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Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse--Bankruptcy Dischargeability of Vicarious Debt?

Steven H. Resnicoff

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IS IT MORALLY WRONG TO DEPEND ON THE HONESTY OF YOUR PARTNER OR SPOUSE? BANKRUPTCY DISCHARGEABILITY OF VICARIOUS DEBT

by Steven H. Resnicoff

Since early in this century, discharge of debts incurred vicariously has been governed by conflicting precedents. The author examines these cases in light of the policies underlying the current Bankruptcy Code and its statutory antecedents, then analyzes the impact of the rule developed in the case law on debtors in varying situations. In particular, the author critically examines the impact of judicially-fashioned rules denying discharge to debtors based on fraudulent actions by the debtors' spouses.

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INTRODUCTION

American bankruptcy law promotes its principal policy of allowing individuals to escape the financial and emotional burden of past debt by discharging prior economic liabilities. For over a hundred years courts have agreed that debts are presumptively dischargeable and that statutory exceptions to discharge must be 1. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 125, reprinted in 1978 U.S.C.C.A.N. 5963, 6086. “The purpose of straight bankruptcy...is to obtain a fresh start, free from creditor harassment and free from the worries and pressures of too much debt.” See also Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (noting that bankruptcy “gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt” (citations omitted)); Neal v. Clark, 95 U.S. 704, 709 (1877) (stating that the Bankruptcy Act relieves “the honest citizen [from] the burden of hopeless insolvency”); Allstate Ins. Co. v. Foreman (In re Foreman), 906 F.2d 123, 127 (5th Cir. 1990) (finding “overarching policy in the Bankruptcy Code in favor of giving the debtor an opportunity for a fresh start...”); Chevy Chase P.S.B. v. Hable (In re Hable), 107 B.R. 356, 358 (Bankr. M.D. Fla. 1989) (“The entire bankruptcy scheme was designed in part to give debtors a fresh start in life, free and unencumbered from pressing debts so they could become useful members of society.” (citations omitted)); Anthony T. Kronman, Paternalism and the Law of Contracts, 92 YALE L.J. 763, 785-786 (1983) (“One reason for giving the debtor a fresh start is to counteract the self-hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets. Whatever its macroeconomic function, the bankruptcy discharge has a moral purpose as well...” (footnote omitted)).

The concept of a discharge of debt is not inherent to a bankruptcy system. Bankruptcy could be envisioned as merely an efficient, equitable mechanism for distributing a debtor’s assets. Furthermore, there is no constitutional right to a discharge. United States v. Kras, 409 U.S. 434, 446 (1973). However, as a legislatively created benefit, the availability of a discharge is now commonly regarded as an essential element of American bankruptcy law. Id. at 446-447 (discussing historical development of discharge policy).

Commentators have vigorously discussed policy bases for particular discharge rules. See generally, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 225-252 (1986) (arguing bankruptcy’s fresh start policy is largely limited to protection of human capital, not property); Charles G. Hallinan, The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and An Interpretive Theory, 21 U. RICH. L. REV. 49, 53 (1986) (asserting the necessity of understanding that discharge rights may be explained as a compulsory allocation of risk associated with consumer credit in order to apply and interpret the code); Margaret Howard, A Theory of Discharge in Consumer Bankruptcy, 48 OHIO ST. L.J. 1047, 1069-70 (1987) (advocating a functional economic theory of discharge which proposes discharge be widely available so that debtors may participate in an open credit economy); Frank R. Kennedy, Reflections on the Bankruptcy Laws of the United States: The Debtor’s Fresh Start, 76 W. VA. L. REV. 427, 434-45 (1974) (reviewing the history of discharge in English and American law).

2. See, e.g., Neal, 95 U.S. at 709 (arguing that equity and Congressional intent demand liberal construction of bankruptcy law); Foreman, 906 F.2d at 126 (holding that an insurance company seeking repayment of worker’s compensation benefits bears the burden of showing that a debt is nondischargeable); California State Bank v. Lauricella (In re Lauricella), 105 B.R. 536, 541 (Bankr. 9th Cir. 1989) (holding that the debtor’s conduct...
in signing checks while intoxicated was not sufficiently wrongful under 11 U.S.C. § 523(a)(6) to deny discharge; Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986) (holding that the burden is on a creditor to prove that the debtor made affirmative misrepresentations placing debt within exception to Bankruptcy law); Tropical Exploration Corp., Inc. v. McCoy (In re McCoy), 121 B.R. 637, 640 (Bankr. M.D. Fla. 1990) (stating that the burden rests with a creditor to establish that the debtor was acting in a fiduciary capacity); Household Bank, N.A. v. Touchard (In re Touchard), 121 B.R. 397, 401 (Bankr. D. Utah 1990) (requiring the plaintiff to prove elements of nondischargeability for false pretenses and false representation); Hable, 107 B.R. at 358 (placing the burden on a creditor to establish elements of a claim of nondischargeability); see also Brown v. Felsen, 442 U.S. 127, 138 (1979) (applying the presumption that all debts are dischargeable unless specifically excepted); Driggs v. Black (In re Black), 787 F.2d 503, 505 (10th Cir. 1986) (finding a presumption under § 523(a) that debts are not the result of fraud); Long v. West (In re Long), 794 F.2d 928, 930 (4th Cir. 1986) (holding that a party challenging dischargeability has the burden of showing that debt falls within the alimony exception to dischargeability).

