Sentenced to a Life of Debt: It Is Time for a Reassessment of How Bankruptcy Law Intersects with Fines and Fees to Keep People in Debt

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I. Introduction

Over the past several decades, bankruptcy gave tens of millions of Americans a fresh start free from crushing debt. Although criminal justice debt weighs disproportionately upon those with the least ability to pay, it has generally been excluded from bankruptcy's fresh start. This exclusion has been grounded on the belief that allowing discharge of monetary sanctions would interfere unduly with important government interests in public safety, deterrence of crime, and rehabilitation.

The bankruptcy dischargeability exception for criminal justice debt encompasses a wide range of monetary sanctions. These include fines and penalties imposed by statute as punishment for an offense. The exception also excludes from discharge many fees and surcharges intended to finance government operations. In recent decades, revenue collection has increasingly become the driving force behind monetary sanctions imposed in criminal cases. At the same time, the severity of sanctions routinely imposed has increased dramatically. Today, the magnitude of a sanction often bears no relation to the harm or injury caused by the offense.

This Article begins with a review of key provisions of the Bankruptcy Code that limit the discharge of criminal justice debt and examines how the courts have construed these limits. We focus in particular on the Supreme Court's 1986 ruling in *Kelly v. Robinson*.[1] In *Kelly* the Court looked beyond the Bankruptcy Code's plain language and extended the bar to discharge to an order to pay restitution arising from a conviction for welfare fraud. Next, we examine the assumptions about criminal justice debt, and its relationship to state interests in deterring and punishing crime, that the Court relied on in *Kelly*. The nature of this debt, its sheer volume, and our understanding of its impact have changed fundamentally in the decades since *Kelly* was decided. These developments have taken several forms: (1) the purpose of many fees and costs routinely included in sentencing orders has increasingly become to collect revenue for cash-strapped states and localities; (2) the evidence assembled over the past decade has established that courts and law enforcement exercise discretion to impose monetary sanctions against people of color at disturbingly high, disproportionate rates; and (3) the effect of monetary sanctions, including fines and penalties, on balance has been shown to impede goals of public safety, deterrence, and rehabilitation.

The Article concludes with the consideration of reforms to the Bankruptcy Code that can allow the law to function appropriately within today's law enforcement landscape. One goal of these reforms must be to remove the limits on dischargeability of fees, costs, and other revenue-driven charges that fall outside legitimate state penal interests. Another objective must be to end lifelong debt burdens that serve only to drive the poorest Americans deeper into poverty, by allowing discharge of all monetary sanctions, including fines, in bankruptcy after a fixed time.

These proposed changes do not displace the Bankruptcy Code's basic safeguards against abuse. The system of means testing added to the Code in 2005 ensures that wealthy individuals who can afford to pay their debts are barred from all chapter 7 relief.[2] A chapter 7 bankruptcy is not an option for individuals who own substantial assets because valuable property is subject to liquidation. In chapter 13 bankruptcies, individuals must devote their disposable income to a court-supervised payment plan for three to five years in order to obtain a discharge. Bankruptcy would not be a refuge for those who have the ability to pay their legal obligations and simply choose not to pay. Instead, with targeted reforms, bankruptcy could aid many individuals on their path to rehabilitation and participation in the mainstream economy.

II. Limits on Dischargeability of Criminal Justice Debt in Bankruptcy

A. The Exception to Discharge for Criminal Justice Debt in Chapter 7 Bankruptcy Cases

Most individuals who seek bankruptcy relief do so under chapter 7 of the Bankruptcy Code.[3] Individual consumers may also file a bankruptcy case under chapter 13 of the Code. Different standards and procedures apply in chapter 13 cases, as discussed below. In chapter 7, debtors offer to liquidate any of their assets that are not protected by exemption laws, which provide for basic needs. The proceeds of liquidation are distributed to creditors under a priority system written into the Code. After a bankruptcy trustee reviews the debtor's financial affairs and liquidates

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any non-exempt property, the bankruptcy court enters a discharge order. The order prohibits creditors from seeking payment from the debtor for discharged debts. The purpose of the discharge order is to give the debtor a "fresh start" in life, free from the burdens of pre-bankruptcy debts. Medical debts, credit card debts, and amounts owed for a wide range of consumer transactions are routinely discharged in chapter 7 cases.

Since its enactment in 1978, the Bankruptcy Code has always excepted certain categories of debts from the scope of the discharge. Section 523(a) of the Code currently lists nineteen types of debts not covered by the chapter 7 discharge.[4] These include debts for child support, most federal and state income tax debts owed for less than three years, and most student loans. Unless a specific exception applies, debts owed to the government are dischargeable like any other debt. However, subsection (7) of section 523(a) excepts from discharge a debt

> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, [other than a tax penalty. . . .][5]

This provision has remained unchanged in the Code since 1978. The exception generally applies to debts for a "fine, penalty, or forfeiture." However, these debts must meet additional requirements to qualify for the exception. The "fine, penalty, or forfeiture" must be (1) payable to a governmental unit; (2) payable for the benefit of a governmental unit; and (3) not compensation for actual pecuniary loss. As will be discussed in the following sections, courts, including the Supreme Court, have not construed section 523(a)(7) in accordance with its plain language.

B. *Kelly v. Robinson* and the Primacy of the Criminal Sentencing Order

In 1986, the Supreme Court issued a decision that profoundly impacted how courts apply section 523(a)(7). *Kelly v. Robinson* involved the case of Carolyn Robinson, a Connecticut woman who pled guilty to larceny for wrongful receipt of welfare benefits in the amount of $9,932.95. The state court entered an order sentencing Ms. Robinson to one to three years imprisonment, the execution of which was suspended, with Ms. Robinson placed on probation for five years on the condition that she make restitution in the amount of $9,932.95. Ms. Robinson was directed to make payments to the State of Connecticut during the period of her probation at the rate of $100 per month.

After making several payments as required by her probation order, Ms. Robinson defaulted. She subsequently filed for chapter 7 bankruptcy relief and obtained a discharge. Several years later, when the State again sought to enforce the restitution order, Ms. Robinson claimed that she had discharged the obligation in her bankruptcy case.

The Second Circuit looked at the plain language of section 523(a)(7) and agreed with Ms. Robinson.[6] In the court's view, the order directing Ms. Robinson to pay the State of Connecticut the precise amount of the benefits she improperly received fit squarely within one of section 523(a)(7)'s qualifying clauses. Section 523(a)(7) made fines and penalties nondischargeable, but not obligations to pay the government "compensation for actual pecuniary loss."

