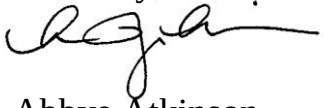
DRAFT – Please do not share.

April 18, 2016

Dear Emerging Scholars Readers:

Attached is a rough and incomplete working draft of my job talk project. As it is very much a work-in-progress, it is verbose in some places and under-developed and skeletal in others. Nonetheless, I hope it will give enough of a substantive view into the project to facilitate your criticisms and suggestions. So, I thank you in advance for engaging with it in this state, and I look forward to your feedback.

Sincerely,



Abbye Atkinson

WORKING TITLE: DISCHARGING DEBT PEONAGE

Abbye Atkinson*

Introduction

David Stojcevski died, naked on the floor of his Macomb County, Michigan jail cell.[1] Because he was held in the mental health unit of the jail, per protocol, jail staff had taken his clothes away for his own safety. For 17 days, he struggled in his cell with severe withdrawal symptoms, at times convulsing and hallucinating. He did not receive the medications that had been prescribed to help him manage his addiction to benzodiazepines, a class of tranquilizers that include Xanax and Klonopin. Although after his death experts would say that he exhibited classic signs of withdrawal,[2] no one employed by the jail intervened to save his life.

The tragedy of Stojcevski's death prompted significant media coverage and criticism of the jail staff and a lawsuit alleging their apparent indifference to his rapidly deteriorating condition.[3] Less attention, however, has been paid to the tragedy of why Stojcevski was in the county jail to begin with. Stojcevski was in jail because he could not afford to pay the $772 fine he owed for failing to appear to answer a charge of careless driving.[4] Not having the means to pay the debt, his only option was to serve a 30-day jail sentence.[5] The municipality was going to have its pound of flesh if it could not have its fine.[6]

The imposition of penal fines and fees on individuals like Stojcevski, who have no hope of paying them, has become a significant and increasingly common problem that has had catastrophic effects in economically disenfranchised communities.[7] The regressive effects of these practices are striking.[8] Take, for example, the case of 62 year-old Edward Brown. The

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1 Ryan Grenoble, *Man Jailed For Unpaid Traffic Ticket Suffers 'Excruciating' Death In Cell: Lawsuit*, The Huffington Post, Oct. 1, 2015 available at http://www.huffingtonpost.com/entry/family-sues-after-man-dies-while-in-jail-for-unpaid-parking-ticket_us_56044469e4b00310edfa778b.

2 http://www.clickondetroit.com/news/man-jailed-for-ticket-dies-in-custody.

3 [TK]

4 *See* Stojcevski Complaint, available at https://www.documentcloud.org/documents/2461234-david-stojcevski-federal-complaint.html.

5 *Id*.

6 William Shakespeare, THE MERCHANT OF VENICE.

7 *See, e.g.*, *Chapter One: Policing For Profit*, 128 HARV. L. REV. 1753 (2015)

8 *See, e.g.*, Joseph Shapiro, *Jail Time For Unpaid Court Fines And Fees Can Create Cycle Of Poverty*, National

City of Jennings, Missouri cited him for too-tall grass in his yard, for trespassing when he remained in his home after the city had condemned it, and for failing to have his dog vaccinated for rabies. Mr. Brown, whose income was limited to $488 per month in Social Security benefits and food stamps, could not pay the $464 that he owed the city. He was jailed repeatedly for his failure to pay the fine, once for 30 days and another time for 20 days. He is homeless now.[9]

Stojcevski and Brown's cases are particularly harsh in their outcomes, yet the experiences of being imprisoned for being too poor to pay a civil or criminal penal debt is common. Individuals with unserviceable penal debt, like David Stojcevski and Edward Brown, face jail time, job loss, asset forfeiture, the run-up of other debts like domestic support obligations while they are incarcerated, and more.[10] Indeed, unmanageable debt stemming from federal, state, and municipal penal processes is a problem in many communities, and practices related to the imposition of civil and criminal penal debt,[11] including policing for profit[12] and "incarceration as a collection method,"[13] have been sharply criticized for their regressive effects.[14]

Commentators have observed the ways in which this type of debt has had catastrophic effects on poor and disenfranchised communities like Ferguson, Missouri,[15] but have assumed that these debts are a one-way ratchet into financial ruin and that there is no way out of them. As a result, concerns overlook that there is an area of law seemingly well-tailored to addressing what is a socially undesirable debt spiral; bankruptcy. However, criminal and civil fines,

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Public Radio, February 9, 2015, available at http://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty.; *See also*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015) ("decriminalization functions as a kind of regressive tax, creating perverse incentives for low-level courts that increasingly rely on fines and fees to fund their own operations").

[9] Joseph Shapiro, *Jail Time For Unpaid Court Fines And Fees Can Create Cycle Of Poverty*, National Public Radio, February 9, 2015, available at http://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty

[10] *See, e.g.*, Arch City Defenders, Municipal Courts White Paper 2015 ("Targeting poor individuals and families with fines for traffic and ordinance violations can have real and devastating consequences on their ability to hold on to stable housing."), http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

[11] I use the term "penal debt" to describe fines and fees imposed after violation of civil or criminal law.

[12] [TK]

[13] Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1949 (2014).

[14] *See, e.g.*, Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1949 (2014).

[15] *See, e.g.*, Arch City Defenders, Municpal Courts White Paper, http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf; *see also* DOJ Complaint.

penalties, and forfeitures, including federal restitution obligations, are categorically non-dischargeable as a matter of the Bankruptcy Code.[16] And courts have further concluded that fines and fees imposed for any penal purpose, including state restitution obligations and prosecution costs, are similarly non-dischargeable in a chapter 7.[17] Yet, bankruptcy scholars, principally concerned as they are with the law of debtors and creditors and how unmanageable debts should be addressed, have paid little attention to this form of debt and its negative treatment in bankruptcy.[18]

The treatment of penal debt in bankruptcy has been legislatively and judicially justified by reference to three concerns. First, public policy concerns. Courts have been reluctant to read bankruptcy laws to permit the discharge of penal debt purportedly imposed to encourage deterrence, punishment, and rehabilitation.[19] Second, federalism concerns. Courts have been reluctant to interpret the bankruptcy laws to allow federal courts to enjoin state court proceedings. Finally, morality. Notions of honesty have shaped bankruptcy law, and paradigmatically, the bankruptcy discharge is reserved for the "honest but unfortunate debtor."[20] In this light, individuals who have violated the law and want to discharge debt related to their conviction have been treated as per se dishonest. Thus, to the extent that fines and fees are imposed for penal purposes, debtors with penal debt must bear the burden of repayment with no relief available in bankruptcy because they are deemed unworthy of that privilege.[21]

This paper argues that these concerns are misguided when viewed against the backdrop of current problems in federal, state, and municipal justice systems. Bankruptcy law should authorize judicial discretion in the discharge of penal debts, particularly in light of failures in both criminal and civil justice systems around penal debt. Stojcevski and Brown's cases provide fodder for a larger discussion about the treatment of penal debt in bankruptcy, particularly in instances in which (1) the penal debt is tainted by suggestion or admission that it is imposed as part of a scheme to fund municipal functions rather than as a "punishment[] inflicted pro bono

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[16] *See* 11 U.S.C. §§ 523(a)(7), (a)(13); 1328(a).
[17] *See Kelly v. Robinson*, 479 U.S. 36 (1986).
[18] *But see*, Margaret Howard, *Bankruptcy Federalism: A Doctrine Askew*, 38 PEPPERDINE L. REV. 1 (2010).
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[20] *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).
[21] *Kelly v. Robinson*, 479 U.S. 36 (1986).

public,"[22] and/or (2) the court or adjudicating entity imposes the penal debt without any assessment of whether the individual has the capacity to pay the debt.[23] With respect to the former, municipalities have misused criminal and civil penal fines and fees to line their coffers, shaking down the poorest and most vulnerable residents in the process.[24]

For example, the Department of Justice's ("DOJ") investigation of and report on the practices of the Ferguson Police Department and the Ferguson Municipal Court, along with the civil complaint that the Department subsequently filed against the City of Ferguson, revealed the extent to which the City's singular focus on revenue drove its policing and judicial policies, and consequently the imposition of penal debt. Indeed, in its short-lived action against the City of Ferguson,[25] the DOJ alleged that the Ferguson Police Department together with the Ferguson Municipal Court engaged in a concerted effort to burden the City's poorest and most disenfranchised citizens with a series of onerous penal fees and fines often related to fairly innocuous infractions of the Ferguson Municipal Code.[26]

Moreover, many courts impose penal fines and fees without inquiring into whether the individual is capable of reasonably paying them, in apparent contravention of the Supreme Court's directive in *Georgia v. Bearden*.[27] Several jurisdictions prohibit their courts from first assessing whether an individual can pay a penal fine or fee. For example, the State of Florida imposes on convicted individuals "the costs of prosecution, including investigative costs incurred by law enforcement agencies," and requires the court to include these costs in its judgment.[28] Moreover, the court must impose these costs without any consideration of whether or not the defendant is able to pay those costs.[29]

In light of profit-focused policing and municipal court practices, and in light of the imposition of fines and fees without adequate judicial inquiry into whether the individual can pay

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[22] Moore at 150.
[23] Beth
[24] *See* DOJ Report and Complaint.
[25] [Describe how the City ultimately settled and what the City agreed to do to reform its practices.]
[26] *See* DOJ Complaint.
[27] *See, e.g.*, Council Of Economic Advisers Issue Brief, *Fines, Fees, And Bail Payments In The Criminal Justice System That Disproportionately Impact The Poor*, December 2015, available at https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.
[28] Fl. Stat. 938.28(1).
[29] Fl. Stat. 938.28(2)(a) ("The court shall impose the costs of prosecution and investigation notwithstanding the defendant's present ability to pay.")

