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Criminal Restitution and Bankruptcy Code Discharge--Another Case for Defining the Scope of Federal Bankruptcy Law

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NOTE

Criminal Restitution and Bankruptcy Code Discharge—Another Case for Defining the Scope of Federal Bankruptcy Law

Of the many conflicts between the Bankruptcy Reform Act of 1978 (Bankruptcy Code)[1] and other areas of substantive law,[2] few have presented a greater dilemma than the dispute over whether bankruptcy courts may discharge criminal restitutionary sentences.[3] The compelling policy concerns that underly the areas of bankruptcy law and criminal law involved in this dispute make it particularly difficult. Discharge in bankruptcy attempts to provide relief and rehabilitation to individual debtors,[4] while criminal restitution offers a sentencing alternative to criminal courts to enable them to fashion more appropriate sentences.[5] While legislatures and courts have increasingly relied on restitution[6] as a sentencing alternative for a wide variety of crimes,[7] some bankruptcy courts have ordered sentences of criminal restitution discharged under Chap-

1 Pub. L. No. 95-598, 92 Stat. 2549 (1978) [hereinafter "Bankruptcy Code"], *as codified at* 11 U.S.C. §§ 101 to 1330, and *as amended by* the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

2 *See infra* notes 133-39 and accompanying text.

3 *See generally* Ballam, Kelly v. Robinson: *An Erosion of the Fresh Start Concept for Debtors in Bankruptcy*, 32 ST. LOUIS U.L.J. 103 (1987); Hennigan, *Criminal Restitution and Bankruptcy Law in the Federal System*, 19 CONN. L. REV. 89 (1986); Note, *Bankruptcy: Dischargeability of Restitutive Conditions of Probation—Criminals Find Refuge in the Provisions of the Bankruptcy Reform Act of 1978*—Robinson v. McGuigan, 31 VILL. L. REV. 591 (1986).

4 *See infra* notes 140-175 and accompanying text.

5 *See infra* notes 176-201 and accompanying text. Federal bankruptcy legislation does not implicate constitutional issues when it conflicts with other federal legislation. Conflicts between federal legislation are dealt with purely on the level of statutory interpretation. However, because the relation of bankruptcy law to other federal law is not clarified by the language of the statutes or the intent of Congress in many instances, an analysis along the same lines as that for the dischargeability of *state* criminal restitution sentences is appropriate. Thus, the same analysis discussed below is applicable to the issue of the dischargeability of *federal* sentences of criminal restitution. *See, e.g*, 11 U.S.C. § 3663 (1982 & Supp. IV 1988). This Note, however, will primarily focus on *state* criminal restitution provisions because federal courts dealing with federal criminal cases have held *federal* criminal restitution unaffected by bankruptcy discharge. *See, e.g.*, United States v. Carson, 669 F.2d 216 (5th Cir. [unit B] 1982).

6 For states with sentencing schemes utilizing various forms of criminal restitution, see, *e.g.*, ALA. CODE §§ 15-23-1 to 15-23-23, and §§ 15-18-65 to 15-18-77 (1972 & Supp. 1988); ALASKA STAT. §§ 12.55.045 and 12.55.100(a)(2) (Supp. 1988); ARIZ. REV. STAT. ANN. §§ 13-603(C), 13-804 to 13-810, and 13-901 (Supp. 1987); ARK. STAT. ANN. §§ 5-4-303(c)(8), and 16-90-301 to 16-90-308 (1987); CAL. GOV'T CODE §§ 13967 to 13967.5 (West Supp. 1988), and CAL. PENAL CODE § 1203.04 (West Supp. 1988); COLO. REV. STAT. § 16-11-204.5 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. § 53a-30(a)(4) (West Supp. 1988), and §§ 54-201 to 54-224 (West 1985 & Supp. 1988); DEL. CODE ANN. tit. 11, §§ 4101 to 4106 (1987); D.C. CODE ANN. §§ 3-401 to 3-415 (1988); FLA. STAT. ANN. § 775.089 (West Supp. 1988), and § 960.28 (West 1985 & Supp. 1988).

7 Although criminal restitution can be assigned in sentences for a wide variety of crimes, there are some crimes for which criminal restitution might be an inappropriate sentence. *See* S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 119-20 (1960).

Although this Note relies on a foundationally grounded analysis which presumes that criminal restitution is an appropriate sentence, there is some debate as to whether it is appropriate at all to provide for restitution in *criminal* sentencing proceedings. *See, e.g.*, Klien, *Revitalizing Restitution: Flog-*

ters 7[8] and 13[9] of the Bankruptcy Code, allowing debtors in bankruptcy to escape from sentences of criminal restitution.[10]

Federal bankruptcy courts have approached the issue of the dischargeability of criminal restitution on an *ad hoc* basis, struggling to find a consistent rationale to resolve the issue.[11] This *ad hoc* approach fails to reconcile interpretation of the broad and often ambiguous language of the Bankruptcy Code with the fundamental goals and policies which bankruptcy law has long embodied. Such a return to the fundamentals of bankruptcy law is necessary because the federal bankruptcy power

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ging a Horse that may have been Killed for Just Cause, 20 CRIM. L.Q. 383, 404-05 (1978); *but see infra* note 204.

8 11 U.S.C. §§ 701-766 (1982). Chapter 7 of the Bankruptcy Code covers cases involving the liquidation of the debtor's non-exempt assets to satisfy, as best it can, the debts of the debtor. *See, e.g.*, 11 U.S.C. § 704, which obliges the trustee to "collect and reduce to money the property of the estate for which such trustee serves." *Id.* at § 704(1). After liquidation, the estate is distributed among the debtor's creditors according to the priority of each debt. *See* 11 U.S.C. § 726.

9 11 U.S.C. §§ 1301-1330 (1982). Chapter 13 of the Bankruptcy Code is known as the "wage earner's" chapter because it allows qualified individual debtors to avoid liquidation of their assets by submitting all or some portion of their future earnings to the trustee pursuant to a "plan" to pay some or all of the debtor's debts. *See* 11 U.S.C. § 1322, which states in relevant part:

> (a) The plan shall—
>
> (1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under [11 U.S.C. § 507], unless the holder of a particular claim agrees to a different treatment of such claim; and
>
> (3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

11 U.S.C. § 1322(a)(1)-(3) (1982 & Supp. IV 1988).

10 *See infra* notes 56-57 and accompanying text. A discharge in bankruptcy of a criminal restitution obligation should have no effect on any other elements of a criminal sentence which stand independently even though given concurrently.

11 The *ad hoc* approach of bankruptcy courts often relies on tortured construction of ambiguous statutory language at issue in individual cases without reference to the broader policy conflicts which are discussed in this Note. *See* T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986), where the author argues for a method of inquiry based on the theoretical framework of bankruptcy law. Professor Jackson states:

> Much bankruptcy analysis is flawed precisely because it lacks rigor in identifying what is being addressed and why it is a proper concern of bankruptcy law. For that reason, when a new and urgent "problem" is discovered in the context of a bankruptcy proceeding, courts, legislators, and commentators all too often approach its resolution in an ad hoc manner, by viewing bankruptcy law as somehow conflicting with—and perhaps overriding—some other urgent social or economic goal.

Id. at 3.

See also A. NAMDAR, CONTRACTS IN BANKRUPTCY (1977), where the author expresses similar concerns:

> The complexity of the issues [in bankruptcy law] in combination with the convergence of various bodies of law have made the subject a difficult and subtle one. Therefore, it is quite understandable that many controversies and conflicting attitudes have arisen with regard to bankruptcy in general . . . . Moreover, the lack of an overall theoretical approach has aggravated the discrepancies among court decisions and further contributed to the uncertainties in the area. . . . [O]ne would expect some theoretical guidance from authors in the field. Unfortunately, the writers, by and large, have been *preoccupied with the conventional questions overlooking the need for a theoretical approach which could have obviated many of the prevailing problems* . . . .

Id. at 1 (emphasis added). *See also* Klee & Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 1 (1988) ("first eight years of jurisprudence under the Bankruptcy Code is riddled with opinions in which the judiciary has gone astray from the drafters' original intent").

originates in the Constitution.[12] Because the Bankruptcy Code is enacted pursuant to the Bankruptcy Clause,[13] the scope of the Bankruptcy Clause should necessarily limit the scope of the Bankruptcy Code. The scope of the federal bankruptcy power may be defined by examining the fundamental policies and goals of bankruptcy law. After the appropriate scope of the bankruptcy power is defined, the Bankruptcy Code's ambiguous language may be interpreted consistently and coherently.

Although the U.S. Supreme Court had the opportunity to resolve the issue of the dischargeability of criminal restitution in *Kelly v. Robinson*,[14] the Court limited its holding to discharge in Chapter 7 of the Bankruptcy Code. The Court expressly declined to use reasoning that courts could apply to discharge under other chapters of the Bankruptcy Code.[15] As a consequence, bankruptcy courts remain divided over the issue in other bankruptcy situations.[16]

A sound determination of the dischargeability of criminal restitution requires an appraisal of the fundamental purposes and policies of bankruptcy law and criminal law to define the scope of the Bankruptcy Code in this situation. Part I of this Note examines the nature and history of the dischargeability of criminal restitution including the numerous judicial attempts at a solution. Part II reviews the fundamental purposes and mechanisms of both bankruptcy law and criminal sentencing in order to provide the basis for balancing the goals of each. Building on this basis, Part III presents judicial and legislative solutions that could not only resolve the conflict with criminal restitution, but also provide a framework for resolving conflicts between the Bankruptcy Code and other areas of law. Finally, this Note concludes that the underlying policies and goals of bankruptcy law and criminal sentencing demand that bankruptcy law be considered completely separate from criminal law, and as such incapable of affecting criminal sentences.

I. The Conflict

Judicial interpretation of the Bankruptcy Code has been required to settle many conflicts between bankruptcy law and other areas of law.[17] In many cases of conflict between the Bankruptcy Code and state law, the Bankruptcy Clause and Supremacy Clause of the Constitution eliminate

12 *See* U.S. CONST. art. I, § 8, cl. 4, which gives Congress the power "[t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States."

13 *See id.*

14 479 U.S. 36 (1986); discussed *infra* notes 82-93 and accompanying text.

15 *See* 11 U.S.C. § 523, and *infra* note 88. By limiting its holding to § 523 and Chapter 7 discharges, the Court left open the relation of criminal restitution to other areas of the Bankruptcy Code. *See* 479 U.S. at 59 n.6 (Marshall, J., dissenting).

16 *See infra* notes 95-125 and accompanying text.

17 *See infra* notes 133-39 and accompanying text. At the core of the conflict over the dischargeability of criminal restitution is the Bankruptcy Code's definition of debt. 11 U.S.C. §§ 101(4) and (11), set out *infra* note 28. In expanding the definition of debt to include criminal restitution, the scope of the Bankruptcy Code is also expanded to encompass criminal sentences such as criminal restitution. This expansion not only gives rise to the issue of the dischargeability of criminal restitution, but also produces conflicts with other areas of the Bankruptcy Code. *See infra* notes 119-125 and accompanying text.

any possible conflict by preempting the state law.[18] However, there are some conflicts which courts cannot so easily resolve. On the surface, such conflicts appear to require preemption. However, on a more fundamental level, there are some areas of state law that the Bankruptcy Code purports to preempt that are fundamentally outside the proper scope of the Bankruptcy Clause. The dischargeability of criminal restitution is just such a case. By examining the dischargeability of criminal restitution, one may develop a method of inquiry that can be helpful in determining the proper scope of the Bankruptcy Clause and the Bankruptcy Code in other situations.

A. *Criminal Restitution and the Bankruptcy Process*

In the typical criminal restitution case, the convicted criminal[19] is sentenced by a criminal court[20] to pay a certain sum[21] in "restitution" for his crime.[22] The state then turns over all or some portion of that amount to the victim of the crime.[23] The conflict with bankruptcy law arises after

18 *See infra* notes 219-23 and accompanying text.

19 Criminal restitution in every sentencing scheme is usually preceeded by a criminal conviction. *See* statutes cited *supra* note 6. *But see* Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 81-86 (1982):

> Many provisions for restitution cover only specified types or degrees of crime; others exclude particular offenses, such as traffic or petty offenses . . . . [H]owever, there is substantial disagreement as to whether restitution is restricted to convictions, or whether "criminal activities" encompasses plea bargaining settlements or offenses which may never be adjudicated or even formally charged.

Id. (footnotes omitted).

20 Criminal restitution provisions of statutory schemes must be kept analytically separate from the *civil* remedies which are increasingly made available in criminal statutes. See, *e.g.*, the civil remedies available in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1982 & Supp. IV 1988). *See also* Harland, *supra* note 19, at 66-67.

21 The standard used for fixing the amount of the restitution sentence presents several problems. *See* Harland, *supra* note 19, at 86-94, where the author discusses the range of recoverable losses from the criminal act and its relation to civil procedures for fixing damages:

> Once the court resolves whether to require restitution . . . , further refinement of the scope of the sanction requires consideration of the type and extent of loss for which criminal courts may impose a restitutive disposition. Criminal and civil courts differ in this area more than in any other in their ability to redress victims' injuries.
>
> The degree to which courts impose limitations upon the type of criminal restitution, and the ways in which these limitations are defined, vary considerably . . . . With few exceptions, criminal liability for restitution is usually considered to be less complete than its civil counterparts so that conduct producing a viable civil claim will not guarantee a similar result in a criminal proceeding.

Id. at 86-87 (footnotes omitted). This is an important point because the Bankruptcy Code's definition of "debt" seems to be directed more towards civil liabilities. *See infra* note 28.

22 *See* Harland, *supra* note 19, at 60-64, for a discussion of the various labels which legislatures have given to the concept of criminal restitution. "[T]ypically, restitution is defined as 'full or partial payment of damages to a victim,' with occasional variation to include 'nominal' payment." *Id.* at 64 (footnotes omitted). For the purposes of this Note, the term "restitution" will be used in the same way that Professor Harland described it, that of "encompassing either the defendant's return or repair of property, or the defendant's provision of monetary value for compensable losses." *Id.*

23 Under many state victim compensation schemes, the victim is paid from a victim compensation fund maintained by the state, and the state will then be the recipient of the restitution. *See* Harland, *supra* note 19, at 70 ("the most systematic approach [of restitution schemes] attempts to recover monies paid out by the state as victim compensation awards"). *See also*, *e.g.*, CAL. PENAL CODE §§ 1203-1203.1 (West Supp. 1988); and statutory provisions cited *supra* note 6.