The Supreme Court reversed. According to the Court, "§ 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence."[7] Under this standard, *any* obligation becomes nondischargeable in a chapter 7 bankruptcy as long as a court incorporates the obligation into a sentencing order in a criminal case.[8]

The *Kelly* Court acknowledged that the plain text of section 523(a)(7) supported Ms. Robinson's position.[9] However, policy considerations led the Court to its nontextual conclusion. Specifically, the Court emphasized "the history of bankruptcy court deference to criminal judgments" and "the interests of the States in unfettered administration of their criminal justice systems."[10]

The *Kelly* Court went to great lengths to place policy considerations above plain statutory language. In the Court's view, the overarching consideration that was at stake was the right of states "to formulate and enforce penal sanctions."[11] Allowing discharge of Ms. Kelly's restitution debt would undermine "the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose."[12] In the Court's view, state court judges must have flexibility to craft sentences in order to further the goals of public safety, deterrence, and rehabilitation.[13] Ms. Robinson's restitution order was a case in point. The restitution order imposed rehabilitation in "concrete terms" because it bore a "direct relation between the harm and the punishment."[14]

Notably, the *Kelly* Court did not consider whether an item included in a sentencing order could have a purpose other than punishment, deterrence, or rehabilitation. In the Court's view, all aspects of a criminal sentencing order were "necessarily" grounded on the "penal and rehabilitative interest of the state."[15] As will be discussed below, contrary to the *Kelly* Court's assumptions, a substantial portion of the debts that have been routinely finding their way into criminal sentencing orders over the past several decades are not grounded on the penal and rehabilitative interests of the government.

C. The Exception to Discharge of Criminal Justice Debt in Chapter 13

As an alternative to chapter 7, individuals may choose to file for relief under chapter 13 of the Bankruptcy Code. In a chapter 13 case, the debtor must propose a debt repayment plan. Chapter 13 plans last from three to five years, during which the debtor makes monthly payments to a bankruptcy trustee. The trustee in turn distributes the debtor's payments to creditors in conformity with the plan's terms.

Chapter 13 involves a significant commitment of time and expense. Debtors pay their disposable income to the trustee for several years. Depending on the debtor's income and the extent and nature of the debts, the amount each creditor ultimately receives varies considerably. In many cases, particularly those of low-income debtors, unsecured creditors receive only a small portion of what is owed on the pre-bankruptcy debts. The remaining indebtedness is discharged at the plan's conclusion. Chapter 13's attraction for consumers has traditionally been its options for flexible treatment of secured debts, such as home mortgages.

Chapter 13 has its own discharge provision and exceptions to discharge.[16] The chapter 13 discharge has always covered a broader range of debts than chapter 7, although the scope of chapter 13's expansive discharge has receded over time.

Unlike chapter 7, where the provisions limiting discharge of criminal justice debt have remained unchanged since 1978, significant amendments have reshaped the treatment of criminal justice debt in chapter 13. As enacted, the Code did not restrict discharge of fines, penalties, or any form of criminal justice debt in chapter 13. Through the 1980s, debtors who abided by a plan to pay what they could afford toward their pre-petition debts for three to five years could discharge the types of criminal justice debts that were nondischargeable in chapter 7.[17] This difference in treatment was consistent with Congress's intent to encourage consumers to use chapter 13 as an alternative to chapter 7.[18]

In its 1990 ruling in *Pennsylvania Dept. of Public Welfare v. Davenport*,[19] the Supreme Court focused attention on how the Code in effect at the time treated discharge of criminal justice debt differently in chapter 13 and chapter 7. In a case with facts mirroring those of *Kelly* (a debtor seeking to discharge a restitution obligation in a sentencing order involving welfare fraud), the Court affirmed that in chapter 13 there were no restrictions on discharge of criminal restitution debt.

Appearing at the height of the national tough-on-crime momentum, the *Davenport* decision immediately prompted Congress to amend the Code provision that defined the scope of a chapter 13 discharge.[20] The 1990 amendment added a new chapter 13 discharge exception for "restitution included in a sentence on the debtor's conviction of a crime."[21] In 1994, Congress added "criminal fines" to the exceptions to the chapter 13 discharge.[22] In its current form, section 1328 of the Code excludes from the chapter 13 discharge any debt

> (3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime[.][23]

Although now subject to these significant restrictions, chapter 13 continues to present options for discharge of certain fines, penalties, and costs that chapter 7 does not. *Civil* fines and penalties, which in certain jurisdictions may include traffic fines and penalties for municipal infractions, are still dischargeable in chapter 13. Criminal fees and other sanctions that are *not* included in a sentence upon conviction of a crime are also dischargeable in chapter 13.[24] However, the bottom line remains that a fine, penalty, and restitution order, regardless of its purpose, is now nondischargeable in both chapter 13 and chapter 7, as long as it was included in a sentencing order in a criminal case.

D. The Relief from Criminal Justice Debt Now Available Under Current Bankruptcy Law Is Extremely Limited

Kelly and the post-*Davenport* amendments limiting the chapter 13 discharge all but closed the door to bankruptcy relief for individuals burdened by unaffordable criminal justice debt. So long as they are included in a sentencing order, nearly all types of financial obligations—regardless of their purpose—are currently excluded from discharge in bankruptcy.[25] And since many jurisdictions do not apply a statute of limitations to collection of criminal justice debt,[26] many people are effectively sentenced to a life of indebtedness.

One of the rare types of criminal justice debt that may still be subject to discharge in bankruptcy involves obligations imposed *after* criminal convictions. For example, fees for post-conviction probation or parole monitoring, incarceration, and post-incarceration services are often imposed after sentencing. These debts should be dischargeable because they are not included in a sentencing order and are not a fine or penalty. Similarly, charges for interest and fees related to collection of criminal justice debt are obviously assessed after the initial sentencing order.

However, even post-conviction fees have been found non-dischargeable by some courts, which have pointed to language in sentencing orders that encompass the obligation to pay fees that will be incurred in the future,[27] or to statutory costs imposed on the defendant automatically upon a conviction.[28] In broadest form, some courts reason that if a fee would not have been assessed against the debtor if the debtor had not been convicted of a crime, the debt falls within the discharge exception of section 523(a)(7).[29] For example, courts have found that fees that prison authorities imposed on incarcerated individuals were nondischargeable debts under section 523(a)(7).[30] These included charges for medical care related to a failed suicide attempt,[31] costs for damage to prison property,[32] and attorney's fees assessed for filing a meritless lawsuit against the state.[33] In all of these instances, the courts reasoned that the fees would not have been imposed if the individual had not been convicted of a crime.

