Bankruptcy: *Pennsylvania Welfare Department v. Davenport*: The Supreme Court Officially Declares Safe Passage for Criminal Offenders Via Chapter 13: Are Criminal Penalties Within the Scope of the Bankruptcy Code?

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NOTES

Bankruptcy: Pennsylvania Welfare Department v. Davenport: The Supreme Court Officially Declares Safe Passage for Criminal Offenders Via Chapter 13. Are Criminal Penalties Within the Scope of the Bankruptcy Code?

Introduction

Should convicted criminals be allowed to avoid obligations imposed as part of their criminal sentence, under the Bankruptcy Code (the Code)? Since the Code's 1978 enactment, this question has been increasingly raised. State criminal laws conflict with the federal bankruptcy laws when a convicted criminal files a bankruptcy petition seeking a discharge of debts which include a criminal restitution obligation. Traditionally, many courts have avoided the conflict by holding that criminal restitution obligations are not "debts" under the Code and thus are not affected by bankruptcy proceedings.

The United States Supreme Court recently abandoned this traditional approach in Pennsylvania Welfare Department v. Davenport. In that case, the Court, leaving no room for interpretation, held that criminal restitution obligations are debts under the Code. As a result, the Court found such obligations dischargeable under chapter 13 of the Code.

2. See infra note 4.
3. See general discussion about bankruptcy infra notes 12-36 and accompanying text.
6. Id. at 2134.
7. Id. There were some previous lower court decisions reaching this result. See, e.g., In re Heincy, 78 Bankr. 246, 249 (Bankr. 1987), rev'd, 858 F.2d 548 (9th Cir. 1988); In re Cullens, 77 Bankr. 825, 827-28 (Bankr. D. Colo. 1987). Congress recently amended the

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The Davenport decision was preceded by the Court’s 1986 decision in Kelly v. Robinson. In Kelly, the Court held that criminal restitution obligations are not dischargeable under chapter 7 of the Code. The Court declined to decide whether criminal penalties, including restitution obligations, are debts because section 523(a)(7) excepts all criminal penalties from discharge. However, the Court’s opinion shows a heavy inclination toward finding that criminal penalties were not intended by Congress to constitute debts under the Code.

This note first gives a brief overview of bankruptcy law and of criminal restitution obligations. It then analyzes the Kelly and Davenport cases and discusses how they are both consistent and inconsistent at the same time. In addition, this note reveals the problems created by the Supreme Court’s approach in each of these cases and suggests a different approach. Finally, the note examines recently enacted legislation on the subject and proposes an alternative amendment to the Code.

Overview of Bankruptcy and Criminal Restitution Obligations

Bankruptcy

The Constitution specifically grants Congress the power to establish national bankruptcy laws. The current bankruptcy law is contained in the Bankruptcy Code of 1978. Generally, the Code has two primary

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Code making restitution obligations nondischargeable under chapter 13. See discussion infra notes 193-95 and accompanying text.


9. Id. at 53.

10. Id. at 50.

11. See infra notes 63-75 and accompanying text.

12. U.S. Const. art. I, § 8, cl. 4 (granting Congress the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

13. Initially, bankruptcy law was designed as a remedy for creditors to provide for the equitable distribution of the debtor’s assets to the creditors. See 1 COLLIER ON BANKRUPTCY ¶ 1.02 (15th ed. 1985) [hereinafter COLLIER]. Until 1978, the Bankruptcy Act of 1898 governed federal bankruptcy law. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979); see S. REP. No. 989, 95th Cong., 2d Sess. 2 [hereinafter SENATE REPORT], reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5788. The Bankruptcy Reform Act of 1978 repealed the former Act and sought to modernize and upgrade the existing bankruptcy laws. See SENATE REPORT, supra, at 2-3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5788-89.


These various enactments have been codified in title 11 of the United States Code which sets out the substantive law of bankruptcy in the Bankruptcy Code. SENATE REPORT, supra, at 3, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5789.
goals. One goal is to rehabilitate debtors by giving them a "fresh start." Bankruptcy gives debtors a "fresh start" by relieving their previous overwhelming financial burdens. The Code's other primary goal is to distribute the property of an insolvent debtor fairly and equitably among the debtor's various creditors. Thus, the bankruptcy laws serve the dual purposes of protecting debtors and their creditors.

The filing of a petition in bankruptcy commences a bankruptcy case and automatically constitutes an order for relief. In addition, debt collection attempts and proceedings against the debtor, with some exceptions, are automatically stayed. The stay protects the debtor from harassment by creditors. A chapter 7, or straight, bankruptcy is the most common form of bankruptcy and contemplates the liquidation of the debtor's property. In a chapter 7 case, a trustee is appointed to collect the non-exempt property of the debtor and convert it to cash. The cash is then distributed by the bankruptcy court to the creditors. All debts are subsequently discharged unless expressly excepted by the Code.


15. See In re Vickers, 577 F.2d 683, 686-87 (10th Cir. 1978) (primary purpose of bankruptcy is the rehabilitation of the debtor through relief of debt); Perez v. Campbell, 402 U.S. 637, 648 (1971) (primary purpose of bankruptcy laws is to allow debtors the opportunity to be unhampered by their preexisting debts); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (bankruptcy gives a "new opportunity in life . . . unhampered by the pressure and discouragement of preexisting debt.").

16. Local Loan, 292 U.S. at 244; see also Perez, 402 U.S. at 648 (quoting Local Loan Co., 292 U.S. at 244); In re Vickers, 577 F.2d 683, 686 (10th Cir. 1978); In re Moynagh, 560 F.2d 1028, 1030 (1st Cir. 1977); In re Adlman, 541 F.2d 999, 1003 (2d Cir. 1976); In re Norman, 25 Bankr. 545, 547 (Bankr. S.D. Cal. 1982); In re Hoover, 14 Bankr. 592, 596 (Bankr. N.D. Ohio 1981), aff'd, 38 Bankr. 325 (N.D. Ohio 1983); H.R. REP. No. 595, 95th Cong., 2d Sess. 117 [hereinafter HOUSE REPORT], reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6078, 6089.


18. 11 U.S.C. § 301 (1988). An involuntary case may be commenced by a requisite number of creditors with a requisite amount of claims under chapters 7 and 11 only; however such filing of an involuntary petition does not automatically give rise to an order for relief. Id. § 303.

19. Id. § 362(b).

20. Id. § 362(a). Section 362(b) lists proceedings against the debtor which are not stayed as a result of filing the petition. Important examples are criminal proceedings, id. § 362(b)(1), and collection of alimony, maintenance or support, id. § 362(b)(2).

21. Id. § 362(a)(6).

22. Id. §§ 701-766.

23. Id. § 701(a)(1) provides for the appointment of an interim trustee by the United States Trustee promptly after the order for relief (commencement of case in voluntary proceeding). A different trustee may be elected by the creditors, but if the creditors fail to do so then the interim trustee becomes the trustee of the case. Id. § 702.

24. Id. § 704(1).

25. Id.

26. Id. § 726. Section 726 also provides the order of distribution of the different types of claims. Id.

27. In chapter 7 cases, discharge is governed by id. § 727. Subsection (b) of that section
discharge shields the debtor from any judgment of personal liability and from further debt collection activities with respect to the discharged debt.28

Chapters 11, 12 and 13 are concerned with the debtor’s rehabilitation as opposed to liquidation.29 This note focuses on chapter 13. A chapter 13 proceeding is voluntary30 and serves as an alternative to a chapter 7 liquidation by offering debtors an opportunity to work out their financial problems under a rehabilitative plan.31 The plan provides a flexible way for the debtor to repay his debts.32 Unlike a chapter 7 debtor, the chapter 13 debtor retains possession of his property except as provided by the plan or required by the court’s confirmation order.33

Chapter 13 is available to any individual with regular income, regardless of its source.34 Upon completion of the required payments, the debtor is

provide: “Except as provided in section 523 . . . a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .” Id. § 727(b).

In chapter 13 cases, discharge is governed by § 1328 which provides:

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 by the plan . . . except any debt - (1) provided for under section 1322(b)(5) of this title; or (2) of the kind specified in section 523(a)(5) of this title.