these debts—both of which are sending more and more poor people to jail to pay their debts with their bodies—public policy, federalism, and honesty concerns seem unsatisfactory reasons why the Bankruptcy Code should not provide relief to those individuals who might benefit from a bankruptcy filing. First, as to public policy, it is unlikely that profit-based legislation and policing encourages deterrence from misconduct, rehabilitates an individual who cannot afford to pay a fine, or punishes proportionally violations of the law that are often innocuous. If anything, the punishment is for being poor, with no deterrent or rehabilitative effect. In other words, while the core concern underlying the public policy rationale might make some sense in many cases of criminal and civil fines, in cases of low-level violations of the law that doesn't trigger the same moral hazard concerns, non-dischargeability of penal debt in bankruptcy unduly removes an important option that addresses a significant social concern.[30]

Second, as to federalism, Congress and courts have taken an overly-formal approach to thinking about shielding the substantive and procedural prerogatives of states and municipalities with respect to penal debt. Professor Melissa Jacoby has shown, in the municipal bankruptcy context, how a functional approach to federal interventions in bankruptcy proceedings were integral in the Detroit bankruptcy, formal federalism restrictions notwithstanding.[31] In addition, Congress and federal courts have been most comfortable intervening in state affairs where Civil Rights (with a capital CR) are at issue. Although the Court has receded from this position in recent times, there are still carve out for instances where federal intervention in appropriate to vindicate rights. From this perspective, it is less clear that state/local penal and collection objectives should be singled out for protection as a matter of federalism as compared to other areas of state law, such as state tax policy, that are subordinated in favor of bankruptcy's fresh start policy. To that end, scholars have noted that by definition, federal bankruptcy law appropriately interferes with and overrides state law in contexts where debt collection is concerned.[32]

Finally, as to moralistic notions of honesty, there are serious questions about bankruptcy law's equation of conviction with inherent dishonesty given persistent deficiencies in the

[30] *See* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 775-6 (2010) (noting that in other contexts, bankruptcy courts often "resolve difficult, politically fraught disputes").
[31] Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REG. 55 (2016).
[32] *See* Margaret Howard.

administration of justice, including, for example, inadequate indigent representation.[33] Conviction in those instances may say more about the state of indigent defense in a particular jurisdiction than about the morals of the individual being convicted. Moreover, where state or municipal policing and adjudicative procedures reveal a profit motive, it may very well be the actions of the state or municipality and its agents that should raise concerns about honesty and legitimacy more so than that of the debtor. Yet, bankruptcy policy's focus on the "honesty" of the debtor categorically protects these state and municipal practices and prevents some deserving individuals from access to a back-end remedy of bankruptcy (insofar as bankruptcy might help the individual to avoid jail time, job loss, wage garnishment, and other catastrophic consequences).[34]

Ultimately, these rationales are anachronistic, not accounting for the evolution of fines and penalties as a state/local government funding mechanism or the regressive effects of state/local revenue schemes that influence the administration of their justice systems. Nor do they account for the willingness of courts and other decision-makers to impose fines and penalties without any inquiry into whether the individual can ever hope to pay them. This article aspires to provide a richer and more grounded account of the connections between criminal law and the Bankruptcy Code than has been provided by scholars, courts, and legislators. It questions whether penal debt should be categorically protected from discharge under the Bankruptcy Code when state/local and federal policing and penal practices, in some instances, appear to be at best problematic and at worst illegitimate. Furthermore, it argues that discharging these debts is consistent with consumer bankruptcy's normative goal to provide a fresh start and to incentivize down and out individuals to return to productivity.[35]

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[33] *See, e.g., Justice in Louisiana: The Ruin of Many a Poor Boy*, The Economist, Mar. 12, 2016, http://www.economist.com/news/united-states/21694525-crisis-louisianas-courts-emblematic-broader-pathologies-both-state-and

[34] *See generally*, Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1633 (2011) (discussing ways to address creditor misconduct in bankruptcy).

[35] *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1421 (1985).

I. Fines, Penalties, and Forfeitures in the Bankruptcy Code

A. General Consumer Bankruptcy Principles

Consumer bankruptcy is a means through which over-burdened debtors may discharge unmanageable financial obligations. Proverbially, it is a path to a "fresh start" for those fortunate enough to receive a discharge of debts.[36] An individual debtor has two principle options for debt relief under the Bankruptcy Code.[37] First, the debtor can file a petition under chapter 7 in which she agrees to turn over her non-exempt assets[38] to a bankruptcy trustee. The trustee sells those assets and uses the proceeds to repay the debtor's creditors on a pro rata basis.[39] Alternatively, the debtor may choose to reorganize her debts under chapter 13,[40] where the debtor is permitted to keep both exempt and non-exempt assets. In exchange, the debtor must complete a bankruptcy court-approved chapter 13 plan in which the debtor devotes a portion of future income to the repayment of creditors for a three or five year period.[41] The court will grant a discharge of eligible debt only if the debtor successfully completes her multi-year chapter 13 plan.[42]

B. Statutory Non-dischargeability

It is a well-established principle of current bankruptcy law that the right to a discharge should be interpreted broadly.[43] Notwithstanding this norm, there are certain debts that are categorically excluded from a bankruptcy discharge, generally in cases "where the public policy at issue outweighs the debtor's need for a fresh start."[44] With regard to a chapter 7 liquidation

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[37] Individual debtors under certain circumstances may also file for bankruptcy protection under chapter 11.

[38] 11 U.S.C. § 522.

[39] Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 116 (2011); Barry Adler, et al., _____, at 559 ("The requirement that those seeking a fresh start give up any non-exempt assets limits the number of opportunists who might take advantage of the system.").

[40] 11 U.S.C. §§ 1301–1330.

[41] 11 U.S.C. § 109(e).

[42] 11 U.S.C. § 1328(a).

[43] See, e.g., In re Spar, Bkrtcy.S.D.N.Y.1994; *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed[.]"); *In re Ryan*, 389 B.R. 710, 713-14 (9th Cir. 2008)("exceptions to discharge are interpreted strictly against objecting creditors and in favor of debtors").

[44] *See.In re Posner*, 434 B.R. 800, 803 (Bankr. E.D. Mich. 2010) (citing *In re Pelkowski*, 990 F.2d 737 (3d Cir. 1993); *see also, e.g., Grogan v. Garner*, 498 U.S. 279 (1991) ("The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain

proceeding, these debts are codified in section 523(a),[45] and with regard to a chapter 13 proceeding, they are codified in section 1328(a).[46]

1. Section 523(a) and Fines, Penalties and Forfeitures

Non-dischargeable debts listed in Section 523(a) of the Code include certain tax debts,[47] debts incurred through fraud or false representations,[48] student loans unless the bankruptcy court affirmatively deems their repayment an "undue burden" on the debtor,[49] domestic support obligations,[50] tort liabilities stemming from willful misconduct like drunk driving,[51] and criminal and civil fines, penalties, and forfeitures, that are payable to and for the benefit of a governmental unit,[52] and that are not imposed for pecuniary purpose.[53] With respect to the latter, courts have further concluded that state restitution obligations, and any other monetary condition that a court imposes, in any part, for penal purposes are also non-dischargeable.[54] Restitution obligations imposed pursuant to a violation of Title 18 of the United States Code are also nondischargeable under the Code.[55]

Historically, debts owing to the sovereign were not dischargeable. The Bankruptcy Act

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categories of debts — such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud. Congress evidently concluded that the creditor' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start. "); *Penn. Dept. of Pub. Welf. v. Davenport*, 495 U.S. 552 (1990) ("Congress defined 'debt' broadly and took care to except particular debts from discharge where policy considerations so warranted."); *In re Sateren*, 183 B.R. 576, 581 (Bankr. D.N.D. 1995) (stating that in the context of a domestic support obligation, "Congress enacted § 523(a)(5) in an effort to resolve the conflict between the fresh start policy of the bankruptcy discharge and the family law policy which recognizes the need of ensuring the necessary financial support for the disadvantaged spouse after the termination of the marriage as well as an equitable distribution of marital property.")

[45] 11 U.S.C. § 523(a).

[46] 11 U.S.C. § 1328(a).

[47] 11 U.S.C. § 523(a)(1).

[48] 11 U.S.C. § 523(a)(2).

[49] 11 U.S.C. § 523 (a)(8).

[50] 11 U.S.C. § 523 (a)(5).

[51] 11 U.S.C. § 523 (a)(9).

[52] The Code defines a "governmental unit" as "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

[53] 11 U.S.C. § 523(a)(7). The text of section 523(a)(7) provides: "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 . . . 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 . . ."

[54] *See* Collier on Bankruptcy 523.13 (2016); *Kelly v. Robinson*.

[55] 11 U.S.C. § 523(a)(13).

of 1898, which was the first lasting bankruptcy legislation passed by Congress, did not expressly limit the discharge of these penal debts. Section 63 of the 1898 Act described the types of debts that were eligible for payment in the bankruptcy proceeding.[56] These included a "fixed liability" plus interest existing at the time that the petition was filed even if payment was not yet due, provided that the liability was "founded upon provable debts reduced to judgments after the filing of the petition."[57] Under section 57 of the 1898 Act, creditors purporting to hold a claim against the debtor's estate were required to "prove" the claim before it would be "allowed" in the bankruptcy proceeding.[58] Creditors could prove their claims by submitting a sworn and signed written statement describing the claim, the consideration exchanged for the claim, any collateral securing the debt underpinning the claim, any payments made on the debt, and the actual amount of the claim, that is how much the allegedly owed the creditor.[59] Claims that were eligible and duly proved were then allowed in the bankruptcy proceeding and eligible for payment from the debtor's estate.[60] However, the 1898 Act expressly disallowed: "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture . . . except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose."[61] Thus, penal debts were not provable under the 1898 Act.