The assessment of whether there is an option for discharge of a fee or cost requires a careful analysis not only of the timing of the charge but also of the parties involved. As discussed in section I, part C above, the fact that an obligation is payable to and for the benefit of a private party does not ensure dischargeability. However, private party involvement as payee and ultimate beneficiary is a factor favoring discharge. For example, courts have found collection charges that a private debt collector imposes and retains as its own compensation to be dischargeable.[34] Some courts have held that debts owed to private bonding companies are dischargeable.[35] When neither included in a sentencing order nor imposed automatically by a statute, charges imposed unequivocally to recover the cost of a post-conviction service the state provided to the defendant may be "compensation for actual pecuniary loss" and dischargeable under a plain-language reading of section 523(a)(7).[36] Nevertheless, court rulings on the dischargeability of charges for post-conviction services are divided and depend heavily on state laws.

E. Other Barriers to Discharge Determinations

Enforcing a bankruptcy dischargeability claim can be a complicated and expensive process. Faced with a government creditor that continues to demand payment of a disputed charge despite a bankruptcy filing, the debtor's option is to ask the bankruptcy court to rule on the dischargeability status of the debt. This typically requires the filing of a lawsuit (an "adversary proceeding") or a contempt motion with the bankruptcy court. Most law firms that specialize in consumer bankruptcy filings charge a set fee for guiding a debtor through the basic bankruptcy procedures that lead to a discharge. The expense of a separate lawsuit against the government is likely to be prohibitive for debtors burdened with criminal justice debt.

Two additional factors dissuade debtors from bringing dischargeability challenges. One problem has been that the court rulings on the dischargeability of criminal justice fees and costs are spotty and inconsistent. Much of the meager precedent in this area has been developed by pro se litigants with poorly developed records and arguments.[37] The other complicating factor is the lack of clarity in the records from many criminal court proceedings. In a given case it is often difficult to decipher what types of fees were imposed, when, and by whom.[38]

An example of how uncertain legal standards and confusing court records complicate a dischargeability proceeding can be seen in *Lopez v. First Judicial District of Pennsylvania*.[39] Mr. Lopez claimed that his chapter 7 discharge relieved him of liability for a series of court costs and charges assessed against him in several pre-bankruptcy criminal proceedings.[40] Reading *Kelly* to exclude from discharge any fee connected with a criminal proceeding, the bankruptcy court dismissed Mr. Lopez's adversary proceeding.[41]

Mr. Lopez appealed, and the Third Circuit eventually vacated the bankruptcy court's dismissal and remanded the case.[42] The Court of Appeals emphasized that "both sides struggled to provide even the most basic description of Lopez's criminal history much less tell us what was provided in the judgments of sentence."[43] On remand, the bankruptcy court again had to puzzle over the nature of various charges.[44] The bankruptcy court ultimately found a small portion of the challenged fees non-dischargeable. Mr. Lopez was represented by experienced pro bono counsel in his case.[45] Few individuals burdened by criminal justice debt are able to pursue their legal claims as he did.

III. The Use of Fees and Fines to Fund Government Operations

A. The Rise of the Use of Fees and Fines for Revenue

As discussed in section I, the Bankruptcy Code speaks only to "a fine, penalty, or forfeiture" when it defines the types of obligations excepted from discharge.[46] Fines and penalties are based on statutes and ordinances that authorize imposition of a range of charges upon commission of a defined infraction. *Kelly v. Robinson* extended coverage of the discharge exception to cover restitution obligations. *Kelly*'s analysis fostered an expansion of the discharge exception to reach any obligation included in a sentencing order, regardless of its purpose or the ultimate beneficiary of payment. The breadth of *Kelly*'s holding blurs the distinctions between many types of obligations. Under *Kelly*, fees and surcharges that finance government operations, and that are often not specific to a defined infraction, are treated the same as fines and penalties. This section looks at the evolution of fees, fines, and penalties in the United States since Ms. Robinson was convicted of welfare fraud in 1981.

In the early 1980s, the use of fees and fines for low-level offenses began to increase. By the late 1980s, fines became a common sanction for less serious criminal offenses under the theory that increasing punishment for minor offenses would prevent major crime.[47] Simultaneously, and during the decades that followed, the costs of the criminal justice system soared. At the same time, state and local court budgets faced significant cuts. In this context, local jurisdictions turned increasingly to fees and fines on low-level offenses to help fund the penal system.[48]

Part of the rapid escalation of costs was due to the exponential increase in incarcerated populations in the United States. The "war on drugs" in the 1970s and 1980s set the stage for zero-tolerance drug policies and dramatically increased drug-related arrests and convictions. Many states enacted mandatory sentencing laws and limited parole. Incarceration rates grew 133.8% between 1980 and 1990 to a then record high of 771,243 inmates.[49] During the 1990s the rates skyrocketed further, and the United States now has almost 2.3 million incarcerated individuals, the highest rate in the world.[50]

With this massive growth in incarceration came a boom in costs for the criminal legal system. State corrections expenditures grew from $15 billion annually in 1982 to around $50 billion in 2010.[51] Likewise, costs for more courtrooms, judges, prosecutors, public defenders, probation officers, training for correctional employees, and administrators increased.[52] Costs related to increased policing, including hiring more officers and personnel, quadrupled between 1985 and 2005.[53]

This unprecedented growth in spending led to an ever-increasing reliance on fines and fees to defray the costs.[54]

With state and local governments facing resistance to increasing taxes, states turned increasingly to criminal fees and fines to fund the system, as well as to support government operations generally.[55] Court personnel became involved in these debt collection practices, which effectively "turn[ed] courts, clerks, and probation officers into general tax collectors."[56]

This practice came to public attention through the U.S. Department of Justice investigation of the Ferguson, Missouri, police department after the shooting of Michael Brown. The DOJ found that "[c]ity officials have consistently set maximizing revenue as the priority for Ferguson's law enforcement activity. . . . City, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process, beginning with how fines and fine enforcement processes are established."[57] Fees and fines collected by the court in Ferguson tripled from around $1 million in 2010 to over $3 million in 2015.[58]

Jurisdictions throughout the United States have implemented similar practices, funding a wide range of government functions with monetary sanctions imposed in criminal proceedings.[59] Since 2008, almost every state has increased criminal fees and fines or added new ones.[60] These financial sanctions are imposed on the majority of those convicted of a crime, including over two-thirds of people in prison.[61]

The costs imposed for criminal offenses can run the gamut, from fees for work release programs, drug testing, weekend release programs, electronic monitoring, and house arrest; to fees for community services, GED testing, substance abuse treatment, and vocational testing; to charges for medical visits and telephone use; to per diem room-and-board charges.[62] In Illinois, for example, monetary sanctions in criminal cases fund general revenue for municipalities, counties, the state, law enforcement agencies, county jails and sheriffs, courts, prosecution and defense of cases, and administrative costs.[63] Many of the special purpose funds are not even connected to the crime, such as a $40 fee for the Prescription Pill and Drug Disposal Fund that prevents further contamination of drinking water.[64] While a $40 fee or fine may not seem like a huge sum in isolation, such charges add up quickly, especially if multiple mandatory debts are imposed for each count of a conviction. A 2019 study found that at least $27.6 billion of fines and fees were owed across the country.[65]

