10-1986

Kelly v. Robinson

Lewis F. Powell Jr.

Grant on conflict on an issue that reoccurs

Resp., convicted of stealing State funds, was given a sentence that was suspended, & placed on probation, on condition she repaid the State $9932 at rate of $100 per mo.

Resp. went bankrupt. The State failed no objection to Respondent's listing of this obligation as a dischargeable debt. State did intervene when Resp. sought a discharge order. The DC agreed with State that a "restitution order" following a criminal conviction, is not dischargeable.

PRELIMINARY MEMORANDUM

February 21, 1986 Conference Bob
List 1, Sheet 4

No. 85-1033-CFX

KELLEY (Ct. State's Attorney) (State of Conn.)

v.

ROBINSON (bankrupt offender)

Cert to (Kearse, Pratt; Mansfield, concurring) CA2

CA2 Reversed — holding such an order is dischargeable

Federal/Civil Timely

1. SUMMARY: Petr (really the State of Connecticut) challenges the CA2's holding that an obligation to make restitution following a criminal conviction is a debt dischargeable in bankruptcy.

2. FACTS AND PROCEEDINGS BELOW: Resp was convicted of

GRANT - Bob. I AM NOT AT ALL AS (See Bob's excellent note on back)

second-degree larceny for simultaneously receiving public assistance from the Connecicut Department of Income Maintenance (CDIM) and Social Security. On Nov. 14, 1980, she was sentenced to one-to-three years imprisonment, but the sentence was suspended and she was placed on probation for 5 years. One of the conditions of her probation was that she make restitution of the $9932 she had stolen at the rate of $100 per month. She was to start making the payments on Jan. 16, 1981. Over the course of her probation, she would repay $5800. On Feb. 5, 1981, however, resp filed a voluntary Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the District of Connecticut. On her schedule of creditors, resp listed CDIM as having a claim of $6000 and the Conn. Office of Adult Probation (COAP) as having a claim of $9932. The bankruptcy court notified both CDIM and COAP of resp's petition, but neither State Agency filed any form of objection by the deadline. Eventually, in May 1981, the bankruptcy court issued an order discharging resp from all dischargeable debts. After receiving this discharge, resp notified COAP of her intention to discontinue making restitution; she then stopped her payments. CDIM and COAP did nothing until February 1984, when COAP wrote resp a letter requesting her to resume payment.

Resp then filed the instant adversary proceeding in the bankruptcy court seeking a declaration that her obligation to make restitution payments had been discharged by the May 1981 order. The bankruptcy court (Shiff), in an order adopted by the district court (Daly), rejected resp's position. It relied on its opinion in a similar case, In re Pellegrino (see App. to Pet.

for Cert. 7a-26a). In Pellegrino, the court had found that a restitution obligation is not a "debt" within the meaning of §101(11) of the Bankruptcy Code, since the victim of a defendant's crime had no right to payment. The court also relied on the Younger doctrine's expression of federal reluctance to interfere in ongoing state criminal proceedings, finding that the restitution obligation was part of such ongoing proceedings, and on a statement in the legislative history of the 1978 Code stating that the bankruptcy laws "are not a haven for criminal offenders ...." That a state agency was the victim of a defendant's crime did not alter the analysis. Since no "debt" existed, no discharge of such a debt in bankruptcy was possible. Pellegrino also held that, even if the obligation to make restitution were a debt, the exception in the automatic stay provision for the continuation of criminal proceedings, §362(b)(1), compelled the conclusion that neither the restitution order nor the wage execution by which it was carried out could be stayed. Finally, Pellegrino held that §523(a)(7), which provides that a discharge does not relieve a debtor of any debt that is "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and [that] is not compensation for actual pecuniary loss," applied. Under Conn. law, restitution is imposed to rehabilitate the offender rather than to compensate the victim. Thus, the restitution obligation is punitive in nature.

The CA2 reversed. First, it held that the restitution obligation was a "debt" within the meaning of §101(11). "Debt" is defined as "liability on a claim," and "claim" is broadly

defined in §101(4). The CA2 recognized that the majority of courts that had considered the question had excluded restitution obligations from the definition of debts, but it disagreed with their reasoning. Congress sought the broadest possible definition of "claim" to bring all legal obligations of the debtor into the bankruptcy proceeding. See, e.g., Ohio v. Kovacs, ____ U.S. ____ (1985). The CA2 found the approach of the other courts to be "anomalous" since finding that restitution obligations were not claims would preclude holders of the right to restitution from participating in the bankruptcy proceedings or receiving any distribution from the estate's liquidation. Under the 1898 Act, however, holders of rights to restitution were permitted to participate. The CA2 also refused to make any distinction based on the provenance of a right to restitution--such a right was a claim whether it was based on civil equitable proceedings or a criminal judgment. The CA2 found the other CA cases cited inapposite. The CA3 and CA11 cases, see App. to Pet. for Cert. 43a, had concerned debtors who were in the midst of criminal proceedings and had not yet been ordered to make restitution; all the CA's had done there was refuse to enjoin the state criminal proceedings. The CA5 and CA7 cases held that a district court could impose a restitution obligation as part of a criminal conviction involving a debt that had been discharged in bankruptcy.

Nor was the CA2 persuaded by the argument that Congress did not intend to permit discharge of restitution obligations because it did not want to provide a "haven for criminal offenders." That language was taken out of context by the courts that

had relied on it; it concerned the automatic stay provisions of §362. The fact that Congress exempted fines and penalties from the discharge provision of §727 shows that such fines are "claims" since otherwise no need for excepting them would exist. Congress engaged in a complex and careful line drawing process regarding the protections criminals were entitled to claim under the Code.

The CA2 then turned to the question whether the restitution obligation was dischargeable. Section 523 excludes several categories of debts from the discharge provisions of §727. Three of those categories--subsection (a)(2), dealing with debts incurred through fraud or false statements; subsection (a)(4), dealing with debts incurred through larceny; and (a)(7), the fines provision discussed above--seemed potentially relevant. But §523(c) discharged debts falling within the categories established by subsections (a)(2) and (a)(4) unless the creditor files a timely objection. Thus, although the CA2 "suspect[ed]" that the bankruptcy court would have refused to discharge the obligation here because it was for larceny, COAP and CDIM had failed to object.

The CA2 found (a)(7), which does not require an objection, to be inapplicable because the restitution was "compensation for actual pecuniary loss." The amount resp had been ordered to pay was exactly equal to the amount she had wrongfully received from CDIM. That other parts of Conn.'s probation scheme are not compensatory does not alter the compensatory character of the restitution condition. And nothing in the legislative histo-

ry of §527(a)(7) suggests that a fine must be exclusively compensatory to be excluded.

Judge Mansfield joined the majority's opinion, but wrote separately to express "concern at the unfortunate result compelled by the language of the relevant provisions of the Bankruptcy Code" and his hope that Congress would close the loophole that permitted criminals to avoid their restitution obligations by going into bankruptcy.

3. CONTENTIONS: Petr claims the CA2's decision has created a conflict among the circuits. The CA5 has held that the prior discharge in bankruptcy of a debt created by the defendant's bank fraud did not preclude the district court from imposing an obligation to make restitution as one of the conditions for a suspended sentence. United States v. Carson, 669 F.2d 216 (CA5 1982); see United States v. Alexander, 743 F.2d 472 (CA7 1980) (similar case). The CA3, CA5, and CA11 have all held that bankruptcy courts cannot enjoin state criminal proceedings that may result in orders requiring defendants to make restitution in connection with discharged or dischargeable debts. See In re Davis, 691 F.2d 176 (CA3 1982); McDonald v. Burrows, 731 F.2d 294 (CA5), cert. denied, ____ U.S. ____ (1984); Barnette v. Evans, 673 F.2d 1250 (CA11 1982). The CA2's attempt to distinguish these cases is unavailing because, at least in McDonald and Barnett, the state court might have imposed a restitution obligation before the end of the bankruptcy proceeding in which case the obligation might have been dischargeable. Moreover, each of the other CA opinions rested, not on the temporal sequence of imposi-

tion of restitution and bankruptcy proceedings, but on the belief that Congress did not intend to allow the discharge of criminal restitution. And, as the CA2 recognized, virtually every federal bankruptcy court to consider the question took a contrary view to that adopted by the CA2.

The CA2's approach misunderstands the nature of a restitution obligation. The obligation bears virtually no resemblance to an ordinary debt, since it is actually paid to an intermediary like COAP rather than the party which is owed the money. Moreover, its central character is punitive. And Congress' desire not to let criminals use the Bankruptcy Code as a haven is relevant: it would make no sense to allow States to continue criminal proceedings and simultaneously tell them that their punitive sanctions could be nullified by a discharge order. Petr echoes the bankruptcy court's argument about Younger.

Finally, that neither CDIM nor COAP filed an objection should not affect their rights. Forcing States to enter bankruptcy proceedings to defend criminal judgments would drain their resources. Moreover, it would not close the loophole, since restitution obligations awarded in cases not involving fraud or larceny would still suffer the same difficulties.

Kovacs does not require a different result. A State's ability to enforce a civil injunction is less important than its compelling interest in protecting the community from crime. Kovacs recognized §523(a)(7)'s force.

Resp replies that the major point made by the CA2 is that CDIM and COAP's failure to object, after notice, was the

reason the restitution obligation was discharged, since they waived their §523(c) rights. For the most part, resp repeats the points made by the CA2's opinion regarding the construction of the words "debt" and "claim" and its interpretation of the scope of §523(a)(7). Resp also distinguishes Carson, Alexander, Davis, Barnette, McDonald, on the same grounds relied on by the CA2.

Twenty-six States have filed an amicus brief supporting petr. In addition to raising the points pressed in petr's brief, amici observe that the CA2's decision may have the effect of forcing States to use less effective or desirable sanctions, such as imprisonment, because restitution obligations will be unenforceable. That restitution, like imprisonment, can be viewed as paying a "debt to society" does not transform it into an obligation dischargeable in bankruptcy. The purposes of restitution--deterrence, punishment, rehabilitation, and proportional justice--distinguish it from the type of compensatory civil fine excluded from §523(a)(7).

4. DISCUSSION: The CA2's summary of the contrary holdings of all but one of the eight bankruptcy courts to address the issue is accurate. See, e.g., In re Johnson, 32 B.R. 614, 615-616 (Bankr. D. Colo. 1983) (also summarizing cases). Were this simply a conflict between the CA2 and various bankruptcy courts, it might make sense to wait for the views of other circuits. But, although the opinions by the CA3, CA5, CA7, and CA11 discussed above do not present a square conflict, they do reflect an approach to the relationship between state criminal law and the Code that seems in fundamental tension with the CA2's per-

spective.

The Court's impending decision in Nos. 84-801 and 84-805, Midlantic National Bank v. New Jersey Department of Environmental Protection and O'Neill v. City of New York, supports petr's claim, since the Court seems inclined to read the Code to avoid conflict with the States' exercise of their police powers. The CA2's decision here provides an easy way of circumventing state criminal law; moreover, to the extent that restitution is an effective, inexpensive criminal sanction, the disincentive to its use provided by the CA2 will raise the costs of criminal law enforcement borne by the States.

Moreover, I think the CA2 mischaracterizes the restitution obligation. Petr and amici seem right when they argue that, as a matter of state law, restitution is meant as part of the punishment scheme. Had Connecticut imposed a $9932 fine on resp, it's clear, under §523(a)(7), that the fine would not be dischargeable in bankruptcy, even if the fine were to be paid in installments. I do not see why Connecticut's decision to remit money paid in criminal fines to the injured party transforms the nature of the fine.

I see a final reason for granting here. Although I think the CA2's bottom line is incorrect, the bankruptcy courts which have taken what I believe to be the correct approach have split as to whether a restitution obligation is not a claim, e.g., Pellegrino, or is a claim, but simply not a dischargeable one, e.g., Johnson. This distinction may make some difference in whether States owed restitution payments must participate in

bankruptcy proceedings to protect their rights under §523(a)(2) and (a)(4).

One thing might counsel against a grant here: the CA2 found that, had CDIM and COAP objected, §523(a)(4) would likely have precluded resp's receiving a discharge. If the CA2 intends to read the larceny and fraud exceptions broadly, the split between its approach and the more straightforward no-discharge approaches taken by other courts may have little effect. But this will require the States to participate in the bankruptcy proceedings to protect their judgments of criminal conviction, a perhaps undesirable effect.

5. RECOMMENDATION: I tentatively recommend a grant.

There is a response and an amicus brief.

January 17, 1986 Karlan opns in petn

"BOTTOM LINE" OF THE CA 2 is WRONG. This case is essentially A statutory CONSTRUCTION CASE, AND CONSTRUING THE STATUTE PROPERLY SEEMS to lead to A BAD POLICY RESULT. ON the other HAND, IF STATE HAD MADE TIMELY OBJECTION, the CASE WOULD NOT Be here. BUT MAYBE IT IS ~~silly~~ to MAKE STATES even go that FAR.

The CASE WOULD CLEARY seem to be of broad import, and there is A SQUARE CONFLICT Between CA2 AND several BANKRUPTCY Courts. IN ADDITION, IT COULD BE A WHILE Before ANOTHER CIRCUIT Court decision, AND THIS DECISION will HAVE CREATED UNCERTAINTY IN the INTERIM. Further, the problem is fairly straightforward and I AM NOT SURE ANOTHER CIRCUIT ~~CASE~~ WOULD HELP THIS Court analyze the ISSUE. THUS I RECOMMEND A GRANT -- ALTHOUGH I HESITATE EVER SO SLIGHTLY TO DO SO

NOTE: THE CA 2 ~~[illegible]~~ REMANDED THE CASE BECAUSE DEFENDANTS HAD RAISED VARIOUS DEFENSES AND CLAIMS OR IMMUNITY WITH RESPECT TO RESPONDENT'S OTHER CLAIMS (DAMAGES, ATTORNEYS FEES, INJUNCTIVE RELIEF, ETC.) I DO NOT THINK THIS REMAND ~~[illegible]~~ WOULD MAKE A GRANT INAPPROPRIATE because the issues are DISTINCT AND Reversal OF CA2 WOULD PRECLUDE ANY REMAND.

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 85-1033

Submitted ....., *19*... *Announced* ....., *19*...

KELLY

vs.

ROBINSON

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				Jurn 3									
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

LFP/djb 08/01/86

No. 85-1033, Kelly, Connecticut Chief State's Attorney, et al. v. Robinson (CA 2)

Memorandum for File

The question presented in the petition for cert quite simply is whether "a criminal restitution order is dischargable as a debt in bankruptcy?" In its brief, the state frames a question favorably to itself substantially as follows: "Whether a bankruptcy court has any authority to nullify a valid final judgment of a state criminal court, and thus allow a convicted criminal, sentenced to make restitution, to escape justice by the simple expedient of listing the restitution order as a dischargable debt in bankruptcy."

Respondent pled guilty to the crime of larceny of $9,900 in public assistance benefits. The state court sentenced her to a prison term, but suspended it, and placed her on probation for five years on the condition that she make restitution to the State of Connecticut at the rate of $100. per month. Thereafter, respondent petitioned for bankruptcy in the district court of Connecticut, and listed in her schedule of creditors the claim of Connecticut Office of Adult Probation (the Probation Office) of $9,932. for restitution. The bankruptcy court notified the state authorities, but they took no action. In due time, the bankruptcy court issued an order discharging respondent from all dischargable debts. The state agencies,

that included Connecticut Department of Income Maintenance as well as the Adult Probation Office took no action for almost three years. It then advised respondent that she must resume payment. She brought this suit in the Federal bankruptcy court seeking a declaratory judgment, an injunction, and a finding that the state officials were in contempt of the bankruptcy order.

The bankruptcy court, relying on its full opinion in a companion case, held that a criminal restitution order does not constitute a bankrutpcy "debt" within the meaning of § 101(11), and that, even if it does, such a debt is a "penalty" and thus exempt from discharge under § 523(a)(7). The district court adopted the order and judgment of the bankruptcy court. On appeal, CA 2 - in an opinion by Judge Kearse, reversed. It recognized that a majority of the courts (three, possibly four CAs) had held that a criminal restitution obligation is not a debt under the Bankruptcy Code, but disagreed with these courts and reversed the DC. The CA cited only one decision in support of this view, In re Brown (Bankr. M.D.Tenn. 1984). Judge Kearse is an excellent judge, her opinion is carefully written, and was joined by Judges Mansfield and Pratt. The CA reasoned that

Bankruptcy court held: 1. Not a "debt" 2. Also, it a "penalty" & exempt from discharge

CA 2

Reversed

Other CAs

the Act defines "debt" as a "right to payment", and that restitution created a right to payment since the probation agency had a right to receive and enforce payment of this obligation. Certainly a plausible argument can be made along these lines, but I tentatively believe that CA 2 is mistaken.

In Connecticut, as elsewhere, a crime victim has no right to determine the amount of restitution, and - according to the state's brief - no right even to tesify at a restitution hearing, no right to appeal a restitution determination, and no right to enforce payment. The CA, in effect, agreed that the victim had no "claim". It held, rather, that the pertinent state agencies - and particularly the Probation Office - did have a claim dischargable in bankruptcy. The state's answer, relying on Connecticut law (that may well be typical), is that neither the state court nor the Probation Office holds a "claim" or "right to payment." The sentencing court may suspend a prison sentence, impose probation, and order as a condition of probation the payment of restitution "in an amount [the defendant] can afford to pay or provide in a suitable manner, for the loss or damage caused thereby." Criminal defendants ordered to make restitution must send

their payments to the Probation Office that is an agency "within the judicial department" (citing the Connecticut Statute), and the Probation Office - in turn - sends these payments to the crime victim. The probation officers who monitor compliance with restitutionary orders, have authority to apply to the sentencing court for an arrest warrant, or notice to appeal, or may make a warrantless arrest, in the event of a suspected violation of probation. And, after hearing, if the state "establishes a violation of probation, the court may modify or enlarge the conditions of probation, or it may revoke probation and order the defendant incarcerated." I am tentatively inclined to agree that the foregoing system, entirely within the scope of judicial processes, creates no "debtor, creditor relationship" in any normal sense.

The state argues, alternatively, that even if one assumes that criminal restitution is a debt, it is excepted from discharge by § 523(a)(7). That provision makes nondischargable "a fine, penalty or forfeiture payable to and for the benefit of a governmental unit [that is] not compensation for actual pecuniary loss. This argument is consistent with what clearly must be sound public policy." Indeed, although Judge Mansfield joined Judge Kearse's opinion, he wrote a brief concurring

opinion noting that the court had reached "an accurate but unfortunate result. In his view, the effect of the court's decision often would be to "stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies."

Respondent's brief, well written by the New Haven Legal Assistance Association lawyers, understandably relies primarily on the reasoning of the court of appeals. It also argues that the failure of the state agency to interpose any objection to the discharge of the restitution obligation should preclude it from coming in subsequently and claiming that the court's restitution order was still in effect. Reliance is placed, in support of this argument, on the statutory bar of claims not filed by § 523(c). But this argument is flawed if the state is correct that the court's order to pay restitution was neither a "debt" or "claim" in the sense in which these terms are used in bankruptcy.

Of course, respondent's main argument, following the rationale of the court of appeals, is that a criminal restitution obligation is a debt. While respondent's brief, like the court of appeals' opinion, is lawyer-like and plausible, my tentative view is to reverse. I will, however, be quite interested in the view of my Clerk. The bench memo need not be a long one,

as I think I understand the issues. I would like for my Clerk to identify the decision or decisions of the courts of appeals that support the position of the respective parties. I have not read any of these.

L.F.P.

rjm 08/05/86

Reviewed. See also Ronald's supplemental memo of 8/19, written after he read my memo to file.

Ron is persuasive that a criminal restitution order is dischargeable in bankruptcy.

