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Michelangelo Scafidi

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CIRCUMVENTING STATE COURT ORDERS OF CRIMINAL RESTITUTION: A BANKRUPTCY LOOPHOLE

Bankruptcy law has developed over the years to provide the financially over-extended debtor relief from mounting debts.¹ Presently, however, the bankruptcy laws are being used to enjoin both state court criminal proceedings and state court orders of criminal restitution. Criminal debtors have increasingly used certain provisions of the bankruptcy laws in an attempt to discharge state court criminal restitution orders.² "Criminal restitution" is a process whereby criminal debtors are required to repay debt in lieu of incarceration. Ideally, they are rehabilitated and made to understand that society has been injured by their actions.³ Criminal restitution is meant to give the unhardened criminal the opportunity to rectify a previous wrong. An order of criminal restitution does not, however, create the debtor-creditor type relationship that normally exists in a bankruptcy proceeding.⁴

In this regard, section 523(a) of the federal Bankruptcy Code delineates several exceptions to the types of debt that are dischargeable in bankruptcy.⁵ Congress enacted section 523(a) because it felt

1. See generally H. REMINGTON, 1 REMINGTON ON BANKRUPTCY §§ 6-10 (1964) (explanation of legislative intent behind Bankruptcy Code) [hereinafter cited as REMINGTON].

2. See *infra* text accompanying notes 40-66.

Currently, the bankruptcy courts employ five different methods to determine the dischargeability of a state court order of criminal restitution. In a number of jurisdictions, the courts hold that criminal proceedings must be enjoined. See *infra* text accompanying notes 40-48. In other jurisdictions, the criminal action is allowed to proceed, but the bankruptcy court enjoins the creditor from receiving any type of restitution. See *infra* text accompanying notes 49-55. Another bankruptcy court currently holds that restitution is a dischargeable debt in bankruptcy. See *infra* text accompanying notes 56-66. However, not all bankruptcy courts discharge state court orders of criminal restitution. There are a number of courts that hold that restitution is not a debt contemplated by the Bankruptcy Code, and therefore, not dischargeable. See *infra* text accompanying notes 89-106. In addition, courts in some jurisdictions state that the bankruptcy courts do not have jurisdiction to interfere with a state court criminal proceeding. See *infra* text accompanying notes 82-88. These courts, in reaching their decision, look to the definitions provided in section 101 of the Bankruptcy Code and conclude that restitution is not a debt dischargeable in bankruptcy.

3. See, e.g., *In re Vik*, 45 Bankr. 64, 67 (Bankr. N.D. Iowa 1984); *In re Johnson*, 32 Bankr. 614, 616 (Bankr. D. Colo. 1983); *In re Magnifico*, 21 Bankr. 800, 803 (Bankr. D. Ariz. 1982).

4. See, e.g., *In re Johnson*, 32 Bankr. at 616; *In re Magnifico*, 21 Bankr. at 803; *In re Newton*, 15 Bankr. 708, 709 (Bankr. N.D. Ga. 1981).

5. 11 U.S.C. § 523(a)(1982). Currently, there are ten types of debts which are

that certain individuals and governmental units needed protection from debtors in bankruptcy.⁶ Section 523(a)(2), the false pretenses provision, provides that debts incurred as a result of false pretenses, false representations, actual fraud or false writings are exempt from discharge.⁷ Section 523(a)(7) exempts from discharge any debt which is represented by a fine, penalty, or forfeiture payable to a governmental unit.⁸ As intended, creditors and governmental units use these sections to prevent criminals from discharging certain debts through bankruptcy proceedings.⁹ Bankruptcy Courts, however, have frustrated this intended result where the type of debt is a state court order of criminal restitution. The circumventive application of the Bankruptcy Code to state court criminal restitution orders clearly indicates a need for legislative reform.

This article begins by briefly tracing the historical background and origins of American bankruptcy law. This will be followed by a discussion of the bankruptcy courts' problems regarding its jurisdiction and the automatic stay of a state court criminal proceeding. Next, this article will depict the clash that occurs between state enacted mandatory criminal restitution laws and the supremacy clause of the United States Constitution. The focus then shifts to the bankruptcy courts' application of the Bankruptcy Code to the criminal restitution issue. Finally, two proposals will be suggested which, if enacted, would eliminate the current problems associated with the discharge of state criminal restitution orders by the bankruptcy courts.

HISTORICAL BACKGROUND

The first "bankruptcy law" existed more than 3,000 years ago

nondischargeable under section 523 of the Bankruptcy Code. L. KING, 3 COLLIER ON BANKRUPTCY ¶ 523.01 (15th ed. 1979) [hereinafter cited as COLLIER]. The ten types of debt exempt from discharge are debts for: tax on customs duty, 11 U.S.C. § 523(a)(1) (1982); money, property or services which are incurred as a result of false pretenses, *id.* § 523(a)(2); when a proof of claim has been filed, *id.* § 523(a)(3); fraud while acting in a fiduciary capacity, embezzlement, or larceny, *id.* § 523(a)(4); amounts owed to a spouse, former spouse or child for maintenance or child support in connection with a divorce decree, *id.* § 523(a)(5); willful and malicious injury by the debtor to another or another's property, *id.* § 523(a)(6); fines or penalties payable to a governmental unit, *id.* § 523(a)(7); educational loans made or guaranteed by a governmental unit, *id.* § 523(a)(8); liability incurred as a result of the operation of the debtor's motor vehicle while legally intoxicated, 11 U.S.C.A. § 523(a)(9) (West Supp. 1985); and those debts which could have been listed or scheduled by the debtor but were waived or denied a discharge. *id.* § 523(a)(9).*

6. 3 COLLIER, *supra* note 5, ¶ 523.05.

7. 11 U.S.C.A. § 523(a)(2) (West Supp. 1985).

8. 11 U.S.C. § 523(a)(7) (1982). If the debt payable under section 523(a) is compensation for actual pecuniary loss, however, the debt will not be exempt from discharge because the government is not supposed to act as a collection agency. *Id.*

9. 3 COLLIER, *supra* note 5, ¶ 523.08.

when the Israelites were granted a release from their debts every seven years, during the Sabbatical year.¹⁰ During the times of Julius Ceasar, debtors were relieved of all their assets in exchange for immunity from personal punishment,¹¹ but were not, however, relieved of the obligation to pay their debts.¹² Modern bankruptcy law lies between these two extremes. It developed as a necessary outgrowth of expanding English commerce.¹³ It had a "quasi-criminal" origin, starting with the bankruptcy statute used during the reign of Henry VIII, which provided that fraudulent claims could not be discharged, but had to be paid or otherwise satisfied and distributed by the lords having authority.¹⁴ With this foundation of English law, early American bankruptcy law was likewise primarily creditor oriented.¹⁵

The Founding Fathers first discussed bankruptcy regulations at the 1787 Constitutional Convention.¹⁶ The delegates were concerned primarily with the lack of commercial unity among the states and with the inadequacy of the several states' insolvency laws.¹⁷ A provision was therefore drafted into the United States Constitution which authorized Congress to establish a "uniform" set of bankruptcy laws.¹⁸ American bankruptcy laws have since evolved into an

10. 1 REMINGTON, *supra* note 1, § 7.

The first bankruptcy law was found to be impracticable, because during the seventh year businessmen would become quite worried about the debtor's mounting debts. *Id.* The law read as follows:

At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it of his neighbor or of his brother; because it is called the Lord's release. Of a foreigner thou mayest exact it again; but that which is thine with thy brother thine hand shall release; save when there shall be no poor among you.

Id.