In 2019, a defendant in Allegheny County, Pennsylvania who pled guilty to "retail theft" of an item worth $121 was assessed $1,400.75 in costs and fees. Many of the fees assessed—such as the child-care facility fee, domestic violence compensation fee, and technology fee—had no connection to the retail theft charge. Other fees, such as the booking fee, costs of prosecution, and court cost are used to directly fund the criminal legal system itself. The amounts of some of the fees assessed are shown in Table 1. Sentencing orders can have a laundry list of twenty-five or more of these types of charges.[66]

Table 1 Examples of Fees Assessed in Criminal Sentencing

Booking Center Fee	$200.00
Costs of Prosecution	$50.00
County Court Costs	$35.10
Crime Victims Compensation Fund	$35.00
Probation/Parole Admin. Fee	$240.00
Offender Supervision Program	$540.00
Victim Witness Service	$25.00
Domestic Violence Compensation Fund	$10.00
Child Care Facility Fee	$5.00
Firearm Education and Training Fund	$5.00
Law Library User Fee	$7.00

B. Racial Disparities and Other Inequities in the Burden of Fees and Fines

Black, brown, and low-income communities disproportionately bear the burden of criminal justice debt. Low-income communities of color, and Black communities in particular, are disproportionately targeted for enforcement of minor crimes and infractions that generate fines and fees, creating a form of regressive and discriminatory taxation.[67] Such disparities were confirmed by the DOJ's Ferguson investigation, which found that "African Americans are disproportionately represented at nearly every stage of Ferguson law enforcement, from initial police contact to final disposition of a case in municipal court."[68] Despite making up 67% of the population, African Americans accounted for 85% of the Ferguson Police Department's traffic stops, 90% of citations, and 93% of arrests from 2012 to 2014.[69]

The harm caused by targeted imposition of monetary sanctions is compounded by the fact that historical and ongoing discrimination has left Black families more likely to be in poverty and with less intergenerational wealth to draw upon when hit with the unexpected cost of criminal sanctions.[70] Therefore, Black families are less likely to be able to pay the fees and fines assessed immediately, which can result in snowballing costs (e.g., interest, late payment fines, license suspension and reinstatement fees) or arrest or incarceration for nonpayment.[71] Family members, rather than the individual who committed the offense, frequently take on payment of court and prison fees, restitution, and fines when a family member is unable to pay, including when incarcerated.[72] Overwhelmingly, women shoulder this financial burden.[73]

Monetary sanctions create a substantial hurdle for the individuals seeking to get back on their feet financially after a conviction. The majority of individuals in prison are poor. According to one study, among men ages eighteen to sixty-four entering prison, only about half are employed, with those employed having an average annual income of $12,780, and about half of men exiting prison earning less than $500 after their first full year of release.[74] Those who are not incarcerated, or who are released after serving their sentence, face significant consequences for nonpayment of fees and fines. Failure to pay criminal legal system debt can result in the issuance of arrest warrants, criminal court hearings, additional fines and court surcharges, detention in jail, inclusion on criminal records, and—in some states—suspension of a driver's license or loss of voting privileges until the fees and fines are paid.[75] The disparities in who is burdened with criminal legal debt act to extract money from already-struggling communities, widen the racial wealth gap, and keep families trapped by the criminal justice system.[76]

C. Monetary Sanctions Obstruct Rehabilitation and Undermine Public Safety

The collection of the myriad fees and fines routinely included in sentencing orders to generate revenue contradicts the goals of deterring crime and rehabilitating individuals. The court in *Kelly* emphasized that the purpose of the criminal justice system is not only to punish those found guilty of crimes but also to deter crime and rehabilitate individuals.[77] However, these goals are not served by burying individuals charged with committing a crime in mountains of fees and fines used to fund cash-strapped localities. Rather, such policies undermine trust and legitimacy in the criminal justice system. They impede rehabilitation by impairing access to safe housing, employment, and transportation.[78] With opportunities for work in the formal labor market significantly curtailed, individuals may turn to illegal activities to meet their debt obligations, increasing recidivism and reincarceration.[79] The same policies distort law enforcement priorities. They cause law enforcement to shift resources to minor offenses that generate revenue and away from more pressing public safety concerns.[80]

Over the past decade, a wide range of organizations have acknowledged the conflict of interest inherent in funding criminal justice systems through fees imposed on defendants. In 2012, in response to the ongoing use of sentencing orders in criminal cases to supplement tax revenue, the Conference of State Court Administrators reiterated its 1986 recommendation that state and local governments restrain their "burgeoning reliance upon courts to generate revenue to fund both courts and other functions of government."[81] Likewise, the American Bar Association recently adopted a similar position against revenue-based criminal sanctions,[82] advocating for elimination of "any and all financial incentives in the criminal justice system to impose fines or fees."[83] The ABA called for all costs of the criminal justice system to be "entirely and sufficiently" funded by general government revenue.[84] Recently, the New York City Bar also emphasized how the sentencing practices from the 1990s have become counterproductive to legitimate law enforcement goals.[85] The New York Bar's report concluded that the purpose of the New York State criminal surcharges and fees was plainly to "raise revenue, not to protect public safety or impose punishment" and that courts "should not prioritize revenue-raising over the successful reintegration of incarcerated persons back into society."[86]

The American Law Institute (ALI) recently concluded the first comprehensive revision to the Model Penal Code conducted since 1962.[87] The ALI found the current state of American law on monetary sanctions "to be under-examined, unprincipled, and counterproductive to the goals of public safety."[88] The drafters concluded that current practices of pushing the poorest individuals burdened with the stigma of the criminal justice system deeper into poverty was not a sensible crime policy.[89] These policies impeded rehabilitation and increased recidivism. The drafters were particularly critical of the use of fees imposed on criminal defendants to generate revenue: "On principle, the [Model Penal Code] regards revenue-generation as an illegitimate purpose of the sentencing process."[90] The revised Model Penal Code, adopted in 2017, proposed significant changes to the current system of imposing monetary sanctions in criminal cases.[91]

IV. Proposals to Amend the Bankruptcy Code

As described above, the criminal justice debt burden that weighs overwhelmingly upon very low-income individuals and communities of color grew exponentially after the enactment of the Bankruptcy Code in 1978. Regardless of their perceived role in 1978, there is mounting evidence that today's monetary sanctions do not further goals of rehabilitation and deterrence of crime, but instead undermine those goals. The magnitude of fines, penalties, and fees imposed routinely exceeds any reasonable ability to pay. Revenue collection and law enforcement have been melded into a toxic force that drives the poorest deeper into poverty and enmeshes them further in the criminal legal system. Changes to the Bankruptcy Code are essential to efforts to address the range of harmful policy decisions of the past four decades.[92]

Amendments to the Bankruptcy Code should focus on two areas. First, in defining limits to discharge, the Code should acknowledge that revenue-generation is not a legitimate state criminal justice interest and that fees imposed for revenue-generating purposes should not be excepted from discharge. Second, the Code should limit the duration of any bar to discharge of criminal justice debt. This time limit should apply to all forms of criminal justice debt, including fines, penalties, and restitution. A time limit ensures that oppressive, unaffordable debts do not become lifelong barriers to rehabilitation.