The 1898 Act also listed a set of debts that were categorically non-dischargeable, so-called "debts not affected by a discharge."[62] These were: (1) federal, state, and municipal tax debts, (2) debts stemming from a judgement based on fraud, obtaining property by false pretenses or willful misrepresentation, or willful and malicious bodily or property injury, (3) debts that were not "scheduled" soon enough to permit the creditor the opportunity to prove them per section 63, and (4) debts incurred more generally through some fraud of the debtor.[63] Debts owing to federal and state governments, including penal debts, were not included in the list.[64] This omission, however, was consistent with the historical view that debts owing to the

[56] 50 Stat. 344 at 63.
[57] 50 Stat. 344 at 63.
[58] 50 Stat. 344 at 57(a).
[59] 50 Stat. 344 at 57(a).
[60] 50 Stat. 344 at 57(d).
[61] 50 Stat. 344 at 57(j).
[62] 50 Stat. 344 at 17.
[63] 50 Stat. 344 at 17.
[64] *See Kelly*.

sovereign were not affected by a bankruptcy proceeding.

Indeed, pre-1898 American bankruptcy jurisprudence interpreting previous bankruptcy laws shows that courts in fact interpreted the omission of debts owed to the sovereign from the list of debts that a debtor could discharge to mean that these debts were simply unaffected by the bankruptcy proceedings.[65] In other words, these debts were not affected by the bankruptcy unless expressly mentioned in the statute,[66] while only those debts (and creditors) that were addressed by the law could be affected by the bankruptcy.

The early nineteenth-century bankruptcy involving the partnership of Johnson and King, filed under the Bankruptcy Act of 1800, exemplifies this treatment of debts owing to the government.[67] Authorized by Article I, Section 8 of the Constitution to enact "uniform Laws on the subject of Bankruptcies throughout the United States,"[68] Congress passed the first bankruptcy law in 1800, the Bankruptcy Act of 1800.[69] Under the 1800 Act, bankruptcy proceedings were involuntary meaning that only creditors could initiate bankruptcy proceedings and only merchants were eligible to receive a discharge.[70] In *United States v. King*, "bankrupts" Johnson and (Daniel) King were importers who owed a debt to the United States government based on customs bonds.[71] The government received a judgment against Johnson and King for the debt and, in the course of collection, executed and levied against a shipment of wine from Spain held by James King, Daniel King's son.[72] James King claimed that the wine and its proceeds were rightfully his because Johnson and King had assigned the wine to him before the judgment was issued in favor of the United States.[73] The United States filed suit to determine whether in the course of the bankruptcy proceedings, its judgment and execution took priority over James King's right to the wine and its proceeds (James King having since apparently since sold the wine to recoup the debt owed to him).[74] The government argued that Johnson and Daniel King

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[65] *See United States v. King*, Wallace's Circuit Court (1801).
[66] See *In re Gi Nam*, 273 F.3d 281, 289 (3d Cir. 2001), *as amended* (Dec. 6, 2001).
[67] *United States v. King*, Wallace's Circuit Court (1801).
[68] Article I, Section 8.
[69]
[70] *See* http://www.rib.uscourts.gov/newhome/docs/the_evelution_of_bankruptcy_law.pdf
[71] A custom bond is a bond given by an importer for payment of damage resulting from failure to comply with the customs laws and regulations. *See* http://www.merriam-webster.com/dictionary/customs%20bond.
[72] *United States v. King*, Wallace's Circuit Court, 13 (1801).
[73] *United States v. King*, Wallace's Circuit Court, 13 (1801).
[74] *United States v. King*, Wallace's Circuit Court, 13 (1801).

were insolvent when they assigned the wine to James King and that under the existing bankruptcy law, the government had a preference of payment of the debt owed by the insolvent debtor in the bankruptcy proceedings.[75]

The Third Circuit Court of Appeals ruled in favor of James King. The court noted that in the ordinary course, a debtor was entitled to prefer a specific creditor over his other creditors by paying one debt in full while leaving other debts outstanding.[76] The court explained, however, that "the bankrupt laws . . . take[] from the debtor his right of preference."[77] Accordingly, the government's preference of payment was applicable only where there was an "act of bankruptcy" by the debtor, such as where the debtor assigned all assets to one creditor, where there was a court action resulting in the attachment of the debtor's property, or where the debtor had "absconded."[78] Because Johnson and King had assigned the wines to James King to satisfy a bona fide debt and because Johnson and King had continued to do business and pay its debts at the time of the assignment (even though in some financial distress), the court concluded that the assignment of the wines James King was not subject to the bankruptcy priority provision in the bankruptcy law that would have favored the federal government.[79] Significantly, in the course of reaching its decision, the court opined that:

> "[W]e are of the opinion, that debts due to the United States, are not within the provisions of the bankrupt law; but that the debtor, his lands and effects, present and future, are liable to actions, and remedies for their recovery, as before the passing of [the bankruptcy] act."[80]

Following *King*, in *United States v. Herron* the Supreme Court considered whether a debt owing to the United States was discharged by a bankruptcy proceeding, this time under the Bankrupt Act of 1867, the third bankruptcy law enacted by Congress.[81] In *Herron*, Lewis Collins, a tax collector, posted a surety bond ensuring that he would perform his duties as required.[82] His bond was guaranteed by several sureties, including Herron. Mr. Collins then

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[75] *United States v. King*, Wallace's Circuit Court, 21 (1801).
[76] *United States v. King*, Wallace's Circuit Court, 21 (1801).
[77] *United States v. King*, Wallace's Circuit Court, 21 (1801).
[78] *United States v. King*, Wallace's Circuit Court, 22 (1801).
[79] *United States v. King*, Wallace's Circuit Court, 22 (1801).
[80] *United States v. King*, Wallace's Circuit Court, 18 (1801).
[81] [TK]
[82] *United States v. Herron*, 87 U.S. 251, 254 (1873).

breached his tax collecting duties by not paying over all of the taxes he had collected and not otherwise doing his job as required.[83] The government sued Collins and all of his sureties, including Herron, to recoup the full bond.[84]

Having already filed for bankruptcy and received a discharge of his debts by the time of Collins breach, Herron argued he no longer owed any money related to the bond to the government.[85] The Supreme Court rejected this argument, however, reasoning that the 1867 Act did not expressly mention the government or debts owed to the government except to the extent that the law authorized priority of payment to tax debt.[86] Moreover, to the extent that the 1867 Act described the rights and interests of creditors more generally, the law was not applicable to the federal government as a creditor.[87] Instead, the Court described the "settled rule of construction that the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign."[88] Thus in Herron's case, the government was not bound by the effect of the discharge on other non-sovereign creditors because the law did not name government "as a creditor in any of its provisions."[89] In other words, that the 1867 Act did not expressly except from discharge debts owed to the government had no bearing on the survival of those debts notwithstanding the debtor's discharge. Relying on the Third Circuit's decision in *King*, the Court concluded that the government was "not bound by the general words of the insolvent law," and that if Congress intended to provide for the discharge of a surety bond guaranteeing "the faithful performance of duty by a public officer," it would have said so expressly in the law.[90] As a final salvo, the Court opined that a rule providing for the discharge of this type of debt "would, in all probability, lead to great loss to the public treasury and to great public embarrassment."[91] Thus, the Court remanded the case to the district court for further proceedings

[83] *Herron* at 254.
[84] *Herron* at 254.
[85] *Herron* at 254.
[86] *Herron* at 260.
[87] *Herron* at 260.
[88] *Herron* at 255.
[89] *Herron* at 262.
[90] *Herron* at 263.
[91] *Herron* at 263-4.

consistent with its decision.[92]

In light of this history, some courts interpreting the 1898 Act understood the omission of penal debts payable to state government entities from the text of the statute to mean that those debts were non-dischargeable in bankruptcy.[93] In *In re Moore*, the leading case interpreting the treatment of penal debt following the passage of the 1898 Act,[94] the district court for the Western District of Kentucky heard an appeal from a decision of the bankruptcy referee[95] concluding that a penal debt did not survive a bankruptcy proceeding.[96] On April 6, 1901, Moore was convicted of "keeping and maintaining a nuisance in the nature of a disorderly house" and fined $400.[97] On April 30, 1901, Moore filed a bankruptcy petition. Moore was adjudged a bankrupt and the commonwealth of Kentucky filed a claim for $400 against the bankruptcy estate.[98] The bankruptcy trustee argued that the state's claim was not a provable debt under the 1898 Act, meaning that it was neither eligible to be paid from the estate nor did it survive the discharge.[99]

The district court acknowledged that the plain text of the 1898 Act could support this interpretation, but refused to accept this construction of the statute.[100] The court reasoned that it could not have been Congress's intention to permit the bankruptcy law to usurp the will of the states to impose inescapable criminal liability in the form of a fine or fee. Thus the court stated: "It seems to me that to rule otherwise would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare."[101] The court determined that states were entitled to benefit from the same reasoning relied on by the *Herron* and *King* courts vis-à-vis a debt owed to the federal government, namely that only an express legislative act could properly limit the rights and interests of the sovereign.[102] The court further opined that: "The provisions of the bankrupt act have reference alone to civil liabilities, as

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[92] *Herron* at 264.
[93] *See Kelly*.
[94] *See Kelly*
[95] [Describe the referee system]
[96] 111 F.145 (1901).
[97] *Moore* at 146.
[98] *Moore* at 146.
[99] *Moore* at 146.
[100] *Moore* at 149 ("It might be admitted that sections 63 and 17 of the bankrupt act, if ony the letter of those provisions be looked to, would embrace such judgments as the one referred to; but it is well settled that there may be cases in which such literal construction is not admissible.").
[101] *Moore* at 150.
[102] *Moore* at 150.

demands between debtor and creditor, as such, and not to punishments inflicted pro bono public for crimes committed."[103] Thus the *In re Moore* court relied principally on state sovereignty considerations as well as public policy in reaching its conclusion that penal fines and fees were non-dischargeable in bankruptcy.

