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## Lifestyles of the Not-So-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy

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### INTRODUCTION

Bankruptcy courts have yet to articulate a cohesive standard that governs whether debtors should be allowed to make lifestyle choices that harm creditors but do not appear to be *necessary*. Any expenditure a debtor makes arguably harms some creditors, at least in the short-term. Thus, courts constantly are forced to decide whether expenditures should be allowed or denied because they "abuse" the spirit (or letter) of bankruptcy laws. Unfortunately, neither debtors nor creditors reasonably can predict whether any given court will permit a particular lifestyle choice because courts have not stated what types of activities categorically should be denied when a person files for bankruptcy.

"Lifestyle," as discussed in this Article, means any choice that yields an act or expenditure that economically harms creditors.<sup>1</sup> Because the Code provides no objective standard for courts

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1. If a lifestyle choice does not cause economic detriment to creditors, the choice should be allowed even if it offends a creditor's moral sensibilities. Likewise, if a lifestyle choice financially harms creditors, but denying the choice would not economically benefit

to apply when deciding which lifestyle choices debtors should be allowed to make, courts rely on vague, undefined concepts. For example, when examining proposed expenditures included in a Chapter 13 budget, courts must decide if those choices are "reasonably necessary."<sup>2</sup> Similarly, when deciding whether to force debtors to sacrifice a lifestyle choice in return for discharging an otherwise nondischargeable debt, courts ask whether the sacrifice would constitute an "undue hardship."<sup>3</sup> Likewise, when deciding whether a prior or proposed lifestyle choice indicates that a debtor is not entitled to a Chapter 7 discharge, courts question whether the debtor filed the petition in "good faith" or whether granting the petition would be a "substantial abuse" of the Code.<sup>4</sup>

Courts and commentators have formulated tests to determine whether a *particular* expenditure is warranted in a *particular* case.<sup>5</sup> However, neither Congress, courts, nor scholarly commentators have developed a normative standard that specifies the types of lifestyle choices courts categorically should deny when a person chooses to file for protection under federal bankruptcy laws. Although deciding lifestyle issues on a case-by-case basis may have some merit,<sup>6</sup> this ad hoc approach causes courts to approve some lifestyle choices that do not further bankruptcy's dual policy considerations of protecting debtors' right to a fresh start yet ensuring that creditors' debts are repaid.<sup>7</sup> Conversely, a case-by-case approach allows courts to disapprove choices that are consistent with those policy considerations.<sup>8</sup> Deciding these issues on a case-by-case basis also increases overall bankruptcy costs to both debtors and creditors since both groups are forced to litigate disputes that easily could be avoided if the

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creditors, the choice should be allowed even if it relates to non-necessary items. See discussion *infra* Parts III.B.3 and III.B.7.

2. See 11 U.S.C. § 1325(b)(2) (1994) (defining items included in Chapter 13 budget); see also discussion *infra* Parts III.A.1 and III.B.1.

3. See 11 U.S.C. § 523(a)(8) (1994) (defining student loan hardship discharge); see also discussion *infra* Part III.B.3.

4. See 11 U.S.C. § 707(b) (1994); see also discussion *infra* Parts III.A.3 and III.B.2.

5. See, e.g., Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse,"* 5 J.L. & COM. 1 (1984); Kathleen M. Cerne, *Honor thy Creditors?: The Religious Debtor's Constitutional Conflict with Section 1325(b),* 98 COM. L.J. 257 (1993); James Rodenberg, Comment, *Reasonably Necessary Expenses or Life of Riley?: The Disposable Income Test and a Chapter 13 Debtor's Lifestyle,* 56 MO. L. REV. 617 (1991).

6. See Oliver B. Pollak, "Be Just Before You're Generous": Tithing and Charitable Contributions in Bankruptcy, 29 CREIGHTON L. REV. 527, 529 n.8 (1996).

7. See discussion *infra* Part I.

8. See discussion *infra* Part III.B.6.

parties could refer to objective standards.<sup>9</sup>

Moreover, the inconsistent, ad hoc, treatment bankruptcy courts have given lifestyle issues fuels the public's perception that bankruptcy has no social consequences. Some of this perceived "abuse" can be attributed to the public's general misunderstanding of a debtor's right to keep some of her property, yet completely avoid repaying most debts.<sup>10</sup> Other perceptions cannot be dismissed so easily.<sup>11</sup> Indeed, until bankruptcy courts develop a consistent, rational framework for analyzing lifestyle choices, both creditors and the public will remain confused by, and disgusted with, a debtor's apparent right to abuse bankruptcy laws.<sup>12</sup>

This Article examines courts' treatment of lifestyle issues involving consumer debtors.<sup>13</sup> I argue that courts should not per-

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9. See generally Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlement, and the Creditors' Bargain*, 91 YALE L.J. 857, 866-68 (1982) (discussing role that clear and determinable bankruptcy rules have on lowering credit costs in non-bankruptcy settings).

10. See Lowell P. Bottrell, *Comfortable Beds, A Church Pew, A Cemetery Lot, One Hog, One Pig, Six Sheep, One Cow, A Yolk of Oxen or a Horse, and Your Notary Seal: Some Thoughts About Exemptions*, 72 N.D. L. REV. 83, 83 (1996) (observing that state law exemptions "may perplex the average individual because it seems strange that the debtor may keep a home worth several thousand dollars yet they cannot keep the \$200 or \$300 cash they have in their checking accounts").

11. See Gene Tharpe, *Going for Broke, Bankruptcy Filings At Record Levels: With Consumer Debt Spiraling Upward, More Individuals in Over Their Heads Are Turning to This Legal Remedy, Which No Longer Seems to Carry a Significant Social Stigma*, ATLANTA J. & CONST., Sept. 23, 1996, at E1. Noting that bankruptcies are approaching one million annually, Sam Gerdano, director of the American Bankruptcy Institute, commented that people view bankruptcy "as no big deal . . . and surely not the socially stigmatizing action it was in the past . . . . They no longer see bankruptcy as only for deadbeats and, for many in financial trouble, it's becoming more of a first option rather than a last option." *Id.*

See also Cary Spivak & Douglas Armstrong, *Accused of \$41 Million Fraud Bankrupt Yet Living the High Life Cattleman Manages to Control Much of What He's Lost*, MILWAUKEE J. SENTINEL, Nov. 5, 1996, at 1. Describing a debtor with over \$41 million in debt who continues to live in a \$221,000 home, one creditor mused, "Something is not right. I'm really beginning to wonder about the justice system." *Id.*

12. *Going for Broke*, BOSTON GLOBE, Dec. 28, 1996, at A10 ("Easy access to credit, coupled with the acquisitive values of a consumer society, have contributed not only to the financial downfall of an increasing number of households but also to the abuse of the bankruptcy law.").

13. There is also a perception that corporate debtors abuse bankruptcy laws. See generally KEVIN J. DELAYEN, *STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE* (1992). However, this Article focuses solely on consumers' lifestyle choices. Presenting an analytical framework that addresses both individual and business lifestyle issues is beyond the scope of this Article because most policy considerations that justify the need for corporate reorganizations simply are not present in consumer filings. See Elizabeth Warren, Essay, *Bankruptcy Policymaking in*

mit debtors to make lifestyle choices that prejudice creditors—even when the choice seems noble—unless the choice provides tangible, necessary, economic benefits to the debtors. Courts should allow choices that detrimentally affect creditors but provide no tangible, necessary, economic benefits to the debtor only if those choices are required by applicable state or federal law.<sup>14</sup> Thus, if the Code clearly specifies how courts should treat a particular lifestyle issue, courts must apply the literal language of the Code—even if doing so produces a result the court views as “distasteful.”<sup>15</sup> Only where the Code is unclear should courts evaluate lifestyle choices based on the economic effect the choices have on debtors and their creditors.

### I. GOALS AND POLICIES OF BANKRUPTCY

Bankruptcy is designed to help financially distressed individuals and businesses either liquidate their assets and discharge their debts, or restructure and repay some of their debts. The Bankruptcy Code<sup>16</sup> is governed by two conflicting policy considerations: providing a fresh start to honest debtors and protecting the rights of creditors.<sup>17</sup>

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*an Imperfect World*, 92 MICH. L. REV. 336, 341 (1993).

14. For example, if a debtor is legally obligated to provide financial support to her adult (but mentally disabled) child, this expenditure must be allowed even though the debtor derives no direct tangible, economic benefit from the expenditure.

15. See discussion *infra* notes 155-156.

16. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in scattered sections of 11 U.S.C. and 29 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in scattered sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in scattered sections of 11 U.S.C.); Criminal Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 11 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Treasury, Postal Service and General Government Act of 1990, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in scattered sections of 28 U.S.C.); Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-121, 107 Stat. 1153 (codified as amended in scattered sections of 28 U.S.C.); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.).

17. This Article does not purport to analyze the validity of, or the weight that should be given to, either policy objective. The standard proposed in this Article does not favor one policy over the other nor does it radically shift the balance of rights from debtors to creditors. Moreover, most of the lifestyle choices courts have permitted, but should

The fresh start policy is designed both to relieve the honest debtor of the burden of repaying debts and to give the debtor enough assets to reestablish himself as a productive, responsible, debt-paying member of society.<sup>18</sup> Consumer debtors can avoid repaying their debts and receive a fresh start by filing for relief under either Chapter 7 or Chapter 13 of the Code.<sup>19</sup>

The second bankruptcy policy protects creditors by facilitating the orderly repayment of debts.<sup>20</sup> The main protections the Code gives creditors are consolidating the debtor's assets into an estate,<sup>21</sup> imposing an automatic stay of virtually all collection activities,<sup>22</sup> and ensuring that similarly situated creditors are treated equally.<sup>23</sup> The automatic stay primarily protects the debtor by preventing creditors from dismantling the estate. By curtailing collection activities, however, the stay also protects

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have denied, directly benefit third-parties (non-dependent family members and religious organizations) who are not creditors. See discussion *infra* Parts III.B.1 and III.B.5.

18. The fresh start policy gives "the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (emphasis in original).

19. While Chapter 11 primarily is used by businesses seeking to reorganize their debts, consumer debtors also can file and receive a discharge under Chapter 11. *Toibb v. Radloff*, 501 U.S. 157, 166 (1991). Indeed, if an individual does not have "regular income," and has unsecured debt that exceeds \$250,000 or secured debt that exceeds \$750,000, she cannot file for relief under Chapter 13. 11 U.S.C. § 109(e) (1994). Instead, she can restructure and repay her debts only by filing for relief under Chapter 11. 11 U.S.C. § 109(d) (1994). Because the overwhelming majority of cases involving lifestyle choices are Chapter 7 and 13 filings, this Article focuses on those two chapters. Nonetheless, courts examining lifestyle choices in individual Chapter 11 cases should also balance the economic benefits the choices give debtors against the economic impact the choices have on creditors.

20. H. R. REP. NO. 95-595, at 366-68 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6321-24. Because the fresh start policy ensures that debtors shield some of their property from creditors, these two goals frequently are at odds. See, e.g., David S. Cartee, Comment, *Surrendering Collateral Under Section 1329: Can the Debtor Have Her Cake and Eat It Too?*, 12 BANKR. DEV. J. 501, 502 (1996).

21. 11 U.S.C. § 541(a) (1994) ("The commencement of a case . . . creates an estate.").

22. 11 U.S.C. § 362 (1994).

23. To ensure similarly situated creditors are treated equally, the Code gives debtors and trustees the right to recover property or money from creditors if: (1) by transferring the property, a creditor is paid before other similarly situated creditors; or (2) a creditor seized the debtor's assets in anticipation of the bankruptcy filing. See 11 U.S.C. § 544 (Trustee can avoid certain pre-petition liens); § 547 (Trustee can avoid certain preferential payments made to creditors within 90 days of filing); § 548 (Trustee can avoid certain pre-petition fraudulent transfers); § 549 (Trustee can avoid certain post-petition transfers). While Chapter 13 Trustees also may bring avoidance actions, they generally have no incentive to do so since Chapter 13 plans generally are funded by the debtor's future income, not her pre-petition property. 11 U.S.C. § 1322(a)(1) (1994).

creditors by giving them an equal opportunity to have their claims repaid in an orderly collective fashion.<sup>24</sup>

## II. "LIFESTYLE" ISSUES IN BANKRUPTCY

Addressing "lifestyle" issues is complicated, given the diametrically opposing perspectives that exist in all bankruptcy cases.<sup>25</sup> That is, from the creditors' perspective, the debtor makes a "lifestyle" choice each time she chooses to spend money on anything other than repaying her debts. In contrast, from the honest debtor's perspective, she makes a "lifestyle" choice only when she attempts to spend money on extravagant, lavish items. To protect debtors' right to a fresh start while ensuring a reasonable attempt to protect creditors' interests in being repaid, courts should be concerned only with preventing debtors from making lifestyle choices that economically harm creditors, but give debtors no tangible, economic benefits. As discussed in greater detail below, choices that yield tangible, necessary, economic benefits to the debtor should be allowed and treated as "necessary" lifestyle choices.<sup>26</sup>

### A. *Courts Reluctantly Judge Consumer Debtors' Lifestyle Choices*

The Code is a paradoxical statute, rife with conflicting social policies.<sup>27</sup> The legislative history of the Code indicates that

24. *But cf.* TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 20 ("[P]rotecting each creditor from other creditors to achieve the fairest collective result is . . . an attractive idea, but the concrete effect is that creditors are barred from taking action to protect themselves, a right that the rest of the law enshrines and vindicates.").

25. The authors of a widely cited empirical study of consumer debt noted that: The question of when the law says 'let go' to the creditor and when it says 'pay' to the debtor is the central issue in consumer bankruptcy. Ultimately, this is a moral decision. Will we collectively permit a creditor to take a debtor's last crust of bread? Will we permit a debtor to live high and avoid legal obligations? The answer to both is no, but it is hard to find a line between the two that can be easily administered, cheaply enforced, and collectively endorsed.

*Id.* at 9.

26. Although deciding whether a lifestyle choice is *necessary* may lead to an "I know it when I see it" test, the definition I propose at least resolves basic disputes. Thus, under my proposed test, debtors are entitled to buy pencils and notebooks for their school aged children, but are not entitled to send their kids to an elite boarding school. *Cf.* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kind of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .").

27. *See, e.g.*, SULLIVAN ET AL., *supra* note 24, at 8 ("[B]ankruptcy policy is [not] a

Congress was aware that allowing debtors to make certain choices potentially would conflict with bankruptcy's goals and policies in general, and with debt repayment specifically.<sup>28</sup> However, rather than determining which lifestyle choices are necessary, Congress delegated to the courts the responsibility of determining the parameters of reasonable choices.<sup>29</sup> Courts tread lightly when examining consumer debtors' lifestyle choices out of a concern that making debt repayment too onerous will discourage debtors from even attempting to repay their debts. That is, because Congress wants to encourage debtors to repay debts in a Chapter 13 case rather than discharge them in Chapter 7,<sup>30</sup> courts (and scholars) argue that making Chapter 13 debtors suffer too much simply will discourage debtors from even attempt-

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function merely of facts. Bankruptcy raises profound moral issues as well as financial ones. It is a concept and an experience surrounded by moral ambiguity and filled with paradox."); Laurence B. Wohl, *Pension and Bankruptcy Laws: A Clash of Social Policies*, 64 N.C. L. REV. 3, 32 (1985). See also *Midatlantic Nat'l Bank v. New Jersey Dep't. of Envtl. Protection*, 474 U.S. 494, 505-08 (1986) (noting conflict between bankruptcy policy that allows trustees to abandon burdensome property and environmental policy that requires property owners to cleanup contaminated property); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211-212 (1983) (noting conflict between bankruptcy policy that prevents creditor collection activities and IRS policy that assesses tax liens for failure to remit withholding payments).

28. For example, Congress expressly noted a debtor's right to convert nonexempt property into exempt property in order "to make full use of the exemptions" permitted by the law even though exercising that right allows debtors to avoid repaying their debts. H.R. REP. NO. 95-595, at 361 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6317. Thus, pre-filing exemption planning is not a per se abuse of bankruptcy laws. See discussion *infra* Part III.B.7.

29. In a prepared statement to the United States Judiciary Committee, Professor Philip Shuchman discussed a court's responsibility in the context of the "Average Bankrupt":

The bankruptcy judges will have to adjudicate what is reasonable for a family's living expenses . . . . This process could also extend to such matters as whether a child must attend public school or may enroll in a private school with tuition and whether a debtor may have a car or must use public transportation; as well as to whether a couple could plan for and have a child . . . .

*Bankruptcy Improvements Act: Hearings on S.333 Before the Comm. on the Judiciary*, 98th Cong. 418-19 (1983) (statement of Philip Shuchman, Professor of Law, Rutgers School of Law (Newark)). See also *In re Packham*, 126 B.R. 603, 609 (Bankr. D. Utah 1991) ("While the court attempts to avoid superimposing its values for those of the debtors', certain sections of the Code require it to make decisions that unavoidably are made based on its sense of equity of what is right and wrong.").

30. See *Associates Comm. Corp. v. Rash* (*In re Rash*), 90 F.3d 1036, 1057 (5th Cir. 1996), cert. granted, *Associates Comm. Corp. v. Rash*, 117 S.Ct. 758 (1997), and rev'd, *Associates Comm. Corp. v. Rash*, 117 S.Ct. 1879 (1997), and remanded, *In re Rash*, 118 F.3d 1081 (5th Cir. 1997) ("[T]he legislative history clearly reflects Congress' intent to encourage debtors to use Chapter 13 and make payments to their unsecured creditors, rather than to opt for a Chapter 7 liquidation.").



ing to repay their debts.<sup>31</sup>

Two powerful protections, one not available under state law and one available only in Chapter 13 cases, ensure that even if courts deny certain choices, most debtors will continue to prefer filing for relief under Chapter 13. The first protection, the automatic stay, shields a person from creditor collection activities only if the consumer files for protection under the federal bankruptcy Code.<sup>32</sup> Second, debtors who have non-exempt<sup>33</sup> assets they want to keep almost always will prefer filing for protection under Chapter 13, because Chapter 13 debtors keep most (if not all) their pre-petition property.<sup>34</sup> Thus, a Chapter 13 debtor who files for bankruptcy to prevent an impending foreclosure on her home<sup>35</sup> still most likely will prefer Chapter 13 over Chapter 7<sup>36</sup> even if the court refuses to permit an unnecessary choice like sending her child to a boarding school or giving money to a non-profit institution.

In addition to not wanting to create disincentives for debt repayment, courts and commentators also suggest that it is unseemly for courts to scrutinize debtors' lifestyles and subjectively determine how debtors ought to live.<sup>37</sup> These critics con-

31. See *In re Navarro*, 83 B.R. 348, 355 n.10 (Bankr. E.D. Pa. 1988) ("A broad interpretation of what constitutes disposable income would contravene the congressional intention of encouraging debtors to use chapter 13 . . ."); Karen Gross, *Preserving A Fresh Start for the Individual Debtor: The Case For Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 119-20 (1986) (discussing incentives provided in Consumer Credit Amendments for debtors to use Chapter 13).

32. 11 U.S.C. § 362 (1994).

33. If a debtor can claim property as exempt under section 522 of the Code, the property cannot be used to satisfy creditors' claims. 11 U.S.C. § 522(b) (1994).

34. 11 U.S.C. § 1327(b) (1994).

35. Many consumers file for relief shortly before a scheduled foreclosure sale simply to halt the sale. See, e.g., *In re Fields*, 190 B.R. 16, 18 (Bankr. D.N.H. 1995) (noting that the case "obviously was filed to stop a foreclosure and loss of a family home"); *In re Oglesby*, 158 B.R. 602, 603 (Bankr. E.D. Pa. 1993) (observing that debtors had filed for bankruptcy four times to halt an imminent foreclosure on home).

36. Some scholars question whether Chapter 13 provides greater benefits to a homeowner debtor than Chapter 7 does. See SULLIVAN ET AL., *supra* note 24, at 141.