A. Fees Imposed for Revenue-Generating Purposes Should Be Dischargeable

A major effect of the *Kelly* decision has been to shield all forms of fees, costs, and surcharges from discharge as long as they were included in a sentencing order. Given *Kelly*'s impact, it requires an amendment to the Bankruptcy Code to end this practice. A specific provision to effectuate such a change appears in the Consumer Bankruptcy Reform Act of 2020 (S4991, HR 8902, Dec. 2020), legislation proposed by Senator Elizabeth Warren and Representative Jerrold Nadler. The Bill proposes wide-ranging reforms of the entire Bankruptcy Code.[93] One provision would amend section 523(a)(7) to exclude from discharge a debt

(7) to the extent such debt is for a fine, penalty, or restitution—

(A) that is incurred in a criminal proceeding and specifically designated as a fine, penalty, or restitution in the sentencing order upon the debtor's conviction;

(B) that is not—

(i) for the cost of prosecuting the debtor, including the cost of public defense, incarceration, probation, or any diversion program;

(ii) for the cost of operating the criminal justice system or funding government functions;

(iii) for the cost of collecting such debt; or

(iv) a fee, surcharge, assessment, or interest or collection charge imposed in connection with such debt[.]

As a stand-alone provision, this section does not limit discharge of criminal fines, penalties, or restitution that are specifically designated as such in a sentencing order but makes clear that fees and costs are dischargeable. Further, by limiting any non-dischargeability status to a fine, penalty, or restitution obligation that was "specifically designated" as such in the sentencing order, the Bill corrects a significant defect in the current law. Court rulings construing current section 523(a)(7) have created substantial uncertainty around the discharge status of many post-conviction and pre-conviction fines, penalties, and other fees.

B. Put an End to Interminable Criminal Justice Debt

Because debts for fines, penalties, and restitution weigh overwhelmingly upon those least able to pay them, establishing a time limit for non-dischargeability is essential.[94]

To balance state interests in enforcing fines with federal interests in providing bankruptcy relief to those held back by debt, Congress should follow the same approach that it has taken for tax debts. Although they are listed among the debts excluded from discharge in section 523(a), most state and federal income tax debts can be discharged after three years without showing an inability to pay.[95] It should also be kept in mind that until 1994, criminal fines and penalties were fully dischargeable in chapter 13 bankruptcy cases, as were criminal restitution debts until 1990. This meant that debtors who paid their disposable income toward their debts for three years under a chapter 13 plan could discharge all types of criminal justice debts.

Should Congress amend the Bankruptcy Code to limit non-dischargeability of criminal fines, penalties, and restitution to a period of three years, it should also specify how that period is measured. For example, this time could run from the date of the sentencing order creating the obligation to the later of either three years or the end of the period for which the individual was actually incarcerated subject to the sentencing order. Under these terms, government creditors would have three years to employ all the State's powerful collection tools to obtain payment from individuals with the capacity to pay, particularly those who enriched themselves through criminal activity. To the extent that fines, penalties, or restitution serve a punitive or rehabilitative purpose, treatment of the debt as non-dischargeable for three years acknowledges that principle.

The Consumer Bankruptcy Reform Act of 2020 proposes to establish a potential time limit for nondischargeability of fines, penalties, and restitution debts. However, features of the Bill as drafted are problematic. The proposed amendment to section 523(a)(7) excepts a debt from discharge

(7) to the extent such debt is for a fine, penalty, or restitution—

[. . .]

(C) only if the creditor demonstrates that the debtor has substantial financial resources that permit the debtor to pay all or a significant portion of the fine, penalty, or restitution for—

(i) a fine, penalty, or restitution with respect to which the petition is filed on or after the date that is 3 years after the later of—

(I) the date of the sentencing order; or

(II) the date on which the debtor was released from incarceration pursuant to the sentencing order[.]

This provision maintains the nondischargeability of criminal fines, penalties, and restitution. However, the bar to dischargeability is subject to modification after the later of three years from the date of the sentencing order or three years from the debtor's release from incarceration—effectively tolling the waiting period during time spent incarcerated. This tolling is problematic both because it fails to acknowledge that the state continues collection and enforcement of criminal justice debts during periods of incarceration, including by seizing funds in prison commissary accounts, and because barring debt relief to people emerging from a lengthy prison term for three more years denies them financial help when they likely need it most.

A potentially greater problem with this provision is that even after the three years have passed, a creditor may oppose discharge by attempting to show that the debtor has "substantial financial resources" to pay "all or a substantial portion" of the fine, penalty, or restitution. This determination is not as straightforward as it may initially seem. A similar test appears in the Code's provision allowing the discharge of a student loan debt upon a showing that the debtor will experience "undue hardship" if forced to repay the loan.[96] Bankruptcy courts have struggled for decades to apply an ability-to-pay standard in the student loan discharge context, and there is a growing consensus that bankruptcy courts have failed to implement this standard in a fair or predictable manner.[97]

As litigation over the "undue hardship" standard for student loan discharge has shown, the question of whether an individual has the financial resources to pay a debt can lead to wildly unpredictable exercises of judicial discretion.

Courts disagree over the relevant time period they should consider for possible payment, with some courts finding that the potential to pay the debt over a lifetime is an appropriate standard. Courts disagree over the extent to which they should require a debtor to minimize expenses and maximize income, as well as whose income and expenses should be considered. These fluid standards have become effective tools in the hands of a powerful student loan creditor industry. With virtually unlimited resources at their disposal, student loan servicers aggressively litigate undue hardship cases and routinely appeal adverse decisions. Few student loan borrowers can afford the daunting expense required to litigate these dischargeability disputes. There is no reason to believe that the playing field would be any more level in the criminal justice debt area.[98]

V. Conclusion

The massive increase in the use of fines, penalties, fees, and costs to fund government activities, and the extensive harms created by this practice, demand a review and reform of the current Bankruptcy Code. Trying to get back on track after a conviction or period of incarceration is difficult enough without the burden of potentially thousands of dollars in associated debt, especially for the low-income people of color and their families who shoulder a disproportionate amount of this debt. While reforming the Bankruptcy Code to create an option to discharge will certainly not address the multitude of complex issues rooted in the criminal legal system, it will provide a safety valve so that no one is relegated to spending a life permanently shackled by ruinous debt from government fines and fees with no realistic way out. The goals of allowing a financial fresh start, protecting public safety, and encouraging rehabilitation are not at odds. Targeted changes to the federal bankruptcy law can allow for the reasonable pursuit of all these objectives.