11. *Id.* The early laws of Caesar are thought to be the prototype of modern bankruptcy law. *Id.* The law called Cessio Bonorum provided for the surrender of all the debtor's assets and granted him immunity from personal punishment. *Id.* This law was strictly voluntary and could not be invoked by the creditors. *Id.*

12. *Id.*

13. 1 REMINGTON, *supra* note 1, § 2. As England grew in prosperity and in the field of commerce, it felt that its merchants needed protection from debtors. *Id.*

14. *Id.* The first English bankruptcy statute was that of 34 and 35 Henry VIII, ch. 4 (1542). See 1 REMINGTON, *supra* note 1, § 3 for the full text of the statute.

15. 1 REMINGTON, *supra* note 1, § 3. Because the English laws were primarily creditor oriented, a common law maxim developed that "[t]he law favors the diligent creditor." *Id.* This maxim stood for the principle that the first creditor to seize a debtor's assets by execution took precedence for his entire claim over the next creditor. *Id.* Shortly thereafter, a new maxim was formed, "equality is equity," which became and is now the primary principle of bankruptcy law. *Id.*

16. 1 COLLIER ON BANKRUPTCY ¶ 0.02 (14th ed. 1976).

17. *Id.*

18. U.S. CONST. art. I, § 8, cl. 4. Clause 4 provides: "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *Id.* This provision is the general constitutional provision which grants Congress the power to enact, amend or repeal the bankruptcy laws. The purpose of the supremacy clause is that it

overwhelmingly complex set of statutes which regulate the liquidation or reorganization of a debtor's obligations.¹⁹ The last major

is used to determine whether a challenged statute stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1970) *citing* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Responding to the constitutional mandate, Congress enacted the Bankruptcy Act of 1800 which provided that the only debts exempt from discharge were debts owed to a state or to the United States. The Bankruptcy Act of 1800, *noted in*, 3 COLLIER, *supra* note 5, ¶ 523.01. The Bankruptcy Act of 1800 was repealed just three years after its enactment. 1 REMINGTON, *supra* note 1, § 7. The Act of 1800 was the United States' first bankruptcy law. *Id.* It was modeled after English law and written to suppress fraudulent and criminal practices, rather than to provide a rational and equitable distribution of the debtor's estate. *Id.* The main reason for its repeal was that the people of the United States resented federal laws. *Id.* Federal laws reminded the general public of the strongly centralized and domineering government they faced prior to the revolution. *Id.*

Other bankruptcy acts followed, including the Bankruptcy Act of 1841. *Id.* § 8. This Act introduced voluntary bankruptcy proceedings. *Id.* The Act of 1841, like its predecessor, was also repealed. *Id.* One of the primary reasons for its repeal was the great physical distance between the United States Courts and the people. *Id.* The bankruptcy courts were great distances apart; the people had burdensome journeys through the backroads by stage coach to bring an action in bankruptcy. *Id.*

Subsequently, Congress enacted the Bankruptcy Act of 1867. The Act of 1867 provided that fraudulent debts were to be included in the list of debts unaffected by a bankruptcy proceeding. COLLIER, *supra* note 5, ¶ 523.01. Congress wanted to preclude those who incurred debts as a result of fraud from benefitting from the applicable bankruptcy laws at the expense of their creditors. The Act of 1867 was repealed 11 years later, again due to the distance between the courts and the people. 1 REMINGTON, *supra* note 1, § 9. Congress then enacted the Bankruptcy Act of 1898. This Act attempted to rectify prior law and provide a concise definition of insolvency. *Id.* Prior to the Act of 1898, the term insolvency meant the inability of the debtor to meet his obligations as they came due. *Id.* This meant that during depressed times, it was very easy for a creditor to place a debtor in bankruptcy. *Id.* However, after the Act of 1898, insolvency took on a new meaning. Insolvency now meant that the fair market value of the debtor's assets had to be worth less than his liabilities. *Id.* This Act also set up a system of laws for seizing the assets of an insolvent debtor. *Id.*

19. 1 COLLIER ON BANKRUPTCY ¶ 0.01 (14th ed. 1976). Currently, the Bankruptcy Code is composed of eight chapters, numbered 1, 3, 5, 7, 9, 11, 13 and 15. 11 U.S.C. §§ 101-1501. Chapters 7, 9, 11 and 13 provide for debtor relief. *See* L. KING & M. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 578 (1985). The remaining chapters, 1, 3, 5, and 15, contain procedural provisions applicable to chapters 7, 9, 11 and 13. *Id.*

Under a Chapter 7 liquidation, the debtor's non-exempt assets are surrendered and sold and the proceeds are then distributed to the debtor's creditors. L. KING & M. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 578 (1985). If the debtor is a business entity, the entity will cease to exist. *Id.* Chapter 9, "Adjustment of Debts of a Municipality," provides for a voluntary petition filed by a municipality. *Id.* at 579. The purpose of Chapter 9 is to prevent liquidation of a municipality's assets by working out a debt adjustment plan with the creditors. *Id.* Chapter 11, "Reorganization," provides for the business debtor. *Id.* Chapter 13, "Adjustment of Debts of an Individual with Regular Income," allows an individual the opportunity to propose a plan in which the debts will be paid out of future earnings. *Id.* Chapter 13 can be viewed as an alternative to the liquidation process of Chapter 7. *Id.*

Chapter 1 contains sections on basic definitions, rules of construction, the applicability of the chapters, the power of the court, and who may be a debtor. 11 U.S.C. § 101 (1982). Chapter 3 is administrative. It contains sections on commencement of the case, officers, administration and administrative powers, *e.g.*, the automatic stay pro-

change in the bankruptcy laws occurred in 1984.²⁰ The criminal sanctions that appeared in earlier laws, however, have disappeared under the current laws. Instead of being held accountable under the bankruptcy laws, criminals are now using the bankruptcy laws to avoid state court prosecution and to discharge state court orders of criminal restitution entered against them. The problem arises out of a question of jurisdiction.

JURISDICTION AND THE AUTOMATIC STAY PROVISION

Congress has granted the federal district courts exclusive²¹ and original²² jurisdiction over all cases and proceedings which arise under Title XI of the United States Code.²³ By enacting the exclusive jurisdiction provision, Congress intended to prohibit state courts from exercising jurisdiction over bankruptcy cases.²⁴ Generally, the Bankruptcy Code's automatic stay provision, section 362(a), stays all actions brought against a debtor in bankruptcy. Section 362(b)(1), however, provides an exception to the automatic stay provision, allowing criminal actions to proceed despite the bankruptcy filing.

vision section 362. 11 U.S.C. §§ 301-366 (1982). *See also* L. KING & M. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY at 580 (1985). Chapter 5 contains provisions relating to the debtor, creditor and the estate. *Id.* The final chapter in the Bankruptcy Code is Chapter 15. Chapter 15 sets forth the duties and powers of the United States trustee and the districts in which his office will be operational. *Id.* at 579. A debtor filing bankruptcy can file a petition under Chapter 7, straight bankruptcy, or under Chapter 13. A. COHEN, DEBITOR-CREDITOR RELATIONS UNDER THE BANKRUPTCY ACT OF 1978, at 705 (1979). Eighty percent of all debtors choose to file bankruptcy under Chapter 7. *Id.* A study of seven districts shows that more people prefer to file bankruptcy under Chapter 7. *Id.*

District	Chapter 13	Chapter 7
Northern Alabama	76%	24%
Maine	52	48
Western Texas	28	72
Southern California	11	89
Northern Ohio	7	93
Oregon	5	95
Northern Illinois	4	96
Seven District TOTAL	18	82
All District in U.S.	17	83

Id.