Another issue often arises as to who or what is the "victim" to which the restitution is directed. *See* Harland, *supra* note 19, at 78-80, where the author surveys the divergent ways in which states have defined legally eligible recipients:

the criminal court hands down the restitution sentence.[24] If the criminal enters the bankruptcy process, either voluntarily or involuntarily,[25] the bankruptcy court must then decide[26] whether the provisions governing discharge under the Bankruptcy Code[27] include such criminal sentences within their scope.[28]

If a court decides that the Bankruptcy Code encompasses the criminal sentence of restitution, then a further question of whether the sentence is dischargeable arises.[29] The discharge process in the Bankruptcy Code is essentially one of form over substance. If the debtor meets all of the formal requirements of the Bankruptcy Code,[30] then a wide variety of debts may be discharged by the court.[31] The discharge available in a

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> The degree of specificity in legislative directives concerning who may be the recipient of restitution varies widely. On occasion, specific types of victims or "aggrieved parties" are listed. Similarly, some states single out particular types of victims, such as the elderly, as deserving special consideration for restitution, and declare others, such as accomplices or coparticipants in the defendant's crime, ineligible.

Id. at 78 (footnotes omitted).

Regardless of *how* victim is defined, some courts require that there be *some* beneficiary of the restitution who has been injured by the criminal conduct. *See, e.g.*, State v. Theroff, 33 Wash. App. 741, 744, 657 P.2d 143, 145-46 (1962); and Note, *Court-Ordered Criminal Restitution in Washington*, 62 WASH. L. REV. 357, 362 (1987).

24 A conflict may also arise if a trustee seeks an automatic stay to enjoin a concurrent criminal action against a defendant who is also a debtor in bankruptcy. Such an attempt would be made under § 362(a) of the Bankruptcy Code. However, § 362(b)(1) protects such ongoing criminal proceedings from that type of interference by exempting "the commencement or continuation of a criminal action or proceeding against the debtor" from the automatic stay. 11 U.S.C. § 362(b)(1).

25 *See generally* G. TREISTER, J. TROST, L. FORMAN, K. KLEE & R. LEVIN, FUNDAMENTALS OF BANKRUPTCY LAW 99-111 (1986). "A voluntary petition may be filed by any eligible debtor .... Undoubtedly, the debtor must owe some debts in order to seek voluntary relief under the Code, but no particular amount of money owed is a prerequisite." *Id.* at 99-100. *See also* 11 U.S.C. § 301. Involuntary cases, however, may only be commenced by the debtor's creditors under Chapters 7 and 11 of the Bankruptcy Code. *See* 11 U.S.C. §§ 303(a) & (b). Involuntary Chapter 7 or 11 cases can be "converted" by the eligible debtor into any other chapter, including Chapter 13, for which the debtor would have been eligible had he filed under that chapter voluntarily. *See* 11 U.S.C. § 348.

26 If the debtor lists his sentence of criminal restitution as one of his debts, then the person or entity to which the restitution must be paid must file a timely notice of claim and objection to discharge for the court to consider the claim. *See* 11 U.S.C. §§ 501, 727(c) & (d), and 1328. However, in *Kelly v. Robinson*, the state's failure to file a timely notice of claim was not considered an impediment to allowing the claim to survive discharge. *See* 479 U.S. 36, 53-54 (1986) (Marshall, J., dissenting).

27 In Chapter 7, discharge is governed by § 727, but limited by the exceptions to discharge in § 523. In Chapter 13, discharge is governed by § 1328, but limited to a lesser extent by § 523(a)(5).

28 A discharge under Chapters 7 and 13 of the Bankruptcy Code is only available for the "debts" of the debtor. *See infra* note 58. The Bankruptcy Code defines "debt" as "liability on a claim." 11 U.S.C. § 101(11). "Claim" is then defined as a:

> (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;

11 U.S.C. § 101(4).

29 Even if criminal restitution is considered a "debt" under the Bankruptcy Code, it must still escape the exceptions to discharge contained in § 523(a) of the Bankruptcy Code before it may be discharged. *See infra* note 61.

30 *See, e.g.*, 11 U.S.C. §§ 727, 1328.

31 The only debts which are not eligible for discharge are listed specifically in § 523(a) of the Bankruptcy Code. *See* 11 U.S.C. § 523(a). If a "debt" does not fit within an enumerated exception, then it is eligible for discharge.

Chapter 7 proceeding is more limited than the discharge available in a Chapter 13 proceeding.[32] Although the Supreme Court has ruled that criminal restitution is excluded from Chapter 7 discharge,[33] courts are divided on the question of whether bankruptcy courts have the power to discharge sentences of criminal restitution in Chapter 13.[34]

In addition to the immediate relief of discharge, the Bankruptcy Code contains other devices designed to protect the individual debtor and the bankruptcy process from interference by other judicial processes.[35] The Bankruptcy Code provides for an "automatic stay"[36] during the bankruptcy proceeding which bars many other judicial actions to enforce a claim against the bankrupt debtor arising from a pre-bankruptcy debt.[37] Many cases involving criminal restitutionary sentences have arisen when the debtor sought enforcement of the automatic stay to bar a criminal court proceeding on probation revocation.[38] In addition, after discharge and other claim settlement procedures have been completed, the Bankruptcy Code finalizes its disposition of the debtor's financial affairs by providing for a permanent injunction[39] barring future action on any debt discharged in the bankruptcy proceeding.[40] Both the automatic stay and permanent injunction act to protect the integrity of the discharge.

B. *Judicial Attempts to Resolve the Conflict*

The dispute over the dischargeability of criminal restitution arose initially under Chapter 7 of the Bankruptcy Code.[41] Lower courts and

32 *See infra* note 95.

33 *See infra* note 82 and accompanying text.

34 *See* cases discussed *infra* notes 94-125 and accompanying text.

35 The act of filing a petition in bankruptcy has serious consequences on the availability of other remedies for creditors.

36 *See* 11 U.S.C. § 362.

37 Section 362 provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case];
>
> . . .
>
> (b) The filing of a petition . . . does not operate as a stay—
>
> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor.

11 U.S.C. § 362(a),(b).

38 *See, e.g.*, Davenport v. Commonwealth of Pennsylvania, Dep't of Public Welfare (*In re* Davenport), 89 Bankr. 428 (E.D. Pa. 1988), *discussed infra* notes 116-120 and accompanying text.

39 *See* 11 U.S.C. § 524.

40 Section 524 provides in relevant part:

> (a) A discharge under this title—
>
> . . .
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . . ; and
>
> (3) operates as an injunction against the commencement or continuation of an action, . . . to collect or recover from, or offset against, property of the debtor . . . ;

11 U.S.C. § 524(a)(2)-(3).

41 *See* 11 U.S.C. §§ 701-766.

commentators were divided over the issue.[42] In *Kelly v. Robinson*,[43] the Supreme Court held that criminal restitution is excluded from discharge in Chapter 7 of the Bankruptcy Code.[44] The Court's holding in *Robinson*, however, left open the question of the dischargeability of criminal restitution in Chapter 13 cases.[45] Courts have been divided over the issue in the Chapter 13 context.[46] This Part will first examine conflicts under the former Bankruptcy Act, then under Chapter 7 of the Bankruptcy Code. This Part will conclude with a discussion of *Kelly v. Robinson* and its effect on Chapter 13.

Under the Bankruptcy Act, courts seldom encountered the issue of the dischargeability of criminal restitution.[47] However, when confronted with the issue, they looked to the underlying policies of the Act for the solution. In *In re Uhe*,[48] for example, the debtor was convicted of the crime of concealing or transferring encumbered property.[49] The debtor received a sentence of probation conditioned on the payment of restitution.[50] In holding that the sentence of criminal restitution "did not create a debt within the meaning of Section 1(14) of the Bankruptcy Act,"[51] the referee in bankruptcy looked to the underlying nature of the criminal restitution sentence to determine whether it fell within the Bankruptcy Act's definition of debt.[52] With the rise in individual bankruptcies under

42 *See infra* notes 56-57.

43 479 U.S. 36 (1986).

44 *See infra* notes 82-87 and accompanying text.

45 *See infra* notes 88-93 and accompanying text.

46 *See infra* notes 96-125 and accompanying text.

47 *See, e.g., In re* Moore, 111 F. 145 (W.D. Ky. 1901), where the dischargeability of a fine imposed in a criminal sentence was denied. In reaching this conclusion, the court looked to the nature and purpose of the conflicting bodies of law stating:

> It may suffice to say that nothing but a ruling from a higher court would convince me that congress . . . intended to permit the discharge . . . of any judgment rendered by a state or federal court imposing a fine in the enforcement of criminal laws, as such, of either jurisdiction . . . . [I]t was never intended in this indirect way . . . to relieve criminals from penalties incurred for criminal acts. . . . [T]o rule otherwise would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare. . . . The *provisions of the bankrupt act have reference alone to civil liabilities*, as demanded between debtor and creditor, as such, and *not to punishments inflicted pro bono publico for crimes committed*.

111 F. at 149-150 (emphasis added). *But cf. In re* Alderson, 98 F. 588 (D.W. Va. 1899), where the court found a criminal fine dischargeable. Interestingly, in reaching this result, the court in *Alderson* did not consider the nature and purpose of criminal sentencing as compared to that of bankruptcy law. *See also* Ballam, Kelly v. Robinson: *An Erosion of the Fresh Start Concept for Debtors in Bankruptcy*, 32 ST. LOUIS U.L.J. 103, 122 (1987).

48 [1973 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 64,956 (W.D. Wis. 1973).

49 *Id.*

50 *Id.*

51 *Id.*

52 The court differentiated between the origins of civil and criminal monetary obligations:

> The determination of the amount a defendant shall pay as a condition to probation is not a civil matter involving the recovery of money owing to a party; it is a factor in a criminal proceeding. Restitution has been construed as the amount for which the defendant was found guilty, or the amount that he admits he should pay. . . . *Certain judgments are not regarded in bankruptcy as debts because they are essentially duties imposed by considerations of public policy.*

Id. (emphasis added).

the new Bankruptcy Code,[53] and the concurrent rise in the use of criminal restitution in sentencing,[54] a greater number of cases have presented the issue under the Bankruptcy Code. Initially, attempts to discharge sentences of criminal restitution were found in Chapter 7 proceedings.[55]

1. Chapter 7 Discharge and *Kelly v. Robinson*

Prior to *Kelly v. Robinson*, bankruptcy courts were divided over the issue of the dischargeability of criminal restitution under Chapter 7 of the Bankruptcy Code.[56] They relied on a variety of rationales to support decisions on the issue.[57] Because the discharge provisions of the Bankruptcy Code apply only to "debts,"[58] many courts sought to avoid incon-

53 In 1970, there were 194,000 petitions filed with bankruptcy courts, and 191,000 cases pending. In 1986, there were 477,856 petitions filed, and 729,000 cases pending. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 501 (1988 ed.). Of the cases filed in 1986, 332,679 were under Chapter 7, while 120,726 cases were filed under Chapter 13. *Id.*

54 *See* Harland, *supra* note 19, at 57-60; *see also* B. GALAWAY & J. HUDSON, OFFENDER RESTITUTION IN THEORY AND ACTION 131-48 (1978); and Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 71 (1970). For a survey of the legislative reliance on criminal restitution in criminal sentencing schemes, see *supra* note 6.

55 11 U.S.C. §§ 701 to 766 (1982). *See, e.g.*, cases discussed *infra* notes 56-81 and accompanying text.

56 *See, e.g., In re* Oslanger, 46 Bankr. 58 (Bankr. M.D. Pa. 1984) (criminal restitution not dischargeable); *In re* Pellegrino, 42 Bankr. 129 (Bankr. D. Conn. 1984) (criminal restitution not dischargeable); *In re* Button, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981) (criminal restitution not dischargeable).

But cf. In re Brown, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984) (criminal restitution is a debt dischargeable in bankruptcy); *In re* Newton, 15 Bankr. 708 (Bankr. N.D. Ga. 1981) (certain forms of criminal restitution are dischargeable).

57 *See, e.g., In re* Button, *supra* note 56, where the court looked to the relationship between criminal restitution and the victim of the crime. After reviewing the Bankruptcy Code's definitions of "debt," "claim" and "creditor," the court concluded:

> [I]t 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.

Id. at 694. In *In re* Magnifico, 21 Bankr. 800 (Bankr. D. Ariz. 1982), however, the court looked to the purpose of the criminal restitution as it was used in that particular case to find that it was not dischargeable. "[T]he underlying purpose of probationary criminal *restitution* under the facts of the case is not one of simple debt servicing for victims but is in fact rehabilitative in nature. There is no pre-petition, pre-existing debtor-creditor relationship between the State and the convicted felon." *Id.* at 803 (emphasis in original).

But cf. In re Brown, *supra* note 56, where the court disregarded distinctions between civil and criminal proceedings to find a sentence of criminal restitution subject to discharge. The court stated:

> 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. However, 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.

Id. at 822 (emphasis in original).

58 Chapter 7 discharge is explicitly limited to the "debts" of the debtor in § 727 of the Bankruptcy Code:

> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section *discharges the debtor from all debts* that arose before the date of the order for relief
>
> . . . .

11 U.S.C. § 727(b) (1982 & Supp. IV 1988) (emphasis added).

Chapter 13 is limited in the same way, *see* 11 U.S.C. § 1328(a), which states in relevant part:

clusive analysis of the exceptions to discharge within the Bankruptcy Code by finding that sentences of criminal restitution do not fall within the scope of the definition of "debt."[59] However, the reasoning used to exclude criminal restitution from the Bankruptcy Code via the definition of "debt" has not been uniform.[60]

Some courts argued on a different level that criminal restitution is excluded from discharge under the specific exceptions to Chapter 7 discharge.[61] Many of the courts concluding that criminal restitution is not a debt also advanced this argument as an alternative rationale.[62] Many of these arguments were considered by the Supreme Court in *Kelly v. Robinson*.[63]

In 1980, a Connecticut criminal court convicted Carolyn Robinson of wrongfully receiving Public Assistance benefits.[64] Robinson was subsequently sentenced to a five year term of probation, conditioned upon her making restitution in monthly installments.[65] After making $450 in restitution payments, she filed a voluntary petition under Chapter 7 of the Bankruptcy Code.[66] The sentence of criminal restitution was listed in that petition as a debt.[67] After notifying the Connecticut agencies that administered the restitution, and after receiving no objections from them, the bankruptcy court granted Robinson a discharge of the restitution sentence.[68] Over two years later, the state probation office informed Robinson of its belief that the sentence of restitution was not dischargeable.[69] Robinson then sought a declaration from the bankruptcy court that the condition of restitution had been discharged, in addition to an injunction preventing Connecticut from revoking her probation for nonpayment.[70]

(a) As soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a *discharge of all debts* provided for . . . .

