NOTES

ENDING RESTITUTION'S GILDED AGE: BANKRUPTCY, CRIMINAL LAW EXCEPTIONALISM, AND FORGIVENESS

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INTRODUCTION

The criminal justice system bills defendants for the distribution of justice. Defendants are subject to legal financial obligations at all stages of their case that can metastasize into unpayable debts. These financial obligations uniquely impact indigent defendants, who may be incentivized to minimize costs instead of minimizing their chances of conviction. If convicted, indigent defendants may face debts that restrict their civil rights indefinitely.

Restitution—which requires an offender to compensate the victim—contributes to the offender's overall legal financial debt. It is exceedingly difficult to absolve a restitution obligation if an offender lacks the money to pay it off. Bankruptcy,

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* This note reflects my personal views and not those of any past, current, or future institutions with which I may be associated.

which allows for the legal "discharge" of civil debts, is generally unavailable for criminal debts owed to the government.[1] A decades-old Supreme Court case, *Kelly v. Robinson*,[2] held that restitution falls under the non-dischargeable category in Chapter 7 bankruptcy. The Court found that despite the fact that restitution looks like a civil debt, it is a penal sanction for the benefit of the state.[3] However, the Ninth Circuit recently questioned *Kelly* in *Albert-Sheridan v. State Bar of California* (*In re Albert-Sheridan*), finding *Kelly*'s analysis questionable and deciding to "cabin *Kelly*'s reach" from discovery sanctions levied against a lawyer for misconduct.[4]

Considering current scholarship and *Albert-Sheridan*'s distaste for *Kelly*, this Note offers a new critique of *Kelly*. First, this Note argues that while restitution is a "punitive" measure, that fact alone should not make it non-dischargeable under the text of the bankruptcy code. Second, this Note argues that *Kelly* exposes an arbitrary distinction between criminal law and civil law and that *Kelly*'s goals of punishment and rehabilitation could be better achieved through debt forgiveness.

Part I explains the problem of criminal debt, analyzes the goals and effects of restitution, and surveys the legal landscape that prevents bankruptcy from discharging restitution payments. Part II argues—contrary to *Kelly*—that although restitution is punitive in nature, it is ultimately not for the benefit of the state. Finally, Part III argues that *Kelly*'s holding is normatively undesirable because it is a product of an arbitrary distinction between the criminal and civil law, and because debt forgiveness has greater utilitarian and moral value.

I. CRIMINAL DEBT AND RESTITUTION

A. The Landscape of Legal Financial Obligations

This Note focuses on restitution obligations; however, restitution must be contextualized by the entirety of legal financial obligations charged to an offender. Imposed by courts on top of criminal sentences, legal financial obligations can be divided into three broad categories: fines, fees, and restitution.[5] Fines are "penalties imposed on defendants after conviction" that are intended to punish the offender and deter further criminal conduct, while fees are revenue-generating charges that often "bear no relation to the offense committed."[6] Restitution refers to a legal

1. 11 U.S.C. § 523(a)(7).
2. 479 U.S. 36 (1986).
3. *Id.* at 52–53.
4. 960 F.3d 1188, 1195 (9th Cir. 2020).
5. For simplicity's sake, this Note divides legal financial obligations into the three aforementioned categories. *Questions and Answers About Legal Financial Obligations (LFOs)*, ACLU WASH., https://www.aclu-wa.org/questions-and-answers-about-legal-financial-obligations-lfos#:~:text=Legal%20financial%20obligations%2C%20or%20LFOs,a%20felony%20case%20is%20%242%2C540 (last visited Oct. 25, 2023).
6. MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES

financial obligation that is payable to the victim.[7]

Despite the term's insipidity, legal financial obligations pose major burdens for offenders. While the full extent of outstanding legal financial obligations is unknown,[8] in 2002 the United States General Accounting Office identified $25 billion in outstanding criminal justice debt ($8 billion of which was not the result of white-collar financial fraud).[9] That number represented a significant increase over a 1995 figure, which had placed total outstanding criminal debt at $6 billion.[10] In 2008, estimates of the total amount of outstanding legal financial obligations in the United States "indicate[d] that 'tens of millions' ha[d] been charged [as] criminal justice debt aggregate[d] [to] more than $50 billion."[11]

Fines and fees accrue at all stages of the criminal justice process and can, for indigent defendants, snowball into unpayable burdens. Fees pile up "from the moment one is stopped by the police (e.g., fees for law enforcement costs and pretrial detention), to trial (e.g., public-defender fees or jury costs), through sentencing (e.g., incarceration or probation costs, statutory fines, surcharges, and restitution), and collections (e.g., interest charges or collection fees)."[12] In Indiana, for example, defendants with felony or misdemeanor charges may be charged with document fees, document storage fees, public defense administration fees, "marijuana eradication program" fees, court administration fees, late payment fees, and

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AND TEN COUNTIES 7 (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines (surveying 1,000 proceedings in seven counties to find ability-to-pay hearings were rarely held).

7. *See infra* Section I.B.

8. MENENDEZ ET AL., *supra* note 6, at 10 ("No one knows how much [criminal justice debt] is owed in total because few states and courts track [that] information.").

9. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 2, 9 (2004).

10. *Id.* at 1, 8.

11. Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 849 (2017) (footnote omitted) (citing Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 516 (2011); LAUREN BROOKE-EISEN, BRENNAN CTR. FOR JUST., CHARGING INMATES PERPETUATES MASS INCARCERATION, BRENNAN CTR. FOR JUSTICE 1 (2015), https://www.brennancenter.org/our-work/research-reports/charging-inmates-perpetuates-mass-incarceration); *Legislative Proposals Before the 110th Congress to Amend Federal Restitution Laws: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 4 (2008) (statement of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism, and Homeland Sec., H. Comm. on the Judiciary) ("The Justice Department estimates that the amount of uncollected Federal criminal debt increases with each passing year, jumping from $41 billion in fiscal year 2005 to nearly $46 billion in fiscal year 2006 and over $50 billion in fiscal year 2007.").

12. Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 22, 22–23 (2017); *see also* DOUGLAS EVANS, RSCH. & EVALUATION CTR., JOHN JAY COLL. OF CRIM. JUST., THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 2 (2014), https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf ("Every state has a unique set of criminal fees, which could include fees for pre-trial detention, security in the courtroom, medical expenses during incarceration, community supervision, drug screens, treatment classes, transfer of community supervision to a different state, registration (for convicted sex offenders) and electronic monitoring.").

drug-alcohol "countermeasure[]" fees.[13] In Florida, a second-degree misdemeanor for graffiti can yield up to a $500 fine and sixty days in jail, but additional procedural fees can exceed $750 *before* late charges for nonpayment;[14] if a convicted defendant uses a public defender, they will be subject to another minimum $50 fee.[15] Many states also impose penalties for late payments. Washington charges 12 percent interest on "outstanding [legal financial obligations]," while Michigan has a penalty of 20 percent after fifty-six days of nonpayment.[16]

Even alternative programs for rehabilitation are not necessarily free of fees; there is always a cost associated with the administration of criminal "justice." Fees are one way for the state to recoup the costs of programs like rehabilitative services. For example, states charge defendants "directly or outsourc[e] the provision of such [alternative] services."[17] Some defendants are "thus required to foot the bill for their own government-imposed alternative punishment."[18]

Put simply, the attachment of legal financial obligations at every step of the criminal justice process creates an enormous mass of uncollected debt. The first result of this phenomenon is financial oppression. Lower-income defendants suffer the most from legal financial obligations, which can accumulate into greater and greater societal disadvantages and reproduce inequality.[19] The second result is administrative muck. The larger the debt burden grows, the more difficult it will be for the government to collect it.[20] Therefore, new solutions are needed to combat

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13. Steven H. David & Cale J. Bradford, *Crime Does Not Pay: Understanding Criminal Debt*, 50 IND. L. REV. 1051, 1054–58 (2017).

14. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 125 (2018). Natapoff also notes that in Texas, graffiti creates a potential charge of up to $444 and in Oklahoma, "misdemeanor fees can total as much as $1,000." *Id.*

15. FLA. STAT. ANN. § 938.29(1)(a) (West 2022). *See also* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 324 (2009) (analyzing the practices of "recoupment" and "contribution" that shift the costs of public defenders to defendants).

16. NATAPOFF, *supra* note 14, at 125.

17. Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C. R.-C.L. L. REV. 1, 4 (2020).

18. *Id.*

19. *See* Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1789 (2010); *see also* John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, 44 A.B.A. HUM. RTS. MAG. (2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/ ("In jurisdictions throughout the United States, monetary payments for infractions, misdemeanors, or felonies typically do not consider a defendant's inability to pay and are instead determined based on offense type, either statutorily or through judicial discretion. These practices entrench poverty in communities across the country, especially minority communities.").

20. *See Legislative Proposals Before the 110th Congress to Amend Federal Restitution Laws: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 20 (2008) (statement of Sen. Byron Dorgan) ("There is $50 billion owed. Now, why is that the case? Because, in most cases, it is the back room at the U.S. Attorney's Office that is asked to collect these things, and they are working up in the front room on prosecutions and so on, and precious little attention is paid to restitutions and

excessive legal financial debt—even if those solutions only address a small portion of a massive problem.

B. Restitution and the Inability to Pay

Restitution is a statutory device[21] that allows—or compels—a court to create a compensatory financial obligation payable to the victim of a crime.[22] Restitution is used in federal court as either a "legal presumption . . . in any case in which the offense caused harm to a victim"[23] or as a compulsory requirement.[24] Similar to civil damages, courts base restitution awards on financial harm incurred as a result of crime[25] but need not necessarily follow specific criteria.[26] For example, federal restitution "ordinarily must cover the full extent of a victim's losses . . . no more and no less, even though the defendant may never be able to make full restitution."[27] However, without a standardized method for estimating the dollar amount of harm, significant discretion is left to the courts.

But restitution is not just compensation. It is a punitive device: "[t]he desire to 'make victims whole' accompanies the desire, figuratively and literally, to 'make criminal defendants pay.'"[28] Restitution may be awarded atop incarceration, other

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fines."). Subsequently, debts owed by those with the means to evade the consequences associated with being indebted to the government will also be harder to collect:

> White-collar crime perpetrators who have been judged guilty and ordered restitution: expensive trips overseas, jewelry, fancy cars, million-dollar homes, spending thousands of dollars a month on entertainment. These are people who have been ordered by the court to pay restitution, who haven't done so, and yet have found ways to spend this money on overseas trips and fancy homes and so on.

Id.

21. United States v. Dickerson, 370 F.3d 1330, 1335 (11th Cir. 2004) ("A federal district court has 'no inherent authority to order restitution, and may do so only as explicitly empowered by statute.'" (quoting United States v. Hensley, 91 F.3d 274, 276 (1st Cir. 1996))).

22. *See, e.g.*, 18 U.S.C. § 3663(a)(1)(A); N.Y. PENAL LAW § 60.27 (MCKINNEY 2023); CAL. PENAL CODE § 1202.4(a)(1)(B) (West 2022); TEX. CODE CRIM. PROC. ANN. art. 42.037(a) (West 2021). Federally, "victim" is a defined term meaning "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . . ." 18 U.S.C. § 3663(a)(2).

23. CATHERINE M. GOODWIN, FED. CRIM. RESTITUTION § 1:1 (2023); *see also* Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117, 117–18 (1980) ("[A] restitutive theory of justice . . . views crime as an offense by one individual against the rights of another." (quoting Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 GEO. J. LEGAL ETHICS 279, 287–88 (1977))).