Id. § 1328(a). The court can, if certain conditions are met, grant a hardship discharge even though payments are not completed under the plan. Id. § 1328(b). However, the scope of a hardship discharge is the same as that under chapter 7 in that all of the exceptions to discharge contained in § 523 apply. Id.

28. Id. § 524(a). That section provides:

A discharge in a case under this title — (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . (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, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor . . . that is acquired after the commencement of the case . . .

Id.

29. Chapter 11 is available to all debtors (e.g., individuals, partnerships, and corporations), id. § 109(d), and is codified at id. §§ 1101-1174. Chapter 12 is available only to family farmers with regular annual income (id. § 109(f)), and is codified at id. §§ 1201-1231. For chapter 13 information, see infra note 34 and accompanying text.

30. Id. §§ 303(a), 705(c), 1112(d).

31. The requirements a debtor’s chapter 13 plan must satisfy are set out in id. § 1322. Chapter 13 allows a debtor to retain his property, to retain better credit standing than under chapter 7, and to avoid the stigma that attaches under a chapter 7 bankruptcy. House Report, supra note 16, at 118, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6079.

32. See Senate Report, supra note 13, at 141, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5927. The plan does not have to provide for full payment of all unsecured claims. See infra notes 117-23 and accompanying text.


34. Id. § 109(e). Additional requirements are that the debtor, on the date of the filing
discharged from the debts which are provided for by the plan. The debtor's effort in completing the plan does not go unrewarded. The chapter 13 discharge is broader than a chapter 7 discharge, as only one of the exceptions to discharge contained in section 523(a) is applicable.

Criminal Restitution Obligations

State criminal courts, at their discretion, may grant probation to criminal offenders in lieu of, or in addition to, other criminal penalties. A sentence of probation is designed to allow a criminal offender to rehabilitate himself without incarceration. The typical restitution order is rendered as a condition of probation. Such an order requires a criminal

of the petition, has unsecured debts of less than $100,000 and secured debts of less than $350,000. Id.

35. Id. § 1328(a) states: "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 by the plan" except debts under § 1322 (b)(5) (default debts) and § 523(a)(5) (spouse and child support payments).

36. Id. § 1328(a). The only exception to discharge contained in § 523 applicable to a chapter 13 normal discharge is the exception for alimony to, maintenance of, or support of a spouse, former spouse or child contained in § 523(a)(5). However, all of the exceptions are applicable in the case of a chapter 13 hardship discharge which may be granted to a debtor who has not completed his plan if certain conditions are met. See id. § 1328(b).

37. Although probation is sometimes precluded by statute, the trial judge usually has authority to place the defendant on probation or to impose a prison sentence, at the judge's discretion. R. Dawson, Sentencing — The Decision as to Type, Length, and Conditions of Sentence 4 (1969). See also Best & Birzon, Conditions of Probation: An Analysis, 51 Geo. L.J. 809, 811-12 (1963).

38. See Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 UCLA L. Rev. 52, 64-77 (1982); see also Best & Birzon, supra note 37, at 811-12.

39. Harland, supra note 38; Best & Birzon, supra note 37. In Roberts v. United States, 320 U.S. 264 (1943), the Supreme Court stated that probation provides "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." Id. at 272.

40. Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 933 (1984). Restitution can, however, be made at any time during criminal proceedings. Id. Government-sanctioned settlements between offender and victim may make formal charges unnecessary, and defendants may avoid charges after indictment by agreeing to make restitution. Id. See also Harland, supra note 38, at 64-77.

Probation statutes traditionally permit judges to impose conditions on probation at their
offender to pay money in order to compensate for the loss he has caused.\textsuperscript{41}

Although a victim of a crime will usually receive compensation, criminal restitution is a criminal sanction.\textsuperscript{42} The restitution order is one of the alternatives available to the states' criminal justice systems in furthering the goals of deterrence, retribution, and rehabilitation.\textsuperscript{43}

Criminal restitution clearly serves as an individual deterrent to the criminal offender because he alone is required to bear the financial hardship of making monetary payments.\textsuperscript{44} Restitution also operates as a stronger deterrent than straight probation to others who might commit similar crimes.\textsuperscript{45} Restitution gives state criminal courts alternatives in fashioning sentences intended to have deterrent effects, without resorting to incarceration.

Furthermore, restitution effectively serves the purpose of retribution. The sanction is constructed to fit the crime, thereby emphasizing the wrongfulness of the offense and the moral responsibility of the criminal defendant. Restitution forces the offender to literally "pay" for his crime.\textsuperscript{46} In addition, restitution forces the offender to recognize the consequences of his crime and thus serves as an effective rehabilitative mechanism.\textsuperscript{47}

\begin{itemize}
  \item \textit{discretion. See, e.g., 22 Okla. Stat. § 991a (Supp. 1986). The Oklahoma statute is extremely broad, giving the court nearly complete discretion in determining probation conditions. The court may suspend a sentence in whole or in part and may order restitution, reimbursement, or community service. Id. It may also levy a fine or order confinement. Id.}

  41. Restitution is ordered in a variety of ways by requiring an offender to pay money directly to the victim, to participate in a work program in which part of his salary is paid to the victim, to render services to the victim, or community service in lieu of repayment to the victim. Note, \textit{supra} note 40, at 933.

  42. Kelly v. Robinson, 479 U.S. 36, 52 (1986). The Court stated that although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. . . . Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victims desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Id. at 52-53. See also Note, \textit{supra} note 40, at 937-41.

  To avoid any confusion due to the multitude of varying penalties possibly existing in different contexts, for purposes of this note, "criminal restitution" refers to a restitution obligation imposed upon a person as a result of the commission of a criminal offense by that person.


  44. For a discussion of "individual" and "general" deterrence, see Burns & Mattina, Sentencing 1 (1978).

  45. This is "general" deterrence. \textit{See id.}

  46. \textit{See Note, supra} note 40, at 939.

  47. \textit{Id. See also} State v. Bausch, 83 N.J. 425, 434, 416 A.2d 833, 838 (1980) ("Restitution related to the character or nature of the criminal offense of which defendant has been
Restitution is an effective and appropriate criminal sanction which "bridges the gap" between probation and imprisonment.48

Kelly v. Robinson

Factual Background

In Kelly v. Robinson,49 the debtor pleaded guilty to a charge of larceny resulting from the wrongful receipt of welfare benefits. The debtor was given a suspended prison sentence and placed on probation for five years. As a condition of the probation, the state court ordered the debtor to make restitution to the state in the form of monthly cash payments.

Shortly after the probation period began, the debtor filed a voluntary petition under chapter 7 of the Code,50 listing the restitution obligation as a debt. The debtor was granted a discharge from her debts pursuant to section 727(a) of the Code.51 Subsequently, the debtor was informed that the state probation office considered the restitution obligation nondischargeable. As a result, the debtor filed an adversary proceeding in the bankruptcy court, seeking a declaration that the obligation had been discharged.52

History of the Case

The bankruptcy court held that the debtor's discharge had not altered the conditions of her probation.53 The court adopted the reasoning of In re Pellegrino,54 which held that a restitution obligation is not a debt under the Code because neither the victim nor the probation office has a right to payment.55

In Pellegrino, the court recognized the Code's broad definition of debt,56 but found an exception to the statutory definition in "the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments."57 The court also concluded that even if

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48. See Note, supra note 40, at 939.
51. Id. § 727. Section 727(a) provides that the bankruptcy court shall grant the debtor a discharge unless certain limitations apply. See id. § 727(a)(1)-(10). Section 727(b) defines the scope of a discharge providing that "a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . ." Id. § 727(b).
53. Id. at 424.
55. Id. at 132.
57. Pellegrino, 42 Bankr. at 134 (citing Younger v. Harris, 401 U.S. 37 (1971)); see also In re Davis, 691 F.2d 176 (3d Cir. 1982).
restitution obligations are debts subject to bankruptcy jurisdiction, they are nondischargeable under section 523(a)(7) of the Code. 58