I need to consider this more carefully. I see little substantive difference between a penal "fine" & a restitution order. A fine is not dischargeable.

8/25

BENCH MEMORANDUM

To: Mr. Justice Powell August 5, 1986

From: Ronald

No. 85-1033, Kelly v. Robinson

Question Presented: Is a criminal restitution order dischargeable as a debt in bankruptcy?

Conclusion: Both the plain meaning of the statute and the legislative history indicate that the order in this case was dischargeable.

I. FACTS AND PROCEEDINGS BELOW

In 1980, resp pleaded guilty to larceny in Connecticut state court. The conviction arose out of resp's wrongful receipt of some $10,000 in welfare benefits from the Connecticut Department of Income Maintenance (CDIM). The trial judge sentenced resp to a suspended prison term of one to three years and probation of five years on the condition that resp make restitution payments to the Connecticut Office of Adult Probation (COAP) at the rate of $100 per month. Under the Connecticut program, COAP would enforce payment, but the monies received would be forwarded to the victim, CDIM.

On February 5, 1981, resp filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut. The bankruptcy judge set a deadline of April 27, 1981, for objections to discharge. Although the restitution order was listed as a debt and the state was notified that the debt would be discharged, the state did not object to discharge. The bankruptcy court granted a discharge on May 14, 1981, at which time resp ceased making restitution payments.

COAP took no action until February 1984, when it asked resp to resume payment. Resp promptly filed an adversary proceeding in the bankruptcy court, seeking a declaration that the 1981 order had discharged the debt and an injunction against further collection efforts. Before the bankruptcy judge ruled on resp's case, the state instituted proceedings in state court to terminate resp's probation for failure to pay restitution. Those proceedings were stayed by the state courts pending disposition of the adversary proceeding in the bankruptcy court. Eventually,

the bankruptcy court rejected resp's claim in a brief order, relying on In re Pellegrino, 42 Bankr. 129 (Bankr. D. Conn. 1984), a companion case in which the court held that a criminal restitution order is not a debt within the meaning of the bankruptcy code. The district court adopted the proposed order and entered judgment for the state.

On appeal, CA2 reversed in an opinion by Judge Kearse. Judge Kearse reasoned as follows. 11 U.S.C. §727(b) [for the remainder of this memo, bankruptcy code sections are cited by section number only] grants a discharge from "all debts," with specified exceptions. Section 101(11) defines a "debt" as "liability on a claim." Section 101(4) defines "claim" in the broadest possible language, as "a right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Acknowledging that most courts had reached a contrary conclusion, Judge Kearse concluded that the literal terms of section 101(4) are broad enough to include a restitution obligation as a debt. She relied on legislative history that demonstrated Congress' intent to give "debt" the "broadest possible definition." She pointed out the practical problems with holding that a restitution claim was not a debt within the meaning of the bankruptcy code; most importantly, the holder of a right to restitution would not be entitled to participation in liquidation of the bankrupt's estate. CA2 then distinguished, on grounds not relevant here, other CA cases, United States v. Brown, 744 F.2d 905 (CA2), cert. denied, 105 S.

Ct. 599 (1984); In re Davis, 691 F.2d 716 (CA3 1982); and Barnette v. Evans, 673 F.2d 1250 (CA11 1982).

Judge Kearse then turned to the dischargeability of the debt. Section 523(a) lists several exceptions to discharge. Two of these that arguably could bar discharge of the restitution obligation apply only if the creditor objects at the dischargeability hearing, viz. for obtaining money by false pretences or by larceny. The only exception that applies automatically is section 523(a)(7), which prohibits discharge "to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Admitting that the obligation was a "penalty" and "to and for the benefit of a governmental unit," Judge Kearse held the debt was dischargeable because it was "compensation for actual pecuniary loss." First, the relevant Connecticut statute provides for payment "for the loss or damage caused" by the crime. Second, the amount assessed in this case was exactly the amount stolen. Thus, because the state failed to appear at the dischargeability hearing, the debt was discharged.

II. DISCUSSION

I find little fault with Judge Kearse's analysis. Accordingly, my discussion is brief and, for the most part, duplicative of her opinion.

A. Is This Obligation a Debt

Under the Bankruptcy Code, a debt is "liability on a claim." A claim is defined as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." The Bankruptcy Act of 1898 and the Chandler Act of 1938 applied the concept of "provable debts," which excluded many types of obligations from bankruptcy proceedings. The House and Senate Reports to the 1978 Code indicate that Congress intended the "broadest possible definition" of claim, including "all legal obligations of the debtor, no matter how remote or contingent." Under the new Code, every conceivable obligation was intended to be brought within the bankruptcy jurisdiction. Obligations that were due special protection either became "nondischargeable" or received priorities in the distribution of funds. It is important to realize that if a restitution obligation is not a "claim," two things must follow. Not only would the obligation never be subject to discharge, but the obligation could never participate in the distribution of assets. Considering the breadth of the legislative scheme, the text of the statute, and the legislative history, I think it is clear that this is a debt.

The best argument to the contrary appears in the Amicus Brief for the States. According to this argument, the obligation is not a debt because collection is enforced not by confiscation of property but by imprisonment. Although this theory is inter-

esting, it has not support in the statutory language. I am not persuaded.

Petr and the amici also discuss at length pre-Code cases, many of which treated restitution obligations as nonprovable debts. I think these are utterly irrelevant, in light of Congress' extensive revision of the statute and insertion of broad new language.

Finally, petr argues that this is not a debt because there is no right to payment. This strange conclusion rests only on the fact that the payment is made to one agency for the benefit of another. The Bankruptcy Court's opinion rested on this ground. It looked to the Code's definition of a creditor as someone who has a claim. Because the victim does not have a right to enforce collection, that Court held, there is no creditor-debtor relationship, and no debt. The most obvious problem with this argument is that the definitions of debt and claim, which govern the question of dischargeability, do not contain the term "creditor."

Congress has drafted a broad statute here, intending to cover the field. None of petr's arguments can overcome the statutory language. In my view, the determinative fact is the state's power to imprison resp if he failed to pay. Thus, the state has a claim, and the obligation is a debt within the meaning of section 727(b).

B. Dischargeability Under Section 523(a)(7)

Section 523(a)(7) bars discharge for fines and penalties only if they are to and for the benefit of a governmental unit and "not compensation for actual pecuniary loss." In most cases, the victims of crimes will not be governmental units. In such cases, as petr concedes, section 523(a)(7) cannot bar discharge because the payment will not be for the benefit of a governmental unit. Thus, the argument made for nondischargeability in this case, maugre the broad rhetoric of petr and the amici, can apply only to restitution orders imposed for crimes committed against governmental agencies.

I am persuaded by the two arguments made by Judge Kearse. First, the relevant Connecticut statute provides that payments are to be made "for the harm caused" by the crime. To me, this puts these payments within the range of "compensation for actual pecuniary loss," at least in this case, where the crime was false receipt of welfare payments. Second, the amount assessed in this case equalled the amount stolen and was to be paid for the benefit of the victim, powerful evidence that the payments were "compensation" within the meaning of section 523(a)(7).

Petr presents only brief arguments on this point. First, it argues that Congress could not possibly have intended to force the states to come into bankruptcy proceedings to protect their criminal judgments. This argument rests on several exaggerations. First, the run-of-the-mill fine automatically will be exempted from discharge. Only with restitution orders will preservation of the obligation require the creditor to ap-

pear at the dischargeability hearing. Second, I do not think the burden is excessive. If a state presents evidence of a criminal conviction for larceny, most bankruptcy judges would probably summarily find that the debt was nondischargeable because it was a debt "for larceny" under section 523(a)(4). Finally, Congress expressly limited the automatic nondischargeability provision of section 523(a)(7) so that it does not apply to restitution orders for the benefit of private victims. Thus, private victims have to come in and protect their restitution claims. Congress could have intended to treat states similarly.

Second, petrs point to a congressional intent not to make bankruptcy a "haven for criminal offenders." But this is not helpful. That statement explains the existence of section 523(a)(7), which automatically bars discharge of criminal fines. But petr refuses to acknowledge that the same section carefully defines "fine," undercutting any argument for a loose interpretation of the word "fine."

III. Conclusion

In short, I think CA2 was substantially correct. I recommend that you vote to affirm.

fjm 08/19/86

Renewed (part of p 2 is missing)
Row still differs from my tentative view. Nun is helpful - but see p 4 & 5.

SUPPLEMENTAL BENCH MEMORANDUM

To: Mr. Justice Powell August 19, 1986

From: Ronald

No. 85-1033, Kelly v. Robinson

Cert to CA2 (Kearse, Manfield (concurring), and Pratt)

Set for oral argument Wednesday October 8

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renead

Once again, one of my bench memoranda has passed your file memo as a ship in the night. You dictated a file memo in this case on August 1; I mailed my bench memo to you on August 5; I received your file memo on August 18. This memo adds two things

to my earlier bench memo. First, I discuss the cases from other circuits. Second, I address briefly the ground on which you have tentatively rested your decision of the case.

I. Earlier Circuit Court Decisions

My earlier memo did not discuss the earlier decisions because I found them, for the most part, irrelevant. They fall into three classes.

First of all, CA2's own decision in United States v. Brown, 744 F.2d 905, , cert. denied, 105 S. Ct. 599 (1

The second group consists of Davis v. Sheldon (In re Davis), 691 F.2d 176 (CA3 1982), and Barnette v. Evans, 673 F.2d 1250 (CA11 1982). These cases rely on Younger v. Harris, 401 U.S. 37 (1971), to reach the unsurprising conclusion that a bankruptcy court cannot enjoin a pending state criminal proceeding, even if those state proceedings might create an obligation enforceable against the bankrupt. In no way do these courts reach the issue whether the state criminal proceeding could create a "debt" within the meaning of federal bankruptcy laws. I assume

that the Kelly court would reach the same conclusion as these two courts.

The final group are somewhat closer to the issue raised in Kelly. Here we find United States v. Carson, 669 F.2d 216 (CA5 Unit B 1982) (adopted by CA11 in Barnette, supra), and United States v. Alexander, 743 F.2d 472 (CA7 1984). In these cases, federal courts held that a prior discharge of a debt in bankruptcy did not preclude imposition of restitution (under the federal Victim Witness Protection Act) in a subsequent criminal proceeding. I think these cases are correct, although I acknowledge a certain tension between them and Kelly. It is one thing to say, as the Kelly court does, that a preexisting restitution obligation is a "debt." It is another thing to say that this restitution obligation was discharged in a bankruptcy proceeding that took place before the restitution obligation was imposed. In my view, these cases involve two separate "rights to payment" within the meaning of the Bankruptcy Code. One arose from the contractual promise to pay. The second arose from the criminal proceeding. In short, absent clear statutory language in the bankruptcy code, I would assume that the federal Victim Witness Protection Act's grant of power to grant restitution is not limited by a prior discharge in bankruptcy, relying on the theory that the restitution obligation does not arise until it is imposed.

II. Is a Restitution Order a "Debt" Even Though It Does not Create a Debtor/Creditor Relationship?

This section supplements the brief discussion of this argument on page 6 of my original bench memo. The argument is that a debt cannot exist unless there is a bilateral relationship--a right to payment--from one debtor to one creditor. In this case, the benefit of the payment has been separated from the capacity to enforce payment. Accordingly, there is no debt. I do not think that this argument can withstand close scrutiny. Its only statutory support is the fact that the Bankruptcy Code contains a definition of creditor, see 11 U.S.C. §101(9) (defining a creditor as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor").

The presence of this definition does not help the State for two reasons. First of all, the word "creditor" does not appear in any of the sections relevant to this case (§§ 727(b), 101(4), 101(11), or 523(a)(7)). More importantly, the definition of creditor depends on the broad definition of claim in 101(4). That definition contains no suggestion that the rights of enforcement must be united with the benefits of payment; it requires only a "right to payment."

As my bench memo pointed out, two arguments from general statutory construction also undercut this argument significantly. First, if a restitution order is not a debt subject to discharge, then there is no statutory basis for allowing the beneficiaries of restitution orders to participate in distribution of the bankrupt's assets; I find such a result extremely unlikely to have been intended by Congress. Second, it is clear that Congress

But one is better off to have a claim that is not discharged

do these include the underlined order in this case?

contemplated that "certain restitution orders" would be within the definition of debt, because Congress specifically excluded them from the "exception" to discharge in 523(a)(7).

Please let me know if this memo has failed to confront your concerns in this case.

Memo. is helpful

rjm 09/19/86

File

Ronald continues to think "plain language" & leg. hist. require that "restitution orders" – such as here involved – are dischargeable in bankruptcy. But he helpfully ~~I think~~ suggests arguments supporting my tentative view.

Congress could not have intended that "restitution" orders, analagous to ~~crime~~ criminal fines, are dischargeable.

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell September 19, 1986

From: Ronald

Ask: If dischargeable, could the Court ~~not~~ that imposed the restitution order impose a new order (or fine)?

No. 85-1033, Kelly v. Robinson

Cert to CA2

Set for oral argument in October

Your file memo and your annotation of my bench memo indicate that you are not likely to follow the recommendation of my bench memo. This memo is designed to present to you the best of the arguments inventive clerks have designed to reach the result

you favor. The general feeling is that the result reached by CA2 is so intrusive on the states that it is incumbent on this Court to "rewrite the statute" to avoid that result. As my bench memo explains, I think the better course is to interpret the statute as written. This inclination, of course, rests on my failure to perceive the states' interests in this case as overwhelming. This in itself is unusual, because I have become accustomed to being among the most deferential to the states on most issues. The arguments attack CA2's opinion at two levels. First, some argue that restitution orders are not debts. Second, some argue that, even if they are debts, they are nondischargeable.

I. Argument that restitution orders are not debts

This argument is fairly straightforward. Congress indicated quite clearly that it wanted the definition of debt to be all-inclusive with respect to the contingency, maturity, and security of the obligation, but it never indicated an intent to include criminal penalties in that definition. Several courts had held criminal penalties not to be debts before passage of the Bankruptcy Code. Congress' failure to explicitly overrule those decisions indicates an intent to preserve them. Cf. Ohio v. Kovacs, 105 S. Ct. 705 (1985) (relying on Congress' failure to overrule preCode bankruptcy cases to find an explicit exception to the Code's specific statutory language). Financial obligations arising out of state criminal justice systems were simply

beyond the contemplation of Congress when it defined "debt" in the Bankruptcy Code.

I am not at all persuaded by this. Congress' complete redrafting of the statute makes reliance on Kovacs inappropriate. More importantly, this argument proves too much, because it assumes that Congress did not intend "criminal fines" to be debts. This is obviously incorrect, because Congress expressly excepted them from discharge in section 523(a)(7). There would be no need to discharge a criminal fine if it was not a debt.

II. Argument that restitution orders are always nondischargeable under section 523(a)(7)

This argument comes from a law clerk to Justice O'Connor. The first draft of what eventually became section 523 did not provide for automatic discharge at all. Under this draft, every debt would be discharged unless the creditor came in to object to discharge. Confronted with this, we may assume that Congress inserted section 523(a)(7) to prevent state prosecutors from having to justify criminal penalties before federal bankruptcy judges. The intent of section 523(a)(7) was to make automatically dischargeable any debt that was imposed in a criminal proceeding that would be subject to discharge upon objection under sections 523(a)(1)-(6).

Although this argument is inventive, it can be accepted only by complete rejection of the actual language of the statute. I am willing to admit that section 523(a)(7) was designed to pro-

vide automatic dischargeability for criminal penalties. But it is impossible to read the section as providing automatic dischargeability for anything dischargeable under sections 523(a)(1)-(6). Such a section would read "to the extent such debt was imposed in a criminal proceeding and would be subject to discharge under subdivisions (1) through (6) of this subsection."

As drafted, the section reads "to the extent such debt is for a fine ... payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." To my knowledge, noone has yet suggested a plausible purpose for the highlighted language except to prevent automatic dischargeability of restitution orders. As I see it, that language was inserted to carve out an exception for restitution orders. When Congress drafted this exception for restitution orders, it assumed that restitution orders would always be payable "for the benefit of" the private entity harmed. Thus, it defined fines, in part, as payments "to and for the benefit of a governmental unit."

This case presents the more unusual situation of a restitution order payable "to and for the benefit of a governmental unit," clearly satisfying the first prong of the definition of a fine. Thus, the Court could hold that this restitution order is nondischargeable by saying that the second part of the fine definition--"not compensation for actual pecuniary loss"--is met here. Such a conclusion would rest on the notion that a restitution order imposed in a criminal proceeding partakes of rehabilitative and punitive purposes, but not of compensatory purposes. In my bench memo I outline my reasoning against this position.

In this memo, I note only that this would lead to the anomaly that criminal restitution orders for thefts from individuals would be dischargeable, while orders for thefts from the government would be nondischargeable. When I drafted my bench memo, I thought this anomaly would be intolerable. While I still think it would be ill-advised, I must acknowledge that this anomaly would salvage some degree of the state's interests, by elevating the status of debts for thefts from states. Unfortunately, there is not a shred of legislative history supporting a distinction between restitution orders based on the private or public character of the victim.

Ronald's view

Thus, if you feel compelled to reverse, the best course would be:

(1) A restitution order is a debt

(2) Restitution orders are not "compensation for actual pecuniary loss" within the meaning of section 523(a)(7)

??

(3) Thus, restitution orders for thefts from private parties are dischargeable only upon objection, while restitution orders for thefts from states are automatically nondischargeable.

85-1033 KELLY v. ROBINSON Argued 10/8/86

Schuman (cont AG - Coren)

CA 2's decision ignores history. Prior to ~~1978~~ 1978, when new bankruptcy act was adopted, it was clear that criminal sanctions - including restitution orders - were not dischargeable.

R/order is punishment - not a debt. Yet it is an ~~integral~~ integral part of state criminal law.

The State here was the victim, but this does not change analysis.

T.M asked whether State waived it rights by failing to do anything for 3 yrs. [If discharge was void, could there be a waiver]

S.O.C. & WHR are troubled by language of Act.

§ 523(a)(7) would automatically exclude this as a "fine" or a "penalty". SOC suggests that State has a stronger position in arguing that restitution orders are "fines" or "penalties". *

[Yet here the "restitution" order - was in the amount of the wrongful receipt of welfare funds. Query whether - as Resp argues - the order here was "compensation for actual pecuniary loss".

Study further

(*) But here the restitution order was repayment to the state.

mitt Regan's memo

Kelly v. Robinson
No. 85-1033
Argued Oct. 8, 1986
For conference Oct. 10, 1986

I conclude that criminal restitution obligations are not dischargeable in bankruptcy by virtue of §523(a)(7) of the bankruptcy statute. I reach this result by concluding that the exception to non-dischargeability in that section for "compensation for actual pecuniary loss" refers only to civil compensatory obligations.

First, criminal restitution obligations should be regarded as "debts" under the bankruptcy code. They were not so regarded under the old code because they were regarded as non-provable. In abolishing the provability requirement in the 1978 Act, Congress eliminated the rationale for characterizing criminal penalties as non-debts. Furthermore, the state has a "right to payment" under the code, since it may enforce the restitution obligation by seeking revocation of probation if it is not fulfilled.

Section 523(a)(7), however, bars discharge of such obligations, because the exception to non-dischargeability in that section encompasses only civil compensation. This conclusion rests on the following analysis. Congress modified §57j of the old code in the 1978 Act by making allowable the claims for non-pecuniary compensation -- civil and criminal -- that were not allowed under the old code. See §726(a)(4). Normally, if claims are allowable against the estate, the obligation in question is

discharged. Congress sought to prevent this consequence of making non-pecuniary claims allowable by specifically providing in §523(a)(7) that these claims are non-dischargeable. The rationale for this non-dischargeability is that the state's interest in such claims is not merely as just another creditor, but is penal as well.