24. *See, e.g.*, 18 U.S.C. § 3663A(b)(1)–(4) (requiring that courts assign restitution to compensate for the value of lost or stolen property, bodily injury, funeral services, and more); 18 U.S.C. § 3663(a)(1)(A) (providing for discretionary restitution).

25. *See, e.g.*, 18 U.S.C. § 3663(b)(1)(B)(i)–(ii) (describing situations where the offender has to pay for the value of damaged, lost, or destroyed property); *see also* Paroline v. United States, 572 U.S. 434, 459–61 (2014) (discussing how restitution is calculated).

26. The Supreme Court has found it "neither necessary nor appropriate to prescribe a precise algorithm for determining the proper restitution amount." *Paroline*, 572 U.S. at 459–60.

27. CHARLES DOYLE, CONG. RSCH. SERV., RS22708, RESTITUTION IN FEDERAL CRIMINAL CASES: A SKETCH (2019).

28. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97 (2014).

fines and fees, or alternative forms of punishment.[29] Moreover, where restitution statutes provide courts with discretionary power, courts sometimes charge a restitution amount that exceeds the monetary value of the harm done. For example, some argue that 18 U.S.C. § 3663's broad definition of "victim" allows federal courts to determine restitution amounts "dependent on whatever the judge determines to be a defendant's 'relative culpability'" when a defendant is not solely to blame for the harm done.[30] As a result, a court's moral evaluation of a defendant's conduct can sometimes factor into the amount the defendant must pay. Some courts can also identify "public harm," estimating broadly how much damage was done to the "community" and labeling the public as the receiver of restitution.[31]

Restitution contributes to the overall mass of criminal justice debt.[32] In conjunction with other legal financial obligations, it can result in substantial financial burdens and stifle reintegration of those who cannot afford to pay.[33] Courts often impose fines and fees without considering the defendant's ability to pay.[34] In the context of federal restitution, 18 U.S.C. § 3663 and § 3664 require that courts consider the defendant's financial resources in order to determine the best *manner* of payment. However, the details of the repayment plan are discretionary and the

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29. *See* Laurie Scott, Anne Cooper & Tim MacGregor, OFF. OF PROGRAM POL'Y ANALYSIS & GOV. ACCOUNTABILITY, REPORT NO. 19-14, ASSESSMENT, COLLECTION, AND DISTRIBUTION OF FINES AND FEES IN CRIMINAL CASES 2–4 (2019), https://oppaga.fl.gov/Documents/Reports/19-14.pdf (breaking down the total fines and fees, exclusive of restitution, first and second degree felons may face); *see also Restitution,* U.S. ATT'Y'S OFF. FOR THE WESTERN DIST. OF N.Y., https://www.justice.gov/usao-wdny/restitution (last visited Oct. 23, 2023) (describing that while offenders are in prison, restitution is paid with one half of the money they earn doing required work; "however, prisoners only earn approximately 11 cents per hour").

30. Lollar, *supra* note 28, at 104 (quoting *Paroline*, 572 U.S. at 470 (Roberts, C.J., dissenting)); *see also* 18 U.S.C. § 3663(a)(1)(B)(i)(II) (allowing courts to consider "such other factors as the court deems appropriate").

31. *See* Dana A. Waterman, Note, *A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 IOWA L. REV. 455, 463 (2020) ("[F]ederal sentencing courts have discretion to designate the 'community' as a victim, order 'community restitution,' and then calculate restitution based on the amount of 'public harm' done." (quoting 18 U.S.C. § 3663(c)(2)(A), (c)(6))).

32. For example, in 2016, the Department of Justice estimated that outstanding federal restitution *alone* as of the end of fiscal year 2016 reached $110.2 billion. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-115, FEDERAL CRIMINAL RESTITUTION: FACTORS TO CONSIDER FOR A POTENTIAL EXPANSION OF FEDERAL COURTS' AUTHORITY TO ORDER RESTITUTION 14 (2017). In all likelihood this figure better reflects the sheer amount of restitution awarded in particular cases with multiple victims—such as fraud—than restitution's ubiquity: "[m]any defendants owe very large amounts of restitution to a large number of victims. In federal cases, restitution in the hundreds of thousands or millions of dollars is not unusual." *Restitution Process*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-vns/restitution-process (last visited Oct. 23, 2023). In any case, however, it displays that "the chance of full recovery is very low. Many defendants will not have sufficient assets to repay their victims." *Id.*

33. *See, e.g.*, Rebecca Vallas & Roopal Patel, *Sentenced to a Life of Criminal Debt - A Barrier to Reentry and Climbing out of Poverty*, 42 CLEARINGHOUSE REV. 131, 132–36 (2012) ("While [legal financial obligations] can appear modest in isolation—$25 here, $40 there—they commonly add up to many hundreds if not tens of thousands of dollars.").

34. *See, e.g.*, MENENDEZ ET AL., *supra* note 6, at 9 (surveying 1,000 proceedings in seven counties to find ability-to-pay hearings were rarely held); Sobol, *supra* note 11, at 850 ("[C]riminal justice debt is often imposed without regard to ability to pay.").

amount of restitution cannot be reduced based on an inability to pay.[35] Essentially:

> [T]here is a legal presumption that in each case in which there was a victim, the court will impose full restitution . . . . Therefore, even where the defendant may not be able to pay the restitution in the foreseeable future, the court must compute it and impose it in virtually any case with a victim.[36]

State restitution statutes vary, and state courts "have yet to arrive at a majority rule as to whether a defendant's financial circumstances or ability to pay should be considered when ordering restitution, modifying restitution payment plans, or imposing fines or penalties for failure to pay restitution."[37] In 2011, only twenty-three states explicitly allowed judges "to consider a defendant's financial circumstances when ordering restitution."[38] States that allow consideration of financial circumstances also vary on the materiality of a defendant's ability to pay. Some states require courts to attach restitution equal to the monetary value of harm done in every case and relegate courts' discretion only to the question of whether that amount should be increased. In California, for example, "[a] defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine . . . ."[39] Since "[t]he courts generally construe a defendant's ability to pay broadly and are not unduly sympathetic to temporary financial constraints,"[40] offenders may be burdened with aggressive or unfair payment schedules that indigent offenders often cannot meet. If legal financial obligations are too great to be repaid, not only do defendants and their dependents suffer, but unpaid victims lose any opportunity for compensation.[41]

The consequences for failing to pay restitution can be grave. For one, punitive statutes and rules designed to compel payment may deprive an individual of financial and physical liberty. Compliance with restitution may be a condition of

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35. 18 U.S.C. § 3663(a)(1)(B)(i); GOODWIN, *supra* note 23, § 1:7 ("After the 1996 Mandatory Victims Restitution Act (MVRA), a consideration of such resources no longer affects the amount of restitution imposed. However, such a consideration is relevant to the court's determination of the manner of payment in all cases, at sentencing as well as for the life of the restitution order."); *see also* Lollar, *supra* note 28, at 103–04 n.24 ("Regardless of a defendant's ability to pay, restitution is now required not only for all crimes in which 'a victim or victims has suffered a physical injury or pecuniary loss,' but also for victims of sex-related and domestic violence crimes as well.").

36. GOODWIN, *supra* note 23, § 1:2.

37. *See* Waterman, *supra* note 31, at 457–58 (describing different states' emphasis on restitution).

38. *Id*. at 469; R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1793 (2015) (footnote omitted).

39. CAL. PENAL CODE § 1202.4(b)(2)(c) (West 2022).

40. GOODWIN, *supra* note 23, § 11:13; *see also* Harris et al., *supra* note 19, at 1792. ("From a policy perspective, it might be argued that criminal justice costs are appropriately borne by convicted criminals and that victims and governments should be reimbursed for the costs of offenders' felonious behavior. Yet few victims actually receive compensation through court-ordered restitution.").

41. *See* Lollar, *supra* note 28, at 126 n.124 (explaining that before the requirement that full restitution be ordered, collection rates were much higher, and state collection rates far exceed federal collection rates because many states considered a defendant's financial position when ordering restitution).

probation,[42] and state laws can regulate the amount of money an incarcerated offender is legally entitled to if they have outstanding court debts. For example:

> Every person incarcerated in an Ohio prison is entitled to keep $25 in their prison accounts. If the person owes court debt, any amount above that is sent to the county to which the debt is owed. In practical terms, this means that an incarcerated person with outstanding court debt can never purchase anything that costs more than $25.[43]

In limited instances, unpaid restitution can even result in incarceration. In *Bearden v. Georgia*, the Supreme Court held that a person's parole can be revoked if they have "not made sufficient bona fide efforts to pay or . . . adequate alternative forms of punishment [do] not exist."[44] *Bearden* found, therefore, that a "willful" failure to pay a legal financial debt can be punished with incarceration consistent with the Constitution.[45] Failure to pay restitution therefore can—and does—result in jail time in some states,[46] a phenomenon Neil Sobol denotes the "modern-day debtor's prison."[47] For those not incarcerated, failure to pay is also often a violation of parole that "can in turn result in denial of federal benefits—including food stamps,

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42. *See Restitution Process*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-vns/restitution-process (last visited Oct. 23, 2023) ("Compliance with the Order of Restitution automatically becomes a condition of the offender's probation or supervised release.").

43. Nikki Trautman Baszynski, *Uncovering Official Lawlessness in Ohio's Criminal Court Debt Assessment and Collection: A Toolkit for Defenders*, 81 OHIO ST. L.J. 1065, 1069 (2020) (footnotes omitted).

44. 461 U.S. 660, 661–62, 672 (1983).

45. *Id.* at 668 ("If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.").

46. Lollar, *supra* note 28, at 128 ("[M]any judges are not sympathetic to a convicted defendant's failure to find a job, and it is rare for a judge to not find a defendant's failure to pay 'willful.' The result is that many individuals on court supervision end up back in jail or prison for failing to meet their restitution obligations."); *Ending Modern-Day Debtors' Prisons*, ACLU, https://www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons (last visited Oct. 23, 2022) (listing campaigns taken in fifteen states to expose "courts that illegally and improperly jail people too poor to pay criminal justice debt"); JUD. COUNCIL OF CAL. ADMIN. OFF. OF THE CTS., RESTITUTION BASICS FOR VICTIMS OF CRIMES BY ADULTS 8 (2012) (explaining refusal to pay restitution can result in jail time or the garnishment of wages). *See generally* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016) (explaining how failure to pay restitution can—and does—result in jail time in some states). Although *Bearden* specifies imprisonment is only justified "[i]f the probationer has willfully refused to pay the fine or restitution *when he has the means to pay*," discretion sits unfettered in the hands of the sentencing court. *Bearden*, 461 U.S. at 668–69 (emphasis added). As the aforementioned sources suggest—and as *Bearden* expressly contemplates—the ability to pay is as fickle a concept as willfulness:

> The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.

Id. at 669–70.

47. Sobol, *supra* note 46.

social security, and housing assistance. Often low-income defendants have to choose between paying criminal justice debt and buying necessities."[48]

The mere fact that outstanding restitution exists can create substantial barriers and collateral consequences.[49] While "[a U.S. Attorney's Office] may identify debts as uncollectible and suspend collection actions on a debt for a variety of reasons, including that the offender has no, or only a nominal, ability to pay the debt,"[50] this does not actually mean the restitution obligation disappears. "Restitution never goes away."[51] Outstanding restitution and other legal financial obligations can take away a person's right to vote or own a firearm[52] and cause other "negative consequences such as driver's license suspension, worsened credit ratings, and limited housing opportunities."[53] Collection actions can also result in consequences such as property liens or wage and bank account garnishment.[54]

In sum, restitution rests upon a proposition of fairness: the best way to remedy bad acts is to require the perpetrator to make up for what they have done. But, as shown throughout this section, restitution does not exist in a vacuum. Restitution obligations sit atop a pile of other fines and fees that reduce an offender's ability to make restitution (and financially sustain themselves), while missing payments can result in grave consequences. The linchpin holding back these consequences is not necessarily willful neglect, but in many cases, the ability to pay. Therefore, society must grapple with the reality that the punitive effect of restitution—and all financial punishments—is but a function of how much money an offender has to give.