20. *See* H.R. REP. No. 5174, 98th Cong., 2d Sess. 3 reprinted in 1984 U.S. CODE CONG. & AD. NEWS 576.

21. 28 U.S.C.A. § 1334(a) (West Supp. 1985). Exclusive jurisdiction was given to the federal courts in section 1334(a) to make it clear that state courts should not exercise jurisdiction over bankruptcy cases. 1 COLLIER, *supra* note 5, ¶ 3.01.

22. 28 U.S.C.A. § 1334(b) (West Supp. 1985).

23. 28 U.S.C. § 1334 (1982); L. KING & M. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 732 (1985).

24. 1 COLLIER, *supra* note 5, ¶ 3.01. Collier states that when exclusive jurisdiction is used in conjunction with the supremacy clause of the Constitution, it will invalidate any state statute which attempts to resemble a bankruptcy statute. *Id.*

The bankruptcy statutes were so designed to help provide debtors with relief from financial over-extension, yet not provide them shelter from the consequences of criminal acts. A strong national policy exists against federal interference with state court criminal proceedings.²⁵ Section 362(b)(1) of the Bankruptcy Code thus contains an exception to the automatic stay provision that specifically exempts criminal proceedings.²⁶ By enacting this exception, Congress intended to keep the bankruptcy laws from becoming a haven for criminal offenders.²⁷ Congress, however, did not leave the bankruptcy courts entirely powerless to stay a state court criminal proceeding. In enacting section 105, Congress granted federal courts the power to issue any judgment or remove any limitation necessary to carry out the intentions of the drafters of the Bankruptcy Code.²⁸ As a result of the exclusive and original jurisdiction provisions, section 362(b)(1) and section 105, the bankruptcy courts have the power to pass judgment on all bankruptcy issues. An attempt has been made in some state courts, however, to circumvent this bankruptcy court power through the use of mandatory criminal restitution sentences.

The mandatory criminal restitution problem is most common in "Not Sufficient Funds" (NSF) check cases. A number of states require, as part of the criminal sentence in a NSF check case, that the debtor make restitution to the creditor-victim.²⁹ In these jurisdictions, state courts demand that the debtor repay the NSF check debt, even where a bankruptcy court has discharged the debt under Chapters 7, 11 or 13 of the Bankruptcy Code. Mandatory restitution poses a unique problem because once a federal bankruptcy court has determined that a debt has been discharged, section 524(a)(2) for-

25. 2 COLLIER, *supra* note 5, ¶ 362.05[1]. The purpose of the automatic stay provision, section 362, is to suspend court actions which seek to divide up the debtor's assets in an effort to collect the debt before any type of debtor relief can be granted. *Preferred Surfacing, Inc. v. Gwinnet Bank & Trust Co.*, 400 F. Supp. 280 (N.D. Ga. 1975). When a creditor attempts to pursue an action after the bankruptcy petition has been filed, the attempt violates the automatic stay provision and is void regardless of whether there was notice of the stay. 2 COLLIER, *supra* note 5, ¶ 362.03. The automatic stay provision promotes equality in the distribution of assets among creditors and protects debtors and their estates from creditor actions. *Id.* ¶ 362.01. There are, however, some exceptions. 11 U.S.C. § 362(b) (1982). Section 362(b) contains eight exceptions to the automatic stay provision. This comment is concerned with the first exception which deals with criminal proceedings against debtors. Collier states that section 362(b)(1) is consistent with the policy of providing relief to the financially pressed without providing a shelter for the consequences of criminal acts. 2 COLLIER, *supra* note 5, ¶ 362.05[1].

26. 11 U.S.C. § 362(b)(1) (1982).

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

28. 11 U.S.C.A. § 105 (West Supp. 1985). This is a very broad provision. It allows the bankruptcy court discretion to do whatever the court feels is necessary.

29. *See, e.g.*, ALA. CODE § 15-18-67 (1982); DEL. CODE ANN. tit. 11, § 4206(a) (1979); TENN. CODE ANN. § 39-3-308(3) (1982).

bids any further action to collect the discharged debt.³⁰ Hence, if the state's criminal court action is allowed to proceed, the jurisdiction, judgments, and the purpose of the Bankruptcy Code will be frustrated.³¹ However, based upon the position taken by the United States Supreme Court,³² and the effect of the supremacy clause,³³ any mandatory order to make restitution of a discharged debt is void because it conflicts with and obstructs the express purpose of the federal bankruptcy laws.³⁴

In order to thwart the mandatory restitution requirements of some states, several bankruptcy courts have enjoined state criminal courts from granting any type of restitution.³⁵ These bankruptcy courts reason that, under the supremacy clause, such orders constitute an impermissible infringement on the application of the federal Bankruptcy Code.³⁶ There are a number of federal bankruptcy courts, however, which have refused to enjoin state criminal courts from ordering restitution. In these jurisdictions, the courts claim that they do not have the authority to enjoin the state action,³⁷ or that restitution is not classified as debt, and is therefore not dis-

30. *In re Barnett*, 15 Bankr. 504, 510 (Bankr. D. Kan. 1981).

31. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

32. *See infra* note 34.

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

34. *Perez*, 402 U.S. at 637; *In re Barnett*, 15 Bankr. at 510. In *Perez*, the petitioner was involved in an automobile accident. *Perez*, 402 U.S. at 638. The petitioner, Perez, did not have liability insurance on his car. *Id.* The Pinkertons, occupants of the second car, sued and obtained a judgment against Perez for personal injury and property damage. *Id.* Subsequently, Mr. and Mrs. Perez filed bankruptcy. *Id.* The District Court discharged the amount owed to the Pinkertons because they were listed as creditors. *Id.* at 639. Arizona had a motor vehicle statute which specifically provided that a debtor could not be relieved in bankruptcy of any judgment that was imposed under that statute. *Id.* at 642. The Court stated that the function of that law was very similar to the bankruptcy laws, because the state law exempted certain debts from discharge. *Id.* at 648. The Court held that the Arizona statute frustrated the purpose of the bankruptcy law and was invalid by reason of the supremacy clause. *Id.* at 652.

35. *See, e.g., In re Holder*, 26 Bankr. 789 (Bankr. M.D. Tenn. 1982) (creditor will be enjoined from accepting any restitution which results from the criminal process); *In re Bray*, 12 Bankr. 359, 363 (Bankr. M.D. Ala. 1981) (permanent injunction granted to prohibit collection of debt discharged in bankruptcy).

36. *See, e.g., In re Holder*, 26 Bankr. at 792 (any order to make full restitution is unconstitutional to the extent it conflicts with section 524(a)(2) of the Bankruptcy Code); *In re Whitaker*, 16 Bankr. 917, 921 (Bankr. M.D. Tenn. 1982) (the state, by forcing restitution on a criminal, would be enforcing a debt which could not be enforced in state or federal court by the victim); *In re Barnett*, 15 Bankr. 504, 510 (Bankr. D. Kan. 1981) (any order to make restitution of a discharged debt conflicts with the purposes of the federal bankruptcy laws).

37. *See, e.g., Matter of Davis*, 15 Bankr. 442 (Bankr. D. Del. 1981) (bankruptcy court did not have the power to issue permanent injunction against the state criminal court and restitution could not be enjoined), *aff'd*, 18 Bankr. 701 (Bankr. D. Del.), *aff'd*, 691 F.2d 176 (3d Cir. 1982); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981) (restitution not dischargeable and bankruptcy court did not have jurisdiction to interfere with state court's sentence).

chargeable in a bankruptcy proceeding.³⁸ Under the latter reasoning, no apparent conflict exists between the jurisdictions and powers of the federal and state courts.