11 U.S.C. § 1328(a) (1982 & Supp. IV 1988) (emphasis added).

59 *See, e.g.*, cases discussed *supra* note 56.

60 *See, e.g.*, *supra* note 57.

61 Section 523 of the Bankruptcy Code provides in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . .

(7) to the extent 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, other than a tax penalty.

11 U.S.C. § 523(a)(7) (1982 & Supp. IV 1988).

62 *See, e.g.*, *In re* Pellegrino, 42 Bankr. 129 (Bankr. D. Conn. 1984), where the court, after holding that criminal restitution was not a "debt" under the Bankruptcy Code, went on to say:

[E]ven assuming *arguendo* that the state court order of restitution in this case is a debt within the purview of the Bankruptcy Code, the result in this proceeding would not change because such a debt would be expected [sic] from the discharge under Code § 523(a)(7).

Id. at 136.

63 479 U.S. 36 (1986), *rev'g In re* Robinson, 776 F.2d 30 (2d Cir. 1985) (which reversed *In re* Robinson, 45 Bankr. 423 (Bankr. D. Conn. 1984)).

64 *In re* Robinson, 776 F.2d at 31.

65 *Id.* at 32.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

The bankruptcy court denied all relief sought by Robinson,[71] relying on its holding in *In re Pellegrino*.[72] In *Pellegrino*, the court faced substantially similar facts and concluded that criminal restitution was not a debt subject to discharge.[73] In reaching this conclusion, the court considered many of the arguments advanced by other courts.[74] In addition, the court determined that criminal restitution would be excluded from discharge by section 523(a)(7) of the Bankruptcy Code even if it were considered a debt.[75]

The Second Circuit Court of Appeals reversed the ruling of the bankruptcy court in *In re Robinson*,[76] holding that restitution was dischargeable in Chapter 7 bankruptcy cases.[77] In reaching this result, the court began by determining whether criminal restitution was a "debt" or "claim" as those terms are defined in sections 101(4),(11) of the Bankruptcy Code.[78] The court noted that "Congress intended 'claim' to encompass any right held by any person or entity to enforce any money obligation of the debtor. Thus, . . . Congress intended the term 'claim' to have the broadest possible scope."[79] In holding that sentences of criminal restitution were within the broad definition of debt in the Bankruptcy Code, the court rejected the *Pellegrino* line of cases.[80] Once it was determined that Robinson's restitution sentence was a debt, the court found no exception in the Bankruptcy Code to exclude it from discharge.[81]

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71 45 Bankr. 423, 425 (Bankr. D. Conn. 1984).

72 42 Bankr. 129 (Bankr. D. Conn. 1984). In *Robinson*, the bankruptcy court noted that "[t]he facts in this proceeding, the issues raised, and the relief sought by the plaintiff are virtually identical to those in *In re Pellegrino* . . . . Accordingly, the . . . legal conclusions reached in *Pellegrino* are adopted to the facts here." 45 Bankr. at 424.

73 *See id.*

74 42 Bankr. at 132-35. *See also supra* notes 56-57 and accompanying text.

75 42 Bankr. at 136-38.

76 *In re* Robinson, 776 F.2d 30 (2d Cir. 1985), *rev'g* 45 Bankr. 423 (Bankr. D. Conn. 1984).

77 776 F.2d at 41.

78 *Id.* at 33-38.

79 *Id.* at 35. A "claim" is an integral aspect of a "debt" in the scheme of the Bankruptcy Code. As the court noted:

> [B]y giving "claim" the broadest possible definition and defining "debt" in terms of a "claim," Congress also sought to give the term "debt" its broadest possible scope. Thus, the congressional reports accompanying [section 101(11)] stated that the concepts of debt and claim were "coextensive: a creditor has a 'claim' against a debtor; the debtor owes a 'debt' to the creditor."

Id. at 36 (quoting 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5809).

80 *Id.* at 36. The court concluded:

> [W]e see no support . . . 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. We think the interpretation that more faithfully reflects Congress's intent is the one we adopt here: that any right to the payment of restitution is a claim within the meaning of the Code; and that if any person or entity has a right to receive a payment of restitution from the bankrupt debtor, the obligor has a debt within the meaning of the Code.

Id.

81 *Id.* at 39-41. The court denied that § 523(a)(7) would exclude criminal restitution from discharge. Although the court admitted that Robinson's sentence of restitution was clearly a "penalty" "payable to and for the benefit of a governmental unit," 11 U.S.C. § 523(a)(7), it found that the sentence was compensatory and thus not to be excluded:

> [A] debt that has compensation for actual pecuniary loss as at least one of its purposes is not, to the extent that it does not exceed the amount of the loss, excepted from discharge

In *Kelly v. Robinson*,[82] the Supreme Court reversed the decision of the Second Circuit, holding that criminal restitution is excluded from discharge by section 523(a)(7) of the Bankruptcy Code.[83] The Court began its analysis with an examination of the treatment of state criminal sentences under the former Bankruptcy Act,[84] concluding that "Congress enacted the Code . . . against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity."[85] The Court also noted its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."[86] In addition, the Court expressed concern over the practical effects of the Second Circuit's determination that criminal restitution is a "debt" for Bankruptcy Code purposes.[87]

Notwithstanding its many criticisms of the appellate court's determination that restitution is a "debt," the Court declined to base its holding on a definition-of-debt analysis.[88] Instead, the Court found that criminal restitution fell within the specific exception of Chapter 7 discharge for fines, penalties and forfeitures.[89] In confining its analysis to the specific exceptions to Chapter 7 discharge, the Court limited its holding to the dischargeability of criminal restitution in Chapter 7.[90] As Justice Marshall pointed out in his dissent, "[t]he Court's solution only postpones the problem: its holding that the restitution obligation is nondischargeable under section 523(a)(7) leaves open the possibility that such obliga-

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by § 523(a)(7). Given the facts that the Connecticut statutory scheme allows the criminal restitution obligation to be fixed with reference to "the loss or damage caused (by the offense)," that the order here fixed Robinson's debt at precisely the amount she had wrongfully received . . . we conclude that Robinson's debt cannot be classified as one that is "not compensation for actual pecuniary loss."

Id. at 40-41.

82 479 U.S. 36 (1986).

83 *Id.* at 50-52.

84 *Id.* at 44.

85 *Id.* at 46. *But see* Ballam, *supra* note 47, at 122.

86 479 U.S. at 47.

87 *Id.* at 48-49. The Court worried that to hold criminal restitution subject to bankruptcy discharge would "create uncertainties and impose undue burdens on state officials. In some cases it would require state prosecutors to defend particular state criminal judgments before federal bankruptcy courts." *Id.* at 48. In addition, such a result "would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Id.* at 49.

88 *See id.* at 50, where Justice Powell wrote for the Court:

> In light of the established state of the law—that bankruptcy courts could not discharge criminal judgments—we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of § 101(4). But we need not address that question in this case, because we hold § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

Id. (citation omitted).

89 *See* 11 U.S.C. § 523(a)(7), which states that debts are dischargeable:

> to the extent 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.

Id.

90 The more expansive discharge allowed under Chapter 13 of the Bankruptcy Code is not limited by the exception to discharge upon which the Court based its decision in *Robinson*. *See* 11 U.S.C. §§ 1328(a). *See also infra* note 95 and accompanying text.

tions will be dischargeable under Chapter 13."[91] The issue is still very much alive in Chapter 13 cases because, in confining its analysis to the specific exception to discharge, the Court *sub silentio* accepted that criminal restitution fell within the Bankruptcy Code's definition of debt.[92] The Court's holding created even greater confusion among courts and commentators.[93] Much of this confusion is manifested in cases involving criminal restitution under Chapter 13.

2. Criminal Restitution in Bankruptcy After *Kelly v. Robinson*

Because the Court in *Kelly v. Robinson* limited its holding to Chapter 7 discharge attempts,[94] the issue of the dischargeability of criminal restitution remains alive in Chapter 13.[95] Since *Robinson*, there have been many cases involving attempts by Chapter 13 debtors to discharge sentences of criminal restitution.[96] In deciding the issue in the Chapter 13 discharge context, many courts have concluded that *Robinson* is not applicable to Chapter 13 cases.[97] In reaching this conclusion, Courts have replicated the debate which surrounded the dischargeability of restitution in Chapter 7.

In *In re Heincy*,[98] for example, a Bankruptcy Appellate Panel of the Ninth Circuit held that certain criminal restitution sentences are dischargeable in Chapter 13.[99] The California statute under which the restitution order was imposed in that case stated that "[a] restitution fine shall be deemed a debt for the purposes of [California] Government Code, excepting any amounts the defendant has paid to the victim as a result of the crime."[100] Based on that language, and a belief that to alter the broad interpretation of "debt" and "claim" in the Bankruptcy Code

91 479 U.S. at 59 n.6 (Marshall, J., dissenting). Justice Marshall would have affirmed "the judgment and permit[ted] Congress, if it were so inclined, to amend the Bankruptcy Code specifically to make criminal restitution obligations nondischargeable." *Id.* at 58-59.

92 Section 523 excludes debts which would otherwise be dischargeable from discharge. Before § 523(a)(7) would enter the analysis, therefore, a court must take an explicit or implicit step finding that criminal restitution is a debt.

93 *See, e.g.*, cases discussed *infra* notes 94-125 and accompanying text. *See also* Ballam, *supra* note 47; and Hennigan, *Criminal Restitution and Bankruptcy Law in the Federal System*, 19 CONN. L. REV. 89 (1986).

94 *See supra* notes 83-85 and accompanying text.

95 *See infra* notes 96, 120. Chapter 13 discharge is more expansive than that afforded by Chapter 7. Section 1328(a) incorporates only one of the § 523(a) exclusions in Chapter 13 discharge. *See* 11 U.S.C. § 1328(a)(2). *But cf.* 11 U.S.C. § 1328(c)(2), where all the § 523(a) exclusions apply under special circumstances.

96 *See, e.g., In re* Heincy, 78 Bankr. 246 (Bankr. 9th Cir. 1987); *In re* Kohr, 82 Bankr. 706 (Bankr. M.D. Pa. 1988); Davenport v. Pennsylvania Dep't of Public Welfare (*In re* Davenport), 89 Bankr. 428 (E.D. Pa. 1988); Penn. Dep't of Public Welfare v. Johnson-Allen (*In re* Johnson-Allen), 88 Bankr. 659 (E.D. Pa. 1988); Becker v. Sacramento County (*In re* Hackney), 83 Bankr. 20 (Bankr. N.D. Ca. 1988).

97 *See, e.g., In re* Heincy, 78 Bankr. at 249 (holding "that *Kelly v. Robinson* does not extend to a Chapter 13 proceeding"); and *In re* Cullens, 77 Bankr. 825 (Bankr. D. Col. 1987) (*Robinson* not determinative of Chapter 13 cases). *See also In re* Johnson-Allen, 871 F.2d 421 (3d Cir. 1989).

98 78 Bankr. 246 (Bankr. 9th Cir. 1987).

99 *Id.* at 249. In determining what criminal restitution sentences could be discharged in Chapter 13, the court stated that "[t]he wording of the restitution statute has an effect on whether the restitution order creates a 'right to payment.' " *Id.* at 248 (relying on Marshall's dissent in *Robinson*, 479 U.S. at 36 n.4).

100 78 Bankr. at 248.

would require legislative guidance, the court deferred to Congress.[101] In effect, *Kelly v. Robinson* had an impact on the court's decision in *Heincy*.[102]

In *In re Cancel*,[103] the Bankruptcy Court considered *Robinson* and saw "no reason why the same result of nondischargeability should not obtain in the present chapter 13 proceeding [*i.e.*,] that a criminal restitution obligation is not a 'debt' within the meaning of the Code."[104] The Bankruptcy Court distinguished criminal restitution from other debts by looking to the nature of each.[105] On appeal,[106] however, the District Court rejected the holding of the Bankruptcy Court,[107] relying instead on the Second Circuit opinion in *In re Robinson*.[108] Because the Supreme Court declined to rule on the question of whether criminal restitution is a "debt,"[109] the District Court in *Cancel* concluded that the holding of the Second Circuit was still binding precedent.[110]

Other courts, however, have followed the spirit of *Robinson* in the Chapter 13 context.[111] In *In re Kohr*,[112] for example, the court concluded

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101 *Id.* The court stated:

> Very strong evidence of explicit language from the legislative history is necessary to overcome the plain meaning naturally to be drawn from the language of a statute . . . . On their face the definitions of "claim" and "debt" . . . encompass a restitution payment, and there is no legislative history which would suggest exclusion of restitution payments from these definitions.

Id. The court was unwilling to consider the fundamental policies and goals embodied by bankruptcy law as against criminal sentencing.

102 The court in *Heincy* stated:

> We recognize that the result, based upon *Kelly v. Robinson*, would be different in a Chapter 7, an individual Chapter 11, or a Chapter 12 bankruptcy case because § 523(a)(7) would apply in these cases to a debt of restitution. However, we hold that *Kelly v. Robinson* does not extend to a Chapter 13 proceeding.

78 Bankr. at 249.

103 82 Bankr. 674 (Bankr. N.D.N.Y.), *rev'd* 85 Bankr 677 (N.D.N.Y. 1988); *see infra* note 107.

104 82 Bankr. at 676.

105 *See id.* The court also compared the functions of bankruptcy courts and criminal courts:

> [T]his court does not agree that the 'fresh start' concept is violated by holding that criminal restitution payments are not embraced by discharge. The bankruptcy and criminal courts are dissimilar in nature and function. It should be noted that in carrying out a dual function to punish as well as rehabilitate its offenders, the criminal court . . . determines the amount of restitution to be paid with reference to what it deems the defendant can afford to pay . . . . It is, therefore, uniquely distinct from a civil money judgment which is imposed with reference to the law of damages.

Id.

106 Cancel v. City of Schenectady (*In re* Cancel), 85 Bankr. 677 (N.D.N.Y.), *rev'g* 82 Bankr. 674 (Bankr. N.D.N.Y. 1988).