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48. *Id*. at 520 (footnote omitted).

49. Collateral consequences are defined as "legal disabilities imposed by legislatures on the basis of past conviction, but not as part of a criminal sentence." Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302 (2015). On this point, one argument of note is that the consequences of outstanding restitution are not "collateral" because they are the result of punishment itself and therefore are "part of a criminal sentence." This argument misconstrues debt itself as the collateral consequence. The "effects" of outstanding debt, such as inability to qualify for benefits, are the collateral consequences for two reasons. First, they are not attached at sentencing, and second, whether they affect a defendant depends on a factor that is unrelated to sentencing: the defendant's ability to pay—the amount of money a defendant has may determine the extent to which they suffer restrictions of their liberty.

50. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 25 (2018).

51. *Offender Restitution Information*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/victim-services/restitution-offender/ (last visited Oct. 27, 2023); *see also* Vallas & Patel, *supra* note 33, at 133 ("[Criminal debt] is also frequently not subject to statutes of limitation.").

52. Lollar, *supra* note 28, at 127 n.127.

53. Nathan W. Link, *Criminal Justice Debt During the Prisoner Reintegration Process: Who Has It and How Much?*, 46 CRIM. JUST. & BEHAV. 154, 166 (2019); *see also* Wesley Dozier & Daniel Kiel, *Debt to Society: The Role of Fines & Fees Reform in Dismantling the Carceral State*, 54 U. MICH. J.L. REFORM 857, 866 (2021) ("Individuals that have court debt assessed against them experience life-altering consequences as a result of nonpayment. Tennesseans with outstanding court debt cannot have their criminal records expunged. Additionally, individuals with outstanding court debt cannot have their voting rights restored, and can have their driver's licenses revoked.") (footnotes omitted).

54. MENENDEZ ET AL., *supra* note 6, at 21 (noting Texas, Florida, and New Mexico allow for property liens for restitution, and Florida and New Mexico allow for wage garnishment).

C. The Legal Landscape: The Non-Dischargeability of Restitution

1. Overview of Bankruptcy and Debt Forgiveness in Law

Bankruptcy is a statutory process created by Congress through which overburdened debtors may restructure and discharge their financial obligations.[55] Those who successfully navigate the process get a "fresh start" free of debts and obligations.[56] This "fresh start" principle of bankruptcy comprises three protections: a "discharge of [financial] obligation, the protection of exempt assets, and a prohibition of discrimination against those who resort to bankruptcy."[57] Discharge is the cornerstone of these protections, which has the legal effect of "an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor."[58]

In a sense, bankruptcy is manifest forgiveness: by discharging a debtor's financial obligations, bankruptcy literally "forgives" them. The discharge mechanism can be seen as mercy for an unfortunate-but-honest debtor.[59] However, bankruptcy also operates for a specific societal purpose. Discharges "encourage[] the debtor to take socially beneficial risks by providing a mechanism to reset her financial life when unmanageable debt interferes with a productive and participatory life."[60] Promoting economic participation is an important governmental interest. Of course, this interest may be subordinated to other important governmental interests: "[t]he Supreme Court has recognized that the code section containing the exceptions to discharge 'is not a compassionate section for debtors. Rather, it demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start.'"[61] The government's interest in criminal punishment, for instance, has prevailed to prevent the discharge of defendants' penal debts. But this begs an important question about restitution, which is criminally imposed yet reminiscent of a civil claim for damages.

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55. The discharge provision in Chapter 7 Bankruptcy is contained in 11 U.S.C. § 524.

56. *See generally* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393–95 (1985) (establishing a theoretical framework justifying the fresh-start principle).

57. Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549, 549 (1995) (footnotes omitted).

58. 11 U.S.C. § 524(a)(2).

59. *See, e.g.*, MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 82 (2019) ("In the United States, the 'power to reward the "honest" but "unfortunate" debtor with a discharge of debt' has a constitutional dimension." (quoting Johnathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 613 (2007))).

60. Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 927 (2017).

61. Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 145 (2017) (quoting Bruning v. United States, 376 U.S. 358, 361 (1964)).

2. Criminal Bankruptcy and *Kelly v. Robinson*

That question is, can bankruptcy discharge restitution obligations? Before *Kelly v. Robinson*,[62] the answer depended on which chapter of the bankruptcy code the debtor filed under. For example, Chapter 13 bankruptcy allows a consumer debtor to restructure their debts in a payment plan over time.[63] Under Chapter 13, restitution can never be discharged.[64] By contrast, Chapter 7 bankruptcy liquidates non-essential assets and discharges other obligations.[65] Whether restitution is dischargeable in Chapter 7 depends on certain characteristics. Section 523 of the bankruptcy code lays out certain types of non-dischargeable debts. Federal restitution obligations under Title 18 of the U.S. Code are included among these,[66] but state restitution obligations are not. Thus, state restitution is an unspecified obligation, and 11 U.S.C. § 523(a)(7) provides the following three characteristics that makes an otherwise unspecified obligation non-dischargeable: it is (1) a debt for a fine, penalty, or forfeiture; (2) "payable *to* and *for* the benefit of a governmental entity;" and (3) "not compensation for actual pecuniary loss."[67]

In *Kelly v. Robinson*, the Supreme Court addressed whether a state restitution obligation is a non-dischargeable debt under the language of § 523(a)(7).[68] Carolyn Robinson pleaded guilty to "larceny in the second degree" based on the "wrongful receipt of $9,932.95" in welfare benefits.[69] As a condition of her probation, the Connecticut Superior Court ordered Robinson to pay the full amount of restitution in monthly payments.[70] Robinson filed for Chapter 7 bankruptcy in 1981, listed her restitution obligation as a dischargeable debt, and stopped making

62. 479 U.S. 36 (1986).

63. *Chapter 13 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics#:~:text=A%20chapter%2013%20bankruptcy%20is,over%20three%20to%20five%20years (last visited Oct. 2, 2023) ("Chapter 13 allows a debtor to keep property and pay debts over time, usually three to five years.").

64. *See* 11 U.S.C. § 1328(a)(3); Atkinson, *supra* note 60, at 938. As discussed by Atkinson, this statute was passed to overrule the Supreme Court's holding in *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990), which found that Chapter 13 debtors could in fact be discharged because of that statute's comparative breadth. *Id.* at 938–40.

65. *See, e.g.*, *Chapter 7 Bankruptcy—Liquidation Under the Bankruptcy Code*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/chapter-7-bankruptcy-liquidation-under-the-bankruptcy-code (last visited Apr. 19, 2022) (explaining the purpose of Chapter 7 Bankruptcy).

66. 11 U.S.C. § 523(a)(13).

67. 11 U.S.C. § 523(a)(7) (emphasis added).

68. 479 U.S. at 38. As an aside, restitution's anatomical similarity to civil tort judgments is immaterial here, and the two are treated differently. While restitution is categorically non-dischargeable, the offender's actions are a determinative element for whether a tort judgment will be dischargeable. This is because there is no categorical bar to the dischargeability of civil judgments in bankruptcy, but the other provisions of § 523(a) will encompass certain torts. For example, 11 U.S.C. § 523(a)(6) makes judgments associated with "willful and malicious" injury or death non-dischargeable (and as a result, certain intentional torts may be non-dischargeable while unintentional torts might not be).

69. *Kelly*, 479 U.S. at 38.

70. *Id.* at 38–39.

restitution payments.[71] In 1984, the Connecticut Probation Office "informed Robinson that it considered the obligation to pay restitution nondischargeable."[72] Robinson countered by seeking a declaration from the Bankruptcy Court that the restitution obligation had been discharged and that the discharge had not violated her probation.[73]

The central question in *Kelly* was the purpose of restitution, which would determine whether § 523(a)(7)'s non-dischargeability requirements applied.[74] Again, 11 U.S.C. § 523(a)(7) makes a financial obligation non-dischargeable if it is (1) a debt for a fine, penalty, or forfeiture; (2) "payable to and for the benefit of a governmental unit;" and (3) it "is not compensation for actual pecuniary loss."[75] Both the Bankruptcy Court and the United States District Court for the District of Connecticut held that because the purpose of restitution was criminal rehabilitation—and not compensation—a discharge of a restitution obligation still violated Robinson's probation.[76] Subsequently, the Second Circuit reversed, finding the restitution obligation was dischargeable and not a violation of probation. Specifically, it found that restitution was compensation for actual pecuniary loss because the state restitution obligation was "assessed 'for the loss or damage caused [by the crime].'"[77]

The Supreme Court reversed yet again, finding that restitution is non-dischargeable because bankruptcy should not be able to discharge criminal judgments.[78] The Court began with the notion that its interpretation of the bankruptcy code "must reflect . . . a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."[79] The Court found the notion of discharging criminal fines—especially restitution—discomforting because that "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."[80] The Court noted that the state has an important governmental interest in requiring restitution for its unique rehabilitative benefits:

> 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

71. *Id.* at 39.
72. *Id.* at 39–40.
73. *Id.* at 40.
74. *Id.* at 38.
75. 11 U.S.C. § 523(a)(7).
76. *Kelly*, 479 U.S. at 40–42.
77. *Id.* at 43 (quoting CONN. GEN. STAT. § 53a–30(a)(4) (1985)).
78. *Id.* at 50.
79. *Id.* at 47.
80. *Id.* at 49.

> the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.[81]

Given this state-based interest in the unique effectiveness of restitution as a rehabilitative and punitive mechanism, the Court concluded that "[t]he criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole."[82] The Court stated that "[t]he 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."[83] Most importantly, restitution stems from "the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation," and it is therefore sufficiently covered as non-dischargeable under § 523(a)(7).[84]

3. *In re Albert-Sheridan* and *Kelly*'s Atextualism

The basic takeaway of *Kelly* is that according to the Supreme Court, the philosophical basis of restitution is "rehabilitation and punishment," not compensation to make victims whole.[85] But, while *Kelly* found that *restitution* was non-dischargeable, it did not consider any other state-imposed obligations with a compensatory character. For example, attorney disciplinary proceedings can create financial penalties payable to the victim.[86] In the wake of *Kelly*, some courts, such as the First Circuit, found that *Kelly*'s reach extended to attorney disciplinary proceedings.[87] Others, including the Sixth Circuit, found that civil damages owed to the court by a defendant in contempt were dischargeable because they were compensatory, even though they had some penal motivation.[88]

Then, in 2020, the Ninth Circuit split with the First Circuit in *In re Albert-Sheridan* in what may be the narrowest construction of *Kelly* to date. There, Lenore Albert-Sheridan, a residential housing lawyer, misused the discovery process in a case where she represented homeowners threatened with eviction.[89] Two sanctions were imposed: an $18,714 charge by a state bar hearing officer for the