Congress therefore provided general language in §523(a)(7) indicating that claims owed to the government were non-dischargeable. It nonetheless sought to preserve the dischargeability of claims owed to the government that had been dischargeable under the old code -- namely, civil compensatory claims. These claims, unlike non-compensatory claims, are given priority in bankruptcy. Section 501(6)(G) lists among the claims given first priority claims civil in nature that are "compensation for actual pecuniary loss" -- the identical language used in §523(a)(7). The state's interest in such claims is essentially as a creditor, which is why it makes sense to give those claims priority and to except them from the non-dischargeability otherwise imposed by §523(a)(7). Any criminal penalty, however, is not discharged under that exception, because the state's claim is not merely as a creditor, but is penal.

The non-dischargeability of criminal restitution obligations is thus consistent with the way in which Congress sought to modify the old code. Furthermore, had Congress intended to take the radical step of significantly interfering with state criminal judgments, it would have said so in language much more explicit than we have before us.

No. 85-1033, Kelly v. Robinson Conf. 10/10/86

The Chief Justice Rev.

The order here is a "debt" & normally would be discharged. This ~~is~~ is a statutory

Q. Despite the statute

Prior to new act, it would not have been discharged

Justice Brennan Rev

It is a debt but is not ~~dischargeable~~ dischargeable.

Justice White Rev

Agree with WJB

Justice Marshall Rev.

State waived any rights it may have had.

Justice Blackmun Rev.

Fed law not intended to interfere with ~~or~~ State crim
Not a debt.

Justice Powell Rev. (tentative)

For me this a close & difficult case. The statutory language is not easy to construe.

If AB is right that Fed Bkruptcy law could not have intended to interfere with State criminal justice. Congress could not have intended this

JUSTICE STEVENS Affirm

Plain language

JUSTICE O'CONNOR ~~Affirm~~ Rev

Can say it is not a debt

or can hold that § 523(a)(7) applies

Can go either way as to "debt" or

under 523(a)(7)

JUSTICE SCALIA Would ~~affirm~~ like to ~~affirm~~ Rev.

but plain language is not easy

to avoid.

May be able to decide if

is not a debt.

Ronald: 5-0 C at Conference that restitutionary orders are an important alternative for of punishment that trial judge ~~may~~ may use frequently.

rjm 10/13/86

Draft Outline for Opinion in Kelly v. Robinson

Introductory Statement

first ¶ - state the Q presented (take a look at several of my opinions)

I. Facts and Proceedings Below

Facts, and relevant statutory provision - perhaps summary in text, + full text of relevant statutory provision in a footnote. Brief summary of decisions below.

II. The Problem

A. ~~Resps ask us to hold~~ CA 2 held that restitution orders imposed in criminal proceedings are debts that are dischargeable in bankruptcy. CA 2 also held that under § 528(a)(7) such orders also are dischargeable

B. This would infringe important state interests

1. Criminal Proceedings are uniquely a province for the states

2. This would require state prosecutors to come into federal court seeking a discharge

3. In ~~some~~ many cases, whether the prosecutors objected or not, restitution orders would be discharged. ? the ~~debts would not be dischargeable~~.

4. Resps suggest that this problem would be alleviated by state criminal judges considering the bankruptcy law aspects of their restitution orders. We hesitate seriously before requiring overburdened state criminal trial judges to be expected to know the requirements of the Bankruptcy Code's dischargeability provisions.

omit fed courts are more overburdened than state courts

C. ~~The language would have to be indubitably clear for us to accept these consequences without examining the history of the provision. This language does support resps, but it is not as clear as the state's interests.~~

[an CA 2 found] in the face [only] support to Resp's view

for in view of substantial state interests & the law prior to 1978, we look to the leg. hist

III. History

A. Under the 1898 Act (and older Acts, if available), these penalties were completely excluded. Citing Cases, Collier's, Norton's, legislative history of new Code. In the bankruptcy area we have required a clear command to assume that Congress ~~overruled a prior rule~~. See your Midlantic opinion. 106 S. Ct. 755.

B. Legislative history of the 1978 Code. Indication to broaden debt, but no indication of a desire to interfere with the state criminal processes.

IV. Resolution

A. This is a debt

B. This is automatically nondischargeable under section 523(a)(7) as a "fine or penalty."

I think this SDC preferred decision. Lets go with this, and also say an arguable case can be made that the 1978 Act did not intent to make a criminal penalty a debt.

one of substance and on which state have relied

rjm 10/17/86

October 17, 1986

To: Justice Powell
From: Ronald
Re: No. 85-1033, Kelly v. Robinson

I attach a draft for your opinion in this case. You will not be surprised to hear that I have had several problems in preparing this draft. Although I have read your opinions, I have not read your editing. Thus, I do not have an adequate feel for what you want. My aim has been the lower goal--to produce something you can easily change into a circulable opinion--rather than the higher goal--to present you a circulable opinion and expect you to change nothing. This memo details several of the conscious choices I made while writing the draft.

1. Throughout the draft I refer to the issue presented as dischargeability of restitution orders entered in state criminal proceedings. There is no suggestion that the rule should be different in federal criminal proceedings, but the interests of the states seem so much more compelling. By referring constantly to state proceedings, the opinion may gain a slight emphasis that it would not have otherwise. Similarly, I refer regularly to federal bankruptcy courts, even though there are, of course, no state bankruptcy courts.

2. Frequently I use circumlocutions like "restitution imposed as a condition of probation" rather than the simple "restitution order." I am quite ambivalent about such awkward phraseology. But it may focus the reader on the penal source of the orders being discharged.

3. There are several factual problems insoluble on the present record. First, the state judge ordered Robinson to pay $100 a month. She stopped when she had paid $450. I presume that she paid a half-payment for one of the months, but have no basis for this statement. Second, as you remember from oral argument, the total amount of the restitution obligation is unclear. As I have noted in the draft, the judge stated the total amount to be $9,932.95, but set a payment schedule totaling $6,000. It may not be coincidental that Robinson's bankruptcy petition listed two debts to the Connecticut government: $9,932.95 to the probation office, and $6,000 to the income assistance office. Nothing in the record explains the source of the $6,000 debt. The state challenged the discharge of both debts. For reasons that are unclear, the bankruptcy judge summarily rejected the challenge to discharge of the $6,000 debt. Discharge of that debt is not before the Court.

I think it is probable that the $6,000 debt was entirely separate from the $9,932.95 theft before the Court. Thus, I as-

sume it is only a coincidence that the restitution payments scheduled totaled $6,000. This conclusion is undermined by the Second Circuit's listing of both debts in its opinion. If the debts are related, it may be that this restitution order was assessed in addition to a civil obligation to repay. This would certainly bolster the result the Court is reaching in this case. You may wish to inquire of the parties as to the relevant facts.

I think that would be unnecessary, however. The sense of the Court is clearly that all restitution orders imposed by criminal courts are nondischargeable, whether they go to a private victim or a public victim, whether they supplement or replace a civil obligation. Thus, the actual state of the facts is not particularly important.

4. In light of your comments on my bench memo, I have dispensed entirely with the acronyms used by the parties, adopting instead the more comprehensible formulations "probation office" and "public assistance office."

5. I am uncomfortable with the length of the section explaining the reasoning of the courts below. I have left the bankruptcy court discussion lengthy because it parallels our analysis. I have left the CA2 discussion lengthy because you said you thought it was entitled to respect.

6. I am not entirely satisfied with the organization. You will notice that I discuss the creation of the exception and the state's interests before I turn to the statute. I tried one draft, starting with section 523(a)(7), and then turning to these sources, but it did not work well. I think the discussion of the lower court opinions adequately sets the stage for the historical discussion, which in turn sets the reader's frame of mind before we finally confront the statute.

7. I have included references to your dissent in TVA v. Hill wherever comments made there supported the analysis here. Some of these probably should be suppressed. Because two members of the majority in this case expressly disagreed with you in TVA, it may not be appropriate to call so much attention to it. By including all the relevant quotations, I hope I have made it easier for you to choose those you most favor. In fact, you will find an unsuitably high number of block quotations. I hope this allows you to select the quotes you like the best, or to eliminate the quotations entirely and rephrase the ideas in your language.

8. I have refused to decide the debt question, as we agreed. I think it would be extraordinarily difficult to write an opinion concluding that it is not a debt. The Code expressly provides for payment of fines in §726(a)(4). The legislative history is replete with references to this. Moreover, it would be somewhat inconsistent with the framework I have devised to explain the analysis of §523(a)(7). If some people are likely to disagree on this point, we should elevate it to the status of a

subpart, to enable the disagreeing Justices to pinpoint the portion of the opinion with which they disagree.

9. I have examined the "to and for the benefit of a governmental unit" language, although in this case it would be easy to say that the payment was "for the benefit of a governmental unit" because it was forwarded to the state public assistance office. I rejected that approach because it would lead to another case, in which we would be called on to adjudicate the dischargeability of restitution orders for money stolen from private individuals. I gather that the sense of the Conference is that all restitution orders should be nondischargeable. I do not think we need leave this question open, inviting another case, which would produce another difficult opinion. Thus, I have decided the question in this draft.

Agree

Term

Draft Opinion for the Court in No. 85-1033

John J. Kelly, Connecticut Chief State's Attorney, et al.,

Petitioners

v.

Carolyn Robinson, Respondent

We granted review in this case to decide whether restitution obligations, imposed as conditions of

lfp/ss 10/22/86 Rider A, p. 10 (Kelly)

KELLYA SALLY-POW

The Court of Appeals nevertheless found support for its holding in the fact that Connecticut officials probably could have ensured continued enforcement of their court's criminal judgment against Robinson had they objected to discharge under §523(c). ~~While~~ this may be true in many cases, it hardly justifies an interpretation of the 1978 Act that is contrary to the long prevailing view that "fines and penalties are not affected by a discharge". Collier on Bankruptcy, id.

Although

Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. In some cases it would

require state prosecutors to defend particular state criminal judgments before the federal bankruptcy courts.[8]

8. In some cases principle of issue preclusion could obviate the need for reexamination of factual questions, or interpretations of state law, in the bankruptcy court. Differences between the elements of crime and the provisions of §523 could, however, hinder the application of issue preclusion. Moreover, apart from the burden on state officials of following and participating in bankruptcy proceedings, there is the unseemliness of requiring state prosecutors to submit the judgments of their criminal courts to federal bankruptcy ~~judges~~.

probation in state criminal proceedings, are dischargeable in ~~bankruptcy~~ proceedings under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701-766.

I.

In 1980, Carolyn Robinson entered a plea of ~~pled~~ guilty to larceny in the second degree. The ~~conviction~~ charge was based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. On November 14, 1980, the Connecticut Superior Court sentenced ~~the~~ ~~respondent~~ ~~plaintiff~~ Robinson to a prison term of not less than one year nor more than three years. The court suspended execution of the sentence and placed ~~the~~ ~~respondent~~ ~~plaintiff~~ Robinson on probation for five years. As a condition of probation, the judge

ordered Robinson to make restitution[1] to the State of Connecticut Office of Adult Probation (Probation Office) at the rate of $100.00 per month, commencing January 16, 1981, and continuing until the end of her probation.[2]

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§701-766, in the United States Bankruptcy Court for the District of Connecticut. That petition listed the

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[1] Connecticut Gen. Stat. §53a-30 describes the conditions a trial judge can impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant

> make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance.

[2] The amount of restitution is not entirely clear. Although the judge imposed restitution in a total amount of $9,932.95, five years of payments at one hundred dollars a month is only $6000.

restitution obligation as a debt. On February 20, 1981, the Bankruptcy Court notified both of the Connecticut agencies of Robinson's petition and informed them that April 27, 1981, was the deadline for filing objections to discharge. Apparently because the agencies did not believe the bankruptcy would affect the conditions of Robinson's probation, they did not file proofs of claim or objections to discharge. Thus, the agencies did not participate in the distribution of Robinson's estate. On May 14, 1981, the bankruptcy court granted Robinson a discharge. See §727.

~~Robinson complied substantially with the conditions of her probation until she received the discharge in bankruptcy.~~ At that time she had paid a total of $450. On May 20, 1981, her attorney wrote the

Probation Office that he believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution. Robinson made no further payments.

The Connecticut Probation Office did not respond to this letter until February 1984, when it informed Robinson that it considered the obligation to pay restitution nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court, seeking a declaration that the restitution obligation had been discharged, as well as an injunction to prevent the State's officials from forcing Robinson to pay.

After a trial, the Bankruptcy Court entered a Memorandum and Proposed Order, concluding that the 1981 discharge in bankruptcy had not altered the conditions of

Robinson's probation. The court adopted the analysis it had applied in a similar case decided one month earlier, In re Pellegrino (Pellegrino v. Division of Criminal Justice), 42 B. R. 129 (Bkrtcy. Ct. Conn. 1984).

In Pellegrino, the court began with the Bankruptcy Code's definitional sections. First, §101(11) defines a "debt" as a "liability on a claim." In turn, §101(4) defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Finally, §101(9) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

The Bankruptcy Court then examined the statute under which the Connecticut judge had sentenced the debtor to pay restitution. Restitution appears as one of the conditions of probation enumerated in Conn. Gen. Stat. §53a-30. Under that section, restitution payments are sent to the Probation Office. The payments then are forwarded to the ~~crime~~ victim. Although the Connecticut penal code does not provide for enforcement of the probation conditions by the victim, it does authorize the trial court to issue a warrant for the arrest of a criminal defendant ~~if he~~ who violates ~~the~~ conditions of probation. §53a-32.

Because the Connecticut statute does not allow the victim to enforce ~~his~~ a right to receive payment, the court concluded that neither the victim nor the Probation

Office had a "right to payment, and hence no "debt" under the Bankruptcy Code. It argued:

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose. 42 B. R., at 133.

The court acknowledged the tension between its conclusion and the Code's specific definition of debt, but found an exception to the statutory definition in "the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments." Id., at .

The court concluded that, even if the probation condition was a debt subject to its jurisdiction, it was

nondischargeable under §523(a)(7) of the Code. That section provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

The court concluded that the purpose of the restitution condition was "to promote the rehabilitation of the offender, not to compensate the victim." 42 B. R., at 137. It specifically rejected the argument that the restitution must be deemed compensatory because the ~~state judge had set~~ the amount ~~at the~~ precise ~~amount~~ of the victim's loss. It noted that the state statute allows an offender "to make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or

provide in a suitable manner, for the loss or damage caused thereby," Conn. Gen. Stat. §53a-30(a)(4). In its view, the Connecticut statute focuses "upon the offender and not on the victim, and ... restitution is part of the criminal penalty rather than compensation for a victim's actual loss." 42 B. R., at 137. Thus, the Bankruptcy Court held that the bankruptcy discharge had not affected the conditions of Pellegrino's probation. The United States District Court for the District of Connecticut adopted the Bankruptcy Court's proposed dispositions of Pellegrino and this case without alteration.

The Court of Appeals for the Second Circuit reversed. It first examined the Code's definition of debt. Although it recognized that most courts had reached the opposite conclusion, the court decided that a

restitution obligation imposed as a condition of probation is a debt. It relied on the legislative history of the Code that evinced Congress's intent to broaden the definition of "debt" from the much narrower definition ~~in~~ of the Bankruptcy Act of 1898. The court also noted that anomalies ~~that could~~ might result from a conclusion that such an obligation ~~was~~ is not a debt. Most importantly, nondebt status would deprive a state of the opportunity to participate in distribution of the bankrupt's estate.

Having concluded that restitution obligations are debts, the court turned to the question of dischargeability. The court state that the appropriate Connecticut agency probably could have avoided discharge

of the debt if it had objected under §§523(a)(2) or 523(a)(4) of the Code.[3]

As no objections to discharge were filed, the court concluded that the state could rely only on §523(a)(7), ~~that~~ provides for automatic dischargeability.[4] The court then looked to the text of the Connecticut

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[3]Section 523(a)(2)(A) protects from discharge debts "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by false pretenses, a false representation, or actual fraud." Section 523(a)(4) protects from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Under §523(c), debts that are protected from discharge only by §523(a)(2) or §523(a)(4) are discharged unless the creditor files an objection to discharge during the bankruptcy proceedings. Because Robinson was convicted of larceny, one of the debts listed in §523(a)(4), it is quite likely that the Bankruptcy Court would have found the debt nondischargeable under that subsection.

[4]The requirement that creditors object to discharge is limited on its face to paragraphs (2), (4), and (6) of §523(a). Because paragraph 7 is not listed there, debts described in that paragraph are automatically nondischargeable, under the general rule prescribed in the opening clause of §523(a) (providing that a "discharge under section 727 ... of this title does not discharge an individual debtor from any debt" listed in the paragraphs that follow).

statute to determine whether Robinson's probation condition was "compensation for actual pecuniary loss" within the meaning of §523(a)(7). But where the Bankruptcy Court had considered the entire state probation system, the Court of Appeals focused only on the language that allowed a restitution order to be assessed "for the loss or damage caused [by the crime]," Conn. Gen. Stat. §53a-30(a)(4). The court thought this language compelled the conclusion that the probation condition was "compensation for actual pecuniary loss." It held, therefore, that this particular condition of Robinson's probation was not protected from discharge by §523(a)(7). Accordingly, it reversed the District Court.

We granted the State's petition for a writ of certiorari. We have jurisdiction to review the judgment

of the Court of Appeals under 28 U.S.C. §1254(1). We reverse.

II.

The Court of Appeals' decision focused primarily on the language of §§101 and 523 of the Code. Of course, the "starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (POWELL, J., concurring). But the text is only the starting point. As JUSTICE O'CONNOR explained last term, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Offshore

L.F.P.
10/17-18

Draft of 10/17/86

Preserve for my file

Draft Opinion for the Court in No. 85-1033, Kelly v. Robinson

are there full names & positions of parties. Who is Kelly?

We granted review in this case to decide ~~if a federal bankruptcy court can discharge~~ whether state restitution obligations, imposed as conditions of probation in state criminal proceedings, are dischargeable in bankruptcy?

I.

In 1980, Carolyn Robinson ~~pleaded~~ pled guilty to larceny in the second degree. The conviction was based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. On November 14, 1980, the Connecticut Superior Court sentenced the plaintiff to a prison term of not less than one year nor more than three years. The court suspended execution of the sentence and placed the plaintiff on probation for five years. As a condition of probation, the judge ordered Robinson to make restitution[1] to the ~~State of Connecticut~~ (Probation Office) State of Connecticut Office of Adult Probation at the rate

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[1]Connecticut Gen. Stat. §53a-30 describes the conditions a trial judge can impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant

> make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of

(Footnote continued)

of $100.00 per month, commencing January 16, 1981, and continuing until the end of her probation.[2]

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§701-766, in the United States Bankruptcy Court for the District of Connecticut. That petition listed the restitution obligation as a debt. On February 20, 1981, the Bankruptcy Court notified both of the Connecticut agencies of Robinson's petition and informed them that April 27, 1981, was the deadline for filing objections to discharge. Apparently because the agencies did not

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(Footnote 1 continued from previous page)
performance.

[2]The amount of restitution is not entirely clear. Although the judge imposed restitution in a total amount of $9,932.95, five years of payments at one hundred dollars a month is only $6000.

OK
This is
all
we need
say →

believe the bankruptcy would affect the conditions of Robinson's probation, they did not file proofs of claim or objections to discharge. Thus, the agencies did not participate in the distribution of Robinson's estate. On May 14, 1981, the bankruptcy court granted Robinson a discharge. See §727.

Robinson complied substantially with the conditions of her probation until she received the discharge in bankruptcy. At that time she had paid a total of $450. On May 20, 1981, her attorney wrote the ~~Connecticut~~ Probation Office informing ~~it~~ that he believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution. Robinson made no further payments.