Not all contemporary courts adopted the views of the *In re Moore* court, instead viewing penal debts as merely a fixed liability of the debtor per the 1898 Act. Two years before the *In re Moore* decision, in *In re Alderson*, the District Court for West Virginia considered "whether or not a judgment obtained by a state upon a criminal prosecution is a provable debt, and, if so, whether or not the state has a prior lien upon the estate of the bankrupt."[104] The debtor in that case owed fines imposed upon his conviction for unlawful retailing. The court noted that because Section 63 clearly defined a provable debt in terms of whether the liability was "evidenced by a judgment," Alderson's penal debt, which was established by a criminal judgment, fell into this category.[105] In addition, the court concluded that section 17's explicit reference to governmental debts, namely tax debt, as being non-dischargeable suggested that Congress did not intend to pay similar treatment to any other category of debt owed to a government entity, including penal debt.[106] Thus, Alderson's debt was dischargeable.

The *In re Moore* court's approach took hold, and the majority of courts considering the issue followed suit, concluding that penal debts were not dischargeable in bankruptcy.[107] Congress ultimately followed suit, codifying this interpretation in section 523(a)(7) of the Bankruptcy Code, which replaced the 1898 Act in 1978.

2. *Kelly v. Robinson*

Less than ten years after the passage of the Bankruptcy Code, the Supreme Court decided *Kelly v. Robinson*, which extended the reach of section 523(a)(7) to state restitution obligations. Concluding that a state-law restitution obligation imposed as a condition of a probation sentence was non-dischargeable under section 523(a)(7), the Court's firmly rooted its decision in the

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[103] *Moore* at 150.
[104] *In re Alderson*, 98 F. 588 (D. W. Vir., 1899).
[105] *Alderson* at 589.
[106] *Alderson* at 589.
[107] [TK]

Court's desire not to interpret the bankruptcy laws to authorize federal interference with the States' penal prerogatives and objectives.[108]

In *Kelly*, Carolyn Robinson was convicted of welfare fraud in Connecticut in 1980 after she wrongfully received approximately $9,000 in welfare benefits. The state court imposed a suspended prison sentence and five years of probation. As a condition of her probation, Robinson was required to pay restitution to the state Office of Adult Probation, paying $100/month for the entire five-year term of her probation.[109]

The following year, Robinson filed a chapter 7 bankruptcy petition in which she listed the restitution obligation as a debt. Although being notified by the bankruptcy court of the filing, the state probation agency did not file a proof of claim or an objection to the discharge of the restitution obligation. The bankruptcy court granted a discharge to Robinson, at which point Robinson had paid just $450 in restitution. In 1984, Robinson returned to the bankruptcy court seeking a declaration that the restitution obligation was discharged after she received a letter from the Connecticut Probation Office indicating that it considered the restitution obligation to be non-dischargeable under the Bankruptcy Code.[110]

The bankruptcy court sided with the state probation office, reasoning that the restitution obligation was not a "debt" as defined under the Code, and that even it is was a debt, it was non-dischargeable criminal fine or fee under section 523(a)(7). The district court affirmed, adopting the bankruptcy court's reasoning. The Second Circuit Court of Appeals reversed, however, reasoning, much like the *In re Alderson* court, that the restitution was merely a "debt" under the Code, and that the state probation office waived its opportunity to collect on its debt from the estate by failing to file a claim and failing to file an objection to the discharge.[111]

The Supreme Court reversed the Second Circuit, expressing "serious doubts" about whether Congress meant to include criminal penalties in the Code's general definition of debt.[112] In reaching its decision, the Court described the statutory treatment of criminal fines and penalties in the 1898 Act. The Court noted that as a textual matter, "the most natural

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[108] 479 U.S. 36 (1986).

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[112] *Kelly*, at 50.

construction of the [1898] Act . . . would have allowed criminal fines and penalties to be discharged in bankruptcy."[113] Notwithstanding the "clear statutory language," however, the Court noted that most lower courts subsequently declined to discharge criminal fines and penalties in order to avoid interfering with the States' ability to enforce their criminal laws[114] and had extended this reasoning to restitution obligations that were imposed as a part of a criminal sentence.[115] Thus, Congress passed the Bankruptcy Code "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders" notwithstanding that the statute was "drafted with considerable care and specificity."[116]

Ultimately, the *Kelly* Court decided that it didn't need to reach the question of whether a restitution obligation was a "debt" under the Bankruptcy Code, and held that section 523(a)(7) itself "preserves from discharge *any* condition a state criminal court imposes as part of a criminal sentence,"[117] including Kelly's probation-based restitution obligation. The Court rooted its decision largely in federalism concerns, specifically its determination to keep bankruptcy law from interfering with the penal interests of the States. Thus notwithstanding the traditional compensatory nature of restitution, Justice Powell wrote that "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."[118] As one commentator observed, the *Kelly* Court "[e]ssentially . . . found [non-dischargeability of fines, penalties, and civil forfeiture under section 523(a)(7)] satisfied by a single factor—characterization of the debtor's obligation as a penal sanction."[119][120]

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[113] *Kelly*, 479 U.S. at 45.
[114] *Kelly*, 479 U.S. at 45-46.
[115] *Kelly*, 479 U.S. at 46.
[116] .*Kelly*, 479 U.S. at 46.
[117] *Kelly*, at 50 (emphasis added).
[118] *Kelly*, at 52.
[119] Howard at 39.
[120] Justice Marshall dissented from the majority's opinion on two grounds. First, he argued that restitution, even though partly penal in nature, is "intended to compensate victims for their injuries," and to restore "the victim as far as possible, to the position that he would have been in if the original criminal act had never occurred." For Justice Marshall then, the restitution obligation at issue was imposed merely as "compensation for actual pecuniary loss" to the Connecticut Department of Income Maintenance and so dischargeable under the terms of section 523(a)(7). Second, although the majority avoided deciding whether the restitution obligation was in fact a "debt" under the Code, Justice Marshall agreed with the lower court that it was in fact a debt for which the state probation office had a right to payment. He reasoned that in passing the Bankruptcy Code, Congress meant to provide a broad and "meaningful discharge" to debtors by according a broad definition of "debt" to be affected by the discharge. He cited legislative history suggesting that one problem that Congress hoped to rectify in passing the Bankruptcy Code was the "incomplete" relief afforded to debtors for whom certain debts survived the discharge under the 1898 Act.

3. Post-*Kelly* Jurisprudence and Statutory Amendment

Many courts have interpreted *Kelly* broadly to mean that any financial obligation imposed as part of a sentence or in accordance with a judgment is non-dischargeable even if, as a textual matter, the obligation does not meet the requirements of section 523(a)(7).[121] For example, restitution obligations that are payable to private individuals (rather than payable to and for the benefit of the governmental entity),[122] and some "usage fees,"[123] like the actual cost of prosecution, that are not on their face a fine, penalty, or a forfeiture are non-dischargeable in som jurisdictions.[124] For example, in *Richmond v. New Hampshire Supreme Court Committee on Professional Conduct*, a New Hampshire attorney was disciplined for violating the state's rules of professional conduct.[125] He was sanctioned and ordered to reimburse the state committee on professional conduct for the *actual* cost of bringing the disciplinary proceedings. Richmond filed a chapter 7 petition, and the state committee on professional conduct sought to have the debt declared non-dischargeable under section 523(a)(7). Both the bankruptcy court and the district court concluded that the costs were non-dischargeable, and the First Circuit Court of Appeals agreed.[126] In reaching its decision, the court of appeals noted that it was "irrelevant that

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In addition, Justice Marshall described legislative concern that creditors whose claims were not allowed in the proceedings as debts would be made worse off. This is because even though the debtor was still liable for those claims after the bankruptcy, the debtor's non-exempt assets would have been completely allocated to the claims allowed in the bankruptcy proceeding, leaving nothing for surviving debts. With respect to fines, penalities, and forfeitures under section 523(a)(7), the Code provides that they must be paid after all other debts in the proceeding, and before the debtor receives any excess. What Justice Marshall does not consider is that surviving creditors still may benefit from the human capital of these debtors. Thus they are worse off in the sense that they are unlikely to collect from the debtor's estate as it exists at that moment in time. But unlike the creditors whose claims are allowed in the bankruptcy, they can still pursue the repayment of their debt through all channels available to them including garnishment and executing and levying on any future assets. Moreover, data from the Consumer Bankruptcy Project has shown that most chapter 7 debtors have very few non-exempt assets from which general unsecured creditors may be paid.

[121] *See also, e.g.*, *In re Gi Nam*, 273 F.3d 281, 287 (3d Cir. 2001), *as amended* (Dec. 6, 2001) ("*Kelly*, therefore, stands for the proposition that § 523(a)(7) excepts from dischargeability some penal sanctions that technically are neither fines nor penalties nor forfeitures.").

[122] *In re Troff*, 488 F.3d 1237, 1240 (10th Cir. 2007) (citing *Kelly* at 53.)

[123] *See Chapter One Policing and Profit*, 128 HARV. L. REV. 1723, 1727 (2015) (describing usage fees in the criminal context, including arrest, adjudication, and incarceration costs).

[124] *See Richmond* listing cases reaching this result. (See In re Smith, 317 B.R. 302, 313 (Bankr.D.Md.2004); In re Bertsche, 261 B.R. at 438–39; In re Carlson, 202 B.R. at 951; In re Doerr, 185 B.R. 533, 537 (Bankr.W.D.Mich.1995); In re Cillo, 159 B.R. 340, 343 (Bankr.M.D.Fla.1993); In re Williams, 158 B.R. 488, 491 (Bankr.D.Idaho 1993); In re Lewis, 151 B.R. 200, 203 (Bankr.C.D.Ill.1992); In re Betts, 149 B.R. 891, 896 (Bankr.N.D.Ill.1993); In re Haberman, 137 B.R. 292, 295–96 (Bankr.E.D.Wis.1992)).

[125] 542 F.3d 913 (1st Cir. 2008).