APPLICATION OF THE BANKRUPTCY CODE TO CRIMINAL RESTITUTION

In interpreting the language of the Bankruptcy Code, federal bankruptcy courts have created two categories of cases applicable to criminal restitution cases.³⁹ The first category consists of cases where restitution is enjoined or discharged by the federal courts. The second category consists of cases in which courts have held that restitution is not dischargeable. Under the first category, the bankruptcy courts have enjoined the entire state criminal proceeding, enjoined the state court from granting any type of criminal restitution, or discharged any restitution ordered by the state criminal court. Bankruptcy courts in the second category have classified criminal restitution as nondebt, thereby eliminating any problem with section 524(a)(2) and the supremacy clause.

Restitution Enjoined or Discharged

All of the cases from jurisdictions establishing the first category have given criminals the necessary means to discharge state court orders of criminal restitution.⁴⁰ Typically, in these cases, the debtor has issued NSF checks to the creditor.⁴¹ The debtor then files for

38. See, e.g., *In re Pellegrino*, 42 Bankr. 129 (Bankr. D. Conn. 1984) (restitution not a debt contemplated by Bankruptcy Code and it is not dischargeable); *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983) (primary purpose of restitution is rehabilitation, therefore, restitution is not equal to debt and not dischargeable).

39. See *infra* notes 40-66 & 82-105.

40. Currently the following jurisdictions and the United States Supreme Court will apparently enjoin a state court criminal proceeding. *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts will enjoin pending state criminal prosecutions when there is a threat to the plaintiff's federally protected rights); *In re Padgett*, 37 Bankr. 280 (Bankr. W.D. Ky. 1983) (creditor who instituted criminal proceeding to collect a debt violated automatic stay, therefore, the criminal proceeding will be enjoined); *In re Alan I. W. Frank Corp.*, 19 Bankr. 41 (Bankr. E.D. Pa. 1982) (criminal proceeding will be enjoined when creditor institutes criminal action after the debtor files Chapter 11); *In re Whitaker*, 16 Bankr. 917 (Bankr. M.D. Tenn. 1982) (state criminal action permanently enjoined when instituted after check was discharged as a debt); *In re Kaping*, 13 Bankr. 621 (Bankr. D. Or. 1981) (state criminal proceeding will be enjoined when the prosecution is seeking restitution); *In re Bray*, 12 Bankr. 359 (Bankr. M.D. Ala. 1981) (bankruptcy court can enjoin state criminal court if an action is brought to enforce collection of debt); *In re Reid*, 9 Bankr. 830 (Bankr. M.D. Ala. 1981) (creditor enjoined from using criminal proceeding to collect debt); *In re Caldwell*, 5 Bankr. 740 (Bankr. W.D. Va. 1980) (creditor enjoined from proceeding with criminal action because preferential status would result).

41. See, e.g., *In re Padgett*, 37 Bankr. 280 (Bankr. W.D. Ky. 1983); *In re Alan I.W. Frank Corp.*, 19 Bankr. 41 (Bankr. E.D. Pa. 1982); *In re Whitaker*, 16 Bankr. 917 (Bankr. M.D. Tenn. 1982).

However, in *In re Kaping*, the debtor was indicted for criminal non-support. *In*

bankruptcy and has the NSF check debt discharged.⁴² Frequently, the creditor will not file an objection to the dischargeability of the debt in bankruptcy, but may instead commence criminal proceedings against the debtor.⁴³ When this occurs, courts in the first category have granted an injunction prohibiting the state criminal court from proceeding with the action.

The primary reason advanced by the bankruptcy courts for granting an injunction is that the creditor's real motivation behind the criminal action is to collect the discharged debt, rather than to seek punishment for the criminal's conduct.⁴⁴ This motivation is clearly demonstrated in statements made by the creditor or his attorney that the criminal action will be dropped if prompt payment is made to the creditor.⁴⁵ These bankruptcy courts have stated that the creditor obtains an unfair advantage over the other unsecured creditors when this occurs.⁴⁶ For example, by allowing the criminal action to proceed, the creditor is permitted to forego any partial payment that might be paid in bankruptcy in anticipation of getting full reimbursement by way of restitution. This gives the creditor preferential status over the other creditors, which the courts suggest

re Kaping, 13 Bankr. 621, 622 (Bankr. D. Or. 1981). The debtor filed bankruptcy and was granted a discharge. *Id.* The *Kaping* court held that the principal motivation behind the indictment was to obtain restitution, and secondarily, to obtain probation for the debtor to ensure payment. *Id.* Therefore, the bankruptcy court stated that the State of Oregon was permanently enjoined from further prosecuting the debtor. *Id.*

In *In re Reid*, the debtor entered into an agreement to build a fish pond for the creditor in return for the top soil on the land. *In re Reid*, 9 Bankr. 830, 831 (Bankr. M.D. Ala. 1981). The debtor removed and sold the top soil without completing the fish pond. The creditor refused to allow another contractor to complete the fish pond and instituted criminal proceedings for grand larceny after the debtor filed Chapter 13. *Id.* The *Reid* court held that the criminal proceeding was instituted to obtain preferential treatment and concluded that the criminal proceeding must be enjoined. *Id.* at 832.

42. See, e.g., *In re Padgett*, 37 Bankr. at 281 (debtor and his wife filed a joint petition in bankruptcy); *In re Alan I.W. Frank Corp.*, 19 Bankr. at 42 (debtor filed for reorganization under Chapter 11); *In re Whitaker*, 16 Bankr. at 918 (debtor filed a voluntary bankruptcy petition).

43. See, e.g., *In re Padgett*, 37 Bankr. at 281 (creditor did not participate in the bankruptcy proceeding); *In re Whitaker*, 16 Bankr. at 919 (creditor failed to file a complaint against the dischargeability of the debt); *In re Caldwell*, 5 Bankr. 740, 741 (Bankr. W.D. Va. 1980) (debtor's plan under Chapter 1 without objection).

44. The bankruptcy court stated that the state courts are being used by creditors for their own advantages and not for the vindication of the public's rights against criminals. See *supra* note 40.

45. *In re Padgett*, 37 Bankr. at 282 (prosecuting attorney offered to dismiss criminal charges if full restitution was made to creditor); *In re Whitaker*, 16 Bankr. at 920 (Assistant District Attorney General offered a *nolle* on the criminal case upon payment of restitution and costs); *In re Caldwell*, 5 Bankr. at 742 (prosecutor's activities were not directed at criminal penalties but at enforcing payment of criminal sanctions).

46. *In re Alan I.W. Frank Corp.*, 19 Bankr. at 43 (creditor would gain unfair advantage over other unsecured creditors); *In re Reid*, 9 Bankr. at 832 (creditor would gain preferential treatment over other creditors).

is against the Bankruptcy Code policy.⁴⁷ As a result of this reasoning, some federal bankruptcy courts have held that criminal actions will be enjoined only when brought in bad faith.⁴⁸

Along similar lines, courts in other jurisdictions have enjoined the creditor from accepting any form of restitution from the debtor.⁴⁹ To support their decisions, these courts have relied on section 524(a)(2), the effect of discharge provision.⁵⁰ Case law has focused on a Supreme Court decision⁵¹ which held that any state legislation which frustrates the full effectiveness of federal law is invalid as a result of the application of the supremacy clause.⁵²

For example, in *In re Barnett*, the debtor had pled guilty to a criminal charge of writing a NSF check.⁵³ The following month the debtor filed a Chapter 13 petition.⁵⁴ The *Barnett* court enjoined the county attorney from requesting or recommending restitution and further stated that any such order would violate the effect of discharge provision.⁵⁵ Therefore, in jurisdictions which follow the *Barnett* reasoning, state criminal actions can legitimately proceed, provided that restitution is not requested.