Had she paid the $100 every month? - 4 1/2 months? But no need to be precise here. OK with word added

The Connecticut probation office did not respond to this letter until February 1984, when it informed Robinson that it considered the ~~condition of probation~~ concerning ~~restitution~~ nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court, seeking a declaration that the restitution obligation had been discharged, as well as an injunction to prevent the State's officials from forcing Robinson to pay.

After a ~~brief~~ trial, the Bankruptcy Court entered a Memorandum and Proposed Order, concluding that the 1981 discharge in bankruptcy had not altered the conditions of Robinson's probation. The ~~Bankruptcy~~ Court adopted the analysis it had applied in a similar case decided one month earlier, In re Pellegrino (Pellegrino v. Division

of Criminal Justice), 42 B. R. 129 (Bkrtcy. Ct. Conn. 1984).

In Pellegrino, the ~~Bankruptcy~~ Court began with the Bankruptcy Code's definitional sections. First, §101(11) defines a "debt" as a "liability on a claim." In turn, §101(4) defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Finally, §101(9) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

The Bankruptcy Court then examined the statute under which the Connecticut judge had sentenced the debtor

to pay restitution. Restitution appears as one of the conditions of probation enumerated in Conn. Gen. Stat. §53a-30. Under that section, restitution payments are sent to the ~~Connecticut~~ probation office, ~~which monitors compliance with the trial court's probation conditions.~~ The ~~probation office forwards~~ the payments to the crime victim. Although the Connecticut penal code does not provide for enforcement of the probation conditions by the victim, it does authorize the trial court to issue a warrant for the arrest of a criminal defendant if he violates the conditions of ~~his~~ probation. §53a-32.

Because the Connecticut statute does not allow the victim to enforce ~~his right to receive~~ payment, the Bankruptcy Court concluded that the victim has no "right

to payment," and hence no "debt" under the Bankruptcy Code. It argued:

> Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose. 42 B. R., at 133.

The Bankruptcy Court acknowledged the tension between its conclusion and the Code's specific definition of debt, but found an exception to the statutory definition in "the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments." Id., at .

The Bankruptcy Court also concluded that, even if the probation condition was a debt subject to its

jurisdiction, it was nondischargeable under §523(a)(7) of the Code. That section provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

~~After examining the Connecticut probation statute,~~ the Bankruptcy Court concluded that the purpose of the restitution condition was "to promote the rehabilitation of the offender, not to compensate the victim." 42 B. R., at 137. It specifically rejected the argument that the restitution must be deemed compensatory because the state judge had set the amount at the precise amount of the victim's loss. It noted that the state statute allows an offender "to make restitution of the

fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby," Conn. Gen. Stat. §53a-30(a)(4). In its view, the Connecticut statute focuses "upon the offender and not on the victim, and ... restitution is part of the criminal penalty rather than compensation for a victim's actual loss." 42 B. R., at 137. Thus, the Bankruptcy Court held that the bankruptcy discharge had not affected the conditions of Pellegrino's probation. The United States District Court for the District of Connecticut adopted the Bankruptcy Court's proposed dispositions of Pellegrino and ~~Robinson~~ Hurcare without alteration.

~~The respondent here~~ Robinson ~~appealed~~ to the Court of Appeals for the Second Circuit, ~~which~~ reversed. ~~That Court~~ first examined

the Code's definition of debt. Although recognizing that most courts faced with the issue had reached the opposite conclusion, the Second Circuit decided that a restitution obligation imposed as a condition of probation is a debt. The principal basis for this conclusion was the legislative history of the Code, which evinced Congress's intent to broaden the definition of "debt" from the much narrower definition used in the Bankruptcy Act of 1898. The court also noted several anomalies that would proceed from a conclusion that such an obligation was not a debt. Most importantly, nondebt status would deprive the state of an opportunity to participate in distribution of the bankrupt's estate. In light of the broad statutory language, the Second Circuit found that conclusion untenable.

Ronald - I rarely refer to a CA as simply "Second" or "Ninth" Circuit. Say "Court of Appeals" when necessary. Usually "court" will be clearly refer only to the relevant court.

Having concluded that restitution obligations debts, the Second Circuit turned to the question of dischargeability. As the Second Circuit recognized, the Connecticut agencies probably could have avoided discharge of the debt if it had objected under §§523(a)(2) or 523(a)(4) of the Code.[3]

are — Ct of appr — The — court stated that the — appropriate — agency — had grounds to object

Because the Connecticut agencies had not filed objections to discharge, they could rely only on

no ¶ — As no — had been filed,* the court concluded the — state

[3]Section 523(a)(2)(A) protects from discharge debts "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by false pretenses, a false representation, or actual fraud." Section 523(a)(4) protects from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Under §523(c), debts that are protected from discharge only by §523(a)(2) or §523(a)(4) are discharged unless the creditor files an objection to discharge during the bankruptcy proceedings.

* Ronald - could we properly add a note here to the effect that the state reasonably could have believed that a restitution obligation, imposed by a court, came did not come within the meaning of § 523(a) 2, etc.

This is not well expressed

§523(a)(7), ~~which~~ that provides for automatic dischargeability.[4] ~~Like the Bankruptcy Court,~~ the ~~Second~~ ~~Circuit~~ count them looked to the text of the Connecticut statute to determine whether Robinson's probation condition was "compensation for actual pecuniary loss" within the meaning of §523(a)(7). But where the Bankruptcy Court had considered the entire state probation ~~scheme~~ system, the ~~Second~~ ~~Circuit~~ focused only on the language words that allowed a restitution order to be assessed "for the loss or damage caused [by the crime]," Conn. Gen. Stat. §53a-30(a)(4).

Ronald - I prefer not to use "scheme" as it connotes something sinister.

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[4]The requirement that creditors object to discharge is limited on its face to paragraphs (2), (4), and (6) of §523(a). Because paragraph 7 is not listed there, debts described in that paragraph are automatically nondischargeable, under the general rule prescribed in the opening clause of §523(a) (providing that a "discharge under section 727 ... of this title does not discharge an individual debtor from any debt" listed in the paragraphs that follow).

The ~~Second Circuit~~ Court thought ~~that~~ this language compelled the conclusion that the probation condition was "compensation for actual pecuniary loss." It held, therefore, that this particular condition of Robinson's probation was not protected ~~by~~ from discharge by §523(a)(7). ~~Thus,~~ Accordingly, it reversed the District Court.

~~Connecticut's Chief Attorney filed a~~ We granted the State's petition for a writ of certiorari, ~~which we granted~~. We have jurisdiction to review the ~~Second Circuit's~~ judgment of the Ct of Appeals under 28 U.S.C. §1254(1). We reverse.

If Kelly has not been sufficiently identified on the State/or as acting on behalf of the State in her official capacity, add a note here

II.

The ~~Second Circuit~~ Ct/Appeals's decision focused ~~almost~~ primarily ~~exclusively~~ on the language of the §§101 and 523 of the

Code. We think that approach ~~is too narrow~~. As JUSTICE O'CONNOR explained last term, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Offshore Logistics, Inc. v. Tallentire, 477 U.S. ___, ___ (1986) (quoting Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 285 (1956) (quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849))). In this case, the ~~Second Circuit did not~~ accord, ~~appropriate~~ weight either to the history of bankruptcy court deference to criminal judgments or to the interests of the States in unfettered administration of their criminal justice systems.

The present text of Title 11, commonly referred to as the Bankruptcy Code, was enacted in 1978[5] to replace the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.[6] The treatment of criminal judgments under the Act informs our understanding of its replacement. The Act's treatment of debts calls to mind medieval disputations on the nature of the Trinity. A general outline of that treatment, however, is sufficient for our purposes.

First, §57 established the concept of an "allowable" debt. See 3 Collier on Bankruptcy ¶57 (14th ed. 1977) (describing the requirements and procedures for

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[5] Congress made numerous technical changes to the Code in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 380. None of those changes are relevant to this decision.

[6] Congress amended the Bankruptcy Act several times between 1898 and 1978, but none of those changes are relevant to this decision.

allowance of a claim). Only if a debt was allowable could the creditor receive a share of the bankrupt's assets. See §65a. For this case, it is important to note that §57j excluded from the class of allowable debts penalties owed to government entities. That section provided:

> Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose. 30 Stat., at 561.

Second, §63 of the 1898 established the separate concept of a "provable" debt. See 3A Collier on Bankruptcy ¶63 (14th ed. 1975). Section 17 provided that a discharge in bankruptcy "release[d] a bankrupt from all of his provable debts," subject to several exceptions listed in later

portions of §17. Although §17 specifically excepted four types of debts from discharge, it did not mention criminal penalties of any kind.

The most natural construction ~~of the Act~~ would have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate. Congress had considered criminal penalties when it passed the Act; it ~~expressly~~ clearly made them nonallowable. The failure expressly to make them nondischargeable at the same time offered substantial support ~~to~~ for the ~~notion~~ view that the Act discharged those penalties.

But the courts did not interpret the 1878 Act in this way. Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the

judgment of a state criminal court. In the leading case, the district judge reasoned:

> It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace [criminal penalties]; but it is well settled that there may be cases in which such literal construction is not admissible. ... It may suffice to say that nothing but a ruling from a higher court would convince me that congress, by any provision of the bankrupt act, intended to permit the discharge, under its operations, of any judgment entered by a state or federal court imposing a fine in the enforcement of criminal laws. ... The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." In re Moore, 111 F. 145, 148-49 (W.D. Ky. 1901).

Ronald: Are my changes accurate?

This reasoning was sufficiently accepted by the time Congress ~~drafted~~ enacted the new Code that a leading commentator could state flatly that "fines and penalties are not affected by

Also of In re Moore was followed by other courts, as you implicate. Perhaps it is a note.

I assume Moore was not a "restitution order" case. Are there other such cases emphasizing no intent to interfere with state criminal laws?

Any cases under 1898 Act to the contrary?

Now I see you have changed it.

a discharge." See 1A Collier on Bankruptcy ¶17.13, at 1609-10 & n.10 (14th ed. 1979).

Moreover, those few courts faced with restitution obligations imposed as part of criminal sentences applied this reasoning to prevent a discharge in bankruptcy from affecting such a condition of a criminal sentence. For instance, four years before Congress ~~passed the~~ enacted the present Code, the New York Supreme Court stated:

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

Mosesson, 78 Misc. 2d 217, ???, 356 N.Y.S.2d 483, 484 (S. Ct. 1974) (citations omitted).[7]

Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity.

B

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[7]For similar decisions involving restitution orders, see State ex rel. Auerbach v. Topping Bros., 79 Misc. 2d 260, 359 N.Y.S.2d 985, 987-88 (Crim. Ct. 1974); State v. Washburn, 97 Cal. App. 3d 621, 625-26, 158 Cal. Rptr. 822, 825 (1979).

Our interpretation of the Code also must consider the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." Younger v. Harris, 401 U.S. 37, 46 (1971). In the opinion of the ~~Second Circuit~~ CA, it was acceptable that Connecticut officials could have ensured continued enforcement of their court's criminal judgment against Robinson by objecting to discharge under §523(c). This approach has several problems.

Ronald: I would not have thought a bankruptcy court would require any more than a verified copy of the ~~state~~ criminal court judg.

First, it would require state prosecutors to reprove the elements of the crime to the satisfaction of the bankruptcy judge. As JUSTICE BRENNAN has noted, federal adjudication of matters already ~~at issue~~ resolved in state criminal proceedings can be "an unwarranted and unseemly duplication of the State's own adjudicative process." Perez v. Ledesma, 401 U.S. 82, 121 (1971) (opinion of BRENNAN, J., concurring in part and dissenting in part).[8]

what about H/Corpus?

Second, as Robinson's attorney conceded at oral argument, some restitution orders would not be protected

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[8]Robinson argues that the burden on the state would not always be imposing. In many cases, principles of issue preclusion might obviate the need for relitigation of factual questions in the bankruptcy court. But this explanation is unsatisfactory for several reasons. First of all, differences between the elements of crimes and the provisions of §523 often may complicate the application of issue preclusion. Moreover, the complexity of proceedings in the bankruptcy courts, and the attendant diversion of prosecutorial effort, is not our only concern. We must also consider the unseemliness of requiring state prosecutors to submit the judgments of their criminal courts to federal bankruptcy judges.

from discharge even if the State did object to discharge. For example, a criminal judge in a negligent homicide case might sentence the defendant to probation, conditioned on the defendant's paying the victim's ~~husband~~ spouse compensation for the loss the husband sustained when the defendant killed his wife. It is not clear that such a restitution order would fit the terms of any of the exceptions to discharge listed in §523 other than §523(a)(7). Thus, this interpretation of the Code would do more than force state prosecutors to defend state criminal judgments in federal bankruptcy court. Inevitably it would lead to federal remission of judgments imposed by state criminal judges.

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 rehabilitation of the defendant. Restitution is a particularly effective ~~tool~~ means for rehabilitation because it forces the defendant to confront, in concrete terms, the harm his actions have caused. ~~It is easy to see why~~ Trial judges ~~might~~ often prefer such an order to a fine, paid to an abstract and impersonal entity like the State, and often calculated without regard to the harm the defendant has caused.[9]

I try to avoid "tool". See dictionary.

Robinson attempts to minimize this problem by arguing that state prosecutors and criminal judges need only consult the provisions of the federal Bankruptcy Code

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[9]See Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 937-41 (1984).

before selecting the appropriate sentence. This contention misses the point entirely. We are not troubled by requirements that state officials understand and apply federal law. But we will not lightly limit the rehabilitative options available to state criminal judges. In cases raising close questions of dischargeability under the Bankruptcy Code, those judges would be put to a harsh choice: impose the sentence that best suits the interests of the state criminal process, and hope that the federal courts will not disturb that judgment; or forgo imposition of a restitution order to ensure continued enforcement of some criminal judgment.

In short, we believe that the Second Circuit's interpretation of the Code would entail grave interference in the core of the state criminal process.

C.

In light of the pre-Code judicial exception, and the interests of the States, we should hesitate before concluding that a discharge in bankruptcy can operate to remit a state criminal sentence. ~~As careful a jurist as~~ Justice Frankfurter ~~favored~~ emphasized the need for a similar caution in the interpretation of regulatory statutes that infringed upon important state interests:

> The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. ... The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation ... justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our

Ronald, I'd move directly from the first sentence above to the top of p 29. Put the Frankfurter quote in a note keyed to last sentence in this sub-section C — the sentence in which I mention federalism

national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit. Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 539-40 (1947).

Similarly, the Court has explained that

> frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

See Tennessee Valley Authority v. Hill, 437 U.S. 153, 204-05 & n.14 (1978) (POWELL, J., dissenting).

no ¶ | ← Just last term we declined to hold ~~We have been particularly unwilling to infer~~ that

the new Bankruptcy Code silently abrogated exceptions created

by courts construing the old ~~Bankruptcy~~ Act. ~~For~~

~~instance, just last term,~~ In Midlantic National Bank v.

New Jersey Department of Environmental Protection, 474

U.S. ___ (1986), a trustee in bankruptcy asked us to hold

that the 1978 Code ~~Congress' enactment of the Bankruptcy Code in 1978~~

had implicitly repealed ~~an~~ the exception to the trustee's

abandonment power. Courts had created that exception out

of deference to state health and safety regulations.

There considerations are comparable to
certainly ~~no more powerful than~~ the States' interest in

administering their criminal justice systems. ~~In response~~

~~to that challenge~~, We stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." 474 U.S., at ___ (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)) (citations omitted).

This tradition of flexibly interpreting the text also of Congress's bankruptcy statutes rests on the equitable nature of bankruptcy jurisdiction. In one of our cases interpreting the Act, Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." Bank of Marin v. England, 385 U.S. 99, 103 (1966). This Court has recognized that the States'

interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering ~~the issuance of~~ equitable type relief. See Younger v. Harris, 401 U.S. 37, 44-45 (1971). This ~~tradition must~~ reflective of our federal-ism also should influence our interpretation of the Bankruptcy Code in this case.

III.

In light of the long pre-Code tradition precluding bankruptcy courts from affecting criminal judgments, we have ~~grave~~ serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of

§101(4).[10] But we need not address that question in this case, because we hold that §523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

The relevant portion of §523(a)(7) preserves 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.

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[10]We recognize, as the Court of Appeals emphasized, that the Code's definition of "debt" is broadly drafted, and that the legislative history supports a broad reading of the definition. But nothing in the legislative history ~~surrounding this provision~~ suggests that Congress intended to change the state of the law with respect to criminal judgments.

is subject to reasonable interpretation.

This language does not compel the conclusion that a

On its face, § 523(a)(7) certainly does not compel the conclusion reached by the CA that a

discharge in bankruptcy voids restitution orders imposed as conditions of probation by state courts. Nowhere in the House and Senate Reports, nor in either of the leading treatises, is there any indication that this language should have such an intrusive effect.[11] If Congress had thought that §523(a)(7) did not provide full protection to state criminal sentences, "we can be certain that there

be read so intrusively."

intended by

, or any other provision,

to discharge

certain

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[11]For the section-by-section analysis in the legislative reports, see H.R. Rep. No. 595, 95th Cong., 1st Sess., 363 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 79 (1978). For explanations of the section by commentators, see 3 Collier on Bankruptcy ¶523.17 (15th ed. 1986); 1 Norton Bankruptcy Law and Practice §27.37 (1981). In fact, both of these commentators expressly state that the language should not have the intrusive effect sought by Robinson. See Collier, ¶523.17, at 523-123 n.4; Norton, §27.37, at 55 n.2.

We acknowledge that a few stray comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a member of Congress. Nor is there any indication to that effect in the official reports cited above. We decline to accord such extraordinary weight to such statements.

Excellent note!

cheers!

eloquent language that failed to persuade my brothers!

would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage," Tennessee Valley Authority v. Hill, 437 U.S. 153, 209 (1978) (POWELL, J., dissenting).

We read this language ~~quite~~ differently from ~~than~~ the CA ~~Second Circuit~~. On its face, it creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both "to and for the benefit of a governmental unit," and "not compensation for pecuniary loss." It ~~would be absurd to argue~~ unreasonable to argue that this section does not protect traditional criminal fines. No one has argued "X" (See next page) We must decide whether the result is altered by the two major differences between restitution and a traditional

fine: the penalty is forwarded to the victim, and the penalty ~~often is~~ may be calculated by reference to the amount of harm the offender has caused. §523(a)(7) codified the judicially created exception to discharge for fines.

In our view, neither of these clauses allows the discharge of a criminal judgment that takes the form of restitution. We think Congress added the qualifications to ensure that the exception was not improperly extended beyond the penal context that justified the exception. This interpretation rests on the legislative development of §523(a)(7), the broader framework of the Code, and the nature of restitution.

A.

The first draft of what eventually became the Bankruptcy Code was presented to Congress in 1973 by the Commission of the Bankruptcy Laws of the United States. House Doc. No. 137, 93d Cong., 1st Sess (Comm'n Rep.). Two sections of that draft changed the Act's treatment of fines and penalties. First, §4-506(a)(9) of that draft, the predecessor of Code §523(a)(7), codified the judicially created exception to dischargeability. Specifically, it excepted from discharge "any liability to the extent it is for a fine for the benefit of a federal, state, or local government."[12]

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[12]The language "for the benefit of a governmental unit" is apparently a reformulation of the language of §57j of the old Act, ~~which~~ that applied to debts "owing to the United States, a State, a county, a district, or a municipality." 30 Stat., at 561. The note to this section explained that the section was intended to "clarify and rationalize the dischargeability status of debts for nonpecuniary loss, i.e., debts for fines, penalties, or forfeitures or for multiple, punitive, or exemplary damages." Comm'n Rep.,

(Footnote continued)

The second relevant section was 4-406(a)(3), the predecessor of Code §726(a)(4), ~~which~~ that subordinated payment of "any claim, whether secured or unsecured, to the extent it is for a fine, penalty, or forfeiture or for multiple, punitive, or exemplary damages." As the Commission's note explained, this section was a reformulation of §57j of the old Act, ~~which~~ that had completely disallowed fines. The Commission changed §57j in two major respects. First, by providing for subordination instead of disallowance, it allowed payment "in the rare case in which all allowed and unsubordinated claims are paid in full." Second, it

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(Footnote 12 continued from previous page)
pt. 2, at 141. This note supports an inference that the "for the benefit of a governmental unit" restriction was designed to distinguish between penal sanctions and ordinary punitive damages, limiting the benefits of nondischargeability to penal sanctions.

removed "the limitation in §57j to debts owing to a governmental unit." See Comm'n Rep., pt. 2, at 116.