37. See *In re Anderson*, 143 B.R. 719, 721 (Bankr. D. Neb. 1992) (the court should not attempt to inject itself into "inherently personal choices"); *Michigan v. Green (In re Green)*, 103 B.R. 852, 853 (Bankr. W.D. Mich. 1988) (the bankruptcy court is urged to maintain a debtor's lifestyle where there is no obvious indulgence in luxuries); *In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989) ("[T]he court should not require drastic changes in the debtor's life or substitute its own values for those of the debtor regarding fundamental aspects of the debtor's life."); *In re Navarro*, 83 B.R. 348, 355 (Bankr. E.D. Pa. 1988) ("In general 11 U.S.C. § 1325(b) should not be considered a mandate for a court to superimpose its values and substitute its judgment for those of the debtor on basic choices about appropriate maintenance and support."); *In re Otero*, 48 B.R. 704, 708 (Bankr. E.D. Va. 1985) ("It is not in the public interest to squeeze the last dollar

tend that courts should prevent debtors only from making lavish, unnecessary lifestyle choices because allowing courts to regulate all aspects of a debtor's lifestyles could have the effect of "equalizing all debtors to the same social standard on the basis of the court's own predilections of how people in financial trouble ought to live."<sup>38</sup> While courts should not require debtors to drop their standard of living to the poverty level,<sup>39</sup> courts necessarily must second-guess debtors' lifestyle choices because Congress relies on courts to make that determination.<sup>40</sup> Since

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from Chapter 13 debtors to fund a Chapter 13 plan."). Cf., *In re McDaniel I*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991) ("[C]ourts must balance the interests of creditors against debtors' entitlement to determine the manner in which they should maintain and support themselves.").

For a detailed discussion on this issue, see 8 COLLIER ON BANKRUPTCY, ¶ 1325.08[4][b], at 1325-52 to 1325-54 (Lawrence P. King ed., 15th ed. 1996):

[A] court determining the debtor's disposable income . . . should not mandate[] drastic changes in the debtor's lifestyle to fit some preconceived norm for Chapter 13 debtors. The debtor's expenses should be scrutinized only for luxuries which are not enjoyed by an average American family . . . . [T]he court cannot and should not order debtors to alter their lifestyles where there is no obvious indulgence in luxuries, even when one or more unsecured creditors demand such a change. [This would] contravene the intent of Congress.

See, e.g., Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 59 AM. BANKR. L.J. 327, 351-353 (1985) ("[T]he statute . . . requires the court to be the arbiter and architect of the defendant's lifestyle. In determining how much of the debtor's income is disposable, the court must . . . determine which of the debtor's expenses are justifiable . . . . Vesting bankruptcy courts with such decisions is disturbing on several grounds."); Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 356 (1982) ("[J]udges should not be charged with the duty to make moral judgments or to second-guess personal decisions.").

38. Gross, *supra* note 31, at 132. See also *id.* at 123 n.274 (quoting *Hearing on a Uniform System of Bankruptcy*, 72nd Cong. 1st Sess. 753 (1932) (statement of Jacob I. Weinstein) ("There is no man who will see eye to eye with the other man as to how he should live, and I would resent any person, court or otherwise, telling me [how to live].")).

39. See Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1133 [hereinafter, *Limiting Access*] ("If creditors were able to capture all the gains from working that exceeded the poverty level, there could well be many debtors who would decide that it simply was no longer worthwhile to work.") According to the statistics cited by these authors, the poverty level for food was based on the cost of a "minimal diet, suitable for 'emergency use.'" *Id.* at 1142 n.317.

40. Congress suggested that courts look to the Labor Department cost of living figures to develop acceptable norms. S. REP. NO. 98-65, at 22 (1983). One court remarked:

The statutory language of § 1325(b) provides little guidance as to the proper scope of inquiry of a bankruptcy court in its determination of whether particular budgeted expenses are reasonably necessary for the maintenance and support of the debtor or the debtor's dependents. The legislative history of

courts must evaluate the debtors' lifestyles, they must develop objective criteria to use when deciding whether to condone elements of that lifestyle.

B. *Courts Should Narrowly Construe the Concept of "Necessary"*

Commentators have analyzed whether a *particular* lifestyle choice is reasonable, necessary, or otherwise should be allowed in a *particular* case based on a *particular* Code provision.<sup>41</sup> However, such treatment of lifestyle choices fails to ask whether certain choices categorically should be denied because they are not economically necessary or provide no tangible benefits directly to the debtor. With few notable exceptions,<sup>42</sup> courts have not narrowly defined the term "necessary" nor will they acknowledge that the Code simply does not give debtors the right to make unnecessary lifestyle choices. Instead, commentators and courts suggest that debtors generally should be allowed to make any lifestyle choice that is convenient, useful, or consistent with the debtor's pre-petition lifestyle.<sup>43</sup>

Courts generally deny lifestyle choices only when they appear excessive, not because the choices themselves are not economic necessities.<sup>44</sup> Bankruptcy courts should narrowly interpret the term "necessary" for several reasons. First, the most natural

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§ 1325(b) has been described as 'singularly vague and unenlightening.' *In re Stein*, 91 B.R. 796, 801 (Bankr. S.D. Ohio 1988) (quoting *In re Jones*, 55 B.R. 462, 465 (Bankr. D. Minn. 1985)).

41. See sources cited *supra* note 5.

42. See *In re Sutliff*, 79 B.R. 151, 157 (Bankr. N.D.N.Y. 1987) (defining "reasonably necessary" as a standard of adequacy that supports the debtor's basic needs, without regard to the debtor's former societal status or accustomed lifestyle).

43. For example, a leading bankruptcy commentator argues that a court, in evaluating whether a budget item is reasonably necessary, "should be reluctant to impose its own values with respect to 'any expenditures, even those which seem unnecessary' if the debtor's total household income is modest. 8 COLLIER ON BANKRUPTCY, *supra* note 37, ¶ 1325.08[4][b], at 1325-53. Likewise, this commentator argues that private schooling can be construed as "necessary" because "it is not unusual for families in some areas to send their children to parochial schools." *Id.* Although it also may be common for families in some areas to enroll their children in dressage classes, it is beyond the pale of reason to conclude that this educational experience is "necessary."

44. For example, the court in *In re Tinneberg*, 59 B.R. 634, 635 (Bankr. E.D.N.Y. 1986), agreed to exclude only "unnecessary luxuries" from support. How the court could approve a Chapter 13 budget that included "necessary" luxuries is puzzling, given that "necessary" and "luxury" appear to be mutually exclusive terms. See also *In re Stein*, 91 B.R. 796, 802 (Bankr. S.D. Ohio) (1988) (refusing to confirm a Chapter 13 plan that has "manifestly excessive" monthly expenditures).

understanding of the word "necessary" is essential or required,<sup>45</sup> not "anything-as-long-as-it's-not-extravagant." Second, if creditors understand that debtors have an absolute right to make only economically necessary choices, then reasonable creditors will limit their objections to only choices that are non-necessary. Reducing creditors' litigation expenses will result in savings in cost and time to both the debtor and creditor and should, in the long run, decrease the cost of credit.<sup>46</sup>

Narrowly interpreting "necessary" also is consistent with the interpretations courts have used in other sections of the Code and other federal statutes. For example, in deciding the "reasonably necessary" property a debtor can exempt under 11 U.S.C. § 522(d)(10)(E), one court limited the property to subsistence, not lifestyle maintenance.<sup>47</sup> Likewise, another court limited the property "necessary" for an effective reorganization for an individual Chapter 11 debtor to only essential or indispensable items.<sup>48</sup>

Narrowly defining necessary provides the additional benefit of eliminating courts' incentive to make subjective conclusions about whether proposed lifestyle choices are *too* extravagant or *too* luxurious. Similarly, narrowly construing necessary prevents courts from relying on imprecise concepts like "undue hardship,"

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45. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510 (1986); BLACK'S LAW DICTIONARY 1029 (6th ed. 1990).

46. See Mark Snyderman, Comment, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. CHI. L. REV. 1335, 1361 (1988) (discussing effect litigation may have on the availability of credit and on credit terms).

Clearly stating that debtors must sacrifice non-necessary lifestyle choices also may help convince the public that there are detrimental social consequences to filing for bankruptcy. Debtors should be expected to sacrifice non-necessary expenditures and engage in conservative spending habits—just as honest, poor, non-debtors are forced to do every day of their lives. While I do not suggest that courts use the Code to strip a debtor of her dignity during the bankruptcy case, bankruptcy should be a humbling experience which requires some sacrifice. See Gross, *supra* note 31, at 74 ("Preservation of self-worth has been a prized value—if a debtor's self-respect can be preserved throughout a case, it has been argued, the individual debtor will have the incentive to begin a new life and to reestablish herself as a productive member of society.").

47. *In re Velis*, 123 B.R. 497, 510 (Bankr. D.N.J. 1991). See also *Warren v. Taff* (*In re Taff*), 10 B.R. 101, 107 (Bankr. D. Conn. 1981) (requiring that courts set aside an amount "sufficient to sustain basic needs, not related to his former status in society or the lifestyle to which he is accustomed").

48. *In re Gregory*, 39 B.R. 405, 410 (Bankr. M.D. Tenn 1984). See also *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-23 (1985) (concluding that courts should narrowly construe "reasonably necessary" exception in Age Discrimination in Employment statute).

"good faith," or "substantial abuse" to prevent lifestyle choices.<sup>49</sup>

In defining "necessary", courts should not negatively define it as "non-extravagant"<sup>50</sup> because there is a wide gap between what is "necessary" (water) and what is "extravagant" (imported, sparkling mineral water).<sup>51</sup> Courts must say that food and water

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49. Congress did not define any of these terms. Moreover, many of the provisions that use these terms were hurriedly added to the Code in the 1984 Consumer Credit Amendments to eliminate perceived abuses of the Code. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered section of 11 U.S.C. and 28 U.S.C.). See Gross, *supra* note 31.

Courts' attempts to use these broad, highly subjective concepts to curtail lifestyle issues have produced mischievous, unsatisfying results. For example, a court can refuse to confirm a Chapter 13 (or Chapter 11) plan that is not proposed in "good faith." 11 U.S.C. § 1325(a)(3) & § 1129(a)(3) (1994). Although the good faith requirement only applies to inquiries concerning the filing of the plan, courts have also dismissed Chapter 13 cases when the debtor apparently did not file the *petition* (rather than the plan) in good faith. See *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996); *In re Love*, 957 F.2d 1350, 1354-55 (7th Cir. 1992); *Eisen v. Curry* (*In re Eisen*), 14 F.3d 469, 470 (9th Cir. 1994); *Gier v. Farmers State Bank of Lucas, Kan.* (*In re Gier*), 986 F.2d 1326, 1329-30 (10th Cir. 1993). While Chapter 13 of the Bankruptcy Act expressly required that petitions be filed in good faith, Congress chose not to retain this requirement when it enacted the Code in 1978. Bankruptcy Act of July 1, 1898, 11 U.S.C. § 541 (1976) (repealed 1978). ("Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith . . .").

Courts have yet to develop objective criteria to assess good faith and instead generally find that plans are filed in good faith if they are consistent with the policy objectives and purposes of Chapter 13. See *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 431-2 (6th Cir. 1982); Virginia M. Hunt, *The Bankruptcy Good Faith Issue*, 47 CONSUMER FIN. L.Q. REP. 402 (1993). One court has described the good faith filing doctrine as "an amorphous gestalt, devoid of reasoning and impenetrable to understanding." *In re Victoria Ltd. Partnership*, 187 B.R. 54, 62 (Bankr. D. Mass. 1995). Commentators question the policy implications of allowing creditors to impose subjectively contrived requirements upon other sections of Chapter 13. See Conrad K. Cyr, *The Chapter 13 "Good Faith" Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 271 (1981); see also John T. Kelly, Note, *Good Faith Analysis under Chapter 13—The Totality of Circumstances Approach*: *Handeen v. LeMaire*, 23 CREIGHTON L. REV. 573 (1990); Ellen M. Horn, Note, *Good Faith and Chapter 13 Discharge: How Much Discretion is Too Much?*, 11 CARDOZO L. REV. 657, 666 (1990); Elisabeth S. Ladd, Note, *In re Okoreeh-Baah*, *The Status of Good Faith Under Chapter 13*, 20 U. TOL. L. REV. 699, 718 (1989); Richard S. Bell, *The Effect of the Disposable Income Test of Section 1325(b)(1)(B) Upon the Good Faith Inquiry of Section 1325(a)(3)*, 5 BANKR. DEV. J. 267 (1987).

50. Congress defines "luxury goods and services" in the negative in 11 U.S.C. § 523(a)(2)(C) (1994). This section defines luxury goods as those not reasonably required for the debtor's (or her dependent's) support. *Id.* One court interpreting this section concluded that luxury items are extravagant, indulgent and nonessential. *In re Hernandez*, 208 B.R. 872, 881 (Bankr. W.D. Tex. 1997).

51. An example would be a Chapter 13 budget that includes a cable television expense. A court that approves this budget implicitly deems the expense to be necessary. That a monthly cable television bill of \$30 is not extravagant does not then make it "necessary."

are "necessary," caviar and sparkling mineral water are not.<sup>52</sup> Choices that fall in the gap between those that are "extravagant" and those that are "necessary" (i.e., discretionary expenditures) should be permitted only if allowing the choice is not economically detrimental to creditors.

C. *"Necessary" Should Be Defined Relative to Those Benefits that the Government Either Provides or Subsidizes*

Because bankruptcy relief no longer is designed to be punitive,<sup>53</sup> courts should not limit necessary expenses only to those that would be expended by someone who lives at the poverty level.<sup>54</sup> However, courts should not automatically deem the current expenditures debtors list on the schedules they file with the court to be "necessary."<sup>55</sup> More importantly, courts should not feel compelled to allow the debtor to continue in the lifestyle to which she became accustomed since the bankruptcy filing itself establishes that the debtor can no longer afford that lifestyle.

Although it may be impossible to quantify "necessary" in a way that satisfies all creditors, defining "necessary" expenses as those benefits the government either provides or subsidizes provides an objective standard courts, debtors, and creditors can rely on and refer to whenever a lifestyle issue arises in a bankruptcy case. Because the federal government directly subsidizes impoverished citizens' food,<sup>56</sup> housing,<sup>57</sup> and medical<sup>58</sup> expenses, these federally subsidized expenditures should be deemed "nec-

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52. One court's ruling noted that an "inquiry into a debtor's 'reasonably necessary' expenses is unavoidably a judgment of values and lifestyles, and close questions emerge . . . . However, a Chapter 13 debtor cannot expect to 'go first class' when 'coach' is available." *In re Sutliff*, 79 B.R. 151, 156-57 (Bankr. N.D.N.Y. 1987) (quoting *In re Kitson*, 65 B.R. 615, 622 (Bankr. E.D.N.C. 1986)).

53. See generally, Vern Countryman, *A History of American Bankruptcy Law*, 81 Com. L.J. 226, 228 (1976).

54. See discussion *supra* note 39; see also *In re Larson*, 203 B.R. 176, 180 (W.D. Okla. 1996) ("Appropriate interpretation of provisions of the Bankruptcy Code should lie somewhere between making debtors totally comfortable and requiring them to sell apples on the street in order to survive.").

55. See BANKRUPTCY CODE, RULES AND FORMS, Form 6A, at 649 (West 1987). For example, that a debtor actually spent \$500 monthly on recreation, clubs and entertainment, newspapers, magazines, etc., does not then make those expenses "necessary."

56. Food Stamp Act of 1977, 7 U.S.C. § 2011 (1994).

57. I.R.C. § 42 (1994) (low-income housing credit); United States Housing Act of 1937, 42 U.S.C. § 1437f (1994) (section 8 Federal Financial Housing Assistance); I.R.C. § 25 (1994) (interest on home mortgage is deductible).

58. See 42 U.S.C. §§ 1395 & 1396 (1994) (Medicaid) and 45 U.S.C. §§ 228 & 301 (1994) (Medicare).

essary." Similarly, because taxpayers' child care<sup>59</sup> and business<sup>60</sup> expenses are subsidized, these expenditures also should be deemed "necessary." As some states exempt clothing purchases from sales taxes,<sup>61</sup> these expenses also should be deemed "necessary." Finally, as both federal and state governments give the poor minimal, unrestricted funds,<sup>62</sup> and because taxpayers may deduct expenses related to unexpected losses,<sup>63</sup> "necessary" also should be defined to allow for minimal, incidental items and for modest, unexpected contingencies.<sup>64</sup>

Federal and state governments also allow taxpayers to deduct charitable contributions on their income tax returns<sup>65</sup> and some taxpayers can receive a tax deduction for support they give to the elderly or disabled.<sup>66</sup> Consequently, these expenses theoretically would fit within my proposed definition of "necessary." Because, however, consumer bankruptcies are designed to economically rehabilitate only debtors,<sup>67</sup> courts should limit necessary choices to those that provide tangible, economic benefits *directly* to the debtor.

Although debtors may receive intangible, psychological, or emotional benefits from giving money to non-creditors, bankruptcy is designed to restructure a debtor's tangible, economic

59. See Aid to Families with Dependent Children (AFDC), Social Security Act, 42 U.S.C. § 602; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211 (codified in scattered sections of the 42 U.S.C. and 2 U.S.C.).

60. Any job-related expenses that a debtor can deduct on her federal income tax return are economically necessary expenditures even if the expenditures relate to seemingly "luxury" items like business travel, meals, and entertainment expenses. See I.R.S. Pub. 529 (1996) (explaining I.R.C. §§ 162, 274 (1994)).

61. See MASS. ANN. LAWS, ch. 64H, § 6(k) (West 1996) (exempting sales of clothing valued at less than \$175).

62. See 7 U.S.C. § 2014 (1994) (general assistance).

63. I.R.C. § 165 (1994) (casualty and theft issues).

64. See *In re Fries*, 68 B.R. 676, 683 & n.7 (Bankr. E.D. Pa. 1986) ("A reasonable reserve fund in a debtor's budget is not violative of section 1325(b)(1)(B)."). The contingency line item should be a small one because, as discussed *infra* Part III.B.6, the Code already allows debtors to modify their plans if they encounter adverse, unforeseen circumstances that make it impossible for them to complete all plan payments. See 11 U.S.C. § 1329(a)(1) & (2) (1994).

65. I.R.C. § 170 (1996).

66. I.R.C. § 22 (1996).

67. See, e.g., SULLIVAN ET AL., *supra* note 24, at 6 ("The purpose of bankruptcy law, properly used rather than abused, is to serve as a financial hospital for people sick with debt."). In contrast, in Chapter 11 corporate filings, courts also must balance the societal costs imposed by a business failure. Those costs would include laying off employees, depriving a locality of a source of tax revenue, and eliminating a potential supplier of goods to, or buyer for, other businesses. See Warren, *supra* note 13. Because these issues are not raised in consumer filings, it is appropriate for courts to focus solely on the rights of the debtors and their creditors.

obligations to her creditors.<sup>68</sup> Choosing to spend money on third-party, non-creditors provides no direct, tangible, economic benefits to the debtor.<sup>69</sup> For example, if the debtor purchases a *People* magazine for her own use, she has received a tangible, economic (albeit non-necessary) benefit. In contrast, if the debtor purchases the magazine for her father, she derives no tangible economic benefit from the purchase, though she may derive psychological benefits from the joy caused by giving her father a present. However, it is impossible to verify or quantify any tangible feel-good benefit a debtor receives after performing an altruistic act.<sup>70</sup> Since those intangible benefits cannot be sold to repay creditors, lifestyle choices that provide no tangible economic benefits to the debtor should be denied. Thus, proposed contributions to third-parties like charities or family members would not be necessary and should be denied unless the contributions are business expenses<sup>71</sup> or the debtor has a legal obligation to make those contributions.<sup>72</sup>

The eligibility requirements for most government benefits are indexed to economic need.<sup>73</sup> As some tax credits and deductions are available to non-needy citizens, creditors might argue that defining "necessary" solely in relationship to government benefits will cause some non-necessary benefits to be deemed necessary.<sup>74</sup> Although not all government benefits and subsidies are need-based, defining "necessary" in relation to those benefits

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68. *Id.*

69. The direct/indirect distinction already is found in commercial law. Article 3-605 of the Uniform Commercial Code protects an indirect beneficiary of a loan from harm caused as a result of a subsequent modification of the loan between the lender and the direct beneficiary. Specifically, an indorser or accommodation party of a loan is discharged of his obligation to repay the loan if the lender fails to obtain the consent of the indirect beneficiary before modifying the principle borrower's obligations. See U.C.C. § 3-605(c) & (d).