Notes

* In addition to the named authors, NCLC staff attorneys Abby Shafroth and Ariel Nelson contributed substantially to this article. The authors would also like to thank NCLC staff attorney John Rao for his review and comments and Maggie Westberg for her research assistance.

1 Kelly v. Robinson, 479 U.S. 36 (1986).

2 11 U.S.C.§ 707(b)(2)(A).

3 During the pre-pandemic years 2016–19, individuals filed between 475,000 and 490,000 cases annually under chapter 7 of the Bankruptcy Code. During the same period, between 283,000 and 296,000 cases were filed each year under chapter 13. American Bankruptcy Institute, Bankruptcy Trends and Filings in the U.S., https://www.abi.org/newsroom/bankruptcy-statistics?page=5.

4 11 U.S.C. § 523(a) (1)–(19). The exceptions to discharge listed in § 523(a) also apply to individuals who seek relief under chapter 11 of the Code (typically wealthy individuals), family farmers in chapter 12 cases, and chapter 13 debtors who request a discharge without completing payments under a chapter 13 plan (commonly referred to as a chapter 13 "hardship" discharge).

5 11 U.S.C. § 523(a)(7).

6 *In re* Robinson, 776 F. 2d 30 (2d Cir. 1985).

7 479 U.S. at 50.

8 *Kelly* has been applied broadly by the lower courts to render fees and costs included in criminal sentencing orders non-dischargeable. *See, e.g., In re* Hollis, 810 F.2d 106 (6th Cir. 1987) (applying *Kelly*, contribution to drug prevention fund and payment of costs of prosecution were non-dischargeable as conditions of sentencing order). Further, although the text of section 523(a)(7) clearly places restitution obligations payable to or for the benefit of private parties outside the discharge exception, courts since 1986 have overwhelmingly applied *Kelly* broadly to hold that an obligation to pay money to or for the benefit of private parties is non-dischargeable if included in a sentencing order. *In re* Troff, 488 F.3d 1237 (10th Cir. 2007); *In re* Verola, 446 F.3d 206 (11th Cir. 2006), cert. denied 549 U.S. 885 (2006); *In re* Thompson, 418 F.3d 362 (3d Cir. 2005); *In re* Caisse, 568 B.R. 6, 8 (Bankr. S.D.N.Y. 2017); *In re* Smith, 547 B.R. 774, 779 (E.D. Mich. 2016).

9 479 U.S. at 43.

10 *Id.* at 44.

11 *Id.* at 47.

12 *Id.* at 41, 52 (quoting *In re* Pellegrino, 42 B.R. 129, 133 (Bankr. D. Conn. 1984).

13 *Id.* at 49.

14 *Id.* at 49 n.10.

15 *Id.* at 53.

16 11 U.S.C. § 1328(a).

17 *See, e.g., In re* Hardenberg, 42 F.3d 986, 992 (6th Cir. 1994) (applying pre-1994 Code, state criminal fines are debts dischargeable in chapter 13).

18 Penna. Dept. of Public Welfare v. Davenport, 495 U.S. 552, 563 (1990); *In re* Ryan, 389 B.R. 710 (B.A.P. 9th Cir. 2008); 5 *Collier on Bankruptcy* ¶ 1328.01[1][c] (__ ed ____).

19 495 U.S. 552 (1990).

20 11 U.S.C. § 1328(a); The Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended at 42 U.S.C. 10606) (enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789).

21 11 U.S.C. § 1328(a)(3).

22 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

23 11 U.S.C. § 1328(a)(3). *In re* Wilson, 252 B.R. 239 (B.A.P. 8th Cir. 2000) (term *conviction of a crime* in § 1328(a)(3) includes guilty plea followed by deferral of sentence with probation).

24 *See, e.g., In re* Ryan, 389 B.R. 710 (B.A.P. 9th Cir. 2008) (costs of prosecution imposed on defendant were not included in criminal sentencing order and were therefore dischargeable in chapter 13).

25 *See, e.g., In re* Sanders, 589 B.R. 874 (Bankr. W.D. Wash. 2018) (non-dischargeable items in sentencing order included obligations to pay a Victims Fund contribution, a criminal filing fee, court appointed attorney fees, DNA collection cost, a criminal fine, and interest on all charges).

26 *See* National Consumer Law Center, Confronting Criminal Justice Debt: A Guide for Litigation 64–70 (Sept. 2016), https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf; National Consumer Law Center, Collection Actions, § 11.3.9 (5th ed. 2020), https://www.nclc.org/library.

27 *In re* Sanders, 589 B.R., *supra* note 25, at 884 (sentencing order incorporated obligation to pay for future collection costs and fees related to main body of fees listed in order).

28 *In re* Thompson, 16 F.3d 576, 581 (4th Cir. 1994) (Virginia statute allowed for assessment of costs of parole against convicted defendant, making obligation to pay a part of sentence even though not expressly stated in sentencing order); *In re* Sanders, 589 B.R., *supra* note 25, at 885 (future collection fees nondischargeable even when not listed in order

because authorized under state statute); *In re* Donohue, 2006 WL 3000100, * 2 (Bankr. N.D. Iowa 2006) (prison "room and board" costs that were assessed upon revocation of probation were authorized by statute and therefore non-dischargeable); *In re* Maxwell, 229 B.R. 400, 405 (Bankr. W.D. Ky. 1998) (costs of incarceration non-dischargeable as imposed on convicted defendants by state sentencing guidelines). *See also* *In re* Lopez, 579 Fed. Appx. 100, 103 (3d Cir. 2014) (if fee included in sentencing order, it is nondischargeable, regardless of intent of court in including fee or of legislature in authorizing the charge).

29 *In re* Thompson, 16 F.3d, *supra* note 28, at 581 ("Since the Virginia Code contemplates parole that is contingent on the payment of costs and it is only the defendant who is convicted that must pay those costs, we find that for the purposes of federal bankruptcy law, the assessment is 'part' of the sentence.").

30 *In re* Cole, 234 B.R. 417, 420 (Bankr. W.D. Wis. 1999) (inmate disciplinary sanction "only imposed on him as a consequence of his conviction").