These two sections of the Commission's draft provided a coherent treatment for obligations in this area. The old Act, and its judicial glosses, rendered penalties owed to the government disallowable and nondischargeable. Under the new bill, penalties owed to the government would continue to be nondischargeable. But those penalties would no longer be completely disallowable. Instead they would be subordinated. As the Commission explained, debtors in bankruptcy who have sufficient funds to pay ordinary creditors gain an unjustified windfall if they are not forced to pay fines as well.

Ronald - This is not easy reading. Do we need it?

But the Commission retained the old Act's reasoning that, where the creditor's interest is more penal than compensatory, he has a reduced interest in payment. Because this reasoning applies equally well to punitive damages, the Commission recommended that punitive damages also be subord.nated (?). The close connection between these sections leads to the conclusion that the language in §4-406 subordinating "punitive and exemplary damages" should be construed as the converse of the phrase in §4-506 preventing discharge of debts "for the benefit of" a governmental unit. Thus, the limitation of nondischargeability relief to fines assessed "for the benefit of a federal, state, or local government" was inserted only to ensure that punitive damages would not receive the benefit of nondischargeability. This language, with slight

Does this help? I may not understand its relevance

modifications, remains in the current text of section 523(a)(7).

Similarly, the reference to "compensation for actual pecuniary loss" was not designed to effect the discharge of state criminal judgments. This language did not appear in the Commission's draft, but was added later. The House Report offers no explanation ~~whatsoever~~ for the insertion of this phrase. The Senate Report offers a brief, though unclear, explanation:

> Paragraph (7) makes nondischargeable certain liabilities for penalties .... These ... liabilities cover those which, but are penal in nature [sic], as distinct from so-called "pecuniary loss" penalties which, in the case of taxes, involve basically the collection of a tax under the label of a "penalty." S. Rep. No. 989, 95th Cong., 2d Sess., 79 (1978).

This statement indicates that the main concern of Congress in this area was to clarify the dischargeability of tax penalties. A common problem arising under the old Act had been attempts to disguise penalties on tax payments by labeling them as interest. If the payments were "interest" instead of "penalties," they would be allowable under section 57j and dischargeable. See 3 Collier on Bankruptcy ¶57.22[2.1] (14th ed. 1979). The new Code thus codified a benefit previously found only in case-law. Apparently, Congress wanted to discourage manipulation of this provision by attachment of the formal label "penalty" to payments "which, in the case of taxes,

involve basically the collection of a tax under the label of a 'penalty.'"[13]

B.

A broader examination of the Code's treatment of debts owed to governments demonstrates the logic of this interpretation. As we have explained above, government debts are generally allowable under the Code. When the government's interest is like that of a creditor, the Code gives the government a first priority of payment, see

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[13]The Code's provisions establishing priority of payment for tax penalties mirror this treatment. In §507, ~~which~~ that ranks various claims receiving priority in the distribution of assets, Congress granted a priority to certain tax penalties, §507(a)(6)(G). In defining the preferred penalties, Congress used exactly the language--"compensation for actual pecuniary loss"--§523(a)(7) uses to limit dischargeability.

§726(a)(1), but does not protect the debt from discharge. When the government's interest is penal, ~~the government's~~ its main interest is not in receiving compensation, but in punishing or rehabilitating the debtor. Thus, the Code subordinates payment of these debts in §726(a)(4), but ~~totally~~ exempts them from discharge under §523(a)(7). Nothing in this framework mandates, or even counsels, an exception that would treat restitution imposed as a condition of probation any differently from other types of criminal sentences.

C.

Finally, consideration of the nature of these restitution orders shows that the language of §523(a)(7)

can be understood to prevent discharge. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. ~~significantly. First,~~ The victim has no ~~little, if any~~ control over the amount of restitution ~~to be~~ awarded, or ~~even~~ over the decision to award restitution. ~~Second,~~ Moreover, the decision to impose restitution generally does not rest on the victim's needs for compensation, but on the penal goals of the State and the situation of the defendant.

This point is well illustrated by the Connecticut statute ~~at issue in this case~~ under which the restitution obligation was imposed. ~~Connecticut~~ The statute authorizes a judge

imposing a sentence of probation to impose any of eight specified conditions, as well as "any other conditions reasonably related to his rehabilitation." Conn. Gen. Stat. §53a-30(a)(9). Clause (4) of that section authorizes a judge to require that the defendant

> make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance.

Ronald - can't it be argued that the language: "for the loss or damage" has the victim in mind?

[This clause does not discuss the needs or desires of the victim.] ~~Nor does it~~ The clause does not require imposition of restitution in the amount of the harm caused. Instead, it provides for a flexible remedy ~~tailored to~~ the condition ~~of the defendant.~~ specified in the ~~St~~ State statutes, including rehabilitation.

Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for ... compensation" of the victim. ~~In our view,~~ The sentence ~~produced by~~ following a criminal ~~trial~~ conviction necessarily considers the penal and rehabilitative interests of the state.[14] Those interests are sufficient to place restitution orders within the meaning ~~text~~ of §523(a)(7).

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[14]This is not the only context in which courts have been forced to evaluate the treatment of restitution orders by determining whether they were "compensatory" or "penal." Several lower courts have addressed the constitutionality of the federal Victim Witness Protection Act, 18 U.S.C. §3579. Under that Act, defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case. See Note, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 Texas L. Rev. 671 (1984). Every federal circuit court that has considered

(Footnote continued)

IV.

Probably unnecessary

In light of the ~~overwhelming~~ interests the States have in administering their state criminal justice systems without interference from the bankruptcy courts, we are unwilling to assume that Congress intended to discharge conditions of probation through the oblique reference in §523(a)(7). An alternate result would "force Congress into otherwise unnecessary action by interpreting a statute to produce a result no one intended," Tennessee Valley Authority v. Hill, 437 U.S. 153, 211 (1978) (JUSTICE POWELL, dissenting). We hold that section

great! But I don't have the nerve to quote myself again.

(Footnote 14 continued from previous page)
the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment. See id., at 672 n.18 (citing cases).

Logistics, Inc. v. Tallentire, 477 U.S. ___, ___ (1986) (quoting Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 285 (1956) (quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849))). In this case, the Court of Appeals accorded little weight either to the history of bankruptcy court deference to criminal judgments or to the interests of the States in unfettered administration of their criminal justice systems.

A

The present text of Title 11, commonly referred to as the Bankruptcy Code, was enacted in 1978 to replace

the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.[5] The treatment of criminal judgments under the Act of 1898 informs our understanding of ~~its replacement~~ the language of the Code. The 1898 Act's treatment of debts calls to mind medieval disputations on the nature of the Trinity [You can pull this if you like, Bob. The Justice's comment was "Wow! Ask your co-clerks about this.] ~~A general outline of that treatment, however, is sufficient for our purposes.~~

The Justice would never say this.

First, §57 of the ~~1898~~ Act of ~~1898~~ established the ~~concept~~ category of an "allowable" debt[s]. See 3 Collier on Bankruptcy ¶57 (14th ed. 1977) (~~describing the requirements and procedures for~~

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[5]Congress amended the Bankruptcy Act several times between 1898 and 1978. Congress also made numerous technical changes to the Code in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 380. None of those changes is relevant to this decision.

~~allowance of a claim~~). Only if a debt was allowable could the creditor receive a share of the bankrupt's assets. See §65a. For this case, it is important to note that §57j excluded from the class of allowable debts penalties owed to government entities. That section provided:

> Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose. 30 Stat., at 561.

Second, §63 established the separate ~~concept~~ category of a "provable" debt(s). See 3A Collier on Bankruptcy ¶63 (14th ed. 1975). Section 17 provided that a discharge in bankruptcy "release[d] a bankrupt from all of his provable debts," subject to several exceptions listed in later

portions of §17. Although §17 specifically excepted four types of debts from discharge, it did not mention criminal penalties of any kind. The most natural construction of the Act therefore would have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate. Congress had considered criminal penalties when it passed the Act; it clearly made them nonallowable. The failure expressly to make them nondischargeable at the same time offered substantial support for the view that the Act discharged those penalties.

But the courts did not interpret the 1898 Act in this way. Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to

affect the judgment of a state criminal court. In the leading case, the district judge reasoned:

> It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace [criminal penalties]; but it is well settled that there may be cases in which such literal construction is not admissible. ... It may suffice to say that nothing but a ruling from a higher court would convince me that congress, by any provision of the bankrupt act, intended to permit the discharge, under its operations, of any judgment entered by a state or federal court imposing a fine in the enforcement of criminal laws. ... The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." In re Moore, 111 F. 145, 148-49 (WD Ky. 1901).[6]

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[6]Although courts differed as to the boundaries of the exception, particularly in cases involving nonmonetary sanctions, or sanctions imposed in civil proceedings, the reasoning of Moore was widely accepted. See, e.g., Parker v. United States, 153 F.2d 66, 71 (CA1 1946) (citing Moore and noting that "[i]t was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense"); Zwick v. Freeman, 373 F.2d 110, 116 (CA2 1967) (citing Moore and stating that "governmental sanctions are not regarded as debts even when they require monetary payments"). We have found only one federal court decision allowing a discharge in bankruptcy to affect a sentence imposed by a criminal court. In re Alderson, 98 F. 588 (W. Va. 1899).

This reasoning was sufficiently accepted by the time Congress enacted the new Code that a leading commentator could state flatly that "fines and penalties are not affected by a discharge." See 1A Collier on Bankruptcy ¶17.13, at 1609-10 & n.10 (14th ed. 1979). ~~Moreover,~~ those few courts faced with ~~restitution obligations imposed as part of criminal sentences~~ applied ~~this~~ reasoning to prevent a discharge in bankruptcy from affecting such a condition of a criminal sentence. For instance, four years before Congress enacted the Code, the New York Supreme Court stated:

> A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is

~~As early~~ Although this Court first approved restitution as a condition on a pardon in Bradford v. United States, 228 U.S. 446 (1913). ~~Although restitution was not often~~ obligations ~~more~~ seldom were imposed as part of criminal sentences until quite recently,

> civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter. State v. Mosesson, 78 Misc. 2d 217, 218, 356 N.Y.S.2d 483, 484 (1974) (citations omitted).[7]

Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity.

* - suggest insert (1) from former II.C (pp28-29)

B

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[7] For similar decisions, see State ex rel. Auerbach v. Topping Bros., 79 Misc. 2d 260, 359 N.Y.S.2d 985, 987-88 (Footnote continued)

Our interpretation of the Code also must consider the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." Younger v. Harris, 401 U.S. 37, 46 (1971). In the opinion of the Court of Appeals, it was acceptable that Connecticut officials could have ensured continued enforcement of their court's criminal judgment against

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(Footnote 7 continued from previous page)
(Crim. Ct. 1974); State v. Washburn, 97 Cal. App. 3d 621, 625-26, 158 Cal. Rptr. 822, 825 (1979).

Robinson by objecting to discharge under §523(c). This approach has several problems.

First, it would require state prosecutors to defend state criminal judgments before the federal bankruptcy courts.[8] As JUSTICE BRENNAN has noted, federal adjudication of matters already at issue in state criminal proceedings can be "an unwarranted and unseemly duplication of the State's own adjudicative process."

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[8]Robinson argues that the burden on the state would not always be imposing. In many cases, principles of issue preclusion might obviate the need for relitigation of factual questions in the bankruptcy court. But this explanation is unsatisfactory for several reasons. First of all, differences between the elements of crimes and the provisions of §523 often may complicate the application of issue preclusion. Moreover, the complexity of proceedings in the bankruptcy courts, and the attendant diversion of prosecutorial effort, is not our only concern. We must also consider the unseemliness of requiring state prosecutors to submit the judgments of their criminal courts to federal bankruptcy judges.

Perez v. Ledesma, 401 U.S. 82, 121 (1971) (opinion of BRENNAN, J., concurring in part and dissenting in part).[9]

Second, as Robinson's attorney conceded at oral argument, some restitution orders would not be protected from discharge even if the State did ~~object~~ appear and enter an objection to discharge. For example, a criminal judge in a negligent homicide case might sentence the defendant to probation, conditioned on the defendant's paying the victim's husband compensation for the loss the husband sustained when the defendant killed his wife. It is not clear that such a restitution

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[9]Of course, federal courts often duplicate state adjudicative processes when they consider petitions for the writ of habeas corpus. But explicit reference in the Constitution, Art. I, §9, cl. 2, as well as ~~numerous~~ several federal statutes, testify to the importance of the writ of habeas corpus ~~in ensuring that States comply with the federal constitution. In this case~~, the case for relitigation in the federal courts rests only on the ambiguous words of the Bankruptcy Code.

Here

order would fit the terms of any of the exceptions to discharge listed in §523 other than §523(a)(7). Thus, this interpretation of the Code would do more than force state prosecutors to defend state criminal judgments in federal bankruptcy court. Inevitably it would lead to federal remission of judgments imposed by state criminal judges.

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 rehabilitation of the defendant. Restitution is a particularly effective means for rehabilitation because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Trial judges often prefer such an order to a

fine, paid to an abstract and impersonal entity ~~like~~ the ~~State~~, and often calculated without regard to the harm the defendant has caused.[10] Robinson attempts to minimize ~~this problem~~ by arguing that state prosecutors and criminal judges need only consult the provisions of the ~~federal~~ Bankruptcy Code before selecting the appropriate sentence. This contention misses the point entirely. We are not troubled by requirements that state officials understand and apply federal law. But we will not lightly limit the rehabilitative options available to state criminal judges. In cases raising close questions of dischargeability under

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[10] See Note, ~~Victim Restitution in the Criminal Process: A Procedural Analysis~~, 97 Harv. L. Rev. 931, 937-41 (1984).

the Bankruptcy Code, those judges would be put to a harsh choice: impose the sentence that best suits the interests of the state criminal process, and hope that the federal courts will not disturb that judgment; or forgo imposition of a restitution order to ensure continued enforcement of some criminal judgment.

In short, the Court of Appeals' interpretation of the Code would entail substantial interference in the state criminal process.

c.

~~In light of the pre-Code judicial exception, and the interests of the States, we should hesitate before concluding that a discharge in bankruptcy can operate to~~

~~remit a state criminal sentence. Just~~ last term we declined to hold that the new Bankruptcy Code silently abrogated exceptions created by courts construing the old Act. In Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. ___ (1986), a trustee in bankruptcy asked us to hold that the 1978 Code had implicitly repealed an exception to the trustee's abandonment power. Courts had created that exception out of deference to state health and safety regulations, a consideration comparable to the States' interests implicated by this case. We stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially

created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." 474 U.S., at ___ (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)) (citations omitted).

Our approach to interpreting the Bankruptcy Code is informed by the equitable nature of bankruptcy jurisdiction. In one of our cases interpreting the Act, Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." Bank of Marin v. England, 385 U.S. 99, 103 (1966). This Court has recognized that the States' interest in administering their criminal justice systems

free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. See Younger v. Harris, 401 U.S. 37, 44-45 (1971). This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.[11]

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[11]Justice Frankfurter ~~favored~~ advocated a similar ~~caution in~~ approach to the interpretation of regulatory statutes that infringed upon important state interests:

> The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. ... The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation ... justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit. Frankfurter, Some Reflections on the Reading of

(Footnote continued)

III.

In light of the long pre-Code tradition precluding bankruptcy courts from ~~affecting~~ altering criminal judgments, we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of §101(4).[12] But we need not address that question in this case, because we hold that §523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

(Footnote 11 continued from previous page)
Statutes, 47 Col. L. Rev. 527, 539-40 (1947).

[12]We recognize, as the Court of Appeals emphasized, that the Code's definition of "debt" is broadly drafted, and that the legislative history supports a broad reading of the definition. But nothing in the legislative history suggests that Congress intended to change the state of the law with respect to criminal judgments.

The relevant portion of §523(a)(7) preserves 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.

This language is subject to interpretation. On its face, §523(a)(7) certainly does not compel the conclusion reached by the Court of Appeals, that a discharge in bankruptcy voids restitution orders imposed as conditions of probation by state courts. Nowhere in the House and Senate Reports, nor in either of the leading treatises, is there any indication that this language should be read so

intrusively.[13] If Congress had intended, by §523(a)(7) or by any other provision, to discharge state criminal sentences, "we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage," Tennessee Valley Authority v. Hill, 437 U.S. 153, 209 (1978) (POWELL, J., dissenting).

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[13]For the section-by-section analysis in the legislative reports, see H.R. Rep. No. 595, 95th Cong., 1st Sess., 363 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 79 (1978). For explanations of the section by commentators, see 3 Collier on Bankruptcy ¶523.17 (15th ed. 1986); 1 Norton Bankruptcy Law and Practice §27.37 (1981). In fact, both of these commentators expressly state that the language should not have the intrusive effect sought by Robinson. See Collier, ¶523.17, at 523-123 n.4; Norton, §27.37, at 55 n.2.

excellent!

We acknowledge that a few stray comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a member of Congress, nor were they included in the official reports cited above. We decline to accord any significance to these statements. See McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931); 2A N.

(Footnote continued)

We read this language differently than the Second Circuit. On its face, it creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both "to and for the benefit of a governmental unit," and "not compensation for pecuniary loss." No one has argued that this section does not protect traditional criminal fines. It is clear that §523(a)(7) codified the judicially-created exception to discharge for fines. We must decide whether the result is altered by the two major differences between restitution and a traditional fine: the penalty is

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(Footnote 13 continued from previous page)
Singer, Sutherland's Statutes and Statutory Construction §48.10, at 319 & n.11 (Rev. 4th ed. 1984).

forwarded to the victim, and ~~the~~ ~~penalty~~ may be calculated by reference to the amount of harm the offender has caused. ~~§523(a)(7) codified the judicially created exception to discharge for fines.~~

In our view, neither of ~~these~~ clauses allows the discharge of a criminal judgment that takes the form of restitution. We think Congress added the qualifications to ensure that the exception was not improperly extended beyond the penal context that justified the exception.[1]

This interpretation rests on the legislative development of §523(a)(7), the broader framework of the Code, and the nature of restitution.

The first draft of what eventually became the Bankruptcy Code was presented to Congress in 1973 by the Commission of the Bankruptcy Laws of the United States. House Doc. No. 137, 93d Cong., 1st Sess (Comm'n Rep.). Two sections of that draft changed the Act's treatment of fines and penalties. First, §4-506(a)(9) of that draft, the predecessor of Code §523(a)(7), codified the judicially created exception to dischargeability. Specifically, it excepted from discharge "any liability to the extent it is for a fine for the benefit of a federal, state, or local government."[14]

The second relevant section was §4-406(a)(3), the predecessor of Code §726(a)(4), that subordinated payment

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[14]The language "for the benefit of a governmental unit" is apparently a reformulation of the language of §57j of the old Act, that applied to debts "owing to the United

(Footnote continued)

of "any claim, whether secured or unsecured, to the extent it is for a fine, penalty, or forfeiture or for multiple, punitive, or exemplary damages." As the Commission's note explained, this section was a reformulation of §57j of the old Act, that had completely disallowed fines. The Commission changed §57j in two major respects. First, by providing for subordination instead of disallowance, it allowed payment "in the rare case in which all allowed and unsubordinated claims are paid in full." Second, it removed "the limitation in §57j to debts owing to a governmental unit." See Comm'n Rep., pt. 2, at 116.

