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Articles

BUILDING "A DOLL'S HOUSE":
A FEMINIST ANALYSIS OF MARITAL DEBT DISCHARGEABILITY IN BANKRUPTCY

PETER C. ALEXANDER*

I. INTRODUCTION
A. Divorce and Bankruptcy

Much has been written about divorce in this country, the "feminization of poverty" that may be fairly attributed to the rise in divorce rates and the resulting financial hardship that often occurs. Less noticeably, a feminist discussion has evolved concerning the intersection of di-

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2. See, e.g., Diana Pearce, Welfare is not For Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty, 19 CLEARINGHOUSE REV. 412, 412 (1985) (discussing "feminization of poverty").

(381)
orce and bankruptcy, specifically the discharge of marital debts in bankruptcy. The reason for the need to focus on this intersection is that divorce in this country is often followed by bankruptcy and the ex-spouse who files bankruptcy, often the man, can be the cause of the non-filing ex-spouse, often the woman, returning to court and revisiting many of the same issues she thought were settled when the divorce was final. However, this second round will take place in a bankruptcy court. Additionally, that initial bankruptcy filing often leads to the second spouse filing her own bankruptcy because she cannot survive under the weight of the couple’s formerly-joint debt which, because her ex-husband’s discharge, is now her sole responsibility.

Several scholars have written about the ways in which bankruptcy affects divorce law, but much is yet to be written. Congress reshaped the discussion by enacting the Bankruptcy Reform Act of 1994 (the 1994 Reform Act). Included within the 1994 Reform Act was Section 304, which was intended to provide greater protection for the family unit by making it difficult for debtors to use the Bankruptcy Code to avoid divorce-related obligations. Section 304 modifies several existing provisions of the Code and it creates one important new provision, which relates to


8. See id. at 58-61 (itemizing existing provisions modified by § 304). Modified provisions include: 11 U.S.C. § 362(b)(2) (1994) (indicating that automatic stay does not apply to commencement or continuation of proceeding that seeks only establishment of paternity or establishment or modification of order for alimony, maintenance and support); 11 U.S.C. § 507(a) (1994) (creating new seventh priority debt category for alimony, maintenance or support obligations); 11 U.S.C.
the dischargeability of certain marital debts previously not protected under the Code.\textsuperscript{9}

Prior to the 1994 Reform Act, there was only one dischargeability provision in the Code relating to the potential discharge of marital debts:

§ 523(a)(5).\textsuperscript{10} Section 523(a)(5) excepts from discharge those debts that are in the nature of alimony, maintenance or support.\textsuperscript{11}

Its goal is clear: to prevent a debtor from discharging a debt that is in the nature of alimony, maintenance or support.\textsuperscript{12} This goal, however, must be balanced against the debtor's right to a fresh financial start after bankruptcy.\textsuperscript{13}

Section 523(a)(5) presents considerable problems for debtors and creditors and for courts seeking to determine whether a debtor would be responsible for debts in the nature of alimony, maintenance or support, notwithstanding the filing of a bankruptcy. Among the problems are a lack of agreement by the courts as to the appropriate standard to apply to the § 523(a)(5) dischargeability analysis\textsuperscript{14} and a perception that the stat-

\textsuperscript{9} 11 U.S.C. § 522(f)(1) (1994) (codifying \textit{Forrester v. Sanderfoot}, 500 U.S. 291 (1991), to forbid using avoidance of judicial liens securing alimony, maintenance or support obligations); 11 U.S.C. § 547(c) (1994) (specifying that bona fide alimony, maintenance or support payments are not subject to avoidance under this section); 11 U.S.C. § 304(g) (1994) (providing that child support creditors or their representatives are permitted to appear at bankruptcy court proceedings and intervene without charge in certain circumstances).

\textsuperscript{10} Subsection (e) of § 304 of the 1994 Act amends § 523(a) of the Code to add a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or child support. See 11 U.S.C. § 523(a)(15) (1994).

\textsuperscript{11} See id. (specifying that determination of debt should be made "in accordance with State or territorial law by a governmental unit, or property settlement agreement") (emphasis supplied).

\textsuperscript{12} See Alexander, supra note 4, at 360-61 (analyzing whether obligations created by divorce court may be discharged in bankruptcy).

\textsuperscript{13} See In re Slingerland, 87 B.R. 981, 984 (Bankr. S.D. Ill. 1988) (holding that ex-wife is required to show by preponderance of evidence that mortgage debt of former husband claiming bankruptcy is in nature of support obligation).

\textsuperscript{14} See Heotis, supra note 4, at 729 (discussing numerous tests created by courts to distinguish between obligations which are alimony, maintenance or support and those which are property settlement); see, e.g., In re Brody, 3 F.3d 35, 38 (2d Cir. 1993) (holding intent of parties at time separation agreement is executed determines whether payment pursuant to agreement is alimony and nondischargeable); In re Gianakas, 917 F.2d 759, 762-63 (3d Cir. 1990) (deciding whether obligation is in nature of support so as to be nondischargeable, depends on intent of parties at time of settlement agreement, which can be found by examining three indicators: (1) court must examine language and substance of agreement in context of surrounding circumstances; (2) what were parties' financial circumstances at time of agreement; (3) court should examine function served by obligation at time of divorce or settlement); In re Shine, 802 F.2d 583, 588 (1st Cir. 1986) (find-
ing spousal or child support debts incurred in connection with separation agreement, divorce decree or other order of court of record or property settlement agreement are nondischargeable); Matter of Long, 794 F.2d 928, 931 (4th Cir. 1986) (holding that nondischargeable alimony payment is determined by whether parties intended that payment be for support rather than as property settlement); Tilley v. Jesse, 789 F.2d 1074, 1078 (4th Cir. 1986) (finding intent of parties rather than labels attached to agreement or application of state law controls determination of whether obligation created by separation agreement is dischargeable); In re Spong, 661 F.2d 6, 10-11 (2d Cir. 1981) (concluding third party beneficiary contracts in connection with divorce proceeding are nondischargeable); see also In re Strickland, 90 F.3d 444, 446 (11th Cir. 1996) (holding that domestic obligations could be deemed actually in nature of support, and nondischargeable, even if it was not considered support under state law); In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996) (finding that whether obligation is in nature of spousal support is determined by intent of parties at time of agreement); In re Ellis, 72 F.3d 628, 629 (8th Cir. 1995) (maintaining that prepetition debts not in the nature of maintenance or support are dischargeable); In re Miller, 55 F.3d 1487, 1490 (10th Cir. 1995) (determining that for dischargeability of familial support obligation, emphasis is on nature of debt, not identity of payee); In re Fitzgerald, 9 F.3d 517, 520 (6th Cir. 1993) (holding that obligations not designated as alimony or maintenance require four step analysis: (1) obligation constitutes support if state court or parties intended to create support obligation; (2) obligation must have actual effect of providing necessary support; (3) if first two conditions are satisfied, court must determine if obligation is so excessive as to be unreasonable under traditional concepts of support; and (4) if amount is unreasonable, obligation is dischargeable to extent necessary to serve purpose of bankruptcy law); Matter of Seibert, 914 F.2d 102, 106 (7th Cir. 1990) (concluding that whether debt is dischargeable as alimony or support, federal courts must make such determination under federal bankruptcy laws, not state law); In re Goin, 808 F.2d 1391, 1392-93 (10th Cir. 1987) (finding pertinent factors supporting determination that obligation arising out of divorce is support thus, not dischargeable, include: (1) agreement fails to provide explicitly for spousal support; (2) under circumstances that spouse needs support; (3) there are minor children and imbalance of income; (4) payments are made directly to recipient in installments over substantial period of time; and (5) obligation terminates on remarriage or death); In re Harrel, 754 F.2d 902, 906 (11th Cir. 1985) (determining whether obligation is in nature of alimony or support requires simple inquiry by court as to whether obligation can be legitimately characterized as support, even if not considered support by state law); In re Calhoun, 715 F.2d 1103, 1109 (6th Cir. 1983) (determining whether assumption of joint debts is alimony or maintenance, initial inquiry is to ascertain whether state court or parties to divorce intended to create obligation of support); In re Williams, 703 F.2d 1055, 1057 (8th Cir. 1983) (holding that debts payable to third persons can be viewed as nondischargeable maintenance or support obligations if they were intended to serve as such); Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982) (determining whether property settlement is actually in nature of alimony or support, court must look at whole agreement); Melichar v. Ost, 661 F.2d 300, 303 (4th Cir. 1981) ("The proper test of whether the payments are alimony lies in proof of whether it was the intention of the parties that the payments be for support rather than as a property settlement."); In re Maidlen, 658 F.2d 466, 468 (7th Cir. 1981) (determining whether obligation is liability for support, court must look to substance of obligation and not to labels imposed by state law); Erspan v. Badgett, 647 F.2d 550, 555 (5th Cir. 1981) (concluding benefits awarded to divorced wife were nondischargeable because award contained substantial element of alimony); In re Schweig, 105 B.R. 140, 143-44 (Bankr. D.D.C. 1989) (determining whether debt is alimony or support, emphasis is on intent of parties with respect to agreement, factors considered in determining intent include: facts and circumstances surrounding obligation such as, whether there was alimony award entered by state court; whether
ute is underutilized by ex-wives, perhaps because of their apparent lack of access to legal representation and to the courts and, perhaps, because of a real sense that § 523(a)(5) provides inadequate relief for creditor ex-spouses when the obligation in question is in the nature of a property settlement. This latter concern gave rise to a number of amendments to the Bankruptcy Code in the 1994 Reform Act, which were designed to strengthen the rights of family law creditors in bankruptcy. This Article will focus on the impact of the body of bankruptcy law known as the marital debt dischargeability provisions, which consists of two statutory provisions: 11 U.S.C. § 523(a)(5) and 11 U.S.C. § 523(a)(15).

Section 523(a)(15) provides:
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

there was need for support at time of obligation; whether payments were to be made periodically over extended period or in lump sum; or whether creditor spouse relinquished rights of support in payment of obligation in question).

15. See Alexander, supra note 4, at 390 (stressing importance of women accessing and engaging competent counsel).


17. See A.B.A. Bankruptcy Material, supra note 7, at 2.


All of the aforementioned issues, interestingly, are highlighted in a work of literature. In the late Nineteenth Century, playwright, Henrick Ibsen, penned "A Doll’s House." This classic work focused on Nora Helmer, who once secretly borrowed a large sum of money from banker, Nils Krogstad, so that her ailing husband could convalesce in Italy following a serious illness. In order to obtain the money, Nora forged her father’s signature on the loan instrument, and she never told her husband, Torvald, what she had done.

Torvald considered Nora to be child-like, carefree and careless, almost like a toy. In fact, Nora accused Torvald of treating her as his “doll’s-wife.” Nora’s assessment was painfully correct; she was Torvald’s plaything and her existence was very similar to a doll’s living in a doll’s house. As a youth, Nora lived in her father’s house, where she was treated as a “doll’s-child,” not allowed to disagree with him for fear of displeasing him. As a young woman, she married a man whom she ultimately realized displayed many of the same characteristics as her father, making all of the arrangements in her life, including what she could and could not eat, what she should wear and how she should behave.

Nora borrowed the money to ease a financial crisis within their home and kept the secret concerning her forgery because she didn’t want to bring shame upon her husband. “[W]ith all his masculine pride—how painfully humiliating for him if he ever found out he was in debt to me,” she says. “That would just ruin our relationship. Our beautiful, happy home would never be the same.” What she failed to realize until the end of the play is that their “beautiful happy home” was not all that beautiful or happy. Moreover, as concerned as Nora was about Torvald’s independence, she had failed to secure her own independence, arguably placing herself in the doll’s house.

Ultimately, the banker reveals to Torvald the ugly truth about Nora’s forgery and Torvald verbally assaults Nora for her deed, renouncing her as his wife. Shortly thereafter, the banker forgives the indebtedness and cancels the note, which prompts a surprisingly forgiving Torvald to tell Nora that all is well and that he wants them to return to their cozy former

21. See id. (discussing circumstances under which Nora forged loan instrument).
22. See id. at 109 (examining Torvald’s perception of Nora).
23. See id. (discussing Nora’s relationship with her father).
24. See id. (comparing Nora’s relationships with her father and Torvald).
25. Id. at 54 (explaining to Mrs. Linde, old friend, why she never told Torvald of forgery).
26. Id. (discussing her life with Torvald and family).
27. See id. at 105 (“What a horrible awakening! All these eight years—she who was my joy and pride—a hypocrite, a liar—worse, worse—a criminal!”).
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existence. By this point in the drama, however, Nora has figured out that she has given up a lot for Torvald and for this marriage. She never discovered her own identity; she never received Torvald’s respect as a partner in their marriage; and she never experienced independence from any of the men in her life. As a result, Nora leaves Torvald, vowing to find the independent woman inside her and, upon discovering who she is, to strive to become a strong personality in a very male-centered culture.

Ibsen’s drama well-illustrates many of the difficulties women confront at the end of a marriage. As such, the discussion that follows in this Article adopts Ibsen’s theme but continues in the same vein as this author’s prior article regarding the dischargeability of marital debts, employing feminist legal theory as the vehicle by which the bankruptcy law is critiqued. The author believes that such an analysis is not only complementary to the subject matter, but also extremely important to the body of work known as “feminist legal theory” and to raising feminist consciousness.

The thesis of this Article is that, in attempting to rectify the preexisting problems regarding the dischargeability of divorce obligations, Congress has engineered and the judiciary has constructed a legal box—a trap—or, more appropriately, a doll’s house in which women (not exclu-

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28. See id. at 106-07 ("But it is true, Nora, I swear it; I have forgiven you everything. I know that what you did, you did out of love for me.").
29. See id. at 110 (explaining that she cannot remain with Torvald if she is to understand herself and world around her).
30. See Alexander, supra note 4, at 359-63 (discussing effect of divorce, bankruptcy and dischargeability of marital debts on women).
31. Feminist theory was selected again, in large measure, because it continues to provide the author with a fresh perspective from which to assess the dischargeability provisions of the Code. As Professor Karen Gross has stated:

[F]eminists seek to have us think about the world in which we live in a more interrelated way, interconnected, and caring manner . . . . Feminists focus on the particular, on context, on the real people and real situations that exist in day-to-day life . . . . What this means, lest there be confusion, is that feminist theory is not about studying “only” women or “women’s issues.” Instead, feminism addresses how to think about people and the world in which we live. The experiences of women have served to reveal that methodology, and women need not necessarily be the only subject of what is being studied.

Gross, supra note 4, at 1037 (footnotes omitted).
32. 'Feminist consciousness' in both activist and theoretical dimensions is a complicated and variously defined phenomenon. Feminism may be seen as a 'commitment to improving women’s position in society;' but this statement is deceptively simple. (citing ALISON M. JAGGAR AND PAULA S. ROTHENBERG, FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN MEN AND WOMEN (2d ed. 1984)). Improving women’s position in society, for some, means reforming extant social and political structures. For others it means restructuring society according to a socialist orientation, or according to a reinterpretation of power or moral development. Some writers prefer to concentrate on the realm of ideas rather than social organization; and some see the prior question in biological function and sex roles. All these perspectives, different as they are, share the empowerment of women as an overarching goal. See GENDER AND SOCIALIZATION TO POWER AND POLITICS 12 (Rita Mae Kelly ed., 1986) (citations omitted).
sively, but more often than men) will find themselves as they try to assert a right to collect the debts they are owed following a divorce. Section 523(a)(15) is gender-neutral on its face and is intended to assist creditor ex-spouses in receiving marital settlement awards notwithstanding a bankruptcy, however, it appears that the statute affects women disparately and it is not the solution that is needed.

II. Imagining the Dollhouse

To understand why Congress created § 523(a)(15) of the Code, one must have some historical perspective.

A. Section 523(a)(5)

Congress considered the initial version of the Bankruptcy Code to have failed creditors who held family law-related debts. Until the 1994
amendments, the only way to challenge the dischargeability of family law debts was to file an adversary complaint pursuant to § 523(a)(5) of the Code.\textsuperscript{34} In determining whether to discharge a marital debt in bankruptcy under § 523(a)(5), the methodology used by the courts is well-established. Bankruptcy law clearly provides that the court reviews the agreement underlying the marital debt pursuant to federal law, not bound by the labels ascribed to the agreement by the parties or the state court.\textsuperscript{35} Additionally, the court is not called upon under § 523(a)(5) to determine if a debt is alimony, maintenance or support, only to determine if it is in the nature of alimony, maintenance or support.\textsuperscript{36} The specific criteria used by the courts, however, varies from jurisdiction to jurisdiction,\textsuperscript{37} making it very difficult to anticipate what precise standard a particular court will use.

There has been considerable discussion about the policies underlying Section 523(a)(5),\textsuperscript{38} but only scant attention has been paid to the dispa-

\textsuperscript{34} 11 U.S.C. § 523(a)(5) (2002); see also Fed. R. Bankr. P. 7001 (detailing adversary proceedings).


\textsuperscript{36} See 11 U.S.C. § 523(a)(5) (emphasis supplied).

\textsuperscript{37} Much has been written about the confusion that surrounds the § 523(a)(5) analysis as it has been developed by the numerous federal courts that have focused on that issue. See, e.g., Alexander, supra note 4, at 389-96 (suggesting that Congress amend section 523(a)(5) and challenging bankruptcy judges and lawyers to rethink how ex-wives are treated in bankruptcy); Gross, supra note 3, at 1547 n.180 (explaining that court can reevaluate whether what debtor is paying is properly characterized as alimony and child support frequently to detriment of women debtors).

\textsuperscript{38} See Alexander, supra note 4, at 361-62 (recognizing that while federal law is applied in bankruptcy to decide whether debt is in fact alimony, federal courts cannot formulate such law in vacuum and so courts may refer to state law in such decisions); see also In re Spong, 661 F.2d 6, 9 (2d Cir. 1981) (pointing out that as many as twenty factors have been articulated by bankruptcy courts to assist in determining whether marital obligation may be discharged and that factors are weighted differently by courts across country).

\textsuperscript{39} See, e.g., Bello, supra note 4, at 649-52 (discussing policies behind federal bankruptcy law); John F. Murphy, \textit{The Dischargeability in Bankruptcy of Debts for Alimony and Property Settlements Arising from Divorce}, 14 Pepp. L. Rev. 69, 71 (1986)
rate impact that the application of Section 523(a)(5) seems to have had on women, particularly women as creditors in bankruptcy following a divorce. As this author discussed in an earlier work, the § 523(a)(5) standard, as applied by bankruptcy courts, affords a debtor (often the ex-husband) "two bites" at the same apple, i.e., it gives him the opportunity to leave the divorce court and to re-contest the division of assets in bankruptcy.

In re Davidson, regarded by some as an extraordinary case, serves to illustrate the potential problems of § 523(a)(5) for women. There, the Daviendsons were divorced in 1983 and, pursuant to their divorce decree, Mr. Davidson agreed to pay his ex-wife $7,732 per month for 121 months. The divorce decree explicitly stated that the obligation was for support and not a property settlement; Mr. Davidson labeled his checks to his ex-wife as "alimony" and deducted the payments as alimony on his income tax returns; and the former Mrs. Davidson declared the checks as alimony on her tax returns. In March, 1988, Mr. Davidson filed for bankruptcy and, in defense of a challenge to the dischargeability of the marital debt by his ex-wife, Mr. Davidson argued that the debt in question was not in the nature of alimony, maintenance or support. The bankruptcy court agreed with Mr. Davidson, as did the district court on appeal. More outrageous than the court rulings is the fact that Mr. Davidson withheld payment to his ex-wife for approximately two years prior to filing bankruptcy, until the United States Court of Appeals for the Fifth Circuit

(presenting enunciated purpose of § 523(a)(5)); Jana B. Singer, Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction, 30 HARV. J. ON LEGIS. 43, 99-105 (1993) (comparing family law considerations for divorce-related financial adjustments with bankruptcy considerations in support of discharge); see also In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996) (discussing overriding public policy favoring enforcement of familial obligations).

40. See Alexander, supra note 4, at 369-73 (using feminist legal theory to discuss impact of marital debt dischargeability provisions on women and to call for amendments to § 523(a)(5)); see also Sheila Driscoll, Note, Consumer Bankruptcy and Gender, 85 Geo. L.J. 525, 546-52 (1994) (arguing some areas of current bankruptcy law and practice have disparate impact on female debtors).

41. See Alexander, supra note 4, at 374-75 (noting courts will often reevaluate characterization of debt as alimony).

42. 133 B.R. 795 (N.D. Tex. 1990), rev'd on other grounds, 947 F.2d 1294 (5th Cir. 1991).

43. See id. at 797 (listing six subparagraphs in agreement itemizing periodic payments Mr. Davidson was obligated to make to Mrs. Davidson).

44. See id. (arguing payments were intended as property settlement).

45. See id. at 797-98 (holding monthly payments were intended for property equalization and were therefore dischargeable).

46. See id. at 800 (holding bankruptcy court did not err in concluding that payments were in nature of property division and not support).

47. See id. at 797 (making payments from May 1983 through July 1986).
finally reversed the lower courts and ordered him to pay (a total of sixty-five months).  

B. Section 523(a)(15)

In a clear attempt to rescue certain marital debts from discharge, the 1994 Reform Act added a second dischargeability provision to the Code. Section 523(a)(15) of the Code excepts from discharge those marital obligations which arise out of a divorce decree or separation agreement and which are not in the nature of alimony, maintenance or support. This category of debts was intended to capture property settlements that, prior to the 1994 Reform Act, were per se dischargeable. Section 523(a)(15) declares such obligations nondischargeable only in those cases where the debtor has the ability to pay the debts in question or where the detriment to the non-debtor spouse (because of nonpayment) outweighs the benefit to the debtor (through discharge).

In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents. The debt will also be discharged if the benefit to the debtor of discharging [the debt] outweighs the harm to the obligee.

This new dischargeability provision has some peculiar procedural aspects, rendering it very different, analytically, from § 523(a)(5). Like the dischargeability exceptions under § 523(a)(2), (a)(4) and (a)(6) of the

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48. See In re Davidson, 947 F.2d 1294, 1297 (5th Cir. 1991) (finding that Davidson had set up "an intricate and unambiguous divorce settlement" and had taken advantage of characterization of payments as alimony for tax purposes). Because of his actions, the court reasoned that husband was collaterally estopped from arguing in bankruptcy that the payments in question were anything but in the nature of alimony, maintenance or support. See id. (reversing lower courts); see also Paul v. Forman, 260 B.R. 758, 762 (E.D. Va. 1999) (rejecting divorce court's finding that $12,500 debt arising from parties' daughter's automobile accident was in nature of child support).


50. 11 U.S.C. § 523(a)(5) excepts from discharge only those debts in the nature of alimony, maintenance or support. Prior to the enactment of subsection (a)(15), subsection (a)(5) provided the only exception to discharge for a family law creditor. Since the enactment of subsection (a)(15), subsection (a)(18) has been added to § 523. It declares nondischargeable a debt "owed under State law to a State or municipality that is (A) in the nature of support, and, (B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. § 601 et seq.)." 11 U.S.C. § 523(a)(18) (2002).

51. See 11 U.S.C. § 523(a)(15)(A), (B) (declaring debt nondischargeable unless debtor does not have ability to pay or discharging debt would result in benefit to debtor that outweighs detrimental consequences to spouse, former spouse or child of debtor).

52. See A.B.A. Bankruptcy Material, supra note 7, at 59-60.
Code, § 523(a)(15) challenges must be raised in an adversary proceeding within the main bankruptcy case and within the time permitted by applicable bankruptcy law; otherwise, the debt will be discharged. This procedure is in stark contrast to the treatment of § 523(a)(5) debts, which may be raised in either federal or state court and where the presumption is that the debts are not discharged unless someone challenges them. In addition,

[Section 523(a)(15)] applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation. If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement.

C. Nora and Torvald Revisited

Congress, however, was reacting to a situation in which bankruptcy follows divorce. To appreciate what bankruptcy law adds to the equation, one must consider what likely has taken place up to the point of bankruptcy. It is therefore helpful to revisit the storyline from Ibsen’s drama, “A Doll’s House.”

Ibsen’s play concludes with Nora deciding to leave Torvald. Assuming arguendo that their estrangement leads to divorce, what might the couple experience as their individual lives progress? First, Nora, having no employment at the time of the divorce (and no apparent skills or professional training) will likely need some form of spousal support in order to exist on her own. However, Nora will probably also need professional representation to assist her in the support negotiations with Torvald.

In a review of June Carbone’s new book, From Partners to Parents: The Second Revolution in Family Law, Professor Katharine Silbaugh summar-


54. See 11 U.S.C. § 523(c)(1); see also Fed. R. Bankr. P. 4007(c) (holding adversary complaints are to be filed no later than 60 days after first date set for meeting of creditors held pursuant to § 341(a)).


56. For a discussion of cases requiring actions under § 523(a)(5) to be asserted only by other party to divorce or separation, see infra notes 100-11 and accompanying text.

57. See A.B.A. Bankruptcy Materials, supra note 7, at 60.

58. See June Carbone, From Partners to Parents: The Second Revolution in Family Law 133-211 (2000) (describing paradigm shift in legal and social regulation of family from emphasis on partners’ relationships with each other to emphasis on parents’ relationships to their children).
rizes Carbone's description of money, divorce and the partnership theory of marriage, which underscores just how important it is for Nora to have counsel for her divorce. She writes:

Carbone notes that divorce courts, which in recent decades had accepted a partnership theory of marriage marked by the assumption that both spouses contributed equal value to the marriage, are now retreating from that theory. The partnership ideal that Carbone describes is one where a court divides assets and income equally upon divorce or separation, despite one spouse's (ordinarily husband's) ownership, because the court views the marriage itself as an equal sharing enterprise. Income is distinct from the division of assets, as assets only reflect what has been accumulated during the marriage itself. Future income represents the return on the investment each spouse has made in the higher earner's earning capacity. The partnership theory of marriage can include the idea that future earning capacity should be split because the spouses have been partners in the common endeavor of marriage. Assets should be divided equally as well, on the theory that the efforts of the marital partners, even where asymmetric, are of equal value.