[126] *Richmond* at 916-918.

the New Hampshire Supreme Court has, in other contexts, stated that attorney disciplinary proceedings are not, strictly speaking, punitive in nature."[127] Instead, the court reasoned that even though the cost imposed represented the actual amount of money that the state spent in Richmond's case, the amount was nonetheless more punitive than pecuniary because its primary purpose was "to deter attorney misconduct, protect the public and to rehabilitate the attorney."[128] Accordingly, the costs were like the restitution obligation at issue in *Kelly* and non-dischargeable under section 523(a)(7).[129]

Other courts have taken a more textual approach to section 523(a)(7) after *Kelly*, limiting its reach notwithstanding that the debt incurred was rooted in the court's intention to punish the debtor. In *Hughes v. Sanders*, the Sixth Circuit Court of Appeals considered whether damages stemming from a malpractice judgment against an attorney were non-dischargeable under section 523(a)(7). The district court in the underlying malpractice action had found the attorney/defendant in contempt of court for "abus[ing] the judicial process" and had imposed the judgment with some penal motivation to vindicate the integrity of the court.[130] As to whether the judgment imposed was non-dischargeable under section 523(a)(7), the plaintiff argued that this penal intention was dispositive under *Kelly* even though the damages were calculated based on actual loss and payable to the plaintiff.[131] The court of appeals "reluctantly" concluded that even though "the judgment [wa]s a default judgment entered by the district court in part as a sanction for Sanders's inexcusable and unprofessional conduct[, that fact did] not change the judgment's compensatory character."[132] Thus, the court concluded that the debt was not excepted from discharge under section 523(a)(7).

For its part, Congress broadened the scope of non-dischargeability in chapter 7 of penal debt. As a part of the sweeping Violent Crime Control and Law Enforcement Act of 1994,

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[127] *Richmond* at 918. The court opined that the state supreme court likely chose not to characterize the disciplinary proceedings as criminal because "enhanced due process protections and notice requirements would likely apply, a result that the New Hampshire Supreme Court might wish to avoid."
[128] *Richmond* at ___.
[129] *Richhmond* at 921; *See also*, U.*S. Dept. of Hous. & Urban Dev. V. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) (concluding that "so long as the government's interest in enforcing a debt is penal, it makes no difference that injured persons may thereby receive compensation for pecuniary loss.").
[130] *Hughes v. Sanders*, No. 204CV744, 2005 WL 1490534, at *1 (S.D. Ohio June 23, 2005), aff'd, 469 F.3d 475 (6th Cir. 2006).
[131] *Hughes* at 477.
[132] *Hughes v. Sanders*, 469 F.3d 475, 479 (6th Cir. 2006).

Congress made restitution obligations imposed for violations under Title 18 expressly nondischargeable.[133] Unlike fines, penalties, and forfeitures in section 523(a)(7), this new section 523(a)(13) does not require any inquiry into whether the government or a private party is the payee or beneficiary of the restitution or whether the restitution is compensatory in nature. Thus, as a textual matter, all federal restitution obligations imposed under Title 18 are expressly non-dischargeable in bankruptcy.[134]

4. Section 1328 and *Pennsylvania Department of Public Welfare v. Davenport*

In exchange for committing some of their future income to the repayment of their debts, chapter 13 filers are able to discharge some debts that are non-dischargeable in a chapter 7.[135] Thus, the range of non-dischargeable debts in chapter 13 is smaller than in chapter 7 due to this so-called "superdischarge" available to chapter 13 filers.[136] Non-dischargeability of debts, however, still factors into a chapter 13 proceeding. As listed in Section 1328(a), chapter 13 filers cannot discharge, for example, certain tax debts,[137] debts incurred through false pretense, false representation, or fraud,[138] domestic support obligations, student loans to the extent they are non-dischargeable in a chapter 7,[139] and a "restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime[140]."

Restitution obligations were not initially excluded from discharge in chapter 13. In *Pennsylvania Department of Public Welfare v. Davenport*, the Supreme Court considered whether a criminal restitution obligation was dischargeable under section 1328(a).[141] The Davenports were convicted of welfare fraud and ordered to pay restitution to the state probation department, who would then forward those payments to the Pennsylvania Department of

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[133] Pub. L. No. 103–322, 108 Stat 1796 (September 13, 1994); 11 U.S.C. § 523(a)(13) ("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 . . . for any payment of an order of restitution issued under title 18, United States Code."

[134] See Collier on Bankruptcy, 523.13.

[135] *See* Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 173 (2005). Professor Jacoby points out, however, that after the 2005 amendments to the Bankruptcy Code, "debtors who finish chapter 13 repayment plans no longer will have earned a substantially broader 'superdischarge' than chapter 7 debtors."

[136] See 11 U.S.C. § 1328

[137] 11 U.S.C. § 1328(a)(2)

[138] 11 U.S.C. § 1328(a)(2)

[139] 11 U.S.C. § 1328(a)(2)

[140] 11 U.S.C. § 1328(a)(3)

[141] 495 U.S. 552 (1990).

Welfare, the victim of the Davenports' fraud. They filed a chapter 13 petition and sought a declaration that the restitution obligation was dischargeable. The state agencies did not file a claim, and the bankruptcy court approved the Davenports' chapter 13 plan, which included the restitution debt as a dischargeable debt.[142]

The Court concluded that restitution obligations were dischargeable in a chapter 13.[143] Leaving *Kelly* intact, Justice Marshall, who had dissented in *Kelly*, took a textual approach to conclude that Congress did not intend to limit the discharge of penal debt in chapter 13 to the same extent that it apparently did in chapter 7. [[*Dear Reader: I will spend more time in this section describing Justice Marshall's reasoning here, particularly as it relates to* Kelly.]]

Congress immediately addressed *Davenport* by expressly superseding its holding. The same year that the Court decided *Davenport*, Congress amended section 1328(a) to make non-dischargeable, "any debt for restitution included in a sentence on the debtor's conviction of a crime."[144] Congress further expanded the scope of non-dischargeability by adding criminal fines to section 1328 in 1994.[145] Thus, non-dischargeability is broader with respect to a criminal fine because the plain language of section 1328(a) does not require a court to engage with, for example, who is the actual beneficiary of a restitution obligation or whether it has been imposed as actual compensation, as is the case under section 523(a)(7).[146] At the same time, it is narrower than section 523(a)(7) insofar as it expressly limits its reach to restitution or a criminal fine.

And in that vein, some courts have taken a more textual approach to limit the range of penal debt that is non-dischargeable in a chapter 13. [[*Dear Reader: In this section, I will describe* In re Ryan, *in which the bankruptcy appellate panel for the Northern District of California took a textual approach in deciding that prosecution costs imposed under a federal criminal statute were dischargeable in a chapter 13. The court concluded that "the chapter 13 exception to discharge for 'restitution, or a criminal fine' does not extend to costs of prosecution*

[142] Davenport at _.
[143] Davenport
[144] *See* The Criminal Victims Protection Act of 1990, enacted as part of the Crime Control Act of 1990, Pub.L. No. 101-647, 104 Stat. 4789;11 U.S.C. § 1328(a)(3).
[145] Bankruptcy Reform Act of 1994, Pub.L. No. 103–394, 108 Stat 4106 (adding "or criminal fine" to the language of section 1328(a)(3)).
[146] *See* Collier on Bankruptcy

assessed pursuant to 28 U.S.C. § 1918(b)."[147]]]

II. PROBLEMATIC PENAL DEBT

The *Kelly* Court contemplated state and municipal penal systems set up to accomplish traditional goals of criminal and civil liability. Yet, there has been a proliferation of municipal procedures set up to achieve the non-traditional goal of maximizing revenue from criminal and civil liability. In addition, courts and decision makers impose fines and penalties with no inquiry into whether an individual have the ability to meet the obligation. This section describes some of the more prominent examples of these developments.

A. Policing For Profit

After Ferguson police officer Darren Wilson shot and killed Michael Brown in August of 2014, the United States Department of Justice launched an investigation into the practices of the Ferguson Police Department to determine whether the City of Ferguson and Darren Wilson had violated Michael Brown's constitutional rights.[148] The resulting report ("Report") observed that "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."[149] The City budgeted for increased revenue year over year from fines and fees associated with violations of the Ferguson Municipal Code. Accordingly, the City "consistently set maximizing revenue as the priority" for the Ferguson Police Department.[150]

The Report alleges that the Ferguson Police Department deployed its officers into the local communities with a City mandate to maximize revenue from municipal fines and fees. As a result, "many officers [saw Ferguson] residents, especially those who live in Ferguson's predominantly African-American neighborhood, less as constituents to be protected than as potential offenders and sources of revenue."[151] These practices yielded significant profits. In 2013, approximately $2.6 million in fines and fees collected largely from traffic and "low-level municipal offenses" represented 21% of the City's total budget.[152]

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[147] *In re Ryan*, 389 B.R. 710 (B.A.P. 9th Cir. 2008).
[148] Investigation of the Ferguson Police Department, U.S. Department of Justice, Civil Rights Division, March 4, 2015.
[149] Report at 2.
[150] Report at 9.
[151] Report at 2.
[152] *See* Joseph Shapiro, Civil Rights Attorneys Sue Ferguson Over 'Debtors Prisons,' NPR, February 8, 2015,

The City's practices ensured that it would benefit financially from violations of the law. The Ferguson Police Department charged as municipal violations the majority of offenses for which it stopped individuals, which maximized the revenue coming to the City.[153] Having set up an atmosphere in which the residents were likely to violate the law, the City set an aggressive schedule of penal fines that were arguably disproportionate to the infraction. For example, the Report notes that in 2011, the fine for having too-tall grass was between $77 and $102 as compared to $5 fine set by a surrounding municipality for a similar infraction.[154]

Moreover, the same revenue-focused objective tainted the Ferguson Municipal Court adjudication of these infractions. Charges brought under the Ferguson Municipal Code were resolved by the Ferguson Municipal Court, which has jurisdiction over violations of the Ferguson Municipal Code.[155] The court is authorized to impose fines, fees, and imprisonment when it finds that an individual is guilty of violating the Ferguson Municipal Court.[156] The court "use[d] its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests."[157] The Report notes that although authorized to impose a jail sentence of up to three months, "the court almost always imposes a monetary penalty payable to the City of Ferguson, plus court fees."[158] However, the court "routinely" issues arrest warrants when a charged individual failed to appear in court as scheduled or failed to pay a fine on time.[159] As a result, individuals charged under the Ferguson Municipal Court for violations that normally did not result in a jail sentence, nonetheless ended up facing municipal warrants, arrest, and jail time in addition to a run-up of costs related to the non-payment of the initial fine or fee.[160]

The Report concludes that Ferguson's "emphasis on revenue generation" led to an atmosphere in which City leaders and officials ignored illegal police practices and the effect that

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available at http://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons

[153] Report at 7.
[154] Report at 10.
[155] Report at 8.
[156] Report at 8.
[157] Report at _.
[158] Report at 8-9.
[159] Report at 9.
[160] Report at 9.

these practices had on the residents of Ferguson.[161] Ultimately, the DOJ Ferguson Report tells a story of a municipality content to extract as much financial support and gain as possible from its residents, regardless of the grave impact these practices have on the well-being of its own vulnerable communities.

