes 91-129 and accompanying text.

7. *See* Act of June 22, 1938, ch. 575, 52 Stat. 840 (Bankruptcy Act). The House Report to the implementation of the Bankruptcy Code states:

[a] major problem under current bankruptcy law is the inadequacy of relief that the Bankruptcy Act provides for consumer debtors. The last

unencumbered "fresh start," Congress broadly defined "debts" subject to discharge in a bankruptcy case.<sup>8</sup> Under the Bankruptcy Code, a "debt" is defined as "liability on a claim,"<sup>9</sup> and "claim" is defined as a "right to payment" or a "right to an equitable remedy for breach of

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major revision of the Bankruptcy Act was in 1938, before any significant amount of consumer credit had been extended. In the post-War years, consumer credit has become a major industry, and buying on time has become a way of life for a large segment of the population. The bankruptcy rate among consumers has risen accordingly, but without the required provisions in the Bankruptcy Act to protect those who need bankruptcy relief. This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor.

H.R. REP. NO. 595, 95th Cong., 1st Sess. 4 (1977), *reprinted in*, 1978 U.S. CODE CONG. & AD. NEWS 5963, 5965-66. Judge Hershner, a bankruptcy judge for the Middle District of Georgia, summarized the law under the Bankruptcy Act prior to 1978 as follows:

Section 57j dealt with the *allowability* of a claim; it did not address the provability or dischargeability of a debt. The provability of a debt was determined by Section 63 of the Bankruptcy Act. Only those creditors with provable debts were entitled to participate in the distribution of the debtor's estate. The dischargeability of a debt was determined by Section 17 of the Bankruptcy Act. Section 17 released a bankrupt "from all of his provable debts, whether allowable in full or in part" subject to certain statutory exceptions. Thus, allowance, provability, and dischargeability were separate determinations under the Bankruptcy Act.

*United States v. Cox (In re Cox)*, 33 Bankr. 657, 658-59 (Bankr. M.D. Ga. 1983) (emphasis in original). One treatise describes the treatment of fines and penalties under the Bankruptcy Act as follows:

The former Bankruptcy Act made no specific provision concerning the dischargeability of fines and penalties due to a governmental unit, but certain principles became well settled in this respect. Fines for violation of law, and forfeiture were not provable and therefore held not to be dischargeable. Generally, fines and penalties were not affected by discharge.

3 COLLIER, COLLIER ON BANKRUPTCY, § 523.17 (15th ed. 1985) (footnotes omitted).

8. See 11 U.S.C. § 101(11) (1982). The legislative history expresses the Congressional intent to broaden the scope of bankruptcy relief:

Paragraph (4) [11 U.S.C. § 101(4)] defines "claim." The effect of the definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in Section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters . . . . By this broadest possible definition . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. *It permits the broadest possible relief in the bankruptcy court.*

H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in*, 1978 U.S. CODE CONG. & AD. NEWS 5963, 6266 (emphasis added). For a discussion of the fresh start policy of the Bankruptcy Code, see Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

9. 11 U.S.C. § 101(11) (1982).

performance if such breach gives rise to a right to payment."<sup>10</sup>

The policy of affording the consumer debtor a "fresh start" under the Bankruptcy Code is tempered by section 523 which provides for the survival of certain "nondischargeable" debts after discharge.<sup>11</sup> In par-

10. 11 U.S.C. § 101(4) (1982). Section 101(4) provides:

(4) Claim means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

For a discussion of § 101(4), see Julis, *Classifying Rights and Interests Under the Bankruptcy Code*, 55 AM. BANKR. L.J. 223 (1981); Matthews, *The Scope of Claims Under the Bankruptcy Code (parts 1 & 2)*, 57 AM. BANKR. L.J. 221, 339 (1983).

11. See 11 U.S.C. § 523(a) (1982). Section 523(a) provides in pertinent part:

(a) A discharge . . . does not discharge an individual debtor from any debt—

....

(2) for obtaining money, property, services, or an extension, renewal, or refinancing of credit, by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive;

....

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

....

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent that such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . ,

....

(c) [T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

*Id.*

Courts faced with interpreting § 523 have found little guidance in the legislative history. See *Tennessee v. Daugherty (In re Daugherty)*, 25 Bankr. 158, 161

ticular, section 523(a)(7) exempts from discharge debts arising from a fine, penalty, or forfeiture payable to a governmental unit that are not compensation for actual pecuniary loss.<sup>12</sup> Also, the commencement or continuation of criminal proceedings is excepted from section 362(a), which provides for an automatic stay of all collection proceedings against the debtor upon the filing of a petition in bankruptcy.<sup>13</sup> The bankruptcy laws, it is said, were not intended to provide a "haven for criminal offenders."<sup>14</sup>

A majority of the courts that have considered the effect of bankruptcy on restitutive probation conditions have concluded that the fresh start policy of the Bankruptcy Code should yield to the policy of avoiding the creation of a refuge for criminal offenders.<sup>15</sup> These courts rea-

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(Bankr. E.D. Tenn. 1982) (close reading of legislative history of § 523(a)(7) "no more helpful in interpreting the statute than reading the text of the statute itself."); *United States v. Cox (In re Cox)*, 33 Bankr. 657, 661 n.3 (Bankr. M.D. Ga. 1983) (indicating agreement with the *Daugherty* court regarding the legislative history of § 523(a)(7)).

12. 11 U.S.C. § 523(a)(7) (1982). For a discussion of the operation of § 523(a)(7), see 3 COLLIER, COLLIER ON BANKRUPTCY § 523.17 (15th ed. 1985).

13. 11 U.S.C. § 362(b)(1) (1982). Section 362 provides that "[t]he filing of a petition . . . does not operate as a stay—(1) under subsection (a) of this subsection, of the commencement or continuation of a criminal action or proceeding against the debtor . . ." *Id.*

In discussing § 362(b)(1), the House Report expressed the view that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy." H.R. REP. NO. 595, 95th Cong., 1st Sess. 342 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6299. For a general discussion of the purpose and scope of § 362, see Note, *Adequate Protection*, 2 BANKR. DEV. J. 21, 26-36 (1985).

14. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 342 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6299.

15. See *Commonwealth v. Oslager (In re Oslager)*, 46 Bankr. 58, 61-62 (Bankr. M.D. Pa. 1985) (restitution ordered as condition of probation not a "debt" under Bankruptcy Code even where state is victim); *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 137-38 (Bankr. D. Conn. 1984) (restitution obligation not a "debt" under Bankruptcy Code and, alternatively, nondischargeable under § 523(a)(7)); *Cornell v. Director, Office of Adult Probation (In re Cornell)*, 44 Bankr. 528, 530 (Bankr. D. Conn. 1984) (restitution obligation imposed as condition of probation "not a debt but a penalty imposed by a state to enforce its criminal statutes"); *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1982) (state imposed criminal restitution order does not create debtor-creditor relationship between debtor and victim or debtor and state); *United States v. Cox (In re Cox)*, 33 Bankr. 657, 662 (Bankr. M.D. Ga. 1983) (obligation to pay costs of prosecution does not give rise to debtor-creditor relationship); *In re Johnson*, 32 Bankr. 614, 616-17 (Bankr. D. Colo. 1983) (obligation to pay restitution as condition of probation not a "debt" under Bankruptcy Code and, alternatively, nondischargeable); *Magnifico v. Arizona (In re Magnifico)*, 21 Bankr. 800, 803 (Bankr. D. Ariz. 1982) (restitution obligation not a "debt" where purpose of imposition is penal rather than compensatory); *In re Button*, 8 Bankr. 692, 694 (Bankr. W.D.N.Y. 1981) (restitution order creates no right to payment in victim and, therefore, no "debt" under Bankruptcy Code); *but see Robinson v. McGuigan (In re Robinson)*,

son that a restitution condition is not a "debt" under the Code definition and, alternatively, that the obligation is nondischargeable under section 523(a)(7) regardless of its compensatory effect.<sup>16</sup> Recently, however, the United States Court of Appeals for the Second Circuit, in *Robinson v. McGuigan (In re Robinson)*,<sup>17</sup> rejected the prevailing view and held that criminal restitution obligations are dischargeable debts under the Bankruptcy Code.<sup>18</sup> In an effort to resolve the resulting split of authority, the Supreme Court granted certiorari in *Robinson*.<sup>19</sup> Additionally, legislation has been proposed which would overrule *Robinson*.<sup>20</sup>

This note will review the leading cases involving the effect of bankruptcy proceedings on restitutive conditions of probation. This note will also highlight and analyze the Second Circuit's decision in *Robinson*. Finally, this note will offer an alternative statutory interpretation which, it is submitted, is consistent with the federal policy concerns implicated by a debtor's attempt to discharge a criminal restitution obligation.

## II. BACKGROUND

### A. *Classifying the Criminal Restitution Obligation Under § 101*

If a court determines that a criminal restitution obligation is not a "debt," then the question of dischargeability is moot since only "debts" are dischargeable under the Bankruptcy Code.<sup>21</sup> A majority of bankruptcy courts hold that criminal restitution obligations do not fall within

776 F.2d 30, 41 (2d Cir. 1985) (restitution obligation imposed as probation condition creates dischargeable debt under Bankruptcy Code), *cert. granted sub nom. Kelly v. Robinson*, 106 S. Ct. 1181 (1986); *Brown v. Shriver (In re Brown)*, 39 Bankr. 820, 822 (Bankr. M.D. Tenn. 1984) (restitution order imposed as condition of probation creates a "debt" which is dischargeable).

16. *See, e.g., Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 132-38 (Bankr. D. Conn. 1984) (restitution requirement creates no "debt" under § 101(11) and, alternatively, creates a nondischargeable debt under § 523(a)(7)).

17. 776 F.2d 30 (2d Cir. 1985), *cert. granted sub nom. Kelly v. Robinson*, 106 S. Ct. 1181 (1986).

18. *Id.* at 41. For a discussion of *Robinson*, see *infra* notes 91-129 and accompanying text.

19. *Kelly v. Robinson*, 106 S. Ct. 1181 (1986).

20. *See* H.R. 3742, 99th Cong., 1st Sess. (1985). In response to the *Robinson* decision, Representative John G. Rowland (R. Conn.) introduced H.R. 3742, entitled the "Criminals Accountability Act of 1985," which would amend § 523(a) by the addition of a new subsection (10). The proposed section 523(a)(10) would make nondischargeable any debt stemming from a consent decree or judgment requiring an individual to make restitution as a consequence of committing a crime. *Id.*

21. *See* 11 U.S.C. § 727(b) (1982) (discharge under Chapter 7 affects only "debts"); 11 U.S.C. § 1141(d) (1982) (discharge under Chapter 11 affects only "debts"); 11 U.S.C. § 1328 (1982) (discharge under Chapter 13 affects only "debts").

the Code's definition of "debt."<sup>22</sup> The impact of this determination is that the filing of a bankruptcy petition and subsequent discharge have no effect on the debtor's obligation to pay restitution.<sup>23</sup>

In *In re Button*,<sup>24</sup> the debtor pleaded guilty to petty larceny and was ordered to pay restitution to his victim as a condition of probation.<sup>25</sup> Subsequently, the debtor filed a petition in bankruptcy and listed the victim, the sentencing judge, and the probation department as creditors.<sup>26</sup> After these creditors failed to file an objection to discharge, the bankruptcy court discharged the debtor's restitution obligation.<sup>27</sup> One

22. See *Commonwealth v. Oslager (In re Oslager)*, 46 Bankr. 58, 61-62 (Bankr. M.D. Pa. 1985) (restitution ordered as a condition of probation not a "debt" under Bankruptcy Code even where state is victim); *Cornell v. Director, Office of Adult Probation (In re Cornell)*, 44 Bankr. 528, 530 (Bankr. D. Conn. 1984) (restitution obligation as a condition of probation "not a debt but a penalty imposed by a state to enforce its criminal statutes."); *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) (state criminal restitution order does not create a debtor-creditor relationship between the debtor and the victim or the state); *United States v. Cox (In re Cox)*, 33 Bankr. 657, 662 (Bankr. M.D. Ga. 1983) (obligation to pay costs of prosecution does not give rise to a debtor-creditor relationship); *In re Johnson*, 32 Bankr. 614, 616-17 (Bankr. D. Colo. 1983) (criminal restitution obligation as a condition of probation is not a "debt" under the Bankruptcy Code); *Arizona v. Magnifico (In re Magnifico)*, 21 Bankr. 800, 803 (Bankr. D. Ariz. 1982) (restitution obligation not a debt where purpose of order is penal rather than compensatory); *In re Button*, 8 Bankr. 692, 694 (Bankr. W.D.N.Y. 1981) (criminal restitution order creates no right to payment in the victim and is not a "debt" under the Bankruptcy Code).