Only one jurisdiction currently discharges outright a state court

47. *In re Reid*, 9 Bankr. 830 (Bankr. M.D. Ala. 1981).

48. See *supra* note 40.

49. See, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971) (state statutes which frustrate Bankruptcy Code are unconstitutional because of the supremacy clause); *In re Godfrey*, 472 F. Supp. 364 (M.D. Ala. 1979) (bankruptcy court prohibited debtor from paying and creditors from receiving any money in satisfaction of the debts); *In re Allman*, 43 Bankr. 840 (Bankr. D. Colo. 1984) (county prosecutor enjoined from revoking debtor's probation for failure to make restitution); *In re Redenbaugh*, 37 Bankr. 383 (Bankr. C.D. Ill. 1984) (creditor enjoined from requesting or receiving any form of restitution); *In re Holder*, 26 Bankr. 789 (Bankr. M.D. Tenn. 1982) (creditor will be enjoined from accepting any restitution which may result from the criminal process); *Johnson v. Lindsey*, 16 Bankr. 211 (Bankr. M.D. Fla. 1981) (bankruptcy court would enjoin state's attorney from using the criminal process to force the debtor to pay restitution); *In re Barnett*, 15 Bankr. 504 (Bankr. D. Kan. 1981) (county attorney enjoined from recommending or requesting restitution).

50. 11 U.S.C.A. § 524(a)(2) (West Supp. 1985). Section 524(a)(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act to collect, recover or offset any debt that was discharged in a bankruptcy proceeding. *Id.*

51. *Perez v. Campbell*, 402 U.S. 637 (1971).

52. *Id.* In *Perez*, Arizona enacted a statute which exempted from bankruptcy any judgments obtained in actions involving a motor vehicle accident. *Id.* at 642. The *Perez* court stated that the function of the Arizona statute closely resembled the function of the bankruptcy laws. *Id.* at 652. The Court concluded that because the Arizona legislature was attempting to carve out its own exception to the Bankruptcy Code, the Arizona statute was invalid because of the supremacy clause. *Id.*

53. *In re Barnett*, 15 Bankr. at 506.

54. *Id.* During the same month, three more criminal actions were filed against the debtor for additional NSF checks. *Id.* Under Kansas law, in addition to a fine or prison term, the court could require restitution to be paid to the victim. *Id.* at 507.

55. *Id.* at 512.

criminal order of restitution.⁵⁶ In *In re Brown*,⁵⁷ a Tennessee bankruptcy court held that a state criminal court order of restitution constituted debt and as such was dischargeable under the Bankruptcy Code.⁵⁸ The court relied on section 524(a)(2),⁵⁹ and the supremacy clause to support its holding. In *Brown*, the debtor, while intoxicated, drove his car into the victim's home causing physical damage.⁶⁰ Probation and an order of criminal restitution followed.⁶¹ The debtor failed to pay restitution and filed for liquidation under Chapter 7.⁶² The *Brown* court held that restitution constituted a debt dischargeable in bankruptcy, and accordingly enjoined the state prosecutor from seeking a revocation of the debtor's probation on the ground that he had discharged the restitution award.⁶³ The court further stated that all obligations incurred are dischargeable in bankruptcy.⁶⁴ Here, bankruptcy is not restricted to business and commercial transactions, but also includes state criminal orders of restitution.⁶⁵ Further, the *Brown* court added that section 524(a)(2) precluded any action taken to collect or recover a discharged debt, and that any order to collect a discharged debt would be found to be void under the supremacy clause.⁶⁶ Therefore, at least in Tennessee, a state court criminal order of restitution is dischargeable outright, and any action to the contrary is void.

Jurisdictions which enjoin either the state criminal proceeding or criminal restitution itself, rely heavily upon the United States Supreme Court's decision in *Younger v. Harris*.⁶⁷ The *Younger* court stated that a federal court may enjoin a state criminal court proceeding when the prosecution is acting in bad faith and without

56. *In re Brown*, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984) (a restitution award is dischargeable in bankruptcy).

57. *Id.*

58. *Id.*

59. *Id.* at 829. The *Brown* court stated that section 524(a)(2) operates as a permanent injunction against the collection of any debt discharged. *Id.* If Congress wanted to limit the effect of § 524(a)(2), it would have done so as in § 362(b)(1). *Id.*

60. *Id.* at 821. The new § 523(a)(9) of the Bankruptcy Code rectifies any questions the bankruptcy court may have regarding the dischargeability of a similar debt. Section 523(a)(9) accomplishes this by exempting from discharge any liability incurred while operating a motor vehicle under the influence of alcohol. 11 U.S.C.A. § 523(a)(9) (West Supp. 1985).

61. *In re Brown*, 39 Bankr. at 821.

62. *Id.* The district attorney then attempted to have the debtor's probation revoked because of the debtor's failure to pay restitution. *Id.* The debtor then sought a permanent injunction precluding revocation of his probation. *Id.*

63. *Id.*

64. *Id.* at 822.

65. *Id.*

66. *Id.* at 829. The *Brown* court stated that the supremacy clause and the holding in *Perez v. Campbell*, 402 U.S. 657 (1971), bind all courts. *In re Brown*, 39 Bankr. at 829. See *supra* notes 46 and 59.

67. 401 U.S. 37 (1971).

hope of obtaining a valid conviction.⁶⁸ This reasoning, however, fails to observe that the debtor's criminal conduct is the reason for his appearance before the court, and not the creditor's efficient use of the legal system. The Bankruptcy Code exempts from discharge any debt incurred as a result of obtaining money, property, or services by false pretenses, false representations, or actual fraud.⁶⁹ In all of the NSF check cases, the debtor has received money,⁷⁰ property,⁷¹ or services⁷² in exchange for a fraudulently written check. Therefore, under section 523, the state court order of criminal restitution, even if characterized as debt, should not be dischargeable. In either situation, whether restitution is or is not characterized as debt, creditors may still bring a criminal action against the debtor for the NSF check. Such a proceeding has been instituted in both situations, but due to the timing involved in the proceedings, the criminal restitution was enjoined in one instance and in the other it was not.⁷³

In some jurisdictions, the entire criminal proceeding is enjoined, while in others, the criminal proceeding is allowed to continue but the bankruptcy court prohibits payment of any form of restitution.⁷⁴ Enjoining only restitution could be highly detrimental to the creditor. In NSF cases it is common for the prosecution to negotiate a *nolle prosequere* pleading in exchange for restitution.⁷⁵ However, such

68. *Younger*, 401 U.S. at 54. A *Younger* rationale equates creditor actions with actions brought in bad faith. Creditors are exercising a legal right given to them by the state legislatures. If creditors act in bad faith when they utilize the NSF check laws, then all of the NSF check laws should be changed or repealed. The holding in *Younger* has been misapplied.

69. 11 U.S.C.A. § 523(a)(2) (West Supp. 1985).

70. See, e.g., *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982); *In re Pellegrino*, 42 Bankr. 129 (Bankr. D. Conn. 1984).

71. See, e.g., *In re Padgett*, 37 Bankr. at 281; *In re Whitaker*, 16 Bankr. at 918; *In re Reid*, 9 Bankr. at 831.

72. *In re C.H. Stuart, Inc.*, 12 Bankr. 85, 86 (Bankr. W.D. N.Y. 1981); *In re Caldwell*, 5 Bankr. 740 (Bankr. W.D. Va. 1980).