31 *In re* Reimann, 436 B.R. 564, 568 (Bankr. E.D. Wis. 2010) (§ 523(a)(7) applied to cost of medication improperly used for suicide attempt and cost of ambulance and treatment).

32 *In re* Merritt, 116 B.R. 924 (Bankr. S.D. Ill. 1995) (no merit to challenge to nondischargeability of sanction assessed for prisoner's destruction of typewriter ribbon and damage to radio).

33 *In re* Searcy, 463 B.R. 874, 884 (B.A.P. 10th Cir. 2012), affirmed on other grounds, 561 Fed. Appx. 644 (9th Cir. 2014).

34 *In re* Lopez, 531 B.R. 554, 561 (Bankr. E.D. Pa. 2015) (collection fee dischargeable where the decision to pursue the recovery of unpaid costs is made "well after the relevant sentencing order is entered, and further, that the decision is not made by the Sentencing Judge, but by administrative employees at the [Court], who systematically assemble a group of cases with unpaid costs and then forward them to a collection agency"); *In re* Dickerson, 510 B.R. 289 (Bankr. D. Idaho 2014) (private debt collector to whom criminal debt assigned collects in its own interest and is not governmental unit).

35 *In re* Sandoval, 541 F.3d 997 (10th Cir. 2008) (bailbondsman not a governmental unit, § 523(a)(7) inapplicable); *In re* Hickman, 260 F.3d 400, 406 (5th Cir. 2001) (stressing private contractual nature of bail bond arrangement); *In re* Collins, 173 F.3d 924, 932 (4th Cir. 1999); *But see In re* Gi Nam, 273 F.3d 281, 287 (3d Cir. 2001) (debt owed to a bond surety for a defendant's failure to appear is a nondischargeable "forfeiture").

36 *In re* Milan, 556 B.R. 922 (B.A.P. 8th Cir. 2016) (incarceration costs were not part of sentencing order and were compensation for pecuniary loss to state, rejecting argument that costs would not have been incurred "but for" conviction); *In re* Lopez, 531 B.R., *supra* note 34, at 563 (probation supervision fees dischargeable); *In re* Miller, 511 B.R. 621, 633 (Bankr. W. D. Mo. 2014) (fees payable to fund cost of probation and parole programs were dischargeable because not included in sentencing order and compensate state for actual pecuniary loss in maintaining the program).

37 These court rulings are discussed in Andrea Bopp Stark & Geoff Walsh, Nat'l Consumer Law Center, Clearing a Path to a New Beginning: A Guide to Discharging Criminal Justice Debt in Bankruptcy (Oct. 2020), https://www.nclc.org/images/pdf/criminal-justice/Rpt_Bankruptcy_and_CJ_Debt.pdf.

38 *See* Sarah Shannon et al., *The Broad Scope and Variation of Monetary Sanctions: Evidence from Eight States*, 4 UCLA Crim. Just. L. Rev. 269 at 272–74 (June 2020) (describing widespread misunderstanding among defendants of nature and extent of fees imposed in sentencing orders), https://escholarship.org/uc/item/64t2w833.

39 Lopez v. First Judicial District of Pennsylvania, 475 B.R. 418 (Bankr. E.D. Pa. 2012), vacated and remanded 579 Fed. Appx. 100 (3d Cir. 2014), ruling on remand 531 B.R. 554 (Bankr. E.D. Pa. 2014).

40 *Id.* at 421.

41 *Id.* at 423.

42 *Lopez*, 579 Fed. Appx. 100, *supra* note 39.

43 *Id.* at 103.

44 *Lopez*, 531 B.R. 554, *supra* note 39.

45 Mr. Lopez was represented by the co-editor-in-chief of *Collier on Bankruptcy*.

46 11 U.S.C. § 523(a)(7).

47 U.S. Comm'n on Civil Rights, Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications 8 (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

48 *Id.* at 8–9.

49 Robyn L. Cohen, Bureau of Justice Statistics, Prisoners in 1990 1 (1991), https://bjs.ojp.gov/content/pub/pdf/p90.pdf (prisoners with sentences of more than one year grew by 8.6% from 1989 to 1990 and accounted for more than 98% of the total prison population); Jenni Gainsborough & Marc Mauer, The Sentencing Project, Diminishing Returns: Crime and Incarceration in the 1990s 3 (2000), https://www.prisonpolicy.org/scans/sp/DimRet.pdf (incarceration numbers continued to soar during the 1990s, and by the year 2000, nearly 2 million people were incarcerated in the United States).

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51 Tracey Kyckelhahn, U.S. Dep't of Justice, State Corrections Expenditures, FY 1982–2010 1, 2 (Apr. 2014), https://bjs.ojp.gov/content/pub/pdf/scefy8210.pdf; *see also* Gainsborough & Mauer, *supra* note 49 (by 2000, the cost of prison construction totaled nearly $40 billion annually); Vera Institute of Justice, What Jails Cost Statewide: Spending on Jails Across the Rural-Urban Spectrum (2021), https://www.vera.org/publications/what-jails-cost-statewide (funds spent on running state jails increased by 13% from 2007 to 2017, from $22 billion to $25 billion); Ronnie K. Stephens, Interrogating Justice, Annual Prison Costs a Huge Part of State and Federal Budgets (Feb. 16, 2021), https://interrogatingjustice.org/prisons/annual-prison-costs-budgets/ (most states spend an average of $25,000 to $30,000 per incarcerated individual each year).

52 Kiren Jahangeer, American Bar Association, Fees and Fines: The Criminalization of Poverty 3 (Dec. 16, 2019), https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/fees-fines/; Kyckelhahn, *supra* note 51, at 2 (for period 1982–2010 "[n]oninstitutional corrections expenditures ranged from $3.8 billion to $12.9 billion, and comprised between 20.4% and 27.3% of total corrections expenditures.").

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55 U.S. Comm'n on Civil Rights, *supra* note 47, at 2, 7, 9; Chris Mai & Maria Rafael, Vera Institute of Justice, The High Price of Using Justice Fines and Fees to Fund Government in New York 5 (Dec. 2020), https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-new-york.pdf.