In contrast, several courts have held that criminal restitution obligations are "debts" subject to administration in bankruptcy. See *Brown v. Shriver (In re Brown)*, 39 Bankr. 820, 822 (Bankr. M.D. Tenn. 1984) (order of state criminal court requiring payment of restitution as condition of probation creates "debt" under Bankruptcy Code); *Newton v. Fred Haley Poultry Farm (In re Newton)*, 15 Bankr. 708, 710 (Bankr. N.D. Ga. 1981) (obligation to pay restitution as condition of probation creates "debt" where victim is empowered to enforce restitution order by levy and execution). See also *Robinson*, 776 F.2d at 38-39 (restitution order creates "debt" under § 101(11)).

23. See, e.g., *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 135 (Bankr. D. Conn. 1984) (restitution order creates no "debt" and is "unaffected" by the discharge issued in bankruptcy).

24. 8 Bankr. 692 (Bankr. W.D.N.Y. 1981).

25. *Id.* at 693. The restitution award was in the amount of \$7,597.26 and was ordered in accordance with the authority provided sentencing judges under New York law. *Id.* (citing N.Y. PENAL LAW § 65.10(2)(g) (McKinney 1980)). The court ordered the debtor to pay the victim \$25 every week until the award plus interest was paid in full. *Id.*

26. 8 Bankr. at 693. The bankruptcy petition was filed approximately one year after the restitution order was issued by the state sentencing judge. *Id.*

27. *Id.* The victim, Sheridan Oil Company, could have blocked discharge of the underlying debt under § 523(a)(4) which excepts from discharge debts arising from larceny. See 11 U.S.C. § 523(a)(4) (1982). Objections to discharge under subsections (2), (4), or (6) of section 523(a), however, are waived unless the creditor raises the objection during the bankruptcy proceeding. 11 U.S.C. § 523(c) (1982). In contrast, objections to discharge for fines, penalties, or forfeitures payable to a governmental unit under section 523(a)(7) may be raised subsequent to discharge. 11 U.S.C. § 523(a)(7), (c) (1982). For a discussion of



month after discharge, the debtor was ordered to reappear before the state sentencing judge for failing to make timely restitution payments in violation of the terms of probation.<sup>28</sup> In response, the debtor filed a motion in the bankruptcy court to enjoin enforcement of the restitution condition by the sentencing judge on the ground that the obligation was discharged in his prior bankruptcy case.<sup>29</sup> The bankruptcy judge denied the debtor's motion, holding that the restitution obligation was not a "debt" and, therefore, not subject to discharge in the bankruptcy case.<sup>30</sup>

The *Button* court reasoned that, as a matter of statutory interpretation, the restitution order created no "right to payment" and, therefore, no "claim" since the victim had no right to enforce the order under state law.<sup>31</sup> Under New York law, the sentencing court, not the victim, was empowered to enforce the restitution order as part of its continued power to supervise the probationary sentence.<sup>32</sup> The court, therefore,

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the dischargeability of criminal restitution obligations, see *infra* notes 71-90 and accompanying text.

28. 8 Bankr. at 693.

29. *Id.* In support of his motion, the debtor asserted that the restitution obligation constituted a debt which was not excepted from discharge as a fine, penalty, or forfeiture payable to a governmental entity. *Id.* He also argued that the action to enforce the restitution obligation was brought for the benefit of the victim/creditor and that the action amounted to a collection proceeding in violation of the "fresh start provisions" of the Bankruptcy Code. *Id.* For a discussion of the "fresh start" policy of the Bankruptcy Code, see *supra* notes 7-10 and accompanying text.

30. *Id.* at 694. The court did not reach the issue of dischargeability under § 523(a)(7) since the absence of a "debt" removed the obligation from the scope of the bankruptcy discharge order. See 1 U.S.C. § 727(b) (1982) (Chapter 7 discharge affects only "debts").

31. 8 Bankr. at 694. The court reasoned:

Under the new Bankruptcy Code, § 101(11) says the term "debt" means liability on a claim. "Claim", pursuant to § 101(4) means right to payment. "Creditor", according to § 101(9) generally means an entity that has a claim against the debtor that arose before filing. From these definitions, it does not appear that restitution could be considered a debt nor that a victim could be considered a creditor. With restitution, the victim has no right to payment. It is the criminal court which sets the restitution amount and if it is not paid the victim cannot proceed against the debtor to enforce payment, but instead the probation officer must report the event of nonpayment to the court which in turn determines if a violation of probation has occurred.

*Id.* State laws generally do not provide for victim enforcement of restitution orders. See, e.g., *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 132 (Bankr. D. Conn. 1984) (applying Connecticut law); *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) (applying Iowa law); *In re Johnson*, 32 Bankr. 614, 616 (Bankr. D. Colo. 1983) (applying Colorado law). But see *Newton v. Fred Haley Poultry Farm (In re Newton)*, 15 Bankr. 708, 710 (Bankr. N.D. Ga. 1981) (restitution is a "debt" where victim is empowered to enforce order by civil proceeding under state law). For a discussion of state laws concerning enforcement of criminal restitution orders, see Harland, *supra* note 1, at 108-19.

32. 8 Bankr. at 694. When the probationer refuses to pay the victim, the

concluded that, while the "debt" owed to the victim/creditor was discharged,<sup>33</sup> the restitution obligation owed to the state was not a "debt" and, therefore, not subject to discharge in the bankruptcy case.<sup>34</sup>

In addition, the *Button* court, relying extensively on two state criminal cases, found that the bankruptcy laws should not affect criminal restitution orders because the restitution obligation does not create a debt or a debtor-creditor relationship.<sup>35</sup> Moreover, the court reasoned that the legislative history of section 362(b)(1) indicates that the bankruptcy laws were not intended to create a "haven for criminals."<sup>36</sup> The court concluded that Congress did not intend for criminal judgments to be subject to the bankruptcy discharge, and therefore, it held that a bank-

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probation officer reports the nonpayment to the sentencing judge who, in turn, determines whether the probationer violated probation. *Id.*

33. *Id.* The court found the obligation owing to the victim discharged since the victim failed to file a timely objection to discharge under § 523(c). *Id.* For the text of § 523, see *supra* note 11.

34. 8 Bankr. at 694. The court commented, "since the criminal proceeding was a matter entirely within the jurisdiction of the courts of the State of New York, this court does not believe that it has jurisdiction to interfere with the sentence of the State Court." *Id.*

35. *Id.* (citing *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483 (1974); *People v. Topping Bros., Inc.*, 79 Misc. 2d 260, 359 N.Y.S.2d 985 (1974)). *Mosesson* and *Topping Bros.*, both decided prior to the 1978 amendments to the Bankruptcy Code, held that bankruptcy proceedings have no effect upon restitutive sanctions imposed by state criminal courts. See *People v. Mosesson*, 78 Misc. 2d 217, 218, 356 N.Y.S.2d 483, 484 (1974) (bankruptcy discharge is insufficient ground for modification or discharge of restitutive probation condition); *People v. Topping Bros., Inc.*, 79 Misc. 2d 260, 262-63, 359 N.Y.S.2d 985, 987-88 (1974) (bankruptcy discharge is insufficient ground for dismissal of criminal charges arising from discharged debt).

In *Mosesson*, the debtor entered a plea of guilty to charges of grand larceny and forgery and was ordered to pay restitution as a condition of a five-year probationary sentence. *Mosesson*, 78 Misc. 2d at 217-18, 356 N.Y.S.2d at 484. Thereafter, he moved to discharge the requirement of restitution in view of his discharge in bankruptcy. *Id.*, 356 N.Y.S.2d at 484. The New York trial court denied the debtor's motion stating:

A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter.

*Id.* at 218, 356 N.Y.S.2d at 484. The *Button* court read *Mosesson* and *Topping Bros.* as establishing the principle that "an order for restitution does not create a debtor-creditor relationship" under New York law. See *Button*, 8 Bankr. at 694.

36. See 8 Bankr. at 693-94 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 342 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6299). For a discussion of the legislative history of § 362(b)(1), see *supra* note 13 and accompanying text. For a discussion of the *Robinson* court's treatment of the legislative history of section 362(b)(1), see *infra* note 111.

ruptcy court is without jurisdiction to interfere with the sentence of a state criminal court.<sup>37</sup>

In *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*,<sup>38</sup> the Bankruptcy Court for the District of Connecticut also held that criminal restitution obligations are not "debts" within the meaning of section 101(11).<sup>39</sup> In *Pellegrino*, the debtor was charged with fraudulently obtaining food stamps and was sentenced to five years probation conditioned upon making restitution to the state of Connecticut.<sup>40</sup> As part of the plea agreement, a wage execution was ordered on the wages of the debtor's husband.<sup>41</sup> Six months after sentencing, Mrs. Pellegrino and her husband filed a joint petition under Chapter 7 of the Bankruptcy Code, listing various state agencies as unsecured creditors on the restitution order.<sup>42</sup> In spite of a discharge issued in due course by the bankruptcy court, the state continued to enforce the wage execution.<sup>43</sup>

37. 8 Bankr. at 694.

38. 42 Bankr. 129 (Bankr. D. Conn. 1984).

39. *Id.* at 134-35. Although the court concluded that the restitutive obligation was not a "debt," it went on, in dicta, to discuss the dischargeability of the obligation. *Id.* at 136-38. For a discussion of the *Pellegrino* court's dischargeability analysis, see *infra* notes 74-80 and accompanying text.

40. 42 Bankr. at 131. The value of the fraudulently obtained food stamps was \$15,960. *Id.* Mrs. Pellegrino was initially sentenced to a two-year prison term which was suspended, and she was placed on probation for a five-year term conditioned upon payment of restitution. *Id.*

41. *Id.* Mrs. Pellegrino and her husband, in seeking a probationary sentence, agreed to the imposition of a wage execution on Mr. Pellegrino's wages in the amount of \$40 per week. *Id.*

42. *Id.* The Pellegrinos listed the Connecticut Department of Income Maintenance (CDIM), the Bureau of Collection Services, and the Connecticut Office of Adult Probation (COAP) as creditors on an apparent welfare fraud claim estimated at \$65,000 for the years 1969-83. The Pellegrinos, however, did not specifically refer to the "restitution debt" in their bankruptcy schedule. *Id.* at 131 n.2. Nevertheless, the restitution claim was not excepted from discharge under § 523(a)(3) because the defendants received notice of the bankruptcy proceedings. *Id.* (citing 11 U.S.C. § 523(a)(3) (1982)).

The *Pellegrino* court did find that the common law debt arising from the larceny was a debt discharged under § 523(c) because the victim failed to object during the bankruptcy proceeding. *Id.* at 132 n.7. The court, however, classified the "restitution debt" arising from the state sentencing judge's order as a separate debt. *Id.* at 132-39.

43. *Id.* at 131. The plaintiffs alleged that continued enforcement of the wage execution violated the automatic stay provision of the Bankruptcy Code. *Id.* (citing 11 U.S.C. § 362(a) (1982)). The court disagreed, holding that enforcement of the wage execution was excepted from the automatic stay under § 362(b)(1) which excepts the continuation of a criminal proceeding against the debtor. *Id.* at 135-36 (citing 11 U.S.C. § 362(b)(1) (1982)); see also *Cornell v. Director, Office of Adult Probation (In re Cornell)*, 44 Bankr. 528, 529-30 (Bankr. D. Conn. 1984) (post-petition collection of restitution payments excepted by § 362(b)(1) from automatic stay); *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 65-66 (Bankr. N.D. Iowa 1984) (post-petition approval of debtor's plan of restitution not in violation of automatic stay because excepted by § 362(b)(1)); *Newton v. Fred Haley Poultry Farm (In re Newton)*, 15 Bankr. 708, 710 (Bankr. N.D. Ga. 1981) (post-petition imposition of restitutive condi-

Subsequently, the Pellegrinos sought both a declaration from the bankruptcy court that the restitution obligation was discharged and an order enjoining enforcement of the restitution order on the state level.<sup>44</sup>

In denying the plaintiff's requested relief, the *Pellegrino* court followed the "right to payment" statutory analysis which was introduced in *Button*.<sup>45</sup> The *Pellegrino* court reasoned that no debt arises from a criminal restitution order since the state administers repayment and the victim has no right to enforce the order under state law.<sup>46</sup> In contrast to the facts of *Button*, however, the state of Connecticut was both the victim of the crime and the prosecuting party in *Pellegrino*.<sup>47</sup> Since the state, as crime victim, had enforcement rights, the state arguably had a "right to

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tion by state sentencing judge not a violation of automatic stay because excepted by § 362(b)(1)).