Ferguson's revenue-focused policing and law enforcement practices are not uncommon. Other municipalities across the country have been accused of misusing their local criminal and civil justice systems to extract funds from already-vulnerable constituents. For example, the Institute of Justice recently filed a federal lawsuit against the City of Pagedale, Missouri alleging that Pagedale officials "violat[ed] due process and excess-fines protections in the Constitution by turning its code enforcement and municipal court into 'revenue-generating machines' to go after residents."[162] By one account:

> [T]he city can fine or jail people for not walking on the right side of crosswalks; barbecuing in the front yard, except on national holidays; playing in the street; wearing one's pants below the waist in public; and failing to have a screen on every door. The city can even issue a ticket if it does not like the look of a homeowner's drapes or if the window blinds are not "neatly hung." Those who receive tickets become subject to the Byzantine workings of the Pagedale municipal court, which is in session two days a month in the early evening, when low-income workers and single parents are often unable to appear. Defendants who don't show up are subject to an arrest warrant, which brings with it additional fines, fees and court costs. And while Pagedale has only about 3,300 residents, the municipal court, according to the lawsuit, heard an astonishing 5,781 cases in 2013. The court costs a little more than $90,000 to operate, but the city netted more than a quarter of a million dollars in revenue.[163]

Pagedale officials even threatened to demolish the home of one resident who was fined for "petty violations" like chipped paint on her home and a loose screen door. The resident ultimately took out a high-cost payday loan to fix the violations.[164] The lawsuit asks for injunctive relief to prevent the city from engaging in these practices, which have had a

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[161] Report at 3.

[162] *See* Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. Times,(Nov. 4, 2015), http://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html?_r=0.

[163] *See* The New York Times Editorial Board, *Policing for Profit in St. Louis County*, N.Y. Times (Nov. 14, 2015) http://www.nytimes.com/2015/11/15/opinion/sunday/policing-for-profit-in-st-louis-county.html?smid=tw-share&_r=0.

[164] *Policing for Profit in St. Louis County*, NY Times.

disproportionate effect on African American residents.[165]

B. Penal Debt without Consideration of Ability to Pay

[[*Dear Reader: In this section, I will review how courts and other adjudicative entities, often as a matter of statutory mandate, impose fines and fees without first considering whether an individual defendant is capable of paying the penalty.*]][166]

II. Rationales for the Treatment of Fines, Penalties, and Forfeitures in Bankruptcy

In this section I review the three common rationales asserted for the treatment of fines, penalties, and forfeitures in bankruptcy: (1) public policy, (2) federalism, and (3) honesty.

A. The Public Policy Rationale

The integrity of the people's interest in punishment, deterrence, and rehabilitation also serves as a rationale underpinning the non-dischargeability of fines, penalties, and forfeitures in bankruptcy.[167] In *Kelly*, Robinson argued that the restitution order was dischargeable because the state did not enter an objection to the discharge of the restitution obligation in the bankruptcy proceeding.[168] The Court dismissed the argument reasoning that this interpretation of section 523 would impose an undue burden on state officials to monitor and appear in bankruptcy proceedings. For example, in the criminal context, the Court hypothesized a state prosecutor who might be forced "to defend state criminal judgments in federal bankruptcy court."[169] The Court reasoned that:

> "This prospect, in turn, 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. We do not think Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges."[170]

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166 See, e.g., Beth A. Colgan, *Paying for Gideon*, 99 Iowa L. Rev. 1929, 1931 (2014) (""There is a range of fees and costs that are likely to be non-surchargeable under the current rationale. Today, countless people living in poverty are assessed indigent defense fees and related costs. Despite having no meaningful ability to pay, people become enmeshed in a system that makes it nearly impossible to pay, and then punished--in ways both nonsensical and extreme--for their inability to pay.").

167 *See, e.g.*, *In re Love*, 442 B.R. 868, 872 (Bankr. M.D. Tenn. 2011) (citing *Kelly*).

168 Kelly at 360.

169 Kelly at 360.

170 Kelly at 360-61.

Further, in characterizing the restitution obligation as penal in nature, even though it was calculated based on the actual amount fraudulently received by Robinson, the Court relied on the public interest in all aspects of a judgment. The Court reasoned that the restitution order should be viewed as non-pecuniary because "criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation." Accordingly, "restitution orders imposed in such proceedings operate 'for the benefit of' the State," and "they are not assessed 'for ... compensation' of the victim" as is required for non-dischargeability under section 523(a)(7).[171] Moreover, the Court concluded that because "the sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State[, t]hose interests are sufficient to place restitution orders within the meaning of § 523(a)(7)."[172]

Relying on *Kelly*, the First Circuit Court of Appeals similarly adverted to public policy in holding that the actual costs of an attorney ethics proceeding were non-dischargeable. The costs associated with the attorney disciplinary proceeding at issue there were authorized by statute and were calculable based on the actual amount that the New Hampshire Supreme Court Committee on Professional Conduct spent in its action against the appellant, Richmond.[173] Nonetheless, the court rejected Richmond's argument that this rendered the debt as "compensation for actual pecuniary loss" under section 523(a)(7). The court began its analysis by noting that many courts that have followed *Kelly* have "held that cost assessments levied in criminal proceedings are non-dischargeable under § 523(a)(7)."[174] The court further noted that with respect to costs associated with "quasi-criminal"[175] attorney disciplinary actions, courts have similarly concluded that they are non-dischargeable because "deterrence, rehabilitation and protection of the public" underpinned these actions, much like in criminal proceedings.[176] Thus, even though acknowledging that the New Hampshire Supreme Court had itself stated that "attorney disciplinary proceedings are not, strictly speaking, punitive in nature,"[177] the court concluded

[171] Kelly at 362-63.
[172] Kelly at 363.
[173] Richmond at
[174] Richmond v. New Hampshire Supreme Court Comm. On Prof'l Conduct, 542 F.3d 913, 920 (1st Cir. 2008)
[175] Richmond at 919.
[176] Richmond at 920.
[177] Richmond at 918.

that "[i]t is clear that the costs assessed in New Hampshire disciplinary proceedings are not 'purely compensatory,'" and the "cost assessments serve both to deter attorney misconduct and to help rehabilitate wayward attorneys."[178]

B. The Federalism Rationale

Courts have relied on federalism to support the non-dischargeability of fines, penalties, and civil forfeitures. Federalism concerns largely underpinned the Court's decision in *Kelly* to expand the read of non-dischargeability. The Court declined to take a textual approach to decide whether the restitution obligation at issue was a "debt" under the Bankruptcy Code, and instead cited *Younger v. Harris* for the proposition that bankruptcy law should not authorize federal courts to interfere with state criminal judgments, including restitution obligations.[179] In *Younger*, the Court considered whether a federal court could enjoin a state criminal prosecution where the defendant argued that the state law under which he was being prosecuted was unconstitutional as a matter of federal law.[180] The Court did not decide the case under the Anti-Injunction Act, which prohibits federal courts from enjoining state court proceedings except under a limited set of circumstances, including where Congress has expressly authorized such intervention.[181] Instead, the *Younger* court decided that the injunction sought by Harris was unjustified as a matter of "Our Federalism."[182] And, like the *Younger* Court, the *Kelly* Court declined to parse the language of the relevant statute in favor of relying on a more general policy of deference to state court proceedings.

Professor Margaret Howard has critiqued the Court's federalism-based reasoning in *Kelly* on several grounds.[183] She argues that the *Kelly* Court's deference to federalism principles is unwarranted in the bankruptcy context both as a matter of the Anti-Injunction Act, which prohibits federal courts from interfering with the state court proceedings subject to very limited exceptions, and as a matter of *Younger* and its progeny, which prohibit federal injunctions of

[178] Richmond at 920 ("Rehabilitation and deterrence are the same public functions that were at issue in Kelly.").
[179] Kelly at 46-47 (citing Younger v. Harris, 401 U.S. 37 (1971).
[180] 401 U.S. 37 (1971
[181] Younger at 54.
[182] Younger at 43-44
[183] *See* Margaret Howard, *Bankruptcy Federalism: A Doctrine Askew*, 38 PEPPERDINE L. REV. 1 (2010).

state criminal and civil proceedings.[184] As to the Anti-Injunction Act, she dispenses with that as a barrier to discharge by observing that bankruptcy is an express exception to that statute's proscription on federal injunctions of state proceedings.[185]

Then, Howard makes a similar argument with respect to the application of *Younger* abstention in the bankruptcy context. She contends that abstention in "collection matters" is inappropriate given Congress' clear intent that bankruptcy law (and bankruptcy courts) engage with "'an entire category of cases in which extraordinary circumstances exist to justify federal court intervention'"; namely where debts and debt collection, even stemming from violations of the law, are at issue.[186] She further argues that the jurisdictional civil rights context of *Younger* was integral to its holding and does not translate well in the bankruptcy context where jurisdiction on discharge is vested only in federal courts. The Court in *Younger* found it compelling that the defendant could have raised his federal constitutional claims in the state forum as a defense to the criminal charges. Howard argues that a debtor would have no occasion similarly to raise bankruptcy discharge rights in a state forum.[187] Thus, "*Younger*'s policy justifications are inapt" and without the "same resonance" in the bankruptcy context.[188] Moreover, Howard argues, the *Kelly* Court need not have worried about "impugning the competence of state courts" where the Constitution authorizes Congress to enable federal bankruptcy courts to intervene in state proceedings.[189] This is particularly true, she argues, where the "state proceeding has a collection purpose."[190] Pointing to Section 1983 actions, Howard acknowledges that it may be the case that federal judicial abstention is necessary even where there is a federal statute that authorizes federal courts to enjoin state court proceedings, f the authorizing statute is too broad in scope. In the bankruptcy context, however, *Younger*

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[184] Howard at

[185] Howard at 3-5.