(Footnote 14 continued from previous page)
States, a State, a county, a district, or a municipality." 30 Stat., at 561.

These two sections of the Commission's draft provided a coherent treatment for obligations in this area. The old Act, and its judicial gloss, rendered penalties owed to the government disallowable and nondischargeable. Under the new bill, penalties owed to the government would continue to be nondischargeable. But those penalties would no longer be completely disallowable. Instead they would be subordinated to other secured and unsecured claims. As the Commission explained, debtors in bankruptcy who have sufficient funds to pay ordinary creditors gain an unjustified windfall if they are not forced to pay fines as well.

But the Commission retained the Act's reasoning that, where the creditor's interest is more penal than compensatory, he has a reduced interest in payment.

Because this reasoning applies equally well to punitive damages, the Commission recommended that punitive damages also be subordinated. The close connection between these sections leads to the conclusion that the language in §4-406 subordinating "punitive and exemplary damages" should be construed as the converse of the phrase in §4-506 preventing discharge of debts "for the benefit of" a governmental unit. Thus, the limitation of nondischargeability relief to fines assessed "for the benefit of a federal, state, or local government" was inserted only to ensure that punitive damages would ~~not~~ remain dischargeable (?) ~~receive the benefit of nondischargeability~~. This language, with slight modifications, remains in the current text of §523(a)(7).

make into a Fn: ?

Similarly, the reference to "compensation for actual pecuniary loss" was not designed to effect the discharge of state criminal judgments. This language did not appear in the Commission's draft, but was added later. The House Report offers no explanation for the insertion of this phrase. The Senate Report offers a brief, though unclear, explanation:

> Paragraph (7) makes nondischargeable certain liabilities for penalties .... These ... liabilities cover those which, but are penal in nature [sic], as distinct from so-called "pecuniary loss" penalties which, in the case of taxes, involve basically the collection of a tax under the label of a "penalty." S. Rep. No. 989, 95th Cong., 2d Sess., 79 (1978).

This statement indicates that the main concern of Congress in this area was to ~~clarify the dischargeability of tax~~ prevent the bad labeling of tax penalties as ~~penalties~~ interest, A common problem arising under the old Act ~~had~~ e

been attempts to disguise penalties on tax payments by labeling them as interest. If the payments were "interest" instead of "penalties," they would be allowable under section 57j. See 3 Collier on Bankruptcy ¶57.22[2.1] (14th ed. 1979). The new Code codified a benefit previously found only in case-law. Apparently, Congress wanted to discourage manipulation of this provision by attachment of the formal label "penalty" to payments "which, in the case of taxes, involve basically the collection of a tax under the label of a 'penalty.'"[15]

B.

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[15]The Code's provisions establishing priority of payment for tax penalties mirror this treatment. In §507, that ranks various claims receiving priority in the distribution of assets, Congress granted a priority to certain tax penalties, §507(a)(6)(G). In defining the preferred penalties, Congress used exactly the language--

(Footnote continued)

considers the penal and rehabilitative interests of the state.[16] Those interests are sufficient to place restitution orders within the meaning of §523(a)(7).

In light of the strong interests of the States, the uniform construction of the old Act over three-~~fourths~~ quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress.

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[16]This is not the only context in which courts have been forced to evaluate the treatment of restitution orders by determining whether they were "compensatory" or "penal." Several lower courts have addressed the constitutionality of the federal Victim Witness Protection Act, 18 U.S.C. §3579. Under that Act, defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case. See Note, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 Texas L. Rev. 671 (1984). Every federal circuit court that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment. See id., at 672 n.18 (citing cases).

Accordingly, the decision of the Court of Appeals for the Second Circuit is

REVERSED.

III. B.

A broader examination of the Code's treatment of debts owed to governments demonstrates the logic of this interpretation. As we have explained above, government debts are generally allowable under the Code. When the government's interest is like that of a creditor, the Code gives the government a first priority of payment, see §726(a)(1), but does not protect the debt from discharge. When the government's interest is penal, its main interest is not in receiving compensation, but in punishing or rehabilitating the debtor. Thus, the Code subordinates payment of these debts in §726(a)(4), but exempts them from discharge under §523(a)(7). Nothing in this

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(Footnote 15 continued from previous page)
"compensation for actual pecuniary loss"--§523(a)(7) uses in to limit dischargeability.

framework mandates, or even counsels, an exception that would treat restitution imposed as a condition of probation any differently from other types of criminal sentences.

Finally, consideration of the nature of these restitution orders shows that the language of §523(a)(7) can be understood to prevent discharge. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of"

the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not ~~rest~~ turn on the victim's ~~needs for compensation~~ situation, but on the penal goals of the State and the situation of the defendant.

This point is well illustrated by the Connecticut statute under which the restitution obligation was imposed. The statute authorizes a sentencing judge to impose ~~ing~~ a ~~sentence of probation to impose~~ any of eight specified conditions of probation, as well as "any other conditions reasonably related to his rehabilitation." Conn. Gen. Stat. §53a-30(a)(9). Clause (4) of that section authorizes a judge to require that the defendant

> make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance.

This clause does not require imposition of restitution in the amount of the harm caused. Instead, it provides for a flexible remedy tailored to the ~~conditions specified in~~ defendant's situation. criminal's ability to pay
~~the statute, including rehabilitation.~~

Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for ... compensation" of the victim. The sentence following a criminal conviction necessarily

523(a)(7) automatically exempts from discharge any provision of a state criminal sentence.

Accordingly, the decision of the Court of Appeals for the Second Circuit is

REVERSED.

lfp/ss 10/18/86 KELLYR SALLY-POW

MEMORANDUM

TO: Ronald DATE: Oct. 18, 1986

FROM: Lewis F. Powell, Jr.

85-1033 Kelly v. Robinson

On the basis of a first reading, I think your draft of October 17 is quite good. Although I was shocked by the 47 pages, in view of your margins - that I like - even its present length may be less than 20 printed pages. I therefore have not attempted to identify possible major omissions or to reframe much of your language. I have done a considerable amount of editing. The purpose of this memorandum is to make additional comments and suggestions.

1. Your Part I (p. 1-14) looks fine.

2. Part II (p. 14-31, divided into subparts A, B and C).

Subpart IIA (p. 14-21) also looks fine.

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Subpart IIIC (p. 43-46) is excellent.

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Act, and the absence of any evidence in the legislative history to an intention to change this settled law.

* * *

I add these further thoughts about Subpart IIB (p. 22-26) that gives me some trouble. It may be necessary, as you think, to address the view of CA2 that Connecticut is not unduly burdened by its decision because state officials simply could have objected to discharge under §523(c). Is it clear that this would be true? You identify "several problems", none of which is entirely persuasive. I do not think a state prosecutor would have to prove the elements of the crime (p. 23). You do have a good point, in light of counsel's concession, in the paragraph that beings at the bottom of p. 23. Also the paragraph at the bottom of p. 24 - on my second reading - may be pertinent. I hope, however, we do not have to concede that CA2 was right in saying that all Connecticut had to do was to write a letter or appear in the bankruptcy court and object to discharge. I do not know how burdensome this would be. I suppose we do not know whether state authorities even follow the filing of bankruptcy petitions. Presumably the debtor - as I believe happened in this case - would list the restitution

order as a debt and ask that it be discharged. Would not this require notification of the proper state authority - in this case the probation office? In sum, these five pages seem to be the least persuasive.

* * *

In general, I think your draft is quite commendable. I do not see how you accomplished this in less than a week, as the draft reflects a wide understanding of both the old and new acts as well as of the relevant court decisions. Also, I think your style of writing conforms fairly closely to mine.

If you have specific questions we can talk. Otherwise, I suggest that you do a second draft, and then submit it to your "editor" - your co-clerk who will review the draft just as an officer of a law review reviews an article or a note submitted for publication. This includes substantive review as well as cite checking.

L.F.P., Jr.

ss

To: Justice Powell
From: Ronald
Re: No. 85-1033, Kelly v. Robinson

1. I have spoken with Justice Blackmun's clerk. Because Justice Blackmun prepared this case himself, his clerk has not spoken with him about it and has no view as to Justice Blackmun's current thoughts.

2. Further thought has led me to recommend a slight change in the opinion. I think this change may alleviate Justice O'Connor's concerns. As presently drafted, footnote 12, on page 13, reserves the question of whether a fine is a debt. In its present form, it is rather encouraging to the "nondebt" view. Perhaps she would be satisfied if we made the footnote more encouraging to the debt view. This could be done by two changes: (a) after the words "legislative history" in the second line of the note, insert the clause [, as well as the Code's various priority and dischargeability provisions,]; (b) change the word "suggests" in the 4th line of the note to "compels the conclusion." I think a more even-handed treatment improves the opinion in three ways. First, reference to the other sections of the Code may remind lower courts of the difficulties of holding that a "fine" is not a "debt." Second, it will defuse commentators who are certain to say that we were not aware of these provisions. Third, it is a more accurate statement of the considerations before us.

My conversations with Justice O'Connor's clerk indicate that she may not be satisfied by anything less than a firm holding that these are debts. As you know, I do not believe there is any significant practical effect. It may be helpful to explain the basis for this conclusion in some detail:

Chapter 7: If a fine is a debt under Chapter 7, payment is subordinated under §726(a)(4). Thus, the fine would receive nothing until all secured and unsecured creditors had been paid. It would then receive the balance of funds in the estate. If it were not a debt, these funds would be returned to the debtor under §726(a)(6), after deductions for postpetition interest under §726(a)(5) (in consumer bankruptcies, which go quite swiftly, postpetition interest is usually minimal). Because the Court holds here that all criminal penalties are nondischargeable, the State could sue the debtor immediately, perhaps even before the Bankruptcy

Court disburses the funds. Thus, there would be little practical difference.

Chapter 11: Under §1141(d)(2), the dischargeability provisions of §523 are incorporated in Chapter 11. Thus, criminal fines would not be discharged in Chapter 11. It is difficult to evaluate the bargaining power States would have in Chapter 11, which has no firm priority provisions. Although I do not have the Code sections in mind, their bargaining power should resemble their (low) priority status under Chapter 7. Thus, for the reasons articulated above, there is not likely to be any practical difference.

Chapter 13: One of the biggest concerns of the clerks about "debt" status has been a perception that Chapter 13 (wage-earner plan) discharges all debts except child support payments. §1328(a)(2). This is not correct. Chapter 13 also preserves from discharge any debt "on which the last payment is due after the date on which the final payment under the plan is due." §1322(b)(5) (preserved from discharge by §1328(a)(1). Chapter 13 plans usually last 3 years; most criminal restitution orders last longer than three years, and thus would be preserved from discharge. In fact, a plan under Chapter 13 must provide for full payment on such a debt for the duration of the plan. §1322(b)(5). There are further complexities in this area, but this is the general framework.

tion payments was a debt within the meaning of the Bankruptcy Code.

B. *The Dischargeability of the Restitution Debt*

The final question is whether Robinson's restitution debt to COAP was dischargeable. Section 523 of the Code, 11 U.S.C. § 523, excludes from discharge several categories of debts that would otherwise be discharged under § 727(b), and three of these categories have arguable relevance to the present case. Section 523(a) provides, in pertinent part, as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
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> (iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and

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

. . . .

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

. . . .

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

11 U.S.C. § 523.

While at first glance all three subsections seem to have at least potential applicability to Robinson's debt, only subsection (a)(7) need concern us on this appeal. Although Robinson's obtaining Public Assistance benefits to which she was not entitled may well have occurred as a result of false representations within the meaning of subsection (a)(2), and although she was convicted of larceny, which is covered by subsection (a)(4), the Code does not exclude debts within these subsections from discharge if the creditor does not object to discharge. Thus, § 523(c) of the Code provides that

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

CA 2's ok

11 U.S.C. § 523(c). *See* Bankruptcy Rule 409(a) (*reprinted in* 11 U.S.C. app. 217 (1982)); Senate Report at 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5865-66; House Report at 365, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5963, 6321; 3 *Collier on Bankruptcy* ¶ 523.21 (L. King 15th ed. 1983).

In the present case, the bankruptcy court gave COAP and CDIM notice in February 1981 that their claims were listed in Robinson's petition; that April 27, 1981, was the last day for filing objections to discharge or complaints to determine dischargeability under § 523(c); and that the failure by that date to file a complaint as to the dischargeability of a debt under §§ 523(a)(2) or (4) might result in discharge of the debt. COAP and CDIM did not file such objections or complaints. We suspect that had objection been made on the ground that the debt was for an established larceny, the court would have excepted it from discharge, and the case would not be before us now. COAP and CDIM waived their rights under subsections (a)(2) and (a)(4), however, and we turn, therefore, to their contention that the debt was nondischargeable under subsection (a)(7).

If objection had been made to Bankruptcy Court on ground that the "debt" was for a proven larceny, it would not have been discharged

Subsection (a)(7) makes a debt nondischargeable "to the extent" that (1) it is for a "fine, penalty, or forfeiture," (2) it is "payable to and for the benefit of a governmental unit," and (3) it is "not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). There is no question that Robinson's restitution debt is in a sense a penalty for her crime. *See, e.g., United States v. Brown*, 744 F.2d at 909; *United States v. Carson*, 669 F.2d at 217-18; *In re Vik*, 45 B.R. at 67-68; *In re Johnson*, 32 B.R. at 616; *In re Magnifico*, 21 B.R. at 803; *see also* 18 U.S.C. § 3579(a)(1), which empowers a federal court

sentencing a defendant for an offense under title 18 to order the defendant to make restitution "in addition to or in lieu of any *other* penalty" (emphasis added). Nor is there any question that Robinson's debt is payable to and for the benefit of a governmental unit. We do not believe it can be said, however, that the debt is "not," "to [some] extent," "compensation for actual pecuniary loss."

Under the Connecticut probation scheme, the state court is given discretion to order an offender to "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, *for the loss or damage caused thereby*". Conn. Gen. Stat. Ann. § 53a-30(a)(4) (West Supp. 1985) (emphasis added). Thus, the amount of restitution to be assessed against a defendant, though it may be adjusted to account for his ability to pay, is measured by the fruits of the debtor's offense or by the victim's resulting loss or damage. These criminal restitution payments, though initially paid to COAP, are ultimately remitted to the victim of the defendant's crime. *See In re Mead*, 41 B.R. at 840; *In re Pellegrino*, 42 B.R. at 132. In the present case, the amount of money wrongfully received by Robinson from CDIM was $9,932.95. The amount of restitution that Robinson was ordered to pay was precisely $9,932.95. Thus, defendants admit on this appeal, as they must, that "the restitution [to be paid by Robinson] also had compensatory consequences . . . ." The conclusion is inescapable that Robinson's obligation to make restitution payments to COAP in the exact amount lost by CDIM, which COAP would then remit to CDIM, was designed to be, among other things, compensation for CDIM's actual pecuniary loss.

lfp/ss 10/18/86 KELLYR SALLY-POW

MEMORANDUM

TO: Ronald DATE: Oct. 18, 1986

FROM: Lewis F. Powell, Jr.

85-1033 Kelly v. Robinson

On the basis of a first reading, I think your draft of October 17 is quite good. Although I was shocked by the 47 pages, in view of your margins - that I like - even its present length may be less than 20 printed pages. I therefore have not attempted to identify possible major omissions or to reframe much of your language. I have done a considerable amount of editing. The purpose of this memorandum is to make additional comments and suggestions.

1. Your Part I (p. 1-14) looks fine.

2. Part II (p. 14-31, divided into subparts A, B and C).

Subpart IIA (p. 14-21) also looks fine.

Subpart IIB (p. 22-26) is not persuasive in its present form. Possibly I do not appreciate its significance. In light of the strength of other arguments, could not the main thought of this subpart be substantially reduced? Indeeed, is the subject of this

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I add these further thoughts about Subpart IIB (p. 22-26) that gives me some trouble. It may be necessary, as you think, to address the view of CA2 that Connecticut is not unduly burdened by its decision because state officials simply could have objected to discharge under §523(c). Is it clear that this would be true? You identify "several problems", none of which is entirely persuasive. I do not think a state prosecutor would have to prove the elements of the crime (p. 23). You do have a good point, in light of counsel's concession, in the paragraph that beings at the bottom of p. 23. Also the paragraph at the bottom of p. 24 - on my second reading - may be pertinent. I hope, however, we do not have to concede that CA2 was right in saying that all Connecticut had to do was to write a letter or appear in the bankruptcy court and object to discharge. I do not know how burdensome this would be. I suppose we do not know whether state authorities even follow the filing of bankruptcy petitions. Presumably the debtor - as I believe happened in this case - would list the restitution

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L.F.P., Jr.

ss

File

(Extra unedited cc)

lfp/ss 10/22/86 Rider A, p. 10 (Kelly)

KELLYA SALLY-POW

The Court of Appeals nevertheless found support for its holding in the fact that Connecticut officials probably could have ensured continued enforcement of their court's criminal judgment against Robinson had they objected to discharge under §523(c). While this may be true in many cases, it hardly justifies an interpretation of the 1978 Act that is contrary to the long prevailing view that "fines and penalties are not affected by a discharge". Collier on Bankruptcy, id.

Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. In some cases it would

require state prosecutors to defend particular state criminal judgments before the federal bankruptcy courts.[8]

8. In some cases principle of issue preclusion could obviate the need for reexamination of factual questions, or interpretations of state law, in the bankruptcy court. Differences between the elements of crime and the provisions of §523 could, however, hinder the application of issue preclusion. Moreover, apart from the burden on state officials of following and participating in bankruptcy proceedings, there is the unseemliness of requiring state prosecutors to submit the judgments of their criminal courts to federal bankruptcy judges."

10/21

Ronald Mann
re 3091, 3098
1 Copy

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated:_____

Recirculated:_____

1st ~~CHAMBERS~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–1033

JOHN J. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL., PETITIONERS *v.* CAROLYN ROBINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[October ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

We granted review in this case to decide whether restitution obligations, imposed as conditions of probation in state criminal proceedings, are dischargeable in proceedings under Chapter 7 of the Bankruptcy Code.

I

In 1980, Carolyn Robinson pled guilty to larceny in the second degree. The charge was based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. On November 14, 1980, the Connecticut Superior Court sentenced Robinson to a prison term of not less than one year nor more than three years. The court suspended execution of the sentence and placed Robinson on probation for five years. As a condition of probation, the judge ordered Robinson to make restitution[1] to the State of Connecticut Office of Adult Probation (Probation

[1] Connecticut Gen. Stat. § 53a–30 sets out the conditions a trial court may impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant

"make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance."

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Office) at the rate of $100 per month, commencing January 16, 1981, and continuing until the end of her probation.[2]

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U. S. C. § 701 *et seq.*, in the United States Bankruptcy Court for the District of Connecticut. That petition listed the restitution obligation as a debt. On February 20, 1981, the Bankruptcy Court notified both the Connecticut agencies of Robinson's petition and informed them that April 27, 1981, was the deadline for filing objections to discharge. The agencies did not file proofs of claim or objections to discharge, apparently because they took the position that the bankruptcy would not affect the conditions of Robinson's probation. Thus, the agencies did not participate in the distribution of Robinson's estate. On May 14, 1981, the bankruptcy court granted Robinson a discharge. See § 727.