44. 42 Bankr. at 132. The plaintiffs also alleged violations of their civil rights and requested appropriate damages and attorney's fees. *Id.* See 42 U.S.C. §§ 1983, 1988 (1982).

45. 42 Bankr. at 132. For a discussion of *Button*, see *supra* notes 24-37 and accompanying text.

46. 42 Bankr. at 132-33. The court commented:

The crime victim receives payments from the Office of Adult Probation. Under the penal code, a victim cannot enforce a court's order of restitution if the criminal defendant fails to make payments to the Office of Adult Probation. The state court may, however, issue a warrant for the arrest of the criminal defendant for violation of a condition of probation . . . . Since a crime victim has no "right to payment," restitution is not a "debt" under Bankruptcy Code § 101(11).

*Id.* at 132.

The Connecticut statute provides that "[a]t any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . or may issue a notice to appear to answer to a charge of such violation . . . ." CONN. GEN. STAT. ANN. § 53a-32(a) (West 1985). Additionally, while the probation officer has the power to arrest the defendant if the defendant violates the conditions of probation, the victim has no express power to enforce probation. *Id.* If it is established that the defendant violated the terms of probation, "the court may continue or revoke the sentence of probation or conditional release or modify or enlarge the conditions, and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence." *Id.* at § 53a-32(b).

The cases relied upon by the *Pellegrino* court in support of its conclusion that a restitutive probation condition is not a "debt" all involved private victims. See *In re Johnson*, 32 Bankr. 614, 615 (Bankr. D. Colo. 1983) (150 private persons or entities victimized by debtor's scheme to defraud); *Arizona v. Magnifico* (*In re Magnifico*), 21 Bankr. 800, 801 (Bankr. D. Ariz. 1982) (bar owner and two patrons victimized by debtor's aggravated assault where debtor repeatedly drove van into the front wall of bar); *In re Button*, 8 Bankr. 692, 693 (Bankr. W.D.N.Y. 1981) (oil company victimized by debtor's petty larceny).

47. The *Button* court's "right to payment" rationale turned on the fact that the ultimate recipient of the restitution had no enforcement rights under state law. See *Button*, 8 Bankr. at 694. In *Pellegrino*, the Connecticut Department of Income Maintenance was victimized and the Connecticut Office of Adult Probation was empowered to enforce the order under state law. *Pellegrino*, 42 Bankr. at 134.

payment" under section 101(4). The *Pellegrino* court reasoned, however, that the state's prosecutorial agency was separate and distinct from the state agency victimized by the criminal activity, and, therefore, as in *Button*, the victim was without enforcement rights under state law.<sup>48</sup>

In addition to its strict "claim" analysis, the *Pellegrino* court stressed the differences between the criminal-state relationship and the traditional debtor-creditor relationship.<sup>49</sup> Notably, the court found restitutive obligations "rooted" in the state's police power, holding that the victim was a mere "incidental beneficiary" of the state's criminal law enforcement efforts.<sup>50</sup> "Clearly," the court concluded, "the plaintiff's payments to the Office of Adult Probation are not a debtor's payments to a creditor."<sup>51</sup>

Finally, while noting the absence of an express exception in the definition of "debt" for obligations arising out of criminal proceedings, the *Pellegrino* court relied upon considerations of federal-state comity<sup>52</sup> and

48. 42 Bankr. at 134. The court reasoned:

Although several parts of the Connecticut governmental unit were involved in the prosecution, collection, deposit and enforcement process necessitated by Pellegrino's criminal conduct, *each must be considered as a separate entity in analyzing whether a debtor-creditor relationship was established by the state court order of restitution*. Therefore the mere fact that one state agency was the actual victim of the crime and another part of the same governmental unit prosecuted Pellegrino and may enforce the order of restitution is an insufficient basis to create a debtor-creditor relationship . . . .

*Id.* (emphasis added).

49. *Id.* at 133. The court stressed that the monetary obligation did not arise from any "contractual, statutory or common law duty," but, rather, it arose "from a court-ordered sanction following a criminal conviction." *Id.* Other courts have similarly distinguished restitution obligations from more traditional debtor-creditor obligations. See *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) ("[T]he Court does not believe a state criminal restitution order creates a debtor-creditor relationship between the Debtor and the victim or the state."); *United States v. Cox (In re Cox)*, 33 Bankr. 657, 662 (Bankr. M.D. Ga. 1983) ("Defendant's obligation to pay the costs of prosecution thus does not arise from any debtor-creditor relationship between him and Plaintiff."); *In re Johnson*, 32 Bankr. 614, 616 (Bankr. D. Colo. 1983) ("Thus, it appears that the Colorado legislature did not intend restitution to be a method of debt collection and did not intend to create a debtor-creditor relationship between the victim and the defendant . . . ."); *In re Button*, 68 Bankr. 692, 694 (Bankr. W.D.N.Y. 1981) ("[T]he above two New York (criminal) cases also indicate that an order of restitution does not establish a debtor-creditor relationship.").

50. 42 Bankr. at 133.

51. *Id.*

52. *Id.* at 134. The policy of avoiding federal interference with state criminal prosecutions is embodied in the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that "[A] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1982). The Bankruptcy Code, however, is an "expressly authorized" exception to the Anti-Injunction Act. See 11 U.S.C.

the much-quoted "haven for criminals" language from the legislative history of section 362(b)(1).<sup>53</sup> The Court concluded that it was necessary to consider these policies in defining "debt" for bankruptcy purposes "in order to avoid an anomalous result."<sup>54</sup>

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§ 105(a) (1982); *see also* *Diners Club, Inc. v. Bumb*, 421 F.2d 396 (9th Cir. 1970) (jurisdiction of bankruptcy court in reorganization not limited by Anti-Injunction Act). However, even when acting under an exception to the Anti-Injunction Act, federal courts are bound by considerations of comity, which dictate restraint from interference with state prosecutions. *See Mitchum v. Foster*, 407 U.S. 225 (1972).

In *Mitchum*, the plaintiff sought injunctive relief in a federal court under 42 U.S.C. § 1983 from a state prosecutor's attempt to have the plaintiff's bookstore closed down as a public nuisance. *Id.* at 228. The Supreme Court ruled that, although § 1983 is an expressly authorized exception to the Anti-Injunction Act, federal courts remain bound by principles of equity and comity when considering the propriety of injunctive relief under § 1983 directed against state criminal prosecutions. *Id.* at 243 (citing *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts should not enjoin state criminal prosecutions absent showing of bad faith and likelihood of irreparable injury if denied relief)).

In *Younger v. Harris*, the Supreme Court introduced the principle of federal-state comity, which Justice Black described as a

proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

401 U.S. 37, 44 (1971).

In *Davis v. Sheldon* (*In re Davis*), the Third Circuit upheld a bankruptcy court's refusal to enjoin a state criminal prosecution, the success of which would have required restitution under state law. 691 F.2d 176 (3d Cir. 1982). In reaching its decision, the court applied principles of comity, stating:

A federal court should be especially cautious in enjoining state criminal proceedings, because of the state's paramount interest in protecting its citizens through its police power. In this case, there has been no showing that Delaware has acted in bad faith in its prosecution, nor any allegation that the Delaware courts have inadequate procedures for hearing the federal challenges to a judgment of restitution. Therefore, we cannot say that the Bankruptcy Court erred in refusing to interfere with the state court proceedings.

*Id.* at 179 (footnote omitted). For a discussion of comity in the context of bankruptcy courts' interference with state enforcement of restitution obligations, see *infra* notes 166-75 and accompanying text. For a general discussion of bankruptcy court abstention, see Reed, Sagar & Granoff, *Subject Matter Jurisdiction, Abstention and Removal Under the New Federal Bankruptcy Law*, 56 AM. BANKR. L.J. 121 (1982).

53. 42 Bankr. at 134. For a discussion of this statement of legislative intent, see *supra* note 14 and accompanying text.

54. 42 Bankr. at 134. The court concluded:

With this congressional policy in mind, it would defy both logic and reason to allow a convicted person, who has been ordered to make restitution to his victim in lieu of incarceration, to use the Bankruptcy Code to escape the consequences of his crime. The definition of debt must therefore be read in the context of that policy in order to avoid that anomalous result.

*Id.*

Prior to the Second Circuit's decision in *Robinson, Brown v. Shriver (In re Brown)*<sup>55</sup> was the lone exception to the majority view that criminal restitution obligations are not "debts" under the Bankruptcy Code.<sup>56</sup> The debtor in *Brown*, guilty of drunk driving, was ordered to pay restitution for property damage as a condition of probation.<sup>57</sup> The debtor, having failed to pay restitution in a timely fashion, was requested to appear at a probation revocation hearing.<sup>58</sup> Prior to the hearing date, the debtor filed a bankruptcy petition and subsequently received a discharge of his restitution obligation.<sup>59</sup> Prior to discharge, the debtor filed a complaint in the bankruptcy court in an effort to permanently enjoin the state from revoking his probation or taking any action to collect the restitution.<sup>60</sup> The bankruptcy court held that the restitution sentence of a state criminal court is a dischargeable debt under the Bankruptcy Code, and therefore it permanently enjoined enforcement of the restitution order.<sup>61</sup>

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55. 39 Bankr. 820 (Bankr. M.D. Tenn. 1984).

56. See *Robinson v. McGuigan (In re Robinson)*, 776 F.2d 30, 35 (2d Cir. 1984) ("The lone exception, as far as we are aware, is *In re Brown* . . ."), cert. granted sub nom. *Kelly v. Robinson*, 106 S. Ct. 1181 (1986); *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 133 (Bankr. D. Conn. 1984) (recognizing *Brown* as the lone exception to the great weight of authority that criminal restitution obligations are not "debts").

57. 39 Bankr. at 821. The debtor had crashed into the victim's home causing an estimated \$1500 in damages. *Id.* The restitution award was set in accordance with the damage. *Id.* Before sentencing, *Brown* completed the requirements of a "pretrial diversion program" by refraining from alcohol-related offenses and submitting to alcohol rehabilitative treatment, but he failed to pay the restitution award. *Id.* Consequently, the restitution requirement was carried over as a condition of probation. *Id.*

58. *Id.* On October 1, 1982, the debtor was notified that a hearing was set for October 15, 1982. *Id.*

59. *Id.* The bankruptcy petition was filed on January 31, 1983, with the victim scheduled as an unsecured creditor. The District Attorney received notice of the bankruptcy proceedings. However, neither the state nor the victim filed objections and the debtor received a discharge from the restitution obligation on August 9, 1983. *Id.* at 821 n.2.

60. *Id.* at 821. After the District Attorney received notice of the bankruptcy petition, the probation revocation hearing was continued until June 17, 1983, when the debtor requested an injunction from the bankruptcy court. *Id.* For a discussion of the court's order enjoining the state from seeking to revoke probation for nonpayment of restitution, see *infra* note 168.

61. *Id.* at 830. The court intimated the possibility of a conflict with the due process and equal protection clauses of the fourteenth amendment if revocation of probation were made automatic upon nonpayment and the debtor was financially unable to pay. *Id.* at 830 n.19 (citing *Bearden v. Georgia*, 461 U.S. 660 (1983) (due process and equal protection violated where revocation of probation occurs automatically upon failure to pay restitution or fine and defendant is unable to pay restitution or fine)). For a discussion of *Bearden*, see generally Comment, *Constitutional Law—Imprisoning Indigents for Failure to Pay Fine—Bearden v. Georgia*—, 30 N.Y.L. SCH. L. REV. 111 (1985); Note, *Equal Protection and Revocation of an Indigent's Probation for Failure to Meet Monetary Conditions: Bearden v. Georgia*, 1985 Wis. L. REV. (1985).