70. See Marleen A. O'Connor, *A Socio-Economic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529, 1545 (1993) (noting the inability to quantify acts that serve one's self-interest).

71. See *infra* note 199.

72. See, e.g., CAL. FAM. CODE § 3910 (West 1996) (outlining parents' duty to provide support for disabled, adult children).

73. E.g., Aid to Families with Dependent Children (AFDC), Social Security Act, 42 U.S.C. § 602 (1994), and Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211 (codified in scattered sections of the U.S.C.); Supplemental Security Income (SSI), 42 U.S.C. § 1381-1383 (1994), United States Housing Act of 1937, 42 U.S.C. § 1437f (1994); Food Stamp Act of 1977, 7 U.S.C. §§ 2011-2030 (1994); 42 U.S.C. § 1396 and § 301 (Medicaid).

74. See, e.g., I.R.C. §§ 25, 162 (1996), I.R.C. § 25 (deductibility of interest on home mortgages) (1996), N.J. STAT. ANN. § 54:32B-8.4 (West 1996) (exempting *all* clothing sales regardless of value).



nonetheless should satisfy most creditors. For example, while deductions for business expenses and tax exemptions for clothing purchases generally are not need-indexed, allowing these expenditures obviously benefits creditors because they help debtors earn a living and, thus, repay their debts. If creditors feel debtors have budgeted for an *excessive* amount of clothing or claim too many expenses as business expenses, creditors can object that the amount of those otherwise necessary expenses is not reasonable. In other words, even if creditors concede that clothing expenses are necessary, they are not required to concede that a \$500 monthly proposed clothing expenditure is necessary.

Moreover, even if a few creditors disagree with defining "necessary" relative to government benefits and subsidies, most rational creditors should accept this definition. First, any rational and reasonable creditor would agree that food, clothing, shelter, and medical care are necessary for debtors' economic rehabilitation because these benefits support the debtor, current creditors (whose can be repaid if the debtor can work), and future creditors (who can sell goods and services to the economically rehabilitated debtor). In addition, relying on benefits and subsidies to define necessary provides a neutral definition for the expenses that are necessary for most Americans. None of the credits or deductions were enacted solely to benefit debtors. Instead, the decision to provide a number of benefits or subsidies to needy Americans (and a limited number of benefits to non-needy Americans) was made by democratically elected bodies as a result of numerous political compromises.<sup>75</sup>

### III. PROPOSED TREATMENT OF LIFESTYLE CHOICES

#### A. *Non-Necessary Lifestyle Choices*

1. *Non-Necessary Choices That Prevent Debt Repayment.* While some creditors object to expenditures in a Chapter 7 debtor's proposed budget,<sup>76</sup> most budget objections are made in Chapter 13 cases. Chapter 13 debtors typically keep all their property in exchange for devoting all disposable income to funding the plan.<sup>77</sup> Disposable income means all income a debtor re-

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75. See Brian Van Vleck, *A Comparison of Japanese and American Taxation of Capital Gains*, 14 HASTINGS INT'L & COMP. L. REV. 719, 724 (1991) (discussing balancing act Congress engaged in when making sweeping reforms of the Code in 1986).

76. See discussion *infra* Part III.A.3.

77. 11 U.S.C. § 1325(b)(2) (1994). Both Chapter 11 and 13 debtors must file a plan

ceives *minus* income "reasonably necessary" for the maintenance and support of the debtor and her dependents. If the plan is confirmed<sup>78</sup> and the debtor makes all plan payments,<sup>79</sup> the debtor receives a discharge of most debts—including some that would not be discharged in a Chapter 7 or individual Chapter 11 case.<sup>80</sup>

Creditors who will not be paid in full can ask the court to deny confirmation of a Chapter 13 plan if the debtor fails to devote all her disposable income to repaying her nondischargeable debts.<sup>81</sup> Even though disposable income means all funds not "reasonably necessary" for the maintenance or support of the debtor or her dependents, some debtors have included non-necessary expenditures like cable television,<sup>82</sup> recreational newspaper and magazine subscriptions<sup>83</sup> and private school tuition<sup>84</sup> in

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that explains how they intend to repay their debts. 11 U.S.C. §§ 1121, 1321 (1994).

78. In addition to requiring debtors to use their disposable income to fund the plan, the Code requires Chapter 13 debtors to file the plan in good faith, satisfy the best interests of creditors test, and pay claims in a specified order. See 11 U.S.C. § 1322 (1994).

79. Some courts question whether a plan is proposed in "good faith" if the plan proposes minimal or zero payments to unsecured creditors. See, e.g., *Pioneer Bank of Longmont v. Rasmussen*, 888 F.2d 703 (10th Cir. 1989); *In re Farmer*, 186 B.R. 781 (Bankr. D.R.I. 1995); *In re Strauss*, 184 B.R. 349 (Bankr. D. Neb. 1995); *In re Anderson*, 173 B.R. 226 (D. Colo. 1993); *In re Stewart*, 109 B.R. 998 (Bankr. D. Kan. 1990); cf. *Deans v. O'Donnell*, 692 F.2d 968, 970 (4th Cir. 1982) ("[N]owhere in Chapter 13 is there any mention of a percentage or proportionate amount that must be offered to unsecured creditors in every case."); *In re Greer*, 60 B.R. 547, 553 (Bankr. C.D. Cal. 1986) ("Congress could have required that a Chapter 13 plan provide that unsecured creditors . . . be paid in full. It could also have provided that unsecured creditors be paid 70%, or 30%, or some other minimum amount of their claim. However, Congress decided against this approach.").

80. The most common Chapter 7 nondischargeable debts are taxes and fines, debts that result from fraudulent or willful acts, child support and alimony, debts for personal injuries caused by the debtor's drunken operation of a motor vehicle, and student loans. See 11 U.S.C. § 523(a)(1), (2), (4)-(9). A Chapter 13 debtor is said to receive a "super-discharge" because, in return for repaying some of her debts, she keeps most of her property and discharges most of her debts. See H.R. REP. NO. 95-595, at 118 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6079. The only debts that are nondischargeable in Chapter 13 are child support and alimony obligations, student loans, drunk driving personal injury claims, and criminal restitution or fines. 11 U.S.C. § 1328(a)(2),(3) (1994). Thus, debtors must repay these unsecured debts after she receives a discharge, even if the Chapter 13 plan does not propose making any payments to creditors who hold unsecured claims.

81. 11 U.S.C. § 1325(b)(1)(B) (1994).

82. See *Bungert v. Fort Eustis Fed. Credit Union*, No. 90-2354, 1992 WL 35797 (4th Cir. Feb. 27, 1992).

83. See *In re Henricksen*, 131 B.R. 467 (Bankr. N.D. Okla. 1991). A debtor should be allowed to include the costs of newspapers or magazines if the periodicals are work-related. Such expenditures would be "necessary" for the debtor's support because it would help the debtor generate future income, and thus, repay current debts and pay fu-

their proposed budgets. Courts typically have allowed expenditures for such items as long as the amount of the proposed expenditure is "reasonable" and, thus, does not appear to be extravagant.<sup>85</sup> In effect, if an expense is reasonable, courts will deem it to be "necessary."<sup>86</sup> If necessary equals reasonable, it thus follows that the opposite of necessary would be unreasonable, extravagant, or luxurious. Accepting this equation, however, creates serious problems of statutory construction.

First, since courts should give effect to all words Congress uses in a statute, courts should not assume that Congress meant for the words "reasonably" and "necessary" to be synonymous.<sup>87</sup> Second, equating necessary with reasonable produces absurd results when examining a Chapter 13 budget. If "necessary" means "non-luxury," debtors would have the right to

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ture debts. See *supra* note 60 and accompanying text.

84. See *Univest-Coppell Village, Ltd. v. Nelson*, 204 B.R. 497, 500 (Bankr. E.D. Tex. 1996); see also *In re Navarro*, 83 B.R. 348 (Bankr. E.D. Pa. 1988); *In re Jones*, 55 B.R. 462 (Bankr. D. Minn. 1985). See generally *In re Nolan*, 140 B.R. 797 (Bankr. D. Colo. 1992) (Chapter 7 debtor proposed to send his son to private school); *Conner v. Illinois State Scholarship Comm'n (In re Conner)*, 89 B.R. 744 (Bankr. N.D. Ill. 1988) (questioning a Chapter 7 debtor's decision to support a daughter who decided to attend a private college).

85. See *In re Anderson*, 143 B.R. 719, 721 (Bankr. D. Neb. 1992) (finding that a court "should not become preoccupied with the exercise of a 'line item veto' over budget item," or "attempt to inject itself into such inherently personal choices as whether limited funds are spent on charity, movies, cable television, music lessons, sport leagues or health clubs"); Bruce Edward Kosub & Susan K. Thompson, Note, *The Religious Debtor's Conviction To Tithe as the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873, 886 (1988) ("Although some courts have disallowed recreational expenditures, the determinative factor seems to be the extravagance of the expenditure rather than a feeling that some recreation is not a basic need."); *In re Cavanaugh*, 175 B.R. 369, 374 (Bankr. D. Idaho 1994) (acknowledging that most courts permit a Chapter 13 debtor "some recreational spending" for "items which are not absolute necessities of life").

86. One court used a historical approach to decide what is "reasonably necessary" for the maintenance of a home. *In re Larson*, 203 B.R. 176, 181 (Bankr. W.D. Okla. 1996). While the court concluded that a home computer was not reasonably necessary in the American home in 1996, it found that "[o]ver the years, the presence of a television set became virtually universal, and its use as the family's primary source of information and entertainment transformed it from a relatively expensive curiosity to a virtual necessity which can be purchased for relatively little." *Id.* Thus, by this court's definition, "necessary" items include all things that most people own as long as those items are not expensive. *Id.* While the court probably is correct that most families own televisions, that this particular consumer good is popular and widely-owned does not make it "necessary." But see *In re Ratliff*, 209 B.R. 534, 535 (Bankr. E.D. Okla. 1997) (allowing debtor to exempt a personal computer under state exemption law because "[t]he computer has indeed become an integral part as a resource for information coming into households").

87. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 46.06 at 119-120 (5th ed. 1992); *Petitioners v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (courts should not render statutory language void and without effect).

budget for meals at McDonald's and subscriptions to *People* magazine simply because these expenses are not extravagant.

Adopting the necessary equals reasonable analysis also fuels both creditors' and society's perception that debtors are not required to make financial sacrifices when they file for bankruptcy relief. Especially in the context of a Chapter 13 plan, which is designed "to provide the maximum recovery to creditors by means of a substantial effort by the debtor to pay all debts,"<sup>88</sup> courts should require debtors to reorder their financial priorities and sacrifice non-essential lifestyle choices.<sup>89</sup> Indeed, the legislative history of Chapter 13 illustrates Congress's understanding that debt repayment most likely requires sacrifice by the debtor and an alteration in the debtor's pre-petition consumption level.<sup>90</sup> As such, Congress appeared to have anticipated that Chapter 13 debtors would be required to use their post-petition income—except that necessary to support them and their families—to repay debts.

Although debtors should not be permitted to make economically non-necessary lifestyle choices associated with their pre-petition lifestyles, courts should not impose budgetary restrictions on debtors that permanently drive them into the lowest socio-economic level.<sup>91</sup> Moreover, courts should not categorically forbid debtors from choosing to use properly budgeted funds to make an extravagant lifestyle choice. Instead, debtors should be

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88. *In re Lees*, 192 B.R. 756, 759 (Bankr. D. Mont. 1994) (quoting *In re Packham*, 126 B.R. 603 (Bankr. D. Utah 1991)).

89. See also *In re Carpico*, 117 B.R. 335, 338 (Bankr. S.D. Ohio 1990) (emphasizing that "there are certain sacrifices that must be made by a debtor who chooses to pursue the remedies of Chapter 13"); *In re Reyes*, 106 B.R. 155, 159 (Bankr. N.D. Ill. 1989) ("Chapter 13 was intended to give debtors a chance to repay debts, which may require some sacrifices by the debtor. It was not intended to be used as a tool for facilitating a debtor's already excessive and over-indulgent lifestyle.").

This analysis also would apply if a debtor decided to leave a financially lucrative (but emotionally unsatisfying) job and spend three years as an unpaid or minimally-paid missionary. If the debtor wants to protect her property by filing for relief under Chapter 13, she should be forced to sacrifice this self-fulfilling, albeitly noble, lifestyle choice. See *In re Rappleye*, 210 B.R. 336 (Bankr. W.D. Mo. 1997) (stating that working in a voluntary position for a church is a lifestyle choice debtors cannot make when they have lawful divorce support obligations); see also Leonard J. Long, *Religious Exercise as Credit Risk*, 10 BANKR. DEV. J. 119, 141 (1993).

90. S. REP. NO. 98-65, at 22 (1983).

91. See Teresa A. Sullivan et al., *Rejoinder: Limiting Access to Bankruptcy Discharge* [hereinafter *Rejoinder*], 1984 WIS. L. REV. 1087, 1096 (1984). In arguing against a rule that Chapter 7 relief be denied to debtors who can repay their debts, the authors note that "bankruptcy may serve other social functions, such as keeping the struggling middle class from sliding back to the lowest socio-economic levels when they face financial reversals." *Id.*

allowed to sacrifice economically necessary items to purchase non-necessary items.

Allowing debtors to purchase non-necessary items with funds properly allocated for economically necessary items does not harm the debtor's right to a fresh start, since the debtor herself must choose to sacrifice a necessary item to "pay" for a non-necessary one. Likewise, since creditors were never entitled to payments earmarked for economically necessary expenditures, they are not harmed if a debtor chooses to purchase an economically non-necessary item by restricting her budgeted expenses for clothing or food.<sup>92</sup>

It is highly unlikely that any social services agency or state or federal legislature would support increasing a welfare recipient's public assistance to ensure that she can eat at McDonald's or read *People* magazine.<sup>93</sup> Since debtors do not have a "right" to purchase non-necessary items, courts should not treat those nice-to-have items (like eating out) as if they were need-to-have items (like bread and milk). Instead, a debtor who is committed to buying nice-to-have items should be required to "pay" for them by sacrificing need-to-have items.<sup>94</sup> Since poor non-debtors can choose to sacrifice a necessary item in order to splurge on a luxury item, courts should give debtors the same option. As long as a court concludes that the debtor's proposed total food budget is reasonable,<sup>95</sup> it should not dictate whether the debtor uses the

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92. See, e.g., *In re Faulkner*, 165 B.R. 644, 647 (W.D. Mo.) (observing that a debtor who wants to tithe can restrict personal expenses for such items as clothing, travel, and recreation in order to increase charitable contributions).

93. To the contrary, the recent Welfare Reform Legislation has the effect of depriving some poor people of all benefits, including benefits that provide food for their children. See Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 211, 110 Stat. 2105 (to be codified at 42 U.S.C.A. § 1382c (West Supp. 1997)).

94. The court's accusation in *In re Tinneberg*, 59 B.R. 634, 635 (Bankr. E.D.N.Y. 1986), that a creditor's objection to a newspaper subscription in a Chapter 13 budget was "downright heartless" is unfair. That a court decides that purchasing a newspaper for recreational purposes or watching cable television is not economically necessary does not mean that the court is prohibiting "debtors in bankruptcy from buying a newspaper." *Id.* at 635. A court's conclusion that debtors do not have a *right* to make non-essential expenditures only means that if the debtor wants to purchase the paper she must make sacrifices in other areas of her life—just like poor people are forced to do every day of their lives.

95. It is possible, of course, that debtors will attempt to hide non-necessary items in their proposed budget. Moreover, because reasonable is a subjective concept, debtors and creditors may not have the same view of that term. There is an administratively simple and efficient way to handle both of these issues. Because Chapter 13 trustees have routinely reviewed and courts have routinely approved Chapter 13 budgets, they have the expertise to uncover unreasonable expenses for food, clothing, etc. Chapter 13 trustees assess the reasonableness of budgets based on regional cost-of-living standards. In addi-

properly allocated funds to buy steak or spam.

2. *Lifestyle Choices That Benefit the Debtor's Legal Dependents.* There is neither a policy nor statutory justification for courts to approve a non-necessary expenditure simply because the expense is consistent with the lifestyle to which the debtor was accustomed before she filed for bankruptcy.<sup>96</sup> By protecting a debtor's right to maintain her pre-petition lifestyle, bankruptcy courts tacitly imply that the debtor has done nothing to cause her financial difficulties and accordingly, should not be forced to alter her (or her legal dependent's) lifestyle in the light of those difficulties. This analysis, analogous to the reasoning used when state courts decide alimony and child support disputes,<sup>97</sup> is inappropriate when applied to bankruptcy lifestyle examinations.

When state court judges fashion child support awards, they are careful not to make the children of divorcing parents "suffer" financially simply because their parents choose not to remain a family unit.<sup>98</sup> For this reason, parents are required to provide financial support for their children in an amount sufficient to maintain the children's pre-divorce lifestyle even if doing so

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tion, Chapter 13 trustees frequently evaluate proposed budgets in the light of information the trustee acquires at the meeting of creditors required by 11 U.S.C. § 341. Telephone Interview with Frank Santoro, Chapter 13 Standing Trustee, E.D. Va. (Jan. 30, 1997). If either courts or trustees need an objective standard by which to compare their views of what constitutes reasonable expenses, they can rely on the Consumer Expenditure Survey, an annual Department of Labor publication that presents average expenditures by region for several categories of spending, including housing, food, transportation, and health care. See U.S. DEPT OF LABOR, CONSUMER EXPENDITURE SURVEY, 1992-1993 (1995).

If the Trustee concludes that a debtor has padded a food or clothing budget in an attempt to hide discretionary expenditures, the court can refuse to confirm the plan until the debtor eliminates the extravagant or discretionary expense. See, e.g., Pollak, *supra* note 6, at 579 ("[T]he subjective smell test, good faith test, clean hands test, and 'I know it when I see it' perception are still appropriate abuse detectors in the hands of creditors, [t]rustees, and judges.").

96. See *In re Jones*, 55 B.R. 462, 466 (Bankr. D. Minn. 1985) (finding that a debtor is entitled to basic living expenses sufficient to sustain the basic needs, not those needs related to the lifestyle to which the debtor is accustomed).

97. Cf. Sheryl L. Scheible, *Defining "Support" Under Bankruptcy Law: Revitalization of the "Necessaries" Doctrine*, 41 VAND. L. REV. 1, 57-58 (1988) (arguing that courts should focus on the pre-divorce lifestyle of the debtor and his dependents when determining the needs of the respective parties).

98. *Luciani v. Montemurro-Luciani (In re Luciani)*, 544 N.W.2d 561, 567 (Wis. 1996) (considering whether "financially, the children would . . . be reduced to a lower living standard than that enjoyed during the marriage" when determining an appropriate child support amount).

means the parents must make sacrifices in their own lifestyle. However, unlike a child who is a third-party bystander to the disintegration of his parents' marriage, the debtor actively participated in the disintegration of her finances. As a result, while it may be appropriate for state court judges to refuse to force a child to radically alter his lifestyle simply because his parents divorced, it is appropriate to force a debtor to radically alter her lifestyle since her decision to file for bankruptcy proves that she can no longer afford that lifestyle.

At first blush, the debtor's legal dependents appear analogous to the children of divorcing parents. If true, approving expenditures for a debtor's children's pre-petition lifestyle should be permitted even if elements of that lifestyle are not necessary. The critical distinction between the rights of the children of a married debtor and those of a divorced non-debtor is the person required to make sacrifices. The creditors of a divorcing couple are not required to sacrifice being repaid simply because the parents are required to maintain their children's pre-divorce lifestyle. Instead, the parents themselves are required to make sacrifices in their post-divorce lifestyle in order to preserve their children's pre-divorce lifestyle. The same burden of sacrifice should be true if the parent is a debtor. If debtors want to preserve their child's pre-petition lifestyle, they must be prepared to make sacrifices in their post-petition lifestyles including possibly curtailing their expenditures on economically necessary items like food or clothing.