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81. *Id.* at 49 n.10.
82. *Id.* at 52.
83. *Id.*
84. *Id.* at 53.
85. *Id.*
86. *See, e.g.*, *In re* Stasson, 472 B.R. 748, 752 (Bankr. E.D. Mich. 2012) (holding a debt "based on the Attorney Discipline Board's Order that Stasson 'pay restitution to complainant Donald Basquin in the amount of $29,178.88'" was dischargeable because it was not payable to a governmental unit).
87. Richmond v. N.H. Sup. Ct. Comm. on Prof'l Conduct, 542 F.3d 913, 920 (1st Cir. 2008); *see also* Atkinson, *supra* note 60, at 936–37 (explaining the landscape of penal debt in bankruptcy post-*Kelly*).
88. Hughes v. Sanders, 469 F.3d 475, 476–77 (6th Cir. 2006). *See* also Atkinson, *supra* note 60, at 937 (discussing *Hughes*).
89. Albert-Sheridan v. State Bar of Cal. (*In re* Albert-Sheridan), 960 F.3d 1188, 1990 (9th Cir. 2020). These sanctions were not placed in accordance with any state bar regulations, but with CAL. CIV. PRO. § 2023.030 (2013). *Id.*

costs of levying attorney disciplinary proceedings against her and $5,738 by a California Superior Court commissioner in monetary sanctions payable to the plaintiff.[90]

Following this, Albert-Sheridan filed for Chapter 13 bankruptcy, which was later converted to Chapter 7, seeking a discharge of her debts stemming from disciplinary proceedings and discovery sanctions.[91] The Ninth Circuit found that the attorney disciplinary proceedings were covered by § 523(a)(7) and thus were nondischargeable "based on their punitive and rehabilitative nature,"[92] but *Kelly* could not be construed broadly enough to cover the discovery sanctions, which were dischargeable.[93] Despite the sanctions' punitive nature and similarity to restitution, the court determined the sanctions were compensatory for actual pecuniary loss, and therefore not subject to § 523(a)(7) because "[a]lthough the California Supreme Court conditioned Albert's reinstatement on payment of the sanctions in its order of discipline, Albert's debt compensates a private party for the costs of litigating civil discovery motions for its own benefit."[94] Rooting its decision in the statute's text, the court distinguished *Kelly*: "*Kelly* was based on a 'deep conviction' rather than statutory language," and "[l]ike other relics of the 1980s, such as big hair, jam shorts, and acid-wash jeans, *Kelly*'s atextual interpretative method should not come back into fashion."[95]

Thus, *In re Albert-Sheridan* declined to extend *Kelly* to penal sanctions that compensate a third party for harm incurred by another's violation of state-established laws. The Ninth Circuit came to its decision on discovery sanctions based on a mismatch between the rationale for discovery sanctions and what the Court in *Kelly* determined was the rationale of restitution: "[a]lthough restitution 'resemble [s]' a judgment for the benefit of a victim . . . such a payment really benefits 'society as a whole.'"[96] The court determined *In re Albert-Sheridan*'s sanction did not have *Kelly*'s same societal benefit and was thus dischargeable.

As understood today, however, the character of restitution also undermines *Kelly*'s societal benefit rationale. When *Kelly* became law, restitution was arguably akin to an experiment. In the forty years since the decision in *Kelly*, the government has passed mandatory federal restitution laws,[97] and Government Accountability

90. In re *Albert-Sheridan*, 960 F.3d at 1190–91.

91. The bankruptcy court converted Albert-Sheridan's case to Chapter 7 based on her inability to find a confirmable Chapter 13 plan. *Id.* at 1191–92.

92. *Id.* at 1192.

93. *Id.* at 1195–96.

94. *Id.* at 1195.

95. *Id.*

96. *Id.* (citing Kelly v. Robinson, 479 U.S. 36, 52 (1986)).

97. 18 U.S.C. § 3663A (1996).

Office reports have exposed the extent of outstanding restitution obligations.[98] Further, the empirical literature cited above now explains the intensity of collateral consequences associated with increasing legal financial obligations.[99] Since, for many offenders, legal financial obligations can snowball into unpayable obligations that both evade collection and reproduce existing financial inequalities, it is also arguable whether restitution "benefits" society—at least in the way it is meant to.

While arguments against *Kelly* already exist,[100] this Note argues that restitution is penal in nature, *Kelly* is not statutorily supported, and discharge of restitution obligations in Chapter 7 would better achieve *Kelly*'s goals. Specifically, Part II of this Note argues that punitive restitution does not fit the statutory scheme of § 523 (a)(7) for non-dischargeability. Part III argues that that *Kelly* is predicated on criminal law exceptionalism and that *Kelly*'s goals of "punishment" and "rehabilitation" can be captured more effectively by forgiveness (via discharge).

II. THE STATUTORY CHALLENGE AGAINST *KELLY*

A. Restitution is State-Based, but Non-Dischargeability Does Not Align with § 523(a)(7)

This Section will argue that restitution is state-based and punitive in nature, yet that *Kelly* nevertheless misconstrues the bankruptcy code. Though restitution might be construed as "victim based"—i.e., primarily for the benefit of the victim—because it means to compensate, the reality of restitution is that it can both (1) punish the inability to pay and (2) become extremely difficult to collect.[101] This would seemingly suggest—consistent with *Kelly*—that restitution is "for the benefit of a governmental unit" and not for the benefit of the victim. However, *Kelly*'s reading of the bankruptcy code is not narrow. If § 523(a)(7) is to be construed so broadly as to find restitution is not payable to a third party as compensation for pecuniary loss,[102] perhaps it should also be read as requiring analysis of what *literal* benefit the restitution obligation affords to the governmental unit in question. Because the purported benefit of restitution to the state is unrealized in practice, *Kelly*'s reading of the bankruptcy code is contrary to the text regardless of whether restitution is state-based or victim-based.

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98. "[A]t the end of fiscal year 2016, $110 billion in restitution was outstanding and USAOs had identified $100 billion of that debt as uncollectible . . . ." U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 25.

99. *See supra* Section I.B.

100. *See, e.g.*, Margaret Howard, *Bankruptcy Federalism: A Doctrine Askew*, 38 PEPP. L. REV. 1, 2–3 (2010) (arguing against *Kelly*'s construction of federalism).

101. *See supra* Section I.B.

102. An alternative, textualist argument against *Kelly* is apparent from the outset. The Court's decision to evade the question of whether restitution is compensation for actual pecuniary loss is suspect. Even where a state restitution statute allows the court to consider the defendant's financial position, restitution is coupled to the losses incurred by the victim. *See* Kelly v. Robinson, 479 U.S. 36, 55 (1986) (Marshall, J., dissenting). However, this argument evades broader philosophical questions underpinning *Kelly* and the place of restitution in the 21st century.

1. The State-Based Rationale

In *Kelly*'s view, "[b]ecause 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."[103] By finding that restitution was designed as a punitive obligation for the benefit of society as a whole, the Court in *Kelly* reconciled the state's interest with the fact that it is victims who benefit financially from restitution. Therefore, restitution is for the benefit of a governmental unit—consistent with the text of § 523(a)(7).[104] Yet the realities of restitution today show that it does not consistently effectuate punishment and rehabilitation. Another pathway—mercy through the mechanism of bankruptcy—could better achieve *Kelly*'s goals.

Critical analysis of *Kelly* must begin by examining why we use restitution in addition to traditional forms of punishment. Restitution has been divided into two models: pure and punitive. In a pure restitution scheme, full compensation to the victim for the amount of harm done is always required because the goal of restitution is the same as any civil debt—to make the victim whole.[105] On the other hand, the punitive form is instead guided by considerations other than complete compensation and, therefore, may account for the ability of the offender to pay.[106]

Pure restitution is entirely based on seeking to restore the victim to the position they were in prior to the harm incurred. In this sense, it is adjacent to and a retrospective application of "the harm principle," a utilitarian theory of criminalization that posits acts which cause objective harm should be criminalized in order to reduce harm done to society (as opposed to acts which society deems to be morally incorrect).[107] Whereas criminal fines and the sentencing guidelines could be a response to any combination of the harm-prevention and moral-condemnation justifications, pure restitution is meant to respond *proportionally* to harm that can be represented by a dollar amount.[108] Pure restitution imports the private sphere into the public sphere, and its usage "beg[ins] to restructure the traditionally public criminal process into a quasi-private dispute between the victim and defendant

103. *Kelly*, 479 U.S. at 53.

104. *Id.*

105. *See* Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 GEO. J. LEGAL ETHICS 279, 288–89 (1977) (noting that under pure restitution, "[n]o longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim.").

106. *Id.* at 288.

107. *See* Lollar, *supra* note 28, at 100 (noting that "initially, courts imposed restitution in a manner consistent with [the] original restorative purpose" of "restoring the victim to her previous economic status"); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 112 (1999) (describing the harm principle as criminalization based on the harm caused by the act).

108. 18 U.S.C. § 3663A would exemplify pure restitution because it holds a court must impose the cost of destroyed property or medical expenses and other related costs in the case of bodily injury—i.e., the amount of harm—but does not account for ability to pay.

resembling a civil action."[109] Thus, the amount owed under a pure restitution scheme would always equal the amount of harm done regardless of ability to pay. Punitive restitution, on the other hand, is focused on responding with a punishment that appropriately addresses the offender's blameworthiness.[110] Though the victim benefits in a punitive scheme because they are ultimately the payee to the defendant's debt, the owed amount will be tailored (1) to accomplish the state's objectives of punishment and rehabilitation and (2) to "preserve the 'hurt'" of other penal sanctions.[111] Therefore, under a punitive scheme, restitution is adjusted based on relative ability to pay so that it always inflicts a justified level of harm on the payor.

These models are not mutually exclusive. Pure restitution is not necessarily established solely for the benefit of the victim, and punitive restitution is not necessarily established for the benefit of the state and the victim together. It is possible that a punitive restitution scheme could cost the state an exorbitant amount to enact, yet victims are better off because they receive payment. Or, the state could require pure restitution because there is a perceived punitive and rehabilitative benefit[112] of always requiring the full amount of harm to be paid out. Yet because collection actions are not robust, victims rarely receive payment.[113] Therefore, there are essentially three underlying rationales regardless of the overarching type of restitution employed: (1) "state-based" vindication and fulfilment of the state's penal goals of punishment and rehabilitation; (2) "victim-based" compensation and vindication of the victim; (3) a "composite" of the victim's and the state's goals.

The Court in *Kelly* took the perspective that the objective of restitution was solely state-based because it effects "the State's interests in rehabilitation and punishment, *rather than* the victim's desire for compensation . . . ."[114] *Kelly*'s state-based rationale for restitution makes perfect sense given the harsh realities of restitution. No matter the kind of restitution, it "recognizes rights in the victim, and this is a principal source of its strength."[115] Note, however, that "recognizing" rights is

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109. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 26 ANN. REV. CRIM. PROC. 775, 793 (1997).

110. Barnett, *supra* note 105, at 288 ("Punitive restitution is an attempt to gain the benefits of pure restitution . . . while retaining the perceived advantages of the paradigm of punishment.").

111. *Id.*

112. *See* Ruback, *supra* note 38, at 1791 ("[M]any scholars and practitioners alike support restitution because it forces offenders to confront the harms they caused victims, makes them responsible for correcting those harms, and gives them a sense of accomplishment when they have paid the restitution.").

113. Federal restitution, which is usually mandatory under 18 U.S.C. § 3663A, may exemplify this hypothetical. The Government Accountability Office, in 2016, reported that "at the end of fiscal year 2016, $110 billion in restitution was outstanding and USAOs had identified $100 billion of that debt as uncollectible . . . ." U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 25. Additionally, the Government Accountability Office noted the important responsibilities of the judiciary and the Department of Justice to properly manage and oversee collections and provided recommendations to improve these practices to ensure reasonable efforts are made to collect restitution. *Id.* at 22–42.

114. Kelly v. Robinson, 479 U.S. 36, 53 (1986) (emphasis added).

115. Barnett, *supra* note 105, at 291.

distinct from embodying them. Despite *emphasis* on the victim, restitution is imposed by the state as a part of sentencing. The interest of the victim merely overlaps with that of the state as it might with any other state punishment. Restitution is arguably "procedurally . . . indistinguishable from traditional punishment, and provides no active role for the victim in determining the appropriateness or amount of restitution."[116] The victim must exact retributivist benefits vicariously through state action. Thus, the state's interest—not the victim's—fuels restitution.