In reaching its decision, the *Brown* court focused on the legislative history of section 101(4) of the Bankruptcy Code and concluded that Congress intended the definition of "claim" to encompass all legal obligations of the debtor.<sup>62</sup> Unlike the *Pellegrino* and *Button* courts, the court in *Brown* refused to compromise the broad fresh start policy underlying the Code's definition of "claim."<sup>63</sup> The court reasoned that no provision of the Bankruptcy Code excluded restitutive obligations arising from a criminal sentence from the scope of "claim."<sup>64</sup>

The *Brown* court reasoned that, for purposes of the Code, the claim underlying the debtor's restitutive obligation arose when the debtor damaged the victim's property.<sup>65</sup> The tort liability arising from the property damage was fully cognizable in bankruptcy.<sup>66</sup> Therefore, the restitutive obligation, which the court viewed as equivalent to a judg-

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It has also been suggested that restitution orders from state criminal courts may conflict with the Supremacy Clause where such orders interfere with the effectiveness of bankruptcy relief. See *Davis v. Sheldon (In re Davis)*, 691 F.2d 176, 178 (3d Cir. 1982) (imposition of restitution penalty in state criminal action "may indeed raise serious questions under the Supremacy Clause" where underlying debt was discharged in bankruptcy).

62. 39 Bankr. at 822 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 21 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5808, 6266). The Court reasoned that the definition of "debt" is not limited to "obligations incurred in consumer or business transactions, but includes all obligations, however incurred." *Id.* (citing 11 U.S.C. § 101(11) (1982)).

The *Brown* court specifically rejected the approach taken by the *Button* court. 39 Bankr. at 822. Judge Ludlin wrote:

This court cannot accept the narrow conception of "debt" adopted in *Button*. The relationship memorialized by a criminal court award of restitution is not beyond the scope of "debt" for bankruptcy purposes. "Debt" dischargeable in bankruptcy is not restricted to obligations incurred in consumer or business transactions, but includes all obligations, however incurred.

*Id.* (emphasis in original). For a discussion of the *Button* court's statutory analysis, see *supra* notes 31-34 and accompanying text.

63. *Id.* at 822-23. The court concluded that creation of an exception to § 101(4) for criminal restitution obligations would require "a level of distortion of language most appropriate for the actions of legislatures and not courts." *Id.* at 822.

64. *Id.* The court noted that "[i]f the right of payment and the liability in a criminal court order of restitution were intended to be outside of the realm of debt for bankruptcy purposes, then how simple would it have been for Congress to include appropriate language in the Bankruptcy Code." *Id.* at 822-23.

65. *Id.* at 822. In identifying the "claim" as arising upon the debtor's commission of the tort, the *Brown* court made clear its intention to treat the victim's claim and the state's claim as creating a single debt. *Id.* The court rejected the notion that the state's claim was independent of the victim's tort claim against the debtor. *Id.* The court viewed the criminal court's order as analogous to a civil court's reduction of a victim's tort claim to judgment. *Id.*

66. *Id.* The definition of "claim" encompasses any right to payment "whether or not such right is reduced to judgment." 11 U.S.C. § 101(4) (1982). For the text of § 101(4), see *supra* note 10.



ment on the underlying debt, was a debt subject to discharge.<sup>67</sup> The *Brown* court found no relevant distinction between civil and criminal judgments for purposes of interpreting the definition of "claim."<sup>68</sup> It reasoned that the restitutive probation order merely acknowledged the victim's "right to payment" and confirmed the debtor's liability on the claim.<sup>69</sup> Furthermore, the court found no reason to exclude a criminal court's order simply because the criminal court can enforce or collect the restitution payments.<sup>70</sup>

#### B. *Dischargeability and the Operation of Section 523(a)(7)*

Even if a restitutive obligation is a debt under section 101(11), it still must be dischargeable for the debtor to be free from the obligation. Section 523(a) of the Bankruptcy Code excepts certain types of debts from discharge in bankruptcy.<sup>71</sup> Of particular applicability is section 523(a)(7) which excepts from discharge debts arising from a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit"

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67. 39 Bankr. at 822. Cases following the *Button* rationale hold that the restitution award is wholly separate from the underlying tort claim since the purpose of the order is penal and not compensatory. See, e.g., *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 137 (Bankr. D. Conn. 1984) (restitution "part of the criminal penalty rather than compensation for a victim's actual loss").

68. 39 Bankr. at 822. The court reasoned that, "[if] the Bankruptcy Code said that only orders to pay money by *civil* courts are debts for bankruptcy purposes, then credence could be given to the defendant's argument that a criminal court restitution order does not embody a 'debt' dischargeable in bankruptcy." *Id.* (emphasis in original). Since Congress did not distinguish civil orders from criminal orders in the definition of "debt" or "claim," the court refused to hold that criminal restitution obligations are not "debts." *Id.*

69. *Id.*

70. *Id.* The court stated that:

nothing in the Bankruptcy Code suggests that only civil courts enter orders to pay money that are subject to discharge in bankruptcy. A restitution order by a criminal court no less acknowledges the existence of a debt than an order of a civil court reducing that claim to judgment. The fact that a criminal court might participate in enforcement or collection of the debt between victim and debtor/defendant does not make the underlying obligation a "nondebt" for bankruptcy purposes.

*Id.* Unlike the *Brown* court, cases following *Button* draw a sharp distinction between the criminal restitution obligation and the underlying tort claim held by the victim. See, e.g., *Cornell v. Director, Office of Adult Probation (In re Cornell)*, 44 Bankr. 528, 530 (Bankr. D. Conn. 1984) (restitution obligation is a penalty imposed by the state for criminal law enforcement purposes); *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) (victim and state treated separately for purposes of determining existence of debt); *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 132 n.7 (Bankr. D. Conn. 1984) (indicating that victim's claim was discharged but that restitution obligation is separate matter); *In re Johnson*, 32 Bankr. 614, 616 (Bankr. D. Colo. 1983) (victim and state treated separately for purposes of determining existence of debt).

71. 11 U.S.C. § 523(a) (1982). For the relevant text of § 523, see *supra* note 11.

that are "not compensation for actual pecuniary loss . . . ."72 Courts that have considered the dischargeability of restitutive obligations are split on the applicability of section 523(a)(7).73

Although it held that a restitution order does not create a "debt" and, therefore, is not subject to discharge, the *Pellegrino* court discussed the dischargeability of criminal restitution obligations as an alternative rationale for its holding.74 The debtor in *Pellegrino* argued that, in essence, the restitution order amounted to "compensation for actual pecuniary loss," and, as such, fell outside the scope of section 523(a)(7).75 Focusing on the language of Connecticut's probation statute,76 the court rejected the debtor's argument and concluded that the restitution order fits within section 523(a)(7).77 The primary purpose behind the statutorily sanctioned conditions of probation, the court concluded, was rehabilitation of the offender, not compensation for the victim.78 Thus,

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72. 11 U.S.C. § 523(a)(7) (1982).

73. See, e.g., *Pellegrino*, 42 Bankr. at 136-39 (criminal restitution not dischargeable under § 523(a)(7)); *Brown*, 39 Bankr. at 824 (restitution obligation dischargeable in spite of § 523(a)(7)).

74. 42 Bankr. at 136-39. For a discussion of the *Pellegrino* court's holding that a restitution obligation is not a debt, see *supra* notes 38-54 and accompanying text.

75. 42 Bankr. at 136.

76. See CONN. GEN. STAT. ANN. § 53a-30(a) (West 1985). The Connecticut statute provides, in pertinent part:

When imposing sentence of probation or conditional discharge, the court may, as a condition of the sentence, order that the defendant: . . . (4) make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance; . . . (9) satisfy any other conditions reasonably related to his rehabilitation . . . .

*Id.* The statute also allows for modification of the restitutive condition or an enlargement of time within which to comply with a restitution order. *Id.* at § 53a-30(c).

77. 42 Bankr. at 136. In support of its conclusion, the court relied upon the language of the catchall provision, § 53a-30(a)(9), which authorizes any conditions "reasonably related to [the defendant's] rehabilitation." *Id.* at 136 (citing CONN. GEN. STAT. ANN. § 53a-30(a)(9) (West 1985)). The court also noted that Connecticut law:

authorizes the court to modify or enlarge the conditions of probation for good cause shown during the period of the probation. That statutory scheme reinforces the conclusion that the focus of restitution, as with the other methods of conditional release, is upon the offender and not on the victim, and that restitution is part of the criminal penalty rather than compensation for a victim's actual loss.

42 Bankr. at 137.

78. *Id.* at 136-39. Characterizing the victim as an "incidental beneficiary" of the restitution order, the court stressed the relationship between the state and the criminal and concluded:

Justice is the end result when the rule of law is interpreted with common sense, reason, and simple fairness. Here a convicted felon and her husband, who wished to save her from incarceration, pleaded for leniency [sic] in the state court. She was spared the penalty of incar-

the incidental compensatory effect resulting from the restitution payments was insufficient to render the debt "compensation for actual pecuniary loss."<sup>79</sup> The *Pellegrino* court, however, did leave open the possibility of a different outcome if the debtor could demonstrate a compensatory purpose behind the criminal prosecution.<sup>80</sup>

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ceration on the condition that restitution would be made. The plaintiffs now come to this court to repudiate that obligation, claiming that the Bankruptcy Code provides that relief. It does not.

*Id.* at 138.

79. Two courts of appeals have held that a federal sentencing judge is not precluded from ordering restitution as a condition of probation where the underlying debt arising from the criminal conduct was discharged in a prior bankruptcy action. See *United States v. Alexander*, 743 F.2d 472, 479-80 (7th Cir. 1984) (refusing to void restitutive condition of probation where underlying debt had been discharged in prior bankruptcy action); *United States v. Carson*, 669 F.2d 216, 216-18 (5th Cir. 1982) (same). Arguably, these cases merely stand for the proposition that debts arising post-discharge are unaffected by the discharge order. See *Robinson v. McGuigan (In re Robinson)*, 776 F.2d 30, 37 (2d Cir. 1985) (*Carson* and *Alexander* not controlling where restitution order entered prior to discharge since both cases involved post-discharge restitution orders which are not subject to discharge under § 727(b)). However, the courts in both *Alexander* and *Carson* stressed the rehabilitative purpose behind the restitution order and intimated that a compensatory purpose would render the restitution order violative of the discharge. See *Alexander*, 743 F.2d at 480; *Carson*, 669 F.2d at 217. The *Carson* court stated:

If the principal aim of the probation condition were to make the [victim] whole, [the argument that the restitution order violates the discharge] might have some appeal. In fact, though, while recompense to the victim is a usually laudable consequence of restitution, the focus of any probation regimen is on the offender. The order of probation is "an authorized mode of mild and ambulatory punishment . . . intended as a reforming discipline."

*Carson*, 669 F.2d at 217 (quoting *Korematsu v. United States*, 319 U.S. 432, 435 (1943)). *Carson* and *Alexander* have been read as supportive of the *Pellegrino* approach to dischargeability. See, e.g., *Black Hawk County v. Vik (In re Vik)*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984) (citing *Carson* and *Alexander* in support of its holding that criminal restitution obligations are not "debts" under Bankruptcy Code).

80. *Pellegrino*, 42 Bankr. at 138. The court cited with approval cases holding that state criminal prosecutions may be enjoined under § 105 where the purpose of the prosecution is debt collection. *Id.* (citing *Alan I.W. Frank Corp. v. P.M.A. Inc. (In re Alan I.W. Frank Corp.)*, 19 Bankr. 41, 42-44 (Bankr. E.D. Pa. 1982) (state criminal prosecution enjoined under § 105 where purpose was debt collection and prosecution would interfere with bankruptcy relief); *Strassmann v. Du-Art Foods, Inc., (In re Strassmann)*, 18 Bankr. 346, 347 (Bankr. E.D. Pa. 1982) (same); *Whitaker v. Lockert (In re Whitaker)*, 16 Bankr. 917, 922 (Bankr. M.D. Tenn. 1982) (same); *Taylor v. Widdowson (In re Taylor)*, 16 Bankr. 323, 325 (Bankr. D. Md. 1981) (same)).