If a divorced debtor's child support payments include funds for non-necessary expenditures (like private school), the child would be entitled to keep this non-necessary benefit because the debtor has a legal duty to make these payments.<sup>99</sup> Since the children of a divorced debtor would have the right to private school tuition payments, while the children of a married debtor would not have that right, some might argue that this would encourage some debtors to consider getting a divorce, entering into a child support agreement that obligates one or both parties to pay the private school (or college) tuition of her children, and *then* filing for bankruptcy.<sup>100</sup> The risk posed by this potential

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99. In general, child support payments can be decreased only if a parent or authorized government officer petitions the applicable state court for a modification of the child support order. See VA. CODE ANN. § 20-108 (Michie 1995). Such a court could also act sua sponte. *Id.*

100. In years past, some married taxpayers divorced in December then remarried in January to avoid the "marriage penalty" of the Internal Revenue Code. The marriage penalty causes most two-income spouses to be taxed in the aggregate in a greater

loophole is negligible for three reasons.

First, some courts currently will not permit debtors to pay college expenses or private, secondary school tuition for their children.<sup>101</sup> This incentive already exists, if debtors know of and are willing to disrupt their family life to take advantage of this loophole. Second, to take advantage of this loophole, the financially strapped member of a married couple who is considering filing for bankruptcy must calculate that she can file for and get a divorce before her creditors can seize all her assets.<sup>102</sup> Since some states require parties to wait for up to a year before their divorce is final,<sup>103</sup> it will be impossible logistically for most debtors to preserve their assets until the divorce is final.

Finally, if a debtor divorces her spouse, agrees to pay her child's private school or college tuition as part of her child support obligations, then files for bankruptcy solely to finance that education at her creditors' expense, the child support payments might be deemed to be fraudulent conveyances. That is, if a creditor can prove that the debtor divorced and agreed to pay educational fees solely to avoid using those funds to repay her creditors, the Trustee might be allowed to recover any payments made within one year of filing.<sup>104</sup> In short, given the timing difficulties and the potential for the divorce/bankruptcy arrangement to be deemed fraudulent, the number of debtors who could take advantage of this loophole would be insignificant.

Courts should not force creditors to subsidize a debtor's desire to preserve either her or her legal dependents' pre-petition

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amount than if they filed separate income tax returns as unmarried taxpayers. *Boyter v. Commissioner*, 668 F.2d 1382, 1384 (4th Cir. 1981). The Internal Revenue Service has now closed this loophole, will view such divorces as sham transactions, and will deem the spouses to be married even though they obtained a legal divorce. See Rev. Rul. 76-255, 1976-2 C.B. 40.

101. See cases cited *supra* note 84; see also *infra* notes 128, 132 & 134.

102. As the authors of the leading comprehensive empirical study of consumer bankruptcies have noted:

Debtors on the verge of a bankruptcy filing are under enormous pressure from their creditors. They are often filled with anxiety and self-loathing. There may be terrific tension in their homes, and they know very little about bankruptcy . . . their lack of information [does] not leave them in a position to 'calculate' much of anything, except that the next paycheck will not stretch around even the most pressing payment demands.

SULLIVAN ET AL., *supra* note 24, at 244.

103. See VA. CODE ANN. § 20-121 (Michie 1995) (one year waiting period for a couple with children); NEV. REV. STAT. § 125.010 (1993) (same).

104. 11 U.S.C. § 548(a)(1). In addition, this scheme may be considered a fraudulent conveyance under applicable state law. See, e.g., *U.S. v. Mongelli*, 857 F. Supp. 18, 21 (S.D.N.Y. 1994).



lifestyle. Because the bankruptcy filing itself proves the debtor can no longer afford her pre-petition lifestyle, she should be forced to make post-petition lifestyle sacrifices. Similarly, if a debtor wants her legal dependents to continue to maintain a lavish lifestyle, the debtor (*not* the creditor) must be prepared to make post-petition sacrifices—including foregoing necessary items—to ensure that the dependents' pre-petition lifestyle is preserved post-petition.<sup>105</sup>

3. *Lifestyle Choices That Prevent Debtors From Funding a Chapter 13 Plan.* Because the Chapter 7 estate does not include a debtor's post-petition wages and Chapter 7 cases typically are closed fairly quickly,<sup>106</sup> creditors rarely challenge a Chapter 7 debtor's proposed post-petition lifestyle. However, a debtor who has the ability to fund a Chapter 13 plan, but instead exercises her option to discharge her debts by filing a Chapter 7 petition, presents a textbook example of a debtor's ability to abuse the bankruptcy system.<sup>107</sup> For creditors, a debtor who is unwilling to

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105. I recognize that, in addition to creating the get-a-divorce-then-file-bankruptcy incentive, the standard proposed in this Article potentially creates an educational opportunity disparity between the children of married and divorced debtors. That is, since a divorced debtor would be required to continue making court-ordered child support payments that included private school tuition, the children of a divorced debtor would have the "right" to attend private school whereas the children of a happily-married debtor would not. While this result might seem unfair, this disparity already exists between the children of rich people (who can afford private school tuition payments) and poor people (who most likely cannot send their children to private school). Since neither the state nor federal legislatures have deemed attending private school to be an unalienable right, the Code should not be used to advance the social policy either of preferring private schools or of ensuring all children receive the same educational benefits. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to find that education is a fundamental right). Moreover, even if the proposal detrimentally affects the children of divorced debtors, the proposal is consistent with the Code's policy of protecting debtors' (not their dependents') right to a fresh start. *See In re Jarrell*, 189 B.R. 374, 376 (Bankr. M.D.N.C. 1995).

106. *See SULLIVAN ET AL., supra* note 24, at 26-30 (describing process of a simple Chapter 7 case).

107. *See In re Davidoff*, 185 B.R. 631, 636 (Bankr. S.D. Fla. 1995). The court expressed disgust that the debtor "d[id] not appear to be suffering" and instead was treating bankruptcy as "a method whereby yuppies and other affluent persons may serenely and luxuriously cruise down the river of life without modification or disturbance of their far above average affluent lifestyle and, with barely a ripple, wash themselves clear of debt by the filing of a bankruptcy petition." *Id.* *See also In re Barnes*, 158 B.R. 105, 109 (Bankr. W.D. Tenn. 1993) (dismissing case for substantial abuse because to do otherwise would cause "the public [to] perceive Chapter 7 bankruptcy as an easy way out of unnecessary consumer debt."); *but see In re Tanenbaum*, 210 B.R. 182 (Bankr. D. Colo. 1997) (finding that the debtors acted in bad faith by refusing to moderate their extravagant lifestyle, but nonetheless were entitled to a Chapter 7 discharge because the trustee

sacrifice non-necessary, post-petition lifestyle choices is not entitled to *any* bankruptcy relief.

Either the Trustee or the court<sup>108</sup> can move to dismiss a Chapter 7 case if the court concludes that allowing a debtor with primarily consumer debts<sup>109</sup> to discharge those debts would be a "substantial abuse" of the Code.<sup>110</sup> Section 109(b) of the Code provides that any "person"<sup>111</sup> may file for relief under Chapter 7 regardless of the amount of debt or the debtor's ability to repay some debts through future income.<sup>112</sup> Thus, despite the appearance of "abuse," the Code allows debtors to economically harm their creditors by refusing to attempt to repay their debts.

Though it economically harms creditors when debtors choose to continue making economically non-necessary choices rather than repay their debts,<sup>113</sup> most commentators have concluded that conditioning Chapter 7 relief on a debtor's willingness (or ability) to fund a Chapter 13 plan effectively allows creditors to circumvent the Code's prohibition against involuntary Chapter 13 filings.<sup>114</sup> In contrast, courts are split over

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failed to timely file a motion to dismiss the debtors' case).

108. Creditors cannot request that the court dismiss a case for "substantial abuse" even if the debtor has the ability, but refuses, to fund a Chapter 13 plan. *See* 11 U.S.C. § 707(b) (1994).

109. Consumer debts are those incurred by an individual primarily for a personal, family, or household purpose. *See* 11 U.S.C. § 101(8) (1994).

110. 11 U.S.C. § 707(b) (1994). Section 707(a) also allows courts to dismiss cases for "cause." Some courts have relied on section 707(b) to dismiss cases when the debtor has the ability to repay some debts, but refuses to fund a Chapter 13 plan. *See* *Fonder v. United States*, 974 F.2d 996, 998 (8th Cir. 1992); *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988).

111. Excluded from the definition are railroads and certain financial institutions. *See* 11 U.S.C. § 109(b) (1994).

112. *See id.* In contrast, Chapter 13 debtors can have no more than \$250,000 in unsecured debts and \$750,000 in secured debts. 11 U.S.C. § 109(e) (1994).

113. *See, e.g., In re Spagnolia*, 199 B.R. 362, 364 (Bankr. W.D. Ky. 1995) (discussing a budget that proposes monthly expenses for charitable contributions and a full-time nanny); *In re Vianese*, 192 B.R. 61, 71-72 (Bankr. N.D.N.Y. 1996) (discussing budget that proposes \$250 per month to purchase life insurance with a \$2 million death benefit and to lease a new automobile); *In re Gyurci*, 95 B.R. 639, 643 (Bankr. D. Minn. 1989) (discussing budget that includes expenses for housekeeper, cable television, five family cars, and payments for private school and college tuition for children); *In re Ploegert*, 93 B.R. 641, 643 (Bankr. N.D. Ind. 1988) (discussing budget that proposes \$840 for entertainment and dining out weekly and camping and weekend trips to California, Wisconsin, and Chicago); *In re Warfield*, 80 B.R. 898, 899-900 (Bankr. S.D. Ohio 1988) (discussing budget that proposes custom-made clothes and eating out every night).

114. Only wage earning debtors may file Chapter 13 petitions. *See* 11 U.S.C. §§ 109(e), 303(a) (1994); *see also* *Toibb v. Radloff*, 501 U.S. 157, 165 (1991); S. REP. NO. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818 ("Short of involuntary

whether a debtor's ability (but refusal) to repay some of his debts, standing alone, justifies dismissing the Chapter 7 case. While two Circuit Courts of Appeals have held that a debtor's ability (but refusal) to pay in itself justifies dismissal for substantial abuse,<sup>115</sup> most courts apply a totality of the circumstances test when deciding whether the debtor's ability to pay warrants dismissal for substantial abuse.<sup>116</sup>

While the legislative history of § 707(b) does not clearly favor either position,<sup>117</sup> Congress previously has refused to condition the availability of Chapter 7 relief on a debtor's willingness to repay his debts.<sup>118</sup> Moreover, given the importance of the fresh start policy<sup>119</sup> and Congress' unwillingness to permit involuntary Chapter 13 petitions, it is unlikely that Congress intended courts to dismiss Chapter 7 cases simply because an honest, but poor, debtor refuses to attempt to repay his debts.<sup>120</sup>

servitude, it is difficult to keep a debtor working for his creditors when he does not want to pay them back."); Hon. Roger M. Whelan, et al., *Consumer Bankruptcy Reform: Balancing the Equities in Chapter 13*, 2 AM. BANKR. INST. L. REV. 165, 190 (Spring 1994) (noting dismissal of a Chapter 7 case for abuse may constitute an involuntary Chapter 13 mechanism); Gross, *supra* note 31, at 98-102; *Limiting Access*, *supra* note 39 at 1133-35; A. Charlene Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 Wis. L. REV. 1069, 1077-78 (1984) [hereinafter *Reply*]; *Rejoinder*, *supra* note 91 at 1088.

115. See *United States Trustee v. Harris*, 960 F.2d 74 (8th Cir. 1992); *Zolg v. Kelly* (*In re Kelly*), 841 F.2d 908 (9th Cir. 1988).

116. See *Green v. Staples* (*In re Green*), 934 F.2d 568 (4th Cir. 1991); *In re Krohn*, 886 F.2d 123 (6th Cir. 1989). See, e.g., *In re Piontek*, 113 B.R. 17, 22 (Bankr. D. Or. 1990) (suggesting courts generally dismiss Chapter 7 cases for substantial abuse when debtor can pay unsecured debts within three years in Chapter 13, even though doing so disregards legislative history prohibition against an involuntary Chapter 13); *In re Edwards*, 50 B.R. 933 (Bankr. S.D.N.Y. 1985).

117. In discussing the various approaches used by the circuits, one court noted that "[e]ach side looks to legislative history in support of their respective positions. Such history, however, is sorely lacking." *In re Ontiveros*, 198 B.R. 284, 288 (C.D. Ill. 1996).

118. See S. REP. NO. 95-989, at 94 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5880 ("The section does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal."); see also Gross, *supra* note 31, at 79-80 nn.76-78 (discussing Congress' refusal to change the Code to deprive debtors of their right to liquidate assets and start afresh in Chapter 7).

119. See SULLIVAN ET AL., *supra* note 24, at 20:

The notion of beginning anew, of rebirth, lies near the center of our restless, westward-moving culture and is also the central proposition of its dominant religions. Whether a bankrupt debtor, given more time, can pay in full or can pay little or nothing, the relaxation of strict legal obligations is the indispensable centerpiece of American bankruptcy law.

120. One might argue that a truly "honest" debtor would attempt to repay his debts even if he had no legal obligation to do so. See generally SULLIVAN ET AL., *supra* note 24, at 8 ("Rebirth and a fresh start lie at the heart of our national mystique [about bankruptcy] and many of our religious beliefs. But we do not admire broken promises, and we fear those who would avoid hard work by taking advantage of our compassion."). If

Given these policy considerations and the current Code provisions designed to curb abusive filings,<sup>121</sup> courts should dismiss Chapter 7 cases only if the debtor's pre-petition actions indicate that, post-petition, the debtor is not acting in good faith.<sup>122</sup>

Courts should not penalize Chapter 7 debtors who refuse to repay their debts simply because the court disagrees with Congress' decision<sup>123</sup> to give debtors the option of filing under either Chapter 7 or 13. If the only indication that a debtor is acting in "bad faith" is his refusal to sacrifice future non-essential lifestyle items, the refusal, standing alone, should not be grounds to dismiss the Chapter 7 petition.<sup>124</sup> Instead, as long as the debtor

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this is true, then every defendant who raises the expiration of the statute of limitations as an affirmative defense to an otherwise meritorious claim would be "dishonest."

121. For example, courts can dismiss a Chapter 7 petition if a debtor fraudulently transferred or removed property during the year prior to the filing. See 11 U.S.C. § 727(a)(2)(A) (1994). Likewise, courts can refuse to discharge certain debts if the Chapter 7 debtor engaged in a "credit buying spree" in contemplation of filing bankruptcy. See 11 U.S.C. § 523(a)(2)(C) (1994). Finally, if the debtor's bankruptcy schedules fail to completely and accurately disclose all relevant financial data—indicating that the debtor currently is attempting to hide nonexempt pre-petition property rather than giving it to the Trustee—courts can dismiss the case. 11 U.S.C. § 727(a)(4)(D) (1994); see *Thaler v. Erdheim* (*In re Erdheim*), 197 B.R. 23 (Bankr. E.D.N.Y. 1996); *Ramsay v. Jones* (*In re Jones*), 175 B.R. 994 (Bankr. E.D. Ark. 1994); *Nof v. Gannon* (*In re Gannon*), 173 B.R. 313 (Bankr. S.D.N.Y. 1994); *In re Roberson*, 154 B.R. 536 (Bankr. E.D. Ark. 1993); *Nisselson v. Wolfson* (*In re Wolfson*), 152 B.R. 830 (Bankr. S.D.N.Y. 1993); *Davis v. Davenport* (*In re Davenport*), 147 B.R. 172 (Bankr. E.D. Mo. 1992); *Resolution Trust Corp. v. Rossmiller* (*In re Rossmiller*), 140 B.R. 1000 (Bankr. D. Colo. 1992); *Morton v. Dreyer* (*In re Dreyer*), 127 B.R. 587 (Bankr. N.D. Tex. 1991); *Wortman v. Ridley* (*In re Ridley*), 115 B.R. 731 (Bankr. D. Mass. 1990); *Nassau Savings & Loan Ass'n v. Trinsey* (*In re Trinsey*), 114 B.R. 86 (Bankr. E.D. Pa. 1990); *Compton v. Powers* (*In re Powers*), 112 B.R. 184 (Bankr. S.D. Tex. 1989); *Wendel v. Kent* (*In re Kent*), 92 B.R. 540 (Bankr. S.D. Fla. 1988); *B.K. Medical Sys., Inc. Pension Plan v. Roberts* (*In re Roberts*), 81 B.R. 354 (Bankr. W.D. Pa. 1987); *Noble v. Renner* (*In re Renner*), 45 B.R. 414 (Bankr. D. Md. 1984); *Rafoth v. Chimento* (*In re Chimento*), 43 B.R. 401 (Bankr. N.D. Ohio 1984); *City Nat'l Bank of Miami v. Savel* (*In re Savel*), 29 B.R. 854 (Bankr. S.D. Fla. 1983); *In re McDonald*, 25 B.R. 186 (Bankr. N.D. Ohio 1982); *Wendel v. Kapsos* (*In re Kapsos*), 16 B.R. 280 (Bankr. S.D. Fla. 1981); *Wendel v. Sharpe* (*In re Sharpe*), 16 B.R. 226 (Bankr. S.D. Fla. 1981).

122. See *In re Higuera*, 199 B.R. 196, 201 (Bankr. W.D. Okla. 1996) ("In order for a debtor's petition to be dismissed for substantial abuse, there must exist some egregious conduct, bad faith, overreaching, unjust enrichment, or substantial profit on the part of the debtor.")

123. It is not the goal of this Article to determine whether Congress *should* force debtors to pay their debts if they have the ability to do so. Instead, this Article argues that, unless and until Congress imposes an ability to pay requirement, courts should allow debtors to take advantage of the benefits afforded by Chapter 7 even if doing so permits debtors to make future, economically non-necessary choices that economically harm creditors.

124. See *In re Watkins*, 210 B.R. 394, 402 (Bankr. N.D. Ga. 1997) (the court refused to find that the debtors' failure to alter their lifestyle post-petition establishes bad faith in the filing of their cases).

is "honest"<sup>125</sup> and is willing to sacrifice all pre-petition nonexempt property, the court should grant the discharge—even if doing so perpetuates the perception that debtors can avoid debt repayment with little or no disruption of their future spending habits.<sup>126</sup>

B. *Lifestyle Choices that do not Yield Tangible Economic Benefits to the Debtor*

The Code allows debtors to financially support themselves and their dependents—even though this prevents them from repaying their debts. Frequently, however, debtors will seek to give financial support to family members who are *not* their legal dependents. Because using money to support non-legal dependents does not provide direct economic benefits to the debtor, courts should not allow debtors to base their inability to pay their debts on their desire to support non-legal dependents. Moreover, it is inconsistent with the Code's policy of treating similarly situated creditors equally to let the debtor divert money from creditors to non-creditor non-legal dependents.

Courts tend to permit this lifestyle choice, believing it to be a noble one. Even if the debtor's choice to financially support non-legal dependents or third-party organizations is well-intentioned, results from the debtor's "moral" obligation to those relatives or organizations, and gives the debtor tangible, emotional benefits, courts should not force creditors to subsidize moral obligations. To emphasize that the Code is designed to govern the relationship between debtors, their *legal* dependents, and creditors, I further propose that Congress amend Code Sections 101, 522, and 1325 of the Code to emphasize that debtors have the right to support only legal dependents, even if other family members in fact depend on them.

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125. A debtor's honesty is frequently overshadowed by whether the debtor looks "needy." Thus, while the court in *In re Ontiveros*, 198 B.R. 284, 291 (Bankr. C.D. Ill. 1996) conceded that the debtor was honest, it nonetheless dismissed the debtor's Chapter 7 petition because the debtor was "non-needy" and had "the ability to live comfortably and to pay off a substantial portion of his unsecured debts." See Gross, *supra* note 31, at 98-102 (arguing that courts narrowly construe § 707(b) and dismiss cases only if a dishonest debtor has engaged in fraudulent or intentionally misleading acts).

126. For a particularly sharp debate on the potential economic harm caused by granting Chapter 7 discharges to consumer debtors who can repay a substantial percentage of their debts from future income, see *Limiting Access*, *supra* note 39; *Reply*, *supra* note 114; *Rejoinder*, *supra* note 91.

1. *Choices That Benefit A Debtor's Non-Legal Dependents.* Some courts have gauged Chapter 13 debtors' necessary expenses based on the needs of the debtors' non-legal dependents.<sup>127</sup> For example, the debtors in *In re Riegodedios*<sup>128</sup> sought to pay college tuition and rent expenses for their adult daughter. Rather than asking whether allowing the debtors to financially support an adult who was not legally dependent on them was consistent with bankruptcy policy, the court instead characterized the creditor's objection to the budget as seeking a "pound of flesh."<sup>129</sup> The court allowed the tuition and rent expenses for two primary reasons.