The Court of Appeals for the Second Circuit rejected this view. 59 While recognizing that most courts had reached the opposite conclusion, 60 the court held that a restitution obligation imposed as a condition of probation is a debt. 61 The court then held that the obligation did not fall under the section 523(a)(7) exception to discharge because the probation condition was compensation for actual pecuniary loss. 62

Supreme Court Decision

The United States Supreme Court began its analysis of whether a restitution obligation is dischargeable by examining the language of the Bankruptcy Act of 1898 (the Act). 63 The Court noted that the natural construction of the Act's language would have allowed criminal penalties to be discharged in bankruptcy. 64 However, it observed that courts had not interpreted the Act in that manner. 65 The Court found that the widely accepted view at the time Congress enacted the Code was that criminal penalties, including restitution orders, were subject to a judicial exception to discharge. 66 The Court noted the normal rule of statutory construction that when Congress intends to change an established judicial concept, it makes that intent specific. 67 Accordingly, the Court found that the Code could not justifiably be interpreted as contrary to the view that criminal penalties are excepted from discharge. 68

Emphasizing the fundamental policy against federal intrusion upon state criminal prosecutions, 69 the Court refused to adopt an interpretation that could lead to federal abatement of state criminal judgments. 70 Such a result would impede the flexibility of state criminal judges in choosing the

58. Pellegrino, 42 Bankr. at 135. Section 523(a)(7) provides that a discharge does not affect any debt that "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." 11 U.S.C. § 523(a)(7) (1988).


60. See supra note 4.

61. Robinson, 776 F.2d at 38.


65. Id.

66. Id. at 45-46 (citing In re Moore, 111 F. 145, 148-49 (W.D. Ky. 1901) (judgments by state or federal court imposing a fine in the enforcement of criminal laws are not affected by bankruptcy proceedings); People v. Mosesson, 78 Misc. 2d 217, 218, 356 N.Y.S.2d 483, 484 (N.Y. Sup. Ct. 1974) (a discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence)).


68. Kelly, 479 U.S. at 53.

69. Id. at 47 (citing Younger v. Harris, 401 U.S. 37, 46 (1971)).

70. Kelly, 479 U.S. at 48.
combination of imprisonment, fines, and restitution most likely to further the goals of state criminal justice systems. The Court stated that it did not think Congress would lightly limit the options available to state criminal judges.

The question of whether criminal penalties constitute debts under the Code was then addressed. In regard to the question, the Court stated: "[W]e have serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." However, the Court declined to decide the question because it held that section 523(a)(7) protects from discharge any condition imposed by a state criminal court as part of a criminal sentence. The Court found that section 523(a)(7) creates a broad exception for all criminal sanctions, whether labeled as fines, penalties, or forfeitures.

Turning to the qualifying phrases in section 523(a)(7) which state that fines must be "to and for the benefit of a governmental unit" and cannot be "compensation for actual pecuniary loss," the Court held that because criminal proceedings focus on the states' interests in punishment and rehabilitation, rather than on a desire for compensation to the victim, restitution orders operate for the benefit of the state and not as compensation for the victim. Therefore, the Court ruled that restitution orders are within the meaning of section 523(a)(7) and thus are nondischargeable under chapter 7.

**Pennsylvania Welfare Department v. Davenport**

**Factual Background**

In *Davenport*, a married couple was convicted of welfare fraud in a Pennsylvania state court. The court sentenced the couple to one year of probation with the condition that the couple make monthly restitution payments. The factual similarity of this case to *Kelly* is immediately apparent.

The difference between *Davenport* and *Kelly* is that in *Davenport*, the couple filed a petition under chapter 13 of the Code, instead of chapter 7, listing the restitution obligation as an unsecured debt. When the couple

71. *Id.* at 49.
72. *Id.* The Court stated: "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" *Id.* at 51 (quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting)).
73. *Id.* at 50. "Debt" is defined at § 101(11) as "liability on a claim." 11 U.S.C. § 101(11) (1988). "Claim" is defined at § 101(4) as "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 . . . ." *Id.* § 101(4).
74. *Kelly*, 479 U.S. at 50.
75. *Id.*
76. *Id.* at 53.
77. *Id.*
failed to make the required payments, the probation department commenced probation violation proceedings. The couple notified the department of the pending bankruptcy case and requested withdrawal of the probation violation charges. When the department refused, the couple sought a declaration by the bankruptcy court that the restitution obligation was, in fact, dischargeable. While this action was pending, the couple's chapter 13 plan was confirmed without objection.

History of the Case

The bankruptcy court ruled that the couple's restitution obligation was an unsecured debt, which was dischargeable under section 1328(a) of the Code. On appeal, the district court reversed, holding that state-imposed criminal restitution obligations could not be discharged under chapter 13. The court relied heavily on the Kelly dicta expressing serious doubts as to whether Congress intended criminal penalties to be considered debts under the Code. The district court also emphasized concerns about the intrusion on the state criminal justice system by the federal courts. The Court of Appeals for the Third Circuit reversed the district court's decision, concluding that restitution obligations are debts within the meaning of the Code and are dischargeable under chapter 13.

Supreme Court Decision

In light of Kelly's heavy condemnation of federal interference with the state criminal justice system and its "serious doubts" as to whether criminal penalties even constitute debts, presumably the Supreme Court would require convicted debtors to fulfill their criminal obligations. However, the Court held that restitution obligations in a criminal case do constitute debts within the meaning of the Code and are therefore dischargeable under chapter 13.

The Court began by taking note of Congress' broad view of the definition of a claim which gives rise to a debt. The Court held that restitution obligations fall within the term "claim" as defined under the Code. A

80. See supra note 73 and accompanying text.
84. For definitions of "debt" and "claim," see supra note 73.
85. See Davenport, 110 S. Ct. at 2132.
claim is a "right to payment," which is no more than an enforceable obligation, irrespective of the state's objective in imposing the obligation. The Court also rejected contentions that the automatic stay provision, section 362(b)(1), reflects Congress' intent to exempt restitution orders from discharge under chapter 13. Section 362(b)(1) exempts from the stay "the commencement or continuation of a criminal action or proceeding against the debtor." The Court noted that the provision does not explicitly exempt governmental efforts to collect restitution obligations from a debtor. Therefore, the Court found that it was not irrational or inconsistent policy to permit the prosecution of criminal offenses while precluding probation officials from enforcing restitution orders during a chapter 13 bankruptcy proceeding.

Also rejected by the Court was an argument relating to section 726. That section establishes the order of distribution for chapter 7 claims. Subsection 726(a)(4) assigns a low rank to "any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture . . . ." The United States, appearing amicus curiae, argued that the phrase "fine, penalty, or forfeiture" should be construed as applying only to civil fines, penalties and forfeitures. Otherwise, state and federal governments would receive disfavored treatment relative to other creditors in both chapters 7 and 13. In response to this argument, the Court held that section 726(a)(4) does apply to criminal restitution obligations. The Court held that the phrase "fine, penalty, or forfeiture" must be given the same meaning in section 726(a)(4) as in section 523(a)(7), which under Kelly includes criminal restitution obligations. The Court next addressed the Kelly dicta which suggested that restitution obligations are not debts. Although not expressly, the Court rejected the dicta and held that given Kelly's decision that restitution obligations are excepted from discharge under section 523(a)(7), debt could not be defined narrowly so as to exclude criminal restitution orders. The Court refused

87. Davenport, 110 S. Ct. at 2131.
88. Id. at 2133.
90. Davenport, 110 S. Ct. at 2132.
92. Id. § 726(a)(4).
93. Section 1325(a)(4) provides that the court shall confirm a plan if "the value . . . of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 . . . ." Id. § 1325(a).
94. Davenport, 110 S. Ct. at 2132-33.
96. See supra notes 63-75 and accompanying text.
97. Davenport, 110 S. Ct. at 2133. The Court specifically stated: "Given Kelly's interpretation of § 523(a)(7), . . . it would be anomalous to construe 'debt' narrowly so as to exclude criminal restitution orders. Such a narrow construction of 'debt' necessarily renders § 523(a)(7)'s codification of the judicial exception for criminal restitution orders mere
to interpret a statutory provision in a way that would render another provision in the same enactment "superfluous." 98