Section 105 grants bankruptcy courts broad injunctive power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]." 11 U.S.C. § 105(a) (1982). The *Taylor* court outlined the inquiry under § 105 as follows:

The nature of the moving force behind the institution of the criminal proceeding is the determinative factor. Prosecutions instituted primarily to vindicate the public welfare by punishing criminal conduct of the

In *Brown*, however, the bankruptcy court held that the restitution obligation was not excepted from discharge by section 523(a)(7).<sup>81</sup> The court found that the purpose behind Tennessee's statutory authorization of restitution is to compensate the victims of crime, not to rehabilitate the offender.<sup>82</sup> The *Brown* court noted that Brown made the restitutive payments directly to the victim, not to a government agency,<sup>83</sup> and that the District Attorney initiated probation revocation proceedings at the urging of the victim.<sup>84</sup> The court was also influenced by the District Attorney's testimony that payment of the restitution by

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Debtor and to discourage similar conduct of others are not usually interfered with by Bankruptcy Courts. When it is clear that the principal motivation is neither punishment nor a sense of public duty, but rather to obtain payment of a dischargeable debt either by an order of restitution or by compromise of the criminal charge upon payment of the civil obligation, the Bankruptcy Court may properly enjoin the criminal proceeding.

*Taylor*, 16 Bankr. at 325-26.

81. *Brown*, 39 Bankr. at 823-26. The court noted that the exceptions to discharge provided in § 523(a) are strictly construed in favor of the debtor to foster comprehensive relief and a fresh start for the debtor. *Id.* at 823 (citing *Perez v. Campbell*, 402 U.S. 637, 648 (1971) (purpose of Bankruptcy Code is to provide fresh start unhampered by pre-existing debts); *Household Finance Corp. v. Danns (In re Danns)*, 558 F.2d 114, 116 (2d Cir. 1977) (exceptions to discharge narrowly construed in favor of debtor)).

82. See TENN. CODE ANN. § 40-35-304 (1982). The Tennessee statute provides:

(a) A sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation.

. . . .

(c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and pay permit payment or performance in installments . . . .

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future liability of the defendant to pay or perform.

*Id.* The statute also provides for waiver or modification of the restitution condition after petition by the defendant, victim, or district attorney general, for good cause shown after notice and a hearing of which the victim is given notice. *Id.*, 40-35-304(f). The statute also provides that the trial judge may issue a warrant for the defendant's arrest "[w]henever it shall come to [his] attention" that the defendant has violated the conditions of probation. TENN. CODE ANN. § 40-21-107 (1982).

83. *Brown*, 39 Bankr. at 824. Although the statute does not speak directly to the method of payment, it is clear from the trial record in *Brown* that the victim was receiving payments directly from Mr. Brown. *Id.* at 825 (citing record at 41, *Brown*).

84. 39 Bankr. at 825. In support of this finding, the court quoted the following portion of the District Attorney's deposition:

The victim would tell us he [Brown] has or hasn't made restitution. *Mr. Brown would say, "Please give me some more time" and I would give him some more time. Then three or four months later the victim would call me again and say he has done nothing. Then we would set the case [probation revocation hearing] again, and each time this process would go on.*

*Id.* (emphasis supplied by the court).

the offender's insurance carrier or other third parties would satisfy the probation condition.<sup>85</sup> Because the court found that the restitution condition was ordered for a compensatory purpose, it discharged the restitution obligation because the criminal court can enforce or collect the restitution payments.<sup>86</sup>

In discussing the availability of injunctive relief against revocation of probation proceedings, the *Brown* court acknowledged the federal policy of noninterference with state criminal prosecutions.<sup>87</sup> The court found, however, that the principle of comity was outweighed by congressional intent to protect federally discharged debtors from state collection practices which vitiate the fresh start goal of bankruptcy.<sup>88</sup> The court concluded that where a criminal proceeding is initiated or contin-

85. *Id.* at 825-26. In support of its conclusion that the restitution obligation was primarily compensatory, the court noted that the sentencing court set the amount of the restitution award in accordance with the damage to the victim's property, rather than by the nature of the criminal conduct. *Id.* at 825.

86. *Id.* at 826. In conclusion, the court stated that, "[t]he District Attorney's office is not seeking to vindicate the right of the citizens of the State of Tennessee, it is just trying to force Brown to pay [the victim]. *The restitution award is a debt discharged in this bankruptcy case.*" *Id.* at 826 (emphasis added).

Cases following the *Button* approach have similarly held that, where the purpose of the restitution award is compensatory, the obligation is dischargeable under the Bankruptcy Code. See, e.g., *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129, 138 (Bankr. D. Conn. 1984) (distinguishing cases where a prosecutor initiates criminal proceedings for the purpose of collecting the underlying debt). Despite its reliance on the particular facts of the case, however, the *Brown* decision is cited as the "lone exception" to the pre-*Robinson* rule because of its strong criticism of the approach advocated by *Button* and its progeny.

87. 39 Bankr. at 826 (citing *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts should refrain from enjoining state criminal prosecutions unless prosecution is brought in bad faith and irreparable injury will result absent injunction)).

The *Brown* court noted that the principle of comity is embodied in § 362(b)(1) of the Bankruptcy Code, which excepts the continuation or commencement of criminal proceedings from the operation of the automatic stay. *Id.* at 827 (citing 11 U.S.C. § 362(b)(1) (1982)). The court noted, however, that state criminal proceedings are not excepted from the scope of the discharge injunction. *Id.* at 828 (citing 11 U.S.C. § 524(a)(2) (1982)).

88. *Id.* at 829. The court stressed the expansive scope of the discharge injunction under § 524(a), and pointed to legislative history indicating that the discharge injunction was "intended to insure that once a debt is discharged, debtor will not be pressured in any way to repay it." *Id.* at 828 n.14 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 366 (1977); S. REP. NO. 989, 95th Cong., 1st Sess. 80 (1978), reprinted in, 1978 U.S. CODE CONG. & AD. NEWS 5866, 6321-22)). The court also relied on bankruptcy decisions holding that states could be enjoined from enforcing restitutive sanctions resulting from state "bad check" prosecutions. *Id.* at 829 (citing *Taylor v. Widdowson (In re Taylor)*, 16 Bankr. 323, 325-28 (Bankr. D. Md. 1981) (state prosecution enjoined under § 105 power where criminal prosecution instituted for purpose of debt collection); *Barnette v. K-MART (In re Barnette)*, 15 Bankr. 504, 512 (Bankr. D. Kan. 1981) (state precluded from ordering civil restitution remedy as part of criminal proceeding since civil remedy would conflict with discharge injunction and would be void under Supremacy Clause)).

ued for the purpose of recovering a discharged debt, federal court interference is justified as a necessary exercise of the bankruptcy court's power to effectuate its judgment of discharge.<sup>89</sup> Thus, the court enjoined further enforcement of the restitutive condition of probation by Tennessee prosecutors.<sup>90</sup>

### III. IN RE *ROBINSON*

Against this background, the United States Court of Appeals for the Second Circuit held, in *Robinson*, that a state court's order to pay restitution as a condition of probation creates a dischargeable debt under the Bankruptcy Code.<sup>91</sup> The plaintiff, Carolyn Robinson, was convicted in a Connecticut court for wrongfully receiving public assistance benefits from the Connecticut Department of Income Maintenance (CDIM).<sup>92</sup> She was sentenced to a five-year term of probation conditioned on her making restitution to CDIM.<sup>93</sup> Three months after sentencing, Robinson filed a petition under Chapter 7 in which she listed several state

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89. *Brown*, 39 Bankr. at 829. The court acknowledged that consideration of comity required restraint from interference with the state prosecution. *Id.* at 826 (citing *Younger v. Harris*, 401 U.S. 37 (1971)). In fact, the court noted that the principle of comity was embodied in § 362(b)(1), which excepts criminal proceedings from the operation of the automatic stay. *Id.* at 827 (citing 11 U.S.C. § 362(b)(1) (1982)). However, the court reasoned that no such exception for criminal proceedings could be found in § 524, which provides for the replacement of the automatic stay with a broader "discharge injunction." *Id.* at 828 (citing 11 U.S.C. § 524(a)(2) (1982) (providing for injunction against "any act, to collect, recover or offset any [discharged] debt")). The court concluded: A criminal proceeding continued or initiated to recover or collect a discharged debt is enjoined by the § 524 discharge injunction and falls outside the protection afforded by the Anti-Injunction Act. Considerations of comity and equity are overcome by the stated Congressional preference to protect discharged debtors . . . .

*Id.* at 829. The court acknowledged the legitimacy of the state's interest in protecting its citizens from criminal acts and stated that it would not intervene if the state imposed a sanction of imprisonment or a "nondischargeable fine". *Id.* at 829 n.16.

90. *Id.* at 830.

91. 776 F.2d at 40-41. The Second Circuit panel consisted of Circuit Judges Mansfield and Kearse and District Judge Pratt. *Id.* at 31. Judge Kearse wrote the opinion of the court; Judge Mansfield concurred in a separate opinion. *Id.* at 31; *id.* at 41 (Mansfield, J., concurring).

92. *Id.* at 31-32. While she was receiving social security benefits, Robinson accepted \$9,932.95 in public assistance benefits from the CDIM. *Id.* Her actions constituted larceny under Connecticut law. *Id.* at 31, 39.

93. *Id.* at 32. Initially, the Connecticut Superior Court sentenced Robinson to serve a prison term of one to three years. *See Robinson v. Director, Office of Adult Probation (In re Robinson)*, 45 Bankr. 423, 423-24 (Bankr. D. Conn. 1984). Ultimately, she was placed on probation conditioned on her paying restitution in the amount of \$9,932.95 to the Connecticut Office of Adult Probation (COAP) in monthly installments of \$100. 776 F.2d at 32. Compliance with the terms of the order would have resulted in her making restitution in the amount of \$5,800.00 instead of the \$9,932.95 wrongfully received. *See Robinson*, 45 Bankr. at 424 n.2.

agencies, including CDIM, as having claims for "public assistance" benefits and "restitution."<sup>94</sup> Despite being notified of Robinson's petition in bankruptcy, the state agencies did not object to discharge in a timely manner.<sup>95</sup> Consequently, six months after sentencing, Robinson's restitution obligation was discharged.<sup>96</sup>

Nearly three years after discharge, the Connecticut Office of Adult Probation (COAP) informed Robinson that it intended to enforce the restitution obligation.<sup>97</sup> In response, Robinson filed a complaint in the bankruptcy court seeking, *inter alia*, a declaration that the restitution obligation was discharged and an order enjoining the state from taking any action to collect the restitution debt.<sup>98</sup> The bankruptcy judge, relying on his previous decision in *Pellegrino*,<sup>99</sup> denied the plaintiff relief, holding that the restitution order did not give rise to a debt and, alternatively, that it was excepted from discharge under section 523(a)(7).<sup>100</sup> On appeal, the Second Circuit reversed on both grounds.<sup>101</sup>

In holding that the restitution obligation constituted a "debt," the

94. 776 F.2d at 32. Robinson was sentenced on November 14, 1980, and the petition in bankruptcy was filed on February 5, 1981. *Id.* Robinson listed CDIM as a creditor having a claim of \$6,000 for "public assistance" and COAP as having a claim of \$9,932.95 for "restitution." *Id.*

95. *Id.* The bankruptcy court notified both CDIM and COAP of the filing of Robinson's bankruptcy petition and the last date for the filing of objections to discharge. *Id.* Neither agency responded to this notice. *Id.* For a discussion of the consequences of the state's failure to file a timely proof of claim or objection to discharge, see *infra* note 120 and accompanying text.

96. 776 F.2d at 32. Shortly after the discharge, Robinson's attorney notified COAP that Robinson considered the debt for restitution discharged and, therefore, she would make no further payments. *Id.* COAP did not respond to the attorney's communication and Robinson stopped making payments. *Id.*

97. *Id.* COAP informed Robinson that it considered the restitution debt "valid and not dischargeable" and that it "intended to enforce the [restitution] order to the fullest extent possible." *Id.* at 32. The reason for COAP's three-year delay in enforcing restitution by the State did not appear in the court's opinion.

98. *Id.* Robinson also sought an award of compensatory and punitive damages under 42 U.S.C. § 1983 and attorney's fees under 42 U.S.C. § 1988. *Robinson v. Director, Office of Adult Probation (In re Robinson)*, 45 Bankr. 423, 424 (Bankr. D. Conn. 1984). The defendants raised various defenses and claims of immunity to Robinson's claim for damages which the bankruptcy court did not reach. *Id.* Accordingly, the Second Circuit remanded for consideration of the damages issue. 776 F.2d at 41.