The alternative we have in the 1990s is the clean break: Assets may be divided, but future income (alimony) should go with the earner, even if short transition alimony is allowable. The other spouse's (wife's) claim to those earnings must be based in her actual contribution to the high-earner spouse's earning capacity, not on the theory that they are partners . . . . A court in 1843, in giving a generous alimony award to Sarah Burr, accepted the argument that she was an equal partner in the marital endeavor. However, in the 1990s, a Connecticut court in the Wendt case refused to give Lorna Wendt the benefit of a presumption of equal contribution, requiring her instead to prove her contribution. Carbone's argument is that developments that have strengthened women's market position as wage laborers and thus given women the ability to leave marriages have also undercut the equal partnership claim.59

How does Nora pay for the attorney? How does she know whom to choose to represent her? Access to competent legal representation is typically not an obstacle for persons of means,60 but Nora has no independent financial standing. She was dependent upon Torvald for monetary sup-


60. According to author Karen Winner, even women of financial means often find it hard to gain access to the courts at the end of marriage. See Karen Winner, Divorced From Justice: The Abuse of Women and Children by Divorce Lawyers
port during their marriage and it would appear that she is destined to continue to be dependent after the marriage.61

Torvald, on the other hand, is able to bargain from a position of strength. He did not walk out on a spouse and children; he did not leave the family home without an income stream; and he did not turn their "happy home" into the unhappy place that it has become. He explains to

61. Access to legal representation is a major concern for women in divorce. See id. (discussing lack of access to legal system for women going through divorce). Many report that they lack sufficient resources to obtain the services of a private attorney, and many complain that they do not receive good legal advice from their lawyer. See Kurz, supra note 1, at 123-28 (summarizing challenges confronted by women facing divorce). Sociologist, Demie Kurz, reported the effects of divorce on women and families in her insightful book. See id. at 3 (discussing challenges and effects of divorce on women and families). In the book, Kurz shares some of the reactions of women to their new lives in the months following their divorces and interviewed numerous women to determine how divorce affects families. See id. at 5-10 (highlighting experiences of some women post-divorce). The following comment seems representative of the feelings of a lot of women:

I don’t think I got good legal advice. He never informed me of my rights. I just filed the Articles and got a basic divorce. I only found out later from talking to my friends some of the other things my lawyer could have done . . . . The lawyer had a clerk do it. He just didn’t keep me informed, he didn’t know what was going on. When you pay a lawyer you expect him to know what’s going on. For example, he didn’t tell me how to go about getting child support . . . .

Id. at 127. A significant number of women in the Kurz study proceeded through the divorce process without a lawyer. Id. at 124 (revealing that approximately 17% of women studied had no legal representation during divorce proceedings). Their experiences, however, indicate that proceeding pro se may not have been the best course of action. See id. at 124-25 (describing problems encountered by women who proceeded pro se). One woman explained,

I didn’t have a lawyer because it was a pretty friendly divorce and I trusted that my ex-husband wouldn’t go back on his word. But he did some. He said he would give me the car, and I never saw it. He traded it in and got a brand new car. He gives me $50 a week for child support, but I feel it should be more now. He says “no, we agreed to $50.”

Id. at 124-25. Another woman, whose pro se experience was not particularly negative, provided a troubling explanation for why she declined professional assistance: "I didn’t have a lawyer. I never bothered. I didn’t have any money. My ex-husband gets nasty, he can be vindictive, like if somebody pushes him. And I didn’t need any more money." See id. at 125 (illustrating some reasons women decline legal representation). Finding an attorney who is well-versed in both family law and bankruptcy can be even more difficult; the risk of receiving advice or incomplete advice is great. See Nancy B. Rapoport, Symposium, Our House, Our Rules: The Need for Uniform Code of Bankruptcy Ethics, 6 AM. BANKR. INST. L. REV. 45, 61-62 (1998) (discussing conflicts arising when attorneys practice both family law and bankruptcy law). Moreover, if the attorney malpractices, the creditor may find it difficult to find someone willing to represent her in a malpractice action. See Jean Braucher, Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility, 5 AM. BANKR. INST. L. REV. 165, 169 (1997) (analyzing some factors that perpetuate inadequate lawyering by debtors’ attorneys); see also Nancy B. Rapoport, Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney, 70 IND. L.J. 783, 789 (1995) (discussing role of bankruptcy attorney).
Nora that he feels that he is under no obligation to support her search for her true being. He offers a modest property settlement and no spousal support in exchange for a simple, quick divorce. Considering the reality of her finances, the desire to begin her new life and a likely reluctance to square off with Torvald on matters of money and law, Nora acquiesces to Torvald’s demands.62

In the months that follow their divorce, Torvald’s and Nora’s lifestyles are very different.63 Soon, however, Torvald’s health declines once more.

62. Nora’s reluctance to fight Torvald in court may be justified. Journalist Karen Winner provides a very chilling account of how women fare in divorce when they don’t reach settlement with their ex-husbands:

By the time you leave [the courthouse], you don’t realize it yet, but like many other divorcing women you are on the verge of losing your middle-class status. Later, you will come to see how the lawyer and judge on your case had a lot to do with it. The judge, for example, has failed to award you your share of the marital property or alimony. All of a sudden you have no more medical insurance either, even though you were entitled to it. You may have been deprived of your share of your husband’s pension benefits too. Maybe your lawyer didn’t bother to figure it into the settlement agreement, or didn’t know the law in your home state. Or the judge may have neglected to order it. Again, you feel alone, but you aren’t. At present, in thirty states, the highest courts have commissioned task forces which have documented judicial discrimination against women in divorce courts. By the time you exit the courthouse, sometime far in the future, you may be in deep debt to your attorney. The assets you thought were to be divided between you and your husband got split four ways instead, with the attorneys taking a large share of your life earnings. Winner, supra note 60, at 5-6 (citation omitted).

63. The divorce issue momentarily aside, Nora will find it difficult to find employment that allows her to live at a level near that which she enjoyed while being married to Torvald. According to the Women’s Action Coalition, nearly 75% of full-time working women earn less than $20,000, while only 37% of full-time working men earn less than $20,000. See Women’s Action Coalition, WAC Stats: Facts About Women 59 (1993) [hereinafter WAC Stats] (comparing salaries of men and women). If Nora were Black, the news would be worse. “The average salary of an African-American female college graduate in a full-time position is less than that of a White male high-school dropout.” Id. (comparing salaries across gender and racial lines). Factoring in the divorce issues, Nora’s situation is even bleaker. See Kurz, supra note 1, at 201 (arguing situation of divorced women is intolerable). Some of the comments from the women in Demie Kurz’s study reflect very negative overall feelings about the divorce process. See id. at 202-04 (detailing reactions of some women to divorce process). “The situation of divorced women is rotten. Legally women do not get their due.” Id. at 202. “Women are still short-changed. It’s still a man’s world.” Id. “The situation of divorced women is deplorable, but it won’t ever get any better. The judges have to pay attention and listen. They have to lower the cost of divorce. Maybe a woman should hear all divorce cases, or a man and a woman.” Id. More interestingly, some comments reflect a recognition that more information must be made available to women.

The situation of divorced women is terrible. I don’t think enough is done for them. If things are out there to help them, I don’t think divorced women are aware of them. I think divorced women need information about how to get food stamps, medical care, assistance for paying utilities. I’m not talking about welfare. But why should we be penalized? Id. at 203.
This time he recovers without Nora's intervention, but he has incurred many expenses as a result of his treatment and the necessary time off from work. He consults an attorney, who suggests that Torvald could be relieved of many of his pressing obligations by filing a Chapter 7 liquidating bankruptcy.64

Torvald's attorney advises him about the bankruptcy process, specifically counseling him that, in his case, certain debts may not be discharged in the bankruptcy.65 At this juncture, Torvald asks about his obligations to Nora (which have not yet been paid because of Torvald's illness), whereupon the attorney advises Torvald that if the debts in question are in the nature of alimony, maintenance or support, they are not dischargeable.66 Torvald assures counsel that Nora waived any right to alimony and produces the necessary Articles to support his claim.67 The attorney then tells

Women need expert advice in financial planning. I didn't know certain things, like about the cost of living . . . and debt cushion. The problem is that women are thinking about "getting a divorce." They don't realize all the other things, that it means thinking about custody, financial planning, that they have to think and plan for a career.

Id. at 204. Regarding financial standing following divorce, a conservative estimate is that a woman and child's household income plummets by 37 percent following divorce, but a man's income rises 10 to 15 percent. See WINNER, supra note 60, at 7 (discussing post-divorce finances of men and women).

64. See generally, DAVID G. EPSTEIN & STEVE H. NICKLES, DEBT 719-29 (1994). Bankruptcy is essentially an equitable process whereby honest debtors are relieved of the obligation to pay all debts that are dischargeable under the Bankruptcy Code. See id. In addition, the bankruptcy court, through a trustee, gathers all of the debtor's reachable assets for the purpose of liquidating them and paying all of the debtor's creditors (or as many as possible with the funds generated). See id. The debt forgiveness process operates independently of the property gathering process. See id. In fact, in many jurisdictions debtors receive discharges of their debts and leave bankruptcy with all of their assets; this is because of laws that allow debtors to exempt some or all of their property from collection and sale. See id.


67. Two tests are cited as being used to determine if a debt is in the nature of alimony, maintenance or support and therefore nondischargeable. See Brian P. Rothenberg, Note & Comment, The Dischargeability of Marital Obligations: Three Justifications for the Repeal of § 523(a)(15), 13 BANKR. DEV. J. 135, 141-48 (1999) (identifying and explaining "intent test" and "present circumstances test"). The first is the "intent test," which is followed by most jurisdictions (i.e., what was the intent of the parties at the time they entered into the agreement in question?). See Michaela M. White, Divorce After the Bankruptcy Reform Act of 1994: Can You Stay Warm After You Split the Blanket?, 29 CREIGHTON L. REV. 617, 625 (1996) (citing In re Long, 794 F.2d 928, 931 (4th Cir. 1986)). The second test is the "present circumstances test" which first appeared in In re Calhoun, 715 F.2d 1103 (6th Cir. 1983). This test first asks whether the parties or the state court intended to create a support obligation or property settlement. See Calhoun, 715 F.2d at 1109 ("In making this determination the bankruptcy court may consider any relevant evidence including those factors utilized by state courts to make a factual determination of intent to create support."). If a support obligation was intended, the court next examines if the creditor spouse's circumstances still reflect a need for payment of the marital obligation. See id. at 1110 ("If the loan assumption is not found necessary to provide
Torvald that the law regarding debts that are not in the nature of alimony, maintenance or support is less than clear. The words of the applicable statute are straightforward: If Torvald lacks the ability to pay the marital debts in question, he will be relieved of having to pay them. If he has an ability to pay, there must be a comparison of the harm associated with requiring him to continue payments and the harm to Nora if his obligation were forgiven. If it would cause greater economic harm to Torvald to require the payments, he would also be relieved of having to pay Nora. Finally, the attorney advises Torvald that if Nora does nothing in the bankruptcy court, the only issue that she could raise after the discharge would be the § 523(a)(5) dischargeability question; failure to raise the § 523(a)(15) issue during the bankruptcy is fatal for Nora.

Normally, in a liquidating bankruptcy, the Code protects only the debtor and not persons or entities related to the debtor. However, if Nora does file an adversary proceeding under Section 523(a)(15) of the Code, her interests should be taken into account by the bankruptcy court. But, notwithstanding this possible protection for creditor ex-spouses like Nora, the rights of the marital-debt creditor are fully protected only if she acts quickly.

The marital-debt discharge provisions of the Code, as drafted by Congress, provide a trap for the unwary. If Torvald’s debt to Nora is in the nature of alimony, maintenance or support, then the dischargeability analysis proceeds under § 523(a)(5) of the Code and can be litigated in either federal or state court at any time. However, if Nora is unsure whether such support, the inquiry ends and the debtor’s obligation to hold the former spouse harmless must be discharged.

69. Id.
70. Id.

71. In addition to the other distinctions mentioned hereinbefore, § 523(a)(15) differs from § 523(a)(5) of the Code in one very important aspect. A creditor spouse must raise his or her challenge under § 523(a)(15) in the bankruptcy court and within 60 days following the first date set for the first meeting of creditors (described in § 341 of the Code). See 11 U.S.C. § 523(c) (2002) (illustrating that notice is necessary). There is no such time limit for challenges under § 523(a)(5). See 11 U.S.C. § 523(a)(5) (2002) (demonstrating that statute is silent as to notice).

72. See In re Condol, Inc., 91 B.R. 79, 82 (B.A.P. 9th Cir. 1988) (discussing how Code generally does not protect persons or entities related to or connected with debtor).

73. Federal and state courts have concurrent jurisdiction to hear matters under § 523(a)(5) of the Code. See 28 U.S.C. § 1334(b) (stating that district courts have original but not exclusive jurisdiction over all civil proceedings arising under Title XI).
bankruptcy court would conclude that the debt in question falls under § 523(a)(5) or if she reasonably believes that the debt is not in the nature of alimony, maintenance or support but is more in the nature of a property settlement or hold-harmless agreement, then she must proceed under § 523(a)(15) and different rules apply. Indeed, most litigants should take advantage of the liberal federal procedural rules and plead in the alternative that both provisions apply. However, unlike the dischargeability provision in § 523(a)(5), § 523(a)(15) must be raised in federal court and within a very short time period following the commencement of the debtor’s bankruptcy. If Nora does not have a personal awareness of the subtle differences in bankruptcy law, or if she lacks competent counsel, Nora could miss the opportunity to proceed under § 523(a)(15) because her challenge could be filed in the wrong court or because her challenge is time-barred. Again, she could find herself trapped.

III. Organic Legal Analysis

A. The Freedom of Space

Down all the avenues of time architecture was an enclosure by nature, and the simplest form of enclosure was the box. The box was ornamented, they put columns in front of it, pilasters and cornices on it, but they always considered an enclosure in terms of the box. Now when Democracy became an establishment, as it is in America, that box-idea began to be irksome. As a young architect, I began to feel annoyed, held back, imposed upon by this sense of enclosure which you went into and there you were—boxed, crated. I tried to find out what was happening to me: I was the free son of a free people and I wanted to be free. I had to find out what was the cause of this imprisonment. So I began to investigate.

—Frank Lloyd Wright

It is important that the bankruptcy law and the literary adjunct in this Article complement each other and assist the reader in understanding why and how feminist theory might aid an investigation of the law regarding the dischargeability of marital debts in bankruptcy. In addition, it is important for the reader to embrace the Article’s allusion to architecture and to construction of a doll’s house, which supports the assertion that

74. See 11 U.S.C. § 523(c) (1) (stating that debtor shall be discharged from debt unless court determines such debt to be excepted from discharge under § 523’s applicable provisions).

75. See 11 U.S.C. § 523(c) (stating exceptions to discharge through § 523’s other provisions); Fed. R. Bankr. P. 4007(c) (stating guidelines for filing timely complaint).

76. FRANK LLOYD WRIGHT, IN THE REALM OF IDEAS 9 (Bruce Brooks Pfeiffer & Gerald Nordland eds., 1988) [hereinafter IN THE REALM OF IDEAS].
§ 523(a) (15) of the Code, and subsequent judicial interpretations thereof, represent a systematic, organized stricture of the rights of women in bankruptcy. To these ends, the following textual analysis is better organized under headings which are the architectural principles of noted American architect, Frank Lloyd Wright.77

Frank Lloyd Wright's career spanned more than seven decades and some of his greatest works continue to dazzle the faithful as well as the curious. His projects, including “Fallingwater,” The Guggenheim Museum, and “Taliesen,” continue to inspire professional architects and amateurs alike.

Wright pioneered what he termed “organic architecture,” which has never been precisely defined, though it has been described as “an architecture that develops from within outward in harmony with the conditions of its being, as distinguished from one that is applied from without.”78 Wright’s core beliefs informed his architecture in that:

[H]is fundamental concerns were with human dignity, with individual freedom and democracy, with human endeavor on its highest altruistic plane, and with enriching the relationship of the individual to his or her environment.79 His inner strength

77. The choice of Frank Lloyd Wright is, admittedly, problematic. To his credit, Wright approached architecture as an interdisciplinarian, not confining himself to the science or traditions of architectural design. Instead, Wright viewed architecture as a way to represent life and the elements of life. See Donald Hoffmann, Understanding Frank Lloyd Wright’s Architecture 94-100 (1995) (stating that nature and life gave imagination and rule to art). This approach to architecture is entirely consistent with feminist analysis, which is unabashedly interdisciplinary and holistic. Wright’s private life, however, was completely antithetical to the values espoused in feminist family law literature. See Merle Seacrest, Frank Lloyd Wright: A Biography 212 (1992). He abandoned his wife and young children in 1911 amidst the unexpected revelation of an affair with Mamah Borthwick Cheney, a married client. See id. To make matters worse, Wright’s explanation offered little in the way of remorse:

The ordinary man cannot live without rules to guide his conduct. It is infinitely more difficult to live without rules, but that is what the really honest, sincere, thinking man is compelled to do. And I think when a man has displayed some spiritual power, has given concrete evidence of his ability to see and to feel the higher and better things of life, we ought to go slow in deciding he has acted badly.

Id. Wright was also no stranger to financial trouble. In September, 1926, while involved in an affair with the woman who would ultimately become Wright’s third wife, Wright’s second wife, Miriam Noel Wright, filed an involuntary bankruptcy petition against Wright. See id. at 329. Throughout his life, Wright suffered significant financial problems and often relied on family and friends to carry him through the tough times. See id.

78. In the Realm of Ideas, supra note 76, at 329. Wright biographer, Meryle Seacrest, credits art critic and writer, John Ruskin with coining the term “organic architecture.” See Seacrest, supra note 77, at 129 (explaining how Ruskin’s teachings influenced Wright).

79. Biographer Meryle Seacrest provides an excellent example of Wright’s “organic architecture” in her description of “Fallingwater,” Wright’s famous vacation home for department store owner Edgar J. Kaufmann. She writes:
and convictions were intensified and matured by constant reference to those he regarded as great creative minds, among them Victor Hugo, William Blake, William Morris, Laotze, Viollet-le-Duc, Jefferson, Emerson, Thoreau, Louis Sullivan, and Dankmar Adler.\textsuperscript{80}

To Wright, organic architecture was much more than a term of art to describe one theory of architecture; it was a metaphor for the essential elements of life. Indeed, Wright once wrote that “all buildings built should serve the liberation of mankind, liberating the lives of individuals.”\textsuperscript{81}

It is, to some, merely an accident that Wright’s theory of architecture is so closely associated with the design and construction of buildings and other stationary objects. Wright may have just as easily selected psychology or law as his professional pursuit; however, he chose architecture.\textsuperscript{82} But Wright’s concepts went far beyond the traditional notions of architectural design. His approach was epistemological, pushing the limits of his imagination and advocating a symbiotic relationship between Nature and Structure, thereby redefining them as the yin and yang for a new generation of architects. A closer examination of Wright’s theory reveals his four informing principles: the freedom of space, the nature of the site, materials

\textsuperscript{80} Id. at 134.

\textsuperscript{81} FRANK LLOYD WRIGHT, A TESTAMENT 24 (1957) (discussing how architects are “mainspring” of any future cultural life in America).

\textsuperscript{82} Many of the scholars who study Wright’s life have concluded that Wright did not “choose” his vocation at all; instead, they assert that Wright’s mother, Anna Lloyd-Jones, had selected architecture and design for her son. See, e.g., SEACREST, supra note 77, at 58-61 (stating how Wright’s profession had been decided for him by his mother before he was born).
and methods and building for democracy. These four principles provide the basic organizational framework for re-examining the marital debt dischargeability provisions of the Code, organically, and serve as a guide for reform.

To better understand Frank Lloyd Wright, one must look at his work in its historical context. Mr. Wright considered the architecture of his time to be "failed architecture." His solution was to discard the "box" as the basic structural form and to open the way for "feeling the space within as the Reality of all true modern building."

Wright's belief that architects must look beyond the "box" has similar application to a feminist legal analysis of a statute. The Code has often been studied, analyzed and even criticized in very predictable ways. Authors have examined the statute, tried to extract the Congressional intent behind the words of the statute and compared that intent to holdings and dicta in case law. This is, indeed, a very effective method of analysis. However, it is not the only method.

Frank Lloyd Wright's approach to architecture suggests a different model for constructing this statutory area of law. Wright's approach, when transported to law, gives one freedom to look beyond the statute and the case law, the traditional "boxes." "Organic legal analysis" allows one to examine the effect of the law on particular constituencies and, on occasion, to examine the law from a new angle, through new and different lenses. In the case of this Article, the alternative lens is feminist legal theory.

B. The Nature of the Site

Man takes a positive hand in creation whenever he puts a building upon the earth beneath the sun . . . Building is an organism only if in accord outside with inside and both with the character and nature of its purpose, process, place and time. It will then incorporate the nature of the site, of the methods by which it is

83. See In the Realm of Ideas, supra note 76, at 1-3 (summarizing Wright's architectural theory).
84. See Hoffmann, supra note 77, at 50 (describing Wright's disdain for architecture of his time and development of his "new sense of building entirely").
85. See In the Realm of Ideas, supra note 76, at 19 (stating that his architecture would not be constricted but would be spaciously liberated).
86. Critical race theory has also been used as an alternative lens through which to examine the Bankruptcy Code. See generally Carlos J. Cuevas, The Consumer Credit Industry, the Consumer Bankruptcy System, Bankruptcy Code Section 707(b), and Justice: A Critical Analysis of the Consumer Bankruptcy System, 103 COM. L.J. 359 (1998) (contending that people of color, working class and poor people have restricted access to chapter 7).
constructed, and finally the whole—from grade to coping, ground to skyline—will be becoming to its purpose.

—Frank Lloyd Wright

In 1994, Congress found itself in the midst of a crisis inasmuch as the Code was deemed to be inadequate to safeguard the claims of creditors holding family law debts. However, it is very difficult to know precisely what Congress was trying to accomplish by enacting §523(a)(15). Underlying this difficulty are two issues: the legislative history concerning this significant amendment to the Code is less than helpful and there are many conflicting opinions as to how the statute is to be interpreted. One helpful explanation, however, appears in *In re Jenkins*, from Judge Larry Lessen in the Central District of Illinois. There, he explains the burdens for each party in a §523 claim:

To prevail under §523(a)(15), Plaintiff must establish that she has a claim against Debtor, other than the type set forth in §523(a)(5), that was awarded by a court in the course of a divorce proceeding or separation. Once Plaintiff demonstrates this (and it is conceded in our case), the burden shifts to Debtor to show either (1) that he lacks the ability to pay the debt at issue, or (2) that the discharge would be more beneficial to Debtor than detrimental to Plaintiff. The debt will remain dischargeable if paying the debt would reduce the Debtor's income below that necessary for the support of the Debtor and the Debtor's dependents.

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87. *In the Realm of Ideas*, supra note 76, at 28.

[Section 523(a)(15)] adds a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or support. In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony payments based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The non-debtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable . . . .


90. *Id.* at 104.
C. Materials and Methods

The machine can be nowhere creator except as it may be a good tool in the creative artist's tool box. It is only when you try to make a living thing of the machine itself that you begin to betray your human birthright. The machine can do great work—yes—but only when well in the hand of one who does not overestimate its resources, one who knows how to put it to suitable work for the human being.

Now there can be nothing frozen or static about either the methods or effects of organic architecture. All must be the spontaneous reaction of the creative mind to a specific problem in the nature of materials.

—Frank Lloyd Wright

"Organic architecture," as defined by Wright, was an architecture "governed by the inner forces of nature," developing from the inside out. Mr. Wright was a staunch believer that stone, glass, wood and other building materials did not constitute "architecture." He believed that architecture was the result of human imagination triumphing over materials. Legal analysis may also be fairly described as human imagination triumphing over materials. By examining doctrine, through statutory interpretation and case analysis, legal scholars engage in a centuries-old method by which law is understood: exploring law from the inside out. However, in the latter half of the last century, thoughtful and creative scholars considered doctrinal analyses to be incomplete. As a result, legal perspectives reshaped legal analysis, and critical legal studies, critical race theory and feminist legal theory, among others, attained their rightful places in the world of legal thought.

Bankruptcy law is arguably an enlightened discipline because, in bankruptcy, legal analysis regularly moves beyond strict interpretations of textual language. Judges are routinely influenced by community interests as they assess how to interpret the Code. This contextualized decision-making, in theory, permits a judge to consider the details of the particular problem before her and to respond with a solution that is often more sensitive to the facts at issue and more respectful of community interests.

91. In the Realm of Ideas, supra note 76, at 48.
92. See Seacrest, supra note 77, at 129.
93. See id. (discussing how Wright proselytized all his life for architecture governed by inner forces of nature).
94. See id. (stating Wright's view on architecture).
95. For an excellent explanation of feminist method, see generally Katharine T. Bartlett, Cracking Foundations as Feminist Method, 8 Am. U. J. Gender Soc. Pol'y & L. 31 (2000) (discussing "what makes a scholar, or her work, 'feminist'").
beyond those of the debtor and the debtor's creditors. In practice, however, case law interpretations—even in bankruptcy—often fall short of this communitarian ideal.