First, the court observed that the plan satisfied the "best-interests-of-creditors test" because it gave creditors more than they would receive in a Chapter 7 liquidation.<sup>130</sup> Although this was true, it also was irrelevant. The Code requires that Chapter 13 debtors both give creditors more than they would receive in a hypothetical Chapter 7 case *and* use all disposable income to fund the plan.<sup>131</sup> That a debtor satisfies one requirement does not excuse the debtor from satisfying the other one.

Second, the court viewed the proposed expenditure as a non-luxury item. In the court's view, a college education is "beneficial" and, because the daughter attended a state school, this particular educational expenditure was not all that expensive.<sup>132</sup>

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127. The budget of an individual who files for relief under Chapter 11 is not scrutinized as closely as the budget of a Chapter 13 debtor. In general, Chapter 11 debtors may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business without obtaining court permission. 11 U.S.C. § 363(c)(1) (1994). Because a Chapter 11 individual debtor's personal expenses are part of the ordinary course of the debtor's business, creditors would not have the right to object to those expenses unless the expenses are so extravagant as to warrant seeking the appointment of a Chapter 11 Trustee or having the case converted to Chapter 7. *See In re Bradley*, 185 B.R. 7, 8 (Bankr. W.D.N.Y. 1995).

128. 146 B.R. 691 (Bankr. E.D. Va. 1992).

129. *Id.* at 693.

130. 11 U.S.C. § 1325(a)(4) (1994). *Cf.* 11 U.S.C. § 1129(a)(7)(A)(ii) (1994) (outlining Chapter 11's best interest of creditors requirement). Unless the creditor provides evidence to the contrary, courts generally will assume that unsecured creditors will receive nothing in a Chapter 7 case. *See In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 434 (7th Cir. 1988).

131. *See* 11 U.S.C. § 1325(a)(4) (1994) (outlining the best interest of creditors requirement); 11 U.S.C. § 1325(b)(1)(B) (1994) (disposable income requirement).

132. The court also seemed to believe that, because the daughter was in her senior year at Virginia Polytechnical Institute, the expense was necessary given the alternatives "at this late stage." *In re Riegodedios*, 146 B.R. at 693. *Cf. In re Conner*, 89 B.R. 744, 749 (Bankr. N.D. Ill. 1988) (finding that a Chapter 7 debtor's decision to financially support her adult daughters' decisions to attend out-of-state and private colleges was self-imposed and not in good faith because "[t]he State of Illinois has one of the finest

However, rather than asking whether the proposed expenditure was consistent with any *bankruptcy* policy, the court instead pronounced that the expenditure was good as a matter of *social* policy: "Do we need a psychologist or a sociologist to demonstrate that this helps build good family life?"<sup>133</sup>

The court never explained why debtors should be allowed to provide economic support for someone who is not their legal dependent when providing that support economically harms creditors. Even if the court correctly concluded that the expenditure gave the adult daughter a "fresh start," creditors should not be forced to forfeit debt repayment so that debtors, their legal dependents, and other non-dependent family members can receive fresh starts. Although the court may be right that allowing the daughter to finish college would make the "young lady become a more productive, useful citizen," the court never explained why the debtors' creditors, as opposed to society at large, should be forced to subsidize this civic venture.<sup>134</sup>

2. *Lifestyle Choices That Prevent Chapter 7 Debtors From Repaying Their Debts So They Can Support Non-Legal Dependents.* Rather than using their income to fund a Chapter 13 plan, some Chapter 7 debtors have attempted to use that income to support non-legal dependents. For example, the debtors in *In re Wegner*<sup>135</sup> intended to use their future income to financially support their two adult children, their ex-daughter-in-law, and their grandchildren. Without asking whether creditors should be forced to subsidize such a lifestyle choice, the court concluded that the debtors "were motivated by charity and a sense of moral, if not legal, responsibility for their family," and because they were not attempting to "enrich themselves or deprive their creditors."<sup>136</sup> Because the court felt that, without the discharge, the debtors "would never recover financially," the court granted the discharge.<sup>137</sup>

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state college systems in the United States").

133. *In re Riegodedios*, 146 B.R. at 693.

134. *Id.* See also *In re Jones*, 55 B.R. 462, 467 (Bankr. D. Minn. 1985) (finding that a debtor's budgeted payments for his son's college tuition were unnecessary because "[a]n expensive private school education is not a basic need of the Debtor's dependents, particularly in view of the high quality public education available in this country . . .").

135. 91 B.R. 854 (Bankr. D. Minn. 1988).

136. *Id.* at 859. The court allowed this lifestyle choice even though the debtors' efforts to "financially assist their family lead [sic], in part, to the debtors' substantial credit card debt," and ultimately, to their need to file for bankruptcy. *Id.*

137. *Id.* at 860.

The court in *In re Richmond*<sup>138</sup> reached an opposite result. The debtors in this case also sought to discharge their debts in Chapter 7 and intended to use their future income to support family members who were not their legal dependents.<sup>139</sup> This court denied the lifestyle choice, reasoning that the debtors' creditors should not be forced "to contribute to the voluntary support of family members who are not dependents of debtors . . . ."<sup>140</sup>

As previously discussed, Congress gives debtors the option of either surrendering most of their property and discharging some of their debts in Chapter 7, or keeping most of their property and repaying some of their debts in Chapter 13. As Congress gives debtors this option, courts should not deny a debtor a Chapter 7 discharge merely because it concludes that debtors should fund a Chapter 13 plan rather than make future non-necessary choices. However, while debtors have the *right* to refuse to fund a Chapter 13 plan, courts should not allow debtors to bolster their eligibility for relief under Chapter 7 on their moral obligations to non-legal dependents.

3. *Lifestyle Choices That Prevent Debtors From Repaying Presumptively Non-Dischargeable Debts In Order To Support Non-Legal Dependents.* Both Chapter 7 and 13 debtors have attempted to discharge presumptively non-dischargeable student loans so they can financially support non-legal dependents. Specifically, debtors have sought to discharge student loan debt by claiming that it would be an undue hardship for them to both repay the debt and support their family members.<sup>141</sup> If the loan

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138. 144 B.R. 539 (Bankr. W.D. Okla. 1992).

139. *Id.* at 541.

140. *Id.* at 542. Another reason for the court's denial of the discharge was the debtor's attempt to keep a motor home that was a recreational vehicle, not their primary residence. *Id.* See *In re Davidoff*, 185 B.R. 631, 635-36 (Bankr. S.D. Fla. 1995) (dismissing the Chapter 7 petition because the debtor intended to support his adult children and his second wife's child even though his wife received substantial child support payments from the child's biological father); *United States v. Bacco (In re Bacco)*, 160 B.R. 283, 289 (Bankr. W.D. Pa. 1993) (dismissing a Chapter 7 petition in which the debtor proposed to pay a debt for which his father was also liable); *In re Peluso*, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987) (dismissing a Chapter 7 petition in which the debtor proposed to subsidize the automobile insurance and the monthly telephone charges attributed to his emancipated, employed son).

141. 11 U.S.C. § 523(a)(8)(A) & (B) (1994). As the "necessity of careful budgeting is not evidence of undue hardship," courts typically prevent debtors from discharging student loans when they intentionally or voluntarily made extravagant or excessive lifestyle choices that created the hardship. *New York State Higher Educ. Services Corp. v. Brock (In re Brock)*, 4 B.R. 491, 494 (Bankr. S.D.N.Y. 1980).



repayment period started less than seven years before the debtor filed for bankruptcy, a debtor cannot discharge student loan debt unless she shows that (1) based on her current income and expenses, she cannot maintain a "minimal" standard of living for herself and her dependents if she were forced to repay the loan; (2) her inability to repay the loans without sacrificing the necessities of life is likely to persist for a significant portion of the loan repayment period, and (3) she made a good faith effort to repay the loan before she filed for bankruptcy.<sup>142</sup>

Some courts have allowed debtors to financially support non-legal dependents rather than pay presumptively dischargeable debts.<sup>143</sup> While other courts have denied that lifestyle choice,<sup>144</sup> the court in *Melton v. New York State Higher Education Services Corporation (In re Melton)*<sup>145</sup> is one of the few that unequivocally distinguishes between a debtor's moral and legal obligations to her extended family. While the holding is consistent with the standard of permitting debtors to make only those lifestyle choices that provide tangible, necessary, economic benefits to the debtor, it is unclear whether the court was motivated

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142. This three-factor test initially was stated in *Brunner v. New York State Higher Educ. Serv. Corp., (In re Brunner)*, 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987). Most courts apply this test, or a variant thereof. See *Rice v. Unites States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996); *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 302-03 (3d Cir. 1995); *Woodcock v. Chemical Bank (In re Woodcock)*, 45 F.3d 363, 367 (10th Cir. 1995); see also *In re Roberson*, 999 F.2d 1132, 1136-37 (7th Cir. 1993) (adopting *Brunner* test, but giving courts the right to suspend loan repayment, rather than immediately and completely discharging the loan debt).

143. For example, the debtor in *Clay v. Westmar College (In re Clay)* sought a loan hardship discharge because he wanted to financially support his retired mother and unemployed father. 12 B.R. 251, 254 (Bankr. N.D. Iowa 1981). While there was no indication in this case that the debtor's proposed budget contained extravagant items, there also was no indication that he was legally obligated to support his parents. Because the debtor could "barely support himself and his parents, not to mention repayment of loans," the court allowed the debtor to divert funds from debt repayment, effectively forcing his creditors to subsidize his lifestyle choice to support non-legal dependents. *Id.*; see also *Hill v. Hill (In re Hill)*, 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995) (finding that the debtor's decision to support two children for whom he had no legal obligation did not constitute a luxurious lifestyle "in the 'big picture' analysis of the case").

144. See *Coveney v. Costep Servicing Agent (In re Coveney)*, 192 B.R. 140 (Bankr. W.D. Tex. 1996), in which the court held that the debtor was not entitled to a loan hardship discharge because she consciously chose to move to a small town to care for her mother rather than seek a higher paying job in a larger town. The court accepted the debtor's contention that her efforts to care for her mother were "unselfish," but still ruled that "her moral obligation to a family member, who is not a dependent, does not take priority over her legal obligation to repay her educational loans." *Id.* at 144.

145. 187 B.R. 98 (Bankr. W.D.N.Y. 1995).

by its desire to prevent harm to creditors or its disapproval of the debtor's non-traditional living arrangement.

The debtor in *Melton* shared living expenses with his girlfriend and was considered a "combined" case with the girlfriend and her two children for public assistance purposes.<sup>146</sup> The debtor argued that it would be an undue hardship for him to repay a student loan and also maintain a minimal standard of living. While conceding that his current underemployment most likely was not permanent, the debtor maintained that it would be economically detrimental for him to accept a slightly higher paying job because any salary increase would be offset by a decrease in public benefits and an increase in his child support obligations for his own child (who did not live with him).<sup>147</sup>

There was no indication that the debtor's living arrangement violated either state or federal welfare laws. Nonetheless, the court clearly disapproved of the debtor's choice to combine his financial affairs with his girlfriend "as if his household were a traditional family" and disapproved of the debtor's attempt to link his chosen lifestyle to his inability to repay his student loans.<sup>148</sup> The court especially found troubling:

the notion that any idiosyncracies of public assistance programs or child support contribution requirements which might impede the ability of the Debtor to improve his net household income may also actually help him prove that his circumstances will not improve, thus assisting him in discharging what is normally a non-dischargeable debt.<sup>149</sup>

Whereas the *Melton* court was unwilling to acknowledge that a debtor's increased earnings potentially could deprive the debtor of income needed for survival (i.e., public assistance benefits), at least one court was willing to consider the relationship between public assistance benefits and increased earnings. The court in *In re Vazquez*<sup>150</sup> was sympathetic to the debtors' claim that taking a slightly higher-paying job most likely would cause the female debtor to lose food stamps and other welfare benefits and would decrease the family's household income.<sup>151</sup> Although the debtors in *Vazquez* certainly seemed eligible for a hardship discharge, one suspects that the court's decision to discharge the

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146. The debtor relied in part on his girlfriend's public assistance to meet his daily needs. *Id.* at 100-01.

147. *Id.* at 101.

148. *Id.* at 102.

149. *Id.* at 102.

150. 194 B.R. 677 (Bankr. S.D. Fla. 1996).

151. *Id.* at 680.

debt was heavily influenced by the fact that the debtors were a "decent well-intended" couple "subsisting below the poverty level."<sup>152</sup> Likewise, one suspects that the *Melton* court's decision not to discharge the debt was influenced by the fact that it was dealing with a single, healthy debtor who was cohabitating with his girlfriend and her two children.<sup>153</sup>

The *Melton* court maintained that, despite its obvious disapproval of the debtor's non-traditional lifestyle, the primary issue was not one of morality, decency, or even "family values," but was a "simple distinction between choice and legal obligation."<sup>154</sup> If the court genuinely was not influenced by morality or family values, then it should have granted the discharge—even if it believed the debtor's lifestyle was slothful or sinful—if, in fact, the debtor could show that living with his girlfriend and her children was an economic necessity. It is unclear from the facts of the case whether the debtor or the non-legal dependents benefited more as a result of their being treated as a "combined case." If the debtor could prove that he could maintain a minimal standard of living only by being linked with his girlfriend and her children, then his relationship with them would be one of economic necessity, not choice. If removing himself from this concededly non-traditional living arrangement would cause him to fall even deeper into debt, then despite any disapproval of this lifestyle, the court should have granted the hardship discharge.

If a debtor manipulates bankruptcy and non-bankruptcy laws out of economic necessity, courts should not penalize the debtor merely because it disapproves of the result of the manipulation. Even if allowing a debtor to manipulate the idiosyncracies of public assistance is distasteful, this is no more objectionable than allowing debtors to "manipulate" the idiosyncracies of state exemption laws and the Code, thereby giving them the right to keep expensive parcels of land or retirement accounts.<sup>155</sup>

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152. *Id.*

153. See also *In re Mastromarino*, 197 B.R. 171, 178 (Bankr. D. Me. 1996) (finding that the debtor's "choice to live with and support his domestic partner and her four children" did not warrant giving expenses relating to that lifestyle choice priority over his obligations to his creditors.)

154. 187 B.R. at 103. The opinion contained no suggestion that the financial arrangement between the debtor and his girlfriend was fraudulent or otherwise prohibited by the rules of the public assistance agencies. Indeed, the court was willing to assume the debtor's motive in helping his girlfriend and her children to be "altruistic, even noble" for the purposes of the opinion. *Id.* at 104.

155. See *McDaniel v. McDaniel* (*In re McDaniel II*), 70 F.3d 841, 844 (5th Cir. 1995) (arguing that a single debtor (widowed by his wife) with no dependent children "consti-

Nor is it any more objectionable than allowing debtors to "manipulate" the Code to file for relief under Chapter 13 simply to discharge a debt that would be nondischargeable in Chapter 7.<sup>156</sup>

Notwithstanding its overly judgmental overtones, *Melton* provides a rational response to the suggestion, raised by some courts, that forcing a debtor to sacrifice expenditures that benefit non-legal dependents is cruel.<sup>157</sup> While the *Melton* court's analysis is colored by its disapproval of the debtor's non-traditional lifestyle, the opinion nevertheless is useful because it is one of the few that explicitly notes the distinction between a "legal" obligation to provide support to legal dependents (which should be allowed in bankruptcy) and a "moral" desire to help non-legal dependents (which should not). Moreover, by refusing to base its holding on whether a lifestyle choice is noble or moral, the *Melton* court avoided the paradoxical conclusion that an economically unnecessary lifestyle choice suddenly can become necessary if it is not too excessive or extravagant.

Applying the *Melton* court's distinction between legal and moral obligations would have changed the nonsensical result in *Arnold v. Weast (In re Arnold)*.<sup>158</sup> The debtor in *Arnold* claimed exemptions for his new spouse's dependent children under a state exemption statute that permitted heads of household to claim a \$250 exemption for each unmarried dependent child under the age of eighteen.<sup>159</sup> The court allowed the debtor to

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tutes a family 'til Gabriel blows his horn,' and the 165 acres he lives on is sheltered by the Texas family homestead exemption"); *Solomon v. Cosby (In re Solomon)*, 67 F.3d 1128, 1131, 1133 (4th Cir. 1995) (ruling that a debtor's individual retirement accounts, worth almost one and one-half million dollars, fell within the terms of a specific state exemption).

156. For example, the debtor in *In re Solomon*, 67 F.3d 1128, 1131 (4th Cir. 1995), had over a million dollars in individual retirement accounts (IRAs). He claimed the retirement funds were not "disposable income" because the funds were exempt under Maryland state law. Likewise, he argued, and the court agreed, that forcing him to withdraw these funds to repay his debts "could have devastating results for pension and retirement savings." *Id.* at 1133. The debtor paid virtually all other creditors in full before filing. The only creditors were former patients (and the spouse of one) of the debtor who sued him for sexual misconduct allegedly occurring during treatment. *Id.* at 1130. Thus, little doubt existed that the debtor filed for protection under Chapter 13 solely to discharge debts not dischargeable in Chapter 7. Although it noted that a "distasteful situation" was created, the Fourth Circuit nonetheless excluded the IRA income from disposable income even though doing so would cause the tort victims to receive only \$45,000 of their claimed damages of \$160 million. *Id.* at 1133-34.

157. The court in *In re Riegodedios* observed that "[a]ll disposable income" does not mean debtor's prison in a modern sense." 146 B.R. 691, 693 (Bankr. E.D. Va. 1992).

158. 193 B.R. 897 (Bankr. W.D. Mo. 1996).

159. *Id.* at 901. See MO. STAT. ANN. § 513.440 (West Supp. 1996).

claim a \$250 exemption for his wife's three dependent children because the children's actual father refused to support them. While the court conceded that the children's biological father was legally responsible for them, the court allowed the debtor to treat these non-dependents as dependents because he chose to support them when their actual father refused to do so.<sup>160</sup>

To be consistent, the court then refused to allow the debtor to claim an exemption for one of his own children because he was in arrears on his child support payments and, thus, had not fulfilled his "legal responsibility" toward that child.<sup>161</sup> This opinion turns the notion of legal responsibility on its head by treating a non-legal dependent as a legal dependent and treating a legal dependent as a non-legal dependent. Applying *Melton's* legal v. moral distinction would reintroduce common sense into the determination of who constitutes a legal dependent by denying the exemption for the new wife's kids (not legal dependents) and allowing it for the debtor's own child (a legal dependent).

The simplest and perhaps most effective way to prevent debtors from attempting to provide support to non-legal dependents is to amend the Code to clarify that "dependent" means only legal dependents. Therefore, Congress should amend both sections 101, 522, and 1325 of the Code to define dependent as only those persons that the debtor is legally required to support. To encompass various states' requirements concerning an individual's obligation to provide economic support to third-parties,<sup>162</sup> the Code should permit debtors to rely on either state or federal laws to establish the identities of their legal dependents.

4. *Lifestyle Choices That Allow Debtors to Discharge Non-Support Marital Debts.* The problems caused by the courts' failure to articulate a normative standard to evaluate lifestyle choices have been exacerbated by a recent amendment to the Code. In the Bankruptcy Reform Act of 1994,<sup>163</sup> Congress amended the Code to clarify<sup>164</sup> that debtors can discharge cer-

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160. *In re Arnold*, 193 B.R. at 901.

161. *Id.* at 902.

162. See *supra* note 72.

163. The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified and amended in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.).