[186] Howard at 17 (quoting *Fredericksburg & Potomac Railroad Co. v. Forst*, 4 F.3d 244 (4th Cir. 1993). [Describe Forst and why Howard relies on this case to support her argument.]

[187] Howard at 18-19 ("A state criminal proceeding being used primarily as a collection device . . . will not afford the debtor-defendant an equivalent opportunity to raise and present questions about the scope of his or her bankruptcy discharge.").

[188] Howard at 18.

[189] Howard at 19-20 ("Federal courts cannot be seen as insulting the state courts when Congress, acting pursuant to its constitutional power, has constructed a system under which particular issues are given over o the protection of those federal courts. If it is an affront, Congress and the Constitution must share the blame.").

[190] Howard at 20

abstention does not need to serve the same cabining function in the bankruptcy context.[191] This is because, the Bankruptcy Code "provides its own filter" through its "thorough and complex statutory structure."[192]

Turning specifically to Section 523(a)(7), Howard criticizes the *Kelly* Court's refusal to parse the language of that section. She concludes that the Court "[e]ssentially . . . found [non-dischargeability of fines, penalties, and civil forfeiture under section 523(a)(7)] satisfied by a single factor—characterization of the debtor's obligation as a penal sanction."[193] Had the Court been faithful to the actual language, however, it could not have concluded that a restitution obligation that is calculated based on actual loss and is imposed as a means of making the victim whole is not pecuniary in nature.[194] She is also wary of "collection scheme[s] . . . clothed in criminal garb,"[195] and ultimately concludes that restitution obligations that are imposed "pursuant to a collection-oriented criminal statute" should be dischargeable in bankruptcy.[196]

Congress too has implicitly relied on federalism principles by adopting wholesale into the Bankruptcy Code, the judicially-created exception on discharge. rooted in common law understanding of how debts owed to the sovereign were traditionally treated in a bankruptcy proceeding.

C. The Honesty Rationale

Honesty is an important value in consumer bankruptcy. It is axiomatic in bankruptcy policy that the privilege of a discharge is not available to the dishonest debtor.[197] Indeed, the Supreme Court and countless lower courts have said time and again that underpinning consumer bankruptcy law is the idea that *only* the "honest but unfortunate debtor" is worthy of a

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[191] Howard at 25-26.
[192] Howard at 24. Howard engages in some other pointed critiques of the application of Younger in the bankruptcy context. [Describe].
[193] Howard at 39.
[194] Howard at __.
[195] Howard at 55.
[196] Howard at 2.
[197] *See* Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance of Culpability and Ability to Pay*, 51 AM. U. L. REV 229 (2002) ("Providing a discharge to honest and unfortunate debtors has long been understood to be an important function of our bankruptcy system[.]").

discharge.[198] For example, in *Grogan v. Garner*, the Supreme Court noted that:

> [A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. But in the same breath that we have invoked this fresh start policy, *we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor*.[199]

Historical views of people who couldn't pay their debts were that those debtors were moral failures and/or had engaged in some misconduct that brought them to their present destitute condition.[200] Bankruptcy law initially developed as a means of assisting creditors in collecting their due from these perceived reprobates, with little to no concern for the well-being of the debtor.[201] Instead, the institution was devised to assist creditors in recovery and, from the creditors' perspective, to equalize amongst similarly-situated creditors the gains recovered from the undoing of the debtors' financial affairs.[202] From the creditors' perspective, the honesty of the debtor in the administration of the proceeding was particularly important because the debtor's candor was integral to ensure that creditors received their due under the law from the debtor's estate.[203]

Complete disregard for the debtor's welfare, however, was not conducive to an efficient recovery for the debtor's creditors. Indeed, as it became apparent that the bankruptcy proceeding would go much better if the debtor was cooperative, some concession to the debtor was necessary to encourage candid participation. Hence, the discharge of debts developed as a carrot

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[198] *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the 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 pre-existing debt."); *See, e.g.*, *Hamby v. St. Paul Mercury Indemn. Co.*, 217 F.2d 78, 81 (4th Cir. 1954) ("The purpose of the Bankruptcy Act is to grant a discharge of honest debts to honest debtors, not to grant discharges to those who have dishonestly misappropriated funds entrusted to them.").

[199] *Grogan v. Garner*, 498 U.S. 279 (1991) (emphasis added).

[200] Moringello at 1613 - 1616.

[201] *See* Juliet M. Moringello, *Mortgage Modification, Equitable Subordination and the Honest But Unfortunate Creditor*, 79 FORDHAM L. REV 1599, 1612 (2010) ("The Code's sections are explicit in requiring both administrative and moral compliance from the debtor, thus granting relief only to the 'honest but unfortunate' debtor.").

[202] Moringello at 1613 – 1616.

[203] Moringello at 1613.

offered to the debtor in exchange for the debtor's candid participation.[204] And, in the Bankruptcy Code, the debtor's honesty and candor in the bankruptcy proceeding itself remains a prerequisite to a discharge.[205]

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[204] Moringello at 1613 – 1616.

[205] Moringello at 1613; 11 USC 727 (a)(2) – (a)(7); (d); *See e.g., Marrama v. Citizens Bank of Massachusetts*. In, *Marrama*, the debtor filed a chapter 7 petition in which he misrepresented the value of his principal asset, a property he owned in Maine. He claimed that the house had zero equity and that in the year before his filing, he had not transferred any property other than in the ordinary course of business. In truth the house had substantial value, and in order to shield that value from his creditors, Marrama had transferred the equity to a newly-created trust for no consideration. The trustee informed Marrama that he intended to recover the Maine property for the benefit of Marrama's creditors, which prompted Marrama to file a notice of conversion to chapter 13 as apparently authorized by section 706(a). Section 706(a) states: "The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable."

The trustee and the Bank of Massachusetts, which held a lien on the house, objected to the conversion arguing that Marrama was not entitled to convert because he had acted in bad faith. In other words, he had been dishonest in the disclosure of his assets. Marrama argued that section 706(a) confers an absolute right for chapter 7 debtors to convert a chapter 7 filing to a chapter 13 filing that, as a statutory matter, is not subject to a bad faith exception. In affirming the decision of the bankruptcy court, the bankruptcy appellate panel rejected Marrama's argument. The BAP interpreted the Code to mean that the section 706(a) conversion right was absolute only in cases where there were no "extreme circumstances" such as Marrama's dishonest behavior. The First Circuit Court of Appeals agreed, noting that section 1307(c) of the Code permits the bankruptcy court to convert a chapter 13 filing to a chapter 7 filing for "cause," including bad faith. Because this would inevitably occur given Marrama's dishonest behavior, Marrama was not entitled to convert his chapter 7 filing under section 706(a).

The Supreme Court agreed with the lower courts, holding that Marrama had "forfeited his right to proceed under Chapter 13." The Court took a somewhat tortured approach to reach its holding. It reasoned that Marrama's ability to convert his chapter 7 case to a chapter 13 case under section 706 was predicated on his ability to be a debtor in chapter 13. Because under section 1307, the bankruptcy court is authorized to dismiss or convert a chapter 7 case to a chapter 13 case for cause, including for "pre-petition bad faith conduct," Marrama was not eligible to be a debtor in chapter 13 because of his pre-petition actions. Justice Stevens concluded:

Bankruptcy courts nevertheless routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words "for cause." In practical effect, a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13. That individual, in other words, is not a member of the class of "'honest but unfortunate debtor[s]' " that the bankruptcy laws were enacted to protect. The text of § 706(d) therefore provides adequate authority for the denial of his motion to convert.

The Court concluded that only the honest debtor had the absolute right under section 706(a) to convert a chapter 7 case to a chapter 13 case. Indeed, "Congress sought to give [the class of honest but unfortunate debtors] the chance to repay their debts should they acquire the means to do so," but "[n]othing in the text of either section 706 or section 1307(c) . . . limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical [dishonest] litigant who has demonstrated that he is not entitled to the relief available to the typical [honest] litigant."

Dissenting, Justice Alito pointed out that the plain text of section 706(a) makes no reference to an exception for bad faith to the chapter 7 filers apparent right to convert his case to a chapter 13 case. He reasoned that the majority's "imposition of [a good faith] condition is inconsistent with the Bankruptcy Code," and that [n]othing in section 706(a) or any other provision of the Code suggests that a bankruptcy judge has the discretion to override a debtor's exercise of the section 706(a) conversion right on a ground not set out in the Code." Yet, the majority's focus on the concept of honesty as undergirding bankruptcy rights was significant to its holding.

Yet, honesty in the administration of the bankruptcy proceeding was just one of two measures of honesty applied to a debtor seeking a discharge. Honesty at the time that the debt was incurred is also a requirement.[206] In other words, only those debtors who find themselves in financial distress notwithstanding purportedly honest behavior can get relief from the bankruptcy court. Understood through this lens, sections 523 and 1328 describe (and limit discharge on debt incurred through) behavior either appears dishonest on its face (like fraud)[207] or situations in which a discharge right might encourage dishonest behavior.