1. Doctinal Analysis

A doctrinal critique of § 523(a)(15) reveals that the present state of "marital-debt" dischargeability law is problematic, though not just for women. Several problems have become apparent in litigation under § 523(a)(15) as courts have tried to apply the relatively new statutory test. They include: a) who may seek relief under the statute; b) what are the elements of a cause of action raised under § 523(a)(15); c) what is the applicable date for measuring a debtor’s ability to pay the debt in question and for weighing the benefit to a debtor (from discharge) against the detrimental consequences to a creditor; d) who has the burden of proof under § 523(a)(15); and e) whether a court may grant a partial discharge of the marital debt under the new provision.

a. Who May Seek Relief Under § 523(a)(15)

It is rare when there is disagreement about who may seek the relief provided within a statute. Yet, § 523(a)(15) seems to have courts asking that very question. The statute is written from the perspective of a debtor and not a creditor. Therefore, many courts have entertained consider-

97. See id. at 216-18 (discussing contextualized decision making and how it allows judge to consider factors beyond facts of specific case).


100. The relevant portion of the statute provides, "A discharge ... under this title ... does not discharge an individual debtor from any debt--(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation." 11 U.S.C. § 523(a)(15) (2002). But see 11 U.S.C. § 523(a)(5), which provides, "A discharge ... under this title ... does not discharge an individual debtor from any debt--(5) to a spouse, former spouse, or child of the debtor."
able litigation to settle just who may bring a dischargeability action under § 523(a)(15).

In In re Douglas,101 the debtor’s former spouse and a guardian ad litem (who was representing the interests of the debtor’s minor child) filed complaints to determine the dischargeability of debts arising out of divorce proceedings in state court. The guardian ad litem sought to have declared nondischargeable her fees of $3,853.50, which the divorce court ordered the debtor to pay. The court heard testimony from all parties to the dischargeability complaint and ruled that the guardian ad litem lacked standing to raise an exception to discharge under § 523(a)(15).102 In support of its position, the court looked first to the cases interpreting § 523(a)(5), the other marital-debt dischargeability provision, and concluded that actions under that Code provision may be asserted only by the other party to the divorce or separation.103 The court then held that “the same is true with regard to complaints brought under § 523(a)(15).”104

As further support for its position as to who has standing under § 523(a)(15), the Douglas court cited to the opinions of the few cases which had been decided on the question at that time and to the remarks of the House Judiciary Committee Chairman made during Congressional consideration of the bill.105 Although the court’s opinion has been validated by numerous opinions since it was issued, it seems that it flies in the face of the long-established rules of statutory construction. A court’s sole function is to enforce a law according to its terms, except for those “rare cases [in which] literal application . . . will produce a result demonstrably at odds with the intentions of its drafters.”106 Here, the statute—on its face—makes no statement about who may bring a dischargeability action under § 523(a)(15); it is only from the statements of a legislator on the floor of the United States Congress that one learns that the petitioners are intended to be limited to the spouse, former spouse or children of the debtor.107

There is, in fact, one court which supports the position that a creditor other than the debtor’s spouse, ex-spouse or children has standing to raise

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\begin{align*}
102. & & See id. at 963 (holding that guardian ad litem lacked standing to raise exception to discharge debt under § 523(a)(5) or (a)(15) and therefore denied relief prayed by guardian in her complaint). \\
103. & & See id. (citing In re Smither, 194 B.R. 102, 120 (Bankr. W.D. Ky. 1996); In re MacDonald, 69 B.R. 259, 278 (Bankr. D.N.J. 1986)). \\
104. & & Id. (citing In re Campbell, 198 B.R. at 467, 472 (Bankr. D.S.C. 1996); In re Dressler, 194 B.R. 290, 304 n.33 (Bankr. D.R.I. 1996); In re Finaly, 190 B.R. 312, 315 (Bankr. S.D. Ohio 1995)). \\
105. & & See id. (discussing issue of standing under § 523(a)(15)). \\
107. & & See In re Campbell, 198 B.R. 467, 472 (citing 140 Cong. Rec. H10752, H10770 (daily ed. Oct. 4, 1994) (statement of Chairman Brooks)) (supporting proposition that plaintiffs who have standing under § 523(a)(15) are limited to spouses, former spouses or debtor’s children). 
\end{align*}
\]
a § 523(a)(15) dischargeability action. In Zimmerman v. Soderlund (In re Soderlund), a law firm brought an adversary proceeding against a chapter 7 debtor, seeking a determination under § 523(a)(15), regarding attorneys' fees occurring from the representation of the debtor in a divorce and child custody proceeding. In making its decision, the court acknowledged that "section 523(a)(15) was undoubtedly directed at debts owed to a spouse, former spouse, or child of the debtor." Notwithstanding, it found that the desired result evidenced by the legislative history was "not mandated by the language of the statute as enacted." According to the Soderlund court, because the statute's language is plain, there was no need to abandon traditional statutory construction principles.

b. Elements of a § 523(a)(15) Cause of Action

It is extremely important for anyone seeking relief under § 523(a)(15) or any statutory provision to understand what she must prove in order to prevail. The language of § 523(a)(15) clearly states the test to be applied has two parts, written disjunctively. The first part focuses on the debtor's ability to pay, while the second part requires a comparison of the harm that would result to the debtor, if the debtor were denied a discharge of the debt, and the harm that would result to the creditor spouse, if the marital debts were discharged.

Regarding the "ability to pay" test, courts have struggled with how to measure a debtor's ability to pay the marital debt in question. The majority of courts use a "disposable income" test, which examines the debtor's income and necessary expenses to determine if there is discretionary income sufficient to pay the debt. The "disposable income test" was first employed in In re Hill because that court recognized the similarity in the language between § 523(a)(15) and § 1325(b)(2), which pro-

109. Id. at 747.
110. Id. (quoting court's determination).
111. When a statute is plain and unambiguous on its face, the inquiry as to its meaning and applicability ends. See Abate v. Beach, 203 B.R. 676, 677 (Bankr. N.D. Ill. 1997) (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)). At that point, it is the responsibility and "sole function of the courts ... to enforce it according to its terms." See Ron Pair Enters., Inc., 489 U.S. at 241 (explaining that when statute's language is plain, courts must enforce it according to that language).
113. See Miles, supra note 99, at 1190 (discussing how another complex question that § 523(a)(15)(A) poses for courts is measuring debtor's ability to pay debt).
114. See id. (explaining that most courts apply "disposable income test" of § 1325 (b)(2) when assessing debtor's ability to pay under § 523(a)(15)(A)).
vides for a disposable income test to be used to determine if a debtor has sufficient income to fund a chapter 13 bankruptcy plan.\textsuperscript{116}

Use of a "disposable income test" makes little sense, however. If one understands that \textsection{523}(a)(15) dischargeability actions are limited to chapter 7 cases because such debts are discharged under the chapter 13 "superdischarge,"\textsuperscript{117} then one must conclude that a chapter 7 debtor will never have disposable income. If a debtor had money left over after meeting his or her fixed, monthly expenses, that person would have filed a chapter 13 case or would have been the subject of a motion to dismiss his or her chapter 7 for abusing the privilege of bankruptcy under \textsection{707}(b) of the Code.\textsuperscript{118}

The minority position regarding the debtor's ability to pay is premised on the insufficiency of the "disposable income test" because that test (as applied in chapter 13 cases) limits the measurement of a debtor's ability to pay to the effective date of the chapter 13 plan and does not take into consideration the dischargeability of debts or other adjustments to the debtor's financial situation.\textsuperscript{119} As a result, some courts have rejected the practice of basing a debtor's ability to pay on a "'snap-shot' which fails to take into account impending changes in the scope of the debtor's financial obligations."\textsuperscript{120}

c. Applicable Measuring Date for Determining Financial Ability

Section 523(a)(15) provides that a debtor's financial ability is germane when considering a challenge to the dischargeability of a marital debt; however, the statutory provision provides no instruction as to the appropriate point in time the bankruptcy court should look at the debtor's financial ability.\textsuperscript{121} Some judges have held that the court is to

\textsuperscript{116} See Miles, \textit{supra} note 99, at 1190 (noting that most courts have followed Hill's interpretative approach).

\textsuperscript{117} See 11 U.S.C. \textsection{1328}(a) (2002) (stating how court can enter discharge of debtor's debts after completion of payments under plan).

\textsuperscript{118} Current bankruptcy practice is for the bankruptcy trustee to bring motions to dismiss a chapter 7 liquidation if the debtor has disposable income and should be in a chapter 13 wage-earner reorganization bankruptcy. \textit{See}, \textit{e.g.}, Paul v. Forman, 260 B.R. 758, 762 (E.D. Va. 1999) (discussing current practices of bankruptcy courts). There, a chapter 7 debtor had monthly expenses of approximately $1,775.00 and income from two jobs that amounted to approximately $1,370.00. \textit{See id.} at 761 (explaining general facts of case). The court concluded that the debtor "lacks the requisite disposable income to make the required payments." \textit{Id.} (concluding that debtor does not have ability to pay debts). Had the debtor had disposable income sufficient to pay his ex-wife, the bankruptcy court should have also inquired into whether the debtor deserved a chapter 7 discharge.

\textsuperscript{119} See Miles, \textit{supra} note 99, at 1191-92 (explaining how some courts have found Hill approach or "disposable income test" insufficient).


\textsuperscript{121} See Miles, \textit{supra} note 99, at 1194-96 (discussing what is appropriate time that court should look to measure debtor's financial ability).
look at the debtor's financial ability at the time the bankruptcy petition was filed;\textsuperscript{122} some have held that the appropriate time is when the creditor's complaint attacking dischargeability of the debt is filed;\textsuperscript{123} and others have held that the point of inquiry is actually at three points in time: the time the petition was filed, the time of the creditor's challenge to the dischargeability of the marital debt and at the time of trial.\textsuperscript{124}

d. Burden of Proof

Another question left unresolved by the drafters of § 523(a)(15) is whom should bear the burden of proof in a dischargeability action under this section of the Code. While courts are divided on the issue, they at least agree on a starting point. "Normally, the burden of proof on questions of discharge usually falls on the objecting creditor in favor of the debtor receiving the benefits of a 'fresh start' through discharge."\textsuperscript{125} Despite the difference of opinion, a majority of courts have interpreted the "burden of proof" under § 523(a)(15) to require the non-debtor spouse first to prove that the debt qualifies as a non-support, divorce-based debt that was contemplated in the new statute. Then, the courts shift the burden to the debtor of going forward and proving that the debt in question should be discharged.\textsuperscript{126} The minority view is that the creditor bears the burden of proof (as in "persuasion"), drawing support from both the statute itself\textsuperscript{127} and "the basic bankruptcy principle that the question of

\textsuperscript{122} See, e.g., \textit{In re Carroll}, 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995) (holding that § 523(a)(15) concerns relative positions of parties as of date of filing for bankruptcy, not date of divorce). \textit{But see In re Anthony}, 190 B.R. 433, 438 (Bankr. N.D. Ala. 1995) (holding that court must look at debtor's financial ability at time bankruptcy petition was filed, not those that existed at time divorce decree entered); \textit{In re Becker}, 185 B.R. 567, 570-71 (Bankr. W.D. Mo. 1995) (holding that courts can consider original schedules as well as post-petition changes to debtor's circumstances).

\textsuperscript{123} See, e.g., \textit{In re Hill}, 184 B.R. 750, 754 (Bankr. N.D. Ill. 1995) (noting that appropriate measuring point for looking at debtor's financial ability is date of filing complaint).

\textsuperscript{124} See, e.g., \textit{In re Melton}, 228 B.R. 641, 646 (Bankr. N.D. Ohio 1998) (noting that courts should look at variety of points in time to determine debtor's financial ability); \textit{In re McGinnis}, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996) (holding that measuring date for assessing whether debtor lacks ability to pay debts is not single point in time, but dates that reflect both debtor's current and future circumstances); \textit{In re Jodoin}, 196 B.R. 845, 854 (Bankr. E.D. Cal. 1996) (holding that measuring date for assessing whether debtor lacks ability to pay is time of trial).

\textsuperscript{125} Miles, supra note 99, at 1185.

\textsuperscript{126} See id. at 1185 n.43 (discussing shift of burden from non-debtor to debtor after non-debtor spouse proves that debt qualifies as non-support, divorce-based debt); \textit{see also Carroll}, 187 B.R. at 200 (explaining how burden shifts to debtor once plaintiff proves prima facie case).

\textsuperscript{127} See id. at 1189 (citing Kessler v. Butler (In re Butler), 186 B.R. 371, 375 (Bankr. D. Vt. 1995)); \textit{see also Becker}, 185 B.R. at 569 (holding that burden of proof shifts to debtor after creditor brings dischargeability action under § 523(a)(15)).
nondischargeability be ‘narrowly construed’ against the creditor.”\textsuperscript{128} Regardless of which perspective is correct, the court in \textit{In re Taylor}\textsuperscript{129} probably spoke for all bankruptcy judges when it said that the question of “which party has what burden . . . is clearly in need of legislative remediation and clarification.”\textsuperscript{130}

e. Partial Discharge of Marital Debt

After reading the text of § 523(a)(15), one is left with the impression that the statute provides a court with two options: either discharging the marital debt in question or holding that it is nondischargeable. Notwithstanding this seemingly clear language, several courts have held that a partial discharge of the indebtedness is an appropriate third alternative.

\textit{In re Comisky}\textsuperscript{131} is the first reported decision to award a debtor only a partial discharge of a marital debt under § 523(a)(15). In \textit{Comisky}, the debtor, James Comisky, sought to discharge an $18,619.00 property settlement owed to his ex-wife, Susan.\textsuperscript{132} The evidence established that James had good employment, that he had the ability to earn extra money as a teacher and that he had remarried and his new wife had “substantial income.”\textsuperscript{133} The evidence also suggested that James was paying over $770 in support and that he had significant monthly expenses in connection with his new marriage.\textsuperscript{134}

After reviewing his finances, the court concluded that James did not have the ability to pay all of the debt he owed his ex-wife; however, the court held that James could pay a portion of the debt over a “reasonable period of time.”\textsuperscript{135} Analogizing the provisions of § 523(a)(15) to the student loan dischargeability provision in the Code,\textsuperscript{136} the court stated that “in appropriate cases the court may both find a nondischargeable debt

\begin{itemize}
\item \textsuperscript{128} Miles, \textit{supra} note 99, at 1189 n.54 (stating that Kessler court held creditors should take affirmative action to pursue determination of nondischargeability).
\item \textsuperscript{129} 191 B.R. 760, 765 (Bankr. N.D. Cal. 1995).
\item \textsuperscript{130} \textit{Id}. at 765; see also Jeffrey Margolin, \textit{Note, Taking the Pernicious Creature that is 523(9)(15) of the United States Bankruptcy Code}, \textit{8 CARDOZO WOMEN'S L.J.} 45, 67 (2001) (arguing that there are “harmful economic and legal consequences to women when courts place the burden of proof on the wife”).
\item \textsuperscript{131} 183 B.R. 883 (Bankr. N.D. Cal. 1995).
\item \textsuperscript{132} \textit{See id}. at 883 (explaining general facts of case). James originally owed Susan $38,619.00 for her share of the couple’s community property. \textit{See id}. (noting amount that Susan was to receive for her share of community under their marital settlement agreement). He obtained refinancing and paid her $20,000.00; the dispute is over the balance. \textit{See id}. (noting amount debtor owed after divorce settlement).
\item \textsuperscript{133} \textit{See id}. at 883-84 (noting debtor’s financial circumstances).
\item \textsuperscript{134} \textit{See id}. at 884 (stating debtor’s current financial obligations). The court also noted that James’s new wife financially supported her elderly parents. \textit{See id}. (stating fact of debtor’s new wife’s expenditures).
\item \textsuperscript{135} \textit{See id}. (holding that partial discharge is appropriate in this case).
\item \textsuperscript{136} 11 U.S.C. § 523(a)(8) (West 1995).
\end{itemize}
and limit the enforcement of the judgment."137 Accordingly, the court directed James to pay $10,000.00 of the more than $18,000.00 he still owed his ex-wife.138

The ability of a bankruptcy court to issue a partial discharge under § 523(a)(15), however, is very much unsettled.139 Although the bankruptcy court in Comisky granted a partial discharge, as have many other courts,140 some courts have taken the position that the discharge issue under § 523(a)(15) is an “all or nothing proposition,” not permitting the court to fashion special relief.141

The analysis regarding partial discharge under § 523(a)(15) is often analogized to the dischargeability analysis under another discharge provision of the Code, one relating to the dischargeability of student loans.142 Courts have reasoned that in situations where a petitioning debtor’s future financial picture is “far from hopeless,” the court has the equitable power in student loan cases to require a partial repayment of the indebtedness.143 While not all courts agree with the ability to order a partial dis-

138. See Comisky, 183 B.R. at 884 (holding that debtor must pay only portion of debt owed to his ex-spouse). The court directed James to apply at least $200 of his disposable monthly income (which he estimated to be between $200 and $300) to his ex-wife, plus interest, until the $10,000.00 nondischargeable sum was paid. See id. (noting specific terms of partial discharge plan).
139. See Vasser, supra note 35, at 90-91 (noting split of authority regarding bankruptcy court’s ability to award partial discharge in § 523(a)(5) cases). The Courts of Appeals for the Second and Eleventh Circuits have held that bankruptcy courts are not authorized to divide § 523(a)(5) debts into dischargeable and non-dischargeable portions, while the Sixth Circuit allows the division. See id. (citing Forsdick v. Turgeon, 812 F.2d 801, 804 (2d Cir. 1987); Harrell v. Sharp, 754 F.2d 902, 907 (11th Cir. 1985); Long v. Calhoun, 715 F.2d 1103, 1111 (6th Cir. 1983)).
143. See, e.g., In re Wetzel, 213 B.R. 220, 227 (Bankr. N.D.N.Y. 1996) (discussing how courts have power under § 523(a)(8)(B) to partially discharge debt in certain student loan cases); In re Fox, 189 B.R. 115, 120 (Bankr. N.D. Ohio 1995) (finding that it would be equitable to reduce debtor’s total amount of student loan by approximately eighty percent).
charge of a student loan,\textsuperscript{144} it seems to have become an acceptable alternative to the traditional “all-or-nothing” approach to dischargeability of student loans.

A doctrinal analysis of the aforementioned legal questions reveals a number of problems regarding the interpretation and application of § 523(a) (15), but very few solutions.\textsuperscript{145} The most common method of investigating the effect of this provision of the Code has been to review the statutory language and the cases which interpret the statute’s words. But a strict doctrinal inquiry does not present a complete picture of this young statute. A closer inspection of some of the cases interpreting § 523(a) (15) also suggests that other significant problems exist in the application and interpretation of the statute.

2. Doctrinal Analysis Re-Viewed Through a Gendered Lens

Another problem inherent in § 523(a)(15) concerns the test to be applied in determining whether the marital debts in question are dischargeable. The statute actually provides two tests: (1) whether the debtor has the ability to pay the marital debt in question; and (2) a balancing test, which requires an examination of the harm to the debtor (if the debtor were required to continue paying the debt in question) as compared to the harm to the creditor ex-spouse (if the marital debt in question were discharged).\textsuperscript{146} While the tests are written disjunctively, courts seem reluctant to limit their inquiries to the first test, even when the debtor has absolutely no ability to pay the debt in question.\textsuperscript{147} Moreover, the sojourn into the world of the balancing test often results in bankruptcy courts sitting as \textit{ad hoc} divorce courts, revisiting all of the painful issues and details

\textsuperscript{144} See, e.g., \textit{In re} Hawkins, 187 B.R. 294, 301 (Bankr. N.D. Iowa 1995) (discussing that courts are essentially rewriting student loan repayment terms and pointing out that Congress could have authorized partial discharge with “to the extent” language similar to that used in §§ 523(a)(2), (a)(5) and (a)(7)); see also \textit{In re} Haines, 210 B.R. 586, 594 (Bankr. S.D. Cal. 1997) (holding that courts do not have power to partially discharge divorce debts); \textit{In re} Florez, 191 B.R. 112, 115-16 (Bankr. N.D. Ill. 1995) (commenting that concept of “partial discharge” does not belong in § 523(a)(15)).


\textsuperscript{147} See, e.g., \textit{In re} Walsh, 247 B.R. 30, 34 (Bankr. D. Conn. 2000) (citing Turner v. McClain (\textit{In re} McClain), 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998)) (explaining how two tests under § 523(a)(15)(A) and (B) are written in disjunctive).
of the divorce in the name of balancing the equities between a debtor and the debtor's spouse, former spouse or child, often to the ex-wife's detriment. But these cases become even more illuminating when the doctrinal issues are re-examined from a feminist perspective. They reveal subtle (and not-so-subtle) gender biases resulting in material differences in the application of § 523(a)(15).

a. In re Hill

In re Hill is one of the more notable cases to apply the § 523(a)(15) analysis to marital debts. In Hill, a chapter 7 debtor's former wife sought to have the court declare nondischargeable the debtor's obligation (under the couple's marital settlement agreement) to assume certain marital debts. Specifically, the debtor, Lawrence, had agreed to pay approximately $9,600.00 in consumer debts, as well as the first and second mortgage on the couple's former residence which totaled approximately $56,000.00. Lawrence, who was remarried with two stepchildren at the time of his bankruptcy filing, earned approximately $1,300.00 per month as a technician (a position he had held for about 7 years). He also earned a nominal sum playing in a band. The debtor's new wife, who received $400.00 per month in child support from her ex-husband, was not employed outside of the home at the time of the debtor's bankruptcy filing. After a hearing, the court found that Lawrence's total monthly debt was $2,025.00 while his ex-wife, Kathleen, received income of approximately $1,000.00 per month (the source of which was not reported) and had monthly expenses of approximately $1,082.00.

148. There are issues beyond the tangible assets and compensation that are painful and that may cause women to be reluctant to participate in additional court hearings. In Divorced From Justice, Karen Winner writes extensively about ex-husbands' divorce lawyers discrediting the ex-wife's character as a tactic to gain an advantage in the divorce. See Winner, supra note 60, at 59. She writes:

When a man's lawyer uses character assassination as a weapon, a biased judge is all too eager to accept his claims at face value. And if this same woman who has been discredited claims that the husband is being unreasonable, the prejudiced judge will cynically assume that the woman is trying to frame her injured spouse. In divorce court, the lying that takes place in court Articles and in oral testimony to discredit the woman in the judge's eyes has a very concrete purpose. Once the judge has a negative impression and believes the woman is bad or is malevolent toward her husband, the woman becomes a victim of the judge's disbelief.

Id.

149. 184 B.R. 750 (Bankr. N.D. Ill. 1995).

150. See id. at 751-52 (explaining general facts of case).

151. See id. at 752 (explaining debtor's current income sources).

152. See id. (noting how debtor's new spouse was not employed outside of home and earned only what she received in child support payments).

153. See id. (explaining court's factual findings of case). The court also noted that the ex-wife "lives with a roommate, does not eat out at restaurants and has no other source of income except for a Christmas bonus of $100.00 to $200.00." See id.
Reviewing the statute, the court concluded that the debts could be discharged if the debtor could demonstrate an inability to pay the debts\textsuperscript{154} or if the debtor could show that the benefit of discharging the debts outweighed the detrimental consequences to his former spouse.\textsuperscript{155} Applying the statute's two-part test to the facts, the court concluded that, regarding the "ability to pay" test under § 523(a)(15)(A), "the Debtor's financial condition renders it virtually impossible for him to pay the debt at issue. The Debtor testified to expenses of approximately $2,025.00 per month and a total household income of $1,700.00 per month. On its face, there could be no clearer showing of a debtor who does not have the ability to pay."\textsuperscript{156} The court's analysis could have ended at this point. As discussed earlier, § 523(a)(15) is written in the disjunctive, allowing a court to use either an "ability to pay" test or a balancing test to determine whether the property settlement in question is dischargeable. The court, however, continued to consider the dischargeability question under the second test in § 523(a)(15).

Concerning the second test under § 523(a)(15), the "balancing test,"\textsuperscript{157} the court determined that both parties earned modest incomes, had extremely limited budgets, lived frugal lifestyles, but the court specifically noted that the debtor had a new wife and family "who enjoy[ed] his support," while Kathleen "ha[d] no other dependents and live[d] with a roommate to help reduce expenses."\textsuperscript{158} Thus, the court concluded that the debtor should be relieved of the marital obligations:

Here, the benefit of the discharge to the Debtor is significant. He obtains a fresh start, unburdened by debts which he has no ability to pay. He receives relief from his financial plight as he undertakes marital responsibilities with his new family.

\textsuperscript{154} See id. at 754 (citing 11 U.S.C. § 523(a)(15)(A)).

\textsuperscript{155} See id. at 755-56 (citing 11 U.S.C. § 523(a)(15)(B)). Although, under § 523(a)(15) the spouse challenging the dischargeability of the debt has the burden of proof, the court reasoned that the burden of production actually shifted to the debtor spouse to show that he does not have the ability to pay the debts in question or that discharging the debts would result in a greater benefit to the debtor. See id. at 753-54 (discussing burden for plaintiff and debtor under § 523(a)(15)). For a more complete discussion, see supra Section III.C.1.d.

\textsuperscript{156} See id. at 755 (applying both tests under statute to case and concluding that debtor has undoubtedly met his burden to show he has no ability to pay debt at issue).