164. Before this amendment, it was not clear whether debtors had the right to discharge non-support obligations. See *Drennan v. Drennan* (*In Re Drennan*), 161 B.R. 661, 667 (Bankr. E.D. Ark. 1993) (holding that an agreement that wife receive one half of debtor's retirement benefits was not dischargeable); *Bush v. Taylor*, 912 F.2d 989, 995-96 (8th Cir. 1990) (holding that property settlement was not dischargeable); *Troup v. Troup*, 730 F.2d 464, 466 (6th Cir. 1984) ("hold harmless" clauses may create nondischargeable

tain divorce-related obligations under limited circumstances. While a debtor can never discharge alimony and child support debts,<sup>165</sup> debtors may discharge obligations to hold an ex-spouse harmless on joint debts and may discharge obligations imposed pursuant to a property settlement under section 523(a)(15).<sup>166</sup> To discharge these debts ("section (a)(15) debts"), the debtor must show either that (1) she cannot repay the debt or (2) that the harm (to the debtor) caused by repaying the debt is greater than the harm (to the non-debtor spouse) caused by the debt *not* being paid.<sup>167</sup>

When deciding if the debtor has enough money to repay a section (a)(15) debt, or whether the debtor or her ex-spouse will be most harmed if the debt is discharged, courts inevitably must evaluate the lifestyles of both the debtor and the ex-spouse and then decide how much the debtor must sacrifice before she is allowed to discharge an otherwise nondischargeable debt.<sup>168</sup> Since courts have yet to develop a normative standard to judge lifestyle choices in other settings, it is not surprising that judicial interpretations of section 523(a)(15) have been inconsistent, bewildering, and sometimes downright disconcerting.<sup>169</sup> The awk-

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obligations); *Long v. Calhoun* (*In re Calhoun*), 715 F.2d 1103, 1106 (6th Cir. 1983) (hold harmless clauses may create nondischargeable obligation).

165. See 11 U.S.C. § 523(a)(5) & § 1328(a)(2) (1994).

166. 11 U.S.C. § 523(a)(15) (1994) is effective in Chapter 7 cases filed on or after October 22, 1994. Debtors who file for relief under Chapter 13 have an absolute right to discharge section 523(a)(15) divorce obligations.

167. Section 523(a)(15) provides that a non-support debt is dischargeable 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 . . . 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[.]

11 U.S.C. §§ 523(a)(15)(A) & (B).

168. See *Phillips v. Phillips* (*In re Phillips*), 187 B.R. 363, 369 (Bankr. M.D. Fla. 1995). The court commented that "[t]he legislative history of this section essentially requires this Court to make a value judgment in deciding which party suffers the most." *Id.*

169. See discussion *infra* notes 174-181. One court observed that section 523(a)(15) forces federal bankruptcy courts "to revisit, in excruciating detail, the anger, the bitterness, and the pain" that the debtor and ex-spouse feel as a result of a divorce. *Silvers v. Silvers* (*In re Silvers*), 187 B.R. 648 (Bankr. W.D. Mo. 1995). See also *Kessler v. Butler* (*In re Butler*), 186 B.R. 371, 372 (Bankr. D. Vt. 1995) (stating that using section 523(a)(15) is the "equivalent to applying acupuncture without a license" because it failed to heal the emotional wounds existing from a divorce).

Forcing bankruptcy courts to reevaluate issues raised, and presumably resolved, in a prior divorce proceeding essentially converts bankruptcy courts into federal "family" courts. Addressing the federalism concerns raised by this use of the bankruptcy courts

ward, somewhat impenetrable language Congress used in section 523(a)(15) is responsible for some of the inconsistent interpretations.<sup>170</sup> However, the primary reason courts seem unable to decide how much debtors must sacrifice before they can discharge section 523(a)(15) debts is due to their general failure to develop any consistent, predictable standards concerning lifestyle issues.<sup>171</sup>

Courts asked to discharge section (a)(15) debts generally have relied on the analysis used in other "lifestyle" cases. Specifically, when deciding whether it would be an "undue hardship" for the debtor to repay the debt, courts have relied on the factors cited in student loan undue hardship cases.<sup>172</sup> Likewise, when deciding how to balance the harm to the debtor and her ex-spouse if the debt is discharged, courts rely on the "reasonably necessary" test when examining a Chapter 13 debtor's budget.<sup>173</sup> Because courts have not narrowly defined "necessary"

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is, however, beyond the scope of this Article.

170. One court commented that the clumsy statute amounted to nothing more than "disgraceful draftsmanship." *Samayoa v. Jodoin (In re Jodoin)*, 196 B.R. 845, 853 (Bankr. E.D. Cal. 1996). Another court declared that the "use of triple negatives" in the statute "turned an otherwise well intended statute into sausage." *In re Butler*, 186 B.R. 371, 373 (Bankr. D. Vt. 1995).

171. *Cf.*, Pollak, *supra* note 6, at 554 ("The lack of coherence regarding the standards of disposable income and reasonably necessary in Chapter 13 tithing cases are paralleled by treatment of substantial abuse challenges and tithing in Chapter 7.").

172. *See Wolfe v. McCartin (In re McCartin)*, 204 B.R. 647 (Bankr. D. Mass. 1996); *Greenwalt v. Greenwalt (In re Greenwalt)*, 200 B.R. 909, 913 (Bankr. W.D. Wash. 1996); *Henderson v. Henderson (In re Henderson)*, 200 B.R. 322 (Bankr. N.D. Ohio 1996); *Stone v. Stone (In re Stone)*, 199 B.R. 753 (Bankr. N.D. Ala. 1996); *Willey v. Willey (In re Willey)*, 198 B.R. 1007 (Bankr. S.D. Fla. 1996); *Samayoa v. Jodoin (In re Jodoin)*, 196 B.R. 845 (Bankr. E.D. Cal. 1996); *McGinnis v. McGinnis (In re McGinnis)*, 194 B.R. 917 (Bankr. N.D. Ala. 1996); *Humiston v. Huddelston (In re Huddelston)*, 194 B.R. 681 (Bankr. N.D. Ga. 1996); *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996); *Straub v. Straub (In re Straub)*, 192 B.R. 522 (Bankr. D.N.D. 1996); *Taylor v. Taylor (In re Taylor)*, 191 B.R. 760 (Bankr. N.D. Ill. 1996); *Anthony v. Anthony (In re Anthony)*, 190 B.R. 433 (Bankr. N.D. Ala. 1995); *Florio v. Florio (In re Florio)*, 187 B.R. 654 (Bankr. W.D. Mo. 1995); *Comisky v. Comisky (In re Comisky)*, 183 B.R. 883 (Bankr. N.D. Cal. 1995); *but see Bodily v. Morris (In re Morris)*, 193 B.R. 949, 953 (Bankr. S.D. Cal. 1996) ("This Court declines to apply any aspect of the student loan test, finding that to do so merely confuses the analysis the Court is required to make.").

173. Because the ability to pay language in 11 U.S.C. § 523(a)(15)(A) mirrors the language used in 11 U.S.C. § 1325(b)(2), courts have applied the same standard. *See Ginter v. Crosswhite (In re Crosswhite)*, No. 95-1021, 1996 WL 756745, at \*1 (Bankr. N.D. Ind. July 3, 1996); *Sterna v. Paneras (In re Paneras)*, 195 B.R. 395, 404 (Bankr. N.D. Ill. 1996); *McGinnis v. McGinnis (In re McGinnis)*, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); *Bodily v. Morris (In re Morris)*, 193 B.R. 949, 952 (Bankr. S.D. Cal. 1995); *Humiston v. Huddelston (In re Huddelston)*, 194 B.R. 681, 686 (Bankr. N.D. Ga. 1996); *Dressler v. Dressler (In re Dressler)*, 194 B.R. 290, 304 (Bankr. D.R.I. 1996); *In re Smither*, 194 B.R. 102, 109 (Bankr. W.D. Ky. 1996); *Slover v. Slover (In re Slover)*, 191

and have yet to develop an analytical framework to decide how much a debtor should sacrifice before repaying a loan becomes an undue hardship, they have reached widely and wildly inconsistent results when interpreting section 523(a)(15). Particularly disturbing are opinions that discharge section (a)(15) debts because of value-laden conclusions about the debtor's ex-spouse's lifestyle.

Some courts have discharged section (a)(15) debts after concluding that the creditor/ex-spouse would not be harmed economically because that spouse is either too rich or too poor. The debtor in *In re Taylor*<sup>174</sup> was gainfully employed, had no dependents, and had over \$3,000 in monthly disposable income.<sup>175</sup> Although the debtor clearly could repay the section (a)(15) debt without sacrificing any economically necessary items, the court discharged the debt because it concluded that the ex-spouse was rich and, thus, could afford not to have the debt repaid.<sup>176</sup> In contrast, the court in *In re Morris*<sup>177</sup> concluded that discharging the debt would cause no real economic harm to the ex-spouse because the ex-spouse would still have "negative excess disposable income" even if the debt was repaid.<sup>178</sup> In other words, because the creditor/ex-spouse would still be poor even if the debtor repaid the debt, the court reasoned that discharging the debt would not economically harm her. To help alleviate the financial predicament then facing the poor ex-spouse, the *Morris* court, in terms that almost sounded advisory, posited that "where the nondebtor spouse is hopelessly in debt, the best solution is for both spouses to file bankruptcy."<sup>179</sup>

Unfortunately, the *Morris* court is not the only one that has advised non-debtor ex-spouses to file for bankruptcy if they are harmed by the court's decision to discharge the section (a)(15) debt.<sup>180</sup> Giving such advice creates the rather disturbing specter

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B.R. 886, 892 (Bankr. E.D. Okla. 1996); *Hesson v. Hesson (In re Hesson)*, 190 B.R. 229, 237 (Bankr. D. Md. 1995); *Collins v. Florez (In re Florez)*, 191 B.R. 112, 115 (Bankr. N.D. Ill. 1995); *In re Phillips*, 187 B.R. 363, 368 (Bankr. M.D. Fla. 1995); *In re Carroll*, 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995); *Hill v. Hill (In re Hill)*, 184 B.R. 750, 754-55 (Bankr. N.D. Ill. 1995).

174. 191 B.R. 760 (Bankr. N.D. Ill. 1996).

175. *Id.* at 762-63.

176. The court referred to the ex-spouse as "a very solvent and relatively well to do individual." *Id.* at 763.

177. 193 B.R. 949 (Bankr. S.D. Cal. 1996).

178. *Id.* at 954-55.

179. *Id.* at 954.

180. See, e.g., *Wiley v. Wiley (In re Wiley)*, 198 B.R. 1007, 1017 (Bankr. S.D. Fla. 1996); *Craig v. Craig (In re Craig)*, 196 B.R. 305, 309 (Bankr. E.D. Va. 1996); *Hesson v. Hesson (In re Hesson)*, 190 B.R. 229, 241 (Bankr. D. Md. 1995); *Silvers v. Silvers (In re*



of bankruptcy judges generating business for themselves by triggering domino filings.<sup>181</sup> Moreover, it is virtually impossible to determine which (if any) bankruptcy or social policy courts interpreting section 523(a)(15) are trying to advance when they allow a debtor to avoid repaying a debt simply because the creditor is too rich or too poor. There is no apparent policy justification for penalizing a non-debtor ex-spouse simply because he became successful after the divorce, or for penalizing an ex-spouse because he has not recovered from a financially devastating divorce.<sup>182</sup> Thus, it is unclear why courts would use the success of an ex-spouse to discharge a debt if the debtor can repay the debt without sacrificing any economically necessary

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Silvers), 187 B.R. 648 (Bankr. W.D. Mo. 1995); *Hill v. Hill* (*In re Hill*), 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995); BUT SEE *Christison v. Christison* (*In re Christison*), 201 B.R. 298, 311 (Bankr. M.D. Fla. 1996) (finding that courts who urge creditor spouses to file for bankruptcy "cavalierly ignore questions of whether the creditor spouse is eligible to file a bankruptcy case" a reasoning that "[t]he fact that the non-filing creditor spouse may later file bankruptcy is not a relevant factor in weighing the relative impact to the respective parties").

Although acknowledging that forcing the ex-spouse to file for bankruptcy is unfair, the court in *Hesson v. Hesson* (*In re Hesson*), 190 B.R. 229, 241 (Bankr. D. Md. 1995), stated that "no one should assume that life is fair." As section 105 gives bankruptcy courts broad equitable powers, this is an odd comment indeed. See generally *Hinkle v. Wheaton College* (*In re Hinkle*), 200 B.R. 690, 693 (Bankr. W.D. Wash. 1996) (recognizing that "[a] number of courts have used [their equitable powers] to restructure . . . loans, either by finding them to be only partially nondischargeable, deferring enforcement, or fashioning payment schedules").

181. After noting that the likely effect of discharging the support debt would be forcing the ex-spouse to file Chapter 7, one bankruptcy court made the following observation: "That is indeed a detrimental consequence, but then again, is it so bad?" *Hill v. Hill* (*In re Hill*), 184 B.R. 750, 756 (Bankr. N.D. Ill. 1995). Whether it is "bad" depends on who you are. From the court's perspective, the result is neither bad nor good since the court's credit history is not at risk and the only potential harm to the court is an increased docket. If the section (a)(15) debt is a joint marital credit card debt, discharging the debt from the debtor's perspective is not so bad: it's great. Assuming the ex-spouse has no moral or philosophical objections to filing for bankruptcy (some people do, see *Christison v. Christison* (*In re Christison*), 201 B.R. 298, 311 (Bankr. M.D. Fla. 1996) (noting that "many individuals today continue to consider bankruptcy an antithetical solution to oppressive debt")), it may not be so bad. However, for the hapless credit card issuer who will not receive money from either the debtor or the soon-to-be-debtor, it is not just bad: it's awful. See also Remarks at the Meeting of the National Bankruptcy Review Commission (Oct. 19, 1996) (minutes on file with author). One marriage and family therapist noted that bankruptcy has a "psycho-biolegal" effect on some people. *Id.*

182. Bankruptcy courts frequently note that people encounter extreme financial difficulties after a divorce and that one of the primary causes for consumer filings is a recent divorce. See *Christison v. Christison* (*In re Christison*), 201 B.R. 298, 301 (Bankr. M.D. Fla. 1996); *Silvers v. Silvers* (*In re Silvers*), 187 B.R. 648 (Bankr. W.D. Mo. 1995); see also Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351 (1994).

lifestyle expenditures. Nor is it clear why courts would use the economic failure of a non-debtor ex-spouse to support its decision to discharge the section (a)(15) debt.

Given the unartful language Congress used in section (a)(15),<sup>183</sup> it is unlikely that courts ever will reach consistent results in interpreting this provision. Because courts interpreting this section have relied heavily on student loan discharge cases, and because the intent of the statute seems to be to discharge the marital debts when forcing debtors to repay the debts would be unduly burdensome, I propose amending section (a)(15) to provide that non-support debts presumptively are dischargeable unless excepting such debt from discharge will impose an undue hardship on the debtor and the debtor's legal dependents. Adopting this revision will prevent debtors from being forced to repay debts when doing so would deprive them of economic necessities, but would force them to repay the debt even if their ex-spouse could afford not to have the debt repaid.

Applying this proposed language probably would change the outcome in *Morris* because the court's holding was based, in part, on the court's concern that forcing the debtor to pay the section (a)(15) debt "nickel and dimed" the debtor and jeopardized his relationship with his children.<sup>184</sup> Applying this proposed language clearly would change the result in *Taylor*. Since the debtor in *Taylor* could repay the debt without sacrificing any economically necessary items, the successful ex-spouse would be repaid and thus be treated no differently than other creditors who can afford not to be repaid (like hospitals, banks, or credit card issuers). Applying the revised section (a)(15) to someone like the *Taylor* debtor would at most force the debtor to (1) suspend payments to his tax-sheltered retirement plan, (2) lease a cheaper apartment, or (3) lease a less expensive car.<sup>185</sup>

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183. One court described the statute as "a paving stone on the road to the region of Hades reserved for litigation nightmares." *In re Smither*, 194 B.R. 102, 106 (Bankr. W.D. Ky. 1996).

184. *Bodily v. Morris (In re Morris)*, 193 B.R. 949, 954 (Bankr. S.D. Cal. 1995).

185. See *Taylor v. Taylor (In re Taylor)*, 191 B.R. 760, 767 (Bankr. N.D.Ill. 1996). Being prevented from accumulating retirement benefits or being forced to move to a cheaper apartment can hardly be considered an undue hardship when one considers that the average savings rate for Americans is 6.4%, and Americans are not guaranteed anyplace to live, much less a large and expensive apartment. See *The Economy: Why Cut Capital Gains Tax Rate? Our Level is Higher Than Most*, INVESTORS BUS. DAILY, Jan. 27, 1997, at B1. Estimates of the number of homeless people in America vary between a low of 192,000 to 300,000 to a high of 1.5 to 3 million. See John J. Dilulio, Jr., *There But For Fortune—The Homeless: Who Are They and How to Help Them*, NEW REPUBLIC, June, 1991, at 28.

Amending the Code to discharge section (a)(15) debts only upon a showing of undue hardship would prevent courts from engaging in the current practice of forcing debtors to repay section (a)(15) debts only if the non-debtor ex-spouse is poorer than the debtor, but not so poor as to be a candidate for bankruptcy relief. Instead, courts would require debtors to sacrifice all economically non-essential lifestyle expenditures and would discharge the section (a)(15) debt only if the debtor cannot both repay the debt and provide economically necessary support for her and her legal dependents.<sup>186</sup>

5. *Lifestyle Choices That Allow Debtors to Make Charitable Contributions Rather Than Repay Their Debts.* Even when people are contemplating bankruptcy and not paying their bills, or have filed for bankruptcy and do not intend to repay all their debts, they frequently give money to their religious organizations. Specifically, some Chapter 7 debtors have attempted to use their future earnings to tithe, rather than to fund a Chapter 13 plan.<sup>187</sup> When this has occurred, courts have questioned whether the debtor is acting in good faith or is attempting to abuse bankruptcy laws.<sup>188</sup> In addition, Chapter 7 and 13 Trustees have brought fraudulent conveyance actions<sup>189</sup> to recover money debtors gave to their churches before they filed for bankruptcy relief.<sup>190</sup> Also, debtors have sought to discharge otherwise

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186. At least one court modified a section (a)(15) debt and required the debtor to pay only a portion of the debt. *Comisky v. Comisky (In re Comisky)*, 183 B.R. 883 (Bankr. N.D. Cal. 1995). While the Code does not authorize courts to modify debts, such an approach would be consistent with the argument advanced in this Article as long as courts discharge only that portion of the section (a)(15) debt that, if repaid, would require debtors to suffer an "undue" hardship.

187. See *In re Hudson*, 56 B.R. 415 (Bankr. N.D. Ohio 1985), *modified in part*, 64 B.R. 73 (Bankr. N.D. Ohio 1986) (dismissing Chapter 7 petition because the debtor contributed funds to non-profit institutions rather than funding a Chapter 13 plan).

188. See, e.g., *Ivy v. Myers (In re Ivy)*, 920 F.2d 936 (9th Cir. 1990); *In re Curry*, 77 B.R. 969 (Bankr. S.D. Fla. 1987); *In re Breckenridge*, 12 B.R. 159 (Bankr. S.D. Ohio 1980).

189. Fraudulent conveyance actions are designed to prevent debtors from diminishing the amount of property available to repay creditors during bankruptcy. A Chapter 7 or Chapter 13 Trustee can avoid a transfer as a fraudulent conveyance by proving that, within a year before filing for bankruptcy, an insolvent debtor transferred an interest in property to a third-party and received less than "reasonably equivalent value" for the transfer. 11 U.S.C. § 548(a)(2) (1994). A debtor facing a fraudulent transfer action is deemed to have been insolvent if, at the time of the transfer, the sum of the debtor's debts exceeded the debtor's property. 11 U.S.C. § 101(32)(A) (1994).

190. See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407 (8th Cir. 1996); *Morris v. Midway S. Baptist Church (In re Newman I)*, 183 B.R. 239 (Bankr. D. Kan. 1995).

nondischargeable debts so they can use that money to tithe.<sup>191</sup>

The conflict between a debtor's desire to tithe rather than repay debts most frequently arises, however, when a Chapter 13 debtor maintains that she is required only to use disposable income *minus* 10% to fund her Chapter 13 plan. In these cases, debtors argue that tithing is reasonably necessary for their support and, accordingly, should be included as a line item in their proposed budgets. Courts typically confirm plans that contain tithing as a necessary expense as long as the tithe is not excessive.<sup>192</sup> Generally, a tithe will be considered excessive only if the debtor proposes to give a disproportionate amount of her disposable income to the religious organization rather than creditors.<sup>193</sup> By framing the argument based on the *amount* of the contribution, courts again fail to ask whether the choice itself (contributing *any* money to a non-creditor organization) is economically necessary and yields tangible, economic benefits to the debtor.