As a result, the Court held that criminal restitution obligations are dischargeable under chapter 13 because section 523(a)(7) is not applicable to a chapter 13 discharge. 99 The Court denied that its refusal to create a broad judicial exception to discharge for criminal restitution orders constituted a retreat from the principles applied in Kelly. 100 It noted the statements in Kelly that if restitution obligations were permitted to be discharged, state court judges would be hampered in fashioning appropriate sentences, and state prosecutors would have to participate in federal bankruptcy proceedings. 101 In addition, the Court recognized that the legitimate state interest in avoiding such intrusion is not diminished when the offender files under chapter 13 rather than chapter 7. 102 Nonetheless, with those ideas in mind, the Court held that federal intrusion in this context was the clear intent of Congress, and that the statute must be enforced according to its terms. 103

Analysis

Restitution Obligations as Debts — The Smaller Question

Together, Kelly and Davenport expose the entire issue of whether criminal restitution obligations should be dischargeable in bankruptcy. While the ultimate holdings of the two decisions are consistent, their reasoning is not. In both cases, the Court focuses on the question of whether criminal restitution obligations constitute debts under the Code. Under the Code, debt is defined as a "liability on a claim," 104 and claim is defined as a "right to payment." 105 The terms are co-extensive in that the creditor has a claim against the debtor, who owes a debt to the creditor. 106 In Davenport, the Court, relying on the premise that Congress intended a broad

surplusage." 106 Collier, supra note 13, ¶ 101.05.

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98. Id. (citing Mackey v. Lanier Collections Agency & Serv., 486 U.S. 825, 837 (1988)).
99. Title 11 U.S.C. § 1328(a) provides:
   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 by the plan . . . except any debt - (1) provided for under section 1322(b)(5) of this title; or (2) of the kind specified in section 523(a)(5) of this title.
100. Davenport, 110 S. Ct. at 2133.
101. Id.
102. Id.
103. Id. at 2133-34.
105. Id. § 101(4), which provides, in relevant part: "'claim' means . . . right to payment . . . ." Id.
definition, had no problem finding that restitution obligations are claims giving rise to debts.\textsuperscript{107} The Court held that the phrase "right to payment," in the definition of claim, simply meant an enforceable obligation, regardless of the objectives behind its imposition.\textsuperscript{108}

In contrast, \textit{Kelly} expressed "serious doubts" as to whether Congress intended criminal penalties to fall under the definition of debt.\textsuperscript{109} However, the Court declined to decide the question and held that section 523(a)(7) preserved from discharge any condition imposed by a state criminal court as part of a criminal sentence.\textsuperscript{110}

Through its efforts to avoid deciding whether criminal penalties are debts, the \textit{Kelly} Court unintentionally decided the question by holding that section 523(a)(7) applied to such penalties. Relying on that holding, the \textit{Davenport} Court held that criminal penalties are debts under the Code.\textsuperscript{111} In \textit{Davenport}, the Court reasoned that if Congress believed restitution obligations were not debts, it would have no reason to except such obligations from discharge in section 523(a)(7).\textsuperscript{112}

The problem with this facile application of \textit{Kelly} is that it glosses over the underlying reasoning of the decision. In \textit{Kelly}, the Court recognized the Code's broad definition of debt, but found that the legislative history of the Code does not compel the conclusion that Congress intended to change the "state of the law" regarding criminal judgments.\textsuperscript{113} The state of the law referred to in \textit{Kelly} was a well-established judicial exception to discharge for all criminal sentences, despite the lack of such an exception in the Bankruptcy Act of 1898.\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Davenport}, 110 S. Ct. at 2130. By defining "debt" and "claim" broadly, Congress abandoned the "provability" concept of claims present under the old Act so that the bankruptcy proceeding could deal with all potential financial obligations of the debtor and preserve the "fresh start" goal of the bankruptcy laws. See \textit{House REPORT, supra} note 16, at 309, \textit{reprinted in 1978 U.S. CODE CONG. \\& ADMIN. NEWS} 5963, 6266.
\item \textit{Davenport}, 110 S. Ct. at 2131.
\item \textit{Kelly} v. Robinson, 479 U.S. 56, 50 (1986).
\item \textit{Id.}
\item \textit{Davenport}, 110 S. Ct. at 2132-33.
\item \textit{Id.}
\item \textit{Kelly}, 479 U.S. at 50 n.12. The Court cited the normal rule of statutory construction that when Congress intends to change the interpretation of a judicially created concept, it makes its intent specific. \textit{Id.} at 47 (quoting Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986) (quoting in turn Swarts v. Hammer, 194 U.S. 441, 444 (1904))). \textit{See also supra} note 72.
\item \textit{See In re Moore}, 111 F. 145, 148-49 (W.D. Ky. 1901) (Bankruptcy Act "ha[s] reference alone to civil liabilities, as demands between debtor and creditors," and not to punishments for crimes); Zwick v. Freeman, 373 F.2d 110, 116 (2d Cir. 1967) (citing \textit{Moore} and holding that "governmental sanctions are not regarded as debts even when they require monetary payments"), \textit{cert. denied}, 389 U.S. 835 (1967); Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946) (adopted \textit{Moore}'s reasoning, holding it was not the intent of Congress that bankruptcy laws "pardon a bankrupt from the consequences of a criminal offense"); \textit{In re Abramson}, 210 F. 878, 880 (2d Cir. 1914) ("bankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy"). \textit{See also People v. Washburn}, 97 Cal. App. 3d 621, 625-26, 158 Cal. Rptr. 822, 825 (1979); People v. Mosesson, 78 Misc. 2d 217, 218, 356 N.Y.S.2d 483, 484 (Sup. Ct. 1974) ("A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a
\end{enumerate}
\end{footnotesize}
Kelly clearly suggests that the definition of debt does not include state criminal penalties. The Court seemed primed to adopt such a definition, but avoided the decision by falling back on the exception to discharge contained in section 523(a)(7). 115

In Davenport, the Court decided the question by flatly holding that criminal penalties are debts, contrary to the Kelly dicta suggesting otherwise. 116 While Davenport is technically consistent with Kelly's holding that section 523(a)(7) applies to criminal restitution obligations, it ignores the reality that Kelly simply used section 523(a)(7) to avoid the question of whether criminal penalties are "debts" under the Code.

As a result of the Davenport decision, convicted criminal offenders could cleanse themselves of a criminal restitution obligation, in bankruptcy. They merely had to file under chapter 13 instead of chapter 7. In a chapter 13 case, the debtor must prepare a plan, 117 which will have to meet certain requirements. 118 The offender's chapter 13 plan may provide for less than full payment of unsecured claims. 119 To be confirmed, the plan must only be approved by the court. 120 Creditors do not vote on the plan. 121 The court will approve a plan if proposed in good faith and if unsecured creditors are to receive at least as much under the plan as they would in chapter 7. 122

If less than the full amount of all claims is provided for by the plan, the debtor must commit all of his disposable income for three years to payments under the plan. 123 Even so, the debtor is able to avoid a sub-

115. 11 U.S.C. § 523(a)(7) (1988). That section creates an exception to discharge "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.

116. Davenport, 110 S. Ct. at 2131.


118. Id. § 1322. Section 1322(a) requires that a plan must "(1) provide for the submission of all or such portion of . . . future income . . . to the . . . trustee as is necessary for the execution of the plan; (2) provide for the full payment . . . of all claims entitled to priority under section 507 . . . ; (3) . . . provide for the same treatment for each claim within a particular class." Id.


120. Id. § 1325.

121. Id.

122. Section 1325(a) provides:

[T]he court shall confirm a plan if—(1) the plan complies with the provisions . . . of this title; (2) any fee . . . has been paid; (3) the plan has been proposed in good faith and not . . . forbidden by law; (4) the value . . . of property to be distributed under the plan . . . [to] each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 . . . and (6) the debtor will be able to make all payments under the plan and to comply with the plan.