\textsuperscript{157} After finding that the debtor lacked an ability to pay under § 523(a)(15)(A), the court did not need to proceed to the § 523(a)(15)(B) analysis because the § 523(a)(15) tests are written disjunctively; in an interesting comment, however, the court stated, "[a]lthough it is unnecessary to proceed further, the Court finds that a review of § 523(a)(15)(B) will be of use to future litigants." Id.; see also In re Hesson, 190 B.R. 229, 237 (Bankr. D. Md. 1995) (concluding that if debtor has no "disposable income" to fund payment of obligation, debtor prevails, and exercise is over).

\textsuperscript{158} In re Hill, 184 B.R. 750 (Bankr. N.D. Ill. 1995) (discussing court's reasoning for its conclusion under § 523(a)(15)(B) test).
The detrimental consequences to the Plaintiff [ex-wife] are also significant. She finds herself burdened with debts she now is alone legally obligated to pay. She may be sued on those debts. If the Debtor does not contribute toward payment of those debts, she, too, may have to file a Chapter 7.

That is indeed a detrimental consequence, but then again, is it so bad? A discharge of debts by both parties strikes the Court as the most sensible solution to the combined problems of the Plaintiff and the Debtor.\textsuperscript{159}

One proximate result of the court's ruling is that Kathleen may be forced to file bankruptcy, the very outcome Congress hoped would be avoided upon enacting § 523(a)(15).\textsuperscript{160}

Additionally, it is clear that the bankruptcy judge in \textit{Hill} made certain assumptions in reaching his conclusion that Lawrence should be allowed to discharge the debts he obligated himself to pay in his divorce. The first assumption was that men are the family providers and that that role should be given great weight in the court's decision making.\textsuperscript{161} In determining that the benefit of discharging the debts outweighed the detriment to the former spouse, the court specifically cited that Lawrence had remarried and had gained dependents "who enjoy his support." The court then compared the ex-husband's situation to the ex-wife's, finding that she, "[o]n the other hand . . . has no other dependents and lives with a roommate to help reduce expenses."\textsuperscript{162} This difference in lifestyle, which has nothing to do with the fact that Lawrence filed for bankruptcy, appears to be a key factor in the court's decision to relieve Lawrence from his financial obligations.\textsuperscript{163}

The analysis in \textit{Hill} does not take into consideration all of the "real situations that exist in day-to-day life."\textsuperscript{164} A feminist critique of \textit{Hill} requires the reader to think about the world in which Kathleen and Lawrence live in a more interrelated way. Instead of minimal economic

\textsuperscript{159} See id. (discussing detrimental consequences to plaintiff if debts are discharged and concluding that those consequences do not outweigh benefit of discharge to debtor).

\textsuperscript{160} See White, supra note 67, at 635-36.

\textsuperscript{161} "Assumptions and stereotypes about the roles of the sexes are firmly rooted in our society. Decision-makers have shown themselves to be unable to move beyond these traditional gender roles, even when given the opportunity to draft new laws or engage in judicial policymaking." \textsc{Suzanne Utaro Samuels, Fetal Rights, Women's Rights} 54 (1995).

\textsuperscript{162} See Hill, 184 B.R. at 756 (discussing court's reasoning for discharging debtor’s debt and denying plaintiff relief).


\textsuperscript{164} See Gross, supra note 96, at 216-19 (discussing how judges should consider practical factors when deciding cases under Bankruptcy Code notion embodied in "contextualized decision making").
analysis and disparate considerations of the couple’s respective new lifestyles, a feminist approach would provide a more holistic inquiry.

The court in Hill concluded that Lawrence was entitled to relief from his obligations because, unlike his ex-wife, he was a “bread-winner,” who had to provide for his (new) dependents. The court acknowledged that both Lawrence (and his new family) and Kathleen lived frugally and that both “work hard for modest earnings.” And yet, the court was reluctant to use its equitable powers to fashion relief to enable the Kathleens of the world to avoid their own bankruptcies and require the Lawrences of the world to live up to promises to assume certain debts from the marriage. The court virtually ignored the fact that Lawrence’s monthly financial picture included funds for the health and welfare of two children whom he is not legally obligated to support. Moreover, the court refused to look more closely at Lawrence’s financial and lifestyle decisions in order to protect Kathleen from her own bankruptcy.

The court believed that Lawrence, a man, was the head of his family and perpetuated the notion that the male is the dominant spouse in a two-parent family. Although it was true that Lawrence earned more than

165. See Hill, 184 B.R. at 756 (making concluding comments for court’s decisions).

166. Admittedly, bankruptcy law does not normally provide for relief for persons other than the debtor. See In re Condel, Inc., 91 B.R. 79, 82 (B.A.P. 9th Cir. 1988) (explaining how Bankruptcy Code generally protects only debtor, not persons or entities related to or connected with debtor); see also Nathalie D. Martin, Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In, 59 Ohio St. L.J. 429, 429 (1998) (contending that standing for bankruptcy is too narrow). There are examples, however, of the interests of non-debtors being affected by the bankruptcy court in certain circumstances. See 11 U.S.C. § 1301 (2002) (stating that chapter 13 automatic stay extends to co-debtors, even if they have not filed for bankruptcy protection); 11 U.S.C. § 363(f) (2002) (stating that bankruptcy trustee has authority to seal property of estate free and clear of any interest of non-debtor/co-owner).

167. The court does acknowledge Kathleen’s argument that Lawrence’s expenses include support for children that are not his and that his new wife could seek employment outside of the home to supplement the family income. See Hill, 184 B.R. at 755 (discussing plaintiff’s arguments in support of her complaint).

168. The Hill judge explained that he “is reluctant to impose lifestyle changes on the Debtor, especially when the Debtor is not attempting to maintain a luxurious lifestyle.” See id. Query whether “the level of luxury that one enjoys” is the true standard. See id. (discussing court’s general tendency of not imposing big changes on debtor who is living frugally). If the standard is the level of luxury, Kathleen passes the test as easily as Lawrence does. See id. at 752. She, like her ex-husband, was not attempting to maintain a luxurious lifestyle. See id.

169. Discrimination against part-time workers may properly be viewed as sexist because of its capacity to perpetuate male dominance in two-parent homes. The typical part-time working mother may be kept in a subordinate economic position by a workplace that is inhospitable to part-time workers. Unless she is willing and able to work full-time, there is little chance that she will achieve economic parity with her husband. Chamallas, supra note 163, at 731. The problem, however, is not limited to part-time workers. When both spouses are full-time workers, men typically earn much
his new wife, the record reflected only minimal economic analysis concerning Lawrence's new family, and overlooked the fact that Lawrence's new wife might be able to earn additional money by working outside of the home and that Lawrence's new children were not his legal obligation. Instead, the court relied on essentialist notions of male-female roles within the family which, once more, traps Kathleen. As the United States Supreme Court once stated, "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."

In addition to finding that Lawrence was the "provider" for his new household, the court also assumed that the detriment to Kathleen (by not receiving payment on the marital debts from Lawrence) was outweighed by the benefit Lawrence would receive were he to discharge his obligation to pay Kathleen. In doing so, the court suggested that the promise of a fresh financial start through bankruptcy would outweigh the devastating effect that a bankruptcy discharge may have on certain individual creditors. Furthermore, this assumption suggests that the court sees bank-

more than their wives. See id. (discussing perpetuation of male dominance in two-parent family and how males on average earn more than women).

170. The debtor's new wife was working within the home and received only child support in the amount of $400 per month. See Hill, 184 B.R. at 752 (illustrating general financial circumstances of debtor and his family).

171. Had an extended economic analysis been performed by the court, valuing Lawrence's new wife's contribution to their family, the conclusion that she was dependent upon him may not have been appropriate; the result may very well have also been the same, however, because it is difficult to value housework and child-rearing responsibilities. See Martha Chamallas, Introduction to Feminist Legal Theory 190-97 (1998) (discussing implicit gender bias in law). Moreover, even when one considers just actual dollars contributed to a marriage, studies suggest that women shoulder a disproportionate burden of housework, leaving them less time to work outside the home. See Chamallas, supra note 165, at 729 ("One study found, for example, that women with outside jobs devoted an average of twenty-eight to fifty-six hours per week to housework and child care. In contrast, men spent only an average of ten and one-half hours per week performing these services.") (citations omitted).

172. See, e.g., Samuels, supra note 161, at 54 (discussing how adjudication of gender-based claims by courts reveals that they often rely on traditional assumptions and stereotypes about roles of sexes that have been firmly rooted in American society).


174. See Hill, 184 B.R. at 756 (discussing court's conclusions and rationale for its holding).

175. In 1991, the U.S. Supreme Court reaffirmed the long-recognized policy that an overriding purpose of bankruptcy law is to provide a debtor with a new financial start, free from the pressures of pre-existing debts. See Grogan v. Garner, 498 U.S. 279, 286 (1991) (explaining how central purpose of Code is to provide indebtedors with new opportunity in life); see also In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992) (stating that one fundamental policy of bankruptcy code is fresh start afforded debtors through discharge of their debts); In re Bonnett, 158 B.R. 125,
ruptcy as a panacea and that the negative aspects of bankruptcy are less important for Kathleen. Indeed, the current bankruptcy reform movement in the United States Congress is a critique of the existing practices, charging that bankruptcy is too easy for debtors, devastates creditors and no longer carries a stigma.176

128 (Bankr. C.D. Ill. 1993) (stating how overriding purpose of bankruptcy law is to provide debtor with new start, free from pressures of pre-existing debt). This “fresh start” protection is generally recognized as protecting only the debtor, not persons or entities related to or connected with the debtor. See In re Condel, Inc., 91 B.R. 79, 82 (B.A.P. 9th Cir. 1988) (explaining how Bankruptcy Code generally protects only debtor, not persons or entities related to or connected with debtor). Moreover, courts have acknowledged that “[i]n order to effectuate the fresh start policy, exceptions to discharge should be strictly construed against an objecting creditor and in favor of the debtor.” See Riso, 978 F.2d at 1154 (citing In re Klapp, 706 F.2d 998 (9th Cir. 1983)). Courts have suggested that the marital debt discharge provisions of the Code are intended to be a departure from the general rule that bankruptcy results in a fresh start for an honest but unfortunate or unlucky debtor. See, e.g., In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996) (citing Shaver v. Shaver, 736 F.2d 1314, 1315-16 (9th Cir. 1984)). In fact, many courts, in ruling on the dischargeability of marital debts under § 523(a)(5), have declared that the public policy favoring the enforcement of familial obligations outweighs the public policy favoring a fresh financial start. See, e.g., In re Platter, 140 F.3d 676, 680 (7th Cir. 1998) (discussing how debts owed to debtor’s family are exceptions to general bankruptcy rule of discharging all debts of individual debtor as per § 523(a)(5)); Macy v. Macy, 114 F.3d 1, 5 (1st Cir. 1997) (discussing how strong policy interest exists in protecting ex-spouses and children from loss of alimony, support and maintenance owed by debtor who has filed for bankruptcy); Sternberg, 85 F.3d at 1405 (noting how public policy favoring family debt outweighs debtor’s interests); In re Lombardo, 224 B.R. 774, 782 (Bankr. S.D. Cal. 1998) (discussing how § 523(a)(5) embodies overriding public policy favoring enforcement of familial obligations over “fresh start” policy); In re Beach, 220 B.R. 651, 653-54 (Bankr. D.N.D. 1998) (discussing how § 523(a)(5) favors enforcement of familial support obligations over “fresh start” for debtor); Stepp v. Stepp, 955 P.2d 722, 726 (Okla. 1998) (explaining how support obligations imposed by divorce decrees are not dischargeable under federal bankruptcy law). That rationale has been cited in cases deciding marital debt dischargeability issues under § 523(a)(15). See, e.g., Matter of Smith, 218 B.R. 254, 258 (Bankr. S.D. Ga. 1997) (explaining how policy considerations require bankruptcy courts to construe domestic relations exceptions more liberally under § 523(a)(15)); In re McGinnis, 194 B.R. 917, 919 (Bankr. N.D. Ala. 1996) (discussing how statute supports proposition that public policy favors enforcement of familial obligations); In re Sateren, 183 B.R. 576, 581 (Bankr. D.N.D. 1995) (discussing how Congress enacted § 523 to resolve conflict between fresh start policy of bankruptcy discharge and family law policy which recognizes need to ensure necessary financial support for disadvantaged spouse after termination of marriage as well as equitable distribution of marital property); see also Hon. Margaret Dee McGarity, When an Ex-Spouse Goes Bankrupt, 81 A.B.A.J. 64 (Nov. 1995) (outlining new rules set forth by Bankruptcy Reform Act of 1994).

Another important case to apply § 523(a)(15) is In re Jenkins. In Jenkins, a debtor’s former wife filed an adversary proceeding under § 523(a)(15), seeking to block the discharge of the debtor’s property settlement obligations arising out of the couple’s divorce. The debtor owed his former wife $5,364.01, and the court concluded that he had the ability to pay the debts over time with reasonable budgeting and conservative living. Once again, the court also concluded that the debts in question were dischargeable because the plaintiff/ex-wife’s state of affairs was “financially oppressive” and that granting the debtor a discharge would have a minimal effect on the plaintiff. However, Jenkins is instructive inasmuch as it provides a glimpse of how complicated it is to determine the dischargeability of a debt under § 523(a)(15) of the Code.

The court in Jenkins concluded that the debtor had disposable income in his budget and thus had an ability to pay his ex-wife the debts that were at issue, but the court ultimately concluded that the debtor should prevail once the balancing test was applied. In order to reach its decision, the court evaluated the following facts: the debtor’s employment, length of employment and monthly budget; the fact that the debtor’s minor son (from a previous marriage) resided with him and the age of that child (16); and the reasonableness (or lack thereof) of the debtor’s payroll deductions. Additionally, the court considered the ex-wife/plaintiff’s employment, total debt, budget, the fact that she was underemployed, that plaintiff’s daughter and grandson lived with her and that the daughter was a full-time student, employed full-time and contributed toward the household expenses.

This inquiry, while necessary, illustrates the frustration that bankruptcy judges express when they are called upon to resolve a dispute under § 523(a)(15) of the Code. The factors that the bankruptcy court must weigh almost mirror the factors that a divorce court judge is called upon to consider when fixing alimony, maintenance or support. Thus, the legislation continues the alarming trend—first cited in connection

178. See id. at 103 (explaining general facts of case).
179. See id. at 105 (discussing court’s conclusion that debtor had ability to repay debt, yet court nevertheless discharged debt owed to plaintiff).
180. See id. at 106 (holding that debt owed to plaintiff is dischargeable even though plaintiff’s financial position was financially oppressive).
181. See id. at 106 (ruling that detriment to plaintiff of discharging debts does not exceed benefit to debtor, so debtor prevails).
182. See id. at 105 (explaining considerations that court used to determine whether debtor had ability to repay debt to plaintiff).
183. See id. at 105-06 (explaining considerations that court used to consider detriment to plaintiff if debt owed to her was discharged).
184. See, e.g., In re Hesson, 190 B.R. 229, 236 (Bankr. D. Md. 1995) (explaining how § 523(a)(15) forces federal courts to thrust themselves into business of domestic relations, which was previously condemned practice).
with the marital-debt discharge provisions of § 523(a)(5)—of men, more often than women, using bankruptcy courts as "second chance" divorce courts.  

c.  In re Phillips

A third noteworthy case in the development of the § 523(a)(15) analysis is In re Phillips. There, Theresa Phillips sought an order to prevent her ex-husband, Michael, from discharging a $120,000.00 lump sum "alimony" payment, pursuant to § 523(a)(15). The court employed the same analysis that the Hill court employed and concluded that under § 523(a)(15)(A), the husband did not have the ability to pay the debt in question. The court found that Mr. Phillips' total monthly income was $1,644.17 and his monthly expenses were $2,812.81. But the court apparently gave no consideration (in its analysis under subparagraph (A) of the statute) to the fact that the debtor owned stock, which was valued by the divorce court at $450,000, by his ex-wife's expert witness in the bankruptcy court at $257,000, in his bankruptcy schedules at $25,490, and by his own expert in bankruptcy at $19,000. Again, as in Hill, the court disregarded the disjunctive language in § 523(a)(15) and proceeded to analyze the debtor's situation under subparagraph (B), the balancing test. In testimony regarding the second test, the court learned that Theresa claimed to have suffered a detriment because, "she cannot afford to attend college, she was forced to sell the marital home and incurred a substantial tax burden, and she is forced to work twelve-hour days for commission-based compensation." Regarding Michael's situation, the court merely stated, "[a]s discussed above, former husband has minimal disposable income. Former husband filed for bankruptcy to obtain a financial "fresh

185. See Alexander, supra note 4, at 362, 388 (noting assertion that § 523(a)(5)'s discharge provision perpetuates unfair economic discrimination against women because ex-husbands discharge more debts in post-divorce bankruptcies than ex-wives).


187. The court rejected the petitioner's original position that the lump sum alimony was nondischargeable under § 523(a)(5) of the Code; the court concluded that the payment was a property settlement. See id. at 367 (noting that divorce court ordered lump sum award under equitable distribution part of settlement, even though it labeled it as "lump sum alimony").

188. See id. at 369 (finding that "former husband has proved by a preponderance of the evidence that he is unable to pay the debt"). The court found that Mr. Phillips's total monthly income was $1,644.17, and his monthly expenses were $2,812.81. See id. But the court apparently gave no consideration (in its analysis under subparagraph (A) of the statute) to the fact that the debtor owned stock, which was valued by the divorce court at $450,000, by his ex-wife's expert witness in the bankruptcy court at $257,000, in his bankruptcy schedules at $25,490 and by his own expert in bankruptcy at $19,000. See id. at 370-71.

189. See id. at 369 (noting former husband's monthly income and expenses).

190. See id. at 366 (showing discrepancy in determining valuation of stocks).

191. See id. at 369 (describing detriment allegedly suffered by former wife).
The court concluded that Michael's obligation to Theresa should be discharged. There was no meaningful analysis here. Like many reported decisions concerning the older § 523(a)(5), the court basically waved its magic wand and determined that the debt is dischargeable.

d. *In re Florio*

The fourth illustrative case is *In re Florio*. This decision is particularly interesting because the debtor was a woman and her ex-husband sought to have the debt in question declared nondischargeable. As a result of a property settlement in their divorce decree, the debtor, Laurie Florio, was indebted to her ex-husband, Marc, by virtue of a $5,000 note, bearing interest at 16% per annum and payable in sixty monthly installments. She made only a few of the required payments and, as of the date of the hearing in bankruptcy, Laurie owed Marc over $30,000.00.

Once again, following *Hill*, the court undertook the § 523(a)(15) analysis, beginning with a determination of whether Laurie had the ability to pay the debt owed to Marc. The court found that, at the time her bankruptcy petition was filed, Laurie had a net monthly income of $1,579.00, and that she voluntarily gave up her job as a surgical technician shortly after filing bankruptcy to work at a dog grooming business that, for all practical purposes, paid her no income. As a consequence, the court concluded that Laurie voluntarily placed herself in a position of having no income; the court would not sanction such behavior; and Laurie would be deemed to have the ability to pay the debt to Marc. Even though Marc

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192. See id. (noting husband’s reasoning in filing for bankruptcy).
193. See id. (deciding that debt owed to former wife should not be excepted if husband is entitled to discharge). The court, however, considering a separate issue, granted the trustee’s request to deny Michael a discharge of any of his debts under § 727(a)(4) of the Code for lying on his bankruptcy petition, thereby preventing Michael from discharging any of his debts. See id. at 370 (noting outcome of trustee’s request).
196. See id. at 656 (stating general nature of divorce decree).
198. See *Florio*, 187 B.R. at 655 (providing factual background of case).
199. See id. (looking to potential income of Laurie). The court continued, “Laurie failed to show that she is unable to pay her debt to Marc. She is capable of earning $1,579 a month, but voluntarily chose to reduce her income to zero. Her earning potential is more than adequate to give her the ability to pay her debt to Marc.” Id. at 658 (emphasis added). This is the first time a court interpreted an “ability to pay” to include earning potential rather than earnings. See id. at 659.
owed Laurie over $20,000 in unpaid child support, this did not seem to be an offsetting factor in the court's economic analysis.200

Regarding the second test under § 523(a)(15), the court stated that the evidence presented failed to show that Laurie "would properly benefit from a discharge of the debt,"201 and that Laurie failed to show that a discharge would not be detrimental to her ex-husband, even though the record reflected that Marc earned approximately $48,000.00 per year.202 In the end, the court granted Marc's request to have the debt deemed nondischargeable.

Here, the court had no trouble examining the debtor's lifestyle choices. Unlike the court in Hill,203 the Florio court imposed its values on the parties. Why didn't the court consider Marc's past-due child support in the § 523(a)(15)(B) balancing test? This question is just one of many unresolved issues that arise as one examines the § 523(a)(15) jurisprudence.

3. Feminist Method

In the prior section of this Article, feminist method was employed to re-examine existing bankruptcy statutes and case law interpretations thereof. But what is "feminist method?" It is examining the marital debt discharge provisions of the Code by an intentionally different approach than most other Articles on the subject of bankruptcy. This Article builds on an earlier effort to document a link between bankruptcy law's treatment of women regarding the dischargeability of marital debts and the oppression of women.204 However, feminist legal theory, like most theories, has become somewhat fragmented as it has developed, and most scholars recognize that there are numerous strands of feminist legal theory to consider when one purports to analyze the law using "feminist theory."205 While no one can accurately identify every permutation of feminist thinking currently existing, one can test a hypothesis against various strands of feminist theory to aid in affirming the validity of that assumption.

200. See id. at 656 (stating that court "may not allow the requested set off").
201. See id. (stating findings of court).
202. See id. (explaining where Laurie's claim falls short in court's analysis). The court explained that "nothing in the record indicates what Marc's expenses are and whether he needs the money Laurie owes him to meet his own debts." Id.
204. See Alexander, supra note 4, at 352 (noting that congressional provisions as well as bankruptcy courts are not gender neutral); Bartlett, supra note 95, at 42 (exploring Professor Martha Fineman's search for and discovery of link between law's treatment of family and oppression of women).
205. See, e.g., Martha M. Ertman, supra note 16, at 26-29 (describing various feminist ideological approaches to be used in her examination of valuing homemakers' marital contributions).
At this point in the discussion of § 523(a)(15), a more-refined thesis is appropriate. Section 523(a)(15) appears, on its face, to be gender-neutral; however, women are often treated differently from men—and negatively—when the statute is applied to specific cases. This disparate treatment is gendered and is the result of a systemic oppression of women. Until those discriminatory practices are unmasked, court decisions will continue to astonish and puzzle practitioners and scholars alike and ex-husbands will thereby continue to be enticed to run to bankruptcy court and discharge marital debts that their ex-wives thought were set in stone. Accordingly, in this section, the Article will examine more closely the link between the Code’s disparate impact to women regarding marital debt discharge and the continued oppression of women.

Three strands of feminist theory will be applied to the inquiry at hand: cultural feminism, radical feminism, and race-conscious feminism. The works that are cited within each category, as well as the feminist theorists whose works are cited within each category, are not meant to define the strand(s) of feminist thinking with which each author is to be identified. The characterizations are intended to be heuristic and not categorical.

a. Cultural Feminism

Cultural feminists, most notably Carol Gilligan, celebrate “the distinctive contributions women make to society, particularly women’s capacity for nurturing, empathy, and preservation of relationships.” Cultural feminists appeal to more positive, stereotypically female, terms in their description of women’s characteristics. Their attempt is an approach that seeks to improve the position of women through legal and social strategies, which validate women’s differences from men. Cultural femi-

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206. This author believes that a discussion employing other strands of feminist thinking would be extremely helpful in exploring the intersection of bankruptcy and divorce. Nevertheless, an exhaustive examination of feminist legal theory is best saved for a different Article or, perhaps, a book.

207. Gilligan is a developmental psychologist whose landmark research in the late 1970s and early 1980s focused on gender differences in resolving moral dilemmas. See Chamallas, supra note 171, at 62. For examples of other cultural feminist approaches, see Deborah Tannen, Gender and Language in the Workplace, in Gender & Discourse 81-97 (Ruth Wodak ed., 1990); Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and the Ethic of Care in Law, 15 VT. L. REV. 1, 1 (1990) (discussing so-called “gender difference” theories and how they apply to legal sphere of women); Carrie Menkel-Meadow, Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change, 14 L. & Soc. INQUIRY 289, 295 (1989) (questioning sources of difference and effects these differences have upon feminization of legal profession); Robin West, Jurisprudence and Gender, 55 U. Chi. L. REV. 1, 1 (1988) (discussing concept of “feminist jurisprudence” and how this concept should be developed in today’s society).

208. Chamallas, supra note 171, at 65.

209. See Frug, supra note 33, at 66 (explaining why cultural feminists use various terms in describing female characteristics).

210. See id. at 61 (describing objective of cultural feminists’ approach).
nists, however, have been criticized for a number of reasons, most notably for describing sexual difference in appositional terms, i.e., defining women in terms of what men are not.\textsuperscript{211}

Criticism notwithstanding, cultural feminism seems to be easily transportable to an analysis of the marital debt discharge provisions of the Code. At the heart of the cultural feminist approach is the recognition that men and women process information differently because both men and women tend to possess distinct and generally mutually-exclusive traits. Gilligan referred to the typical “female” problem-solving approach in her study\textsuperscript{212} as the “ethic of care” approach and the typical “male” approach as the “ethic of justice” approach.\textsuperscript{213} Over-simplifying the results of Gilligan’s study (but perhaps not), one finds men described as self-interested and autonomous but women described as selfless, caring and compassionate, with a heightened sense of empathy.\textsuperscript{214} These labels provide an inter-

\textsuperscript{211} For a critical perspective of cultural feminism, see, for example, Cynthia F. Epstein, Deceptive Distinctions: Sex, Gender, and the Social Order 81-83 (1988) (arguing that cultural feminism helps further engrain stereotypes of both genders); Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkley Women’s L.J. 1, 8 (1987) (noting dangers associated with creating man versus woman struggle, leaving out other important factors); Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11, 73-77 (1985) (describing famous “conversation” between feminist scholars Catherine MacKinnon and Carol Gilligan); Joan Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 802-22 (1989) (noting different criticisms to which cultural feminists are subjected).