Courts who have addressed tithing generally discount (or ignore) bankruptcy policy. Instead they focus on whether prevent-

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191. Some courts have refused to discharge student loans because of their concern that the integrity of bankruptcy laws would be diminished if they yielded to that choice. *See, e.g.,* *Lynn v. Diversified Collection Serv. & USA Funds, Inc.* (*In re Lynn*), 168 B.R. 693, 697 (Bankr. D. Ariz. 1994); *Motor v. Great Am. Fed. Sav. & Loan Ass'n* (*In re Motor*), 64 B.R. 317, 318 (Bankr. W.D. Pa. 1986).

The court in *In re Sturgeon*, 51 B.R. 82 (Bankr. S.D. Ind. 1985), refused to allow a Chapter 13 debtor to tithe rather than repay a debt relating to a drunk driving judgment (when this case was decided, drunk driving judgments were dischargeable in Chapter 13). The court concluded that, while it was a "noble thought and gesture on her part" to give 10% of the "fruits of her labor" to her church, it would be a "more just and noble a gesture" to offer the money to the estate of the DUI victim. *Id.* at 83.

192. Creditors typically have not argued (and courts have not found) that tithing transformed an otherwise modest budget into an excessive or extravagant one. *See In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995) (while unsecured creditors received nothing, there was no suggestion that the budget included extravagant expenditures); *In re Lees*, 192 B.R. 756, 760 (Bankr. D. Mont. 1994) (budget with proposed tithe listed nothing for recreation or any other discretionary item). Moreover, most Chapter 13 debtors had tithed for a number of years before filing and stated that they would continue to tithe even if it meant taking another job. *See id.* at 758 (debtor tithed for 30 years); *In re McDaniel I*, 126 B.R. 782, 783 (Bankr. D. Minn. 1991) (debtor tithed for "several" years); *In re Packham*, 126 B.R. 603, 605 (Bankr. D. Utah 1991) (debtors tithed since they first started earning income); *In re Navarro*, 83 B.R. 348, 357 (Bankr. E.D. Pa. 1988) (debtor testified tithing was a long-standing family practice).

193. *See, e.g., In re McDaniel I*, 126 B.R. 782 (determining \$540 monthly tithe excessive where creditors receive only \$600); *In re Breckenridge*, 12 B.R. at 159-60 (allowing tithe would reduce creditors repayment from 70% to 10%); *In re Curry*, 77 B.R. 969 (proposing to give more than 50% of disposable income deemed excessive); *but see In re Gaukler*, 63 B.R. 224, 225-26 (Bankr. D.N.D. 1986) (finding debtor's tithe of over one-third of monthly income was excessive, but not considered substantial abuse).

ing the debtor from tithing violates the First Amendment<sup>194</sup> or, more recently, the Religious Freedom Restoration Act ("RFRA").<sup>195</sup> Missing from both the judicial and scholarly treatment of the issue is an in-depth consideration of the following question: assuming tithing is *not* constitutionally protected,<sup>196</sup>

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194. See *In re Lees*, 192 B.R. at 758-59; *In re Newman I*, 183 B.R. 239; *In re Cavanaugh*, 175 B.R. at 374; *In re Faulkner*, 165 B.R. 644 (Bankr. W.D. Mo. 1994); *In re Lee*, 162 B.R. 31 (Bankr. N.D. Ga. 1993); *In re McDaniel I*, 126 B.R. at 784; *In re Green*, 103 B.R. 852 (Bankr. W.D. Mich. 1988); *In re Miles*, 96 B.R. 348 (Bankr. N.D. Fla. 1989); *In re Bien*, 95 B.R. 281 (Bankr. D. Conn. 1989); *In re Reynolds*, 83 B.R. 684 (Bankr. W.D. Mo. 1988); *In re Navarro*, 83 B.R. at 353; *In re Curry*, 77 B.R. 969; *In re Green*, 73 B.R. 893 (Bankr. W.D. Mich. 1987); *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr. N.D. Ga. 1986).

195. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified in scattered sections of 42 U.S.C. and 5 U.S.C.). See *In re Young*, 82 F.3d 1407, 1418-19 (8th Cir. 1996) (finding fraudulent conveyance actions to recover tithes violate RFRA because governmental action significantly constrained the debtors' ability to express a central tenet of their religious beliefs, curtailed the debtors' ability to express adherence to their faith, and denied the debtors a reasonable opportunity to engage in tithing, a concept fundamental to their religion). See also, *Morris v. Midway S. Baptist Church (In re Newman II)*, 203 B.R. 468, 475-77 (D. Kan. 1995); *Fitzgerald v. Magic Valley Evangelical Free Church (In re Hodge)*, 200 B.R. 884, 894-901 (D. Idaho 1996); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995); *In re Faulkner*, 165 B.R. 644, 648 (Bankr. W.D. Mo. 1994). In *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the United States Supreme Court held that Congress exceeded its remedial powers when it enacted RFRA. Because RFRA is unconstitutional, bankruptcy courts must now rely on the First Amendment to protect a debtor's right to tithe.

196. It is beyond the scope of this Article to address whether tithing is a constitutionally protected activity. Many commentators have undertaken this task already. See, generally, Oliver B. Pollack, *Religious Tithing, Fraudulent Transfers in Bankruptcy, and the Religious Freedom Restoration Act*, 6 J. BANKR. L. & PRAC. 209 (1997); Pollack, *supra* note 6; Brian Wildermuth, Note, *In re Lee: Tithing As Grounds for Dismissal Under Section 707(b) of the Bankruptcy Code*, 26 U. Tol. L. Rev. 725 (1995); Michael M. Duclos, *A Debtor's Right to Tithe in Bankruptcy Under the Religious Freedom Restoration Act*, 11 BANKR. DEV. J. 665 (1995); Long, *supra* note 89; Donald R. Price & Mark C. Rahdert, *Distributing the First Fruits: Statutory and Constitutional Implications of Tithing in Bankruptcy*, 26 U.C. DAVIS L. REV. 853 (1993); Cerne, *supra* note 5; Bruce Edward Kosub & Susan K. Thompson, Note, *The Religious Debtor's Conviction to Tithe as the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873 (1988); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and The U.S. Code*, 56 MONT. L. REV. 249 (1995); David W. Case, Comment, *Resolving the Conflict between Chapter 13 of the Bankruptcy Code and the Free Exercise Clause—In re Green: A Step in the Wrong Direction*, 57 MISS. L.J. 163, 166 (1987).

If the bankruptcy court concludes that tithing is a constitutionally protected lifestyle choice, and that the government does not have a compelling interest in either the efficient and orderly administration of the bankruptcy system or protecting the legitimate interests of creditors, the court would not need to consider whether tithing is a necessary lifestyle choice. If, instead, the court concludes that tithing either is *not* a protected activity or that the government has a compelling interest in having an efficient, orderly, and fair federal debt collection system, courts then should ask whether tithing yields an economically necessary, tangible benefit to the debtor.

should this lifestyle choice be allowed in bankruptcy? Because courts and scholars largely have ignored this crucial policy consideration, their analyses of the issues have been influenced by whether they think the act of giving money to a church is good (not whether the act is consistent with bankruptcy policy) or whether the debtor gave the church too much money (not whether the debtor should be allowed to give *any* amount).

The lifestyle choice to tithe economically harms creditors but does not provide tangible, economic benefits to the debtor.<sup>197</sup> Since this choice economically harms creditors but does not give debtors tangible, necessary, economic<sup>198</sup> benefits, the choice should be denied even if the court thinks it is noble. In contrast, if giving money to a church yields a tangible economic benefit because, for example, it is a necessary business expense,<sup>199</sup> then the debtor should be allowed to make the contribution even if the court disapproves of it. Finally, as is true with all discretionary expenditures, debtors should be allowed to give money to a church or any other non-creditor organization if they are willing to sacrifice "necessary" items by, for example, restricting the amount or quality of food or clothing purchases.<sup>200</sup>

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197. I recognize that some devoutly religious debtors believe tithing is required by their faith and that adhering to their faith gives them the benefit of eternal life. *See Mark 16:16; Romans 13:2; 1 Timothy 5:12.* While I neither dispute nor denigrate the sincerity of such beliefs, the Bankruptcy Code regulates only a debtor's physical, earthly needs. It is not designed, nor does it have the authority or ability, to regulate the debtor's psyche or his life in the hereafter.

198. Again, I recognize that in the Christian faith, many believers feel that exercising their religious faith sustains them just as much as food, shelter, clothing, or medical care does. *See John 6:27, 53-58; Revelations 2:7, 21:6.* Just as this Article distinguishes between necessary and non-necessary expenses, life's necessities are secularly defined. "Food" means edible goods that are physically consumed in the body, not the "bread of life", "bread of the mighty," or other forms of "spiritual" nourishment. *John 6:35; Psalm 78:25.* Shelter means a structure that protects the debtor from meteorological harm, not a spiritual "shelter from the storm." *Isaiah 25:4.* Clothing means those items that are worn physically to protect the body from the elements, not a "cloth of righteousness" or "salvation." *Job 29:14; II Chronicles 6:41.* Finally, I limit the definition of necessary medical care to services rendered by a human being who received medical training somewhere on this earth, while recognizing that many devout Christians genuinely believe that their Lord is their "healer." *Psalms 103:2-3, 107:19-21, 147:3.*

199. For example, if the debtor is a full-time clergy person whose employer requires all employees to tithe, the tithe should be included in the debtor's budget as a necessary work expense. The same analysis also would apply if, for example, a debtor could show that contributing to the United Way Campaign was a necessary business expense.

200. *See In re Stottlemire*, 146 B.R. 234, 237 (Bankr. W.D. Mo. 1992) (stating that Chapter 12 debtor can restrict personal expenses for food or clothing to support their desire to give money to their church).

6. *Lifestyle Choices That Provide Financial Support to Post-Petition Legal Dependents.* A debtor who marries or procreates during the term of a Chapter 13 plan should be permitted to modify plan payments to account for any additional expenses caused by this lifestyle choice as long as she did not marry or give birth solely for the purpose of economically harming her creditors. Typically, a Chapter 13 debtor who encounters an adverse change in circumstances may petition the court to modify the terms of the plan by decreasing the amount, or extending the number of payments.<sup>201</sup> The Code does not list the factors courts should consider when deciding whether to modify or eliminate<sup>202</sup> plan payments nor does it tell courts how much debtors must sacrifice before they are entitled to reduce plan payments.<sup>203</sup> In general, courts deny plan modifications if (1) the debtor "chose" to engage in a lifestyle activity, (2) the lifestyle activity created the inability to make plan payments, and (3) the lifestyle activity is not a "noble" one.<sup>204</sup> In short, if the debtor "caused" her inability to make plan payments, courts will not allow her to modify those payments.<sup>205</sup>

While the "you-caused-it" reasoning sounds reasonable in the abstract, applying it to choices involving marriage and procreation can lead to disturbing and unanticipated results. For example, the debtor in *In re Nelson*<sup>206</sup> sought to modify her Chapter 13 plan payments because she could no longer make

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201. See 11 U.S.C. § 1329(a)(1) & (2) (1994). The Code also permits the trustee and creditors to ask the court to modify plan payments in order to increase the amount of payments or decrease the length of plan payments.

202. Courts also may grant a "hardship" discharge before the debtor completes plan payments if the debtor's failure to complete such payments is due to circumstances beyond the debtor's control. See 11 U.S.C. § 1328(b)(1) (1994). If a debtor receives a "hardship discharge", she is required to repay debts that are dischargeable in Chapter 13, but are non-dischargeable in Chapter 7. See 11 U.S.C. § 1328(b)(2) (1994). Thus, the "penalty" for failure to complete plan payments is the loss of the Chapter 13 super-discharge. See discussion *supra* note 80.

203. See, e.g., Harry L. Deffebach, *Postconfirmation Modification of Chapter 13 Plans: A Sheep in Wolf's Clothing*, 9 BANKR. DEV. J. 153, 153 (1992) ("[T]he various approaches to postconfirmation modification of chapter 13 bankruptcy plans are obscured in rhetoric, resulting in contradictory judicial approaches to postconfirmation modification of chapter 13 plans.") (notes omitted).

204. See generally *In re Cooper*, 98 B.R. 294, 300 (Bankr. W.D. Mich. 1989) (stating any modified Chapter 13 plan must meet all Chapter 13 requirements).

205. Compare *In re Witkowski*, 16 F.3d 739, 742-44 (7th Cir. 1994) (there is no requirement that a debtor initially show a change in circumstances before seeking to modify plan payments) with *In re Arnold*, 869 F.2d 240 (4th Cir. 1989) (to avoid a court ordered increase in monthly bankruptcy payments, a debtor must evidence an unanticipated substantial increase in his expenses).

206. 189 B.R. 748 (Bankr. D. Minn. 1995).

full plan payments and pay the expenses related to her new, physically disabled, husband.<sup>207</sup> No one disputed that the debtor's spouse was disabled and could not work or that the debtor's new expenses actually were for her spouse.<sup>208</sup> The only dispute was whether she was entitled to modify her Chapter 13 plan to account for the expenses created by her post-confirmation decision to marry a disabled person. The court characterized the debtor's decision to marry a disabled person who did not contribute to the debtor's household income as "voluntary," noting that she was aware of her new spouse's disability before she married him, and that she "must have known that the disability would limit his ability to contribute to their marital expenses."<sup>209</sup> The court rejected the debtor's claim that these changed circumstances warranted a decrease in plan payments, finding that the "circumstances are of her own making."<sup>210</sup>

This "you-caused-it" analysis would be appropriate if the court was considering whether the debtor could modify plan payments because she voluntarily purchased a BMW. Refusing to condone the BMW-purchasing debtor's lifestyle choice makes sense, since permitting that choice would give the debtor an economically non-necessary benefit that harms her creditors. While modifying the plan to account for expenses the debtor incurred by marrying a disabled person *does* prevent debtors from repaying debts, providing support for a disabled spouse generally does not divert money from creditors to the debtor. Moreover, categorically preventing debtors from supporting dependents acquired post-petition ignores the primary reason Congress and courts allow debtors to support their dependents and fails to recognize that providing this type of support may in many circumstances be in the best interests of creditors.

Congress recognized that, in some situations, debt repayment must yield to a debtor's desire to protect her loved ones. In addition to allowing Chapter 13 debtors to support their legal dependents, the Code automatically stays lawsuits to collect co-signed debts until the bankruptcy case is either closed, dismissed or converted and permits debtors to repay co-signed debts at a higher rate than other unsecured debts.<sup>211</sup> Congress prevents creditors from suing co-signors to collect the debt, then

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207. *See id.* at 749-50.

208. *Id.* Moreover, the debtor could have included the expenses that were reasonably necessary to support her spouse in her original Chapter 13 plan. *Id.*

209. *Id.* at 751.

210. *Id.*

211. 11 U.S.C. §§ 1301(a) & 1322(b)(1) (1994).



permits debtors to discriminate in favor of creditors holding claims co-signed by debtors' spouses and loved ones to ensure that debtors focus on rehabilitating themselves in bankruptcy rather than shielding their friends or family from creditor collection attempts.<sup>212</sup> Just as debtors would feel compelled to repay co-signed debts outside the plan to protect their loved ones, they would feel compelled to pay for the necessary living expenses of their spouses—whether the marriage occurred pre- or post-petition.

While creditors reasonably could expect a debtor to continue making plan payments even if she is not allowed to subscribe to cable or *People* magazine, it is unlikely that a debtor will continue making plan payments if doing so prevents her from giving her husband life's basic necessities. If Chapter 13 debtors use their income to support their spouses rather than make plan payments, creditors' alternatives are to move to have the case either dismissed or converted to Chapter 7.<sup>213</sup> Creditors almost always receive less in Chapter 7 than they do in Chapter 13.<sup>214</sup> Thus, even if the *Nelson* debtor created the adverse circumstance by marrying a disabled man, allowing her to modify the plan to account for her new spouse's expenses actually benefits her creditors because the modification increases the likelihood that she will continue to make plan payments.

The rigid "you-caused-it" analysis also ignores the possibility that marrying a person who cannot work outside the home could provide a tangible economic benefit to the debtor and a long-term benefit to creditors. If the debtor has children and the disabled spouse can provide in-home child care, the debtor would not have to pay the expenses for an outside child care provider. In addition, having an in-home child care provider may allow a debtor/parent to take a more demanding (or a second) job. Categorically preventing plan modifications based on voluntary post-petition marital lifestyle choices ignores the possibility

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212. See *Timex Fed. Credit Union v. Di Domizio (In re Di Domizio)*, 11 B.R. 357, 358 (Bankr. D. Conn. 1981) (observing that Code section 1301 was enacted to prevent creditors from bringing indirect pressure on Chapter 13 debtors to make payments outside the plan by threatening to collect the debt from friends or relatives who co-signed the debt); *In re Martin*, 189 B.R. 619, 627 (Bankr. E.D. Va. 1995) (presuming that discriminatory treatment allowed by Code section 1322 was necessary to ensure the debtor completed plan payments without facing overwhelming pressure to make additional payments outside of the plan).

213. See 11 U.S.C. § 1307(c)(6) (1994) (court may dismiss a Chapter 13 case or convert it to a Chapter 7 case if the debtor defaults under the plan).

214. See *supra* note 130.

that the debtor can show that providing support for her husband gives her a tangible economic benefit.

Finally, given the potential breadth of the court's "you-caused-it" analysis, courts applying this analysis could (1) prevent a married female debtor from modifying a plan to account for pregnancy-related expenses if she became pregnant but chose not to abort the child, or (2) prevent a debtor from modifying plan payments to include additional medical expenses created by injuries the debtor sustained while voluntarily engaging in a known high risk activity like skydiving, skiing, or parasailing. Since the decision to give birth or to participate in a risky activity is a "choice," courts could refuse to permit plan modifications in these instances—even though the medical expenses related to the choice are economically necessary—simply because the choice was the debtor's.

Courts should not reduce plan payments if a debtor chooses to marry a person who will not work or chooses to bear multiple children during the pendency of a Chapter 13 plan.<sup>215</sup> Where, however, a debtor's lifestyle choice creates economically necessary expenses, or where denying the choice most likely will economically harm creditors, courts should allow the choice even if the court is offended by the choice or thinks the debtor voluntarily made the choice.

7. *Lifestyle Choices Supported By State Exemption Statutes.* A Chapter 7 debtor gives the Trustee virtually all the property she owns when she files her bankruptcy petition, except for a limited amount of property she can protect or "exempt" under section 522 of the Code. Debtors can exempt property under section 522<sup>216</sup> to ensure both that they keep a reasonable amount of economic assets to help them start over in life and that they

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215. How many kids is too many kids is a decision that courts necessarily must decide on a case-by-case basis. If the debtor is pregnant when the plan is confirmed, it is at least biologically possible for her to seek modification more than once during the course of a three to five year plan. If the court concludes that the debtor is "choosing" to have additional children rather than repaying her debts, then it would be appropriate to deny further modifications—not because she chose to become pregnant, but because she became pregnant solely to avoid repaying her debts.

216. See H.R. REP. NO. 95-595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087. Although section 522 applies to both Chapter 7 and 13 filings, most exemption cases involve Chapter 7 debtors. Chapter 13 debtors generally have no need to exempt property from creditors because they typically keep all their pre-petition property, both exempt and non-exempt, and fund the plan using their post-petition disposable income, not their pre-petition property. See *In re Cordes*, 147 B.R. 498, 504 (Bankr. D. Minn. 1992).

keep some sentimental assets.<sup>217</sup> Allowing debtors to exempt property under state exemption statutes that place no monetary limitations on the value of exemptible property<sup>218</sup> represents perhaps the most striking conflict between the need to allow debtors to keep economically necessary items and the need to prevent them from keeping economically non-necessary items.