107 *See* 85 Bankr. at 678. The District Court reversed the Bankruptcy Court, not based on the merits of the lower court's argument, but rather on the weight of prior precedent expressed by the Second Circuit.

108 *In re* Robinson, 776 F.2d 30, 33-39 (2d Cir. 1985), *rev'd on other grounds, sub nom.* Kelly v. Robinson, 479 U.S. 36 (1986).

109 *See supra* notes 83-85 and accompanying text.

110 *See* 85 Bankr. at 679, where the court stated:

> While the Supreme Court expressed "serious doubts" about the Second Circuit's conclusion that restitution constituted a debt within the meaning of the Code, it declined to reverse on that ground. Accordingly, that portion of the Second Circuit opinion in *Robinson* which concluded that restitution is a debt is still good law in this Circuit. No matter how well reasoned [the bankruptcy court's] decision is, the court is constrained to reverse it on the authority of *In re Robinson*.

Id.

111 *See, e.g.*, *In re* Norman, 95 Bankr. 771 (Bankr. D. Colo. 1989); *In re* Ferris, 93 Bankr. 729 (Bankr. D. Colo. 1988); *In re* Johnson, 32 Bankr. 614 (Bankr. D. Colo. 1983).

that criminal restitution could not be dischargeable in Chapter 13 cases.[113] The court based this conclusion on a definition-of-debt analysis utilyzing the *Robinson* Court's references to deference to state criminal law[114] and federalism.[115] In *In re Davenport*,[116] the court concluded that criminal restitution could not be discharged in Chapter 13 cases.[117] The court in *Davenport* also placed great weight on "important policies of federalism."[118] In addition to federalism concerns, the court looked to the possibility of chilling effects on state criminal sentencing discretion.[119] On appeal, however, the Court of Appeals for the Third Circuit reversed the District Court's holding, choosing instead to adopt the reasoning employed by the Ninth Circuit in *In re Heincy*.[120]

The scope of the conflict between criminal restitution and the Bankruptcy Code extends beyond discharge.[121] In *In re Hackeny*,[122] for example, the court determined that a debtor-creditor relationship existed between the debtor and the county receiving the restitution payments.[123]

112 82 Bankr. 706 (M.D. Pa. 1988).

113 *Id.* at 712.

114 *Id.* at 709.

115 *Id.* at 710-11. The court criticized *Heincy* for:

> fail[ing] to address the federalism rationale which was held to be paramount by the U.S. Supreme Court in *Kelly*. The principle of federalism as it concerns insulation of "the results of state criminal proceedings" from a bankruptcy discharge should be no less applicable in Chapter 13 than it is in Chapter 7.

Id. at 711 (quoting *In re Heincy*, 78 Bankr. at 251).

116 Davenport v. Commonwealth of Pennsylvania, Dep't of Public Welfare (*In re* Davenport), 89 Bankr. 428 (E.D. Pa. 1988), *rev'd sub nom. In re* Johnson-Allen, 871 F.2d 421 (3d Cir. 1989).

117 *Id.* at 429.

118 *Id.* The court looked to the nature of the criminal restitution sentence to determine its place and importance in the federalism scheme:

> Allowing a federal bankruptcy court to discharge a financial obligation imposed by a state court as an alternative punishment for crime would conflict with important policies of federalism . . . . The decision to impose a particular punishment involves a weighing of various goals of the state criminal justice system . . . . Sometimes the particular punishment (*e.g.*, restitution payments to the victim of the crime) will have a concommitant private benefit for the victim of the crime. Despite this private benefit, criminal restitution benefits, unlike civil obligations, involve vindication of fundamental public interests.

Id. (citations omitted). *See also infra* notes 215-224 and accompanying text.

119 The court noted:

> If a criminal restitution obligation can be discharged by filing a Chapter 13 petition, courts would be reluctant to impose restitution as a criminal penalty and might opt for periods of incarceration instead. It is essential that state courts are able to impose penal sanctions other than incarceration without fear that a federal court will render this punishment nugatory after the fact.

Id. at 430. *See also infra* notes 199-201 and accompanying text.

120 *In re* Johnson-Allen, et. al., 871 F.2d 421, 423 (3d Cir. 1989), *rev'g In re* Davenport, 89 Bankr. 428 (E.D. Pa. 1988). In addition to adopting the reasoning of *Heincy*, the Third Circuit placed weight on the Second Circuit's holding in *In re* Robinson, 776 F.2d 30 (2d Cir. 1985), and on the Supreme Court's refusal to base its decision in *Kelly v. Robinson* on a definition-of-debt analysis. *See Johnson-Allen*, 871 F.2d at 425-26. Thus, the Courts of Appeal for the Second, Third and Ninth Circuits have held sentences of criminal restitution dischargeable in Chapter 13 of the Bankruptcy Code.

121 Once a court defines debt to include criminal restitution, then the other processes of the Bankruptcy Code will also interact with the restitutive sentence.

122 83 Bankr. 20 (Bankr. N.D. Cal. 1988).

123 *Id.* at 21-22. The holding in *Hackney* follows directly from the holding in *In re Heincy*, *supra* note 96. The court in *Hackney* stated:

> [T]he Court need not decide the question which the Supreme Court declined to decide, i.e., whether a restitution obligation is a "debt", because in *In re Heincy*, [*supra* note 96], the Ninth Circuit Bankruptcy Appellate Panel expressly held that a restitution obligation is a

This determination had important consequences in terms of the Bankruptcy Code's provisions on voidable preferences.[124] The court in *Hackney* downplayed any effect on the state criminal justice system caused by compelling the county to surrender restitution payments made within the preference period.[125]

In viewing cases decided in the aftermath of *Robinson*, the relation of criminal restitution to bankruptcy law is no less in need of resolution than before the Supreme Court undertook to resolve the conflict. Courts need to employ a clear, consistent rationale in order to reach a uniform and fundamentally sound determination of the proper scope of the Bankruptcy Code as it interacts with areas of state substantive law like criminal sentencing. This rationale must be based on a recognition of the fundamental goals and policies of the law involved when the provisions of the Bankruptcy Code do not clearly preempt the state law.

II. Returning to Fundamentals

When a conflict arises between the provisions of the Bankruptcy Code and state law, in the absence of express statutory provisions directly addressing the conflict,[126] courts should begin their analysis with a contextual examination of the language of the Bankruptcy Code and its legislative history.[127] In the conflict over the dischargeability of criminal

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"debt" within the meaning of Bankruptcy Code Section 101(11) (and thus, the remaining provisions of the Bankruptcy Code, including Section 547(a)(2)).

83 Bankr. at 23. *See also supra* notes 98-102 and accompanying text.

124 Section 547(b)(1) of the Bankruptcy Code provides:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the *debtor* in the property—
>
> (1) to or for the benefit of a *creditor;*

11 U.S.C. § 547(b)(1) (emphasis added). Once it is determined that a debtor-creditor relationship exists between the state and the restitutioner, the trustee in bankruptcy may avoid any payments made by the restitutioner to the state within the 90-day preference period. Thus, the bankruptcy court can actually order a state, and perhaps even the victim, to return any payments so made.

125 *Id.* at 24. The court noted:

> The County argues that if the transfer at issue is avoided, such avoidance would constitute a modification of a criminal sentence imposed by the State Court. It is true that a judgment which compels the County to surrender a preference may deprive it of the benefit which the State Court intended it to receive . . . . It is also true, however, that although California's restitution provisions may serve both a compensatory and punitive function, the County focused on the compensatory aspect by seeking to enforce its right to receive restitution through a normal civil collection proceeding and not through the criminal proceeding.

Id. (footnote omitted). Thus, instead of looking to the nature of the criminal sentence involved, the court chose to confine itself to the method of collection utilized by the victim and the state.

126 When there are express provisions of the Bankruptcy Code which directly address potential conflicts with state law, the provisions of the Bankruptcy Code clearly must prevail. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971), discussed *infra* notes 219-223 and accompanying text. *See also, e.g.*, § 523(a)(8) of the Bankruptcy Code, which excepts from Chapter 7 discharge any debt:

> (8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution . . . .

11 U.S.C. § 523(a)(8). Thus, state and federal guaranteed student loans are not dischargeable in Chapter 7, while they *are* dischargeable in Chapter 13, regardless of what the state statute authorizing the loans may read.

127 On the need to extend the interpretation of statutory provisions beyond the "plain meaning" and face of the statute to syntactical and contextual considerations, see generally J. CUERTO-RUA, JUDICAL METHODS OF INTERPRETATION OF THE LAW (1981), where the author states:

restitution, the language of the Bankruptcy Code provides no help.[128] When one examines the legislative history of the Bankruptcy Code, the ambiguity over the dischargeability of criminal restitution becomes even greater.[129] Thus, to resolve the conflict, courts should employ a careful analysis of the "first principles" and fundamental values which the conflicting areas of law represent.[130]

One reason for extending the analysis to the "first principles" is that federal bankruptcy law flows from the Bankruptcy Clause of the Constitution.[131] As with any grant of power to Congress, the bankruptcy power

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> Utterances such as those commonly found in written legal materials . . . very seldom constitute by themselves a complete judicial norm—a rule of law. They are only a part of that norm. An appropriate understanding of an utterance demands linkage between that utterance and the complete rule of law. The complete rule of law is itself only part of a larger linguistic-normative context in which juridical utterances ought to be interpreted.

Id. at 106. Thus, the scope of the Bankruptcy Code should not be determined in the vacuum of the statutory text. Reference must also be had to the foundations of bankruptcy law which provide a context, as well as the background provided by all other jurisprudential rules beyond bankruptcy law, such as the jurisprudential foundations of state criminal law. *See also* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); J. HURST, DEALING WITH STATUTES (1981); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

128 The only area of the Bankruptcy Code which explicitly deals with the relation of the Bankruptcy Code to criminal law is the exceptions to the automatic stay. *See* 11 U.S.C. § 362(b)(1). *See also infra* note 237. The definitions of "debt" and "claim," 11 U.S.C. §§ 101(4),(11), are broad on their face, with no limiting language. *See supra* note 28. In addition, the exceptions to discharge never refer to criminal sentences. *See* 11 U.S.C. § 523(a).

129 As discussed earlier, the Bankruptcy Code's definitions of "debt" and "claim" act as the entry point into the statute's operations. *See supra* notes 28, 57-58. The House Report's discussion of the definition of "claim" expressed a legislative intent to enlarge the availability of bankruptcy relief:

> The effect of the definition [of "claim"] is a significant departure from present law . . . . The term is defined in the debtor rehabilitation chapters of present law far more broadly [than under the former Bankruptcy Act]. The definition in [11 U.S.C. § 101(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. & ADMIN. NEWS 5963, 6266. Despite the sweeping language of the House Report, there is important limiting language at the end of the passage. The House Report limits its definition of "claim" to "permit[] the broadest *possible* relief in the bankruptcy court." *Id.* (emphasis added). What is "possible" in the bankruptcy court is defined by the scope of the Bankruptcy Clause and hence the nature of bankruptcy law generally. There is a need to resort to the "first principles" because the legislative history of the Bankruptcy Code does not define what is "possible." Thus, the ambiguity inherent in the Bankruptcy Code's definition of "claim" prevents resolution of the conflict merely through a reading of the language and legislative history of the Bankruptcy Code. Indeed, it is the circular reasoning inherent in that definition which necessitates recourse to the "first principles" of bankruptcy law.

130 *See* T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 2-3 (1986) [hereinafter JACKSON, LOGIC AND LIMITS], where Professor Jackson states:

> In analyzing bankruptcy law, as with any other body of law, it helps to start by identifying *first principles*. Those principles can then be developed by defining their potential operation in the existing social, economic, and legal world to identify precisely what bankruptcy law should encompass, how it can accomplish its goals, and the constraints on its ability to do so. That normative view of bankruptcy law can then be contrasted with the Bankruptcy Code as enacted to see whether and to what extent the existing regime follows the path the principles suggest is the proper one.

Id. (footnote omitted) (emphasis in original).

See also 1 W. BLACKSTONE, COMMENTARIES 41 (1832), which states that "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it." *Id.* (emphasis in original).

131 *See* U.S. CONST. art. I, § 8 cl. 4, which grants Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

must have some limits. Those limits are set by the very nature of bankruptcy law and its position in jurisprudence historically. By defining the nature and scope of bankruptcy law, certain limits to the bankruptcy power of Congress emerge. Delineating the scope of the Bankruptcy Clause and bankruptcy law in general will help define the proper scope of the Bankruptcy Code.[132] Judicial definition of the scope of the Bankruptcy Code has often determined what independent areas of law must fall by the wayside. Such definition of scope was crucial when the Bankruptcy Code conflicted with state subordination powers,[133] state family law,[134] state and federal environmental law,[135] state property law,[136] in-

132 That is not to say that limitations found in the Bankruptcy Clause would be absolute; rather, when Congress purports to act pursuant to the bankruptcy power, it must abide by those limits. Congress may well have other powers that would support such action outside the scope of the Bankruptcy Clause. Nevertheless, when Congress purports to act pursuant to the Bankruptcy Clause, such legislation should be interpreted as if intended by Congress to be within the limits of the proper scope of the Bankruptcy Clause.

133 *See, e.g.*, Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953), which examines conflicts between the equity powers of bankruptcy courts under the Bankruptcy Act of 1898 and state-created rights in relation to questions of disallowance and subordination. The author states that "[b]eyond the apparent purpose of the Bankruptcy Act to provide a system for the effectuation of what are for the most part state-created rights, the Act provides little guidance as to the recognition to be accorded state law." *Id.* at 1035. Hill goes on to cite "cases where substantive rights asserted under state law were denied or modified in the name of 'general law' or 'general equitable principles.' " *Id.*; for those cases, see *id.* nn.93-94.

134 *See* Note, *Pension Awards in Divorce and Bankruptcy*, 88 COLUM. L. REV. 194 (1988) (examining the dischargeability of property awards in a divorce such as pension or retirement benefits); *see also* White, *Strange Bedfellows: The Uneasy Alliance Between Bankruptcy and Family Law*, 17 N.M.L. REV. 1 (1987); and Note, *Bankruptcy Discharge of Texas Marital Property Awards under Section 523(a)(5) of the Bankruptcy Code: Rethinking* In re Nunnally, 41 S.W.L.J. 869 (1987).