Others have argued that restitution is victim-based because it is compensatory, meaning § 523(a)(7)'s "for the benefit of a governmental unit" requirement is not met.[117] Another hypothetical line of argument could take a composite approach, acknowledging the victim- and state-based benefits restitution can yield but concluding the split between state and victim benefits simply does not meet the muster of § 523(a)(7) because "for the benefit of a governmental unit" should be read as exclusive. However, given the realities of restitution described in Part I, it is impossible to deny restitution's increasing penal—i.e., state-based—character. Combined with the swaths of other criminal justice debt owed by defendants from their collisions with the criminal justice system, restitution is ineffective at compensating the victims and poses insurmountable collection problems.[118] And outstanding criminal debts create cycles of repeated punishment where failure to pay can result in a myriad of collateral consequences, even including incarceration through the debtors' prison "exception" to *Bearden*.[119]

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116. Sara Manaugh, *The Vengeful Logic of Modern Criminal Restitution*, 1 L., CULTURE & HUM. 359, 372 (2005). For this reason, restitution may also effectively proxy general issues with approaches to reform that seek to reinforce the status quo of carceral punishment and rely too heavily on the state. *See* Christopher W. Maidona, Note, *Ordering Criminal Restitution: An Exercise In Overstepping Statutory Authority*, 120 W. VA. L. REV. 253, 255 (2017) (explaining that boilerplate language found in plea agreements generally places a cap on restitution). *See generally* SARA KERSHNAR, STACI HAINES, GILLIAN HARKINS, ALAN GREIG, CINDY WIESNER, MICH LEVY, PALAK SHAH, MIMI KIM & JESSE CARR, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE & OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE, GENERATION FIVE 21 (2007), https://criticalresistance.org/resources/toward-transformative-justice-guide-a-liberatory-approach-to-child-sexual-abuse-others-forms-of-intimate-community-violence/ ("[T]he Restorative Justice approach has largely been co-opted by the State for use in coercive contexts in which the integrity of such a model is put into question.").

117. *See* Howard, *supra* note 100, at 43 ("[Section] 523(a)(7) only applies when restitution is payable both to a governmental unit and for its financial benefit. Neither of those requirements is satisfied when restitutionary payments flow to private parties.").

118. *See infra* Section II.A.2. While the linkage between restitution and retributivism could be a separate undertaking, it is clear from the outset that the state's role in modern restitution's quasi-private disputes is at odds with moral vindication. *See* JEAN HAMPTON, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 22 (Wesley Cragg ed., 1992) ("[T]here is something morally disturbing about an institution inflicting retribution on these people to vindicate the worth of their victims, even while ignoring the fact that they are themselves far more victimized.").

119. *See, e.g.*, Cortney E. Lollar, *Eliminating the Criminal Debt Exception for Debtors' Prisons*, 98 N.C. L. REV. 427, 427 (2020) ("[T]he data available suggests nearly a quarter of the current incarcerated population is detained due to a failure to pay their legal financial obligations.").

These penal consequences of restitution confirm the state-based punishment rationale, which seems to support the application of § 523(a)(7)'s "for the benefit of a governmental unit" requirement to make restitution non-dischargeable.

2. The Beneficiary of Restitution

This Section argues that the *actual* beneficiary of restitution is not the state despite restitution being imposed for the purpose of punishment. Section 523(a)(7) requires, again, that a non-dischargeable obligation be "for the benefit of a governmental unit," and the reality of restitution is that it has a clear penal and state-based rationale. However, as this Section further argues, that does not mean *Kelly*'s conclusion that restitution is non-dischargeable is warranted. In the state-based rationale, the state's end is not restitution itself, but the interests of rehabilitation and punishment.[120] The question of § 523(a)(7)—whether restitution is "for the benefit of the state"—is therefore a question of whether restitution "punishes and rehabilitates."[121] If restitution does not punish and rehabilitate, the state does not receive its proclaimed benefit from restitution, and as a result, restitution would not be "for the benefit of a governmental unit."[122]

The state's interest in punishment is not satisfied by the infliction of an arbitrary amount of harm. Appropriate punishment is just punishment that is sufficient to hold an offender accountable and "fairly reflect[s] the degree of reprehensibleness" of the crime committed.[123] Just punishment, therefore, has connotations of precision and impermanence. If the punishment is proportionate to the harm inflicted by the offender, "then presumably the completion of punishment represents their having been held accountable."[124] On the other hand, if society eschews proportionality, punishment can become exile: permanent condemnation, helplessness, hopelessness.[125] Exile, in particular, is wholly contrary to the goal of rehabilitation, which is defined as "restoration especially by therapeutic means to an improved condition of physical function."[126]

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120. Albert-Sheridan v. State Bar of Cal. (*In re* Albert-Sheridan), 960 F.3d 1188, 1195 (9th Cir. 2020) (noting that the *Kelly* court found criminal sentences necessarily consider the interests of the state of rehabilitation and punishment); *see also* Ruback, *supra* note 38, at 1791 (discussing support for restitution by scholars and practitioners because it forces defendants to confront the harm they caused to victims).

121. *See infra* Section II.B for a defense against counterarguments to this broad reading of the statute.

122. 11 U.S.C. § 523(a)(7).

123. *See* ANDREW VON HIRSH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005) ("Proportionalist sentencing is designed to avoid unjust results . . . .").

124. Zachary Hoskins, *Ex-Offender Restrictions*, 31 J. APPLIED PHIL. 33, 35 (2014).

125. An example of this would be the concept of "civil death" at early English Common law, whereby an offender was "disqualified from being a witness, prohibited from bringing an action or performing any legal function, and he was in effect regarded as dead by the law." Harry David Saunder, *Civil Death - A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 989 (1970).

126. *Rehabilitation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rehabilitation (last updated Oct. 19, 2023). Put simply, an offender cannot be "restored" if they are permanently excommunicated from the benefits of civil life.

Restitution fails to properly capture the goals of the state—and in turn, is not "for the benefit" of it—because the reality of restitution is disproportionate punishment. As explained in Part I, offenders' legal financial obligations include both restitution and other fines and fees and are virtually guaranteed to attach during a criminal proceeding. Therefore, if the court orders pure restitution that exactly matches the amount of harm, the final bill that the defendant receives will *always* exceed the amount of harm that they inflicted. On the other hand, if restitution is of the punitive form, the cost of harm is not necessarily the restitution amount (although the risk of over-punishment and unequal punishment is still high).

Moreover, only indigent defendants face the dangers of non-payment. The punishments for non-payment and the collateral consequences of outstanding criminal debt are *always* over- or under-punishing of a particular class group. If we assume these consequences are *part* of the state's punishment against the offender, then they disproportionally affect those who cannot afford to pay. As a result, the rich are comparatively under-punished and the poor are comparatively over-punished based on an arbitrary characteristic—their ability to pay.

The state benefits of proportional and reasonable punishment are clear when considering the personal consequences of restitution for those who cannot afford it. If defendants *can* pay restitution, they may be compelled to make amends for their wrongdoing by compensating the victim of their conduct. But if defendants cannot pay because their other obligations in addition to restitution far exceed the perceived amount of harm, they will need "to choose between competing financial obligations and pressing needs, including housing and food."[127] Prioritizing these living expenses leaves restitution unpaid and prevents defendants from making amends. In this case, the state loses the benefit of defendants making amends for their harm, and the state may also have to expend money on collection actions and punishments that fail victims and offenders alike.

For example, "Linda Roberts, fifty-five, lived off of food stamps and disability checks in Colorado. After she shoplifted $21 worth of food, she owed a debt of $746, composed of court costs, fines, fees, and restitution. She 'paid' by spending fifteen days in jail."[128] In this situation, is the *state* the one benefitted—financially or otherwise—by the imposition of hundreds of dollars in fines for the harm of stealing $21? No. The state might have "punished" Roberts, but did not do so in a just and proportionate manner that would effectively deter criminal activity and rehabilitate the defendant in context of the crime committed.[129]

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127. Harris et al., *supra* note 19, at 1780.

128. Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 4–5 (2016).

129. *See, e.g.*, David A. Harris, *The Realities of Punishment*, 83 J. CRIM. L. & CRIMINOLOGY 1098, 1110 (1993) ("Even as imprisonment and its costs have soared, crime has not decreased.").

Anybody in Roberts' position probably does not feel they have made amends for their supposed wrongdoing.[130] Instead, they likely feel they have been wronged *by* the state.[131] The state's interests of punishment and rehabilitation—vindicating a harm against the community and reducing the chance of recidivism—have not been met because Roberts' financial position has only worsened as a result of criminal proceedings. In terms of material, financial effects on everyone involved—the state, the shop owner, and the victim—the net outcome was a loss of value. For that reason, the restitution obligation is arguably not "for the benefit of the state" and, as discussed below, perhaps bankruptcy—and the discharge that comes with it—could be of greater value to the state and offenders alike.[132]

As a final consideration, even considering the role of restitution in the grand scheme of criminal law, it fails to achieve its purported objective. As stated by Henry Hart, Jr., the endgame of criminal law is social organization: "[m]an is a social animal, and the function of law is to enable him to realize his potentialities as a human being through the forms and modes of social organization. It is important to consider how the criminal law serves this ultimate end."[133] What service does restitution actually play in the macro-organization of a society underpinned by criminal law if it results in consistently disproportionate punishment? If criminal debt requires more money from those already under financial constraints, there is no opportunity for effective punishment. Instead, due to collateral consequences, offenders are exiled from opportunities that may help them escape their debt burden.[134] The constant pressure of debt may also incentivize recidivism: "debt may cause high stress levels for an individual, as a result of which they may commit

130. Especially considering the fact that debtors' prisons are purportedly unconstitutional. *See* Bearden v. Georgia, 461 U.S. 660, 668–69 (1982) (holding that "it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available").

131. *See* Harris et al., *supra* note 19, at 1777–80 (noting, of a survey of individuals with outstanding legal financial obligations, that "[t]he fact that legal debt often grew despite regular payments led some to feel so frustrated that they eventually stopped paying").

132. One construction of restitution I have yet to address is where a state's constitution gives citizens the right to seek and receive restitution. *See, e.g.*, CAL. CONST. art. I, § 28(b), (13)(A)–(B). In that case, one could claim restitution is never punitive because it is a political right of the victim. However, that argument chases its own tail. Compulsory or not, the "character" of restitution changes depending on what other regulations are in place. For example, if pure restitution is available but there are only ineffective options for collection, it would be more "punitive" than if income-based payment plans are available. This suggests that the character of constitutional restitution is separate from its origination as an inherent right. But, if one argues an inherent right of a private individual cannot make restitution "punitive," on behalf of the state, restitution would not be payable to and for the benefit of the state under § 523(a)(7). It would be payable to, and for the benefit of, the exerciser of the inherent right.

133. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 409 (1958).

134. *See, e.g.*, Dozier & Kiel, *supra* note 53, at 866 ("[I]ndividuals need jobs that will provide them with the financial resources . . . to pay their court debt. With convictions on their criminal records, however, it is very difficult for people to find jobs that will provide them with enough income to pay their bills, let alone their court costs.").

crimes. Debt is also likely to worsen as a consequence of crime, for example, as a result of monetary sanctions or due to the lack of income during incarceration."[135]

Put simply, there is no effective, rehabilitative punishment if payment obligations never cease or if payment obligations pile up into redundancy. When that happens, the victim goes unpaid and the offender lacks rehabilitation; there is only exile of those without sufficient economic means. As a result, the state does not exact a material *benefit* that furthers any of its goals in seeking restitution.