73. Compare *In re Redenbaugh*, 37 Bankr. 383 (Bankr. C.D. Ill. 1984) (creditor enjoined from accepting any type of restitution) and *In re Holder*, 26 Bankr. 789 (Bankr. M.D. Tenn. 1982) (as a result of criminal proceeding creditor could not accept restitution) and *Johnson v. Lindsey*, 16 Bankr. 211 (Bankr. M.D. Fla. 1981) (criminal proceeding will not be enjoined but state's attorney will be enjoined from requesting restitution) with *In re Vik*, 45 Bankr. 64 (Bankr. N.D. Iowa 1984) (restitution order is not a debt and not dischargeable) and *In re Pellegrino*, 42 Bankr. 129 (Bankr. D. Conn. 1984) (state court order of restitution did not create a "debt" under the Bankruptcy Code) and *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983) (restitution obligation not a dischargeable "debt" in bankruptcy).

74. Compare *In re Padgett*, 37 Bankr. 20 (Bankr. W.D. Ky. 1983) (state court criminal proceeding will be enjoined when it violates the automatic stay) and *In re Whitaker*, 16 Bankr. 917 (Bankr. M.D. Tenn. 1982) (state court criminal proceeding will be enjoined when creditor acts in bad faith); with *In re Redenbaugh*, 37 Bankr. 383 (Bankr. C.D. Ill. 1984) (creditor enjoined from accepting any type of restitution) and *In re Holder*, 26 Bankr. 789 (Bankr. M.D. Tenn. 1982) (as a result of criminal proceeding creditor could not accept restitution).

75. See, e.g., *In re Padgett*, 37 Bankr. at 22; *In re Whitaker*, 16 Bankr. at 922; Lewis & Jennings, *Bad Checks and Bankruptcy*, FLA. B.J. 532 (October 1983).

negotiation places the prosecution in a "Catch-22" position. If negotiation is attempted by the prosecution, it may be equated to bad faith and the restitution will be enjoined.⁷⁶ The prosecution is then left with the only other alternative: seeking incarceration. Ironically, in an effort to protect the debtor, the bankruptcy court may actually be forcing a jail sentence upon him.⁷⁷

The supremacy clause and section 524(a)(2) are integral parts in the effective discharge of criminal restitution. All of the cases under this category vitiate any possibility that a state criminal order of restitution will be obtained or paid. This problem can be avoided by characterizing restitution as nondebt.⁷⁸ Currently, some bankruptcy courts characterize restitution as "debt," the payment of which conflicts with the supremacy clause and the effect of discharge provision. However, where restitution is not considered debt, there is no conflict and the problem is resolved.⁷⁹

Nondischargeable Restitution

The rationale underlying the second category, nondischargeable restitution, is that restitution is not a debt and, therefore, not dischargeable. The courts appear to utilize two separate views to justify such a holding. The first view stands for the proposition that state court ordered criminal restitution is not a dischargeable bankruptcy debt and the bankruptcy courts do not have adequate jurisdiction to enjoin the state court proceeding.⁸⁰ The second view is that criminal restitution is simply not a debt contemplated by the Bankruptcy Code and, therefore, not dischargeable.⁸¹ For example, in *In re Button*,⁸² a criminal was ordered to make restitution after he pled guilty to a petty larceny violation.⁸³ The *Button* court held that restitution

76. Lewis & Jennings, *supra* note 75, at 533.

77. If the state court did impose upon the criminal offender a jail sentence instead of probation and restitution, the debtor would clearly not be able to discharge the jail sentence in bankruptcy. See *In re Vik*, 45 Bankr. 64, 69 (Bankr. N.D. Iowa 1984). Therefore, the alternative to incarceration should not be dischargeable. See Lewis & Jennings, *supra* note 75, at 533.

78. See *infra* text accompanying notes 110-115.

79. See *supra* text accompanying notes 37-38.

80. See, e.g., *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982) (criminal offender can be ordered to pay restitution after debt occasioned by the offense has been discharged); *Matter of Davis*, 15 Bankr. 442 (Bankr. D. Del. 1981) (bankruptcy court did not have the power to issue permanent injunction against the state criminal court and restitution was not enjoined), *aff'd*, 18 Bankr. 701 (Bankr. D. Del.), *aff'd*, 691 F.2d 176 (3d Cir. 1982); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981) (restitution not dischargeable and bankruptcy court did not have jurisdiction to interfere with state court's sentence).

81. See *infra* text accompanying notes 92-98.

82. 8 Bankr. 692 (Bankr. W.D.N.Y. 1981).

83. *Id.* at 693. The offender made partial repayment to the victim and subsequently filed for bankruptcy. *Id.* The debt was then discharged without objection

was not a dischargeable debt, and the bankruptcy court did not believe it had jurisdiction to interfere with the state criminal proceeding.⁸⁴ The court further suggested that a bankruptcy order had no effect on a state criminal court order of restitution.⁸⁵

Although the analysis employed in *Button* for determining that nondischargeability of restitution is within the ambit of the Bankruptcy Code, the court's statement that it did not have jurisdiction to interfere with the state criminal proceeding was without merit. Section 2283 of the United States Code provides that a federal court has no power to enjoin a state court proceeding except where expressly authorized to do so.⁸⁶ Section 105 grants that authority to the bankruptcy court and provides that a bankruptcy court may issue any process or judgment that is necessary to carry out the intent of the Bankruptcy Code.⁸⁷ Under section 105, a federal bankruptcy court has the power to enjoin a state criminal court proceeding, and should do so when the bankruptcy laws are abused.⁸⁸ Therefore, in those jurisdictions which follow *Button*, restitution is not a debt, but a criminal sanction, and thus not subject to discharge in bankruptcy.

Courts in other jurisdictions, however, are not concerned with the exceptions to dischargeability, the effect of discharge provision, the automatic stay provision, the dischargeability provision or the supremacy clause. These courts instead look to the literal definitions of "debt," "claim," and "creditor" and have determined that restitution is not a debt contemplated by Congress in the Bankruptcy Code.⁸⁹ Some of these courts have realized that restitution was not

from the creditor and the debtor was charged with violating parole because he did not make full restitution. *Id.*

84. *Id.* at 694. The *Button* court concluded that restitution was not dischargeable because the definition of "debt," "claim," and "creditor," do not encompass criminal restitution and because criminal restitution "does not create a financial debt between private individuals, but rather a duty to the People of the State." *Id.*

85. *Id.* The *Button* court, citing *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483 (N.Y. Sup. Ct. 1974), stated that restitution did not create a debtor-creditor relationship. *Id.* Furthermore, the bankruptcy courts should not be used as the last refuge for criminals seeking to avoid criminal responsibility. *Id.*

86. 28 U.S.C. § 2283 (1982).

87. 11 U.S.C. § 105(a) (1982).

88. *Matter of Davis*, 691 F.2d 176, 178 (3d Cir. 1982).