99. Bankruptcy Judge Alan Schiff decided both *Pellegrino* and *Robinson* in the bankruptcy court. See *Robinson*, 45 Bankr. at 423; *Pellegrino*, 42 Bankr. at 131. For a discussion of *Pellegrino*, see *supra* notes 38-55 & 75-81 and accompanying text.

100. *Robinson*, 45 Bankr. at 424 (citing *In re Pellegrino*, 42 Bankr. 129 (Bankr. D. Conn. 1984)). The bankruptcy court in *Robinson* stated that "[t]he facts in this proceeding, the issues raised, and the relief sought by the plaintiff are virtually identical to those in [*Pellegrino*]. Accordingly, the . . . legal conclusions, reached in *Pellegrino*, are adopted to the facts here." *Id.* (citation omitted).

101. 776 F.2d at 38-39, 41.

Second Circuit relied upon the broad language in the Code's definition of "claim" and the legislative history of section 101(4).<sup>102</sup> The court pointed to legislative history indicating that Congress sought the broadest possible definition of claim "intending that virtually all obligations to pay money be amenable to treatment in bankruptcy proceedings."<sup>103</sup> Viewing section 101(4) with this predilection, the court rejected the *Pellegrino* analysis of section 101(4).<sup>104</sup>

The *Robinson* court, rejecting the approach of the majority of courts which focused solely on whether the victim had a "right to payment," concluded that section 101(4) was satisfied because the Restitution order vested an enforceable "right to payment" in COAP, the state probation department.<sup>105</sup> The Second Circuit found no relevant distinction between traditional civil enforcement by levy and execution and "the threat of revocation of probation and incarceration" for a violation of probation.<sup>106</sup> Thus, the court held that COAP had a "right to payment"

102. *Id.* at 33-36 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6266). For a discussion of the legislative history of § 101(4), see *infra* notes 137-46 and accompanying text.

103. 776 F.2d at 34. In addition, the court cited cases for the proposition that Congress intended the relief under § 101(4) to be broad. 776 F.2d at 35 (citing *Ohio v. Kovacs*, ("broad"); *Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F.2d 332, 336 (3d Cir. 1984) ("very broad"), *cert. denied*, 105 S. Ct. 911 (1985); *Kallen v. Litas*, 47 Bankr. 977, 982 (Bankr. N.D. Ill. 1985) ("broadest possible"); *In re Kennise Diversified Corp.*, 34 Bankr. 237, 244 n.6 (Bankr. S.D.N.Y. 1983) ("extremely broad"); *Iowa v. Thomas (In re Thomas)*, 12 Bankr. 432, 433 (Bankr. S.D. Iowa 1981) ("could not be broader").

104. 776 F.2d at 33-34. The Second Circuit commented:

In sum, we see no support in the language, the legislative history, or the statutory scheme as a whole for the view adopted by the *Pellegrino* line of cases that unless the victim of the crime has a right of payment, a criminal restitution obligation is not a debt within the meaning of the Code.

*Id.* at 36. For a discussion of *Pellegrino*, see *supra* notes 38-55 & 75-81 and accompanying text.

105. 776 F.2d at 38. The Second Circuit expressly rejected the *Pellegrino* approach, which focused solely on whether the victim had a "right to payment." *Id.* at 34. The court reasoned that a restitution obligation is a debt if "any person or entity, not just the crime victim, has a right to payment." *Id.* (emphasis supplied by the court).

106. *Id.* The court stated:

Nor is it relevant that the right is enforceable by the threat of revocation of probation and incarceration rather than by the threat of levy and execution on the debtor's property. The right is not the less cognizable because the obligor must suffer loss of freedom rather than loss of property upon failure to pay.

*Id.* The sentencing judge and COAP were responsible for enforcing the restitution order. See CONN. GEN. STAT. ANN. §§ 53a-32(a), 54-108 (West 1985). Under the statute, probation officers have the authority to arrest a delinquent probationer and bring him before a sentencing judge. *Id.* § 53a-32(a). The court may then revoke probation and incarcerate the probationer if he has violated a condition of probation. *Id.* § 53a-32(b).



and the power to enforce payment sufficient to create a debt for purposes of the Bankruptcy Code.<sup>107</sup>

The *Robinson* court also found the policy against providing a "haven for criminals" in bankruptcy an unpersuasive rationale for excluding restitution obligations from the definition of "debt."<sup>108</sup> The court pointed out that the quote from the legislative history<sup>109</sup> supporting this argument was taken from the legislative history accompanying the automatic stay provision, section 362, which contains an express exception for criminal proceedings.<sup>110</sup> The legislative history of section 101 contains no such limiting language.<sup>111</sup> Moreover, the court listed several Code provisions that evinced congressional intent to include criminal court orders within the definition of "debt."<sup>112</sup>

Focusing on section 523, which excepts certain "debts" from discharge, the court noted that the exceptions include criminal fines<sup>113</sup> and debts arising from crimes such as larceny<sup>114</sup> and fraud.<sup>115</sup> According to the Second Circuit, Congress, by specifically treating criminally based obligations in the complex provisions of the Bankruptcy Code, struck a balance between the policy favoring a comprehensive fresh start and the desire to avoid creating a refuge for criminals.<sup>116</sup> The *Robinson* court

107. 776 F.2d at 38-39.

108. *Id.* at 37-38. For a discussion of the reliance on this rationale by the *Pellegrino* court, see *supra* note 54 and accompanying text.

109. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 342 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6299. For a discussion of this quote from the legislative history, see *supra* note 13.

110. 776 F.2d at 37. The court regarded this legislative history as only supportive of the exception from stay for "criminal action[s] or proceeding[s] against the debtor." *Id.* (quoting 11 U.S.C. § 362(b)(1) (1982)).

111. 776 F.2d at 37. For a discussion of the legislative history to §§ 101(4) and 101(11), see *supra* notes 7-10 & 137-46 and accompanying text.

112. 776 F.2d at 37-38.

113. 11 U.S.C. § 523(a)(7) (1982). For a discussion of the legislative history of § 523, see *supra* note 11.

114. 11 U.S.C. § 523(a)(4) (1982).

115. *Id.* § 523(a)(2). Since § 523 deals with the dischargeability of "debts", the court reasoned that the inclusion of criminal obligations within its provisions clearly indicated congressional intent to include such obligations within the definition of "debt". 776 F.2d at 37. In addition, the exceptions for debts arising from larceny and fraud are waived unless raised in a timely manner. See 11 U.S.C. § 523(c) (1982). For the text of § 523, see *supra* note 11.

116. 776 F.2d at 37-38. The court stated:

[I]t is plain that Congress was attentive to the possibility that the bankruptcy laws might be invoked by criminals in an effort to retain their unlawful gains, and it enacted both provisions that thwart those efforts, and provisions that, despite those efforts, give precedence to the bankruptcy laws' aim to provide relief for financial overextension. Thus . . . § 362(b)(1) makes the automatic stay of pending proceedings inapplicable to criminal proceedings against the debtor; § 523(a)(7) makes certain obligations to pay money to governmental bodies nondischargeable. On the other hand, . . . § 523(c) of the Code provides that debts for crimes such as larceny and fraud "shall be dis-

concluded that a judicial reordering of priorities established by Congress in the complex statutory scheme would be inappropriate.<sup>117</sup>

Having decided that the restitution order created a debt, the *Robinson* court analyzed whether the debt was dischargeable.<sup>118</sup> Because the state agencies waived their rights under section 523(a)(2) or (4) by not objecting to discharge,<sup>119</sup> the court focused on whether the restitution debt fit within the section 523(a)(7) exception for fines, penalties, and forfeitures payable to a governmental unit which are not compensation for actual pecuniary loss.<sup>120</sup>

The *Robinson* court initially noted that the language of section 523(a)(7) excepts debts only "to the extent" that they fall within its provisions.<sup>121</sup> Thus, the Second Circuit reasoned that for purposes of discharge, a fine or penalty payable to a governmental unit can be separated into its penal and compensatory components.<sup>122</sup> Since the victim was the beneficiary of the restitution order, the amount of which was measured by the victim's losses,<sup>123</sup> the court found "inescapable" the conclusion that the debt was, at least to some extent, designed as

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charged" unless the creditor to whom such a debt is owed files an objection . . . .

*Id.*

117. *Id.* The court commented that "[i]t is inappropriate for a court, based on its own view as to the relative importance of that policy, to create judicial exceptions to the clear language of the statute that are warranted neither by that language nor by the legislative history." *Id.* (citing *Central Trust Co. v. Official Creditor's Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 357-60 (1982) (per curiam); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

118. *Id.* at 39-41.

119. *Id.* at 32. The Second Circuit observed that timely objection to the discharge of the restitution obligation would probably have resulted in a determination of nondischargeability under § 523(a)(2) (for fraud) or § 523(a)(4) (for larceny). *Id.* at 39 (citing 11 U.S.C. §§ 523(a)(2), 523(a)(6) (1982)). The court stated:

[T]he bankruptcy court gave COAP and CDIM notice in February 1981 that their claims were listed in Robinson's petition; that April 27, 1981, was the last day for filing objections to discharge or complaints to determine dischargeability under § 523(c); and that the failure by that date to file a complaint as to the dischargeability of a debt under §§ 523(a)(2) or (4) might result in discharge of the debt . . . . We suspect that had objection been made on the ground that the debt was for an established larceny, the court would have excepted it from discharge, and the case would not be before us now.

*Id.* For the relevant text of § 523, see *supra* note 11.

120. 776 F.2d at 39. For a discussion of § 523 including its text, see *supra* note 11 and accompanying text.

121. 776 F.2d at 40 (citing 11 U.S.C. § 523(a)(7) (1982)). For the text of § 523, see *supra* note 11.

122. 776 F.2d at 40. The court reasoned that, by excepting debts "to the extent" that they meet the specifications of § 523(a)(7), Congress recognized the possibility that a debt could fall within more than one category of debt created by the code. *Id.*

123. See CONN. GEN. STAT. ANN. § 53A-30(a)(4) (West 1985) ("make restitution of the fruits of his offense or make restitution, in an amount he can afford to

“compensation for actual pecuniary loss.”<sup>124</sup> In determining the extent of the debt’s compensatory character, the court held that, to the extent that the restitution award did not exceed the amount of the pecuniary loss suffered by the victim, the debt was compensatory and, therefore, dischargeable.<sup>125</sup> Thus, the restitution award in *Robinson*, which did not exceed the amount of the victim’s loss, was fully dischargeable.<sup>126</sup> As a result, the *Robinson* court entered judgment declaring the debt discharged, thereby enjoining the State of Connecticut from taking any further action to recover the restitution debt.<sup>127</sup>

In a brief concurring opinion, Judge Mansfield firmly endorsed the majority’s analysis but he expressed dissatisfaction with the “unfortunate result.”<sup>128</sup> Judge Mansfield expressed his hope that Congress would amend section 523(a)(7) to render criminal restitution obligations

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pay or provide in a suitable manner, for the loss or damage caused thereby . . . .”).

124. 776 F.2d at 40 (citing *United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984)). In *Dudley*, the Fourth Circuit was faced with the issue of whether a restitution order abates upon the death of the defendant during the pendency of an appeal, as would a criminal fine or forfeiture. *Dudley*, 739 F.2d at 176. The restitution order at issue in *Dudley* was imposed pursuant to 18 U.S.C. § 3579 (1982), which provides for a victim’s right of civil enforcement. See 739 F.2d at 178 (citing 18 U.S.C. § 3579(h) (1982)). The court held that the state, as victim, could enforce the order in spite of the defendant’s death and distinguished restitution under the federal statute from more traditional forms of punishment. *Dudley*, 739 F.2d at 177-78. The court held that, unlike traditional forms of punishment which have penal and rehabilitative aims, the dominant purpose of restitution under the federal statute is to compensate the victim. *Id.* at 177. It should be noted, however, that the Connecticut probation statute does not provide for enforcement by the victim. See *Pellegrino*, 42 Bankr. at 132, 137 (noting that Connecticut statute does not provide for victim enforcement and reasoning that Connecticut statutory scheme reinforces notion that purpose of restitution is not compensatory).