Id. § 1325(a) (subsection (5) deals with secured claims).

123. Id. § 1325(b). Section 1325(b)(2) defines "disposable income" as "income which is
substantial portion of his unsecured claims, in chapter 13. For example, the
debtor may have little disposable income to commit to the plan. If the
amount of disposable income is only sufficient to make payments equal
to the amount that would have been distributed under a chapter 7 liqui-
dation, the debtor can avoid unsecured debts to the same extent as under
chapter 7. Of course, the plan will have to be proposed in good faith and
successfully completed by the debtor.\textsuperscript{124}

The above example exposes the inconsistency of the \textit{Kelly} and \textit{Davenport}
decisions. \textit{Kelly} held that criminal penalties are not dischargeable in chapter 7. The Court was guided by strong federalism concerns and the widely accepted view that criminal penalties are unaffected by bankruptcy.\textsuperscript{125} The obvious question after \textit{Davenport} is: Why do these principles forbidding discharge apply when the criminal offender files under chapter 7, but do not apply under chapter 13? The answer seems clear: The principles underlying \textit{Kelly} should apply regardless of whether the debtor files under chapter 7 or chapter 13. In fact, the \textit{Davenport} Court acknowledged this concern, but held that enforcing the Code according to its terms requires the contrary.\textsuperscript{126}

Despite this acknowledged inconsistency, the Court insisted that its
decision did not constitute a retreat from the principles applied in \textit{Kelly}.\textsuperscript{127} At first reading, the Court’s statement is difficult to understand because \textit{Davenport} seems completely oblivious to the concerns enunciated in \textit{Kelly}. However, the Court was simply pointing out that Congress’ intent in enacting chapter 13 cannot be ignored. The Court cited \textit{Kelly}’s finding that the pre-Code practice represented an unwillingness by courts to interpret bankruptcy laws as remitting state criminal judgments and concluded that this was its basis for holding that section 523(a)(7) applies broadly to all criminal penalties.\textsuperscript{128}

Turning to chapter 13, the \textit{Davenport} Court was faced with the unmistakable exclusion of section 523(a)(7)’s exception to discharge from the chapter 13 discharge.\textsuperscript{129} The Court held that Congress clearly intended to

\begin{footnotesize}
\item[124] Remember, a chapter 13 plan only has to provide for payment to unsecured claims of an amount not less than what would be paid under chapter 7. \textit{Id.} § 1325(a)(4). Under chapter 13, a debtor is discharged as soon as he completes the payments provided for by the plan. \textit{Id.} § 1328(a). Under chapter 7, the debtor is discharged immediately. \textit{Id.} § 727.
\item[125] See supra notes 63-77 and accompanying text.
\item[126] \textit{Davenport}, 110 S. Ct. at 2133-34.
\item[127] \textit{Id.} at 2133.
\item[128] \textit{Id. See} Kelly v. Robinson, 479 U.S. 36, 44 (1986).
\item[129] Title 11 U.S.C. § 1328(a) provides:
\begin{quote}
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 by the plan . . . except any debt (1) provided for under section 1322(b)(5)
\end{quote}
\end{footnotesize}
limit the exceptions to discharge applicable in chapter 13, and that criminal penalties are not excepted from the chapter 13 discharge.\textsuperscript{130} The Court's reasoning is tenable in light of \textit{Kelly} and the broad scope of a chapter 13 discharge. Therefore, once it determined that criminal penalties are debts under the Code, the Court's only logical course of action was to allow the restitution obligations to be discharged under chapter 13.

The problem with \textit{Davenport} is that congressional intent is not clear as to whether criminal penalties, including restitution obligations, are debts. In fact, the \textit{Kelly} Court expressed "serious doubts" as to whether Congress intended for criminal penalties to be considered debts.\textsuperscript{131} Although \textit{Davenport} focuses on restitution obligations, its holding could extend to make all types of criminal penalties dischargeable under chapter 13. Of course, to be dischargeable under any chapter, criminal penalties must constitute debts under the Code.

\textit{The Kelly/Davenport Dilemma}

The Supreme Court's approach to the question of whether criminal restitution obligations should be dischargeable in bankruptcy obviously raises some perplexing issues. In deciding whether criminal penalties are debts, the Court was faced with the congressional intent that "claim"\textsuperscript{132} be defined as broadly as possible so that all of the debtor's legal obligations could be dealt with in bankruptcy, thereby permitting the broadest possible relief.\textsuperscript{133}

Based on this intent, the Court could not easily justify holding that Congress had intended criminal restitution obligations not to be included in the definition of "debt." In \textit{Kelly}, the Court declined to decide the question for that reason, but was not forced to allow the discharge of restitution obligations because it was able to fit the obligations into the exception to discharge contained in section 523(a)(7).\textsuperscript{134}

However, by fitting criminal restitution obligations into 523(a)(7)'s exception to discharge, the Court trapped itself into holding that the obligations were dischargeable under chapter 13. Applying \textit{Kelly}, the Court in \textit{Davenport} was forced to allow the restitution obligations to be discharged under chapter 13. The effect of the two cases is not limited to restitution obligations. In \textit{Kelly}, the Court held that section 523(a)(7) applies to any condition imposed by a state court as part of a criminal

\[\ldots\text{ or (2) of the kind specified in section 523(a)(5) of this title.}\]


130. \textit{Davenport}, 110 S. Ct. at 2133.

131. \textit{Kelly}, 479 U.S. at 50.

132. See supra note 73.


sentence. There is no basis for concluding that Davenport should be limited to restitution obligations. Section 1328(a) unmistakably provides that section 523(a)(7) does not apply to the normal chapter 13 discharge. This reflects Congress' intent to give almost complete relief to a chapter 13 debtor who successfully completes payments under a plan. Of course, the Court could not rewrite the statute to create a new exception to discharge.

Through Kelly and Davenport, the Court has reached a dilemma: the Court recognizes the strong, longstanding principles against federal intrusion on state criminal processes and therefore believes that criminal penalties should be excepted from discharge. However, finding criminal penalties to be excepted from discharge allows such penalties to be discharged under chapter 13. This dilemma could be avoided entirely by approaching the problem from the perspective of the larger question of defining the scope of the Code.

The Scope of the Bankruptcy Code — The Broader Question

Federalism and the Supremacy Clause

Before considering the question of whether criminal restitution obligations are debts, courts should address the broader question of whether the Code applies to such obligations at all. The fundamental notion that the bankruptcy laws should not interfere with state criminal proceedings forms the central basis for the argument that such proceedings, and their resulting penalties, do not fall within the scope of the Code. The right to devise and enforce criminal sanctions is an important facet of the sovereignty retained by the states. The Supreme Court has repeatedly emphasized "the fundamental policy against federal interference with state criminal prosecutions." Those concerns run counter to the disturbing proposition that a state criminal judgment could be overturned, or at least ineffectuated, by operation of the Code. Nonetheless, such preemption was recognized in Davenport, where the Court acknowledged the ability of convicted criminals to avoid restitution obligations imposed as part of a criminal sentence,

135. Kelly, 479 U.S. at 50.
136. 11 U.S.C. § 1328(a) (1988). This is only true in a normal chapter 13 discharge, or in other words, a discharge obtained by completing payments under a chapter 13 plan. The court can also grant the debtor a chapter 13 hardship discharge under § 1328(b). All of § 523(a)'s exceptions apply to a hardship discharge. Section 1328(b) provides that the court may grant a discharge under chapter 13 even though a debtor has not fully completed payments under the plan if: (1) the debtor's failure to complete the payments is due to circumstances beyond his control; (2) the allowed unsecured claims have received as much as they would have received if the case had been filed under chapter 7; and (3) modification of the plan under § 1329 is not practicable. Id. § 1328(b).
137. See supra notes 63-72 and accompanying text.
138. Kelly, 479 U.S. at 47.
under the protective umbrella of the Code. That is the disturbing aspect of *Davenport*.

In *Kelly*, the Court expressed similar concerns, noting that its interpretation of the Code must be guided by the deep conviction that federal bankruptcy courts should not invalidate the decisions of state criminal courts. The Court also stated that one of the strongest considerations which must influence its interpretation is the state interest of administering the criminal justice system free from federal interference.