B. Addressing a Textualist Interpretation of § 523(a)(7)

One can imagine a crucial counterargument that § 523(a)(7) still renders restitution non-dischargeable: it does not matter who actually benefits; the intention of the legislature is all that matters. Under this line of argument, we can separate the "benefit" to the state from the intention of the state. If the intention is for restitution to satisfy state-based goals, that would be enough to fall within § 523(a)(7).

This argument is flawed for two reasons. First, it applies a narrow reading of § 523(a)(7) in some places, but not others. Second, principles of statutory interpretation suggest a plain reading of "for the benefit of a government unit" is inappropriate.

First, strictly interpreting § 523(a)(7)'s "for the benefit of a governmental unit" requirement without also strictly interpreting its "compensation for actual pecuniary loss" and "payable to . . . a governmental unit"[136] pieces would make for interpretive acrobatics. But *Kelly* did not interpret the statute with this level of stringency—it "was based on a 'deep conviction' rather than statutory language."[137] Restitution obligations may be payable directly to the victim of the crime or may even become enforceable as a civil judgment.[138]

Second, as Margaret Howard notes, construing the statute as only requiring legislative intent would result in surplusage because it would render § 523(a)(13)—which explicitly renders *federal* restitution non-dischargeable—redundant: "[i]t cannot be the case that all restitutionary obligations are nondischargeable under § 523(a)(7) without regard to their penal character. If that were true, then § 523(a)(13), which was added in 1998, is completely superfluous. That section makes restitution ordered under federal criminal statutes nondischargeable."[139] In short, principles of statutory interpretation cut against a plain reading of "for the benefit of a governmental unit" that emphasizes intent

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135. Gercoline van Beek, Vivienne de Vogel & Dike van de Mheen, *The Relationship Between Debt and Crime: A Systematic and Scoping Review*, 13 EUR. J. PROBATION 41, 42 (2021).

136. 11 U.S.C. § 523(a)(7).

137. Albert-Sheridan v. State Bar of Cal. (*In re* Albert-Sheridan), 960 F.3d 1188, 1195 (9th Cir. 2020).

138. *See, e.g.*, CAL. PEN. CODE § 1202.4(a)(3)(B). On this point, another interpretation is that "§ 523(a)(7) only applies when restitution is payable both to a governmental unit and for its financial benefit" because of clear indications that the statute is conjunctive and its reference to "payability." Howard, *supra* note 100, at 43.

139. Howard, *supra* note 100, at 45 n.276 (arguing against *Kelly*'s construction of federalism).

of the benefit alone. And, in any case, the approach is normatively undesirable given the current state of restitution.[140]

For the foregoing reasons established in this Section, a broad reading of the "for a governmental unit" piece of § 523(a)(7) is appropriate. As established in the preceding section, reading that statute to require an analysis of who the *actual* beneficiary of restitution is (based on empirical realities about the effectiveness of restitution in context of other legal financial obligations) necessitates a conclusion that although restitution *means* to benefit the state as a punitive and rehabilitative measure, in reality, it fails to capture either of those goals. Therefore, restitution is not "for the benefit of a governmental unit."

III. THE NORMATIVE CHALLENGES TO *KELLY*

In addition to its suspect statutory reasoning, *Kelly*'s normative implications are categorically undesirable. First, *Kelly* exemplifies criminal law exceptionalism—the idea that criminal law is of great, inherent societal importance.[141] Whether criminal law exceptionalism is categorically desirable or undesirable is a question that is better left for another day; however, *Kelly*'s type of criminal law exceptionalism underscores a greater inequality entangled with the bankruptcy code.

Though *criminal* sanctions are non-dischargeable no matter their size, bankruptcy courts maintain significant power to enjoin *civil* obligations.[142] Yet it is not always the case that a "criminal" sanction means to remedy a greater harm than a "civil" one, and where punishment fails to achieve the state goals deemed imperative by *Kelly*, forgiveness may have an unspoken value. Finally, there are the practical normative considerations of using bankruptcy to address the problem of restitution and legal financial obligations. While bankruptcy's accessibility issues do not make it a solution to legal financial obligations, it has some practical value as an available statutory mechanism that could relieve collateral consequences of restitution and other legal financial obligations in individual cases with some immediacy.[143]

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140. *See supra* Section I.B.

141. As mentioned hereafter, *Kelly*'s exceptionalism stems from its "deep conviction" that the civil, statutory process of bankruptcy should not be able to invalidate state criminal proceedings. Kelly v. Robinson, 479 U.S. 36, 47 (1986). Specifically, this is because "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States" and there is a "fundamental policy against federal interference with state criminal prosecutions." *Id.* (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)).

142. For example, filing bankruptcy immediately stays pre-filing actions against the debtor. 11 U.S.C. § 362(a). Bankruptcy courts also have broad equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out" the bankruptcy code. *Id.* § 105(a). A bankruptcy court may even use the § 105 power to enjoin civil lawsuits against third parties if it determines doing so is appropriate or necessary for the success of the bankruptcy plan. *See, e.g.*, Caesars Ent. Operating Co. v. BOKF, N.A. (*In re* Caesars Ent. Operating Co.), 808 F.3d 1186, 1188–89 (7th Cir. 2015) (finding that the court could temporarily enjoin guaranty creditors' claims against the debtor company's principal owner because, otherwise, those suits would "thwart" the debtor's restructuring plan).

143. *See* Andrea Bopp Stark & Geoff Walsh, *Bankruptcy's Role in Alleviating Criminal Justice Debt*, NAT'L CONSUMER L. CTR. (May 7, 2021), https://library.nclc.org/bankruptcy%E2%80%99s-role-alleviating-criminal-justice-debt.

This Part will first consider how criminal law exceptionalism underpins a utilitarian dissonance between the bankruptcy court's power over civil claims and criminal claims. Then, it will consider whether debt forgiveness would yield more value than allowing restitution obligations to pile up uncollected. Finally, it will address practical issues with using bankruptcy as a solution to legal financial obligations.

A. The Exceptionalist Treatment of Criminal Law in Bankruptcy Results in Preferential Treatment to the Rich

Kelly is a prime example of criminal law exceptionalism—the idea that criminal and civil law are distinct from one another because of the sacred necessity of criminal law in society.[144] It brings with it an important question. At what point, if any, does the distinction between criminal and civil law devolve into arbitrariness? While a categorical answer to that question is unascertainable, one thing is certain: in bankruptcy, the distinction loses its sanctity when civil law is used for a penal purpose to remedy a sizeable harm, and as a result, upholding the distinction creates inequality between those with money and those without.

According to Alice Ristroph, the view that criminal and civil law are distinct structures is usually based on two justifications: "*subject-matter exceptionalism*, which claims that criminal law addresses, or should address, a discrete set of particularly harmful or wrongful behaviors, and *operational exceptionalism*," which "capture[s] a set of claims about the unique mechanics of criminal law."[145] The history of criminal law exceptionalism is connected to the political expansion of the criminal justice system. Ristroph observes that the exceptionalist mode of thought coincided with the explosion of mass incarceration, arguing that "the framework in which American law schools have educated legal professionals for more than half a century" at least partially underlies "[t]he individual political officials, judges, and prosecutors who have made the decisions that contributed to mass incarceration."[146] In conjunction with this point, Ristroph notes that "in the 1980s and 1990s, making criminal law 'better' did not mean making it smaller. In these two decades during which prison populations exploded most dramatically, the sheer numbers of prisoners were not seen as a crisis."[147] In short, expansion of the criminal law goes hand in hand with criminal law exceptionalism.

Kelly, decided in the 1980s, exemplifies criminal law exceptionalism[148] and was perhaps a part of this criminalization zeitgeist. The "deep conviction that federal

144. Exceptionalism's connection to the deprivation of rights is analyzed in recent scholarly works. *See, e.g.*, Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305 (2023).

145. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1953–54 (2021).

146. *Id.* at 2008.

147. *Id.* at 2000.

148. Another important point here is that § 523(a)(7) itself is *not* criminal law exceptionalist. There is no language in the exception that limits § 523(a)(7)'s applicability to criminal sanctions. *See In re* Purdue Pharma, L.P., 635 B.R. 26, 107 (S.D.N.Y. 2021) (noting that state-imposed civil penalties "payable to and for the benefit

bankruptcy courts should not invalidate the results of state criminal proceedings" underpinning *Kelly*[149] are operational-exceptionalist because the Court understood that bankruptcy—a civil mechanism—should not be used to diminish a state's power to police and impose criminal punishment. The Court "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" and gave procedural reasons (e.g., the flexibility of state judges to determine the appropriate combination of corrective actions) for holding that restitution was non-dischargeable.[150] *Kelly*'s focus on the operational exceptionalism of criminal law complies with its state-based rationale of restitution, and if one assumes that a "civil" mechanism should not be able to forgive a "criminal" debt, *Kelly*'s "deep convictions" are warranted.

Thus, though bankruptcy offers a process by which restitution could be reduced, restitution's label as "criminal" insulates it. In other words, the gilded age of restitution rages on in part because exceptionalism insulates it from change. It is gilded neither because restitution lacks unique punitive and rehabilitative benefits in theory nor because it is "worse" than traditional punishment. Quite the opposite, in fact; one would be hard-pressed to argue a system of justice focused on punishment *and* restoration is not favorable to one predicated solely on punishment. But today, it is clear what restitution has become in practice: an extension of the punitive system already in place. *Kelly* quite literally exemplifies Ristroph's hypothesis: the "deep conviction" that a civil mechanism should not alter or diminish the effects of a criminal action by the state lead to unjust incarceration—via the modern-day debtor's prison—which only affects those who cannot afford to pay.

Criminal law exceptionalism in this context also creates inequality because the differing treatment of suits for civil restitution and criminal restitution favors defendants in civil suits, even if those suits are brought for punitive reasons and are meant to remedy great harms to society. The contrast between criminal and civil restitution in bankruptcy is best exemplified by the ongoing battle over "non-consensual third-party releases."[151] In short, "non-debtor releases" are a mechanism allowing a bankruptcy court dealing with a corporate bankruptcy case to release

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of governmental units" are non-dischargeable), *aff'd in part, rev'd in part, remanded* 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (U.S. Aug. 10, 2023) (No. 23-124). It is instead *Kelly*'s interpretation of the discharge exception—predicated on a "deep conviction" about the fundamental importance of the state's power to criminally sanction—that is criminal law exceptionalist. *See* Kelly v. Robinson, 479 U.S. 36, 47 (1986).

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

150. *Id.* at 49.

151. *See, e.g.*, Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1106–09 (explaining the contentious nature of, and circuit split regarding, non-debtor releases); Ralph Brubaker, *A Case Study in Federal Bankruptcy Jurisdiction: Core Jurisdiction (or Not) to Approve Non-Debtor "Releases" and Permanent Injunctions in Chapter 11*, 38 BANKR. L. LETTER 1, 1 (2018).

third parties from liability to present and future claimants.[152] Pursuant to 11 U.S.C. § 105(a), a bankruptcy court may issue any order that is "necessary" or "appropriate" to carry out the provisions of Title 11, which has been interpreted by some courts as allowing courts to enjoin claims against related parties who are not debtors in bankruptcy.[153]

The question of whether a bankruptcy court may grant non-debtor releases as a general matter[154] culminated in the case *In re Purdue Pharma*.[155] There, the Sackler family sought a discharge of all future claims against them for activities related to the debtor, Purdue Pharma (a company they once controlled).[156] This discharge would cover claims of individuals (e.g., mass tort claims against the Sacklers for deceptive marketing practices leading to widespread opioid addiction) *and* of the states (e.g., actions under consumer protection statutes).[157] The latter claims are technically civil but are really quasi-public sanctions that resemble criminal fines: they are aimed at restraining future misconduct and exacting retribution and restoration for deceptive marketing practices, including "civil penalties, restitution, and disgorgement."[158] As stated by the district court in *Purdue*:

> [W]hen Purdue filed for bankruptcy in September 2019, ". . . the threat of liability for at least some members of the [Sackler] family was real and [ ] without the protections of bankruptcy, individual family members were at risk of substantial judgments against them." As explained . . . in the Confirmation

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152. Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1169–76 (2022) (discussing the controversiality of non-debtor releases).