89. See, e.g., *In re Moore*, 111 F. 145 (Dist. Ct. W.D. Ky. 1901) (judgment imposing a fine as punishment for violating a state statute is not a debt provable in bankruptcy); *In re Vik*, 45 Bankr. 64 (Bankr. N.D. Iowa 1984) (pre-petition criminal order of restitution not equal to debt and not dischargeable); *In re Pellegrino*, 42 Bankr. 129 (Bankr. D. Conn. 1984) (restitution not a debt contemplated by Bankruptcy Code and it is not dischargeable); *In re Mead*, 41 Bankr. 838 (Bankr. D. Conn. 1984) (order of restitution not a debt and enforcement thereof did not violate automatic stay); *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983) (primary purpose of restitution is rehabilitation, therefore, restitution is not equal to a debt and not dischargeable); *In re Magnifico*, 21 Bankr. 800 (Bankr. D. Ariz. 1982) (restitution equal to rehabilitation not debt, therefore, restitution is not dischargeable); accord *In re Newton*, 15 Bankr. 708 (Bankr. N.D. Ga. 1981) (restitution is a debt but not dis-

intended to create a debtor-creditor relationship.⁹⁰ These courts characterize restitution as a process whereby criminals are rehabilitated and made to understand that society has been injured by their actions.⁹¹

In *In re Johnson*,⁹² for example, the debtor pled guilty to the criminal offense of fraud for authorizing 150 NSF checks.⁹³ The *Johnson* court recognized only two exceptions to a Chapter 13 bankruptcy, and stated that restitution was not one of them.⁹⁴ The court concluded that the only alternative was to find that restitution was not classified as a debt, and consequently not dischargeable in bankruptcy. To determine the dischargeability of restitution, the bankruptcy court looked to the definition of "debt," which means liability on a claim,⁹⁵ "claim," which means a right to payment,⁹⁶ and "creditor," which generally means an entity that has a claim against the debtor that arose before filing.⁹⁷ From these definitions the *Johnson* court concluded that criminal restitution was not a "debt" and the victim was not a "creditor" as contemplated by the Bankruptcy Code.⁹⁸ Therefore, there was nothing to discharge in bankruptcy.

Thus, under the second category, courts employ reasoning which removes restitution from dischargeability by characterizing it as nondebt.⁹⁹ In evaluating the definitions of "debt,"¹⁰⁰ "claim,"¹⁰¹

chargeable under Georgia law).

90. See, e.g., *In re Johnson*, 32 Bankr. at 616; *In re Magnifico*, 21 Bankr. at 803; *In re Newton*, 15 Bankr. at 709.

91. See, e.g., *In re Vik*, 45 Bankr. at 67; *In re Johnson*, 32 Bankr. at 616; *In re Magnifico*, 21 Bankr. at 803.

92. 32 Bankr. 614 (Bankr. D. Colo. 1983).

93. *Id.* at 615. The offender was sentenced to a community correction facility and ordered to pay restitution. *Id.* at 616. Five months later, the offender filed a Chapter 13 petition. *Id.*

94. *Id.* The *Johnson* court looked to 11 U.S.C. § 1328(a) to determine whether criminal restitution payments are dischargeable. *Id.* at 615. The court then determined that section 1328 only provides two situations which are exempt from discharge. The court did not specify what the two exemptions were but emphasized that restitution was not one of them. *Id.* Therefore, the *Johnson* court decided that in order for restitution not to be dischargeable, it was not a debt. *Id.* at 616.

95. *Id.* at 615.

96. *Id.* at 616.

97. *Id.*

98. *Id.*

99. See *supra* text accompanying notes 80-98.

100. 11 U.S.C. § 101(11) (1982). Section 101(11) provides that "'a debt' means any liability on a claim." *Id.*

101. 11 U.S.C. § 101(4) (1982). Section 101(4) defines 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; [or]

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

and "creditor,"¹⁰² courts have reasoned that restitution is not a form of debt dischargeable under the provisions of the Bankruptcy Code.¹⁰³ These federal bankruptcy courts allow state courts to decide the criminality of the offender's actions. The criminal proceeding is specifically exempt from the automatic stay provision and no debtor-creditor relationship develops from any order entered at the proceeding.¹⁰⁴ If appropriate, the state court can order restitution. The imposition of criminal restitution does not necessarily conflict with the underlying purposes of the bankruptcy laws because criminal restitution is a statutory penalty for violating the law.¹⁰⁵

Restitution is considered rehabilitative. It is meant to give an unhardened criminal the opportunity to rectify a previous wrong. The debtor's mark in a NSF check case is the victim of illegal conduct, unlike the unsecured creditor who is the victim of misfortune.¹⁰⁶ In addition, restitution will not afford the NSF check holder preferential status because restitution will be paid out of post-petition earnings, whereas the unsecured creditor takes from pre-petition assets.¹⁰⁷ Consequently, because under this view restitution is not considered debt, no problem exists with the supremacy clause and section 524(a)(2).¹⁰⁸ Jurisdictions utilizing this reasoning promote the kind of relief Congress intended for the financially troubled, while denying relief to those who are criminally inclined.¹⁰⁹

puted, undisputed, secured or unsecured. . .

Id.

102. 11 U.S.C. § 101(9) (1982). Section 101(9) defines creditor as an:

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

Id.

103. Courts suggest that the definitions of "debt," "claim," and "creditor" do not encompass "criminal restitution." *In re Vik*, 45 Bankr. at 67; *In re Pellegrino*, 42 Bankr. at 132.

104. *See supra* note 90.

105. Mehler, *Criminal Prosecution and Restitution under the Bankruptcy Code*, ANN. SURV. AM. L. 810, 821 (1983).

106. *See id.* at 830.

107. *Id.* at 822 n.36.

108. *Id.* at 831-32. Mehler contends that the supremacy clause problem can be resolved by treating restitution as nondebt. *Id.* The state's restitution should be viewed as a criminal sentence and as a by-product of the state court criminal proceeding. *Id.* at 831. Mehler concludes that if criminal restitution continues to be classified as debt, the supremacy clause problem will continue to exist. *Id.*

109. Congress did not intend for the bankruptcy laws to become a haven for criminal offenders. *In re Johnson*, 32 Bankr. 615, 616 (Bankr. D. Colo. 1983). To emphasize this point, Congress enacted section 362(b)(1), which allowed a criminal action to proceed in spite of a bankruptcy filing. *Id.*

PREVENTING THE DISCHARGE OF CRIMINAL RESTITUTION

The contradictory results that have evolved from the nonuniform application of "uniform" bankruptcy laws clearly indicate a need for reform. Two alternative proposals to correct this problem will be advanced here. Both proposals effectuate the debtor relief sought by the bankruptcy laws, yet preserve the states' rights in adjudicating criminal proceedings in which restitution is sought.

Reform can be accomplished through either modification of the definitional provisions, section 101, or through modification of the nondischargeable provision, section 523. The first proposal is based on the bankruptcy courts' interpretation of the definition provision, section 101,¹¹⁰ and the term "criminal restitution" itself.¹¹¹ Under this proposal, section 101 must be amended: first, to contain a definition of criminal restitution;¹¹² second, to define the term "debt" so as to exclude an order of criminal restitution;¹¹³ third, so that the term "claim" does not include an order of criminal restitution;¹¹⁴ and fourth, so that the term "creditor" does not include a criminal restitution payee.¹¹⁵

110. See *supra* note 91.

111. *Black's Law Dictionary* defines "criminal restitution" as "restitution programs under which the criminal offender is required to repay, as a condition of his sentence, the victim or society in money or services." BLACKS LAW DICTIONARY 1181 (5th ed. 1979).

Courts have suggested that "criminal restitution" is defined as a condition of probation which is intended to be rehabilitative in nature, it can result in full or partial payment of pecuniary damages suffered by victims in addition to fulfilling the state's penalogical interests. See *In re Vik*, 45 Bankr. at 66-67; *In re Pellegrino*, 42 Bankr. at 137; *Matter of Cox*, 33 Bankr. at 661; *In re Magnifico*, 21 Bankr. at 803.

112. Section 101(10) if enacted as proposed should read:

(10) "criminal restitution" means -

- (A) a condition of probation which is intended to be rehabilitative in nature;
- (B) an amount which may result in full or partial payment of pecuniary damages suffered by the victims;
- (C) a type of penalogical sentence that results from a criminal conviction in which no debtor-creditor relationship exists; and
- (D) an amount which is not dischargeable in a bankruptcy proceeding.