See also, e.g., In re Nunnally, 506 F.2d 1024 (5th Cir. 1975); Matter of Benich, 811 F.2d 943 (5th Cir. 1987); and *In re* Meadows, 75 Bankr. 695 (Bankr. N.D. Tex. 1987) (involving the nondischargeability of attorneys' fees awarded with an award of child support).

135 State and federal environmental protection statutes have conflicted with the operations of the bankruptcy trustee's abandonment powers under 11 U.S.C. § 554, and the trustee's avoiding powers under 11 U.S.C. §§ 545 & 546. State and federal environmental statutes contain provisions for environmental liens on contaminated property which can be enforceable against intervening bona fide purchasers. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1982 & Supp. IV 1988); *see also* Epling, *Environmental Liens in Bankruptcy*, 44 BUS. LAWYER 85 (1988), where the author surveys the interaction of state and federal environmental "superliens" with the powers of the trustee under the Bankruptcy Code. The U.S. Supreme Court has dealt with the relation of state environmental liens to the Bankruptcy Code in Ohio v. Kovacs, 469 U.S. 274 (1985), and Midlantic National Bank v. New Jersey Dep't of Environmental Protection, 474 U.S. 494 (1986). In *Midlantic*, the Court stated: "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety." 474 U.S. at 502. Notwithstanding the Supreme Court pronouncements on the relation of state and federal environmental law to bankruptcy law, there remains much debate among commentators. *See generally* Epling, *supra*; Shanker, *A Bankruptcy Superfund for Some Super Creditors — From Ohio to Midlantic and Beyond*, 61 AM. BANKR. L.J. 185 (1987); Comment, Ohio v. Kovacs: *The Conflict Between Federal Bankruptcy Laws and State Environmental Regulations*, 34 AM. U.L. REV. 1263 (1987); Comment, Ohio v. Kovacs, *and* Penn Terra: *The Bankruptcy Code and State Environmental Law — Perceived Conflicts and Options for the Trustee and State Environmental Agencies*, 7 J.L. & COM. 65 (1987).

136 Trustees in bankruptcy have sought to have the bankruptcy court avoid mortgage foreclosure sales as constructively fraudulent transfers as defined in section 548 of the Bankruptcy Code. Foreclosures are governed by state property law and have traditionally been considered outside the definition of a transfer in bankruptcy law. Recently, however, courts found such foreclosures to constitute transfers within section 548. Consequently, the trustee may avoid the foreclosure governed by state law as a constructively fraudulent transfer when made for insufficient consideration. There is a split among the Circuits as to the applicability of section 548 to such foreclosure sales. *See, e.g.*, Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980) (holding that a non-

surance law,[137] labor law,[138] and other areas of state law.[139] Courts must arrive at a uniform and coherent methodology for delineating the proper

collusive, regularly conducted foreclosure sale [*i.e.*, in compliance with state law] is a fraudulent transfer under section 67(d) of the former Bankruptcy Act if not made for "fair consideration"); *see also* Matter of Bundles, 856 F.2d 815 (7th Cir. 1988) (following *Durrett*, *supra*); *but see In re* Madrid, 21 Bankr. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984) (declining to follow *Durrett*). *See also* Alden, Gross & Borowitz, *Real Property Foreclosure as Fraudulent Conveyance: Proposals for Solving the Durrett Problem*, 38 BUS. LAWYER 1605 (1983); and Zinman, Houle & Weiss, *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 BUS. LAWYER 977 (1984).

The conflict with state common law and statutory provisions governing foreclosure sales is analogous to the conflict over the dischargeability of criminal restitution. Against the backdrop of non-interference with state foreclosure proceedings, bankruptcy courts have expanded the definition of a transfer under the Bankruptcy Code to encompass foreclosure sales. Similarly, against a backdrop of non-interference with state criminal law, bankruptcy courts have expanded the scope of the definition of debt to encompass sentences of criminal restitution. Just as with the conflict over attempts to discharge criminal restitution, bankruptcy courts have not consulted the underlying policies when determining whether a foreclosure sale is a transfer under the Bankruptcy Code. In addition, courts will often rest on tortured legal reasoning in order to avoid ruling on the conflict at all. *See, e.g.*, Butler v. Lomas and Nettleton Co., 862 F.2d 1015 (3d Cir. 1988), where the court reasoned that the technicalities of the sheriff's sale involved placed any transfer that could have taken place outside of the one-year preference period. *See id.* at 1019.

137 Many bankruptcy courts, broadly construing the Bankruptcy Code's definition of the property of the debtor's estate, have determined that a debtor's liability insurance policies fall within that definition and are to be treated as property of the estate. *See, e.g.*, A.H. Robbins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). Some of the consequences of this conclusion may be seen in MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988). MacArthur was a distributor of Manville's asbestos products, and a coinsured under some of Manville's insurance policies by "vendor endorsements" contained in the policies. The Bankruptcy Court ordered an automatic stay under the Bankruptcy Code to enjoin claims by asbestos victims against Manville's insurers. In addition, the court approved a settlement between asbestos-injured claimants and the insurers. MacArthur argued that "the injunctive orders constitute[d] a *de facto* discharge in bankruptcy of non-debtor parties not entitled to the protection of Chapter 11." 837 F.2d at 91. By expanding the definition of property of the estate under the Bankruptcy Code, the court exercised jurisdiction over a non-debtor's contractual rights which were separate from those of the debtor in bankruptcy. It is unclear just how expansive the definition of property of the estate will prove to be in the future. In *MacArthur*, the scope was broad enough to allow jurisdiction over the contractual rights of a non-debtor coinsured which would normally be governed and defined by state law. For a discussion of the expanding definition of property in the Bankruptcy Code, see generally Dunham, *Pensions and Other Funds in Individual Bankruptcy Cases*, 4 BANKR. DEV. J. 293 (1987).

138 Section 365(a) of the Bankruptcy Code provides that the trustee, under certain restrictions, and subject to the bankruptcy court's approval, "may assume or reject any executory contract" of the debtor. Collective-bargaining agreements, included in the term "executory contract," have been set aside by trustees in bankruptcy with the approval of the court. The conflict with federal labor law arose when the National Labor Relations Board attempted to hold the trustee accountable under the National Labor Relations Act for unilaterally changing the terms of collective-bargaining agreements. *See* National Labor Relations Act, 29 U.S.C. § 158(a) (1973 & Supp. IV 1988).

In National Labor Relations Bd. v. Bildisco & Bildisco, 465 U.S. 513 (1984), the Supreme Court resolved the conflict by holding that:

> [T]he language "executory contract" in § 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a) (1982 ed.), includes within it collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon appropriate showing. We also decide that a debtor-in-possession does not commit unfair labor practice when, after filing a bankruptcy petition but before court-approved rejection of the collective-bargaining agreement, it unilaterally modifies or terminates one or more provisions of the agreement.

Id. at 516-17.

See also, Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); Miller, *Chapter 11 of the Bankruptcy Act and Collective Bargaining Agreements: The Rejection of Collective Bargaining Agreements Under the Bankruptcy Code — An Abuse or Proper Exercise of the Congressional Bankruptcy Power?*, 52 FORDHAM L. REV. 1120 (1984); and Wines, *The Long March to Bildisco and the 1984 Bankruptcy Amendments: Establishment of a Limited Right to Reject Collective Bargaining Agreements*, 20 GONZ. L. REV. 187 (1984).

scope of the Bankruptcy Code as it interacts with these other areas of state and federal law.

A. *Foundations of Bankruptcy Law and Criminal Restitution*

Where, as here, the statutory language and legislative history of the Bankruptcy Code do not resolve a conflict with another area of law, one can arrive at a consistent and predictable solution by first defining the "first principles" of the area of bankruptcy law involved, and then by relating these to the "first principles" of the independent area of law which the Bankruptcy Code purports to supersede.

1. "First Principles" of Bankruptcy Law

The "first principles" of bankruptcy law are the product of a long evolution which began long before a mature federal law of bankruptcy was developed.[140] One cornerstone of bankruptcy law since its origin in Roman law has been that it is ultimately debt-collection law.[141] Over time however, a dual purpose has developed. The dual goals of bankruptcy law today are to provide a fair and final distribution and settlement of the debtor's assets among his creditors,[142] and to provide individual debtors with a "fresh start" financially.[143] Debtor relief aimed at providing a "fresh start" has become increasingly prominent in bank-

139 *See, e.g.*, Note, *The Bankruptcy Trustee's Power to Waive the Attorney-Client Privilege of a Corporate Debtor: A New Approach*, 2 BANKR. DEV. J. 221 (1985).

140 *See generally* 1 COLLIER ON BANKRUPTCY ¶¶ 0.01-0.07 (14th ed. 1974), where the author reviews the history and development of bankruptcy law in America from the Articles of Confederation through the Bankruptcy Act amendments of 1938. The lack of uniformity among state bankruptcy laws early on shows that:

> [t]he main inadequacy of the state insolvency laws . . . was the inability to give a discharge which would be effective in other states.
>
> It was inevitable that Congress would be called upon to exercise its legislative power over the subject of bankruptcies. An expanding commercial union would require it; financial stringency would accelerate the demand. This latter element has been the culminating factor in producing the Acts of 1800, 1941, 1867 and 1898.

Id. at ¶ 0.03, p. 7. The first long-term attempt to establish a uniform and permanent federal law of bankruptcy came in the Bankruptcy Act of 1898, 30 Stat. 544, *as amended by* Bankruptcy Act amendments of 1938 (Chandler Act), 52 Stat. 840.

141 *See*, F. NOEL, A HISTORY OF THE BANKRUPTCY LAW 10-32 (1919), where the author surveys the history of bankruptcy law beginning in ancient Greek and Roman law and going through the provision in the U.S. Constitution granting Congress the bankruptcy power. *Cf.* D. EARL, THE BANKRUPTIAN$ § 43-53 (1966) (tracing the history of bankruptcy law back to the Code of Hammurabi and the Bible).

142 *See* D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (1971), where the authors observe:

> The bankruptcy process was established to resolve in a fair and orderly manner the conflicts in interest that arise among the creditors of a debtor who cannot pay his debts. Other legal remedies are available that enable creditors to attempt to recover their claims from the property of the debtor; but if that remedy is too meager to pay all claims in full, one creditor's success in satisfying his claim causes loss to another creditor.

Id. at 9 (footnote omitted). The authors conclude that "[t]he object of the bankruptcy law is to ensure that all creditors are treated fairly." *Id.* at 9-10.

143 *See id.* at 10, where the authors note the shift in emphasis in bankruptcy law from primarily one of seeking fair settlement and distribution among creditors, toward a concurrent emphasis on relief of the debtor:

> For centuries bankruptcy law served [the objective of seeking a fair distribution] above all other [objectives]. At the end of the nineteenth century, however, another object became equally important in the United States. The bankruptcy process became also a

ruptcy law. The increased reliance on this "first principle" of bankruptcy law is partly due to the rapid rise of consumer debt in this century.[144] In response to the increase in consumer debt and the consequent incidence of consumer insolvency,[145] Congress amended the former Bankruptcy Act[146] in order to give "honest but unfortunate" individual debtors a "fresh start" financially.[147] Although the concept is a recent addition to bankruptcy law, it has become an overriding goal for many courts and commentators.[148]

The scope of "fresh start" embodied in the Bankruptcy Code[149] greatly expanded the availability of a "fresh start" under the provisions of the former Bankruptcy Act.[150] The policy is primarily embodied in the discharge,[151] automatic stay,[152] and permanent injunction[153] provisions of the Bankruptcy Code.[154] The goal of providing individual debtors with a fresh start has been at the core of arguments in favor of discharg-

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method of granting relief to the honest but unfortunate debtor, who through ill luck or bad judgment was burdened with more debt than he could afford.

Id.

144 *See, e.g., id.* at 18-40, where Professors Stanley and Girth survey the interrelation of the increase of personal bankruptcies, personal debt, and debt-income ratio between 1945 and 1970.

145 *See supra* note 53.

146 The House Report concerning the implementation of the Bankruptcy Code stated:

> A major problem under current bankruptcy law is the inadequacy of relief that the Bankruptcy Act provides for consumer debtors. . . . 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. & ADMIN. NEWS 5963, 5965-66.

147 *See* Local Loan Co. v. Hunt, 292 U.S. 234 (1934), where the Court first enunciated the policy of debtor relief as a primary purpose of bankruptcy law:

> One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." . . . This purpose of the act has been again and again emphasized by the courts as being a public as well as private interest, in that it gives the honest but unfortunate debtor who surrenders for distribution any property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. at 244 (quoting Williams v. U.S. Fidelity Co., 236 U.S. 549, 554-55 (1915)) (emphasis in original).

148 *See, e.g.*, Ballam, *supra* note 47; Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C.L. REV. 723 (1980).

149 See the discharge provisions of the Bankruptcy Code, *as codified at* 11 U.S.C. §§ 727 and 1328 (1982 & Supp. IV 1988).

150 "Fresh start" policy was embodied in the discharge provisions of the former Bankruptcy Act. *See* §§ 14-17 of the Bankruptcy Act, 30 Stat. 550-51 (1898), *as amended by* §§ 14-17 of the Bankruptcy Act amendments, 52 Stat. 850-51 (1938).

151 *See* 11 U.S.C. §§ 727 and 1328.

152 *See* 11 U.S.C. § 362.

153 *See supra* note 40.

154 Another manifestation of the "fresh start" concept may be found in provisions which exempt parts of the debtor's property from liquidation in Chapter 7, *see* 11 U.S.C. § 522, as well as in the provisions concerning "non-disposable income" in Chapter 13 plans which is protected from creditors in order to support debtors in their new life. *See, e.g.*, 11 U.S.C. § 1325(b). See also manifestations of "fresh start" policy in other areas of law, discussed *infra* notes 168-173 and accompanying text. In addition to "fresh start" policy, the policy of a fair and final distribution among creditors may also influence the proper scope of discharge. *See Kelly v. Robinson*, *supra* note 82, at 57-58 (Marshall, J., dissenting).

ing criminal restitution,[155] even though such arguments do not expressly state their reliance on the goal.[156] In considering whether discharging criminal restitution is an appropriate application of bankruptcy law, it is necessary to first consider the appropriate weight to be given "fresh start" as a goal in bankruptcy.