125. 776 F.2d at 40. The court stated that a restitution debt would not be dischargeable to the extent that it exceeded the amount of the actual pecuniary loss of the victim. *Id.* It should be noted, however, that the Connecticut statute limits restitution to the “loss or damage caused” by the criminal offense. See CONN. GEN. STAT. ANN. § 53a-30(a)(4) (West 1985).

126. 776 F.2d at 40.

127. *Id.* Because the court held that the obligation was a debt which was discharged in the bankruptcy case, the § 524(a)(2) injunction was triggered automatically. *Id.* at 41 (citing 11 U.S.C. § 524(a)(2) (1982) (providing for injunction against all acts to recover discharged debts)). Perhaps because the injunction was automatic, the court did not discuss considerations of federal-state comity. *Id.*

128. 776 F.2d at 41-42 (Mansfield, J., concurring). In many cases, noted Judge Mansfield, the effect of the rule propounded by the court “will be to stultify and render useless criminal restitution payments as a means of punishing [criminals].” *Id.* at 41 (Mansfield, J., concurring). Moreover, Judge Mansfield could not perceive a meaningful distinction between restitution and other forms of pecuniary punishment, such as fines or penalties, sufficient to justify different treatment under § 523. *Id.* at 41-42 (Mansfield, J., concurring).

nondischargeable.<sup>129</sup>

#### IV. ANALYSIS

In *Robinson*, the Second Circuit rejected the then prevailing position of bankruptcy courts and held that criminal restitution obligations are debts which are dischargeable in bankruptcy.<sup>130</sup> If upheld by the Supreme Court, this decision would have a profound and potentially adverse effect on state criminal sentencing.<sup>131</sup> It is suggested that the Supreme Court should reverse the Second Circuit's decision on both statutory and policy grounds.

Where restitution is ordered as a condition of probation, a tripartite relationship is formed between the victim, the criminal/debtor and the state.<sup>132</sup> Within this relationship, the bankruptcy court must initially determine the existence of a "claim" giving rise to a "debt" for purposes of treatment in the bankruptcy case.<sup>133</sup> The courts agree that a victim who has no statutory right to enforce a restitution order has no right to payment and, therefore, no claim under section 101(4).<sup>134</sup> A majority of courts which have dealt with the question have relied upon this reasoning and have failed adequately to address the possibility of a claim arising from the criminal-state relationship.<sup>135</sup> It is submitted that the *Robinson* court was correct in evaluating the criminal-state relationship for purposes of determining the existence of a claim under section 101(4).<sup>136</sup> Claim is defined in terms of "a right," which, by the absence of restrictive language, is sufficiently broad to encompass a relationship between the criminal/debtor and the state.<sup>137</sup> It is suggested, however,

129. *Id.* at 42. For a discussion of a proposed amendment to § 523, see *supra* note 20.

130. For a discussion of the *Robinson* decision, see *supra* notes 91-129.

131. For a listing of states which permit restitution as a sentencing condition, see *supra* note 1.

132. For a discussion of the relationships formed upon imposition of a restitution obligation, see *supra* notes 46-48 and accompanying text.

133. For a discussion of the definitions of "debt" and "claim" in the Bankruptcy Code, see *supra* notes 9-10 and accompanying text.

134. See, e.g., *Pellegrino v. Division of Criminal Justice (In re Pellegrino)*, 42 Bankr. 129 (Bankr. D. Conn. 1984) (victim has no right to payment so obligation is not a debt); *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983) (same); *Arizona v. Magnifico (In re Magnifico)*, 21 Bankr. 800 (Bankr. D. Ariz. 1982) (same); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981) (same); but see *Newton v. Fred Haley Poultry Farm (In re Newton)*, 15 Bankr. 708 (Bankr. N.D. Ga. 1981) (victim has recourse to seek enforcement of restitution order in civil court under Georgia law, therefore restitution order creates a "debt").

135. See, e.g., *Pellegrino*, 42 Bankr. at 134 (court determined that state had no right to payment under the Bankruptcy Code for "policy" reasons); *In re Button*, 8 Bankr. 692.

136. For a discussion of the state's enforcement rights under the Connecticut statutory scheme, see *supra* note 46. For a general discussion of the enforcement of criminal restitution orders, see Harland, *supra* note 1, at 108-18.

137. For the text of § 101(4), see *supra* note 10.

that, while the Second Circuit correctly examined the debtor-state relationship, it incorrectly applied section 101(4) by failing to consider the impact of section 101(4)(B).

The definition of "claim" in section 101(4) was amended just prior to passage to include section 101(4)(B).<sup>138</sup> The provision, as amended, reads:

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) *right to an equitable remedy for breach of performance if such right gives rise to a right of payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.<sup>139</sup>

The addition of section 101(4)(B) makes it clear that Congress intended to *exclude* from the definition of "claim" any right to an equitable remedy which does not give rise to an alternative "right to payment" upon breach of performance.<sup>140</sup> The House and Senate reports, relied upon by the court in *Robinson*,<sup>141</sup> were prepared prior to the inclusion of the present section 101(4)(B), and erroneously indicate that a right to an equitable remedy which does *not* give rise to an alternative right to payment is a claim under section 101(4).<sup>142</sup> Subsequent legislative history indicates clearly, however, that a right to an equitable performance, the breach of which does not give rise to a right to payment, is not a claim.<sup>143</sup>

138. See Matthews, *supra* note 10, at 235-36.

139. 11 U.S.C. § 101(4) (1982) (emphasis added).

140. See Matthews, *supra* note 10, at 235-36.

141. 776 F.2d at 38.

142. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6266 (describing the definition of "claim" as including "an equitable right to performance that does not give rise to a right to payment"); S. REP. NO. 989, 95th Cong., 1st Sess. 22 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5808 (same).

143. See 125 CONG. REC. H11089 (daily ed. September 28, 1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6436, 6437-38 (statement of Rep. Edwards); 124 CONG. REC. S17406 (daily ed. October 6, 1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6505, 6506 (statement of Sen. DiConcini). The statements are identical, indicating that

[s]ection 101(4)(B) represents a modification of the House-passed bill to include in the definition of "claim" a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . . . For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to spe-

It is submitted that the state has no "claim" in the criminal restitution context where, as in *Robinson*, the state's exclusive remedy for breach of the restitutive condition is revocation of the probationary sentence. Although the state's interest is difficult to categorize in standard debtor-creditor terms, its interest is analogous to an equitable right of rescission unaccompanied by an alternative right to enforce payment of the monetary obligation. This is the type of obligation that section 101(4)(B), as enacted, was designed to exclude from the parameters of "claim" for bankruptcy purposes.

The Second Circuit, in advocating an expansive reading of section 101(4), relied upon legislative history that evinced congressional intent "that *all legal obligations* of the debtor . . . will be able to be dealt with in the bankruptcy case."<sup>144</sup> This language, however, accompanied a proposed but unadopted version of section 101(4) which included within the definition of claim equitable remedies *not* giving rise to a right to payment.<sup>145</sup> Contrary to the Second Circuit's characterization, Congress did not intend to cover all legal obligations in the definition of "claim". Congress clearly intended section 101(4)(B) to exclude from the definition of claim any right to performance, the breach of which does not give rise to a right to payment.<sup>146</sup> It is submitted that where the state's exclusive remedy for breach of a restitutive condition is revocation of probation, the state has not satisfied section 101(4)(B).

The *Robinson* court found no significant distinction between the state's right to revoke probation and a creditor's right to enforce payment by levy and execution on the debtor's property.<sup>147</sup> While both methods of enforcement compel performance of the underlying obligation, it is contended that the distinction is dispositive in light of section 101(4)(B) and the purpose behind the Bankruptcy Code. The Bankruptcy Code was intended to provide relief for the debtor who is overwhelmed by financial overextension.<sup>148</sup> It would seem logical, therefore, to exclude from bankruptcy disposition those creditors who do not hold an unconditional right to financial satisfaction of their legal claims. Where the debtor (criminal) agrees to the imposition of a financial obligation (restitution) in order to avoid a more onerous duty of

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cific performance would have a "claim" for purposes of a proceeding under title 11.

On the other hand, rights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment are not "claims" and would therefore not be susceptible to discharge in bankruptcy.

*Id.*

144. 776 F.2d at 34 (emphasis in original).

145. See Matthews, *supra* note 10, at 235-36.

146. See *supra* note 143 and accompanying text.

147. 776 F.2d at 38.

148. For a discussion of the legislative intent behind the Bankruptcy Code, see *supra* notes 7-14 and accompanying text.

performance (incarceration) and the creditor (state) holds no right to enforcement of the obligation against the property of the debtor's estate, but only a right to equitable relief (revocation of probation), then the obligation is not an otherwise unavoidable source of financial over-extension. It is submitted, therefore, that section 101(4)(B) renders the state's rights against the debtor insufficient to constitute a "claim" since, upon breach of performance of the restitutive condition, the state's only remedy is an equitable right to seek revocation of probation.

Where the victim or the state holds an unconditional right to enforce payment of the restitution order under state law,<sup>149</sup> then the conclusion that there exists a "debt" is unavoidable and courts must decide upon the application of section 523(a)(7).<sup>150</sup> The *Robinson* court held that the imposition of a restitution obligation as a condition of probation is necessarily compensatory in purpose and, therefore, dischargeable in spite of section 523(a)(7).<sup>151</sup> The alternative analysis, followed by a majority of courts, is to indulge in the presumption that restitution conditions are imposed for a rehabilitative purpose unless the evidence indicates otherwise.<sup>152</sup> The majority approach, it is suggested, represents the better view in light of the strong federal policy concerns compromised by the *Robinson* approach.<sup>153</sup> Where a state prosecution is actually motivated by a desire to circumvent the bankruptcy discharge, the bankruptcy courts retain sufficient injunctive power under section 105 to protect the integrity of bankruptcy relief.<sup>154</sup>

149. See, e.g., *Newton v. Fred Haley Poultry Farm (In re Newton)*, 15 Bankr. 708, 710 (Bankr. N.D. Ga. 1981). In *Newton*, the court held that an order to pay restitution as a condition of probation is a debt under Georgia law. *Id.* at 710. According to the court, the controlling factor in *Newton* was the fact that, under Georgia law, a victim is empowered to enforce the restitution order as a civil judgment by execution. *Id.*; see GA. CODE ANN. § 17-14-13 (Supp. 1985) (providing that restitution order is enforceable "as is a civil judgment by execution").

150. See *id.*; see also *Pellegrino*, 42 Bankr. at 132-33 (citing *Newton* as authority for proposition that victim's right to enforcement of restitution order is controlling question under § 101(4)).

151. Arguably, the *Robinson* court imputed an improper motive to the Connecticut sentencing court since the Connecticut probation scheme seems to focus exclusively on rehabilitative purposes. See CONN. GEN. STAT. ANN. § 53a-30(a) (West 1985) (empowering sentencing court to impose certain enumerated conditions of probation and "any other conditions reasonably related to his rehabilitation."); see also *Belden v. Hugo*, 88 Conn. 500, 504, 91 A. 369, 370 (1914) (purpose for probation is reformatory and the "end sought is the good of the individual wrongdoer").

152. *Pellegrino*, 42 Bankr. at 136-37.

153. For a discussion of these policy concerns, see *infra* notes 162-75 and accompanying text.

154. See 11 U.S.C. § 105 (1982). Section 105 provides, in pertinent part: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.*; see also *State Finance Co. v. Morrow*, 216 F.2d 676, 679-80 (10th Cir. 1954) (bankruptcy courts have equitable power to guard the integrity of their decrees).

Where the purpose of the state criminal prosecution is the circumvention of

It is submitted that the first step toward any meaningful analysis of the criminal restitution obligation in bankruptcy requires a recognition of the fact that standard rules of statutory construction compel no specific result.<sup>155</sup> Restitution, when ordered as a condition of probation, creates a unique financial obligation which, unlike more standard forms of indebtedness, does not fall neatly into any of the various categories of "debt" provided in the Bankruptcy Code.<sup>156</sup> In arguing over the propriety of any given statutory interpretation, judges and practitioners can expect to find little guidance in the plain language or legislative history

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the bankruptcy laws, and the debtor establishes this fact, then an injunction would not be inconsistent with the principle of comity since the state prosecution would presumably be in "bad faith." See *Younger v. Harris*, 401 U.S. 37, 54 (1971) (comity does not preclude injunction of state prosecution which is brought in bad faith).