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57 U.S. Dep't of Justice Civil Rights Division, Investigation of the Ferguson Police Department ("Ferguson Report") 9–10 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

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59 *See* Dick M. Carpenter et al., Institute for Justice, The Price of Taxation by Citation: Case Studies of Three Georgia Cities That Rely Heavily on Fines and Fees (Oct. 2019), https://ij.org/wp-content/uploads/2019/10/Taxation-by-Citation-FINAL-USE.pdf (for three Georgia municipalities, fees and fines represented the second largest revenue source after property taxes); Rachel L. McLean & Michael D. Thompson, Justice Center, Repaying Debts 16 (Oct. 2007), https://www.prisonpolicy.org/scans/csg/repaying_debts.pdf (Nevada office of courts 100% funded from citations); Alan Rosenthal & Marsha Weissman, Center for Community Alternatives Justice Strategies, Sentencing for Dollars: The Financial Consequences of Criminal Convictions 27 (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Sentencing-for-Dollars.pdf (in 2007 the Massachusetts Governor proposed a mandatory fee upon convictions to pay for half of the $20 million cost of hiring 250 new police officers); Aaron Littman, *Jails, Sheriffs and Carceral Policymaking*, 74 Vand. L. Rev. 861, 888–91 (May 2021) (describing how an Arkansas county's solicitations to investors to purchase bonds to construct new prisons highlight reliance on fees from defendants as a source of revenue to pay bonds); American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons 25 (Oct. 2010), https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons?redirect=prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons (describing a Louisiana parish that receives two-thirds of its budget from fees).

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67 *See* U.S. Comm'n on Civil Rights, *supra* note 47, at 72; Abby Shafroth, Nat'l Consumer Law Center, Criminal Justice Debt in the South: A Primer for the Southern Partnership to Reduce Debt 5 (Dec. 2018), https://www.nclc.org/images/pdf/criminal-justice/white-paper-criminal-justice-debt-in-the-south-dec2018.pdf.

68 Ferguson Report, *supra* note 57, at 64–69.

69 *Id.*

70 John Creamer, U.S. Census Bureau, Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html; *see* Nat'l Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination 1 (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf (with fewer assets to draw on, people of color—and the friends and family to whom they might turn—are far less able to cushion the blow of financial catastrophes).

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75 Menendez et al., *supra* note 54, at 1, 6, 7, 10, 20; Colgan, *supra* note 72 at 32–33.

76 *See* Shafroth, *supra* note 67, at 5; Harris, *supra* note 60, at 156.

77 *Kelly*, 479 U.S., *supra* note 1, at 41, 45.

78 Alicia Bannon et al., Brennan Center for Justice, The Hidden Costs of Criminal Justice Debt 27–30 (Oct. 2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753 at 1786–87 (May 2010), http://faculty.washington.edu/kbeckett/articles/AJS.pdf; Mai & Rafael, *supra* note 55, at 4 (noting that 680,000 New Yorkers had drivers' licenses suspended in 2016 for nonpayment of fines and fees).

79 *See* Colgan, *supra* note 72, at 36–38.

80 Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 Hastings Law J. 517, 547 (2021) ("The evidence suggests that public officials have responded rationally to the incentives presented to them. They have the power to increase fee revenue, and they have done so. Importantly, they have responded to these revenue incentives, at least in part, independent of public safety needs."); Bannon et al., *supra* note 78, at 31; Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. Legal Stud. 189 (Jan. 2019).

[81] Carl Reynolds & Jeff Hall, Conference of State Court Administrators (COSCA), Courts Are Not Revenue Centers 1 (2011–12), https://cosca.ncsc.org/__data/assets/pdf_file/0019/23446/courtsarenotrevenuecenters-final.pdf.

[82] American Bar Association, Resolution Adopting ABA Ten Guidelines on Court Fines and Fees, Report to the House of Delegates (Aug. 2018), https://finesandfeesjusticecenter.org/content/uploads/2018/12/Ten-Guidelines-on-Court-Fines-and-Fees.pdf. *See also* Jahangeer, *supra* note 52.

[83] American Bar Association, *supra* note 82, at 4.

[84] *Id.* at 4–5.

[85] Committee on Criminal Justice Operations et al., New York City Bar, New York Should Re-examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations (May 2019), https://s3.amazonaws.com/documents.nycbar.org/files/2018410-MandatorySurchargesCriminalCharges.pdf.

[86] *Id.* at 16.

[87] Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code* (Second) 99 Minn. L. Rev. 1735 (May 2015) (discussing interim draft); Kevin R. Reitz & Cecilia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, 48 Crime & Just. 255, 296–99 (2019) (discussing final version approved in 2017).

[88] Reitz, *supra* note 87, at 1735.

[89] *Id.* at 1743.

[90] *Id.* at 1749.

[91] Reitz & Klingele, *supra* note 87, at 255, 296–99.

[92] *See also* Pamela Foohey, *Fines, Fees, and Filing Bankruptcy*, 98 N.C. L. Rev. 419, 426 (2020) (concluding that "attorneys, judges, and other system actors, including those able to change provisions regarding dischargeability, have a responsibility to recognize and work to address bankruptcy's place in augmenting the effect that both court debt and fees to access courts have in creating social inequalities").

[93] The Bill proposes a general merging of what are now distinct chapter 7 and chapter 13 bankruptcy provisions. The language discussed here would therefore apply in all individual consumer bankruptcy cases.

[94] Some have argued that because criminal monetary sanctions do not further penal interests and are overwhelmingly imposed in a racially discriminatory manner, they should be treated as categorically dischargeable in bankruptcy. *See, e.g.*, Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 Vand. L. Rev. 917 (2017).

[95] Section 523(a)(1)(A) of the Bankruptcy Code ties the dischargeability of tax debt to the definition of a tax found in § 507(a)(8)(A) of the Code, namely: "a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition." As one court noted in applying these Code sections, "[o]rdinarily, in a Chapter 7 proceeding, calculating which tax debts are dischargeable is a relatively simple process." *In re* Waugh, 109 F.3d 489, 491 (8th Cir. 1997).

[96] 11 U.S.C. § 523(a)(8).

[97] Krieger v. Educ. Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013); *In re* Roth, 490 B.R. 908, 920–23 (B.A.P. 9th Cir. 2013) (Pappas, B.J., concurring); *In re* Clavell, 611 B.R. 504, 514 (Bankr. S.D.N.Y. 2020); *In re* Smith, 582 B.R. 556, 565 (Bankr. D. Mass. 2018); *In re* Nightingale, 543 B.R. 538, 544–545 (Bankr. M.D.N.C. 2016) (noting that "a crescendo of courts" have recognized that the undue hardship standard as applied by the courts needs to be revised). *See generally* Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 Am. Bankr. L.J. 179 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121226 (concluding from a five-year empirical study that debtors who received a undue hardship discharge of student loans, and those who did not, predominantly resembled one another and that there are few statistically significant differences in the factual circumstances of the two groups).

[98] One aspect of the Consumer Bankruptcy Reform Act of 2020's provision on ability to pay that is an improvement over the Code's current student loan undue hardship standard is that the proposed amendment to § 523(a)(7) places the burden on the government to establish the debtor's ability to pay. In the student loan context, it is the debtor's burden to establish undue hardship. Either burden-of-proof structure opens an enormous range for judicial discretion where the imbalance of litigation resources can play the decisive role.