Although "fresh start" exists concurrently with the debt-collection and distribution function of bankruptcy law,[157] the two goals do not always coexist peacefully. The social and economic policy determinations represented in "fresh start" policy are distinct from those underlying the debt-collection function.[158] Despite the inherent tension between the two goals, they are necessarily interrelated and interdependent in bankruptcy law.[159] "Fresh start" as a goal is debtor-oriented,[160] while the goal of equitable distribution and settlement of assets and debts is creditor-oriented.[161] Congress' balance between debtor and creditor interests in bankruptcy appears in the discharge and automatic stay provisions of the Bankruptcy Code.[162] Thus, the Bankruptcy Code's provisions giving discharges to individual debtors embody the "fresh start" policy.[163]

155 Sentences of criminal restitution, if determined to survive discharge, would clearly impair to some extent the debtor's future financial life. By arguing in favor of discharging criminal restitution, one necessarily argues for an expanded scope of "fresh start." *Cf.* United States v. Soleto, 436 U.S. 268 (1978) (discussing relation of "fresh start" policy and non-dischargeability of certain taxes).

156 *See* cases discussed *supra* notes 56-57.

157 *See generally* JACKSON, LOGIC AND LIMITS, *supra* note 130, at 225-28. *See also* Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 976-83 (1981); Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1395-99 (1985).

158 *See* JACKSON, LOGIC AND LIMITS, *supra* note 130, at 226-28, where Professor Jackson observes:

> Because discharge policy historically has been embodied in bankruptcy law, we sometimes lose sight of the distinction between the law of discharge and the law relating to the creditor-oriented function of bankruptcy . . . . [M]ost of bankruptcy law is concerned not with defining a debtor's right of discharge but with providing a compulsory and collective forum for satisfying the claims of creditors. . . . The fresh-start policy is thus substantively unrelated to the creditor-oriented distributional rules that give bankruptcy law its general shape and complexity.

Id. at 226-27 (footnote omitted).

159 *See id.* After observing the substantive distinction between "fresh start" and the debt-collection goal of bankruptcy, Professor Jackson recognizes that:

> Nonetheless, the link between the two [goals] is not surprising. If an individual were allowed to demand discharge as long as he agreed to surrender certain assets, he would be likely to avail himself of that right only when his liabilities exceeded his assets. . . . Because bankruptcy's collective process achieves such a coordinated sharing [among creditors], it serves an appropriate function once the decision to discharge debts has been made. Nevertheless, the justifications for discharge do not relate to the concerns of the creditors.

Id. at 227 (footnote omitted). *See also* Weistart, *The Costs of Bankruptcy*, 41 LAW & CONTEMP. PROBS., Autumn 1977, at 107, 108-10.

160 *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1933). *See also* JACKSON, LOGIC AND LIMITS, *supra* note 130, at 223-52. The policy determinations in "fresh start" policy are debtor-oriented because they represent concern for the debtor's future, to the detriment of creditors.

161 *See* JACKSON, LOGIC AND LIMITS, *supra* note 130, at 226-27 (discussing the "creditor-oriented distributional rules that give bankruptcy law its general shape and complexity").

162 *See* 11 U.S.C. §§ 727, 1328, and 362. *But see* 11 U.S.C. § 523(a) (limiting the scope of "fresh start" policy in bankruptcy via exceptions to discharge).

163 *See supra* notes 149-150. On the judicial recognition of the importance of "fresh start" as a goal in bankruptcy law, see, *e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234 (1934); *see also* Lines v. Frederick, 400 U.S. 18, 20 (1970) (per curiam) (noting that the purpose of the Bankruptcy Act was to provide the debtor with a " 'new opportunity in life' " and a " 'clear field for future effort' " (quoting *Local Loan*, *supra*)). *See also* Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988) ("[a] primary purpose of bankruptcy law is to give honest debtors a fresh start 'unhampered by the pressure and discouragement of preexisting debt' " (quoting *Lines v. Frederick*, *supra*)); and U.S. Dep't of Health

The exceptions to discharge,[164] however, reflect a desire to protect creditors' interests.[165]

Although "fresh start" policy has been defended on a number of grounds,[166] it began in England merely as a device to entice debtors to fully disclose their assets in bankruptcy for distribution to creditors.[167] Inducement to full disclosure has since given way to considerations of allocation of risk,[168] contract impossibility,[169] insurance,[170]

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and Human Serv. v. Smith, 807 F.2d 122, 123 (8th Cir. 1986) ("[t]he bankruptcy laws embody a congressional policy to free an honest debtor from his financial burdens and thus to allow him to make an unencumbered fresh start"). The exceptions to discharge contained in the Bankruptcy Code, however, limit the breadth of this "fresh start." *See, e.g.*, Boyle v. Abilene Lumber, Inc. (*In re* Boyle), 819 F.2d 583, 587 (5th Cir. 1987) ("[t]he general policy of bankruptcy law favors allowing the debtor to discharge debts and to make a fresh start. This policy, however, is subject to exceptions for certain types of debts, including those arising from the debtor's malfeasance"(footnotes omitted)).

164 11 U.S.C. § 523(a).

165 The enumerated exceptions to discharge in § 523(a) of the Bankruptcy Code protect certain creditors with rights in certain types of debts by limiting the scope of discharge. The extent of this protection is substantially less in Chapter 13 than in Chapter 7, however. *See supra* note 95 and accompanying text.

166 *See infra* notes 168-173 and accompanying text.

167 *See* JACKSON, LOGIC AND LIMITS, *supra* note 130, at 226-27 n.4, where the author examines the historical perspective of discharge:

> [F]rom a historical perspective discharge is a relatively recent addition to bankruptcy law. . . . A statute passed in 1705 allowed merchants to be discharged of their debts, see 4 Anne, ch. 17, § 7 (1705), but the discharge was conceived more as a means to encourage merchants to disclose their assets to creditors (and thus to facilitate collection) than as a way to give individuals a fresh start.

Id.

168 *See, e.g.*, Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953 (1981), where Professor Eisenberg considers arguments in favor of bankruptcy discharge, and consequently "fresh start" policy. In considering the economics of discharge, he states:

> A discharge system provides a technique for allocating the risk of financial distress between a debtor and his creditors. . . .
>
> There are two factors to explore in deciding which party is the superior bearer of the risk of financial distress of bankruptcy. A party may be a better risk bearer because he is in a better position to prevent the risk from occurring. This factor would almost always weigh against a broadly available discharge. Debtors in general have greater control of their financial activities than any particular lender.

Id. at 981-82 (footnotes omitted). For the second factor in assessing proper allocation of risk as a justification of discharge, Eisenberg considers "which party to a contract is the superior insurer." *Id.* at 982. He concludes that the ability to insure against the financial failure of the debtor is not always on the creditor. *Id. See also* Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1399-1401 (1985).

169 Professor Eisenberg has analogized discharge, and hence "fresh start," to contract principles of impossibility. He compares the economic analysis which underlies impossibility to that which underlies bankruptcy discharge:

> Outside of bankruptcy, Professor Posner and others have offered an economic analysis of impossibility, an issue closely akin to that of discharge. Their analysis focuses on the event giving rise to the claim of impossibility and asks which party could have better insured against that event. To apply this analysis in bankruptcy, which can be viewed as a claim of impossibility with respect to all of one's obligations on the basis of general financial distress, one must then decide whether the debtor or a creditor is the superior insurer against that cause.

Eisenberg, *supra* note 168, at 982 (footnotes omitted).

170 This consideration rests on the question of which party would better be able to insure against the financial failure of the debtor. *See* Eisenberg, *supra* note 168, at 982; *see also* Jackson, *supra* note 168, at 1399-1400.

limited liability,[171] debtor rehabilitation,[172] and others.[173] All of the arguments support the conclusion that "fresh start" is a policy primarily geared toward *voluntary* "credit" relationships[174] in a credit-based econ-

171 *See* Jackson, *supra* note 168, at 1399-1401, where the author bases discharge and "fresh start" policy on a theory of limited liability for individuals which resembles limited liability in corporation law. Professor Jackson discusses two common justifications for limited liability of corporations:

> Discharge may be viewed as a form of limited liability for individuals—a legal construct that stems from the same desire, and serves the same purposes, as does limited liability for corporations. . . .
>
> Both of [the reasons making limited liability appropriate for corporations] could also support limited liability for individuals. [F]irst, the creditors of an individual, having gained experience through dealing with many debtors, may be more adept than the individual at monitoring his borrowing. . . . Moreover, [t]o the extent that individuals can invest their capital in . . . income-producing assets, they can further their desire to avoid risk by diversifying their holdings. Yet an individual's capital may consist largely of *human* capital . . . and this particular form of property cannot readily be invested in assets with differing risk characteristics.

Id. at 1400 (emphasis in original) (footnote omitted). Professor Jackson concludes that "like business associations that find the corporate form and its accompanying limited liability worth the increase in the cost of credit, individuals may also derive a net benefit from the limited liability that discharge affords them." *Id.* (footnote omitted).

172 Debtor rehabilitation has been a further policy consideration underlying fresh start and discharge. It is a consideration which has been expressly noted by courts. *See, e.g.*, Jennon v. Hunter (*In re* Hunter), 771 F.2d 1126, 1130 (8th Cir. 1985); Federal Land Bank of Louisville v. Olenn (*In re* Olenn), 760 F.2d 1428, 1432-33 (6th Cir. 1985) (Chapter 13 provides debtors greater relief than the former Bankruptcy Act to "encourage consumer debtor rehabilitation rather than liquidation").

173 *See, e.g.*, Shuchman, *An Attempt at a Philosophy of Bankruptcy*, 21 UCLA L. REV. 403 (1973), where the author argues that bankruptcy law is at least "class legislation" which is primarily geared toward "the lower middle class, semi-skilled, blue collar worker" as opposed to the "poor." *Id.* at 423-24 (footnote omitted). In conjunction with this view, see Jackson, *supra* note 168, at 1401-04, which likens bankruptcy discharge with other "social safety nets" in form and effect.

See also JACKSON, LOGIC AND LIMITS, *supra* note 130, at 226-252. Professor Jackson explores certain volitional and cognitive justifications of fresh start policy, arguing that:

> [A] key to bankruptcy discharge policy has to do with inherent biases—uncorrected by marketplace constraints—in the ways most individuals make decisions that lead them to overconsume and undersave. This view, in turn, is based on available evidence that suggests that many people systematically fail to pursue their own long-term interests when making decisions about whether to spend today or save for tomorrow. . . . [I]n order to justify a nonvaluable right to discharge, it must be shown that individuals *systematically* judge (or ignore) their own interests and that this bias consistently leads them in one direction to consume too much and save too little.

Id. at 233 (emphasis in original).

But cf. Weistart, *The Costs of Bankruptcy*, 41 LAW & CONTEMP. PROBS. Autumn 1977, at 107, surveying arguments against permitting discharge:

> Granting discharges may erode the degree of responsibility with which the debtor approaches his affairs and may lessen his incentive to avoid overextension. To the extent that we remove the penalty for insolvency we may actually nudge debtors down the path of imprudence and thus foster the tragedies that attend the disintegration of personal estates. Finally, it would be urged that a contract is a contract, and a creditor who gave fair consideration to his debtor is entitled to the promised return, even if he is required to wait for its receipt.

Id. at 110.

174 Allocation of risk, contract impossibility, insurance and the other considerations which underly fresh start policy assume at their core that the obligation was freely entered into by *both* parties to the transaction. There can be "involuntary creditors," however, which did not consent to the extension of credit before it was made. An example would be judgment creditors of torts. When a person is hit by a car, he involuntarily becomes a creditor of the tortfeasor, the claim being the as yet unliquidated civil judgment. Such "involuntary creditors" are often included in the Bankrupty Code. *But see* 11 U.S.C. § 523(a)(6), where judgment debts arising from *intentional* torts are not dischargeable in Chapter 7 cases. They are, however, dischargeable in Chapter 13 cases.

omy.[175] Because criminal sentences, including restitution, arise out of *involuntary* occurrences from the perspective of the victim, "fresh start" policy cannot be used to justify discharge of criminal sentences. Thus, the policy which underlies discharge is not advanced by the discharge of criminal restitution.

2. History and "First Principles" of Criminal Restitution

After considering the policies which underlie bankruptcy discharge, the scope of discharge remains to be fleshed out in each particular instance. In the conflict over the dischargeability of criminal restitution, this leads to a consideration of the "first principles" which underlie criminal restitution and criminal law generally. Modern concepts of criminal sentencing, including criminal restitution, are the product of a long evolution which began in the earliest stages of history.[176] Central to Western sentencing theory has been the notion that criminal law and criminal sentencing are directed against those who adversely affect society.[177] Criminal sanctions and sentences represent a judgment that societal sanctions and stigma should be given to those who violate the moral norms and minimal standards of conduct required in a civilized society.[178] The determination of whether to attach such stigma and sanc-

175 *See generally* REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I, ch. 3, 81-87 (1973), for the relationship between bankruptcy discharge and a credit-based economy.

176 *See* A. CAMPBELL, LAW OF SENTENCING 1-20 (1978 & Supp. 1987) (tracing the growth and evolution of criminal sentencing theory and practice from tribal times to its present form, and noting a trend away from harsh sanctions toward sentences geared to specific goals); and N. KITTRIE & E. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS 3-11 (1981) (considering the history and evolution of criminal sentencing theory and practice).

177 *See generally* R. FERGUSON & A. STOKKE, CONCEPTS OF CRIMINAL LAW (1976), where the authors survey accepted definitions of crime:

> Crime over the years has had many definitions ranging from the simplest: that a crime is a public offense against the state, to a more complicated statement that defines crime as a course of conduct or practice that is detrimental to public welfare and that is prohibited. Crime can further be defined as an act committed or omitted in violation of a law forbidding or commanding it and to which is annexed, upon conviction, certain penalties.

Id. at 61. *See also* B. WHITE, CRIMES AND PENALTIES 3 (1970) ("[c]riminal law is in essence a means of social control, and grows even more complex in our complex society").

178 *See* C. TORCIA, WHARTON'S CRIMINAL LAW (1978), discussing the relationship between criminal law and morality:

> The criminal law does not attempt to impose or enforce the standards of any particular religion . . . . In a general way it may be said that the aim of a religion . . . is, inter alia, the setting of maximum standards for the guidance of human conduct. As a practical matter, the law could not insist that every individual attain such high standards. The law must content itself with establishing and maintaining minimum standards—i.e., standards which are attainable by virtually all individuals—and punishing the failure to conform therewith as a crime.

Id. at 17.