Creditors criticize the exemption procedure provided in Section 522 for two primary reasons. First, because debtors can exempt property based either on state statutes or the Code,<sup>219</sup> creditors and commentators argue that the exemption scheme creates non-uniformity and creditor uncertainty and prevents creditors from knowing (both when credit is extended and when the debtor files for bankruptcy) exactly what (and how much) property a debtor will claim as exempt.<sup>220</sup> Second, and more important, creditors criticize exemptions because they let some debtors manipulate generous state exemption laws to shield virtually all their assets from creditors. This, critics contend, gives debtors a "head" start—not just a fresh start.<sup>221</sup>

In addition to having the right to exempt extravagant real property, debtors have the right to convert nonexempt assets (like cash) into exempt property (like a home) solely to take ad-

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217. See, e.g., VA. CODE ANN. §§ 34-26(1) (family bible), 34-26(1a) (wedding and engagement rings), 34-26(2) (family portraits and heirlooms valued at less than \$5000), & 34-26(5) (family pets not kept or raised for sale or profit); FLA. STAT. ANN. § 222.18 (West 1989) (disability benefits); MASS. GEN. LAWS. CH. 235 § 34 (West 1986) (2 cows, 12 sheep, two swine and 4 tons of hay, as well as tools used to carry on debtor's trade); OHIO REV. CODE ANN. § 239.66 (Baldwin 1994) (debtor's interest in a burial lot and professionally prescribed or medically necessary health aids).

218. *Border v. McDaniel* (*In re McDaniel II*), 730 F.3d 841 (5th Cir. 1995) (debtor claimed 165 acre property as exempt); *Davis v. Davis* (*In re Davis*), 170 B.R. 892, 893 (Bankr. N.D. Tex. 1994) (debtor claimed \$500,000 house as exempt). See TEX. PROP. CODE ANN. § 41.002 (West Supp. 1997) (unlimited homestead exemption); FLA. STAT. ANN. § 222.01 (West Supp. 1997) (unlimited homestead exemption).

219. A debtor may claim property as exempt by relying on either section 522(d) of the Code or her state's exemption laws, unless the debtor's state of residence has "opted out" of the federal exemptions and requires debtors to rely on state law. See 11 U.S.C. § 522(b)(1)-(b)(2)(B) (1994).

220. See Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 339 (1982) (letting debtor's exemption vary by state increases creditors' uncertainty and costs).

221. See William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1152 (1983) ("To overcome the major criticisms of the new Bankruptcy Act, one simple and relatively minor change is needed. The exemption policy should be modified . . ."); Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 994 (1981) (arguing that exemption planning allows debtors to keep more property than they need for survival and a fresh start).

vantage of generous exemption statutes.<sup>222</sup> That debtors engage in such pre-filing exemption planning is no secret.<sup>223</sup> Most do so openly, on the advice of counsel.<sup>224</sup> The Code places no limits on the amount of non-exempt property a debtor can convert to exempt property.

While Congress is aware that pre-filing exemption planning occurs, it has been unwilling to limit either a debtor's right to rely on generous state law exemptions or her right to convert nonexempt property into exempt property to shield it during the bankruptcy proceeding.<sup>225</sup> Instead, Congress has made the policy determination that States should be allowed to determine the minimal living needs of their residents. Since Congress prevents courts from applying a good faith test to examine pre-filing conversions of property,<sup>226</sup> as long as a debtor can prove that he did not fraudulently convert the property, courts should permit him to exempt converted property even if it is non-necessary.<sup>227</sup> Thus,

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222. See generally Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?* 70 N.Y.U. L. REV. 235 (1995); Douglas E. Deutsch, Note, *Exemption Reform: Examining the Proposals*, 3 AM. BANKR. INST. L. REV. 207 (1995); J.T. Hardin, *Bankruptcy Planning: Risks of Converting Nonexempt Property to Exempt Property on the Eve of Bankruptcy*, 12 OKLA. CITY U.L. REV. 279 (1987); Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22 (1983); Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615 (1978); Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459 (1959).

223. See *Border v. McDaniel* (*In re McDaniel II*), 70 F.3d 841, 843 (5th Cir. 1995) ("[W]e must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly—or even knowingly but powerless to avoid it—assist a dishonest debtor in wrongfully defeating his creditor.' This may account for the oft-repeated creditor's lament: 'Debtors either die or move to Texas.'" (footnote omitted).

224. See *Norwest Bank Neb. v. Tveten*, 848 F.2d 871, 872 (8th Cir. 1988) ("As part of his pre-bankruptcy planning, [the debtor] liquidated almost all of his non-exempt property, converting it into exempt property worth approximately \$700,000.").

225. For example, Congress considered an amendment to section 522 to limit the homestead exemption to \$500,000 in the Bankruptcy Technical Amendments Act of 1996, 104th Cong., 2d Sess. SB1559. While the Act passed the Senate, it did not come up for a vote in the House.

226. See *Davis v. Davis* (*In re Davis*), 170 B.R. 892, 898 (N.D. Tex. 1994) ("Texas could provide a remedy by limiting the amount of homestead equity available for exemption by a debtor. Congress could also provide a remedy by affirmatively limiting state exemptions available under § 522(b)(2). But this court must apply the statutes as it finds them.")

227. Cf., *First Tex. Savings Ass'n v. Reed* (*In re Reed*), 700 F.2d 986 (5th Cir. 1983), in which the court acknowledged that state law allows debtors to convert non-exempt property into exempt property before filing for bankruptcy. The court stressed, however, that federal law determined whether the debtor was entitled to a bankruptcy discharge because the Code, not state law, "sets separate standards for determining whether the

even if courts feel that debtors are openly "abusing" the Code by exempting lavish (and thus, non-necessary) items, they should not substitute their policy determination for the determination Congress already has made.

Courts should not attempt to judicially repeal unambiguous state exemption statutes to prevent debtors from making non-necessary lifestyle choices. When courts must apply state exemption statutes that have no monetary limitations, they frequently rely on vague, imprecise, subjective concepts like "good faith" or "abuse" to prevent debtors from exempting expensive property. Relying on these terms causes courts to reach widely varying conclusions concerning a debtor's right to engage in pre-filing exemption planning. Two cases, issued by the Eighth Circuit on the same day, present strikingly inconsistent analyses of a debtor's right to engage in pre-bankruptcy exemption planning.

The Chapter 11 debtor (a doctor) in *Norwest Bank Nebraska v. Tveten*<sup>228</sup> converted non-exempt property (worth approximately \$700,000) to exempt property immediately before he filed his bankruptcy petition. The debtor admitted that, on advice of counsel, he converted the property solely to shield those assets from creditors.<sup>229</sup> The Eighth Circuit agreed with the lower courts' finding that the debtor's behavior was an abuse of bankruptcy laws, and, accordingly, refused to grant the debtor a discharge.

The Chapter 7 debtors (farmers) in *Hanson v. First Nat'l Bank in Brookings*,<sup>230</sup> also engaged in pre-filing exemption planning. They also converted non-exempt property (worth approximately \$31,000) to exempt property immediately before filing. It also appeared that they converted the property on the advice of counsel, as they admitted that they were attempting to preserve their state law exemptions.<sup>231</sup> On the same day it concluded that the doctor in *Norwest Bank* would not receive a discharge, the Eighth Circuit concluded that the farmers could keep the exempt property *and* would received a discharge.

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debtor shall be denied a discharge." *Id.* at 991. Because the court found that there was "evidence of actual intent to defraud creditors" and that the debtor failed to explain satisfactorily why the nonexempt-assets were sold at less than fair market value, the court denied the discharge. *Id.*

228. 848 F.2d 871 (8th Cir. 1988).

229. *See id.* at 873.

230. 848 F.2d 866 (8th Cir. 1988).

231. *See id.* at 867.

The majority opinions ignore the apparent inconsistency of affirming two opinions, posing virtually identical fact patterns, where one court found fraud but the other did not. The only noticeable differences between the two cases were the state's exemption laws, the amount of property the debtors converted, and the debtors' occupations. The majority opinions claim that they did not base their judgments on these differences. Instead, the majorities purport to base their decision to allow the farmers to exempt the property, but deny the doctor the same right, on a procedural technicality. The standard of review for the lower courts' findings of fact was clearly erroneous. Because the majority concluded that neither lower court's findings was clearly erroneous, both cases were affirmed even though the conclusions the decisions reached were inconsistent.

Despite the Eighth Circuit's contention that it relied solely on the standard of review, the majority opinions seemed to be influenced by the factual differences (state law, amount of converted property, debtors' occupations) in the two cases. These differences clearly are irrelevant for bankruptcy purposes as the Code allows all debtors—regardless of their socio-economic status or the amount of their claimed exemptions—to rely on their state statutory exemptions. In fact, the judge who concurred in *Hanson* and dissented in *Norwest Bank* refers to the differences as plainly immaterial and legally irrelevant<sup>232</sup> and criticizes the majority opinions for failing to explain why they agreed that the doctor committed fraud, but the farmers did not. Moreover, this judge expressed concern about the guidance (or lack thereof) these two opinions gave litigants and lower courts. The concurrence argues that the majority's analysis in *Hanson* "is not a rule of law" but, instead, is a "license to make distinctions among debtors based on subjective considerations that will vary more widely than the length of the chancellor's foot"<sup>233</sup> and characterizes the opinion in *Norwest Bank* as one that "leaves the distinction between permissible and impermissible claims of exemption to each bankruptcy judge's own sense of proportion."<sup>234</sup>

Allowing debtors to shield expensive property economically harms creditors, obviously is not consistent with debt repayment,<sup>235</sup> and appears to abuse the spirit of bankruptcy policy.

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232. *See id.* at 870.

233. *Id.* at 871.

234. 848 F.2d at 879.

235. The Chapter 7 Trustee uses only non-exempt property to pay creditor claims and must pay expenses and claims in a specified order. *See* 11 U.S.C. §§ 507, 704(1) & 726 (1994). If the debtor does not have non-exempt, unencumbered assets sufficient to

Notwithstanding this appearance, the exemption scheme clearly is consistent with the fresh start state legislatures have decided to give their citizens *via* unambiguous exemption statutes. As long as Congress has made the policy determination that debtors may rely on state exemption statutes, courts should not attempt to erode that policy determination by hampering a debtors' efforts to take full advantage of those statutes.<sup>236</sup> Moreover, any effort to judicially repeal an otherwise unambiguous statute creates uncertainty and increased costs for both debtors and creditors since neither party would know which court would interpret the statute as written and which would engraft a good faith requirement onto the statute.

While courts often attempt to prevent debtors from exempting substantial parcels of real estate, they essentially have ignored smaller luxury items as long as the item falls within a category of items that can be claimed as exempt under state law. Rather than making a distinction between smaller versus larger items, courts should make a distinction between ambiguous versus unambiguous exemption statutes. If the statute is unambiguous, debtors should be allowed to exempt both large and small pieces of property, whether necessary or not. In contrast, if a debtor relies on an ambiguous state exemption statute to exempt non-necessary property, the court should construe the statute in a manner that limits the exemption to only necessary items.<sup>237</sup>

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pay all claims, each class of creditors will receive a *pro rata* share of the assets. 11 U.S.C. § 726(b) (1994). In "no-asset" Chapter 7 cases, unsecured creditors receive nothing. See *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983). Even if there are no non-exempt assets, the Chapter 7 debtor will receive a permanent discharge of all non-dischargeable pre-petition debts. Once the Chapter 7 debtor receives a discharge, her pre-petition creditors can never collect those discharged claims unless the debtor agrees to repay (*i.e.*, reaffirm) the debts. 11 U.S.C. § 524(a) & (c) (1994).

236. Again, it is not the purpose of this Article to determine whether Congress *should* allow debtors to rely on unrestricted state exemption schemes. Instead, I suggest that unless and until Congress unequivocally states that pre-filing conversions are not allowed in bankruptcy, courts should interpret the Code—as written—even though this may permit some debtors to avoid paying their debts.

237. Courts liberally construe state exemption statutes in the debtor's favor. See, e.g., *Border v. McDaniel* (*In re McDaniel II*), 70 F.3d 841, 843 (5th Cir. 1995) (interpreting Texas law); *In re Geise*, 992 F.2d 651, 656 (7th Cir. 1993) (interpreting Wisconsin law). Notwithstanding "this general principle of liberal construction," courts should not rely on this principle to "write exemptions into statutes." *In re Geise*, 992 F.2d at 656. If an exemption statute might be interpreted either favorably or unfavorably *vis-à-vis* the debtor, courts should interpret the statute in a manner that favors the debtor's right only to exempt economically necessary items. Cf. *In re Barker*, 768 F.2d 191, 196 (7th Cir. 1985) (interpreting Illinois law in manner that favors debtor without regard to bankruptcy policies).

The court in *In re Perry*<sup>238</sup> had the opportunity—but refused—to narrowly construe an exemption to prevent a debtor from keeping a mink coat. The debtor in *Perry* exempted property under a state exemption law which, at that time, permitted debtors to exempt “[a]ll necessary wearing apparel.”<sup>239</sup> While some provisions in that exemption statute contained monetary caps on the value of property a debtor could exempt, there was no cap for wearing apparel.<sup>240</sup> Because of this, the debtor claimed that a \$2,500 mink coat was “necessary” wearing apparel. Although the express language of the exemption statute protected only “necessary” apparel, the court steadfastly refused to decide whether a mink was “necessary.”

Acknowledging that the use of the term “necessary” might suggest that it is “a word of limitation requiring the fixing of a value upon the coat in question as a criteria in determining its exempt status,” the court nevertheless permitted the choice because it found that there was “no question of a good faith claim” that coats are necessary items of clothing.<sup>241</sup> While the court correctly noted that the state legislature easily *could* have placed a monetary cap on the value of “necessary” wearing apparel,<sup>242</sup> the court just as easily could have denied the debtor’s attempt to retain an obvious luxury item. For some reason, however, the court would not state that, while coats are necessary, mink coats are not. Rather than interpreting the exemption statute to allow only those exemptions that protect a debtor’s right to a fresh (you get a warm coat), not a head (you don’t get a mink) start, the court abdicated its responsibility to protect creditor’s rights—and the integrity of the bankruptcy process.

The court’s analysis in *In re Lyall*<sup>243</sup> is equally puzzling. There, the debtor relied on an exemption statute that allows debtors to exempt a motor vehicle not exceeding \$10,000 in value which is necessary for use in the course of the debtor’s occupation or trade.<sup>244</sup> The debtor sought to exempt an Acura Legend automobile. The Chapter 13 Trustee conceded that the

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238. 6 B.R. 263 (Bankr. W.D. Va. 1980).

239. *Id.* at 264. The Virginia General Assembly has since amended sections 34-26 to limit the value of wearing apparel a debtor may exempt to \$1,000. VA. CODE ANN. § 34-26 (Michie 1996).

240. When the court decided *Perry*, the following monetary caps existed: value of a clothes dryer (\$150); value of provisions (\$50); value of fowl (\$25); value of hay (\$25); value of a fisherman’s boat and tackle (\$1500). *In re Perry*, 6 B.R. at 264.

241. *Id.* at 264-65.

242. *See id.* at 264.

243. 193 B.R. 767 (Bankr. E.D. Va. 1996).

244. *See* VA. CODE ANN. § 34-26(7) (Michie 1996).



value of the Acura did not exceed \$10,000, but argued that a luxury car like an Acura was not necessary to the debtor's occupation as an architect. Like the court in *Perry*, the *Lyall* district court refused to decide whether a seemingly luxury item is "necessary," even though the express language of the state exemption statute permitted debtors to exempt only necessary automobiles. Rather than interpreting the statute in a way that prevented the debtor from keeping what appeared to be a luxury item, the court stated that "an inquiry into whether the vehicle is a luxury automobile is unnecessary when the net fair market value is established to be under \$10,000."<sup>245</sup> Because the court was unwilling to state that an automobile is necessary, but a luxury car like an Acura may not be, the court again abdicated its duty to protect creditor's rights—and the integrity of the bankruptcy process.<sup>246</sup>

If an exemption statute uses a limiting word like "necessary"<sup>247</sup> and the Trustee or a creditor objects to the exemption, courts have a right and, more importantly, a duty to decide whether the specific item claimed as exempt is necessary. Courts should not permit debtors to exempt a luxury item merely because it is included in a category of items deemed to be necessary. Instead, if the court concludes that the item claimed as exempt is necessary, but that the quality or cost of the particular type of the item is not, it should force the debtor to sacrifice the non-necessary item.

If, however, denying the exemption will not yield an economic benefit to the creditor, then the lifestyle choice should be permitted even if the choice is non-necessary. For example, if the

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245. *In re Lyall*, 193 B.R. at 769.

246. In contrast, the judge in *In re Erwin*, 199 B.R. 628 (Bankr. S.D. Tex. 1996), refused to allow the debtor to exempt a 1988 Ford Crown Victoria LTD as a tool of the trade. The court distinguished between a debtor's need to have access to a car, and the debtor's need to have that particular car: "this car is not 'necessary' to his alleged trade—any car would be adequate." *Id.* at 631. See also *In re Weinstein*, 192 B.R. 133 (Bankr. E.D. Va. 1995) (emphasizing that the word "necessary" prevented the debtor from exempting a pickup truck).

247. See, e.g., CAL. CIV. PROC. CODE § 703.140(E) (West Supp. 1997) (allowing debtor to keep alimony, stock bonus, payment on account of wrongful death, and payment under a life insurance contract to the extent reasonably necessary for the support of the debtor); GA. CODE ANN. § 44-13-100 (Supp. 1997) (allowing debtor to keep alimony payments, pension benefits, and IRA benefits to the extent reasonably necessary for the support of the debtor); OKLA. STAT. ANN. tit. 31 § 1 (West 1991) (allowing debtor to keep implements of husbandry necessary to farm the homestead); N.Y. DEBT. & CRED. LAW § 282 (McKinney 1990) (allowing debtor to keep payment on account of wrongful death or payment in compensation for loss of future earnings to the extent reasonably necessary for the support of the debtor).

cost to purchase a necessary car/coat is equal to or greater than the money the debtor would receive if he sold the Acura/mink, then creditors would not benefit from the sale. In such a case, the debtor should be allowed to keep the non-necessary property. In contrast, if the debtor can sell the Acura/mink, purchase a replacement car/coat and still have proceeds remaining from the sale to satisfy creditors' claims, then the debtor should be forced to sell the non-necessary property.

### CONCLUSION

Congress and the courts must find a more consistent way to address lifestyle issues. Courts' sporadic treatment of these issues has led them to prevent debtors from making choices permitted by the Code, simply because the court dislikes the particular choice. Likewise, courts have allowed debtors to make choices that economically prejudice creditors even though those choices are not necessary or yield no tangible, economic benefits to the debtor.

Preventing debtors from making economically non-necessary choices would not force courts to become inappropriately judgmental because the courts' primary focus would be to limit the economic impact of the choice on creditors.<sup>248</sup> Moreover, to the extent that the courts' conclusion appears judgmental, this would not be inappropriate. Courts quite appropriately judge a debtor's post-petition lifestyle because the debtor incurred debt, chose not to repay the debt,<sup>249</sup> then chose (at least with respect to most cases)<sup>250</sup> to file for bankruptcy. By inviting the bank-

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248. The lifestyle choices courts should disallow are not core public values that should be protected at all costs. As such, there should be little disruption to the overall statutory bankruptcy scheme or to the moral growth of our society if these choices are disallowed. See, e.g., William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1015 (1989) ("[T]here are at least some values, like the anti-segregation principle, that have worth and contribute to the moral growth of our society.").

249. See SULLIVAN, ET AL., *supra* note 24, at 7:

[B]eing in financial trouble does not always lead to bankruptcy. If Joe, Jean, and Julius are all in deep financial trouble. Joe may go bankrupt, Jean may struggle to pay, and Julius may skip town. From one perspective, it can be said that Joe's bankruptcy was "caused" by his unwillingness to struggle as hard as Jean or to sneak out of town like Julius.

250. The overwhelming majority of bankruptcy filings are debtor-initiated. For example, in the year ending June 30, 1994, the total number of voluntary petitions filed in this country was 844,087. For the same period, only 1,170 involuntary petitions were filed. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 553 (115th ed. 1995). In the Eastern District of Virginia, Norfolk Division, 6,843 petitions were filed in 1995. Only three were involuntary petitions. Interview with Debera Conlon, Assistant U.S. Trustee, E.D. Va. (Dec. 13, 1996).

ruptcy court into her life *via* filing a bankruptcy petition, the debtor should expect her life and lifestyle to be scrutinized and should not be surprised when she is told to sacrifice economically non-necessary choices. While courts should protect a debtor's right to discharge most debts and proceed to a fresh start in life, bankruptcy must have social consequences and courts must make debtors engage in a bit of "good, old-fashioned belt tightening."<sup>251</sup>

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251. *In re Krohn*, 886 F.2d 123, 128 (6th Cir. 1989)