At the time Robinson received her discharge in bankruptcy, she had paid $450 in restitution. On May 20, 1981, her attorney wrote the Probation Office that he believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution. Robinson made no further payments.

The Connecticut Probation Office did not respond to this letter until February 1984, when it informed Robinson that it considered the obligation to pay restitution nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court, seeking a declaration that the restitution obligation had been discharged, as well as an injunction to prevent the State's officials from forcing Robinson to pay.

After a trial, the Bankruptcy Court entered a Memorandum and Proposed Order, concluding that the 1981 discharge

---

[2] There is some uncertainty about the total amount Robinson was ordered to pay. Although the judge imposed restitution in a total amount of $9,932.95, five years of payments at one hundred dollars a month total only $6000.

in bankruptcy had not altered the conditions of Robinson's probation. The court adopted the analysis it had applied in a similar case decided one month earlier, *In re Pellegrino (Pellegrino* v. *Division of Criminal Justice)*, 42 B. R. 129 (Bkrtcy. Ct. Conn. 1984).

In *Pellegrino*, the court began with the Bankruptcy Code's definitional sections. First, § 101(11) defines a "debt" as a "liability on a claim." In turn, § 101(4) defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Finally, § 101(9) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

The Bankruptcy Court then examined the statute under which the Connecticut judge had sentenced the debtor to pay restitution. Restitution appears as one of the conditions of probation enumerated in Conn. Gen. Stat. § 53a–30. Under that section, restitution payments are sent to the Probation Office. The payments then are forwarded to the victim. Although the Connecticut penal code does not provide for enforcement of the probation conditions by the victim, it does authorize the trial court to issue a warrant for the arrest of a criminal defendant who has violated a condition of probation. § 53a–32.

Because the Connecticut statute does not allow the victim to enforce a right to receive payment, the court concluded that neither the victim nor the Probation Office had a "right to payment," and hence neither was owed a "debt" under the Bankruptcy Code. It argued:

> "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to

rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133.

The court acknowledged the tension between its conclusion and the Code's expansive definition of debt, but found an exception to the statutory definition in "the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments." *Id.*, at 134.

The court concluded that, even if the probation condition was a debt subject to bankruptcy jurisdiction, it was nondischargeable under § 523(a)(7) of the Code. That subsection provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

The court concluded that the purpose of the restitution condition was "to promote the rehabilitation of the offender, not to compensate the victim." 42 B. R., at 137. It specifically rejected the argument that the restitution must be deemed compensatory because the amount precisely matched the victim's loss. It noted that the state statute allows an offender "to make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby," Conn. Gen. Stat. § 53a–30(a)(4). In its view, the Connecticut statute focuses "upon the offender and not on the victim, and . . . restitution is part of the criminal penalty rather than compensation for a victim's actual loss." 42 B. R., at 137. Thus, the Bankruptcy Court held that the bankruptcy discharge had not affected the conditions of Pellegrino's probation. The United States District Court for the District of Connecticut adopted the Bankruptcy Court's proposed dispositions of *Pellegrino* and this case without alteration.

The Court of Appeals for the Second Circuit reversed. It first examined the Code's definition of debt. Although it recognized that most courts had reached the opposite conclu-

sion, the court decided that a restitution obligation imposed as a condition of probation is a debt. It relied on the legislative history of the Code that evinced Congress's intent to broaden the definition of "debt" from the much narrower definition of the Bankruptcy Act of 1898. The court also noted that anomalies might result from a conclusion that such an obligation is not a debt. Most importantly, nondebt status would deprive a state of the opportunity to participate in distribution of the bankrupt's estate.

Having concluded that restitution obligations are debts, the court turned to the question of dischargeability. The court stated that the appropriate Connecticut agency probably could have avoided discharge of the debt if it had objected under §§ 523(a)(2) or 523(a)(4) of the Code.[3] As no objections to discharge were filed, the court concluded that the State could rely only on § 523(a)(7), the subsection that provides for automatic nondischargeability for certain debts.[4] The court then looked to the text of the Connecticut statute to determine whether Robinson's probation condition was "compensation for actual pecuniary loss" within the meaning of § 523(a)(7). But where the Bankruptcy Court had consid-

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[3] Section 523(a)(2)(A) protects from discharge debts "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by false pretenses, a false representation, or actual fraud." Section 523(a)(4) protects from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Under § 523(c), debts that are protected from discharge only by § 523(a)(2) or § 523(a)(4) are discharged unless the creditor files an objection to discharge during the bankruptcy proceedings. Because Robinson was convicted of larceny, one of the debts listed in § 523(a)(4), it is quite likely that the Bankruptcy Court would have found the debt nondischargeable under that subsection.

[4] The requirement that creditors object to discharge is limited on its face to paragraphs (2), (4), and (6) of § 523(a). Because paragraph 7 is not listed there, debts described in that paragraph are automatically nondischargeable, under the general rule prescribed in the opening clause of § 523(a) (providing that a "discharge under section 727 . . . of this title does not discharge an individual debtor from any debt" listed in ~~the paragraphs~~ that follow).

ered the entire state probation system, the Court of Appeals focused only on the language that allows a restitution order to be assessed "for the loss or damage caused [by the crime]," Conn. Gen. Stat. § 53a–30(a)(4). The court thought this language compelled the conclusion that the probation condition was "compensation for actual pecuniary loss." It held, therefore, that this particular condition of Robinson's probation was not protected from discharge by § 523(a)(7). Accordingly, it reversed the District Court.

We granted the State's petition for a writ of certiorari. We have jurisdiction to review the judgment of the Court of Appeals under 28 U. S. C. § 1254(1). We reverse.

II

The Court of Appeals' decision focused primarily on the language of §§ 101 and 523 of the Code. Of course, the "starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). But the text is only the starting point. As JUSTICE O'CONNOR explained last Term, "'"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."'" *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. ——, —— (1986) (quoting *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270, 285 (1956) (quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849))). In this case, we must consider the language of §§ 101 and 523 in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems.

A

Courts traditionally have been reluctant to interpret federal bankruptcy statutes to remit state criminal judgments. The present text of Title 11, commonly referred to as the

Bankruptcy Code, was enacted in 1978 to replace the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.[5] The treatment of criminal judgments under the Act of 1898 informs our understanding of the language of the Code.

First, § 57 of the Act established the category of "allowable" debts. See 3 Collier on Bankruptcy ¶ 57 (14th ed. 1977). Only if a debt was allowable could the creditor receive a share of the bankrupt's assets. See § 65a. For this case, it is important to note that § 57j excluded from the class of allowable debts penalties owed to government entities. That section provided:

> Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose. 30 Stat., at 561.

Second, § 63 established the separate category of "provable" debts. See 3A Collier on Bankruptcy ¶ 63 (14th ed. 1975). Section 17 provided that a discharge in bankruptcy "release[d] a bankrupt from all of his provable debts," subject to several exceptions listed in later portions of § 17. Although § 17 specifically excepted four types of debts from discharge, it did not mention criminal penalties of any kind. The most natural construction of the Act, therefore, would have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate. Congress had considered criminal penalties when it passed the Act; it clearly made them nonallowable. The failure expressly to make them

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[5] Congress amended the Bankruptcy Act several times between 1898 and 1978. Congress also made numerous technical changes to the Code in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 380. None of those changes is relevant to this decision.

nondischargeable at the same time offered substantial support for the view that the Act discharged those penalties.

But the courts did not interpret the Act in this way. Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court. In the leading case, the court reasoned:

> It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace [criminal penalties]; but it is well settled that there may be cases in which such literal construction is not admissible. . . . It may suffice to say that nothing but a ruling from a higher court would convince me that congress, by any provision of the bankrupt act, intended to permit the discharge, under its operations, of any judgment entered by a state or federal court imposing a fine in the enforcement of criminal laws. . . . The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *In re Moore*, 111 F. 145, 148–149 (WD Ky. 1901).[6]

This reasoning was ~~sufficiently~~ accepted by the time Congress enacted the new Code that a leading commentator could state flatly that "fines and penalties are not affected by

[6] Although courts differed as to the boundaries of the exception, particularly in cases involving nonmonetary sanctions, or sanctions imposed in civil proceedings, the reasoning of *Moore* was widely accepted. See, *e. g.*, *Parker* v. *United States*, 153 F. 2d 66, 71 (CA1 1946) (citing *Moore* and noting that "[i]t was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense"); *Zwick* v. *Freeman*, 373 F. 2d 110, 116 (CA2 1967) (citing *Moore* and stating that "governmental sanctions are not regarded as debts even when they require monetary payments"). We have found only one federal court decision allowing a discharge ~~in bankruptcy~~ to affect a sentence imposed by a criminal court. *In re Alderson*, 98 F. 588 (W. Va. 1899).

a discharge." See 1A Collier on Bankruptcy ¶17.13, at 1609–1610, and n. 10 (14th ed. 1979).

Moreover, those few courts faced with restitution obligations imposed as part of criminal sentences applied the same reasoning to prevent a discharge in bankruptcy from affecting such a condition of a criminal sentence. For instance, four years before Congress enacted the Code, the New York Supreme Court stated:

> A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter. *State* v. *Mosesson*, 78 Misc. 2d 217, 218, 356 N. Y. S. 2d 483, 484 (1974) (citations omitted).[7]

No new 9

Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity.

Just last Term we declined to hold that the new Bankruptcy Code silently abrogated exceptions created by courts construing the old Act. In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U. S. —— (1986), a trustee in bankruptcy asked us to hold that the 1978 Code had implicitly repealed an exception to the trust-

another

[7] For other decisions adopting this reasoning, see *State ex rel. Auerbach* v. *Topping Bros.*, 79 Misc. 2d 260, 359 N. Y. S. 2d 985, 987–988 (Crim. Ct. 1974); *State* v. *Washburn*, 97 Cal. App. 3d 621, 625–626, 158 Cal. Rptr. 822, 825 (1979).

ee's abandonment power. Courts had created that exception out of deference to state health and safety regulations, a consideration comparable to the States' interests implicated by this case. We stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." 474 U. S., at —— (quoting *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904)) (citations omitted).

B

Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *Younger* v. *Harris*, 401 U. S. 37, 46 (1971). The Court of Appeals concluded that Connecticut officials could have ensured continued enforcement of their court's criminal judgment against Robinson by objecting to discharge under § 523(c). This approach is unsatisfactory for several reasons.

First, it would require state prosecutors to defend state criminal judgments before the federal bankruptcy courts.[8]

[8] Robinson argues that the burden on the state often would be slight. In many cases, principles of issue preclusion might obviate the need for relitigation of factual questions in the bankruptcy court. Differences be-

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As JUSTICE BRENNAN has noted, federal adjudication of matters already at issue in state criminal proceedings can be "an unwarranted and unseemly duplication of the State's own adjudicative process." *Perez* v. *Ledesma*, 401 U. S. 82, 121 (1971) (opinion of BRENNAN, J., concurring in part and dissenting in part).[9]

~~Second~~, as Robinson's attorney conceded at oral argument, some restitution orders would not be protected from discharge even if the state did appear and enter an objection to discharge. For example, a ~~criminal~~ judge in a negligent homicide case might sentence the defendant to probation, conditioned on the defendant's paying the victim's husband compensation for the loss the husband sustained when the defendant killed his wife. It is not clear that such a restitution order would fit the terms of any of the exceptions to discharge listed in § 523 other than § 523(a)(7). Thus, this interpretation of the Code would do more than force state prosecutors to defend state criminal judgments in federal bankruptcy court. ~~Inevitably it would~~ lead to federal remission of judgments imposed by state criminal judges.

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 ~~rehabilitation of~~ the defendant. Restitution is a particularly ~~effective means~~ for ~~rehabilitation because it forces~~ the defendant to confront,

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tween the elements of crimes and the provisions of § 523, however, may hinder the application of issue preclusion. Moreover, the complexity of proceedings in the bankruptcy courts, and the attendant diversion of prosecutorial effort, is not our only concern. We must also consider the unseemliness of requiring state prosecutors to submit the judgments of their criminal courts to federal bankruptcy judges.

[9] Of course, federal courts often duplicate state adjudicative processes when they consider petitions for the writ of habeas corpus. But explicit reference in the Constitution, Art. I, § 9, cl. 2, as well as several federal statutes, testify to the importance of the writ of habeas corpus. Here, the case for relitigation in the federal courts rests only on the ambiguous words of the Bankruptcy Code.

in concrete terms, the harm his actions have caused. Trial judges often prefer such an order to a fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. The direct relation between the harm and the punishment may make restitution a valuable deterrent as well.[10]

Robinson attempts to minimize this difficulty by arguing that state prosecutors and criminal judges need only consult the provisions of the Bankruptcy Code before selecting the appropriate sentence. This contention misses the point entirely. We are not troubled by requirements that state officials understand and apply federal law. But we will not lightly limit the rehabilitative and deterrent options available to state criminal judges. In cases raising close questions of dischargeability under the Bankruptcy Code, those judges would be put to a harsh choice: impose the sentence that best suits the interests of the state criminal process, and hope that the federal courts will not disturb that judgment; or forgo imposition of a restitution order to ensure continued enforcement of some criminal judgment. In short, the Court of Appeals' interpretation of the Code would entail substantial interference in the state criminal process.

In one of our cases interpreting the Act, Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin* v. *England*, 385 U. S. 99, 103 (1966). This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. See *Younger* v. *Harris*, 401 U. S. 37, 44–45

[10] See Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 937–941 (1984).

~~(1971).~~ This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.[11]

III

In light of the ~~long pre-Code tradition precluding bankruptcy courts from altering~~ criminal judgments, we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of § 101(4).[12] But we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

The relevant portion of § 523(a)(7) protects from discharge 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.

This language is subject to interpretation. On its face, § 523(a)(7) certainly does not compel the conclusion reached

established state of the law -- that bankruptcy courts could not discharge

C-=

[11] Justice Frankfurter advocated a similar approach to the interpretation of regulatory statutes that infringe upon important state interests:

> The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 539–540 (1947).

[12] We recognize, as the Court of Appeals emphasized, that the Code's definition of "debt" is broadly drafted, and that the legislative history supports a broad reading of the definition. But nothing in the legislative history of these sections suggests that Congress intended to change the state of the law with respect to criminal judgments.

by the Court of Appeals, that a discharge in bankruptcy voids restitution orders imposed as conditions of probation by state courts. Nowhere in the House and Senate Reports is there any indication that this language should be read so intrusively.[13] If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, "we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage," *Tennessee Valley Authority* v. *Hill*, 437 U. S. 153, 209 (1978) (POWELL, J., dissenting).

Our reading of § 523(a)(7) differs from that of the Second Circuit. On its face, it creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the

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[13] For the section-by-section analysis in the legislative reports, see H. R. Rep. No. 595, 95th Cong., 1st Sess., 363 (1977); S. Rep. No. 989, 95th Cong., 2d Sess., 79 (1978). For explanations of the section by commentators, see 3 Collier on Bankruptcy ¶ 523.17 (15th ed. 1986); 1 Norton Bankruptcy Law and Practice § 27.37 (1981). In fact, both of these commentators expressly state that the language should not have the intrusive effect sought by Robinson. See Collier, ¶ 523.17, at 523–123 n. 4; Norton, § 27.37, at 55 n. 2.

It seems likely that the limitation of § 523(a)(7) to fines assessed "for the benefit of a federal, state, or local government" was intended to prevent application of that subsection to wholly private penalties such as punitive damages. See House Doc. No. 137, pt. 2, 93d Cong., 1st Sess., 116, 141 (1973). As for the reference to "compensation for actual pecuniary loss," the Senate Report indicates that the main purpose of this language was to prevent § 523(a)(7) from being applied to tax penalties. S. Rep. No. 989, 95th Cong., 2d Sess., 79 (1978).

We acknowledge that a few stray comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a member of Congress, nor were they included in the official Senate and House reports. We decline to accord any significance to these statements. See *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494 (1931); 2A N. Singer, Sutherland on Statutory Construction § 48.10, at 319, and n. 11 (rev. 4th ed. 1984).

fines must be both "to and for the benefit of a governmental unit," and "not compensation for pecuniary loss." Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines. We must decide whether the result is altered by the two major differences between restitution and a traditional fine. Unlike traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused.

In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

This point is well illustrated by the Connecticut statute under which ~~the~~ restitution obligation was imposed. The statute authorizes a judge to impose any of eight specified conditions of probation, as well as "any other conditions reasonably related to his rehabilitation." Conn. Gen. Stat. § 53a–30(a)(9). Clause (4) of that section authorizes a judge to require that the defendant

> make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance.

This clause does not require imposition of restitution in the amount of the harm caused. Instead, it provides for a flexible remedy tailored to the defendant's situation.

Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the state.[14] Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).

In light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress. Accordingly, the decision of the Court of Appeals for the Second Circuit is

Reversed.

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[14] This is not the only context in which courts have been forced to evaluate the treatment of restitution orders by determining whether they ~~were~~ are "compensatory" or "penal." Several lower courts have addressed the constitutionality of the federal Victim Witness Protection Act, 18 U. S. C. § 3579. Under that Act, defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case. See Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 Texas L. Rev. 671 (1984). Every federal circuit court that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment. See *id.*, at 672 n. 18 (citing cases).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated: OCT 22 1986.

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–1033

JOHN J. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL., PETITIONERS *v.* CAROLYN ROBINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[October ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

We granted review in this case to decide whether restitution obligations, imposed as conditions of probation in state criminal proceedings, are dischargeable in proceedings under Chapter 7 of the Bankruptcy Code.

I

In 1980, Carolyn Robinson pled guilty to larceny in the second degree. The charge was based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. On November 14, 1980, the Connecticut Superior Court sentenced Robinson to a prison term of not less than one year nor more than three years. The court suspended execution of the sentence and placed Robinson on probation for five years. As a condition of probation, the judge ordered Robinson to make restitution[1] to the State of Connecticut Office of Adult Probation (Probation

[1] Connecticut Gen. Stat. § 53a–30 sets out the conditions a trial court may impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant "make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance."

Office) at the rate of $100 per month, commencing January 16, 1981, and continuing until the end of her probation.[2]

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U. S. C. § 701 *et seq.*, in the United States Bankruptcy Court for the District of Connecticut. That petition listed the restitution obligation as a debt. On February 20, 1981, the Bankruptcy Court notified both of the Connecticut agencies of Robinson's petition and informed them that April 27, 1981, was the deadline for filing objections to discharge. The agencies did not file proofs of claim or objections to discharge, apparently because they took the position that the bankruptcy would not affect the conditions of Robinson's probation. Thus, the agencies did not participate in the distribution of Robinson's estate. On May 14, 1981, the bankruptcy court granted Robinson a discharge. See § 727.

At the time Robinson received her discharge in bankruptcy, she had paid $450 in restitution. On May 20, 1981, her attorney wrote the Probation Office that he believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution. Robinson made no further payments.

The Connecticut Probation Office did not respond to this letter until February 1984, when it informed Robinson that it considered the obligation to pay restitution nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court, seeking a declaration that the restitution obligation had been discharged, as well as an injunction to prevent the State's officials from forcing Robinson to pay.

After a trial, the Bankruptcy Court entered a Memorandum and Proposed Order, concluding that the 1981 discharge

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[2]There is some uncertainty about the total amount Robinson was ordered to pay. Although the judge imposed restitution in a total amount of $9,932.95, five years of payments at one hundred dollars a month total only $6,000.

in bankruptcy had not altered the conditions of Robinson's probation. The court adopted the analysis it had applied in a similar case decided one month earlier, *In re Pellegrino (Pellegrino* v. *Division of Criminal Justice)*, 42 B. R. 129 (Bkrtcy. Ct. Conn. 1984). In *Pellegrino*, the court began with the Bankruptcy Code's definitional sections. First, § 101(11) defines a "debt" as a "liability on a claim." In turn, § 101(4) defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Finally, § 101(9) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

The Bankruptcy Court then examined the statute under which the Connecticut judge had sentenced the debtor to pay restitution. Restitution appears as one of the conditions of probation enumerated in Conn. Gen. Stat. § 53a–30. Under that section, restitution payments are sent to the Probation Office. The payments then are forwarded to the victim. Although the Connecticut penal code does not provide for enforcement of the probation conditions by the victim, it does authorize the trial court to issue a warrant for the arrest of a criminal defendant who has violated a condition of probation. § 53a–32.