These federalism concerns are clearly important values implicitly provided by the Constitution and repeatedly recognized by the Supreme Court. However, federalism must give way to the Supremacy Clause, which expressly mandates the preemption by federal laws of conflicting state laws. Thus, federalism concerns must only be a consideration in the preemption analysis.

Federal law may preempt state law in several different ways. First, Congress is empowered to preempt state law by stating its intent to do so in express terms. Second, congressional intent to preempt may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it with state laws on the same subject. While these grounds for preemption clearly apply to prevent states from enacting their own bankruptcy laws, they do not apply to the question of whether the operation of state criminal laws is preempted by the Code.

However, preemption can also arise where Congress has not completely displaced state regulation in a particular area if a state law conflicts with federal law. The state law will be preempted to the extent it actually conflicts with the federal law. Such a conflict arises if a state statute stands as an obstacle to the accomplishment and execution of the full

140. *Kelly*, 479 U.S. at 47.

141. *Id.* at 49.


143. The supremacy clause of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .

U.S. Const. art. VI, cl. 2.


147. *Pacific Gas*, 461 U.S. at 204.

purposes and objectives of Congress. Therefore, if the purposes and objectives of the bankruptcy laws are not frustrated by the exclusion of state criminal sentences, there should be no preemption.

The Code's objectives are to provide a fair and final distribution and settlement of the debtor's assets among his creditors and to provide individual debtors with a financial "fresh start." The former objective was the original objective of bankruptcy laws, while the latter developed as a result of the increase in consumer debt and the resulting increase in consumer insolvency.

The fresh start principle as a primary purpose of bankruptcy was first enunciated by the Supreme Court in Local Loan Co. v. Hunt. The Court stated that a primary purpose of the bankruptcy law is to "relieve the honest debtor from the weight of oppressive indebtedness . . . ." The Court clearly stated that the fresh start concept was intended to apply to "honest" debtors. Seemingly, such a policy was not intended to apply to criminal offenders seeking to be freed from criminal obligations, through bankruptcy. In this respect, the exclusion of criminal sentences from the Code does not impede the fresh start objective.


150. In support of non-preemption is the Supreme Court policy that "pre-emption is not to be lightly presumed." Guerra, 479 U.S. at 281 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

151. See supra note 17.

152. See supra notes 15-16.


155. Id. at 244 (emphasis added). In Hunt, the Court stated:

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. (emphasis added) (quoting Williams v. United States Fidelity Co., 236 U.S. 549, 554-55 (1915)).

156. See Hamby v. St. Paul Mercury Indem. Co., 217 F.2d 78 (4th Cir. 1954) ("[I]t is not the purpose of the bankruptcy laws to grant discharges to those who have dishonestly appropriated them."); People v. Topping Bros., Inc., 79 Misc. 2d 260, 261, 359 N.Y.S.2d 985, 987 (Crim. Ct. 1974) ("[T]he purpose of the bankruptcy laws is to assist individuals from being completely overwhelmed by their debts and not to provide them with a means to avoid criminal responsibility for their actions.").

157. See Note, The Second Circuit's Novel Approach to Defining Debt Under the Bankruptcy Code: In re Robinson, 60 ST. JOHN'S L. REV. 344, 357 (1986) (argued that excluding criminal restitution from discharge would not impinge on the "fresh start" policy stating:
In addition, the idea that the Code is designed to govern disputes between an insolvent debtor and his creditor is not offended by the exclusion of state criminal penalties. This idea is a facet of the other primary objective of the Code, the fair and equitable distribution of the debtor's assets to his creditors. While a criminal restitution obligation may have an incidental effect on creditors' claims (e.g., restitution obligations would reduce the amount of future income available for incorporation into a chapter 13 plan), it would not prevent the fair and equitable distribution of the debtor's remaining property among the creditors.

State criminal laws do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Code and thus should not be preempted. In addition, if the legislative history of an enactment contains controlling statements to the effect that Congress does not intend to preempt particular areas of state law, the courts should honor the state laws. The legislative history of the Code does contain a statement which can be read as showing an intent by Congress not to preempt state criminal law. This often-cited statement appears in the Senate Report: "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension." Also, the federalism concerns expressed in Kelly, and acknowledged in Davenport, lend additional support for non-preemption.

By allowing the discharge of criminal restitution obligations, the Supreme Court, in effect, held that the Code preempts state criminal laws to the extent such laws conflict with the Code's objectives. As shown above, a preemption analysis suggests that the Code should not preempt, and thus should not affect, state criminal laws or the resulting criminal penalties.

**The Civil Law/Criminal Law Distinction**

An examination of the nature of the bankruptcy laws also lends support for the idea that state criminal laws are not within the scope of the Code. There is support for the proposition that state criminal laws are simply not within the scope of the Code, which is strictly civil in nature. In Kelly, the Court referred to the "state of the law" prior to the Code's enactment. The Court found the existence of a well-established...
judicial exception to discharge for all criminal sentences, despite the lack of such an exception in the Bankruptcy Act of 1898.\textsuperscript{164} The Court cited \textit{In re Moore}\textsuperscript{165} as the leading case on the subject. \textit{Moore} stated that the provisions of the bankruptcy act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed.\textsuperscript{166} \textit{Moore} stands not only for the proposition that criminal penalties are not debts under the Code, but for the broader idea that the bankruptcy laws are not applicable to any aspect of criminal law.\textsuperscript{167}

An examination of the Code itself reveals nothing to offend the notion that the Code does not encompass criminal laws. No mention of criminal laws or proceedings, other than sections 362(b)(1) and 503(b)(3)(C), appears in the Code.\textsuperscript{168} Section 503(b)(3)(C) allows a creditor to be paid, as an administrative expense, any expense incurred in connection with the prosecution of a criminal offense relating to the bankruptcy case.\textsuperscript{169} The provision does not attempt to affect the criminal prosecution, and does not provide any grounds for concluding that criminal laws are within the scope of the Code.

Section 362(a) automatically stays collection and enforcement proceedings against the debtor and his property.\textsuperscript{170} Section 362(b)(1) exempts from the stay “the commencement or continuation of a criminal action or proceeding against the debtor.”\textsuperscript{171} This provision supports the proposition that the Code does not apply to criminal sentences. In fact, as previously noted, the Senate Report states that the purpose for the exception is that the bankruptcy laws are not designed to protect criminal offenders from punishment, but to offer relief from “financial overextension.”\textsuperscript{172} Financial overextension gives rise to civil, not criminal, liabilities.\textsuperscript{173}

\begin{itemize}
  \item \textsuperscript{164} Kelly v. Robinson, 479 U.S. 36, 44-47 (1986); see Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979).
  \item \textsuperscript{165} 111 F. 145 (W.D. Ky. 1901).
  \item \textsuperscript{166} See id. at 148-49.
  \item \textsuperscript{167} See \textit{In re Pellegrino}, 42 Bankr. 129, 133 (Bankr. D. Conn. 1984) (“Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.”); \textit{In re Milone}, 73 Bankr. 452, 455 (Bankr. D.N.H. 1987) (true criminal proceeding is not affected by a bankruptcy proceeding involving the criminal defendant).
  \item \textsuperscript{168} 11 U.S.C. §§ 362(b)(1), 503(b)(3)(C) (1988). Section 523(a)(9) excepts certain debts arising out of the debtor’s operation of a motor vehicle while legally intoxicated. \textit{Id.} § 523(a)(9). But, while of course, driving under the influence of alcohol is a criminal offense, this exception applies to civil liabilities arising as a result of driving under the influence.
  \item \textsuperscript{169} \textit{Id.} § 503(b)(3)(C).
  \item \textsuperscript{170} \textit{Id.} § 362(a).
  \item \textsuperscript{171} \textit{Id.} § 362(b)(1).
  \item \textsuperscript{172} \textit{Senate Report}, supra note 13, at 51, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5837.
  \item \textsuperscript{173} For example, financial overextension causes the debtor to default on loans and credit agreements thereby giving the lenders, and/or creditors, an action to collect the debt. These are civil actions between the debtor and his creditors bringing suit.
\end{itemize}
In *Davenport*, the United States, appearing amicus curiae, contended that section 362(b)(1) reflected Congress’ intent to exempt restitution obligations from discharge under chapter 13. The Court addressed the argument in the context of the narrower question of whether restitution obligations are dischargeable debts. *Davenport* disposed of the argument by holding that sections 362(b)(1) and 523(a)(7) are not inconsistent.174 The Court did not address the broader question of whether criminal penalties are within the scope of the Code.