153. *See, e.g.*, Caesars Ent. Operating Co. v. BOKF, N.A. (*In re* Caesars Ent. Operating Co.), 808 F.3d 1186, 1187–89 (7th Cir. 2015).

154. The bankruptcy code only explicitly allows for non-debtor releases in asbestos bankruptcies, in which claims are permanently enjoined and replaced with an interest in a trust set up during the bankruptcy process. *See* 11 U.S.C. § 524(g)(2)(B)(i)(I); Levitin, *supra* note 151, at 1106.

155. 635 B.R. 26 (S.D.N.Y. 2021), *aff'd in part, rev'd in part*, *remanded* 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (U.S. Aug. 10, 2023) (No. 23-124). The case is ongoing. On August 10, 2023, the Supreme Court issued a stay temporarily preventing Purdue Pharma's bankruptcy plans from going into effect pending a forthcoming writ of certiorari. Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (U.S. Aug. 10, 2023) (No. 23-124) (order granting stay).

156. *Id.* at 35–38; *see, e.g.*, Paul Schott, *Sacklers Quit Purdue Pharma Board Amid Shifts for OxyContin Maker*, STAMFORD ADVOC. (Nov. 4, 2019, 4:44 PM), https://www.stamfordadvocate.com/business/article/Sacklers-quit-Purdue-Pharma-board-signaling-13742946.php.

157. *Purdue*, 635 B.R. at 34–35, 37–38, 67, 70 (reversing the bankruptcy court below and finding non-debtor releases could not be justified by the code). Ultimately, the states settled with the Sacklers following the district court's opinion as the case was appealed to the Second Circuit. Brian Mann & Martha Bebinger, *Purdue Pharma, Sacklers Reach $6 Billion Deal with State Attorneys General*, NPR (Mar. 3, 2022, 1:43 PM), https://www.npr.org/2022/03/03/1084163626/purdue-sacklers-oxycontin-settlement. Before the settlement, however, the Sackler family sought a "channeling injunction" that was equivalent to a release in bankruptcy from states' claims. *Purdue*, 635 B.R. at 67. In fact, as the district court noted, some of these claims *would* have been barred by § 523 (a)(7) had the Sacklers—and not Purdue—been the debtor: "[a]t least some of the claims asserted by the State Appellants seek relief in the nature of non-dischargeable civil penalties payable to and for the benefit of governmental units. Such claims could not be discharged if the Sacklers had filed for personal bankruptcy." *Id.* at 107.

158. *Purdue*, 635 B.R. at 53.

> Hearing, it was estimated that ". . . litigating against the Sacklers could eventually lead to a judgment or multiple judgments greater than $4.275 billion."[159]

Juxtaposed with the non-dischargeability of criminal restitution obligations, the supposed ability of the bankruptcy court to grant non-debtor releases of quasi-public claims suggests there is an inequity between poor and rich (more specifically, corporate) debtors on account of criminal law exceptionalism. However, the distinction between criminal and civil law diminishes when considering restitution. Under any rationale, criminal restitution is quasi-private because it necessarily involves (1) ascertaining the harm inflicted on a victim and (2) a payment made out to that victim, or to the state and transmitted to the victim, that restores them to some extent. In both criminal and civil restitution actions, a party seeks compensation on behalf of a community (or part of one) for the tangible harm that resulted from wrongdoing.

Thus, while society condemns both individual offenders and corporate offenders because of harm perpetrated against the community, the federal bankruptcy court can forgive liability of the latter via non-debtor releases simply because that liability is not "criminal."[160] In that way, *Kelly* and *Purdue* create a profound moral dissonance. In *Kelly*, the bankruptcy court could not discharge Kelly's obligation of several thousand dollars. But in *Purdue*, a bankruptcy court *could* enjoin billions in future civil penalties against the Sackler family despite their actions, seemingly taken to avoid liability.[161] Under an exceptionalist interpretation, this differential treatment makes sense because the former is "criminal." But considering that the harms in the two cases are not equivalent, we are left with the question of whether criminal liability *should* be treated as exceptional in this context when the bankruptcy process may be used deliberately by those with means to enjoin civil liabilities.[162]

B. The Value of Forgiveness

The alternative to non-dischargeability is dischargeability, or forgiveness. In the literal financial sense, forgiveness is "to grant relief from payment."[163] However, in the philosophical sense, forgiveness is a more nuanced concept. Jeffrie Murphy

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159. *Id.* at 51 (citation omitted).

160. *See In re* Purdue Pharma L.P., 633 B.R. 53, 112–13 (Bankr. S.D.N.Y. 2021), *vacated* 635 B.R. 26 (S.D. N.Y. 2021), *aff'd in part, rev'd in part*, *remanded* 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (U.S. Aug. 10, 2023) (No. 23-124).

161. *See Purdue*, 635 B.R. at 55–57 (describing that, anticipating lawsuits and piercing liability, the Sackler family made massive transfers of money to the family from Purdue Pharma).

162. Simon, *supra* note 152, at 1162 ("Though companies traditionally viewed bankruptcy as a last resort, businesses are increasingly using Chapter 11 filings as an efficient way to deal with outsized liabilities and debt. That is, companies are using bankruptcy not merely because they are insolvent, but in an effort to escape unwanted obligations.") (footnote omitted).

163. *Forgive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/forgive (last visited Oct. 28, 2023).

defines "forgiveness" as the "overcoming, on moral grounds, of the negative passions (such as anger and resentment) that are generally present in victims against the persons who have wrongfully harmed them."[164] Martha Minow offers a similar but more action-oriented definition: forgiveness is "a conscious, deliberate decision to forgo rightful grounds for grievance against those who have committed a wrong or harm."[165] Forgiveness, therefore, seems to involve two main components: (1) deliberate release of a grievance by (2) the harmed party.

Discharge of restitution could be "forgiveness" under the state-based rationale of restitution (where the state, and not the victim, is the beneficiary of restitution). Put simply, if restitution is state-based, punitive, and intended to be for the ultimate benefit of the state, then perhaps "society," through a deliberately established mechanism such as a federal bankruptcy court, has the *personal* standing to forgive it. After all, it is the state's retributivist and rehabilitative interest that underpins the attachment of restitution under the state-based rationale. And though criminalized acts harm victims, it is the state that legislates and adjudicates just punishment.

This is not to eschew the complications of calling bankruptcy "forgiveness." One may argue the bankruptcy process is purely utilitarian, and therefore, it does not forgive at all. Specifically, the court does not determine whether a discharge is appropriate based on the morality of the debtor's conduct. This argument is difficult to overcome.[166] But regardless of bankruptcy's utilitarian function, the reduction of a debt always has a moral component to it. A debtor's debts are owed to another, and if the state chooses to alter that amount, it is intruding upon a bilateral relationship between two parties. This gives off the *appearance* of morality (i.e., reducing an unjust amount owed), or the lack of it (i.e., reducing a just amount owed). This is particularly the case for state-based restitution obligations because society's prerogative to condemn offenders might appear to be unfulfilled if a punitive sanction is discharged.

Irrespective of the categorization of bankruptcy on the spectrum of forgiveness, however, there are many benefits of debt forgiveness—in the literal sense—for *Kelly*'s goals of punishment and rehabilitation. As detailed above, criminal restitution obligations atop other legal financial barriers create substantial reentry barriers into society and lead to extensive consequences that are as cruel as they are lasting.[167] It is expensive for states to not only collect restitution (which often fails) but also impose other collateral consequences. And these actions make it difficult for offenders to start a new life. Since fines and fees can pile up into unpayable debts, non-dischargeability could be morally wrong: "[w]hen an offender

164. Jeffrie G. Murphy, *Punishment, Forgiveness, and Mercy*, 35 J.L. & RELIGION 5, 6 (2020).

165. Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615, 1618 (2015).

166. Though it suggests bankruptcy is instead mercy. "*Mercy* is the reduction, on moral grounds, of the punishment that might reasonably be thought to be required for crime control or retributive desert," and it is arguably "moral" for society to reduce debts and ensure that everyone has the opportunity to participate in the economy. *See* Murphy, *supra* note 164, at 6.

167. *See supra* Sections I.A, I.B.

completes punishment, when she has been held accountable for her crime, she should regain the same standing as everyone else. To continue to impose restrictions on her would be to deny her the equal treatment to which she is entitled."[168]

Therefore, discharge is desirable because it can mitigate collateral consequences and because following the bankruptcy process may have inherent benefits that contribute toward *Kelly*'s aims. First, discharge may provide an out to the collateral consequences associated with outstanding debt, but it would not be without sacrifice. Discharge is only awarded after the debtor completes obligations imposed by the court, successfully files for bankruptcy, complies with procedures, and does not conceal any assets.[169] Offenders would still have to seek legal advice and, most likely, pay a filing fee to enter bankruptcy.[170] In the Chapter 7 context, the debtor's non-exempt assets, if any, would be liquidated by the bankruptcy trustee for the benefit of creditors.[171] Debtors also cannot repeatedly file for a discharge and will only be granted one if they have not filed for another Chapter 7 discharge in the last eight years.[172]

On this point, there are a few counterarguments about bankruptcy procedures that must be addressed. Some obstructive procedures prevent filings from debtors who do not actually need bankruptcy protections, but regardless, the process' conceived benefit without *Kelly*—avoidance of the consequences associated with outstanding legal financial debt—outweighs these costs.[173] They also may reduce bankruptcy's accessibility and usefulness as a solution. But bankruptcy's perceived value here is through the protections served by the process—particularly the discharge that would allow offenders a "fresh start" without the legal financial debt, and thus, the debilitating collateral consequences associated with an inability to pay them.[174]

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168. Hoskins, *supra* note 124, at 41.

169. 11 U.S.C. § 727(a).

170. Atkinson, *supra* note 60, at 971 ("A debtor who wants to file a bankruptcy petition must pay a filing fee of $335 for a Chapter 7 case . . . . The average cost of a bankruptcy attorney in a Chapter 7 case ranges from approximately $900 to $1,100 . . . ."). However, defendants may pay in installments, and those with income 150% below the poverty line may have fees waived. 28 U.S.C. § 1930(a)(6)(A), (f)(1).

171. Atkinson, *supra* note 60, at 923. Note, however, that most Chapter 7 cases filed have no non-exempt assets. *Id.*; *see also* Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 798, 800 (2009) (finding that only seven percent of a sample of 2,500 consumer bankruptcy cases were "asset-cases" in which there was any distribution to unsecured creditors).

172. 11 U.S.C. § 727(a)(8).

173. *See* Minow, *supra* note 165, at 1639 ("Debt, and the property it represents, matters, but not more than liberty and dignity—or so societies decided in abolishing debtors' prison.").

174. In short, some might find it better, in the long run, to deal with the costs of bankruptcy immediately rather than the prolonged collateral consequences and effective "civil death" perpetrated by legal financial debt. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (arguing that civil death, an archaic punishment whereby a criminal's civil rights are "extinguished," has reappeared "in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences"). And, because of the state expenses associated with imposing the cycles of punishment connected to restitution, discharge may also be in the financial interest of the state. *See supra* Part II.