\textsuperscript{212} For an excellent summary of Gilligan’s research, see Chamallas, supra note 171, at 62-64.

\textsuperscript{213} See Carol Gilligan, In a Different Voice (1995). In discussing the “ethic of care,” Gilligan writes:
Thus women not only define themselves in a context of human relationship but also judge themselves in terms of their ability to care. Women’s place in man’s life cycle has been that of nurturer, caretaker, and helpmate, the weaver of those networks of relationships on which she in turn relies. But while women have thus taken care of men, men have, in their theories of psychological development, as in their economic arrangements, tended to assume or devalue that care. When the focus on individualization and individual achievement extends into adulthood and maturity is equated with personal autonomy, concern with relationships appears as a weakness of women rather than as a human strength.

\textit{Id. at 17} (citation omitted). Moreover, to differentiate the “ethic of justice” problem-solving approach from the “ethic of care” approach, Gilligan writes:
Women’s construction of the moral problem as a problem of care and responsibility in relationships rather than as one of rights and rules ties the development of their moral thinking to changes in their understanding of responsibility and relationships, just as the conception of morality as justice ties development to the logic of equality and reciprocity. Thus the logic underlying an ethic of care is a psychological logic or relationship, which contrasts with the formal logic of fairness that informs the justice approach.

\textit{Id. at 73}.

\textsuperscript{214} See Feminist Legal Theory Foundations 335-36 (D. Kelly Weisberg ed., 1993) (describing differences between men and women found in Gilligan’s research).
esting lens through which one can judge bankruptcy "judging" and hypothesize why women fare far worse under the marital debt discharge provisions of the Code and why § 523(a)(15) has not remedied the disparate treatment.

In 1990, Professor Katherine Bartlett challenged the legal academy to "Ask the Woman Question" in problem solving. "'Asking the Woman Question' does not require all problems to be resolved in favor of the female participant in a dispute. Rather, it compels people to analyze the social significance of gender, considering the impact of women's experiences." "Asking the Woman Question" is actually comprised of seven questions first proposed by Professor Heather Wishik:

(1) What have been and what are now all women’s experiences of the “Life Situation” addressed by the doctrine, process, or area of law under examination? (2) What assumptions, descriptions, assertions and/or definitions of experience—male, female, or ostensibly gender neutral—does the law make in this area? ... (3) What is the area of mismatch, distortion, or denial created by the differences between women’s life experiences and the law’s assumptions or imposed structures? ... (4) What patriarchal interests are served by the mismatch? ... (5) What reforms have been proposed in this area of law or women’s life situation? How will these reform proposals, if adopted, affect women both practically and ideologically? ... (6) In an ideal world, what would this woman’s life situation look like, and what relationship, if any, would the law have to this future life situation? ... and (7) How do we get there from here?

The method is designed to uncover how substantive law may silence the perspectives of women and other underrepresented populations. In the context of bankruptcy law, Wishik’s test may help to reveal how women are really treated by a gender-neutral statute that purports to safeguard family law debts and family law creditors; moreover, it may lead to a more workable solution. Using Ibsen’s character, Nora, as an example, it is helpful to “Ask the Woman Question” in an attempt to uncover the gen-

215. Katherine Bartlett’s scholarship is more appropriately described as an anti-essentialist, rather than cultural feminist legal theory. Professor Barlett’s writings evidence a strong desire to avoid assuming that a monolithic “woman’s experience” exists, and she has written extensively and thoughtfully in an attempt to unpack gender essentialism. See, e.g., Katherine T. Bartlett & Angela P. Harris, Gender and Law: Theory, Doctrine, Commentary 1007-09 (2d ed. 1998); Katherine T. Bartlett, Gender Law, 1 DUKE J. GENDER L. & POL’Y 1, 1 (1994).


217. See Alexander, supra note 4, at 398.

under subordination relating to judicial interpretations of § 523(a)(15) of the Code.

1. Women’s Life Experiences Following Divorce

Women and their loved ones frequently describe the divorce process and the court system as “abusive.” In addition to financial devastation, many women report emotional trauma as a result of their treatment during the divorce process. There is often a mistrust of the judicial system because many women perceive the judges as colluding with the family law bar to deprive women of meaningful relief through divorce.

Nora (temporarily liberated from Ibsen’s literary ending) will experience life in a dramatically different way than when she was married to Torvald. Not only will she be a single woman striking out on her own for the very first time, she will do so with considerably less financial security and with considerably fewer creature-comforts. Much like Kathleen in In re Hill, Nora will find that even a minimalist lifestyle will not shield her from her former creditors should Torvald have to file for bankruptcy. Upon receiving notice of Torvald’s bankruptcy filing, Nora will need information. She will need competent bankruptcy counsel to advise her about the dischargeability provisions within the Code and the likelihood that one or both provisions apply to her situation. Nora is unlikely to receive such advice, however, because she always permitted her father and her husband to make all of her life decisions and she could not be expected to know about the need for specialized bankruptcy representation. Additionally, tactical planning was most likely not part of Nora’s psychological development. But, if Nora is directed to appropriate counsel

219. See Winner, supra note 60, at 16-17 (“Ginger’s” brother stated that he had “not ever seen an institution of this nation so abuse a person as the court system, law enforcement system, and legal system attorneys have abused my sister.”). “Laura” reports having been coerced by the judge and counsel to accept a settlement that resulted in Laura receiving no alimony, losing any interest in the marital home and receiving minimal child support. See id. at 147-49 (describing difficulties faced by Laura).

220. See id. at xvi (“[N]ewly divorced women find that their standard of living has plummeted, on the average, by 30 percent, and mothers' and childrens' available income has fallen as much as 37 percent.”); see also, Alexander, supra note 4, at 363-69 (describing negative financial effect divorce has on women).

221. See id. at 369 (noting that courts have found that women are treated differently during divorce process).

222. See id. at 363-69 (explaining effect of disparate treatment women receive in divorce proceedings).

223. See Winner, supra note 60, at 6-9 (describing most women’s post-divorce life).

224. See In re Hill, 184 B.R. 750, 752 (Bankr. N.D. Ill. 1995) (pointing out that Kathleen has roommate and does not eat out in order to minimize expenses).

225. Nora’s first reaction might be “poor Torvald” because, [w]omen and men experience conflict in psychologically different ways that are more advantageous to men in the current adversarial system.
and she challenges the dischargeability of Torvald's continued support of her, the bankruptcy court will likely side with Torvald. If his financial situation is "bad," and if Nora's situation is also "bad," Torvald wins.226

2. Gendered Assumptions

According to Professor Wishik, the second question in the "Asking the Woman Question" analysis addresses the need to collect data about the law's assertions regarding women's experience. Legal definitions, assumptions, or assertions—especially those which claim to be either gender-specific or gender neutral—reveal what the law is saying about women and how the law operates politically and socially in relation to women's lives.227

Looking once again at Hill, one can observe the court's interpretation of § 523(a)(15) and resultant treatment of Lawrence in comparison to his ex-wife, Kathleen. The Hill court disregarded Kathleen's expectation of payment of a valid marital debt and assumed that Lawrence must take care of his new wife and her children.228 The court then relieved Lawrence of his legal obligation to Kathleen.229 Hill is hardly the first case in which a court relied on gender assumptions to make law. In fact, this country has witnessed decades of gender-based lawmaking.230

In Michael M. v. Superior Court of Sonoma County,231 a case heard by the U.S. Supreme Court in 1980, Justice Stewart observed:

Men tend to react to marital conflict by wanting to fight, while women are more likely to react by becoming depressed and insecure, turning inward instead of outward . . . . Men tend to treat the divorce as a business and leave their emotions behind, while women, on the other hand, dwell more on their emotions' leaving concerns of their own financial welfare behind.

Winner, supra note 60, at 11-12.

226. See Hill, 184 B.R. at 756 (noting importance of financial situation of both parties to action).

227. See Wishik, supra note 218, at 73 (inquiring into relationship between law and society through feminist perspective).

228. See Hill, 184 B.R. at 756 (noting that debtor lives with new wife and her two children "who enjoy his support, even if he has not adopted the children").

229. See id. (finding that "benefit of the discharge to the Debtor outweighs the detrimental consequence to the Plaintiff").


[D]etrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated . . . . By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.232

A few years prior, in 1978, Justice Powell observed in *Regents of the University of California v. Bakke*233 that “[t]he perception of racial classification as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.”234 And just a few years before *Bakke*, in *Frontiero v. Richardson*,235 Justice Brennan cited to the nation’s “long and unfortunate history of sex discrimination.”236 Evidence of a history of gender discrimination and gendered assumptions is not limited to the courts, however. Professor Reva B. Siegel shared the concerns of a Congressman from California in the late Nineteenth Century as the issue of voting rights for women was being debated.237 She wrote:

“What is this demand that is being made?” asked one representative to a California constitutional convention in 1879: This fungus growth upon the body of modern civilization is no such modest thing as the mere privilege of voting, by any means . . . . The demand is for the abolition of all distinctions between men and women, proceeding upon the hypothesis that men and women are all the same . . . . Gentlemen ought to know what is the great and inevitable tendency of this modern heresy . . . . It attacks the integrity of the family; it attacks the eternal degrees [sic] of God Almighty; it denies and repudiates the obligations of motherhood. In this same spirit, W.H. Smith, a Pennsylvania politician, objected to the “pernicious heresy” of woman suffrage because “my mother was a woman, and further, because my wife is a woman.” If women were allowed to vote, “the family . . . would be utterly destroyed.”238

232. *Id.* at 478 (Stewart, J., concurring) (citations omitted).
234. *See id.* at 303 (Powell, J., concurring) (noting that views on “racial classification” differ from those regarding “gender-based classification”).
236. *Id.* at 684.
238. *Id.* at 978 (citations omitted).
3. **Mismatch, Distortions, and Denial**

As Professor Wishik writes:

Analyzing mismatch between the data from women’s lives... and the data from the law’s articulated definitions and assumptions about particular life situations... helps reveal whose power is being served by the law as it exists, what aspects of women’s lives are legally visible, and how women’s experience is distorted by law. These are all aspects of understanding the relationship between law and society from the perspective of women’s experience.239

Courts and legislatures have long-assumed that women need protection because they are the “weaker sex” and, therefore must be protected.240 However, a very different picture is revealed when one explores the life situations of the women who are the subjects of case law. Reviewing once again, for example, at the *Florio*241 decision, one finds Laurie (the debtor) trying to discharge a $5,000 obligation to her ex-husband, Marc.242 Although the original debt was only $5,000, because Laurie had made only a few payments to Marc, the amount of her obligation had ballooned to over $30,000.243 Laurie gave up her job as a surgical technician following the divorce and decided to work at a dog grooming business, where she was earning almost no income.244 The reason(s) why Laurie might have changed jobs remain a mystery—it could have been because she no longer needed the income from the surgical technician’s position; it could have been because she wanted a less-stressful job; it could have been for a host of other reasons. The court did not uncover an explanation for the job change. But the opinion revealed the reason she

239. Wishik, *supra* note 218, at 74 (inquiring into relationship between law and society through feminist perspective).

240. *See, e.g., Frontiero,* 411 U.S. at 684 (noting that “romantic paternalism” has long been aspect of our national consciousness).

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious... [H]istory discloses the fact that woman has always been dependent upon man... [S]he is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions... justify legislation to protect her from the greed as well as the passion of man.


242. *See id.* at 656 (noting that Laurie is asking to discharge $5,000 debt she owes to her former husband).

243. *See id.* (identifying increased amount due to small number of payments Laurie made after stipulation).

244. *See id.* at 657 (discussing change of Laurie’s income after her job switch).
had to file bankruptcy: Marc owed Laurie over $20,000 in unpaid child support.\footnote{See id. at 659 (noting that Marc did not pay child support between 1985 and 1993).}

The judge in \textit{Florio} chastised Laurie for changing jobs, which resulted in a significant diminution in her income and the court ruled that it would not sanction this irresponsible personal decision.\footnote{See id. at 657 (pointing to fact that Laurie voluntarily lowered her income capacity, yet still asked for discharge of her debt).} The court’s opinion reads as if Laurie was being accused of seeking equity from the bankruptcy court with unclean hands. Bankruptcy law protects the honest but unfortunate debtor, not the debtor who voluntarily eliminates her income stream in an effort to make her ex-husband pay her obligations for her. The reality, however, is that Laurie changed jobs—why she did was apparently not a concern for the court—but the reality is also that Marc owed Laurie considerable unpaid child support. The court saw fit to include Laurie’s activity (the job change) in its analysis, but not Marc’s (the non-payment of the support obligation).

From Laurie’s perspective, bankruptcy was the only way to free herself from the financial obligation of the $5,000 loan because her income, as modest as it was, was insufficient to pay her fixed monthly household expenses, to pay the expenses related to the raising of her and Marc’s child and to pay the loan. It was a necessary step because the couple’s child-raising expenses were not being shared equally; Marc was not contributing his portion. Laurie was not weak; she was not a poor ex-spouse, overly dependent on Marc and taking advantage of him by asking that he subsidize her new lifestyle. Laurie was placed in the position of having to extricate herself from her financial obligations because Marc did not honor his contractual obligation.

4. \textit{Patriarchal Interests}

Women are not on an equal playing field with their ex-husbands in court, regardless of which court it is. While it is certainly in the interest of both parties to end the squabbling as well as the marriage, many women report being at the mercy of their spouses and the dirty tricks of the ex-husbands’ lawyers throughout the divorce proceedings.\footnote{See \textit{Winner}, supra note 60, at 57-70 (describing treatment by spouses and spouses’ attorneys that women are subjected to during divorce proceedings).} Judges can intentionally or unwittingly conspire with the ex-husbands by refusing to examine closely the lifestyles of the parties to the litigation in a uniform way. In \textit{Hill},\footnote{See \textit{In re Hill}, 184 B.R. 750, 751 (Bankr. N.D. Ill. 1997) (stating background of petition to discharge debt owed to former wife).} for example, the bankruptcy judge refused to separate Lawrence (the debtor) and his new wife from her children.\footnote{See id. at 756 (discussing Debtor’s obligations to his new family, which include his new wife and her two prior children).} The court was
certainly able to take testimony about the sufficiency of the support payments that Lawrence's wife was receiving but, for some reason, there was no mention of it other than to conclude that the kids were dependent upon Lawrence. Additionally, the court could have inquired about the employability of Lawrence's new wife. After all, she presumably married him knowing that he had debt and that one of his creditors was Kathleen. If bankruptcy court is a court of equity, then an equitable injustice has occurred inasmuch as Lawrence had a new wife with an earning capacity of her own, a bankruptcy discharge and financial freedom from his former wife. However, in In re Florio, the bankruptcy court criticized the debtor/ex-wife's decision to change jobs and concluded that the debt to her ex-husband was not going to be discharged because the court would not sanction her behavior. The court passed judgment on the ex-wife's lifestyle change but virtually ignored another very important fact: the ex-husband was indebted to the debtor in excess of $20,000 for unpaid child support.

5. Reform Efforts

Reform efforts have been underway in family law for many years, however, there is a strong belief that the "gender-neutral" divorce reforms have been the very reason women find themselves in the box that this Article attempts to describe. Author Karen Winner uncovers the problem in her powerful book, Divorced From Justice.

[The women who were the subjects of her book] thought they were just getting divorced, but instead they turned into victims of the legal/judicial system. All around the country, there are similar cases of women just like them. How did women get into this crisis?

None of these women's circumstances would have been possible if not for the radical overhaul in the divorce laws over the past thirty years, which ushered in the era of divorce court abuse. These laws—the no-fault, equitable distribution, and "best interests of the child" doctrines—were supposedly formulated to promote gender equality and make the laws more equitable between the sexes. But as exhaustive research has since borne out, these supposedly gender-neutral laws are being used as a tool of discrimination and abuse against women, with a ferocity that seems unparalleled in modern American history. Women are now le-

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251. See Florio, 187 B.R. at 657 (explaining that court would not grant discharge when petitioner voluntarily reduced her income to zero).
252. See id. (discussing changing of jobs by petitioner).
253. See id. at 659 (noting that each child support payment that Marc failed to make had become judgment in favor of Laurie already).
gally being ordered to give up their children, their homes, their economic security. The fact that the undermining of the laws’ intent has taken place under the noses of the state judicial branches nationwide—and been openly acknowledged—makes this phenomenon all the more shocking.254

The cultural feminist discussion is about creating and supporting a feminist theory of justice to give women a place at the table of legal and economic discourse.255

6. A Utopian View of Nora’s World

Professor Wishik states that change begins to take place from the act of discovering what women share because of the patriarchal oppression which all women must deal with.256 Specifically, she asks, “In an ideal world, what would this woman’s life situation look like, and what relationship, if any, would the law have to this future life situation?”257 What Nora and other women share is that they have been left out of consideration. Moreover, Nora and other women will find that it will take considerable strength and resources to move the legislatures and courts to recognize that they have overlooked women in law-making and law interpretation. From Elizabeth Cady Stanton258 to Myra Bradwell259 to Sally Reed260 and to Nora and other female creditors in bankruptcy, women have had to push hard against a legal system that benignly pushes them and, often, pushes them over. In an ideal world, Nora would find laws that recognize the value of being a stay-at-home spouse so she could be compensated appropriately for the services she provided to her family. She would find laws that respect the importance of a contract, even if it is made between spouses. She would find courts willing to reexamine methods of analysis to provide the Noras of the world with ways to survive financially and to

254. See Winner, supra note 60, at 25 (explaining that current divorce laws do not promote gender equality, but rather widen gap between genders during and after divorce).


256. See Wishik, supra note 218, at 75 (inquiring into relationship between law and society through feminist perspective).

257. Id.

258. See Elizabeth Cady Stanton Biography, available at http://www.huntington.org/vfw/imp/stanton.html (noting that Stanton is widely regarded as mother of women’s suffrage movement and author of “Seneca Falls Declaration of Sentiments,” which included women’s bill of rights and listed demands for social equality).

259. See Bradwell v. Ill., 83 U.S. (16 Wall.) 130, 130 (1873) (noting that Bradwell was one of the first women to challenge State of Illinois’s prohibition on women receiving license to practice law).

260. See Reed v. Reed, 404 U.S. 71, 71-74 (1971) (explaining that Reed challenged Idaho statute that gave males preference over females in appointments as estate administrators).
avoid having to file their own bankruptcies in those situations where the ex-husbands file bankruptcy.

7. How do we get there from here?

The final inquiry in "Asking the Woman question" really asks what kind of world it is that the questioner is trying to create.\textsuperscript{261} The simple response, as applied to marital debt discharge issues, is that the goal is a just world where men and women are each treated fairly. Fairness, in a Rawlsian sense, is the essence of justice.\textsuperscript{262} But Rawls's theory is criticized because it neglects gender. Furthermore, his theory of moral and political development does not take into account that it is applied in a gender-structured society.\textsuperscript{263}

In response to the valid criticism of Rawls's theory of justice, this author suggested (in an earlier Article on the intersection of bankruptcy and divorce) that more women be appointed to the bench.\textsuperscript{264} At that time, there were few women bankruptcy judges on the bench and the author believed that, perhaps, more women on the bench might bring a different emphasis to their judging than men seem to exhibit and might result in a more inclusive theory of justice.\textsuperscript{265} Indeed, other scholars have also called for the appointment of more women to the bench.\textsuperscript{266}

\textsuperscript{261} See Wishik, \textit{supra} note 218, at 77 (inquiring into relationship between law and society through feminist perspective).

\textsuperscript{262} See \textsc{John Rawls,} A\textsc{\textit{Theory of Justice}} 21 (1971) (noting relationship between justice and fairness).

\textsuperscript{263} For an insightful feminist critique of Rawls's theory of justice, see \textsc{Susan Moller Okin, Justice, Gender and the Family} 89-109 (1989). Professor Okin writes:

Whereas Rawls and most other philosophers have assumed human psychology, rationality, moral development, and other capacities are completely represented by males of the species, this assumption itself has now been exposed as part of the male-dominated ideology of our gendered society. \textit{Id.} at 107.

\textsuperscript{264} See Alexander, \textit{supra} note 4, at 389-97 (discussing lack of opportunities for women in our legal system).

\textsuperscript{265} See \textit{id.} at 389 n.200 (describing impact of increasing number of female bankruptcy judges); \textit{see also Karen Lehman, The Lipstick Proviso} 160 (1997) ("A strain of feminism has typically held that when women finally have the opportunity to hold power, they will change the nature of it, use it only for good, altruistic, 'feminist' purposes, and wield it compassionately."); Carrie Menkel-Meadow, \textit{Portia in a Different Voice: Speculations on a Women's Lawyering Process,} 1 BERKELEY WOMEN'S L.J. 39, 49-58 (1985) (discussing whether and how additional women lawyers have informed law and have reshaped lawyering process); Suzanna Sherry, \textit{Civic Virtue and the Feminine Voice in Constitutional Adjudication,} 72 VA. L. REV. 543, 582 (1986) (suggesting that "while women emphasize connection, subjectivity, and responsibility, men emphasize autonomy, objectivity, and rights.").

\textsuperscript{266} See, \textit{e.g.,} Suzanna Sherry, \textit{The Gender of Judges,} 4 LAW & INEQ. 159, 159-60 (1986) (noting that women judges make contributions through their mere presence and participation in that capacity); Michael E. Solimine and Susan E. Wheatley, \textit{Rethinking Feminist Judging,} 70 IND. L.J. 891, 919 (1995) (noting that there "should be more female judges"); Carl Tobias, \textit{The Gender Gap on the Federal Bench,}
The call for more women judges, however, may not necessarily provide a noticeable change in how laws are interpreted.\textsuperscript{267} Professor Sue Davis compared the decisions of male and female judges sitting on the U.S. Court of Appeals for the Ninth Circuit and concluded that, in the end, it is hard to generalize that one sex employs an ethic of care and the other an ethic of justice.\textsuperscript{268} One reason that adding more women judges may not be the appropriate response is that "men" and "women" are mere biological descriptors of beings; gender, on the other hand, includes acculturation and therefore connotes more than just sex.\textsuperscript{269} Consequently, what is needed is not necessarily more women judges, but a more gendered approach to judging, one that takes into account the unique experiences of women in society. That is precisely what "Asking the Woman Question" offers. It helps legal thinkers to uncover and "identify the gender implications of rules and practices which might otherwise appear to be neutral or objective."\textsuperscript{270}

After applying Professor Wishik's test to Nora's situation, one is led through a very different method of resolving Nora's and Torvald's problem. Consider this hypothetical resolution of Nora's and Torvald's dilemma: Nora spent much of her adult life with the responsibility for maintaining the household and raising the children; Torvald, on the other hand, worked outside of the home. Their marriage was typical of the time. Torvald governed his wife and her behavior, telling her how to dress, what to eat and how to think. At some point, however, Nora realized that she was trapped in this unhealthy existence, just like a doll's that is kept in the doll's house until its owner takes it out of the box to play. Escaping to freedom, Nora found herself at the financial mercy of her ex-husband. After agreeing on appropriate spousal support for Nora, the pair now find themselves in a situation where Torvald's medical condition has forced him to file bankruptcy. (That "support," by the way, could take the form of traditional alimony or maintenance or it could be in the form

\textsuperscript{19} Hofstra L. Rev. 171, 184 (1990) (urging President Bush to place highly qualified women on federal bench); Carl Tobias, \textit{Closing the Gender Gap on the Federal Courts}, 61 U. Cin. L. Rev. 1237, 1237 (1993) (noting that he urged President Bush "to appoint substantial numbers and percentages of women to the federal bench").

\textsuperscript{267} See, e.g., Franklin v. Nat'l City Bank (\textit{In re} Franklin), 1995 W.L. 539549 (Bankr. D. Minn. September 8, 1995) (describing Judge Nancy Dreher's surprisingly unsympathetic view of Franklins' lifestyle—husband working two jobs and pregnant wife who cares full-time for three small children—and denial to discharge their student loan debt).

\textsuperscript{268} See Sue Davis, \textit{Do Women Judges Speak "In a Different Voice?"} Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit, 8 Wis. Women's L.J. 143, 172 (1992-93) (noting much more work must be done to decide whether male and female judges speak in different voices).

\textsuperscript{269} See Catherine A. MacKinnon, Toward a Feminist Theory of the State 38 (1989) (pointing to different ways of defining what woman is).

\textsuperscript{270} See Bartlett, \textit{supra} note 216, at 837 (explaining objective of "Asking the Woman Question").
of a property settlement or equitable distribution. The form of support is irrelevant to this analysis because the Code addresses both forms.) Following the dischargeability provisions in bankruptcy law, Torvald's bankruptcy judge will be called upon to decide whether Torvald should be able to discharge his obligation to Nora.

To the extent that the debt in question is in the nature of alimony, maintenance or support, it would be non-dischargeable in bankruptcy. Clearly Nora, having little or no prior employment outside of the home, is entitled to be supported for a period of time following the break-up of her marriage to Torvald. Even if he is financially unable to pay what he owes Nora, Torvald is nonetheless obligated to Nora. The couple will share in his financial misery, just as they shared in all things while they were married, and once Torvald's health permits him to return to work and to earn a living again, he will have to resume his payments to Nora.