Several bankruptcy courts have followed this approach, enjoining state criminal prosecutions under § 105 where the purpose of the prosecution is to compensate the victim of the criminal offense. See *In re Curley*, 25 Bankr. 260 (Bankr. E.D. Pa. 1982); *Ohio Waste Services, Inc. v. Fra-Mar Tire Services, Inc.* (*In re Ohio Waste Services, Inc.*), 23 Bankr. 59 (Bankr. S.D. Ohio 1982); *Alan I.W. Frank Corp. v. P.M.A., Inc.* (*In re Alan I.W. Frank Corp.*), 19 Bankr. 41 (Bankr. E.D. Pa. 1982); *Strassmann v. Du-Art Foods, Inc.* (*In re Strassmann*), 18 Bankr. 346 (E.D. Pa. 1982); *Whitaker v. Ockert* (*In re Whitaker*), 16 Bankr. 917 (Bankr. M.D. Tenn. 1982); *Taylor v. Widdowson* (*In re Taylor*), 16 Bankr. 323 (Bankr. D. Md. 1981); *Kaping v. Oregon* (*In re Kaping*), 13 Bankr. 621 (Bankr. D. Or. 1981); *Bray v. Holley* (*In re Bray*), 12 Bankr. 359 (Bankr. M.D. Ala. 1981); *In re Lake*, 11 Bankr. 202 (Bankr. S.D. Ohio 1981); *Reid v. Young* (*In re Reid*), 9 Bankr. 830 (Bankr. M.D. Ala. 1981); *In re Caldwell*, 5 Bankr. 740 (Bankr. W.D. Va. 1980); *Barth v. Broshot* (*In re Barth*), 4 Bankr. 141 (Bankr. W.D. Mo. 1980).

155. As a general matter, the rules of statutory construction require a court to determine the legislative will from an examination of the plain language and legislative history of the relevant statute. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) (proper statutory interpretation must begin with examination of the language employed by Congress); *Pettis ex rel. United States v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 671 (9th Cir. 1978) (legislative history should always be consulted because plain language may be misleading). For a general discussion of the rules of statutory construction, see Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

156. See Zemans, *Coercion to Restitution: Criminal Processing of Civil Disputes*, 2 LAW & POL'Y Q. 81 (1980) (criminal restitution award uniquely combines elements of penal and restitutive justice); see also Mehler, *Criminal Prosecution and Restitution Under the Bankruptcy Code*, 1983 ANN. SERV. AM. L. 817 (1983) (discussing juridical sanctions as either penal or restitutive).

To the extent that the debt arises from an adjudication of criminal guilt, it is of penal character. See *Robinson v. McGuigan* (*In re Robinson*), 776 F.2d 30, 40 (2d Cir. 1985) (restitution order "intended in part to punish the defendant and foster his rehabilitation."), cert. granted sub nom. *Kelly v. Robinson*, 106 S. Ct. 1181 (1986). Unlike a fine, however, satisfaction of the obligation has the effect of compensating the victim's personal loss and is, therefore, restitutive. See 776 F.2d at 40 (restitution award is punitive, rehabilitative, and compensatory in purpose); see also *United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984) (restitution order has both penal and compensatory purposes).



of the Bankruptcy Reform Act.<sup>157</sup>

Without the aid of those determinative guideposts, it is suggested that a thorough searching of the various policies implicated in the discharge of criminal restitution obligations is vital to a responsible statutory interpretation.<sup>158</sup> Too often, it is submitted, courts faced with administration of a criminal restitution obligation have indulged in the luxury of conclusory characterizations that lead to a simple and uncomplicated application of the Bankruptcy Code's provisions.<sup>159</sup> The *Robinson* court left the policy determinations necessary to an honest resolution of the issue exclusively with Congress.<sup>160</sup> Given the absence of a determinative statement of congressional intent,<sup>161</sup> however, it is suggested that guidance be drawn from other congressionally articulated policy concerns, including the general policies underlying the Bankruptcy Reform Act itself.

The legislative history of the Bankruptcy Reform Act contains a clear statement of congressional intent to avoid the creation of a refuge for criminal offenders.<sup>162</sup> The House Report states that "the bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy."<sup>163</sup> The *Robinson* court dismissed this statement of legislative intent because it appears in

157. For a discussion of the legislative history to the Bankruptcy Reform Act, see *supra* notes 7-14 and accompanying text.

158. As a matter of statutory interpretation, it has been suggested that policy concerns should guide a court's interpretation where the plain language and legislative history of a statute do not dictate a particular result. See Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 820 (1983). Judge Posner explains:

[W]hat if the judge's scrupulous search for the legislative will turns up nothing? There are of course such cases, and they have to be decided some way. It is inevitable, and therefore legitimate, for the judge in such a case to be moved by considerations that cannot be referred back to legislative purpose. There might be considerations . . . drawn from some broadly based conception of the public interest.

*Id.*

159. See, e.g., *In re Brown*, 39 Bankr. at 822 ("To win their argument, the defendants must first characterize the restitution order as being disembodied from the underlying 'debt' created by [the debtor's] actions."); *In re Pellegrino*, 42 Bankr. at 134 (no "debtor/creditor relationship" arises between criminal and state and, therefore, no "debt" under § 101(11)).

160. *Robinson*, 776 F.2d at 38 (refusing to "create judicial exceptions to the clear language of the statute that are warranted neither by that language nor by the legislative history"); but see *In re Pellegrino*, 42 Bankr. at 134 (exception to § 101(11) found in federal policies implicated in criminal restitution context).

161. For a discussion of proposed legislation which would render criminal restitution obligations nondischargeable, see *supra* note 20 and accompanying text.

162. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6299.

163. *Id.*

the discussion of the automatic stay provisions of section 362 and not in the provisions defining "debt" or "claim."<sup>164</sup> It is submitted, however, that the quoted language clearly establishes a broad policy directive concerning the very purpose and design of the entire Bankruptcy Code.<sup>165</sup>

In addition, the principle of federal-state comity, embodied in the Anti-Injunction Act<sup>166</sup> and firmly embedded in federal common law, strongly suggests restraint by federal courts from interference with state criminal prosecutions.<sup>167</sup> By enjoining the state from enforcing the restitution order, the *Robinson* court extinguished a condition placed upon a criminal sentence imposed by the state court, and permanently altered the disposition chosen by the state trial judge.<sup>168</sup> Moreover, the *Robinson* decision may serve to curtail state courts' freedom to choose among rehabilitative sentencing options in the future, to the extent that those options are placed in danger of extinguishment through bankruptcy.

In *Davis v. Sheldon (In re Davis)*,<sup>169</sup> the United States Court of Appeals for the Third Circuit refused to enjoin the continuation of a "bad check" prosecution where a conviction would have resulted in an order

164. 776 F.2d at 37. For a discussion of the court's reasoning, see *supra* notes 110-11 and accompanying text.

165. Several courts have read this statement of legislative intent as a broad policy directive for application beyond interpreting § 362(b)(1). See, e.g., *Black Hawk County, Iowa v. Vik (In re Vik)*, 45 Bankr. 64, 65 (Bankr. N.D. Iowa 1984) (relying upon legislative history of § 362(b)(1) in support of holding that criminal restitution obligation not a "debt"); *Pellegrino*, 42 Bankr. at 134 (same); *United States v. Cox (In re Cox)*, 33 Bankr. 657, 660 (M.D. Ga. 1983) (relying upon legislative history to § 362(b)(1) as support for holding that order to pay costs of prosecution is nondischargeable under § 523(a)(7)); *In re Johnson*, 32 Bankr. 614, 616 (Bankr. D. Colo. 1983) (relying upon legislative history to § 362(b)(1) as support for holding that criminal restitution obligation not a "debt" under § 101(11)).

166. 28 U.S.C. § 2283 (1982). For a discussion of § 2283 and comity, see *supra* note 52.

167. For a discussion of comity, see *supra* note 52.

168. The Second Circuit directed the district court to discharge Robinson's restitution obligation and to enjoin defendants from attempting to recover further restitution payments. 776 F.2d at 41. See also *Pellegrino*, 42 Bankr. at 138 (analyzing restitution condition as a *quid pro quo* for probationary sentence in bargain reached between criminal and state). Such interference with a state court's sentencing power compromises the fundamental police functions of the state government in enforcing its criminal laws. See *Davis v. Sheldon (In re Davis)*, 691 F.2d 176, 179 (3d Cir. 1982) (refusing to enjoin state criminal prosecution where underlying debt was discharged in bankruptcy because of the "state's paramount interest in protecting its citizens through its police power").

It is unclear whether an unconditional probation would violate an order which merely enjoined attempts at collection of the debt. The *Brown* court was clearer in ordering the state to refrain from "seeking to revoke Brown's probation for failure to make restitution discharged in bankruptcy." *Brown*, 39 Bankr. at 830. For a discussion of *Brown*, see *supra* notes 55-70 & 81-90 and accompanying text.

169. 691 F.2d 176 (3d Cir. 1982).

to pay restitution on a discharged debt.<sup>170</sup> Relying upon the principle of comity enunciated by the Supreme Court in *Younger v. Harris*,<sup>171</sup> the Third Circuit reasoned that state criminal prosecutions should not be enjoined absent compelling circumstances involving bad faith on the part of the state prosecutor.<sup>172</sup> Analyzing the case under section 105, the *Davis* court reasoned that, while the complaining witnesses may have been motivated by a desire to avoid the consequences of the discharge, the debtor failed to establish bad faith on the part of the prosecutor.<sup>173</sup> Furthermore, the court reasoned that the debtor could raise his federal challenges in the state court.<sup>174</sup>

It is submitted that the approach adopted by the *Davis* court represents the proper approach to criminal restitution obligations in bankruptcy. Bankruptcy courts should exercise restraint when called upon to alter a sentence imposed by a state criminal court. The integrity of the discharge order can be adequately protected under the bankruptcy courts' general injunctive power, giving proper consideration to the various policies implicated in the criminal restitution cases.

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170. *Id.* at 179. The debtor was prosecuted under the Delaware "bad check" law, which provides that knowingly issuing a worthless check is a class "A" misdemeanor. See DEL. CODE ANN. tit. 11, § 900 (Supp. 1984). The Delaware Code mandates a requirement of restitution upon conviction of a violation of § 900. See DEL. CODE ANN. tit. 11, § 4206(a) (1979).

171. 401 U.S. 37 (1971). For a discussion of *Younger*, see *supra* note 52.

172. *Davis*, 691 F.2d at 179. Judge Adams concluded:

Federalism in this nation relies in large part on the proper functioning of two separate court systems. The integrity of each must be preserved so that both can serve as effective forums for protecting individual rights and societal interests. Therefore, federal courts must remain vigilant not to diminish the rightful prerogatives of their state counterparts, and should exercise their power to enjoin state criminal proceedings only with considerable caution and indeed only when proper cause has been shown.

*Id.*

173. *Id.* at 178-79.

174. *Id.* at 179. It should be noted that, under the Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), a criminal debtor is protected from a state's revocation of probation if the debtor is unable to make restitution payments because of his financial condition. *Id.* at 665, 674. In *Bearden*, the Court held that, where a criminal debtor makes bona fide efforts to comply with the restitutive condition, a state may not revoke probation and order incarceration unless alternative modes of punishment are inadequate to meet the state's interest in enforcing its criminal laws. *Id.* at 674. The Court based its decision upon due process and equal protection considerations. *Id.* at 665. It is suggested that the Court's decision in *Bearden* provides bankrupt debtors with adequate protection from discriminatory treatment on the state level. The constitutional protection provided by *Bearden* ensures that restraint by federal courts from interference with state criminal prosecutions will not leave the debtor without protection from arbitrary treatment in the state court.

## V. CONCLUSION

In deciding *Kelly v. Robinson*,<sup>175</sup> it is respectfully suggested that the Supreme Court consider the operation of section 101(4)(B) in deciding upon the propriety of the Second Circuit's conclusion that the State of Connecticut holds a "claim" against Carolyn Robinson. Alternatively, it is suggested that the Court consider formulating a rule which would mandate the presumption of a non-compensatory purpose behind state criminal courts' restitutive orders. Finally, it is suggested that the Court redirect federal judges to consider the principle of comity when called upon to interfere with a state's enforcement of its criminal laws.

*Seamus C. Duffy*

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175. *Cert. granted*, 106 S. Ct. 1181 (1986).