> It is important to note, however, that there is *some* relationship between the individual law and morality. For, many acts which are condemned by the law as crimes are also condemned by moral principles. Moreover, society punishes certain conduct as a crime not merely because it is necessary as a matter of collective self-defense, but because the conduct runs counter to certain moral standards entertained by the organized community known as the state.

Id. (footnote omitted) (emphasis in original).

tions to certain conduct, and to what extent, has primarily been left to the states in our system of government.[179]

In addition, there has been a trend away from sentencing schemes which impose a set penalty for each crime regardless of the circumstances.[180] The current movement is toward sentencing schemes which look to both the nature of the crime and of the offender.[181] As a result of this emphasis on such fact-specific indicia, sentencing courts now have great discretion to fashion sentences which match the offender and his crime.[182] In exercising this sentencing discretion, courts consider four basic objectives which help make the sentence fit the crime.[183] The four goals of criminal sentencing are: general and special deterrence;[184] pro-

179 *See* R. FERGUSON & A. STOKKE, *supra* note 177, at 53, where the authors discuss limitations of federal criminal law:

> Since no mention of common-law crimes is made in the United States Constitution, the Tenth Amendment by implication gives the states the power to regulate and define crimes such as murder and theft. . . . In sum, the federal government can act only under specific grants of power; the states cover everything else.

Id. Any strictures the Tenth Amendment places on federal power in criminal law have proved to be somewhat illusory, however. *See generally* N. ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT (1986). Professor Abrams discusses how federal criminal law has expanded to cover "traditional" state crimes:

> Conduct comprising traditional crimes—the kind that makes up the normal caseload in state court systems—is also subject to prosecution in the federal courts under federal law when the offense occurs on federal property, or where federal moneys are affected or federal personnel are injured or killed. . . . Criminal conduct that does not involve such direct federal interests is also prosecuted by the federal government; the crimes involved are usually based on the commerce power.

Id. at 63.

180 *See* A. CAMPBELL, *supra* note 176, at 12 ("[s]entencing trends in this country and elsewhere have generally reflected a reduction of harsh sanctions").

181 *See id.* There has been a "recognition that for both society's protection and the sake of justice a criminal sentence should consider the character of the criminal as well as the nature of the crime." *See also* Williams v. New York, 337 U.S. 241, 247 (1949) ("punishment should fit the offender and not merely the crime"); and People v. Tijerina, 632 P.2d 570, 571 (Colo. 1981) ("court must consider the nature of the offense, the character of the offender, and the public interest in safety and deterrence").

182 *See* R. DAWSON, SENTENCING—THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE xix (1969) ("[s]tudy of the criminal justice systems makes very clear that the 'exercise of discretionary power is the lifeblood' of the criminal justice process").

183 As with any distillation of a complex system such as modern criminal sentencing, no broad categorization of goals will cover every consideration. *See* A. CAMPBELL, *supra* note 176, at 21 ("[b]oth courts and commentators agree that sentencing practices throughout the United States do not rest upon any one sentencing rationale"); *see also* R. DAWSON, *supra* note 182, at 7 (there are "[o]ther criteria" which arise in day-to-day practice. "[C]orrectional decisions are based on numerous criteria only some of which conform to these commonly held assumptions. Thus, the encouragement of guilty pleas very commonly influences the decision to grant or deny probation and . . . the length of the prison sentence").

184 *See* A. CAMPBELL, *supra* note 176, at 24-27, noting that:

> As a sentencing rationale deterrence embraces both the concepts of general deterrence and special deterrence. . . . General deterrence signifies criminal sanctions imposed for the purpose of discouraging the general public from recourse to crime. Special deterrence refers to sanctions imposed for the purpose discouraging the specific offender from repeating the same or other criminal acts. . . .
>
> Both general and special deterrence . . . support a single aim of crime prevention.

Id. at 24 (footnote omitted). *See, e.g.*, State v. Ogata, 95 Idaho 309, 508 P.2d 141, 148 (1973); Thessen v. State, 508 P.2d 1192, 1197 (Alaska 1973).

See also N. KITTRIE & E. ZENOFF, *supra* note 176, at 19-23; and C. TORCIA, *supra* note 178, at 13-14 ("the efficacy of punishment as a deterrent cannot be measured. There are no statistics as to crimes which have not been committed because the actor was deterred by the prospect of punishment").

tection of society;[185] retribution;[186] and rehabilitation of the offender.[187] There are many sentencing alternatives to achieve these basic goals.[188] Sentencing courts choose the one alternative, or combination of alternatives, which most appropriately serves the four basic goals of sentencing and accounts for the individual circumstances of the criminal and his crime.[189]

One alternative to incarceration is a sentence of probation conditioned on the probationer following certain conduct.[190] The range of permissible conditions to probation is expansive and left largely to the discretion of the court.[191] Such conditions may restrict the freedom of the probationer[192] or impose affirmative obligations.[193] Fundamentally,

185 This goal has also been referred to as "incapacitation of the offender," *see* A. CAMPBELL, *supra* note 176, at 27-30. *See also* N. KITTRIE & E. ZENOFF, *supra* note 176, at 23-30.

186 This goal has also been referred to as "vindication of social order." *See* A. CAMPBELL, *supra* note 176, at 31-34, where the author states:

> As a sentencing rationale, vindication of the social order is often discussed under various labels—the most common of which is "retribution". . . .
>
> The first source [of this rationale] is the apparent need in a significant sector of society to believe that by *punishing* the offender the "balancing of right and wrong" can be restored to that social order. . . .
>
> The second principal source for the vindication rationale is [that v]iolators of the law—any law—must suffer social sanctions for the sake of continued survival of the rule of law itself.

Id. at 31-32 (footnotes omitted) (emphasis in original). *See also* N. KITTRIE & E. ZENOFF, *supra* note 176, at 39-46.

187 *See* A. CAMPBELL, *supra* note 176, at 34-41, where Professor Campbell states:

> As a sentencing rationale rehabilitation seeks to prevent an offender from repeating criminal behavior by subjecting the person to "cure" or substantially reduce the person's criminal propensities. . . .
>
> Rehabilitation is based upon the theory that crime is a disease that for any number of reasons has taken control of an offender's behavior.

Id. at 34 (footnotes omitted). *See also* N. KITTRIE & E. ZENOFF, *supra* note 176, at 30-39.

188 *E.g.*, incarceration, fines, costs, restitution, forfeiture, probation, work-release, or any combination, or the death penalty. *See generally* A. CAMPBELL, *supra* note 176, at 43-71. *See also, e.g.*, FEDERAL SENTENCING GUIDELINES MANUAL (1988).

189 *See supra* notes 184-87 and accompanying text.

190 Under a sentence of probation, the offender is not incarcerated, but allowed to return to society. This release is conditioned, however, on the offender following certain conduct under the supervision of the state criminal justice system. *See* A. CAMPBELL, *supra* note 176, at 51-57; *see also* R. DAWSON, *supra* note 182, at 67-168. Should the probationer fail to conform to the required conduct, limited freedom may be revoked and he could be incarcerated. *Id.* at 142-168.

191 *See, e.g.*, *supra* note 6. *See also generally* A. CAMPBELL, *supra* note 176, at 81-86; and R. DAWSON, *supra* note 182, at 100-121.

There are, however, possible conditions on probation which have been held impermissible. It has been held "as a general rule that conditions will be deemed impermissible if they bear no relationship to the probationer's original crime, relate to conduct not criminal in itself, or require or forbid conduct not reasonably related to future criminality." R. DAWSON, *supra* note 182, at 86-87 (footnote omitted). *See, e.g.*, Higdon v. United States, 627 F.2d 893 (9th Cir. 1980) (probation conditions requiring forfeiture of assets, and full-time charity work for three years without pay are improper when they do not leave enough time to the probationer for gainful employment).

192 *See, e.g.*, United States v. Toney, 615 F.2d 277 (5th Cir. 1980) (offender restricted from participating in federal or state political activity after conviction of unlawful electioneering); and United States v. Miller, 549 F.2d 105 (9th Cir. 1976) (condition that probationer abstain from consuming alcohol is valid), *reh'g denied*, 558 F.2d 1038 (9th Cir. 1977). *See also* A. CAMPBELL, *supra* note 176, at 85-86.

193 One example of such an affirmative obligation is a requirement that the probationer make payments in restitution as a condition to his continued freedom. There are other possible permissible affirmative conditions, however. *See, e.g.*, United States v. Stine, 675 F.2d 69 (3d Cir. 1982) (condition that probationer undergo mandatory psychological counselling).

a sentence of probation is an attempt "to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement . . . under the continuing power of the court to impose institutional punishment."[194]

Although criminal restitution is a permissible and appropriate condition to probation,[195] it may also be given independently of other elements of a criminal sentence.[196] Criminal restitution, whether given independently or as a condition to probation, goes to the rehabilitative function of criminal sentencing.[197] In addition to the rehabilitative function, criminal restitution has found support in the recent weight given the interests of crime victims in criminal sentencing.[198] On another level, insofar as criminal restitution is a sentencing alternative at the disposal of the sentencing court, it represents one aspect of the important sentencing discretion of the criminal court.[199] The goal of rehabilitating the offender would be frustrated if a sentence of criminal restitution, given as a condition to probation or standing alone, were allowed to be discharged in bankruptcy.[200] Such a discharge would also have a chilling effect on sentencing courts in the exercise of their discretion insofar as it would effectively limit the range of choices available for fashioning an appropriate sentence.[201]

There is a further incongruity inherent in attempts to discharge criminal restitution. As discussed, bankruptcy discharge is founded in the "fresh start" policy.[202] "Fresh start" policy is primarily geared to-

194 Roberts v. United States, 320 U.S. 264, 272 (1943).

195 *See generally* H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME (1974); J. HUDSON & B. GALAWAY, RESTITUTION IN CRIMINAL JUSTICE (1975); S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME (1970); Harland, *supra* note 19; and Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 71 (1970).

196 *See, e.g.*, *supra* note 6. *See also* Harland, *supra* note 19, at 69-77.

197 *See* Laster, *supra* note 195, at 80-83, where the author discusses the goals of criminal restitution as an alternative to incarceration:

> Custody conflicts with rehabilitation, if for no other reason than that [it] forces a man to adjust to prison society while [criminal restitution] encourages him to learn to adjust to a different "normal" society. One benefit of a meaningful system of restitution is that it would keep the criminal within the normal society and thus prevent him from having to adjust to prison. . . . At the same time, it would allow the offender to support himself and his family.

Id. at 81 (footnote omitted). *Cf.* Note, *Court-Ordered Criminal Restitution in Washington*, 62 WASH. L. REV. 357, 358 (1987) ("[c]ommentators have justified restitution in criminal sentencing on grounds of rehabilitation, deterrence, retribution, and compensation. [It has been] suggested that restitution may improve an offender's self image and sense of control over his or her life").

There may also be other, more utilitarian justifications for probation conditioned on restitution as an alternative to incarceration. *See, e.g.*, *Intensive Probation can Reduce Need for Prisons, Study Finds*, 18 CRIM. JUST. NEWSL., Feb. 17, 1987, at 6.

198 *See* Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL. 357 (1986); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); and Note, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. LEGIS. 394 (1983).

199 *See supra* note 182 and accompanying text. *See also, e.g.*, Note, *supra* note 197, at 360 (Washington statutes "give courts wide discretion to order criminal defendants to make restitution").

200 The rehabilitative function of criminal restitution would be eliminated. However, proponents of the dischargeability of criminal restitution might see the rehabilitative function of discharge replace the offender rehabilitative function of criminal restitution. *See, e.g.*, Ballam, *supra* note 47. *See also supra* note 172.

201 *See supra* note 87, and *In re* Davenport, 89 Bankr. 428, 430 (E.D. Pa. 1988).

202 *See supra* note 158 and accompanying text.

ward voluntary extensions of credit.[203] Criminal restitution, however, is based on the goals of rehabilitating the offender, and allowing the sentencing court to fashion a sentence which will match the criminal offender and his crime. These important rehabilitative and discretionary aspects of criminal restitution must be considered in addition to the fact that the underlying criminal act is involuntary from the perspective of the victim and the state.

B. *Civil Law v. Criminal Law Generally*

The limits of "fresh start" policy, and thus bankruptcy discharge, become even more apparent when one considers the conflict on the level of the fundamental distinction between civil and criminal law. Bankruptcy law and fresh start policy must be limited by the parameters of the civil law. The conflict between bankruptcy discharge and criminal restitution is a manifestation of the tension between civil and criminal law.[204] Generally, civil law governs disputes between individuals, and its purpose is to hold individuals accountable vis-à-vis each other.[205] Bankruptcy law is a facet of the civil law in that it is geared toward the debtor's financial affairs in relation to his creditors.[206] There is no societal judgment inherent in the bankruptcy process.[207] Criminal law, however, represents a settlement of conflicts between individual offenders and society.[208] Criminal law is based upon societal norms that establish stan-

203 *See supra* notes 168-173 and accompanying text.

204 Criminal restitution, because of its compensatory aspect, has been criticized as an inherently civil device, out of place in criminal sentencing. The compensatory aspect, however, is a side-effect which is not part of the core of criminal restitution. *See* Laster, *supra* note 195, at 80, where the compensatory aspect is distinguished from the true goal:

> [T]he concept of restitution as used here differs from the term "compensation to victims of crime." Restitution by the criminal to his victim implies a making whole of the victim, as much as possible, by the direct action of the criminal. Compensation to the victims of crime involves a monetary payment by the state to those persons injured by criminal acts. The difference between the two is that compensation is "an indication of the responsibility of *society*" to the victim, whereas restitution, while restoring the victim, is also therapeutic and aids in the rehabilitation of the criminal.

Id. (footnotes omitted) (emphasis added). *Cf.* Harland, *supra* note 19, at 56 (identifying "an historical background of divergent views concerning the soundness of civil-criminal distinctions," but concluding that criminal restitution has found "growing support" regardless of questions as to the "propriety of enforcing civil liability through the criminal process").

205 *See generally* 3 R. POUND, JURISPRUDENCE 5-373 (1959), noting that "[l]aw in the sense of legal order has for its subject matter relations of individual human beings with each other and the conduct of individuals so far as they affect others or affect the social or economic order." *Id.* at 5. *See also* W. ROBINSON, ELEMENTS OF AMERICAN JURISPRUDENCE 170-73 (1900) (discussing the divergence between "Private Law" and "Public Law").

206 *See supra* notes 142-43.