While sections 523(a)(7) and 726(a)(4) use the phrase “fine, penalty or forfeiture,” there is no indication that the phrase was meant to embrace criminal sentences.175 In *Davenport*, the United States argued that the phrase should apply only to civil fines, penalties and forfeitures. The Court rejected the argument, again relying on the holding in *Kelly* that section 523(a)(7) applies to criminal restitution obligations.176 Notwithstanding *Kelly*, there is no direct statement by Congress that the phrase is intended to apply to criminal fines, penalties and forfeitures.

Generally, the goal of civil law is to compensate for private wrongs.177 Civil law governs disputes between individuals, and its purpose is to hold individuals accountable to each other.178 The bankruptcy laws are clearly designed to govern such disputes. Bankruptcy law governs disputes between a debtor and his creditors, not between the debtor and society. The underlying dispute in a bankruptcy case lies between individuals and should be governed by civil laws.

Criminal law, on the other hand, is concerned with public wrongs or conflicts that arise between individual offenders and society.179 It is based upon societal expectations that establish the minimal behavioral standards of civilized society.180 Criminal law is aimed at preventing injury to the health, safety, morals and welfare of the public.181 This protection of society is accomplished by punishing those who have done public harm and by threatening those who have not yet done harm to others.182

Criminal restitution obligations result from the resolution of a conflict between society and a criminal offender. The offender has acted in a manner which goes beyond the minimum standards of behavior demanded by society. The only way to maintain these standards of behavior is to penalize those who do not conform.183 Accordingly, the criminal law is designed to meet this end.

174. *See supra* note 90 and accompanying text.
181. LAFAVE & SCOTT, CRIMINAL LAW 10 (2d ed. 1986).
182. *Id. See generally* Hall, Interrelations of Criminal Law and Torts, 43 COLUM. L. REV. 753 (1943).
183. Conduct forbidden by society is not a crime if there is no punishment. *See United
The bankruptcy laws were simply not designed with these penal concerns in mind. The purpose of bankruptcy is to govern disputes between an insolvent debtor and his creditors. The distinction between civil and criminal laws is clear with respect to the bankruptcy laws.

The Code's purposes and goals\(^{184}\) reveal its civil character, and as such it should not apply to criminal penalties. *In re Moore*\(^ {185}\) limited the scope of the Bankruptcy Act to civil liabilities. *Moore* should be recognized under the Code as well because the bankruptcy laws are civil laws.\(^ {186}\)

**Solving the Kelly/Davenport Dilemma**

Although the Supreme Court has spoken on the issue of whether criminal restitution obligations are dischargeable in bankruptcy, the court left the issue far from settled. The issue could have been settled judicially if the Court would have addressed it in the context of the larger question, the scope of the Code. The conflicts caused by Congress' intent to define debt as broadly as possible, and to make chapter 13 relief as complete as possible, would be eliminated if the Court held that criminal penalties are not within the scope of the Code.

Such a holding could be accomplished by applying a preemption analysis to the Code. As discussed above, there is a basis for holding that the Code does not preempt state criminal laws to any extent. Obviously, the Code does not wholly preempt the criminal law. However, under *Davenport*, state criminal laws are preempted to a certain extent. More specifically, *Davenport* contemplates that when a state-imposed criminal restitution obligation conflicts with provisions of the Code, namely chapter 13, the penalty is preempted.\(^ {187}\) A preemption analysis suggests that the Code should not be held to preempt state criminal laws.\(^ {188}\) In addition, the civil nature of the bankruptcy laws calls for holding criminal penalties outside the scope of the Code.\(^ {189}\)

Once it is determined that the Code does not affect criminal restitution obligations, then under chapter 7 the obligation remains after discharge. The obligation will also remain after a chapter 13 discharge, unless satisfied before the plan is completed. In addition, the obligation will have to be included in the computation of the amount of the debtor's disposable income available to pay debts under a chapter 13 plan.\(^ {190}\)

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\(^{184}\) See *supra* notes 14-17 and accompanying text.

\(^{185}\) 111 F. 145, 149-50 (W.D. Ky. 1901).

\(^{186}\) *Id.* at 149-50. See also *supra* notes 163-64 and accompanying text.

\(^{187}\) Although preemption is not specifically discussed by the Court, it is essentially the result of its decision to allow the discharge of criminal restitution obligations in chapter 13. *Davenport* hold that such obligations were dischargeable debts under chapter 13. *Davenport*, 110 S. Ct. at 2030-31.

\(^{188}\) See *supra* notes 145-61 and accompanying text.

\(^{189}\) See *supra* notes 163-86 and accompanying text.

\(^{190}\) See *In re Cancel*, 82 Bankr. 674, 677 (Bankr. N.D.N.Y. 1988), rev'd on other
Of course, Congress could always solve the \textit{Kelly/Davenport} dilemma by simply amending the Code in an appropriate manner. The \textit{Davenport} case, without a doubt, raised some legislative eyebrows. In fact, two bills were introduced in the House of Representatives during the week following the \textit{Davenport} decision, and both were aimed specifically at eradicating its result.\footnote{H.R. 4959, 101st Cong., 2d Sess. (1990); H.R. 4981, 101st Cong., 2d Sess. (1990). In speaking of \textit{Davenport}, the representative introducing bill 4959 to the House stated: "What an awful result which we intend to cure by introduction of this legislation." 136 Cong. Rec. H3098 (daily ed. June 5, 1990) (statement of Rep. Gekas). For bill 4981, even stronger language was used on the House floor, where it was stated: "In the \textit{Davenport} ruling, the Court determined that such obligations are dischargeable by convicted criminals filing under chapter 13. Mr. Speaker, I am today introducing legislation to close this loophole. Let us restore integrity to the bankruptcy code and to State criminal proceedings." 136 Cong. Rec. H3266 (daily ed. June 6, 1990) (statement of Rep. Rowland).} In addition, the problem has been raised in other proposed legislation.\footnote{House Bill 4959 (H.B. 4959) proposed that an eleventh exception to discharge be created: \textsection 523(a)(11). This section would not have allowed a debtor to be discharged from a debt "for a restitution payment under section 3663 or 3664 of title 18, or a similar State statute." H.R. 4959, 101st Cong., 2d Sess. (1990). The bill also proposed to amend section 1328(a)(2) by adding "or (a)(11)" after "section 523(a)(5)," which would have made the new exception to discharge applicable in chapter 13, along with section 523(a)(5). \textit{Id.} House Bill 4981 (H.R. 4981) also proposed to make restitution obligations nondischargeable under chapter 13, but took a different approach. This bill proposed the "Bankruptcy Antifraud Act of 1990." The act would have also added an eleventh exception to \textsection 523(a), making nondischargeable any debt arising "from a proceeding brought by a governmental unit to recover civil or criminal restitution . . . ." H.R. 4981, 101st Cong., 2d Sess. (1990). In addition, H.B. 4981 proposed that section 1322(a), which sets forth the requirements of a chapter 13 plan, be amended by adding a requirement that the plan "provide for the full payment, in deferred cash payments, of all claims for debts of the kinds specified in section 523(a)(11)." \textit{Id.} By adding a new \textsection 523(a)(11), as both bills would have done, uncertainty for other criminal penalties could have been compounded by conceivable interpretations of the section. The proposed section could have been read as showing congressional intent that \textsection 523(a)(7) does not apply to criminal penalties, since criminal restitution would be specifically provided for by the new \textsection 523(a)(11). Remember \textit{Davenport}'s refusal to interpret a statutory provision in a way that would render another provision superfluous. \textit{See supra notes 97-98.} If all criminal penalties were intended by Congress to be excepted from discharge in \textsection 523(a)(7), then there would be no reason to specifically except criminal restitution in a separate provision. Under such an interpretation, other criminal penalties, other than restitution could be discharged under chapter 7. Such a result was clearly not the intention of the bills.} As a result of this strong dissent to the \textit{Davenport} decision,
Congress recently amended the Code to make restitution obligations nondischargeable under chapter 13.\footnote{193} The amendment adds the following language to section 1328(a) which excepts certain debts from the chapter 13 discharge: "(3) for restitution included in a sentence on the debtor's conviction of a crime."\footnote{194} Therefore, criminal restitution obligations are no longer dischargeable under chapter 13.