Because the Connecticut statute does not allow the victim to enforce a right to receive payment, the court concluded that neither the victim nor the Probation Office had a "right to payment," and hence neither was owed a "debt" under the Bankruptcy Code. It argued: "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133. The court acknowledged the tension between its conclusion and

the Code's expansive definition of debt, but found an exception to the statutory definition in "the long-standing tradition of restraint by federal courts from interference with traditional functions of state governments." *Id.*, at 134. The court concluded that, even if the probation condition was a debt subject to bankruptcy jurisdiction, it was nondischargeable under § 523(a)(7) of the Code. That subsection provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

The court also concluded that the purpose of the restitution condition was "to promote the rehabilitation of the offender, not to compensate the victim." 42 B. R., at 137. It specifically rejected the argument that the restitution must be deemed compensatory because the amount precisely matched the victim's loss. It noted that the state statute allows an offender "to make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby," Conn. Gen. Stat. § 53a–30(a)(4). In its view, the Connecticut statute focuses "upon the offender and not on the victim, and . . . restitution is part of the criminal penalty rather than compensation for a victim's actual loss." 42 B. R., at 137. Thus, the Bankruptcy Court held that the bankruptcy discharge had not affected the conditions of Pellegrino's probation. The United States District Court for the District of Connecticut adopted the Bankruptcy Court's proposed dispositions of *Pellegrino* and this case without alteration.

The Court of Appeals for the Second Circuit reversed. It first examined the Code's definition of debt. Although it recognized that most courts had reached the opposite conclusion, the court decided that a restitution obligation imposed as a condition of probation is a debt. It relied on the legislative history of the Code that evinced Congress's intent to

broaden the definition of "debt" from the much narrower definition of the Bankruptcy Act of 1898. The court also noted that anomalies might result from a conclusion that such an obligation is not a debt. Most importantly, nondebt status would deprive a state of the opportunity to participate in the distribution of the bankrupt's estate.

Having concluded that restitution obligations are debts, the court turned to the question of dischargeability. The court stated that the appropriate Connecticut agency probably could have avoided discharge of the debt if it had objected under §§ 523(a)(2) or 523(a)(4) of the Code.[3] As no objections to discharge were filed, the court concluded that the State could rely only on § 523(a)(7), the subsection that provides for automatic nondischargeability for certain debts.[4] The court then looked to the text of the Connecticut statute to determine whether Robinson's probation condition was "compensation for actual pecuniary loss" within the meaning of § 523(a)(7). But where the Bankruptcy Court had considered the entire state probation system, the Court of Appeals focused only on the language that allows a restitution order to be assessed "for the loss or damage caused [by the crime],"

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[3] Section 523(a)(2)(A) protects from discharge debts "for obtaining money, property, services, or an extension, renewal, or refinance of credit, by false pretenses, a false representation, or actual fraud." Section 523(a)(4) protects from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Under § 523(c), debts that are protected from discharge only by § 523(a)(2) or § 523(a)(4) are discharged unless the creditor files an objection to discharge during the bankruptcy proceedings. Because Robinson was convicted of larceny, one of the debts listed in § 523(a)(4), it is quite likely that the Bankruptcy Court would have found the debt nondischargeable under that subsection.

[4] The requirement that creditors object to discharge is limited on its face to paragraphs (2), (4), and (6) of § 523(a). Because paragraph 7 is not listed there, debts described in that paragraph are automatically nondischargeable, under the general rule prescribed in the opening clause of § 523(a) (providing that a "discharge under section 727 . . . of this title does not discharge an individual debtor from any debt" listed in the paragraphs that follow).

Conn. Gen. Stat. § 53a–30(a)(4). The court thought this language compelled the conclusion that the probation condition was "compensation for actual pecuniary loss." It held, therefore, that this particular condition of Robinson's probation was not protected from discharge by § 523(a)(7). Accordingly, it reversed the District Court.

We granted the State's petition for a writ of certiorari. We have jurisdiction to review the judgment of the Court of Appeals under 28 U. S. C. § 1254(1). We reverse.

II

The Court of Appeals' decision focused primarily on the language of §§ 101 and 523 of the Code. Of course, the "starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). But the text is only the starting point. As JUSTICE O'CONNOR explained last Term, "'"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."'" *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. ——, —— (1986) (quoting *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270, 285 (1956) (quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849))). In this case, we must consider the language of §§ 101 and 523 in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems.

A

Courts traditionally have been reluctant to interpret federal bankruptcy statutes to remit state criminal judgments. The present text of Title 11, commonly referred to as the Bankruptcy Code, was enacted in 1978 to replace the Bank-

ruptcy Act of 1898, ch. 541, 30 Stat. 544.[5] The treatment of criminal judgments under the Act of 1898 informs our understanding of the language of the Code.

First, § 57 of the Act established the category of "allowable" debts. See 3 Collier on Bankruptcy ¶ 57 (14th ed. 1977). Only if a debt was allowable could the creditor receive a share of the bankrupt's assets. See § 65a. For this case, it is important to note that § 57j excluded from the class of allowable debts penalties owed to government entities. That section provided:

> Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose. 30 Stat., at 561.

Second, § 63 established the separate category of "provable" debts. See 3A Collier on Bankruptcy ¶ 63 (14th ed. 1975). Section 17 provided that a discharge in bankruptcy "release[d] a bankrupt from all of his provable debts," subject to several exceptions listed in later portions of § 17. Although § 17 specifically excepted four types of debts from discharge, it did not mention criminal penalties of any kind. The most natural construction of the Act, therefore, would have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate. Congress had considered criminal penalties when it passed the Act; it clearly made them nonallowable. The failure expressly to make them

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[5] Congress amended the Bankruptcy Act several times between 1898 and 1978. Congress also made numerous technical changes to the Code in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 380. None of those changes is relevant to this decision.

nondischargeable at the same time offered substantial support for the view that the Act discharged those penalties.

But the courts did not interpret the Act in this way. Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court. In the leading case, the court reasoned:

> It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace [criminal penalties]; but it is well settled that there may be cases in which such literal construction is not admissible. . . . It may suffice to say that nothing but a ruling from a higher court would convince me that congress, by any provision of the bankrupt act, intended to permit the discharge, under its operations, of any judgment entered by a state or federal court imposing a fine in the enforcement of criminal laws. . . . The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *In re Moore*, 111 F. 145, 148–149 (WD Ky. 1901).[6]

This reasoning was so widely accepted by the time Congress enacted the new Code that a leading commentator could state flatly that "fines and penalties are not affected by a dis-

[6] Although courts differed as to the boundaries of the exception, particularly in cases involving nonmonetary sanctions, or sanctions imposed in civil proceedings, the reasoning of *Moore* was widely accepted. See, *e. g.*, *Parker* v. *United States*, 153 F. 2d 66, 71 (CA1 1946) (citing *Moore* and noting that "[i]t was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense"); *Zwick* v. *Freeman*, 373 F. 2d 110, 116 (CA2 1967) (citing *Moore* and stating that "governmental sanctions are not regarded as debts even when they require monetary payments"). We have found only one federal court decision allowing a discharge under the Act to affect a sentence imposed by a criminal court. *In re Alderson*, 98 F. 588 (W. Va. 1899).

charge." See 1A Collier on Bankruptcy ¶17.13, at 1609–1610, and n. 10 (14th ed. 1979).

Moreover, those few courts faced with restitution obligations imposed as part of criminal sentences applied the same reasoning to prevent a discharge in bankruptcy from affecting such a condition of a criminal sentence. For instance, four years before Congress enacted the Code, the New York Supreme Court stated:

> A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter. *State* v. *Mosesson*, 78 Misc. 2d 217, 218, 356 N. Y. S. 2d 483, 484 (1974) (citations omitted).[7]

Thus, Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders, an exception created in the face of a statute drafted with considerable care and specificity.

Just last Term we declined to hold that the new Bankruptcy Code silently abrogated another exception created by courts construing the old Act. In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U. S. —— (1986), a trustee in bankruptcy asked us to hold

[7] For other decisions adopting this reasoning, see *State ex rel. Auerbach* v. *Topping Bros.*, 79 Misc. 2d 260, 359 N. Y. S. 2d 985, 987–988 (Crim. Ct. 1974); *State* v. *Washburn*, 97 Cal. App. 3d 621, 625–626, 158 Cal. Rptr. 822, 825 (1979).

that the 1978 Code had implicitly repealed an exception to the trustee's abandonment power. Courts had created that exception out of deference to state health and safety regulations, a consideration comparable to the States' interests implicated by this case. We stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." 474 U. S., at —— (quoting *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904)) (citations omitted).

B

Our interpretation of the Code also must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *Younger* v. *Harris*, 401 U. S. 37, 46 (1971). The Court of Appeals nevertheless found support for its holding in the fact that Connecticut officials probably could have ensured continued enforcement of their court's criminal judgment against Robinson had they objected to discharge under § 523(c). Although this may be true in many cases, it hardly justifies an interpretation of the 1978 Act that is contrary to the long prevailing view that "fines and penalties are not affected by a discharge," 1A Collier on Bankruptcy ¶ 17.13, at 1610 (14th ed. 1979).

Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. In some cases it would require state prosecutors to defend particular state criminal judgments before federal bankruptcy courts.[8] As JUSTICE BRENNAN has noted, federal adjudication of matters already at issue in state criminal proceedings can be "an unwarranted and unseemly duplication of the State's own adjudicative process." *Perez* v. *Ledesma*, 401 U. S. 82, 121 (1971) (opinion of BRENNAN, J., concurring in part and dissenting in part).[9]

Also, as Robinson's attorney conceded at oral argument, some restitution orders would not be protected from discharge even if the state did appear and enter an objection to discharge. For example, a judge in a negligent homicide case might sentence the defendant to probation, conditioned on the defendant's paying the victim's husband compensation for the loss the husband sustained when the defendant killed his wife. It is not clear that such a restitution order would fit the terms of any of the exceptions to discharge listed in § 523 other than § 523(a)(7). Thus, this interpretation of the Code would do more than force state prosecutors to defend state criminal judgments in federal bankruptcy court. In

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[8] In many cases, of course, principles of issue preclusion would obviate the need for the bankruptcy court to reexamine factual questions, or interpret state law. But differences between the elements of crimes and the provisions of § 523 frequently might hinder the application of issue preclusion. Moreover, apart from the burden on state officials of following and participating in bankruptcy proceedings, it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federal bankruptcy courts.

[9] Of course, federal courts often duplicate state adjudicative processes when they consider petitions for the writ of habeas corpus. But explicit reference in the Constitution, Art. I, § 9, cl. 2, as well as several federal statutes, testify to the importance of the writ of habeas corpus. Here, the case for relitigation in the federal courts rests only on the ambiguous words of the Bankruptcy Code.

some cases, it could lead to federal remission of judgments imposed by state criminal judges.

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.[10] We will not lightly limit the rehabilitative and deterrent options available to state criminal judges.

In one of our cases interpreting the Act, Justice Douglas remarked: "[W]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin* v. *England*, 385 U. S. 99, 103 (1966). This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. See *Younger* v. *Harris*, *supra*, at 44–45. This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.[11]

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[10] Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. See Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 937–941 (1984).

[11] Justice Frankfurter advocated a similar approach to the interpretation of regulatory statutes that infringe upon important state interests:

> The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The his-

III

In light of the established state of the law—that bankruptcy courts could not discharge criminal judgments—we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of § 101(4).[12] But we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

The relevant portion of § 523(a)(7) protects from discharge 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.

This language is subject to interpretation. On its face, § 523(a)(7) certainly does not compel the conclusion reached by the Court of Appeals, that a discharge in bankruptcy voids restitution orders imposed as conditions of probation by state courts. Nowhere in the House and Senate Reports is there any indication that this language should be read so intrusively.[13] If Congress had intended, by § 523(a)(7) or by any

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tory of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 539–540 (1947).

[12] We recognize, as the Court of Appeals emphasized, that the Code's definition of "debt" is broadly drafted, and that the legislative history supports a broad reading of the definition. But nothing in the legislative history of these sections suggests that Congress intended to change the state of the law with respect to criminal judgments.

[13] For the section-by-section analysis in the legislative reports, see H. R. Rep. No. 95–595, p. 363 (1977); S. Rep. No. 95–989, p. 79 (1978). For explanations of the section by commentators, see 3 Collier on Bankruptcy ¶ 523.17 (15th ed. 1986); 1 Norton Bankruptcy Law and Practice § 27.37 (1981). In fact, both of these commentators expressly state that the lan-

other provision, to discharge state criminal sentences, "we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage," *Tennessee Valley Authority* v. *Hill*, 437 U. S. 153, 209 (1978) (POWELL, J., dissenting).

Our reading of § 523(a)(7) differs from that of the Second Circuit. On its face, it creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both "to and for the benefit of a governmental unit," and "not compensation for pecuniary loss." Section 523(a)(7) protects traditional criminal fines; it codifies the judicially created exception to discharge for fines. We must decide whether the result is altered by the two major differences between restitution and a traditional fine. Unlike traditional fines, restitution is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused.

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guage does not have the intrusive effect sought by Robinson. See Collier, ¶ 523.17, at 523–123 n. 4; Norton, § 27.37, at 55 n. 2.

It seems likely that the limitation of § 523(a)(7) to fines assessed "for the benefit of a federal, state, or local government" was intended to prevent application of that subsection to wholly private penalties such as punitive damages. See House Doc. No. 93–137, pt. 2, pp. 116, 141 (1973). As for the reference to "compensation for actual pecuniary loss," the Senate Report indicates that the main purpose of this language was to prevent § 523(a)(7) from being applied to tax penalties. S. Rep. No. 95–989, p. 79 (1978).

We acknowledge that a few comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a member of Congress, nor were they included in the official Senate and House reports. We decline to accord any significance to these statements. See *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494 (1931); 2A N. Singer, Sutherland on Statutory Construction § 48.10, at 319, and n. 11 (rev. 4th ed. 1984).

In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the bankruptcy judge in this case recognized, "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133.

This point is well illustrated by the Connecticut statute under which the restitution obligation was imposed. The statute authorizes a judge to impose any of eight specified conditions of probation, as well as "any other conditions reasonably related to his rehabilitation." Conn. Gen. Stat. § 53a–30(a)(9). Clause (4) of that section authorizes a judge to require that the defendant

> make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance.

This clause does not require imposition of restitution in the amount of the harm caused. Instead, it provides for a flexible remedy tailored to the defendant's situation.

Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the state.[14] Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).

In light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress. Accordingly, the decision of the Court of Appeals for the Second Circuit is

Reversed.

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[14] This is not the only context in which courts have been forced to evaluate the treatment of restitution orders by determining whether they are "compensatory" or "penal." Several lower courts have addressed the constitutionality of the federal Victim Witness Protection Act, 18 U. S. C. § 3579. Under that Act, defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case. See Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 Texas L. Rev. 671 (1984). Every federal circuit court that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment. See *id.*, at 672 n. 18 (citing cases).

rjm 10/22/86

INSERTS TO PAGES 10-12 of the Opinion for the Court in No. 85-1033 (as marked on the attached draft)

INSERT A (with attached footnote) to pp. 10-11:

The Court of Appeals nevertheless found support for its holding in the fact that Connecticut officials probably could have ensured continued enforcement of their court's criminal judgment against Robinson had they objected to discharge under §523(c). Although this may be true in many cases, it hardly justifies an interpretation of the 1978 Act that is contrary to the long prevailing view that "fines and penalties are not affected by a discharge," 1A Collier on Bankruptcy ¶17.13, at 1610 (14th ed. 1979).

Moreover, reliance on a right to appear and object to discharge would create uncertainties and impose undue burdens on state officials. In some cases it would require state prosecu-

tors to defend particular state criminal judgments before federal bankruptcy courts.8

8. In many cases, of course, principles of issue preclusion would obviate the need for the bankruptcy court to reexamine factual questions, or interpret state law. But differences between the elements of crimes and the provisions of §523 ~~frequently might~~ could hinder the application of issue preclusion. Moreover, apart from the burden on state officials of following and participating in bankruptcy proceedings, it is unseemly to require state prosecutors to submit the judgments of their criminal courts to federal bankruptcy courts.

INSERT B (to footnote 10 on page 12):

Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently from a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment may give restitution a more precise deterrent effect than a traditional fine.

INSERT C (to page 15)

As the bankruptcy judge in this case recognized, "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." 42 B. R., at 133.

10/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

L.F.P 10/22

From: **Justice Powell**

Circulated:_____

Recirculated:_____

1st CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85–1033

JOHN J. KELLY, CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL., PETITIONERS *v.* CAROLYN ROBINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[October ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

We granted review in this case to decide whether restitution obligations, imposed as conditions of probation in state criminal proceedings, are dischargeable in proceedings under Chapter 7 of the Bankruptcy Code.

I

In 1980, Carolyn Robinson pled guilty to larceny in the second degree. The charge was based on her wrongful receipt of $9,932.95 in welfare benefits from the Connecticut Department of Income Maintenance. On November 14, 1980, the Connecticut Superior Court sentenced Robinson to a prison term of not less than one year nor more than three years. The court suspended execution of the sentence and placed Robinson on probation for five years. As a condition of probation, the judge ordered Robinson to make restitution[1] to the State of Connecticut Office of Adult Probation (Probation

[1] Connecticut Gen. Stat. § 53a–30 sets out the conditions a trial court may impose on a sentence of probation. Clause 4 of that section authorizes a condition that the defendant

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make restitution of the fruits of his offense or make restitution, in an amount he can afford to pay or provide in a suitable manner, for the loss or damage caused thereby and the court may fix the amount thereof and the manner of performance.

Office) at the rate of $100 per month, commencing January 16, 1981, and continuing until the end of her probation.[2]

On February 5, 1981, Robinson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U. S. C. § 701 *et seq.*, in the United States Bankruptcy Court for the District of Connecticut. That petition listed the restitution obligation as a debt. On February 20, 1981, the Bankruptcy Court notified both the Connecticut agencies of Robinson's petition and informed them that April 27, 1981, was the deadline for filing objections to discharge. The agencies did not file proofs of claim or objections to discharge, apparently because they took the position that the bankruptcy would not affect the conditions of Robinson's probation. Thus, the agencies did not participate in the distribution of Robinson's estate. On May 14, 1981, the bankruptcy court granted Robinson a discharge. See § 727.

At the time Robinson received her discharge in bankruptcy, she had paid $450 in restitution. On May 20, 1981, her attorney wrote the Probation Office that he believed the discharge had altered the conditions of Robinson's probation, voiding the condition that she pay restitution. Robinson made no further payments.

The Connecticut Probation Office did not respond to this letter until February 1984, when it informed Robinson that it considered the obligation to pay restitution nondischargeable. Robinson responded by filing an adversary proceeding in the Bankruptcy Court, seeking a declaration that the restitution obligation had been discharged, as well as an injunction to prevent the State's officials from forcing Robinson to pay.

After a trial, the Bankruptcy Court entered a Memorandum and Proposed Order, concluding that the 1981 discharge

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[2] There is some uncertainty about the total amount Robinson was ordered to pay. Although the judge imposed restitution in a total amount of $9,932.95, five years of payments at one hundred dollars a month total only $6000.