207 *But cf.* B. WEISS, THE HELL OF THE ENGLISH—BANKRUPTCY AND THE VICTORIAN NOVEL 35-36 (1986) ("connotations of inferior social class and criminal origin that clung to the idea of bankruptcy" reinforced "the moral repugnance with which the Victorians regarded it"); *see also* D. STANLEY & M. GIRTH, *supra* note 142, at 2 ("the American people in general disapprove of bankruptcy"). These considerations, however, do not rise to the level of the stigma inherent in criminal law. *See infra* note 210 and accompanying text.

208 *See* E. WASHBURN, A MANUAL OF CRIMINAL LAW 1 (1889), which states:

> [T]he purposes of judicial process in respect to [civil law] are to obtain recompense or satisfaction for the party who has been thereby injured; while, as to [criminal law], such proceedings have reference to the prevention of such wrongs rather than obtaining thereby compensation. . . . [To be within the criminal law] the wrong must be one of a public nature in its character.

dards of minimal behavior necessary for the continuation of a civilized society.[209] There is a stigma following a criminal conviction not found in bankruptcy or civil law generally.[210] This in turn mandates the stricter protections, both procedural and substantive, found in criminal proceedings.[211] Because criminal restitution is rooted in criminal law, is assigned in criminal proceedings, and carries the stigma of a criminal conviction, it should be viewed as existing on a higher level than that affected by bankruptcy law.

In *In re Moore*,[212] the court noted the distinction between civil and criminal obligations and limited the scope of the Bankruptcy Act to civil liabilities.[213] In addition, many state courts, relying on the distinction between civil and criminal law, have insisted that their sentences of criminal restitution are unaffected by federal bankruptcy law.[214] Thus, the scope of bankruptcy law must be viewed as existing within a scope defined by both its purposes and goals, as well as the purposes and goals of the areas of law which it affects.

C. *Considerations of Supremacy, Comity, and Federalism*

Criminal sentencing in state criminal proceedings has traditionally been exempt from federal interference.[215] Indeed, the Court in *Kelly v. Robinson*[216] noted that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering

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Id. See also C. TORCIA, *supra* note 178, at 20-21.

209 *See supra* note 178 and accompanying text.

210 *See, e.g.*, Powell v. Texas, 392 U.S. 514 (1968), where the Court discussed the basis of the deterrent effect of punishment and the stigma that attaches:

> Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication. . . . Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo . . . .

Id. at 531.

211 *See, e.g.*, U.S. CONST. art. V.

212 111 F. 145 (W.D. Ky. 1901), discussed *supra* note 47.

213 *Id.* at 149-50 ("provisions of the bankrupt act have reference alone to civil liabilities, as demands between a debtor and creditor, as such, and not to punishments inflicted pro bono publico for crimes committed"). *But cf. In re* Alderson, *supra* note 47 (declining to distinguish between civil and criminal obligations).

214 *See, e.g.*, People v. Mosesson, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484 (N.Y. Sup. Ct. 1974), 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 but unfortunate debtor of his debts and to permit him to 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 debtor/creditor relationship . . . .

356 N.Y.S.2d at 484 (citation omitted) (emphasis added). *See also* People v. Topping Bros., 79 Misc. 2d 260, 262, 359 N.Y.S.2d 985, 987-88 (N.Y. Crim. Ct. 1974).

215 *See* Kelly v. Robinson, 479 U.S. at 43-44 ("[c]ourts traditionally have been reluctant to interpret federal bankruptcy statutes to remit state criminal judgments"). The Court noted that judicial deferrence to state criminal law had grown to the level of a "judicial exception to discharge for criminal sentences." Some commentators, however, have challenged that assertion. *Cf.* Ballam, *supra* note 148, at 122 ("[c]ase law . . . does not support the Court's assertion that a judicially created exception preventing discharge of restitution orders existed in 1978").

216 479 U.S. 39 (1986).

equitable types of relief . . . . This reflection of our federalism must also influence our interpretation of the Bankruptcy Code . . . ."[217] Such "influence" can only go so far, however. Federalism may be an important value implicitly embodied in the Constitution, but it is not an express constitutional mandate. Preemption via the Supremacy Clause is explicitly provided for in the Constitution.[218] Thus, federalism can be only one of the many considerations in the preemption analysis.

Perez v. Campbell[219] presented the Court with a state statute that purported to exempt its civil and administrative sanctions from the discharge provisions of the Bankruptcy Act.[220] The Court stated that its "function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[221] The state statute in *Perez* was preempted pursuant to the "controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."[222] Thus, the "full purposes and objectives of Congress" must first be determined.[223] If the purposes and goals of bankruptcy law, as discussed above,[224] are not frustrated by exempting state criminal sentences from its operation, then there should be no preemption.

IV. Solutions

Possible solutions to the conflict over the dischargeability of criminal restitution may be reached through both the legislative and judicial branches. A solution should be found, however, that provides broader guidance for the resolution of future disputes involving the appropriate scope of the Bankruptcy Code.

A. *Judicial*

Although the issues presented in conflicts between bankruptcy law and state substantive law are complex and often involve hard choices between compelling policy objectives,[225] courts should not mistreat or avoid such complex issues by relying on an *ad hoc* methodology.[226] Instead, courts should follow a uniform and coherent rationale which looks to the "first principles" of the areas of law in conflict, while at the same time exercising deference toward the policy determinations represented

217 *Id.* at 49 (citations omitted) (footnote omitted). *See also supra* notes 87-88 and accompanying text.

218 U.S. CONST. art. VI, cl. 2.

219 402 U.S. 637 (1971).

220 In *Perez*, the Arizona Motor Vehicle Safety Responsibility Act, 1951 Ariz. Sess. Laws 300 (current version at ARIZ. REV. STAT. ANN. §§ 28-1101 to 28-1261 (1989)), which provided for suspension of licenses and registration for non-payment of judgments arising out of automobile accidents, 402 U.S. at 641, purported to be unaffected by discharge under the Bankruptcy Act. *Id.* at 642.

221 402 U.S. at 649 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

222 402 U.S. at 652.

223 "[F]ull purposes and objectives" in this case are the "first principles" and fundamental objectives of the Bankruptcy Code.

224 *See supra* notes 141-203 and accompanying text.

225 *See, e.g., supra* notes 133-39 and accompanying text.

226 *See supra* note 11.

in other areas of law. The order of inquiry should begin with a consideration of the statutes which are in conflict. When the statutory provisions do not clarify the dispute, courts should also consider the areas of law involved on a more fundamental level.[227] Although the Court in *Kelly v. Robinson* seemed to employ a limited form of this analysis,[228] it relied on the wording of only a single sentence of the Bankruptcy Code.[229] In order for bankruptcy law to develop in an organized way, courts should develop its foundational goals and policies into well-articulated doctrine. This doctrine then could replace the irreconcilable results of the *ad hoc* methodology with coherent analysis and consistent results.

Considering the goals and policies involved as a foundation, courts should proceed to systematically define the proper scope of the Bankruptcy Code. Before reaching the question of whether criminal restitution is a debt subject to the discharge provisions of the Bankruptcy Code, courts must first decide whether federal bankruptcy law can affect such a criminal sentence at all. If a court decides that criminal restitution is not subject to the provisions of the Bankruptcy Code, it must still resolve the complex question of how to handle the criminal restitution obligation in relation to the disposition of the debtor's assets. In keeping with what could be called a "complete separation" doctrine, which would exclude bankruptcy law from interfering with state criminal law, bankruptcy courts should simply leave that which is criminal to the criminal courts.[230] This is, in effect, the result in Chapter 7 after *Kelly v. Robinson*.[231] The Chapter 13 repayment approach is not handled so easily, however, because it directly impacts on a debtor's future earnings.[232] A few courts have suggested that an obligation of criminal restitution should be included in the debtor's expenses and provided for as *non-disposable income*.[233] Even though this view is not specifically endorsed by the letter of the Bankruptcy Code, it is consistent with the "complete

227 *See supra* notes 127-130 and accompanying text.

228 The Court did consider some of the history of American bankruptcy law in its interpretation of the Bankruptcy Code, but neglected to consider the "first principles" of the law involved.

229 *See supra* note 88 and accompanying text.

230 This "complete separation" approach has been criticized by one commentator as a "simplistic view." *See* Ballam, *supra* note 148, at 125.

231 After *Kelly v. Robinson*, § 523(a)(7) of the Bankruptcy Code excepts from discharge any sentence of criminal restitution, *see supra* note 88. This, in effect, leaves intact the criminal sentence of restitution for the criminal court to deal with in the manner the state has chosen to handle supervision of its probation system.

232 The restitution obligation must be provided for in some way. In a Chapter 13 case, the repayment plan takes into account all obligations of the debtor. If the criminal restitution obligation is not provided for, then the debtor would not be able to pay it because his income is already allocated to other obligations.

233 *See, e.g., In re* Cancel, 82 Bankr. 674, 677 (Bankr. N.D.N.Y. 1988), *rev'd on other grounds*, 85 Bankr. 677 (N.D.N.Y. 1988) (discussed *supra* notes 106-110). In *Cancel*, the Bankruptcy Court stated:

> In concluding that state-ordered criminal restitution payments are not debts . . . , this court is not troubled by what was referred to by the Second Circuit Court of Appeals as the "anomolous result" that the holder of a right to restitution would thereby have no right to participate in [bankruptcy distribution]. In the Chapter 13 context, the amount of the debtor's disposable income available to make payments under the plan is only determined after all fixed and necessary expenses are deducted from income. Clearly, a criminal restitution payment which is ordered as a condition of probation would constitute a necessary expense that would be first subtracted in determining the debtor's disposable income available to pay debts under the plan.

separation" view that criminal sentences should be unaffected by bankruptcy proceedings.

B. *Legislative*

Clearly, the simplest solution to the conflict over the dischargeability of criminal restitution would be the addition of an exception to discharge covering criminal restitution.[234] However, although such an amendment might resolve the status of criminal restitution, it would not provide guidance for future definition of the scope of the Bankruptcy Code.[235] Congress should amend the Bankruptcy Code in the area where judicial interpretation first went astray. To this end, Congress could attach language to the Bankruptcy Code's definition of "claim" that would expressly limit the scope of the Bankruptcy Code. Such language could be borrowed from the exception to the automatic stay for the "commencement or continuation of a criminal action or proceeding against the debtor."[236] While remaining consistent with the policy behind the "criminal action or proceeding" exception to the automatic stay,[237] the Bankruptcy Code's definition of "claim" could be amended to include:

> (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;
>
> *(C) but does not include any obligation of the debtor arising out of a criminal action or proceeding against the debtor.*

Id. at 677 (citation omitted). *See also* Commonwealth of Pennsylvania Dep't of Welfare v. Johnson-Allen, 88 Bankr. 659, 662 n.7 (E.D. Pa. 1988); and Note, *The Disposable Income Test: An Attempt Toward Uniformity*, 4 BANKR. DEV. J. 221 (1987).

234 Such an amendment was proposed and passed in the U.S. Senate, S. 548, 100th Cong., 1st Sess. (1987). Section 301 of S. 548 would add an exception to §§ 523(a) and 1328(a) of the Bankruptcy Code. The proposed exception would except from discharge any debt "to the extent that such debt arises from a violation by the debtor of a civil or criminal law enforceable by an action by a government unit to recover restitution, damages, civil penalties, attorney fees, costs or any other relief . . . ." S. REP. No. 119, 100th Cong., 1st Sess. 14 (1987). *See also Bankruptcy Discharge of Obligations to Governmental Units: Hearing on H.R. 2619 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 4 (1988) (H.R. 2619 was identical to S. 548).

In addition to the theoretical problems expressed below to such an amendment, there are serious problems with the language of S. 548 and H.R. 2619. The proposed exception extends to both civil and criminal laws. Civil laws are more properly encompassed within the "fresh start" policy discussed above. *See supra* notes 144-175 and accompanying text. In addition, the sweeping language of the proposed exception is made even greater in scope by the word "enforceable." Thus, it would appear that the "debt" need not in fact be the result of an action by a governmental unit, rather it would be enough that it could have been brought by the government.

235 By amending the *exceptions* to discharge, Congress, like the Court in *Robinson*, would be accepting *sub silentio* that criminal sentences are within the scope of the Bankruptcy Code. Thus, if amendment is necessary, it should be directed at the scope-determining section of the Bankruptcy Code—*i.e.*, the definitions of "debt" and "claim."

236 11 U.S.C. § 362(b)(1).

237 In considering § 362(b)(1), the House Report noted that "bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension." H.R. REP. No. 595, 95th Cong., 1st Sess. 342 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6299.

However, such an amendment would only resolve the issue of the relation of criminal restitution to the Bankruptcy Code. The numerous other conflicts between state and federal law and the Bankruptcy Code would remain unresolved by such a narrow amendment.[238] The Bankruptcy Code could also be given a new section outlining how its scope is to be construed in relation to other independent areas of law. Such a provision, however, would still be subject to judicial elaboration based on the fundamental goals and policies of bankruptcy law.

V. Conclusion

In *Kelly v. Robinson*,[239] the Supreme Court had the opportunity to resolve the issue of the dischargeability of criminal restitution. The Court could also have provided lower bankruptcy courts with a clear and coherent method for interpreting the Bankruptcy Code. The Court chose, instead, to postpone such a resolution.[240] Consequently, bankruptcy courts, debtors, creditors, and state criminal justice officials have no consistent or coherent way to deal with the interrelation of criminal restitution and bankruptcy law. Instances have arisen in the past, and will certainly arise in the future, for which *Robinson* provides little or no guidance.[241] A clear and well-reasoned statement is needed to resolve the issue. Using a clear and coherent analysis of the fundamental goals and policies of bankruptcy law and criminal sentencing, it is clear that courts should consider criminal restitution and criminal law in general completely separate from bankruptcy law.[242] Courts should use such an analysis of fundamental goals and policies to resolve all issues requiring definition of the scope of the Bankruptcy Code. Although bankruptcy law holds an important place in this country's economic system, that position should not translate into the derrogation of state substantive law absent express authorization of Congress. Even with such authorization, deference should be shown to the states wherever possible.

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238 *See, e.g., supra* notes 133-39 and accompanying text.
239 479 U.S. 36 (1986).
240 *See supra* notes 82-91 and accompanying text.
241 *See, e.g., supra* notes 93-123 and accompanying text.
242 Such a result is consistent with the reasoning the Court employed in Younger v. Harris, 401 U.S. 37 (1971), where the Court stated:

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. . . .
>
> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain.

Id. at 43 (citations omitted).