However, the debt in question might be more fairly characterized as not being in the nature of alimony, maintenance or support. If it is not so considered, then it is probably in the form of "equitable distribution" and bankruptcy law requires the court to look at Torvald's ability to pay Nora to determine whether the debt should be discharged. The "equitable distribution" classification has some appeal because equitable distribution does not have a fixed meaning. In some states, for example, equitable distribution is interpreted to require a fifty-fifty division of currently held assets. In other states, the principle is interpreted as a fairness standard, whereby a spouse's future earning capacity as well as her past domestic service are among the factors that can lead to an unequal but "equitable" distribution of present and future resources.

If Torvald lacks the ability to pay the equitable distribution claim, the debt is discharged. If, however, he has the ability to pay her, the court must then balance the harm to Nora against the benefit to Torvald if the debt was to be discharged.

Here, Wishik's analytical model is particularly helpful. Instead of wrestling with the host of doctrinal issues that bankruptcy courts across America have grappled with, a more feminist approach would look to the legislative intent and try to use the language of the statute to fulfill the

271. One could reasonably argue, however, that the court should view Torvald's financial obligation to Nora as something other than alimony. As Professor Mary Joe Frug wrote, "alimony plainly represents continued dependency upon a former spouse, a dependency which could seem infantilizing and subordinating." Mary Joe Frug, Women and the Law 309 (1992).

272. Id. at 309 n.2 (emphasis in original).


275. See supra Section III.C.1.
promise of the statute. There was a clear concern that the non-debtor spouse would be “saddled with substantial debt and little or no alimony” and therefore the bankruptcy court was the only protection the non-filing spouse had. In Nora’s and Torvald’s case, there is no doubt that Nora needs the bankruptcy court to help ensure some financial viability for her in the face of Torvald’s bankruptcy. She faces enormous potential liability for the joint debts of the marriage because the automatic stay will force all of Torvald’s creditors to look beyond him to a co-obligor for payment of their respective debts. Nora will be the only co-obligor as to all of the joint marital debts. Nora was imprisoned by Torvald for years and it would be grossly inequitable for her to remain financially imprisoned because he had to file bankruptcy. Consistent with current law, the court could easily order that, unless Torvald’s financial situation is permanently hopeless, the debt running from Torvald to Nora be deemed nondischargeable. Moreover, the court could require that as soon as Torvald has the ability to pay Nora, he should commence (or recommence) repayment. This result works to protect Nora from her own bankruptcy filing for as long as she can otherwise forestall her creditors.

The requirement that Torvald’s situation be “permanently hopeless,” while not directly provided for in § 523(a)(15), is consistent with dischargeability law as applied to student loans. Until 1988, student loans were dischargeable if a prescribed number of years had passed since the debtor was first obligated to repay the loan or if requiring the debtor to pay the loan would impose an undue hardship, regardless of the number of years that had passed. In 1998, Congress amended the Code to eliminate the ability to discharge student loans after a period of years and now student loans will be discharged only if repayment would impose an undue hardship on the debtor. Bankruptcy courts are loathe to discharge student loans and most have held that undue hardship exists only where the debtor’s financial situation is hopeless. Following the student loan

276. See In re Woodworth, 187 B.R. 174, 175 (Bankr. N.D. Ohio 1995) (citing legislative history of § 523(a)(15)).

277. See id. at 175-76 (discussing facts of case).


279. See David J. Light, Discharging Student Loans in Bankruptcy 4 (2d ed. 1999).

280. See id.; see also 11 U.S.C. § 523(a)(8) (2002) (describing only occasion on which student loans will be discharged).

decisions, unless Torvald was permanently disabled, Nora will prevail and be protected by receiving continuing indemnification from Torvald or cash payments or both from her creditors.\textsuperscript{282}

Even though Wishik’s paradigm may be helpful in understanding how bankruptcy law might give voice to women and how women’s voices may help improve bankruptcy law, the components of women’s economic subordination go well beyond a seven-step test. As Professor Martha Chamallas has explained,

Not surprisingly, one important focus of the legal literature on the economic subordination of women asks how the law contributes to women’s inferior economic status, either by actively placing obstacles in the path of women’s acquisition of wealth or by failing to correct for undervaluations of women’s labor by employers, judges and juries, or other institutional actors.\textsuperscript{283}

One of the themes of this Article and of the author’s prior Article on the same topic is that women are oppressed and unable to obtain suitable relief in bankruptcy. One explanation for this phenomenon is classically economic, i.e., that many women lack the resources and information to maneuver adequately in the bankruptcy arena following a divorce. Women statistically earn less money than men in our society and therefore often find themselves financially disadvantaged following a divorce.\textsuperscript{284} A second explanation is culturally economic, i.e., that women do not receive adequate value for the work that they do in caring for their families.\textsuperscript{285} Thus, they lack bargaining power at the end of a marriage, especially when a bankruptcy follows the end of that marriage. A third explanation is...
drawn from the work of developmental psychologist, Kathy Davis, who posits that the unique life experiences of women may influence their moral perspectives about filing bankruptcy.\[286\]

As applied to bankruptcy and divorce, the two economic analyses start from the same place: women, while in the midst of a divorce proceeding, often lack financial resources sufficient to access competent bankruptcy counsel and to know what their options are with regard to bankruptcy. Ibsen’s character, Nora, is a classic example. According to the play, Nora was financially dependent upon Torvald; she did not appear to be employed outside of the home.\[287\] The reasons why women like Nora lack sufficient resources vary greatly. “Women experience an average decline of seventy-three percent in their standard of living in the year immediately following a divorce.”\[288\] That is an astounding statistic. Many fail to receive alimony or support, even when they are so entitled by court order; many have higher incidence of medical debt than men; many, at a higher rate than men, have the responsibility to care for aging parents; and, obviously, many receive lower pay than men for doing the same or similar work.\[289\] Likewise, one could argue that women’s economic subordination, whether because of tokenism, stereotyping,\[290\] glass ceilings, lack of comparable worth or the undervaluation of the “homemaker” job classification, stems, in part, from a lack of respect for male-female difference. It is an emphasis on respect for difference that some feminist scholars believe fuels the comparable worth effort and other strategies directed toward upgrading female jobs.\[291\]

In the Nora and Torvald example, Nora was a stay-at-home mom, without an identifiable outside-the-home career in her past. She, like many women post-divorce, will likely be dependent upon Torvald for her financial sustenance and he will likely pay her alimony or maintenance until such time that she is no longer financially dependent on him. But how long will that take? Nora has few of the skills which seem to be most

\[286\] See Davis, supra note 284, at 235 (noting different experiences of men and women which create different moral perspectives regarding bankruptcy).

\[287\] See Ibsen, supra note 20, at 109.

\[288\] Davis, supra note 284, at 240 (citing Vickie C. Jackson & Susan Deller Ross, Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias, 84 Geo. L.J. 1657, 1757 (1996)).

\[289\] See Davis, supra note 284, at 240-41 (discussing factors that make divorced women a higher risk of filing for bankruptcy than men); see also Chamallas, supra note 163, at 713 (noting that recurring theme in legal scholarship has been devaluation of women’s work wherever women are working).

\[290\] In 1979, Catherine MacKinnon argued that women are “limited to a range of jobs at the bottom of the socioeconomic spectrum because of their sex.” Cathereine A. MacKinnon, Sexual Harassment of Working Women 11 (1979). One could argue that while women have moved into jobs at all points on the socioeconomic spectrum, many women still find themselves trapped in “womens” jobs. See id. at 10-11 (describing this phenomenon as “horizontal segregation”).

\[291\] See Chamallas, supra note 163, at 711 n.4 (describing how some feminists perceive importance that is placed on respect for difference).
valued in the workplace currently and she has no prior work history outside of the home. It will be very difficult for her to find employment to enable her to live adequately without Torvald’s help. Furthermore, the money she will receive from him is calculated to support her at a certain minimum lifestyle with little or no money for entertainment, luxury or extraordinary items.292 After all, her only entertainment during the marriage was to dance for Torvald.293

It is therefore very likely that Nora will have little money with which to hire a bankruptcy lawyer, in addition to her divorce lawyer (assuming she had funds sufficient to hire divorce counsel), to safeguard her interests now that Torvald has filed bankruptcy.294 She may not be able to access competent bankruptcy counsel or that rare breed of divorce counsel who has more than minimal expertise in bankruptcy. Nora may not even be aware that she could challenge the marital debt Torvald owes to her. And if she is aware, she may not have the financial resources to fund such a challenge.295

Beyond the financial calculations, there are considerations that involve the intersection of culture and economics. Nora may be surprised to learn that Torvald may carp, but he will probably not object to paying spousal support. He will likely pay her support without much fanfare. Torvald will probably regard the support obligation as his duty as breadwinner and provider, even after his and Nora’s marriage is dissolved.296 Torvald’s chivalry sends several messages. First, the obvious and main message is the act of helping. However, even in his eleemosynary endeavor there is a dangerous stereotype in operation. Just as the court in In re Hill297 considered Lawrence Hill’s obligation to his “new family” but virtually ignored the fact that the children in the new family were not his


293. See IBSEN, supra note 20, at 82.

294. See KURZ, supra note 1, at 77-78 (“While almost all women suffer economically at divorce, however, there are also large differences in income and standard of living among women. Middle-class women have the greatest decrease in income at divorce.”).

295. Under § 523(a)(5) and (a)(15) of the Bankruptcy Code, Nora could file an adversary complaint against Torvald. However, the adversary requires a filing fee and, often, there are substantial litigation costs associated with pursuing such action. Among other things, the Bankruptcy Rules of Procedure contemplate discovery, motions and a trial to help the parties resolve adversary disputes. See generally Fed. R. Bankr. P. 7001.

296. See FRUG, supra note 271, at 309 (“[A]limony’s roots are deeply steeped in the protectionist view that upon marriage a man (but historically not a woman) undertakes a lifelong obligation to support his spouse, an obligation which even divorce does not sever . . . .”) (footnote omitted). But see Orr v. Orr, 440 U.S. 268, 283 (1979) (outlawing sex bias of alimony).

297. See In re Hill, 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995) (noting that his new children depend on him “even if he has not adopted” them).
legal responsibility to support, Torvald may regard the payments to Nora as his final obligation as the head of the household. But there is an equally dangerous subtext to the message as well.

Professor Deborah Tannen, borrowing from the work of Gregory Bateson, refers to the subtext or interpretation of a main message as a "metamessage." According to Professor Tannen, metamessages frame conversations and enable people to interpret what someone is saying, i.e., is it a conversation or an argument? Is it assisting or attacking? Sociolinguistic literature suggests that Torvald's metamessage in this example is an attack on Nora and that she is powerless to change her situation. "Linguists have repeatedly noted significant differences between the speech of dominant and subordinated groups within the same broad language communities. Particularly in the context of gender, such differences, both in language practice and in beliefs about how men and women speak, have been documented across many cultures."

The Noras of the world are victims of a discourse that sustains gender subordination. The discourse is shaped by negative cultural imagery of gender, race and class and the imagery dwells in the minds of the participants, including Nora, the judge in the Hill case, the judge in the Phil-

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299. See id. at 33-34 (explaining how metamessages help frame context).
300. See Deborah Tannen, Gender & Discourse 20-21 (1994). Using scenes from Ingmar Bergman's Scenes from a Marriage, Professor Tannen examines discourse between the play's lead characters:
   Each one’s style is made up of habitual use of linguistic devices according to the broad operating principles outlined above. Marianne's style reflects a combination of deference and camaraderie. She frequently talks (and acts) like a child. She habitually puts herself down, and she puts up a smokescreen of nonstop verbiage made up of impressionistic romanticism or a flurry of questions. Johan’s style, on the other hand, is distancing. He uses sarcasm and irony, pontification, generalization and abstraction, and high-flown language in complex sentences.
   Id. at 149. Professor Tannen writes that "misunderstandings due to different uses of indirectness are commonplace among members of what appear to (but may not necessarily) be the same culture. Nevertheless, such mixups are particularly characteristic of cross-cultural communication." Id. at 177.
301. Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., in Feminist Legal Theory: Readings in Law and Gender 405 (Katherine T. Bartlett and Rosanne Kennedy eds., 1991) (emphasis in original); see also R. Lakoff, Language and Woman's Place (1975).
302. See id. at 421.
lips case and the judge in the Florio case. Nora, and other similarly-situated women, become powerless because they succumb to the negative gender images and allow the imagery to undermine their own voices. It is therefore entirely realistic for Nora and other ex-wives to feel that they have no recourse but to accept the discharge of ex-husbands' indebtedness.

"Asking the Woman Question" is a significant step in changing the subordinating rhetoric that keeps women like Nora from asserting themselves and standing up for their rights. As Professor Lucie White has suggested, as a first step, lawyers and judges can be educated about the risks attendant with race- and gender-linked speech and as a result of their awareness begin to adjust lawyering and judging to empower subordinated groups.

On the issue of non-economic impediments to bankruptcy, Professor Jean Braucher has reported that bankruptcy clients make decisions concerning whether to file bankruptcy based in part on moral and social concerns. Some feminists have noted a greater discomfort on the part of women when it comes to the decision to file bankruptcy. In their extraordinary look at America's first female bankrupts, Karen Gross, Marie Newman and Denise Campbell cite the extreme moral dilemma faced by the first known woman bankruptcy debtor, Susannah Kneeland. Mrs. Kneeland was a widow with two small children whose bankruptcy petition revealed assets of approximately $14,000 and liabilities of nearly


305. See In re Florio, 187 B.R. 654, 659 (Bankr. W.D. Mo. 1995) (obligating Laurie to pay interest-inflated debt she owed Marc, even though he had failed to make over $20,000 in child support payments).

306. See White, supra note 301, at 421 (describing negative effects of gender subordination).

307. See supra Section III.C.3.a.

308. See White, supra note 301, at 421 (discussing initial steps in eliminating gender subordination).

309. See Braucher, supra note 61, at 166-67 (stating that moral and social considerations play role in determining whether to file bankruptcy).

310. See, e.g., Davis, supra note 284, at 235 ("But, for some women there is tremendous guilt associated with having to file for bankruptcy. According to some developmental psychologists, the unique experiences of a woman may influence her moral perspectives on filing for bankruptcy differently than the experiences of a man may influence his perspectives."); Driscoll, supra note 40, at 541 ("Many [clients] have a strong bias against bankruptcy. They see it not only as a last resort but something bad and they require a lot of counseling for them to appreciate that they need to do it."); Karen Gross, et al., Ladies in red: Learning From America's First Female Bankrupts, 40 AM. J. LEGAL HIST. 1, 3-38 (1996) (rewriting history of bankruptcy law to acknowledge and include experiences of women debtors under early bankruptcy acts).

311. See Gross, supra note 310, at 13 (noting that fifty-seven year old widow's attempts to help her son had led to her financial difficulties, as she had endorsed many of his obligations).
$16,000.312 Mrs. Kneeland ultimately received a discharge of her debts, but the bankruptcy experience troubled her until her death.313

Modern examples suggest that Mrs. Kneeland's moral struggle still exists today. Some legal guides suggest to women that filing for bankruptcy is only for when a woman is "in really bad trouble." Other resources suggest that bankruptcy is not a part of women's vocabularies to the same extent as it is part of men's vocabularies because women have not been as fully engaged in the practice of bankruptcy law as men.315

Cultural feminism helps one to understand that a different dischargeability analysis is needed because women and their experiences are unique and different from men and their experiences. Moreover, women are more likely to be the creditor ex-spouses challenging the dischargeability of marital debts, and the current marital debt discharge tests do not recognize these important differences. Additionally, it is plausible that differences between men and women mean that judging is gendered and that there would be a meaningful difference if there were more women judges or if all judges modified their styles to "Ask the Woman Question."

b. Radical Feminism

Professor Catherine MacKinnon claims that feminism has a theory of power.316 She writes, "sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctly feminist account of gender inequality."317 According to MacKinnon and others who embrace radical feminism (or, as MacKinnon calls it "feminism unmodified"), the State embodies a male point of view and that inescapable starting point bedevils women.318 "Starting point" is used intentionally. To state merely that the State is male would be simplistic and essentialist. To radical feminists, the State is much more than just

312. See id. (discussing details of Susannah’s bankruptcy file).
313. See id. at 14 ("Susannah appears to have died of physical illness accompanied by considerable mental anguish, and her simple headstone reads: ‘My flesh shall rest in hope.’") (footnotes omitted).
316. See MacKinnon, supra note 33, at 22 (noting that feminism “seeks to empower women on our own terms”).
318. See id. at 642 (discussing influence of male perspectives on State). Like Gilligan and her critics, MacKinnon and the radical feminists are not without their detractors. See, e.g., Lehrman, supra note 265, at 169 (referring to theories of Catherine MacKinnon and others as “extreme”).
gendered; it is a tool of dominance over women because of its very construction. In this country, wealth, family, money, worth, politics, law and legal interpretation are all male-constructed and have, historically, been male-centered and male-dominated. Rejecting the liberal feminist ideal that everyone is equally autonomous, radical feminists assert that women’s biology—deep structural differences that constrain women’s choice—render the liberal feminist paradigm unworkable.

MacKinnon likens her brand of feminist legal theory to Marxism because both radical feminism and Marxism

“[F]ocus on that which is one’s one, that which most makes one the being the theory addresses, as that which is most taken away by what the theory criticizes. In each theory you are made who you are by that which is taken away from you by the social relations the theory criticizes.” In Marxism, the “that” is work; in feminism, it is sexuality.

In the context of bankruptcy and family law, radical feminists would most likely agree that women have a greater need for alimony, maintenance and support because they are the individuals who do the reproducing. Recognizing this essential and unique role in our society, women

319. As Catherine MacKinnon has written:
From a feminist perspective, male supremacist jurisprudence erects qualities valued from the male point of view as standards for the proper and actual relation between life and law. Examples include standards for scope of judicial review, norms of judicial restraint, reliance on precedent, separation of powers, and the division between public and private law. Substantive doctrines like standing, justiciability, and state action adopt the same stance. Those with power in civil society, not women, design its norms and institutions, which become the status quo. Those with power, not usually women, write constitutions, which become law’s highest standards. Those with power in political systems that women did not design and from which women have been excluded write legislation, which sets ruling values.

MACKINNON, supra note 269, at 238; see also Bartlett, supra note 95, at 47-48 (“MacKinnon, like other feminists including [Martha] Fineman, believes that women’s situation is unjust and that the injustice is hidden and maintained through social and legal arrangements that appear neutral and objective but, in fact, mirror male privilege.”).

320. See generally MacKinnon, supra note 317, at 643-45 (discussing how influential male gender has been on our society).


322. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 235, 241 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991) (quoting CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 48 (1987)).

323. This feminist approach was, for a time, referred to as calling for “special treatment” for women. See, e.g., Linda J. Krieger and Patricia N. Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women’s Equality, 13 GOLDEN GATE U. L. REV. 513, 560 (1983) (discussing how, in order to effectuate
should not be placed in a position of having to ask for alimony, maintenance or support or wonder if they will receive their alimony, maintenance or support. Radical feminists contend that the principle reason women who deserve alimony, maintenance and support do not receive them is that existing laws and legal structures work to undermine women’s rights. Stated another way, if women drafted the bankruptcy and family laws, alimony, maintenance, support, property settlements and equitable distribution would be non-negotiable, nondischargeable, ever-present financial staples.

Ibsen’s character, Nora, lives in a “male world.” Certainly there are women in her life, but the individuals who exert the most influence over her and her life are male: her father, her husband, the banker. Radical feminism helps one to think about why Nora would be helpless to protect her marital asset in the face of a bankruptcy filing by Torvald. According to Professor MacKinnon, “Women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive.”

Nora lacks power; she lacks an ability to protect her legal and financial interest in the face of a bankruptcy filing by her ex-husband. Her inability to survive Torvald’s bankruptcy is, in part, because the bankruptcy laws have been constructed and interpreted according to a male norm.

equality of opportunity, Montana Maternity Leave Act (MMLA) provides women with “special right” to reasonable unpaid leave, and how MMLA is nothing more than reasonable accommodation statute such as those statutes feminists generally support in context of discrimination against disabled or members of religious minorities). Nevertheless, the “special treatment” language was dropped even as the feminist call for workplace reform to accommodate women with family responsibilities continued. See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1233, 1241 (1989) (arguing that without relying at first on transitional, nongendered programs, it may be difficult to obtain equal respect for gendered career paths in workplace, but that employers must recognize need for flexibility to accommodate working parents); Bartlett, supra note 95, at 37 n.20 (citing Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118, 1142-63 (1986)).

324. “Alimony orders are frequently too low to support recipients adequately, and even when order levels are adequate former spouses typically fail to make the payments required of them.” FRUG, supra note 271, at 309.

325. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 161-63 (1995) (arguing that governmental support for family should look away from obscure notions of marital bonds and, instead, should focus on relationships of dependency in traditional and non-traditional households).

326. See MacKinnon, supra note 317, at 650 (contending, if man takes his foot off woman’s neck, then all will hear in what tongue woman speaks). “So long as sex equality is limited by sex difference, whether you like it or don’t like it, whether you value it or seek to negate it, whether you stake it out as grounds for feminism or occupy it as the terrain of misogyny, women will be born, degraded, and die.” Id.
The state’s formal norms recapitulate the male point of view on the level of design. In Anglo-American jurisprudence, morals (value judgments) are deemed separable and separated from politics (power contests), and both from adjudication (interpretation). Neutrality, including judicial decision making that is dispassionate, impersonal, disinterested, and precedential, is considered desirable and descriptive. Courts, forums without predisposition among parties and with no interest of their own, reflect society back to itself resolved. Government of laws not men limits partiality with written constraints and tempers force with reasonable rule following. This law aspires to science: to the immanent generalization subsuming the emergent particularity, to prediction and control of “doctrine” aspire to mechanism, classification to taxonomy. Courts intervene only in properly “factualized” disputes, cognizing social conflicts as if collecting empirical data. But the demarcations between morals and politics, the personality of the judge and the judicial role, bare coercion and the rule of law, tend to merge in women’s experience. Relatively seamlessly they promote the dominance of men as a social group through privileging the form of power—the perspective on social life—feminist consciousness reveals as socially male. The separation of form from substance, process from policy, role from theory and practice, echoes and reechoes at each level of the regime its basic norm; objectivity.  

The solution, according to MacKinnon, is to remove men’s feet from women’s necks and to embrace a “true,” “unmodified” feminism: one which analyzes women as women, not as subsets of men or as beings having no gender at all.  

In § 523(a)(15), the two tests available to a debtor seeking to discharge marital debts not in the nature of alimony, maintenance or support are either to show an inability to pay the debt(s) in question or to show that the burden to the ex-spouse (because of a discharge) outweighs the benefit to the debtor/spouse that discharge provides. Although the test is written disjunctively, nearly every reported decision regarding this Code section seems to analyze the situation under both tests thus, it is

327. Id. at 655-56.

328. See MacKinnon, supra note 33, at 32, 45 (maintaining that, until cost silent sexual submission is collectively experienced as unacceptable by those who have drawn best of men’s options for women, and glimpsed as changeable by those who have drawn worst, we will continue to live—if it can be called living—under its aegis).

329. See id. at 16-17 (explaining that solution is to adopt pure feminism).

important to examine both tests.\textsuperscript{331} The first test—whether the debtor has the ability to pay—is relatively straightforward and, in most chapter 7 cases, the debtor should win. If a debtor in chapter 7 had the ability to pay his debts, the debtor would either be dismissed from bankruptcy or would have been nudged into a chapter 13 wage-earner readjustment plan.\textsuperscript{332} After all, chapter 7 is supposed to be for debtors who do not have regular and steady income; those debtors with regular and steady income are supposed to be in chapter 13 reorganizations.\textsuperscript{333} It is most unfortunate that the “ability to pay” test is part of the § 523(a)(15) formula because it is a \textit{de facto} determination of whether a property settlement debt will be discharged in a chapter 7 liquidation.