Liability for breaking the law is one such behavior, and Congress and courts have relied on actual liability for misconduct as a proxy for dishonesty with respect to criminal and civil fines, penalties and forfeitures.[208] The conventional wisdom goes: "[B]ecause discharge in bankruptcy is not intended to be a haven for wrongdoers, a Chapter 7 debtor may nor discharge 'a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and [that] is not compensation for actual pecuniary loss[.]"[209] For example, then-Congressman from New York, Hamilton Fish Jr., remarked during hearings for the proposed 1990 Amendments to the Bankruptcy Code that:

> "A major purpose of the law of bankruptcy, as we all know, is to assist the honest debtor confront financial distress and maximize recoveries for the benefit of creditors collectively. Individuals who inflict harm on others through wrongful conduct—and incur related debts to society and their victims—must be encouraged to bear the consequences of their actions."[210]

D. Questioning the Rationales

In this section, I argue that the rationales are anachronistic, overly formalistic, and/or do not account for changes in municipal funding schemes and other intractable problems in the administration of state and local justice systems that have regressive effects and a disparate impact on economically disenfranchised or otherwise poor

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[206] Moringello at 1615 ("there is some bad behavior that renders a debtor unworthy of bankruptcy relief").
[207] [TK]
[208] *In re Ryan*, 389 B.R. 710, 713 (B.A.P. 9th Cir. 2008) (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) ("A second, countervailing policy consideration is a historic deference, both in the Bankruptcy Code and in the administration of prior bankruptcy law, to excepting criminal sanctions from discharge in bankruptcy. Application of this policy is consistent with a general recognition that, '[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'").
[209] *United States HUD v. Cost Control Mktg. & Sales Mgmt.*, 64 F.3d 920, 927 (4th Cir. 1995).
[210] [TK]

communities.

1. Public Policy

[[*Dear Reader: In this section, I will argue that the public policy rationale has resulted in an unduly over-inclusive bankruptcy policy vis-à-vis penal debt. With respect to punishment, penal fees that are assessed for relatively innocuous violations of the law and that target poor and disenfranchised individuals because they are poor and disenfranchised do little to deter misconduct in the traditional sense in which we understand deterrence. They are unlikely to achieve any benefits of punishment because they punish the poor disproportionately. Even a relatively low fine, if unaffordable, can result in catastrophic outcomes when further punishment is meted out for the failure to pay those fines. In the same vein, there is no meaningful rehabilitation benefits when the practical violation is being too poor to pay the fine.*]]

2. Federalism

[[*Dear Reader: In this section, I will argue that Congress and courts have taken an unnecessarily formal approach to federalism concerns and penal debts. Bankruptcy law policy has an interest in functional outcome at heart (the fresh start) and often must rely on function over form to achieve this goal. I will review Melissa Jacoby's study of the Detroit bankruptcy proceedings which shows how integral the bankruptcy judge's interventions were to the city's reorganization, notwithstanding the nominal federalism-based restrictions on the bankruptcy judge's power in the municipal bankruptcy context. In that instance, the federal intervention was arguably necessary to handle the extreme crisis that Detroit faced.*

In addition, Congress and courts have been willing to intervene in state processes where Civil Rights (with a capital CR) are at issue. While the Court has receded from this position in recent years (for example in the voting rights context), the Court has still acknowledged that there might be instances in which federal intervention is appropriate, federalism concerns notwithstanding. Here, policing for profit and other deficiencies in state justice systems have disproportionately impacted poor communities of color, evoking some of the concerns that have supported a nationalist approach to federal intervention in the past.

Moreover, as a historical matter, when crises have arisen, bankruptcy law has trumped concerns about its potentially negative effects on state power. Each of the three short-lived

bankruptcy statutes that preceded the 1898 Act were passed in the wake of a national financial crisis, and federalism concerns were subordinated to providing a uniform mechanism for debt relief. Here, the problem of penal debt has reached crisis proportions. By some accounts as much as 25% currently imprisoned are there as a result of not paying penal debt.

In other contexts, federalism does not result into non-dischargeability. Specifically, in the tax context, some state taxes are conditionally dischargeable, yet Congress has not concluded that federalism interests impose a barrier to this treatment.

Finally, federal-penal debt is also at issue given the proliferation of federal crimes and attendant mandatory fines in the last 30 years. Scholars have documented this phenomenon and its effect on disenfranchised communities, and federalism would be no barrier to a bankruptcy rule permitting their discharge.]]

3. Honesty

[[*Dear Reader: In this section, I will argue that the honesty rationale tracks anachronistic notions of morality that don't account for the proliferation of over-regulation as a state and municipal money-making tool. The honesty rationale also does not account for stereotypes of poor and economically disenfranchised groups who have to rely on a robust social-insurance system. Finally*

In 1990, Congressman Fish, in his support of amending chapter 13 to make restitution obligations non-dischargeable in chapter 13, was specifically concerned with restitution obligations imposed on convicted drunk drivers. Following the Court's decision in Davenport, Mothers Against Drunk Drivers lobbied Congress to amend the Bankruptcy Code to make restitution obligations expressly non-dischargeable in chapter 13.[211] *The record of these hearings shows compelling testimony describing instances of significant harm that drunk drivers have caused. But hard cases make bad law.*[212] *And while it is arguably reasonable to conclude that an individual who drives drunk should be made to owe, without any relief, those debts stemming from this misconduct, it is harder to conclude that all individuals who break the law*

[211] *See, e.g.*, Statement of Janice Lord, National Director, Victim Services, Mothers Against Drunk Drivers (testifying that "Since MADD was incorporated 10 years ago, we have heard victims cry for justice upon learning that the civil wrongful death or personal injury judgments against the drunk drivers who killed or injured their loved ones were meaningless because the offenders simply filed bankruptcy to avoid payment.").

[212] *N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (J. Holmes dissenting) ("Great cases, like hard cases, make bad law.").

and incur debt as a result must be made to pay that debt without relief. Yet, this is the current state of bankruptcy law. Although it may be reasonable to base bankruptcy policy on the normative principle that it should not be a haven for wrongdoers,[213] *(as the case of the drunk driver may exemplify), there is a spectrum of wrongdoing in the law.*[214] *A poor person who is convicted of not mowing his lawn arguably exists at the opposite end of this spectrum than a person who drives drunk and seriously injures someone. Yet, sections 523 and 1328 do not make that distinction and they should.*

In addition, current deficiencies in the criminal and civil justice system support that it is too simplistic a characterization to view every individual convicted of breaking the law equally. Take, for example, severe funding deficits in Louisiana that have led to a crisis in indigent representation. Indigent defendants have to "get in line" if they hope to have representation.[215] *This has meant that many indigent defendants end up being convicted without representation. In these cases, the procedural deficiency means that a guilty verdict or adjudication is indicative of misconduct and guilt and more indicative of underfunding and poverty. In these cases, without a "robust system of public defenders,"*[216] *it seems deeply problematic to label individuals as dishonest by virtue of the conviction alone. Instead, the conviction reveals poverty and disenfranchisement*.]]

V. A BANKRUPTCY SALVE?

[[*Dear Reader: This final section of the paper will analyze three configurations of bankruptcy law that Congress might implement given my critique. The first is to remain with the status quo. I critique this as a matter of bankruptcy's goals of providing a fresh start. To the extent that penal debt stays with a debtor for life, it raises familiar concerns regarding the disincentivization of already-disenfranchised individuals from working and otherwise*

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[213] *U.S. Dept. Of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 927 (4th Cir. 1995).
[214] [TK]
[215] Debbie Elliot, *Need a Public Defender in New Orleans? Get in Line*, NPR, February 4, 2016, available at http://www.npr.org/2016/02/04/465452920/in-new-orleans-court-appointed-lawyers-turning-away-suspects; *see also, e.g.*, Carimah Townes, *Louisiana's Budget Crisis Spells Doomsday for Justice in New Orleans*, March 9, 2016, available at http://thinkprogress.org/justice/2016/03/09/3757685/new-orleans-public-defense-crisis/.
[216] Debbie Elliot, *Need a Public Defender in New Orleans? Get in Line*, NPR, February 4, 2016, available at http://www.npr.org/2016/02/04/465452920/in-new-orleans-court-appointed-lawyers-turning-away-suspects

participating in their communities. The second is to make penal debt automatically dischargeable. I argue that this approach would be overly-inclusive. The rationales for non-dischargeability are relevant and valid in some set of circumstances and a rule making penal debt fully dischargeable for all debtors might result in the negative outcomes that concern proponents of broad non-dischargeability (like MADD). The third is to make penal debt conditionally dischargeable, with discretion vested in the bankruptcy court. I ultimately advocate for the latter.

I also will address some downsides to increased dischargeability, including the practical utility of bankruptcy in these circumstances. It is an empirical question whether the individuals who might need relief would use or practically could use bankruptcy relief in these circumstances. Conventional wisdom is that bankruptcy is for the middle class. Sullivan, Warren, and Westbrook revealed that middle class people were the ones who have used bankruptcy to recover from exogenous shocks like job loss, illness, and divorce. Even though they have no assets that creditors may seize outside of bankruptcy[217] *making debt-relief particularly important to financial recovery. The poor, however, are judgment proof so creditors have no leverage in collection. In other words, with no threat of collection comes no need for relief in the form of a discharge. But poor debtor might gain prolonged freedom and personal liberty and the advantage of the stay while they figure out alternatives. This notion might raise concerns about bankruptcy as obstruction, where it is only the stay that the debtor is looking for. It might also raise a concern about practicality of a filing in light of likely prohibitive costs associated with filing such as filing fee and attorney costs.*]]

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[217] Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2052-53 (1999) ("In addition, some judgment proof debtors who file for bankruptcy pro se would not have done so had they received proper advice."); Daniel L. Skoler, *The Status and Protection of Social Security Benefits in Bankruptcy Cases*, 67 AM. BANKR. L.J. 585, 591 (1993) ("Regardless of the foregoing, it remains a fact that an elderly or disabled debtor who has minimum assets and virtually all of whose income is derived from Social Security retirement, survivors, or disability insurance (RSDI) payments, or SSI payments,[34] is 'judgment proof' and may not cost-effectively be placed in bankruptcy.").