113. Section 101(11) "debt" will have to be changed to section 101(12) if the "criminal restitution" definition is adopted. The new "debt" definition, section 101(12) should read:

(12) "a debt" means

- (A) liability on a claim; and
- (B) does not include any order of criminal restitution.

114. Section 101(4) "claim" will have to be amended to read:

(4) "claim" - means . . .

- (C) does not include any right to receive an amount from a court order of criminal restitution.

115. Section 101(9) "creditor" will have to be amended to read:

(9) "creditor" means . . .

- (D) those entities contained in subsections (A), (B), and (C) of this paragraph and not any person or entity that is designated a criminal restitution payee.

Amending the definitions in section 101 will eliminate the current ambiguities which gave rise to the differential interpretations by the federal bankruptcy courts. The *Button*¹¹⁶ and *Johnson*¹¹⁷ courts have applied the essential features of this proposal. Those courts presently interpret the definitions of "debt," "claim," and "creditor" so that the term "criminal restitution" does not fall within the ambit of these definitions.¹¹⁸ Under those interpretations, criminal debtors are not allowed to discharge a state criminal court order of restitution via the bankruptcy courts.¹¹⁹ Moreover, since restitution would not be classified as a debt, there is no conflict between section 524(a)(2) and the supremacy clause.¹²⁰ Adoption of this proposal would: (1) allow the criminal action to proceed under the exception to the automatic stay provision in section 362(a); (2) eliminate the supremacy clause and effect of discharge provision issues; and (3) reduce the possibility that bankruptcy laws will become a haven for criminal offenders.

The second proposal is to amend sections 523(a)(2) and 523(a)(7), which identify nondischargeable types of debts. Section 523(a)(2), the false pretenses provision, currently provides an exception to discharge for money, property, or services obtained as a result of fraudulent misrepresentations either actual or in writing.¹²¹

116. *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981).

117. *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983).

118. The *Button* and *Johnson* courts have essentially enacted this proposal through case law. The same result occurs without formal legislation. However, the application is not "uniform." Only legislative reform will allow for the "uniform" application of the bankruptcy laws.

119. See *supra* text accompanying notes 80-105.

120. See Mehler, *supra* note 105, at 831-32. See notes 37-38 and accompanying text.

121. 11 U.S.C.A. § 523(a)(2) (West Supp. 1985). Section 523(a)(2) currently provides in part:

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

2) for obtaining money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -

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

B) use of a statement in writing -

i) that is materially false;

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

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

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

Id.

The proposal set forth amends section 523(a)(2) by adding subsection (D). See *infra* note 122. The proposal attempts to resolve the criminal restitution problem by allowing an exception for a check returned NSF, if the maker is convicted under a

This subsection should be modified to specifically include debts which arise from checks returned for non-sufficient funds.¹²² Further, section 523(a)(7) provides that any debt for fines, penalties or forfeiture paid to a governmental unit are exempt from discharge.¹²³ This section should be modified to expressly include court orders of criminal restitution.¹²⁴ Amending the aforementioned sections eliminates the uncertainty and inconsistency currently experienced in determining dischargeability on the basis of whether restitution is a debt. This proposal, by carving out express exceptions for criminal restitution, would also eliminate any problem involving the supremacy clause and the effect of discharge provision.

The decisions which follow the "restitution enjoined or discharged" reasoning could no longer provide bankruptcy courts with any basis for enjoining or discharging a criminal order of restitution. Additionally, even if bankruptcy courts utilizing the "nondischargeable restitution" reasoning, classify restitution as a debt, they would still be prevented from discharging or enjoining that restitution. Providing for restitution within section 523 also takes the subjectivity out of the bankruptcy court's process of determining the bad faith of the prosecution.¹²⁵ These provisions would allow the prosecution to seek restitution as a viable and socially acceptable alternative to incarceration.

state's NSF check law. *See infra* note 122.

122. Section 523(a)(2) should be amended to read:

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

(2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by . . .

(D) the issuance of any check returned not sufficient funds (NSF) in which the drawer can, will be, or has been convicted under the NSF check laws.

123. 11 U.S.C. § 523(a)(7) (1982). Section 523(a)(7) currently provides:

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

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

11 U.S.C. § 523(a)(7) (1982). The proposal set forth amends section 523(a)(7) to specifically allow for a criminal restitution exception. *See infra* note 124.

124. Section 523(a)(7) should be amended to read:

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

(7) to the extent such debt is for a fine, penalty, criminal order of restitution, or forfeiture payable to and for the benefit of a governmental unit.

If the courts which follow *Button* and *Johnson* should decide to discontinue treating restitution as a non-debt, the proposed amendments to section 523 will ensure the "uniform" treatment of criminal restitution. *See supra* text accompanying notes 80-98.

125. *See Mehler, supra* note 105, at 825.

CONCLUSION

Congress is authorized by the United States Constitution to establish a "uniform" set of bankruptcy laws. Congress has attempted to do so, only to fail at the hands of the federal bankruptcy courts. Currently, the bankruptcy courts employ five different methods to determine the dischargeability of criminal restitution with inconsistent and contradictory results. This chaotic application of the "uniform" set of bankruptcy laws does not meet the standard originally intended by the drafters of the Constitution.¹²⁶ Congress should amend the current Bankruptcy Code and rid the bankruptcy courts of the subjective inconsistency with which they are plagued. The necessary legislation should be enacted to effectively dispose of the bankruptcy loophole, thereby preventing criminals from taking advantage of the inconsistent application of the Bankruptcy Code by the bankruptcy courts in criminal restitution cases.

Michelangelo Scafidi

126. Five states employ more than one view. Alabama: *In re Godfrey*, 472 F. Supp. 364 (N.D. Ala. 1979) (bankruptcy court can enjoin criminal proceeding); *In re Bray*, 12 Bankr. 359 (Bankr. M.D. Ala. 1981) (bankruptcy court can enjoin state court from granting restitution); *In re Reid*, 9 Bankr. 830 (Bankr. M.D. Ala. 1981) (state court proceeding *must* be enjoined). Colorado: *In re Allman*, 43 Bankr. 840 (Bankr. D. Colo. 1984) (county prosecutor enjoined from requesting repayment of restitution); *In re Johnson*, 32 Bankr. 614 (Bankr. D. Colo. 1983) (restitution not dischargeable in bankruptcy). Georgia: *In re Rose*, 37 Bankr. 876 (Bankr. N.D. Ga. 1984) (debts tainted by fraud are dischargeable under chapter 13); *Matter of Cox*, 33 Bankr. 675 (Bankr. M.D. Ga. 1983) (criminal prosecution debts are not dischargeable in bankruptcy); *In re Newton*, 15 Bankr. 708 (Bankr. N.D. Ga. 1981) (criminal restitution not dischargeable in bankruptcy). New York: *In re HBG Servicercenter, Inc.*, 45 Bankr. 668 (Bankr. E.D.N.Y. 1985) (restitution not a debt contemplated by Bankruptcy Code); *In re C.H. Stuart, Inc.*, 12 Bankr. 85 (Bankr. W.D.N.Y. 1981) (state court proceeding will not be enjoined by bankruptcy court); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981) (restitution not a debt dischargeable in bankruptcy). Tennessee: *In re Brown*, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984) (restitution is a debt dischargeable in bankruptcy); *In re Holder*, 26 Bankr. 789 (Bankr. M.D. Tenn. 1982) (state court proceeding not enjoined but creditor prohibited from accepting restitution); *In re Wilson*, 12 Bankr. 363 (Bankr. M.D. Tenn. 1981) (debts incurred through fraud are not dischargeable in bankruptcy).