In \textit{Davenport}, the Court held that restitution obligations in a criminal case do constitute debts within the meaning of the Code and are therefore dischargeable under chapter 13.\footnote{195} While overruling \textit{Davenport}'s result by excepting criminal restitution obligations from discharge under chapter 13, Congress has endorsed its analysis. Specifically, Congress has implicitly accepted \textit{Davenport}'s holding that criminal restitution obligations, and thus criminal penalties in general, are debts.

Congress has attacked the issue, as done by the Supreme Court, in the context of the smaller question. The amendment does not affect the dischargeability of other types of criminal penalties giving rise to monetary obligations, thus leaving uncertain their dischargeability under chapter 13.

\footnote{193. Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865. The Act also amends section 523(a)(9) to make nondischargeable any debt "for death or personal injury" caused by the debtor's operation of a motor vehicle while intoxicated, and amends § 1328(a)(2) to make that exception to discharge applicable to chapter 13. \textit{Id.}}

\footnote{194. \textit{Id.} Title 11 U.S.C. § 1328(a) provides in relevant part:
\begin{quote}
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 by the plan . . . except any debt - (1) provided for under section 1322(b)(5) of this title; or (2) of the kind specified in section 525(a)(5) of this title.
\end{quote}}

\footnote{11 U.S.C. § 1328(a) (1988).}

\footnote{195. Pennsylvania Welfare Dep't v. Davenport, 110 S. Ct. 2126, 2134 (1990).}
Although Congress’ action narrowly solves the Kelly/Davenport dilemma with respect to criminal restitution obligations, it provides no guidance for future determinations of whether criminal laws are affected by the Code. The guidance offered by the amendment is that criminal laws are within the scope of the Code and that criminal penalties constitute debts.

Instead of carefully excepting criminal restitution from discharge, Congress, like the courts, should approach the issue in the context of the broader question. In other words, Congress should enact legislation defining the scope of the Code and excluding state criminal laws from the operation of the Code.

All that is needed is a clear statement by Congress of its intent not to preempt state criminal laws. If Congress expressly states that it does not intend to preempt state criminal laws, the courts must honor the state laws. One way to do this would be to enact a provision defining the scope of the Code. A new section could be enacted as follows:

§ 100. Scope of title.
This title shall establish the uniform law of bankruptcies in the United States. Nothing contained herein shall be construed to displace any state criminal law or to affect any penalty resulting from the enforcement of such law.

Such a section would clearly solve the Kelly/Davenport dilemma and would accord with the views that the Code is a civil statute and that state criminal laws should not be preempted by the Code.

The provision could also be used to expressly exclude specific federal criminal sanctions from the operation of the Code. Other conflicts between state and federal law could be resolved in the scope section, either originally enacted or added by amendment.

196. See supra note 146.
198. Another approach that has been suggested is an amendment to the definition of claim in 11 U.S.C. § 101(4)(a) (1988) which would exclude any obligation of the debtor arising out of a criminal proceeding against the debtor. Note, Criminal Restitution, supra note 144, at 138.
199. The question of whether federal criminal laws are within the scope of the Code raises some difficulties, because neither the supremacy clause nor federalism concerns are applicable. Therefore, the question of whether federal criminal laws are within the scope of the Code would be a policy determination by Congress. Congress would thus be able to decide whether a federal criminal sanction should be dischargeable in bankruptcy on a statute by statute basis, and make amendments to the proposed scope provision accordingly.
200. The following are some of the areas of state law that have conflicted with the Code: environmental laws (see, e.g., Ohio v. Kovacs, 469 U.S. 274 (1985) (Court held that a cleanup order obtained in a state court which had been converted into a money judgment was dischargeable in bankruptcy)), family law (see, e.g., In re Nunnally, 506 F.2d 1024 (5th Cir. 1975)) (amount awarded to bankrupt’s ex-wife during divorce proceedings as advance to community from her separate estate was nondischargeable debt)), and insurance law (see, e.g., A.H. Robbins Co. v. Piccinin, 788 F.2d 994 (4th Cir.) (debtor’s liability insurance policies are property of the bankruptcy estate), cert. denied, 479 U.S. 876 (1986)).
A scope provision would provide guidance for courts and promote a more consistent interpretation of the Code and its various provisions.

Conclusion

The Supreme Court’s decisions in *Kelly v. Robinson* and *Pennsylvania Welfare Department v. Davenport* are manifestations of the problems which arise because of the inherent conflict between the Bankruptcy Code and state criminal laws. Applying the Code to criminal restitution obligations creates inconsistent results. The inconsistency is evidenced by the fact that as a result of *Kelly* and *Davenport*, a convicted criminal could discharge a criminal restitution obligation under chapter 13 to the same extent as if he were allowed a discharge for such obligation under chapter 7. The criminal must simply file under chapter 13 instead of chapter 7. Thus, under *Davenport* the principles underlying the decision to make criminal restitution obligations, or penalties in general, nondischargeable under chapter 7 are wholly inapplicable in a chapter 13 case.

Although Congress intended a broader discharge under chapter 13 for the debtor who earned it by completing a rehabilitative plan, that intention should not be construed as displacing the basic rule that the bankruptcy courts should not invalidate state criminal judgments. More fundamentally, a convicted criminal should not be able to avoid part of a criminal sentence by filing for bankruptcy. The proposition offends society’s expectation that a criminal will be held accountable for criminal activities.

For these reasons, Congress amended the Code to eradicate the result of *Davenport*. Through this amendment, proponents of the view that the bankruptcy laws should not affect criminal laws may have won the battle but lost the war. By specifically excluding criminal restitution obligations from discharge, Congress has endorsed the view that criminal

203. See supra notes 117–24 and accompanying text.
204. The *Kelly* Court stated: “Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings.” *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).
205. See *In re Abramson*, 210 F. 878, 880 (2d Cir. 1914) ("[B]ankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy."); *In re Pellegrino*, 42 Bankr. 129, 134 (Bankr. D. Conn. 1984) ("[t]his would defy both logic and reason to allow a convicted person, who has been ordered to make restitution to his victim in lieu of incarceration, to use the Bankruptcy Code to escape the consequences of his crime."); *In re Zarzynski*, 771 F.2d 304, 305 (7th Cir. 1985) ("[I]t is not within the intent of Bankruptcy law . . . to relieve a creditor from criminal responsibility."). See also cases cited supra note 156; Note, *Criminal Restitution*, supra note 144 (called for recognition of "complete separation" doctrine which would exclude bankruptcy law from interfering with state criminal law).
penalties are debts under the Code. As a result, other types of criminal penalties not specifically accounted for will be dischargeable under a reasonable interpretation of the Code. In addition, the amendment leaves the resolution of any conflict between the Code and state criminal laws unclear.

If the courts, or better yet, Congress, would define the scope of the Code in a manner that excludes state criminal laws, the fundamental policy against federal interference with state criminal prosecutions would be served.207 Such a definition would not prevent the effective operation of the Code in meeting its underlying objectives of giving the debtor a fresh start and distributing the debtor's property fairly among the various creditors.208 More importantly, such a definition would prevent the use of the Bankruptcy Code as an escape route for convicted criminals.

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207. Younger v. Harris, 401 U.S. 37, 46 (1971); Kelly, 479 U.S. at 47.
208. See supra notes 15-17 and accompanying text.