The balancing test, however, is not straightforward, and it invites a closer examination using unmodified feminism. Under the balancing test, the court is invited to balance the harm to the creditor spouse (because of a discharge) against the benefit that a discharge gives to the debtor. The factors that various courts have considered include:

\begin{itemize}
  \item[a)] Changes in the financial condition of the parties from the time of the divorce or separation to the filing of the bankruptcy petition;
  \item[b)] The relative income and worth of the parties, including their assets and those of their respective spouses;
  \item[c)] A comparison of the parties’ post-bankruptcy obligations;
  \item[d)] The amount and nature of the debt involved, and whether the non-debtor spouse is jointly liable on the debt;
  \item[e)] The health, job skills, training, age and education of the parties and their respective spouses;
  \item[f)] The number of dependents of the parties and their respective spouses, their ages and any special needs which they might have;
  \item[g)] Whether the objecting creditor is eligible for relief under the Bankruptcy Code;
  \item[h)] The amount of debt which has been or will be discharged in the debtor’s bankruptcy case;
  \item[i)] The parties’ good faith in the filing of the petition, including the timing of the petition and litigation of the discharge adversary proceeding;
  \item[j)] The income and expenses of each party;
  \item[k)] The nature of the debt in question;
  \item[l)] Both parties’ ability to pay;
\end{itemize}

\textsuperscript{331} Informally, bankruptcy judges have reported to this author that they typically disregard the “or” in the statute and complete the analysis under both paragraphs of § 523(a)(15) because they do not wish to be overturned on appeal and have to consider the analysis under § 523(a)(15)(B) on remand. Some courts, however, have ended their analyses after concluding that the debtor lacks the ability to pay under § 523(a)(15)(A). See, e.g., \textit{In re} Williams, 271 B.R. 449, 455-56 (Bankr. N.D.N.Y. 2001) (finding that debtor met burden of establishing she had no ability to pay debt); \textit{In re} Nazario, 228 B.R. 394, 399 (Bankr. W.D. Pa. 1999) (concluding that debtor falls within exception to nondischargeability under § 523(a)(15)(A), therefore debtor’s obligation under Marriage Settlement Agreement was discharged).


m) The intangible effect on each party of the discharge (or not) of the debt.\textsuperscript{334}

Depending upon the jurisdiction, the “ability to pay” test’s factors may include some consideration of the intangible effect that a bankruptcy discharge would have on an ex-spouse. Nevertheless, even if one is in a jurisdiction where “intangibles” are factored in, bankruptcy courts are given no direction to aid them in interpreting what “intangibles” are. Contemporary society’s version of “woman” is not much different from Victorian “woman” or Ibsen’s “woman:” “docile, soft, passive, nurturant, [sic] vulnerable, weak, narcissistic, childlike, incompetent, masochistic, and domestic, made for child care, home care, and husband care . . . . Women who resist or fail . . . are considered less female, lesser women.”\textsuperscript{335} Thus, without statutory direction, judges who rely on “intangibles” as one factor in determining the balancing test under § 523(a)(15) (and there are not many reported decisions where “intangibles” are a factor)\textsuperscript{336} are very likely to gloss over the fact that the creditor spouse is most often a woman. Furthermore, judges fail to take into consideration the uniqueness of women’s experiences—in society and, especially, in divorce—and to apply a very mechanical formula to the dischargeability analysis.

The radical feminist model teaches that feminism, true feminism, is an approach that does not modify the definition of “woman.” The feminist definition of “woman” has not been corrupted by male supremacy, i.e., it has not been scrubbed clean of its unique experiences and it has not been subordinated in the law by redefinition as “sexuality,” which is then expropriated by the male hegemony to exclude women and their experiences and to keep them on the bottom. In marital debt discharge cases, the radical feminist view suggests that the criteria used to decide whether marital debts should be discharged under § 523(a)(15) exclude women by design. The construction and interpretation of the relevant bankruptcy laws do not consider women as women; instead, the law uses gender-neutral factors and male privilege to keep women from receiving the marital

\textsuperscript{334} Shayna M. Steinfield and Bruce R. Steinfield, \textit{The Intersection of Bankruptcy and Divorce for Divorce Practitioners}, 2001 A.B.A. SEC. FAM. L. FALL C.L.E. MEETING 646-47 (citations omitted) (listing factors that court considers when using balancing test to determine if debts should be discharged).


\textsuperscript{336} See, e.g., Sparangna v. Metzger (\textit{In re Metzger}), 232 B.R. 658, 664 (Bankr. E.D. Va. 1999) (observing that test for ability to pay considers whether debtor’s expenses are really necessary to support debtor and debtor’s dependents); Fitzsimonds v. Haines (\textit{In re Haines}), 210 B.R. 586, 594 (Bankr. S.D. Cal. 1997) (“Finding the debtor’s ability to pay is only one of the factors considered in deciding whether to discharge a debt under section 523(a)(15) . . . . [T]his court has followed the ‘totality of the circumstances’ standard . . . .”); In re Cleveland, 198 B.R. 394, 400 (Bankr. N.D. Ga. 1996) (noting courts also give weight to intangible effects); In re Slover, 191 B.R. 886, 892 (Bankr. E.D. Okla. 1996) (recognizing court must review totality of circumstances when making determination of dischargeability).
assets to which they are entitled. Radical feminists would suggest that the present statutes fail to serve women and women's needs, and therefore, need to be changed dramatically.

c. Race-Conscious Feminism

One strand of feminist theory that has gained momentum in the literature is race feminist theory, or race-conscious feminist theory. At first blush, it may seem too great a challenge to include a discussion about the intersection of race and gender within this Article. Nevertheless, an honest feminist inquiry requires going beyond an essentialist view of feminism in order to acknowledge that bankrupt women and female bankruptcy creditors are not a homogeneous group. Professor Angela Harris describes "gender essentialism" as "[t]he notion that there is a monolithic 'women's experience' that can be described independent of other facts of experience like race, class, and sexual orientation . . ." Essentialists believe that one can strip away these other human identifiers and beneath them find an essential "woman." Gender essentialists, like Carol Gilligan, have been under attack for clinging to a theory that is too simplistic, that ignores the experiences of women of color and lesbians and that does not allow for differences of opinion within the feminist community.

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337. Authors and scholars constantly struggle with the extent to which race and gender should be separated. See, e.g., Okin, supra note 263, at 6-7, wherein she writes:

Some feminists have been criticized for developing theories of gender that do not take sufficient account of differences among women, especially race, class, religion, and ethnicity. While such critiques should always inform our research and improve our arguments, it would be a mistake to allow them to detract our attention from gender itself as a factor of significance. Many injustices are experienced by women as women, whatever the differences among them and whatever other injustices they also suffer from.

Id. (citation omitted).

338. Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 588 (1990), reprinted in FEMINIST LEGAL THEORY FOUNDATIONS 348, 348-49 (D. Kelly Weisberg ed., 1993) (discussing gender essentialism as arising from second voice, voice that claims to speak for all).

339. See id. at 592-94 (discussing Catharine MacKinnon's assumption that there is essential "woman" beneath realities of differences between women).

340. See id. at 605 ("[A]s a matter of intellectual convenience, essentialism is easy.")

341. See id. at 605-06 (describing how theory of Gender Essentialism is consumed by mostly white women and ignores lives and experiences of black women and lesbians); see also Ruth Colker, The Example Of Lesbians: Posthumous Reply To Professor Mary Joe Frug, 105 HARV. L. REV. 1084, 1085 (1992) (exploring Professor Frug's Commentary and concluding it made inaccurate generalizations about subgroups of women, particularly lesbians, and would have been richer if she had been more attentive to anti-essentialist perspective).

342. See, e.g., BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 13-14 (1984) (pointing out that privileged feminists ignore extent to which black women are likely to be victimized); Harris, supra note 338, at 606-07 (identifying feminist
Antiessentialists reject the view that there is a single experience common to all persons within a particular group (in this instance, women). Their thesis, as applied to this Article, would suggest that there is something valuable to be gained by reexamining § 523(a)(15) from the perspective of women of color. Nevertheless, changing the analytical model—e.g., from middle class white couples to poverty-level couples of color—may not shed much new light on why § 523(a)(15) affects men and women differently. It is very likely that only persons in the middle and upper economic strata are concerned with avoiding bankruptcy, and many people of color find themselves in the lowest economic brackets. Moreover, a white, remarried ex-husband, could file bankruptcy and be virtually unaffected by the "stigma of bankruptcy" because, statistically, his new wife's credit could be sufficiently strong to allow him to remain in the lifestyle to which he had grown accustomed.

Even if a race-conscious feminist examination of § 523(a)(15) reveals very little about why women fare worse than men as a result of the statute in question, it is critical to gather as much information as possible about bankruptcy's effects on all women—within the context of a bankruptcy and without. Because a debtor's bankruptcy victories under § 523(a)(5) and § 523(a)(15) often mean that the non-filing spouse also suffers and has to file her own bankruptcy, a race-conscious feminist analysis does support a conclusion that the consequences of marital-debt dischargeability for women of color include continued financial discrimination in the marketplace, continued inability to obtain credit and continued inability to essentialism as zero sum game because of its perpetuation of notion that there is only one "women's experience").

343. See The Myth Of Context In Politics And Law, 110 Harv. L. Rev. 1292, 1292-93 (1997) (contending that "group rights fail to be antiessentialist because they implicitly affirm the essentialist presumption that all persons of a particular race or gender share a common identity outside the context of discrimination").


345. See Karla Mombberger, Breeder at Law, 11 Colum. J. Gender & L. 127, 146 (2002) ("I am again reminded of the position of society's most vulnerable, the very poor, who are disproportionately non-white.").

346. Consider, for example, the situation of "Lawrence" from In re Hill, 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995) (disregarding claim of wife that her husband "Lawrence" is living extravagantly off his new wife's assets and is unaffected by current bankruptcy claim).
break the cycle of poverty that befalls many women of color. In this way, a race-conscious feminist analysis can support this author's thesis that §§ 523(a)(15) and (a)(5) are inadequate remedies for creditor spouses, particularly ex-wives.

One must gaze once again at the operative statutory provisions, but this time through a race lens. If, for no other reason than to provide a more complete picture of the gender sub-ordination which results from the application of § 523(a)(15). As Professor Adrien Wing has written, "Critical Race Feminism (CRF) is a movement committed to exploring the reality of the lives of women of color in order to end their subordination and to ensure their full citizenship in 'all geographies.' Indeed, several professors assert that race is an essential building block in the shaping of feminist thought. Thus, the issues presented by the confluence of a divorce and a bankruptcy are appropriately discussed from a race-conscious feminist perspective.

Admittedly, the race/feminist discussion, as it relates to the subject of this Article, is regarded by many to be about economics as much as it is about race and the intersectionality of race and economics. Nevertheless, it is the race axis that changes the paradigm, not the class or economic axis. Professor Taunya Lovell Banks explains that race may be a

347. See Angela Mae Kupenda, Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race, and Class Bind Black Women Based on Alice Walker's Book the Third Life of Grange Copeland, 42 How. L.J. 1, 15, nn.80-81 (1998) (arguing that women of color possess fewer financial, legal and other resources than white women and that causes of this condition—poverty and lack of job training—are consequences of race, gender and class oppression).

348. There are, of course, reasons beyond just wanting to "provide a more complete picture of ... gender subordination" to apply race-conscious feminist theory to this Article. Another reason flows from a criticism of liberal feminist theories as excluding black women from the definition of "women." See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antirace Politics, 1989 U. CHI. LEGAL F. 139, 166 (arguing that "if any real efforts are to be made to free Black people of the constraints and conditions that characterize racial subordination, then theories and strategies purporting to reflect the Black community's needs must include analysis of sexism and patriarchy").


350. See, e.g., Hawley Fogg-Davis, An Argument Against a Historical "Difference" in Feminist Political Theory, 4 CIRCLES: BUFF. WOMEN'S L.J. & SOC. POL'Y. 2, 9 (1996) ("When feminism does not explicitly oppose racism, and when antiracism does not incorporate opposition to patriarchy, race and gender politics often end up being antagonistic to each other and both interests lose."); Sheila Foster, Difference and Equality: A Critical Assessment Of The Concept of "Diversity", 1993 Wis. L. REV. 105, 137 (noting that "race has a deep social significance that continues to disadvantage Blacks and other Americans of color on a systematic level").

351. See, e.g., Midge Wilson & Kathy Russell, Divided Sisters 117 (1996) ("What is often thought to be a race difference in this country is, in reality, a class difference.").
significant factor over class because studies of domestic and other working-class women suggest that, within a certain economic class, a hierarchy of race, color and culture is present.352 She writes that, “even among domestic workers there is a racialized hierarchy of labor.”353

Regardless of what position one takes, race and ethnicity cannot ever be completely erased from the discussion of emancipatory politics.354 Skin color, accents and shapes of the eyes, nose and lips are immutable and, often, derided characteristics of people of color. The negative ways in which people within the majority culture perceive or react to these features are well-documented.355 In fact, some scholars argue that women of color deserve a constitutionally-protected class separate and apart from women in general and minorities in general.356 But the challenge of this Article is to look beyond mere physical characteristics and to explore...


353. See id. at 28 (“Where more than one group was available for service, a differentiated hierarchy of race, color, and culture emerged. White and racial-ethnic domestics were hired for different tasks.”) (internal quotation marks and footnotes omitted).

354. See, e.g., Wilson & Russell, supra note 351, at 47 (discussing neighborhood segregation study from 1980s that debunks myth that people of color cluster together because they are poor and do so by choice, showing, instead, that many whites “prefer not to live with blacks”).


356. See, e.g., Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, in FEMINIST LEGAL THEORY FOUNDATIONS, 383-95 (D. Kelly Weisberg ed., 1993) (discussing marginalization of Black women in feminist theory and in antiracist politics, which contributes to erasure of experience of Black women); Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights, 24 HARV. C.R.-C.L. L. REV. 9, 12, 35-38 (1989) (arguing that black women form discrete group based on their history as black Americans and as female Americans, and that therefore this group is entitled to highest level of protection currently available under Equal Protection Clause).
whether all women are similarly, negatively impacted by the marital debt discharge provisions of the Code.

1. *Family and Finances*

Statistics indicate that people of color and, within that broad group, women of color in particular, earn less money than any other group of people in the workforce.\(^ {357} \) By and large, these women lack the financial resources to access the legal system or to hire an attorney to file an adversary complaint in the bankruptcy court. In this important respect, the issues confronting women of color are very similar to issues facing all women. Nevertheless, the level of poverty for women of color is different—they are poorer than white women.\(^ {358} \) As a result, if there is no money at the outset, or no assets, then there is probably not the same financial urgency when a divorce or a bankruptcy enters the picture. Perhaps it is less likely that bankruptcy will be an issue for a woman of color because many of these women are essentially judgment-proof. Often, there are very few assets for poor couples to divide in divorce so the complicated aspects of alimony, maintenance, support and equitable distribution really never come into play. Furthermore, a bankruptcy filing fee between $150 and $200 is prohibitive, and the truly poor cannot afford such a high filing fee.\(^ {359} \) It might be cheaper and just as effective to ignore the creditors’ phone calls and the mounting debt because the lower socio-economic classes are basically immune from post-judgment collection efforts.

\(^ {357} \) See WAC STATS, *supra* note 63, at 59-62 (indicating: nearly 75% of full-time working women, and 37% of full-time working men, earn less than $20,000; average salary of African-American female college graduate in full-time position is less than that of white male high-school dropout; minority women make up 3.3% of all women corporate officers); see, e.g., Jenny Rivera, "The Politics of Invisibility," 3 GEO. J. ON FIGHTING POVERTY 61, 61 (1995) (noting that unemployment rate for Latinas is nearly double that of non-Hispanic women and that, when they find work, they often earn less pay for their work than do other women); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 776-804 (1991) (focusing on status of women of color in workplace and intersection of race and gender in employment law); see also Stephanie Armour, *Minority Job Losses Shrink Gains Made in '90s*, U.S.A. TODAY, January 14, 2002, at B-1 ("Hispanics and blacks tend to be disproportionately represented in low-income or part-time jobs . . . ").

\(^ {358} \) See Kurz, *supra* note 1, at 29 ("Black single mothers are also poorer than white ones. Nearly one-third of black single mothers who worked for pay in 1987 lived below the poverty line, compared with 17 percent of white single mothers.").

Another common alternative to liquidation is a chapter 13 reorganization. Nevertheless, it is really not an option because a poor debtor (the ex-husband or the ex-wife) would find it difficult to file a chapter 13 petition and plan without the aid of an attorney because chapter 13 bankruptcies are more involved and are, typically, more costly. Moreover, chapter 13 is not really available to the poorest families because over fifty percent of their income is devoted to food, shelter and utilities.

Additionally, within communities of color, there is often a distrust of governmental authority and the legal system. Professor Jenny Rivera suggests that the “trust and confidence of communities of color has been dwindling over the last several years” because of what she terms a breach of the “social contract” between society at large and these communities. For Spanish-speaking cultures, the problem is even worse because often there are not only language barriers but also a lack of bilingual-bicultural services and personnel within law enforcement, the legal system and social services.

Another factor to consider within the context of a race-conscious feminist analysis is the relative importance of family to each culture. Within communities of color, there is a strong sense of “family” and a need for families of color to remain geographically as well as emotionally close. On the other hand, white middle-class families, because of “white flight,” job opportunities, and other reasons, have experienced a disintegration of

360. Chapter 13 is an alternative method of bankruptcy relief for some individuals. See 11 U.S.C. § 109(e) (2002) (specifying who may be debtor under Chapter 13). Also known in some circles as a “wage-earner bankruptcy,” a Chapter 13 bankruptcy allows debtors with regular and steady income to pay all or a portion of their debts pursuant to a plan over a three-year period. See 11 U.S.C. § 1322(d) (2002) (establishing plan may not provide for payments over period that is longer than three years, unless court, for cause, approves longer period, but court may not approve period longer than five years). In certain circumstances, the plan payments may be extended to up to five years. See 11 U.S.C. § 1322(d) (explaining extension of plan by court for cause).

361. See Nichols, supra note 359, at 333 (explaining American family of four is considered poor if its yearly gross income is less than $13,924—spending over fifty percent of its yearly income on food, shelter and utilities).


363. See id. at n.29 (noting that courts do not adequately provide for bilingual and bicultural services).

364. See, e.g., Hernández-Truyol, supra note 355, at 72 (describing living with her “traditional” extended family, consisting of her immediate family and grandmother and adding that her aunt, her aunt’s husband, their two children and his parents were just around the corner); see also Lisa Crooms, The Mythical, Magical “Underclass”: Constructing Poverty in Race and Gender, Making the Public Private and the Private Public, 5 J. GENDER RACE & JUST. 87, 88-90 (2001) (observing that family sits strategically between government and individual and that term “the underclass’ is essentially raced and gendered . . . its race is black . . . [i]ts gender is dysfunctional”).
Families of color tend to be involved in each other's problems, even financial problems. White families, on the other hand, eschew family assistance and would be more likely to keep financial problems within the immediate family. The impact of a bankruptcy or related financial problem within an African American, Native American, Asian or Latino household may be more easily shared with family members while white families may be geographically or emotionally unable to share their financial burdens with their immediate family unit.

365. See, e.g., Wilson & Russell, supra note 351, at 232 (discussing importance of "othermothers" in African American community, who help mentor and raise black children and comparing that interrelated family model to white mothers who rarely turn to other family members or friends to help raise their children); see also Eric Bickford, White Flight: The Effect of Minority Presence on Post World War II Suburbanization, at http://www.eh.net/Clio/Publications/flight.shtml (describing "white flight" phenomenon).

366. See, e.g., Elvia R. Arriola, Law and the Family of Choice and Need, 35 U. LOUISVILLE J. FAM. L. 691, 691-92 (1997) (describing importance that Latin culture gives to extended family and labels "co-mother" and "co-father," which are often used). Professor Arriola states that "[t]he physically close and extended family concept among Latinos is a presumed reality." Id. at 696. She describes her own family's response to her mother's need for independence, even though her mother's resources do not permit her to be independent. See id. at 696-97 (explaining her siblings unbridled commitment to caring for her elderly mother, whose social security checks do not even cover rent). Professor Arriola writes that she and her siblings pooled their money "to help her have her own apartment, while she is minutes away by car to a son or daughter." Id. at 696; see also Angela Mae Kupenda, Two Parents are Better than None: Whether Two Single, African American Adults—Who are not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should be Allowed to Jointly Adopt and Co-Parent African American Children, 35 U. LOUISVILLE J. FAM. L. 703, 707 (1997) (writing about existing adoption system, which is based on preference for nuclear family model and which does not fit realities and traditions of many black adults and children). Professor Kupenda also discusses the history of "informal adoptions" among blacks in America, where children are raised by extended families, a throwback to African tradition where children were raised with "multiple adult involvement." Id. at 711-12 (citing Gilbert A. Holmes, The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy, 68 TEMP. L. REV. 1649, 1665 (1995)). Indeed, even members of the U.S. Supreme Court have acknowledged that for many black Americans, the realities of family life are different from the confines of the traditional nuclear family model. See Moore v. City of East Cleveland, 431 U.S. 494, 508 (1977) (Brennan, J., concurring; Marshall, J., joining) (noting that "nuclear family" is pattern found in white suburbia and that minorities, due to lack of financial resources, still prefer living patterns encompassing "extended family"); see also Julia A. Boyd, In The Company Of My Sisters 31-39 (1993) (describing pleasures and pains of being part of tight, inter-connected family of color).

367. See, e.g., Wilson & Russell, supra note 351, at 232 (discussing sense of community and shared responsibility for child-rearing within Black community, often involving individuals other than biological parents who are often called "othermothers"); Hernández-Truyol, supra note 355, at 70-72 (discussing shared family responsibilities of Latin families); Joyce E. McConnell, Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform, 10 YALE J. L. & FEMINISM 29, 51-54 (1998) (examining Native American and African American families as well as recent Latino/Latina and Asian immigrant families to show kinship systems that go well beyond nuclear family); see also Moore, 431 U.S. at 508-09
This phenomenon suggests that the impact of bankruptcy is more often less severe for women of color than it is on majority-culture women.

2. The Cycle of Poverty and Dual-Axis Discrimination

Beyond family and finances, race-conscious feminist theory requires one to look at the “cycle of poverty” in which many women and children of color find themselves.368 Too often, these families live below the poverty line, and a bankruptcy would just ensure that they would not be able to find meaningful work or a chance to be promoted within their present work settings. In turn, the denial of hiring or promotion opportunities would mean the denial of a decent salary or benefits (or an increase in benefits). This cycle obviously needs to be interrupted.

The “cycle of poverty” argument is not peculiar to women of color. White men and women and many men of color are trapped within the same cycle, however, statistics indicate that the problem befalls women more than men, and minority women most of all.369 But what places women of color in a more precarious position than white women? Perhaps it is what this author chooses to label “dual-axis discrimination.”

Dual-axis discrimination acknowledges that women experience less economic benefit in the workplace and in the financial marketplace than men do. Nevertheless, it goes further to recognize the unique place in society in which minority women find themselves.370 Whites, as well as women, fear bankruptcy and financial ruin, white men as well as white women. The potential harm to one’s reputation and the harm to future credit, which are alleged to accompany bankruptcy, is a real threat to the way of life for many white families.371 Minority women, particularly poor minority women, arguably look differently at bankruptcy and the alleged financial “stigma” that attaches because they have no faith in the bankruptcy “fresh start” theory to begin with. Minority families often find no meaningful benefit in the workplace, the marketplace or the courthouse.

(Brennan, J., concurring; Marshall, J., joining) (comparing nuclear family model of majority community to extended family model of minority communities).

368. See Okin, supra note 263, at 3 (explaining that one-half of poor and three-fifths of chronically poor households with dependent children are maintained by single female parent).

369. See Crooms, supra note 364, at 89 (arguing “the underclass” is left to shoulder burden for its poverty, made heavier by white supremacist and patriarchal tropes of race and gender, respectively).

370. See Crenshaw, supra note 348, at 139-40 (suggesting that intersection of race and gender disadvantages women of color more than sum of its parts may disadvantage them).

Rather than file bankruptcy, the poor minority mother will allow the phone to be disconnected or the water to be turned off, and she will just use her mother’s phone or water, or her aunt’s. That is as close to a fresh start as she will ever enjoy anyway, and she does so without a filing fee or an attorney’s fee.

Another important factor to be weighed in the race-conscious feminist analysis of “cycle of poverty” issues is one of access to the legal system. Ibsen’s “Nora and Torvald” are the equivalent of an American upper-middle-class or upper-class white family.\textsuperscript{372} Torvald interacts with legal professionals all of the time and Nora frequently meets with them in a social setting, if not in a professional setting. In communities of color, however, the legal system is a principal source of the bias and prejudice which confront minorities everyday.\textsuperscript{373}

A bankruptcy filing for the ex-husband of a woman of color likely means that she will again be responsible for the credit cards and other debts that she and her ex-husband had incurred. Without sufficient financial means to pay all of the reappearing debts as well as her individual debts, the woman of color’s credit could suffer and her own bankruptcy might be necessary. Poor credit and a bankruptcy notation on one’s credit report will further complicate the ability to obtain credit in the future, thereby perpetuating the cycle of poverty that some women of color just cannot seem to escape.

IV. BUILDING FOR DEMOCRACY

I declare, the time is here for architecture to recognize its own nature, to realize the fact that it is out of life itself for life as

\textsuperscript{372} The identification of Nora and Torvald as a middle-class white couple is intentional. “A middle-class white child can look forward to inherited wealth, occupational upward mobility and institutional racism skewed in his favor. Not so for the middle-class black child.” Joan Tarpley, \textit{A Comment on Justice O’Connor’s Quest for Power and Its Impact on African American Wealth}, 53 S.C. L. Rev. 117, 152-33 (2001) (arguing that Justice O’Connor’s opinions undermine generational wealth for African Americans by suggesting that racial inequality in bidding process is simply tough and punishing reality without remedy).

\textsuperscript{373} See Rivera, \textit{supra} note 357, at 63 (“The reality is that institutional racism, individual bias, prejudice, and xenophobia are entrenched within the deepest recesses of our governmental institutions and within the hearts of some of our elected officials.”). Professor Rivera argues for changes to the ways in which law professionals interact with persons of color. \textit{See id.} at 63 (advocating changes to education and training of law enforcement personnel to incorporate changes facing Latinas). She states:

For example, judges, law enforcement personnel, and, dare I say, lawyers, must be educated to recognize and work to eliminate the pervasive bias in our courts and criminal justice system . . . . Law officials must be made aware of the adverse impact such institutionally-sponsored bias has on women. The lack of sufficient translation and culturally appropriate services further exacerbate the isolation and discomfort Latinas experience when they seek help within the judicial system.

\textit{Id.} at 63 (citations omitted).
it is now lived, a humane and therefore an intensely human thing; it must become the most human of all expressions of human nature.

I have always wanted to build for the man of today, build his tomorrow in, organic to his own Time and his Place as modern Man.