Second, there is inherent benefit in the process of (1) filing for bankruptcy, i.e., seeking forgiveness; (2) taking other steps necessary to receive a discharge; and (3) accepting the discharge. By completing these concrete steps, offenders can take responsibility for their actions and return to society without restriction. And the state, acting through the bankruptcy court, determines eligibility for bankruptcy, discharge, or both, so offenders must acknowledge the state's power in order to have a chance at discharge:

> [I]n accepting forgiveness, the offender acts on his victim's normative power over him and his delinquency. In this way, it involves a reversal of a dynamic in which he acted as though she did not matter, as though he could wrong her and move on without being answerable to her in any way.[175]

If the offender is granted discharge after trudging through the process of bankruptcy, they probably would not get a second chance.[176] Offenders might act in good faith, comply with the law, and earn their forgiveness through the process of bankruptcy. Forgiveness would then contribute to the punitive and rehabilitative goals of the state, and these offenders—armed with the knowledge that they were forgiven—might be uniquely situated to move on with their lives. After all, "[f]orgiveness has the potential to introduce an element of humanity and healing that has been absent from the legal field."[177]

C. Is Bankruptcy an Adequate Solution?

In criticizing *Kelly* and the current conception of restitution obligations as non-dischargeable, it is also important to address normative criticisms of the alternative. There are two important questions here: (1) whether making restitution obligations dischargeable would do a disservice to victims while benefitting criminals and (2) whether bankruptcy is the correct avenue to deal with legal financial obligations at all.

On the first question, some offenders might abuse this process and others may receive forgiveness who we might not think deserve it at the expense of underpaid victims.[178] Intuitively, it also might seem victims will be paid *less* if restitution

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175. Jeffrey S. Helmreich, *Accepting Forgiveness*, 26 J. ETHICS 1, 14 (2022).

176. *See, e.g.*, CAROLINE COHN, ARIEL NELSON, ANDREW G. PIZOR & ABBY SHAFROTH, NAT'L CONSUMER L. CTR., MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE HIGH COST OF A FRESH START: A STATE-BY-STATE ANALYSIS OF COURT DEBT AS A BAR TO RECORD CLEARING 8–10 (2022) (explaining that outstanding court debt can mean "access to record clearing may be put at risk, delayed, or denied entirely, depending on the law of the jurisdiction where the record originated").

177. This is especially vital when many hold cynicism and mistrust towards the legal system. Eileen Barker, *The Case for Forgiveness in Legal Disputes*, 13 PEPP. DISP. RESOL. L.J. 205, 206 (2013).

178. That said, if restitution judgments as a whole were no longer categorically non-dischargeable, certain restitution obligations would still be non-dischargeable because of other provisions of the bankruptcy code. The inquiry would simply change from whether there is a governmental obligation to whether the *mens rea* and *actus reus* of a crime make the obligation non-dischargeable under the other parts of § 523 (as would be the case for civil judgments of torts debts). For examples of other debts that are non-dischargeable, see 11 U.S.C. § 523(a)(5) (domestic support obligations); *id.* § 523(a)(6) (actions causing "willful and malicious" injury); *id.* § 523(a)(9) (costs of wrongful death and injury resulting from debtor's operation of a vehicle while intoxicated).

obligations can be discharged. But, without empirical analysis, we cannot know whether making restitution dischargeable would have any negative impact on public safety.[179] We also cannot know whether making restitution dischargeable would result in less actual value transferred to victims because victims already receive far less than the amount of harm done:[180] "[m]any states have millions of dollars that have gone uncollected for a number of years."[181] Even states that track outstanding restitution are only able to collect portions of it.[182] Additionally, discharge is never automatic—in Chapter 7, a discharge is only available after non-exempt assets have been liquidated and used to satisfy debts in order of priority.[183] If a debtor has only exempt assets—a "no-asset" case—a discharge may be granted without liquidation, and, theoretically, a restitution obligation owed might not be paid at all.[184] However, even in that case, the bankruptcy trustee appointed by the court is responsible for "collect[ing] and reduc[ing] to money the property of the estate for which such trustee serves"; "investigat[ing] the financial affairs of the debtor"; and, "if advisable, oppos[ing] the discharge of the debtor."[185] This ties into the issue of those who might attempt to use a restitution discharge in bad faith. A lack of forthcomingness may cause bankruptcy to fail—assets must be fully and publicly disclosed to the court, and the trustee must verify the financial position of the debtor.[186]

One other consideration is that the bankruptcy process would not take into account the severity of the crime in determining whether a discharge should be granted. That is a point well taken: if the theory of restitution forgiveness is that the state has personal standing to forgive it, then, in theory, the state should be able to consider the severity of the crime when determining whether to extend a discharge. The value of forgiveness is somewhat diminished without weighing the

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179. That said, it is also not a forgone conclusion that the current system of punishment and incapacitation reduces crime. *See, e.g.*, Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 267–69 (2007) (surveying inconclusive research on this subject and outlining the complications of testing it empirically).

180. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 25.

181. Waterman, *supra* note 31, at 470.

182. *Id.* ("South Dakota courts have ordered $10.4 million in restitution since 2016, yet they have only been able to collect around $2.1 million for victims . . . . California had a $9.1 billion delinquent restitution debt and was able to collect $3.9 billion.").

183. *See, e.g.*, 11 U.S.C. §§ 507, 704.

184. *Chapter 7 - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Oct. 28, 2023).

185. 11 U.S.C. § 704(a).

186. *Is Bankruptcy Information Available to the Public? Can Anyone Look at It?*, U.S. BANKR. CT. N. DIST. OF CAL., https://www.canb.uscourts.gov/faq/general-bankruptcy/bankruptcy-information-available-public-can-anyone-look-it (last visited Oct. 6, 2023). This is particularly valuable because defendants already may be hiding assets to avoid their restitution obligations. *See* OFF. FOR VICTIMS OF CRIME, RESTITUTION: MAKING IT WORK 2 (2002) https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin5/ncj189193.pdf ("In some cases, defendants may conceal assets or may even waste assets in an attempt to avoid paying restitution.").

severity of the action committed because forgiveness has limitations where the underlying offense is so dire that restoration is impossible.[187]

Yet it would not help to leave debts non-dischargeable because that option also fails to account for severity in the reverse sense. Leaving debts categorially non-dischargeable exposes those who cannot pay to collateral consequences, resulting in selective over-punishment. This is really the same problem: the dischargeability of restitution decides whether to help those who have committed serious crimes or punish those whose wrongdoings have been resolved. And moreover, bankruptcy cannot touch other traditional forms of punishment (i.e., incarceration) that simultaneously mean to hold the defendant accountable.

Additionally, without *Kelly*, bankruptcy would not always be the right option due to the costs and legal processes associated with it, which may deter certain offenders from abusing the bankruptcy process. The Chapter 7 discharge also would not be available to all debtors and would be more advantageous to those at certain income levels. Debtors whose monthly income exceeds the state's median may not qualify for Chapter 7[188] and may need to use Chapter 13—in which restitution is non-dischargeable by statute. In the absence of *Kelly*, offenders would decide whether to go through bankruptcy on a case-by-case basis. Bankruptcy is not free, and the benefits of bankruptcy must outweigh the costs. Prospective bankruptcy debtors face the cost of filing for bankruptcy, attorney's fees,[189] and the subjective cost the debtor might incur if they have to liquidate assets in the process of bankruptcy. These costs must be offset by the value of the discharged restitution obligation, the amount of other debts that may be discharged in bankruptcy, and the value of avoiding the collateral consequences associated with outstanding restitution and other dischargeable obligations.[190]

On its own, the end of *Kelly* would not provide offenders with relief from crushing fines and fees. Substantial revisions to the bankruptcy code could help, making bankruptcy more of a tool for the resolution of social issues that come under its penumbra.[191]

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187. *See* Helmreich, *supra* note 175, at 22 ("[A]ccepting forgiveness faces some of the same limitations as moral repair more generally. With some wrongdoings[,] . . . acts like apology and reparations barely begin to counteract what most needs repair.").

188. U.S. CTS., *supra* note 184.

189. *The Cost of Bankruptcy*, DEBT.ORG, https://www.debt.org/bankruptcy/cost/ (last visited Oct. 29, 2023) (explaining that "filing bankruptcy costs between $1,500 and $4,000 in court filing fees and attorney fees"); Atkinson, *supra* note 60, at 971 ("The average cost of a bankruptcy attorney in a Chapter 7 case ranges from approximately $900 to $1,100 depending on jurisdiction and whether the case is an asset or no-asset case.").

190. Some argue that many other legal financial debts could be discharged in Chapter 7 liquidations. *See* Stark & Walsh, *supra* note 143 (explaining how, assuming restitution is non-dischargeable, a $12,634 debt could be reduced to a $2,750 debt).

191. Though, it is important to consider bankruptcy's intended purpose and inherent limitations. "[B]ankruptcy judges . . . see themselves as problem solvers, but there are some problems for which they have neither the tools nor the mandate. [] Some understand this, but there are others . . . who have Messiah complexes that make them think that they should be trying to save the world through bankruptcy. Square pegs just aren't going to work well with round holes." Adam Levitin (@AdamLevitin), TWITTER (Apr. 18, 2022,

But bankruptcy itself might require prohibitive costs to indigent debtors that may not outweigh the cost of legal financial obligations.[192]

Still, there would be some immediate and practical advantages to bankruptcy. Bankruptcy is an existing federal statutory scheme, meaning new structures would not have to be designed and implemented for it to provide discharges. Since bankruptcy is federal, it would reach states that do not consider a defendant's ability to pay as well as those with a "modern day debtor's prison."

Additionally, if these debts were dischargeable, other actors might act favorably to indigent defendants. For example, "if bankruptcy is an option, it might encourage attorneys who provide pro bono services to indigent clients in other contexts to fold bankruptcy into the set of substantive services provided."[193] More importantly, Congress might take more decisive action on whether bankruptcy should be a viable option for those suffering under penal debt.

Therefore, if *Kelly* did not exist, discharge in bankruptcy could help alleviate legal financial burdens by creating an avenue for debt forgiveness. Moreover, the process would have positive collateral effects that help to satisfy the state's interest in punishment and rehabilitation. Though bankruptcy is not a complete solution, it has merit as a readily available and well-established statutory scheme in lieu of broader solutions for legal financial debt.

CONCLUSION

While restitution may be gilded as a humane, fair method of punishment, *Kelly v. Robinson* was wrongly decided. The non-dischargeability of restitution is inconsistent with § 523(a)(7) of the bankruptcy code because of its disproportionately punitive consequences. Construing § 523(a)(7) to make restitution categorically non-dischargeable creates surplusage within the statute and ignores the empirical realities of restitution. Restitution and legal financial debt create a distinction between those offenders who *can* pay and those offenders who *cannot*, thereby disproportionately punishing those with less means. Alleviating these obligations through a mechanism as obtuse as bankruptcy would be merciful to those who suffer the greatest repercussions of legal debt. The disproportionate punishment brought by restitution and other legal financial obligations is not only unfair and unjust but undesirable from an economic standpoint. It upholds the idea that criminal law is distinct from civil law, part and parcel of a functioning society.

For the foregoing reasons, *Kelly v. Robinson* should be cabined to the extent *stare decisis* allows, and we should acknowledge restitution's punitive and disproportionate character. While not a complete solution to the onset of crushing legal financial obligations, cabining *Kelly* is the right decision statutorily, normatively, and morally.

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192. Atkinson, *supra* note 60, at 970–72.

193. *Id.* at 972.