The upshoot [sic] of indigenous art is already dedicated to our democracy: alive none too soon, organic expression of modern life square with our forefathers’ faith in man as Man. Sovereignty of the individual now stems true as the core of indigenous culture in the arts and architecture.

That is why I have always referred to this as the architecture of democracy: the freedom of the individual becomes the motive for society and government.

—Frank Lloyd Wright

As bankruptcy courts have grappled with interpreting § 523(a)(15), there is an obvious and uneasy lack of agreement similar to the lack of agreement that exists concerning an appropriate interpretation of § 523(a)(15). On one issue, however, there is uniformity. Bankruptcy judges do not want to be second-chance divorce courts. As the court in In re Silvers stated:

This is the first 523(a)(15) case which the Court has heard and it certainly demonstrates all of the problems this author and other commentators have voiced concerning the adoption of section 523(a)(15). The problem with that section is that it requires bankruptcy courts to revisit, in excruciating detail, the anger, the bitterness, and the pain which the Debtor and the Debtor’s former spouse have felt and now feel. In the instant case, one could almost see the old wounds being reopened and new and more expensive scars being inflicted upon both parties.

Unfortunately, bankruptcy courts are second-chance divorce courts. Congress has engineered a system that affords individuals (most often ex-husbands) the opportunity to re-litigate painful divorce issues and to strip...
away responsibility for debts that ex-spouses (most often ex-wives) believed the state court resolved.

Frank Lloyd Wright's genius was rooted in an ability to harmonize environment, structure, objects, fittings and inhabitants. Moreover, throughout his life he "fought for a truly indigenous American architecture based on the democratic ideals of personal freedom and human dignity." He constantly struggled for solutions to architectural problems. The "problems" he was trying to solve, however, went beyond building materials, angles and structural supports. Wright viewed his brand of architecture as providing solutions for problems most people did not even realize they had. Wright concerned himself with the relationship between the structure and its site, the relationship between the materials used and the occupant's lifestyle, the relationship between the materials used and the site and the use of architecture to challenge other architects and transform "building" into a powerful prescription for the problems with the way humans were living during Wright's time.

Likewise, one can view the Code as an attempt to harmonize the conflicting interests of various members of the American financial community by providing relief for honest but unfortunate debtors at the expense of the creditors. Bankruptcy has often been described as a risk-shifting device inasmuch as creditors are asked, through discharge, to bear the cost of the bad debts of a few members of society who cannot bear the cost of trying to pay their debts. Creditors, in turn, share their losses with their other customers in the form of increased fees or prices. Bankruptcy is "organic" at its very core. It arises from inevitable economic forces where existence of successful players (the "haves") will also mean the existence of unsuccessful players (the "have-nots"). As a result, bankruptcy recognizes the inherent relationship between the players in the American marketplace and attempts to strike a balance between a financially-distressed debtor and his or her creditors. Bankruptcy then permits the resulting debt forgiveness to be shared with society at large, a resolution from the inside out.

In much the same way that Frank Lloyd Wright envisioned solutions for shaping an "architecture of democracy," bankruptcy scholars must advance solutions for shaping bankruptcy laws that take into consideration the interests of all people—debtor and creditor, men and women—and


379. See generally Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 149-51 (1974) (contending that more lawyers view themselves exclusively as courtroom advocates, thus they are less likely to serve as agents of redistributive change).
that safeguard the lives and lifestyles of all citizens, to the greatest extent possible.\textsuperscript{380} To that end, some solutions are offered.

A. A New Analytical Paradigm

Perhaps the reason women are treated disparately when §§ 523(a)(5) and 523(a)(15) are applied is because the seemingly gender-neutral statutory provisions are not gender-neutral when applied to real life situations. There are at least three reasons for this unexpected result: (1) the statute tries to balance the interests of the debtors and the creditors when the obligations in question are marital debts instead of removing the bankruptcy courts from the analysis; (2) the statute is sufficiently vague such that it invites gendered interpretations and, thus far, most of the interpretations fail to take into consideration the unique position of women in our society; and (3) the marital debt discharge provisions perpetuate a cycle of poverty for women, particularly women of color because decisions to discharge marital debts (principally by ex-husbands) may often result in the ex-wife having to file her own bankruptcy and having to endure the stain of bankruptcy on her credit report.

What society needs is an approach that understands that marital debts are different from other debts and that creditors holding marital debts have needs that are different from trade creditors, service providers, lenders and other creditors in bankruptcy. The correct approach may involve a reconceptualization of how judges should evaluate marital debt dischargeability questions.

B. Removal of Marital Debt Discharge Issues from the Code

Closely related to the idea of a new analytical paradigm is the notion that the best way for bankruptcy to manage questions concerning the dischargeability of marital debts is to take a hands-off approach. In his first article addressing the topic of discharging marital debts in bankruptcy, this author proposed that the Code be amended to provide that all marital debts be deemed nondischargeable.\textsuperscript{381} This author's belief was, and still is, that the divorce courts are the best venue in which to resolve matters arising from and relating to a divorce.\textsuperscript{382} Moreover, bankruptcy judges

\textsuperscript{380} See, e.g., Martin, \textit{supra} note 166, at 429 (challenging current notions of standing in bankruptcy court, which too narrowly limit participation in bankruptcy cases).

\textsuperscript{381} See Alexander, \textit{supra} note 4, at 393 (advocating that more appropriate version of § 523(a)(5) would require bankruptcy court to refuse to discharge any debt to spouse, ex-spouse or child of debtor, which was reduced to judgment by court of competent jurisdiction and which arose out of separation or divorce or out of alimony or support).

\textsuperscript{382} See \textit{id.} at 392 (declaring bankruptcy court is simply not proper forum within which to address family law issues because too much time passes between divorce and bankruptcy filing, divorce court dockets become crowded and divorced couples must expend substantial time and money to bring bankruptcy court "up to speed" before considering bankruptcy/divorce questions involved).
have repeatedly expressed their discomfort and displeasure in having to act as *ad hoc* divorce courts.883 The best solution may still be to rely on the ability of divorce judges to review assertions of changed circumstances in order to determine whether a spouse should be relieved of the obligation to pay all or a portion of a debt to an ex-spouse.

The Bankruptcy Reform Act of 2001884 proposes a partial change in the direction that the author suggests. The proposed law, currently pending before a Congressional conference committee, contains new provisions relating to the dischargeability of certain marital debts. It reclassifies the type of debts listed in § 523(a)(5) as "domestic support obligations,"885 which would be nondischargeable in a chapter 7.886 Under the proposed § 523(a)(15), the reform bill removes the hardship tests that currently exist and declares all such obligations nondischargeable.887

883. See *e.g.*, Mitchell v. Mitchell-Long (*In re Mitchell*), 132 B.R. 585, 588 (Bankr. S.D. Ind. 1991) (recognizing state court is in better position to determine obligations arising from divorce agreement and recommending that district court abstain from hearing adversary proceeding brought for determination of dischargeability of debtor's obligation to former spouse). Subsequently, the district court accepted the Bankruptcy Court's Report Recommending Abstention in this adversary proceeding. See *id*.


Domestic support obligations are defined as debts that accrue before or after entry of an order for relief, including interest that accrues under applicable non-bankruptcy law, that is: [Money] [o]wed to or recoverable by a spouse, former spouse, or child, or the child's parent, legal guardian, or responsible relative, or a governmental unit; [money] [i]n the nature of alimony, maintenance or support, (including assistance provided by a governmental unit) of a spouse, former spouse, child, or child's parent, without regard to whether such debt is expressly so designated; [money] [e]stablished or subject to establishment before or after the order for relief by reason of a separation agreement, divorce decree, or property settlement agreement; order of a court of record; or determination made in accordance with applicable non-bankruptcy law; and [money] [n]ot assigned to a governmental entity, unless voluntarily assigned for the purpose of collection.

887. The proposed § 523(a)(15) reads:

(a) A discharge under §§ 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, di-
 Nevertheless, the proposed legislation falls short inasmuch as it maintains the current dischargeability distinctions for chapter 13 cases, dividing the debts into two classes: (1) debts in the nature of alimony, maintenance or support; and (2) debts which are property settlements.  

C. Other Proposals

1. Alternative Relief Under the Bankruptcy Code

Some courts have been asked to look to other provisions of the Code to safeguard the rights of a creditor/ex-spouse. In one case, involving a chapter 13 wage-earner reorganization, the Eleventh Circuit Bankruptcy Appellate Panel upheld the rejection of a proposed chapter 13 plan of reorganization that would have left the debtor’s ex-wife with a very small percentage of her interest in his pension under their divorce decree. The debtor admitted to the court that his chapter 13 was motivated by a desire to avoid paying his ex-wife her share of his pension, and the court concluded that the debtor proposed his plan in bad faith and in violation of § 1325(a)(3) of the Code.

Other courts have been receptive to requests for relief based on § 523(a)(2) of the Code. Section 523(a)(2) makes exceptions to discharge debts caused by fraud, false misrepresentation or defalcation. In In re Capelli, the creditor/ex-wife sought to except from discharge the debtor/ex-husband’s obligation to pay her $20,000, which was a compromise of an original debt of $29,600. The debt was compromised as part of the couple’s dissolution proceedings and the debtor promised to satisfy the obligation to his ex-wife from the net proceeds of a personal

For the language of 11 U.S.C. § 523(a)(15), see supra note 386; see also Steinfeld & Steinfeld, supra note 334, at 603 (discussing non-dischargeable debt obligations for alimony, maintenance and support obligations subject to criteria of § 523(a)).

388. See Banks v. Vandiver (In re Banks), 248 B.R. 799, 802-05 (B.A.P. 8th Cir. 2000), aff’d, 267 F.3d 875 (8th Cir. 2001) (finding that chapter 13 plan, proposing to pay former spouse meager portion of amount to which she is not only entitled, but needs, was not filed in good faith and cannot be confirmed).

389. See id. at 805 (delineating facts of case).


391. See, e.g., Burbank v. Capelli (In re Capelli), 261 B.R. 81, 92 (Bankr. D. Conn. 2001) (finding requisite intent to deceive component of § 523(a)(2)(B) was met, therefore, non-dischargeability was appropriate); In re Arterburn, 15 B.R. 189, 192 (Bankr. W.D. Okla. 1981) (finding defendant’s divorce decree non-dischargeable due to misrepresentation to plaintiff about debts to third parties).


393. 261 B.R. 81, 92 (Bankr. D. Conn. 2001)

394. See id. at 85 (delineating facts of case).
injury action then pending in state court.\textsuperscript{395} The lawsuit was subsequently settled for $85,000 and the debtor instructed his attorney to distribute the proceeds “according to a written accounting, which, \textit{inter alia}, excluded payment to [his ex-wife].”\textsuperscript{396} Additionally, the debtor paid himself $22,595.45, and instructed the attorney not to alert his ex-wife of the settlement.\textsuperscript{397}

The \textit{Capelli} court considered the compromised debt to be a “renewal of credit” under § 523(a)(2)\textsuperscript{398} and found that the debtor acted with an intent to deceive when he provided his ex-wife with a financial affidavit in connection with their dissolution that was false.\textsuperscript{399} As a result, the marital debt in question was held to be nondischargeable under the fraud dischargeability provisions of the Code.\textsuperscript{400}

In addition to adversary actions under §§ 523(a)(2), (a)(5) and (a)(15) of the Code,\textsuperscript{401} the U.S. Trustee’s Office and the courts should also consider action under § 707(b) of the Code to assist creditor spouses in receiving the marital assets to which they are entitled.\textsuperscript{402} Currently, consumer chapter 7 bankruptcies may be dismissed if the court

\begin{footnotesize}
\begin{enumerate}
\item See id. (describing agreement to repay modified debt from proceeds of personal injury action and executed promissory note to secure debt).
\item See id. (explaining how defendant avoided repaying debt after personal injury action culminated).
\item See id. (discussing payment defendant took for himself out of personal injury settlement and instruction to attorney not to inform his ex-wife of payment or settlement).
\item Section 523(a)(2) provides (in pertinent part):
\begin{enumerate}
\item A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt . . .
\item for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
\begin{enumerate}
\item false pretenses, a false representation, or actual fraud . . . ;
\item use of a statement in writing—
\begin{enumerate}
\item that is materially false;
\item respecting the debtor’s or an insider’s financial condition;
\item on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
\item that the debtor caused to be made or published with intent to deceive . . . .
\end{enumerate}
\end{enumerate}
\end{enumerate}
\item See \textit{Capelli}, 261 B.R. at 90-91 (highlighting that defendant testified he had knowledge that debts exceeding $137,000.00 were excluded from Financial Affidavit, but excluded them because payments were contingent or exact balances were not available).
\item See id. at 91-92 (ordering debt non-dischargeable under § 523(a)(2)(B)).
\item One might also consider bringing an action in bankruptcy under § 523(a)(6) of the Code, alleging willful and malicious injury when a debtor-spouse stops paying alimony, maintenance or support to a creditor-spouse. See 11 U.S.C. § 523(a)(6) (2002) (providing exception to discharge for willful and malicious injury by debtor to another entity or to property of another entity). This author is not familiar with any cases where this theory of recovery prevailed, but it may be worth examining, given the right set of circumstances.
\item See 11 U.S.C. § 707(b) (2002) (“[T]he court . . . may dismiss a case filed by an individual debtor . . . if it finds that the granting of relief would be a substan-
determines that the granting of a discharge in a particular case would constitute a substantial abuse of the bankruptcy system. Many activities by debtors have been ruled to constitute a “substantial abuse.” In fact, the Fourth Circuit has held that using bankruptcy to ensure that an ex-wife would not be paid was sufficient to constitute substantial abuse.

One serious problem with reliance on § 707(b), however, is that only the court, on its own motion, or the U.S. Trustee may raise a challenge based on substantial abuse; a creditor or other interested party may not request or suggest it. With the number of consumer bankruptcy cases skyrocketing, it is not practical for the courts and the U.S. Trustee’s Office to police every filing with an eye toward determining which debtors are using bankruptcy primarily to deceive their ex-spouses. Nevertheless, given the Fourth Circuit precedent, § 707(b) becomes another tool in the arsenal of the ex-spouse to ensure that the debtor-spouse’s bankruptcy filing is for a legitimate purpose.

2. State Law Assistance

Attorney Christine Donnelly highlights a non-bankruptcy solution in her law review article addressing § 523(a)(15); she explores the use of the contempt power of the state court to enforce the divorce decree. Ms. Donnelly asserts that the term “hold harmless” in property settlement is the substantial abuse of the provision of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.”.

403. For a discussion of 11 U.S.C. § 707(b), see supra note 332 and accompanying text.

404. See, e.g., In re Rodriguez, 228 B.R. 601, 605-06 (Bankr. W.D. Va. 1999) (finding bad faith was sufficient to find substantial abuse); In re Norris, 225 B.R. 329, 334 (Bankr. E.D. Va. 1998) (determining unreasonable expenses in budget constituted substantial abuse); In re Blair, 214 B.R. 257, 259-60 (Bankr. D. Me. 1997) (deeming $1,600 in disposable income excessive and therefore constituted substantial abuse); In re Ragan, 171 B.R. 592, 595-56 (Bankr. N.D. Ohio 1994) (commenting that defendant’s extravagant lifestyle constituted substantial abuse, in that spending entire retirement account was impetus for seeking Chapter 7 relief).

405. See Kestell v. Kestell, 99 F.3d 146, 150 (4th Cir. 1996) (establishing Kestell’s sole purpose for filing petition was to favor certain creditors and defraud ex-wife, and finding this conduct abuse of bankruptcy process).


407. For the year ending December 31, 2001, there were 1,492,129 bankruptcy cases filed, and 97.3% of the filings were non-business filings. See U.S. Bankruptcy Filings 1980-2001 (Business, Non-Business, Total), ABI WORLD, available at http://www.abiworld.org/stats/1980annual.html (2001) (suggesting that failure to include hold harmless language in assigning joint debts to one single party may not be fatal to excepting debt from discharge if plaintiff spouse obtains contempt order as soon as debtor becomes delinquent).

treated as the "magic words" triggering the application of § 523(a)(15). In the absence of those words, however, she notes that at least two bankruptcy courts have been willing to imply a "hold harmless" agreement from the circumstances. In both cases, the obligations in question were incurred through divorce, although no "hold-harmless" agreement was ever created. The bankruptcy courts in question, reviewing their respective host State’s laws, noted that the divorce courts had held the debtors in contempt for failing to abide by the terms of the marital settlement. As a result, each court held that the "contempt order itself 'would create a debt within the meaning of § 523(a)(15')."

3. Changing Gendered Mindsets

Perhaps the greatest impediment to changing the way women are treated in bankruptcy is society's collective perception of women and the role of women. This is clearly not a problem peculiar to a bankruptcy court or to the practice of bankruptcy law. In her fascinating book, The Price of Motherhood, author Ann Crittenden reports on a poll of students enrolled in Economics 203 at Williams College in the 1990s. The students were asked about their expectations for family and work. The women responded that they wanted "marriage, children, a husband who shares the child-rearing, and a fulfilling career on a part-time basis while the children are at home." The men responded differently. "They too expected their wives to work part-time while the children were young, but envisioned themselves working more than forty hours a week. Their highest rating for a marriage with preschool children was one in which the husband works full-time and the wife does not work at all outside the home." Ms. Crittenden continues, "Both the men and the women thought the least desirable arrangement while children were under five

409. See id. at 104 ("The terms 'hold harmless' in the property settlement have been treated as the magic words triggering § 523(a)(15).”).
410. See In re Speaks, 193 B.R. 436, 442 (Bankr. E.D. Va. 1995) (finding that it is well settled that agreement to hold spouse harmless on specific debts may qualify as nondischargeable under § 523(a)(5)); see also In re Schmitt, 197 B.R. 312, 316 (Bankr. W.D. Ark. 1996) (following rule in Speaks that, in absence of explicit agreement, law will imply obligation to indemnify where one party incurs debt for own benefit which creates liability on part of another).
411. See Donnelly, supra note 408, at 104-05 (explaining that in Speaks, court held there was sufficient proof of indemnity agreement implied from circumstances and, in Schmitt, court found obligation was incurred through divorce, although there was no hold harmless agreement—both cases enforcing agreements through contempt).
412. See id. (illustrating courts' endorsement of state court authority to enforce divorce decrees with contempt power).
413. Id. at 105.
415. See id. at 238 (pointing out women desire same things their mothers wanted back in 1960s and 1970s).
416. Id.
was one in which both husband and wife worked full-time—which is the most common pattern among American married couples with preschoolers."\textsuperscript{417} She concludes that the Williams College poll suggests two things: (1) that most families in the U.S. are raising their children under conditions that neither spouse considers ideal; and (2) that "[t]he male ideal of a traditional family approximates reality, while what the women want is still an unattainable dream."\textsuperscript{418}

Ms. Crittenden concludes her discussion of the Williams College study with this apocalyptic elegy: "A few years down the road, when many of these girls marry, become mothers, take on most of the costs of child-rearing, and watch their independence slip away, someone is sure to say, 'Well, it was her choice.'\textsuperscript{419} American society must begin to value housework and motherhood in new and different ways so that women are not second-class economic citizens in their own homes. The paradigm shift that must occur is more than attitudinal; the government must find ways to make women, particularly mothers, full economic partners in society, eliminating the "mommy tax,"\textsuperscript{420} reducing the Social Security penalty for stay-at-home moms\textsuperscript{421} and recognizing the value of unpaid household labor in the GDP.\textsuperscript{422}

V. CONCLUSION

What do Frank Lloyd Wright's designs, Henrik Ibsen's play "A Doll's House" and the marital debt discharge provisions of the Code have in common? They are all works-in-progress, requiring the reader or viewer to look beyond the obvious and to provide his or her own finishing touches to the work.

More than forty years after his death, Wright continues to tell stories through his art and architecture; he viewed his work as not merely architecture but as a representation of American ideals and vision. Wright never designed a building merely for the sake of adding a particular struc-

\textsuperscript{417} Id. at 239.

\textsuperscript{418} See id. (noting "[w]omen's aspirations for demanding careers are not consistent with their anticipated home situations").

\textsuperscript{419} See id. (concluding that poll shows young men are more likely to achieve what they want out of life than young women).

\textsuperscript{420} The "mommy tax" is the term given to the reduced earnings of mothers and others who stay at home to care for children. See id. at 88 (describing "mommy tax" as heavy personal tax levied on people who care for children, or for any other dependent family members). "This levy . . . is easily greater than $1 million in the case of a college-educated woman." \textit{id.}.

\textsuperscript{421} See id. at 262 (advocating reform so that spouses would automatically earn equal Social Security credits during marriage and would be able to combine whatever credits they might have earned before or after marriage, for their own individual retirement benefits).

\textsuperscript{422} See id. at 267-68 (arguing countries all over world are complying with United Nations Statistical Commission's recommendation to include value of unremunerated work in Gross Domestic Product accounts, but United States has unjustifiably held out).
ture to the landscape; his was an organic architecture which developed from within. His buildings were one man’s attempt to be one with the land and with the client(s). But Wright also believed that architecture would change as America changed and that the architect would have to keep pace, sometimes as a leader of the change and sometimes as a follower.

Ibsen wrote a magnificent story about one couple in Nineteenth Century Europe. Theirs was a typical story, one where the husband ruled over the wife, treating her as a plaything in much the same way as all of the men in her life had treated her. But Ibsen had a surprise for the reader; this wife would experience an epiphany and would leave the “comfort” of her surroundings to strike out on her own and, hopefully, find herself and happiness.

Neither Wright nor Ibsen provide neat and tidy endings; their respective works call for continued examination of those parts of the human conditions over which each man labored. Wright acknowledged that the next generation of architects would have to respond to the America that existed in their time, but he cautioned them to adhere to organic principles in architecture and design. Ibsen sends “Nora” out into the world but does not tell the reader how she fares, perhaps leaving the final chapter for discussion groups to create or for future writers and thinkers to examine.

Similarly, the two marital debt dischargeability provisions in the Code are incomplete works. Section 523(a)(15) was designed to respond to a problem that Congress correctly perceived with regard to the application of § 523(a)(5) of the Code. Nevertheless, the combined statutory provisions are insufficient to safeguard the rights of all citizens, particularly women. By enacting § 523(a)(15), Congress completed the engineering of a system (which includes § 523(a)(5)) to determine whether certain marital debts should be excepted from discharge in bankruptcy that seems to disfavor women. It is doubtful that Congress intended or even anticipated this result; in fact, what little legislative history there is suggests that Congress thought it was doing the opposite and curtailing the effect of discharge as to marital debts. To make matters worse, the judiciary has constructed an analytical model for interpreting these marital debt dischargeability provisions that perpetuates the discrimination against women. It is difficult, however, to understand why this is the case. Many cases provide little or no reasoning to support their conclusions that debtors (more often ex-husbands) should be permitted to discharge marital debts. The judges who do provide reasoning to support their decisions often do not provide helpful analyses, leaving it largely to the imagination of the reader to discern why the marital debt in question should or should not be discharged.

Bankruptcy law in America has witnessed steady change ever since the first laws were enacted. Additionally, bankruptcy laws have directly af-
fected women since the Bankruptcy Act of 1800,\textsuperscript{423} and current law is no exception. The key difference between early bankruptcy law and the current law, however, is that the latter also seems to have a great indirect impact on women. Stated another way, current bankruptcy laws relating to the dischargeability of marital debts seem to impact women more negatively than men. There is a certain irony in reporting that women are disparately impacted by the application of §§ 523(a)(5) and 523(a)(15) because most people would say that the dischargeability laws were enacted to protect women. Even though family law obligations are important and even though bankruptcy law has attempted to safeguard the claims of family law creditors, women (more often than men) find themselves in the positions of "unwilling creditors" and "reluctant debtors" in their own bankruptcies because current law really does not contemplate the combined use of divorce law and bankruptcy law to disadvantage ex-spouses.

Despite the new language in the current bankruptcy reform bill that seems to make all marital debts nondischargeable in a chapter 7, there appears to be only a modest effort to remove the current dischargeability distinctions from Chapter 13 of the Code and to excise the statutory differentiation between debts in the nature of alimony, maintenance and support and other types of marital debts. Nevertheless, recognizing that current law is unfair to many former spouses, the distinctions between types of marital debts should be eliminated and, as this author has suggested previously, the Code should be amended to provide merely that all debts are nondischargeable if they are the result of a marital settlement, divorce decree or a judgment by a family law court.

Other, less drastic, reform options include judges reinventing the way(s) in which they work through the marital debt discharge analysis or family lawyers becoming more aware of bankruptcy law and the impact that bankruptcy could have on the dissolution of a marriage. Through continuing legal education, family lawyers could easily be made aware of the need to contemplate bankruptcy as an option for one or both of the divorcing spouses. A final reform option would be for bankruptcy lawyers who represent creditor ex-spouses to prosecute dischargeability actions more vigorously, including raising possible claims under other sections of the Code to allege fraud or a lack of good faith where the facts suggest that such options are appropriate.

No matter what form it takes, additional bankruptcy reform is needed to protect the rights of family law creditors. The bankruptcy community has suffered under the weight of § 523(a)(15) for nearly a decade and the statute, even when used in conjunction with § 523(a)(5), does not provide

\textsuperscript{423} An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 19, 2 Stat. 19 (1800) (repealed 1803). See Gross, et al., supra note 310, at 35 (summarizing experiences of numerous women with financial distress and bankruptcy during 17th, 18th and 19th centuries).
the protection that it was intended to provide. In fact, the marital debt discharge provisions further impair creditors (mostly women) who hold claims arising out of the dissolution of a marriage.