The Supreme Court has recently determined that the burden of proof standard in all § 523(a) cases is preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (applying preponderance standard to all § 523(a) exceptions, even though case involved only § 523(a)(2)); Hoskins v. Yanks, 931 F.2d 42, 43 (11th Cir. 1991) (construing Grogan as applying to all § 523(a) exceptions and applying it to § 523(a)(6)); Texas Am. Bank v. Barron (In re Barron), 126 B.R. 255, 258 (Bankr. E.D. Tex. 1991) ("The Supreme Court's recent decision in Grogan v. Garner . . . categorically holds that the preponderance of the evidence standard is appropriate in all 11 U.S.C. § 523 dischargeability matters."). Prior to Grogan, the cases had been in complete disarray. The acknowledged importance of the policy favoring discharge had led the majority of lower courts to rule that, at least in some situations, a creditor would have to satisfy a "clear and convincing evidence" standard. See, e.g., In re Weber, 892 F.2d 534, 538 (7th Cir. 1989) (holding that a clear and convincing standard applies to § 523(a)(4)); Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1262 (11th Cir. 1988) (holding that a clear and convincing test applies to § 523(a)(6)); Knoxville Teachers Credit Union v. Parkey, 790 F.2d 490, 491 (6th Cir. 1986) (holding that a clear and convincing applies to § 523(a)(6)) But see, e.g., Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988) (holding that a preponderance of evidence test applies to § 523(a)(6)); Century Surety Ins. Co. v. Rainer (In re Rainer), 108 B.R. 184, 186 (Bankr. S.D. Ohio 1989) (holding that a preponderance test applies to § 523(a)(4)). For a more comprehensive list of cases and discussion of the creditor's burden of proof, see ROBERT E. GINSBERG, BANKRUPTCY § 11.07[d] (2nd ed. 1989). For a discussion of the difference between the two standards, see Price Waterhouse v. Hopkins, 490 U.S. 728 (1989).


Even if a general discharge is granted, the Code prohibits the discharge of certain debts. See 11 U.S.C. § 523. Whether a particular debt is nondischargeable depends upon the bankruptcy chapter in which the debtor is proceeding. An exhaustive list of nondischargeable debts appears in 11 U.S.C. § 523, which applies to chapters 7, 11 and 12 and to some chapter 13 cases. Nondischargeable debts include taxes, alimony, child support, certain tort damages, government-guaranteed education loans, and fraudulently obtained debts. Id. In other chapter 13 cases, most of these kinds of debts are discharge-
narrowly construed in order to afford comprehensive relief to honest debtors.\(^4\)

Although courts consistently emphasize that protection by discharge was designed to aid the "honest citizen" or "honest debtor," judicial decisions do not provide a comprehensive definition of those terms. One basic premise of this article is that a debtor who is vicariously responsible for a debt obtained by fraud, but who did not directly participate in the fraud on the creditor, is an "honest debtor."\(^5\)

Whether a debt is discharged is of critical importance to both debtor and creditor.\(^6\) The importance to unsecured creditors is obvious; if the discharge is granted, these creditors ordinarily go unpaid. The disproportionate amount of court time devoted to dischargeability litigation reflects the stakes at risk for all parties. One recent study indicates that dischargeability proceedings under Section 523 consume approximately twenty-seven percent of the time bankruptcy judges devote to "case-related" matters and over sixteen percent of their total "work-related" hours.\(^7\)

Some exceptions to discharge apply to debtors proved guilty of certain forms of normatively repugnant conduct,\(^8\) such as fraud or willful and malicious injury.\(^9\) Surprisingly, there is relatively

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4. See, e.g., Neal, 95 U.S. at 709 (stating that the purpose of the law is to relieve honest debtors from the burden of debt); Evans v. Dunston (In re Dunston), 117 B.R. 632, 636 (Bankr. D. Colo. 1990) (noting that the "[c]ourt must narrowly construe exceptions to discharge against the creditor and in favor of the debtor" (citations omitted)); Cardenas v. Stowell (In re Stowell), 113 B.R. 322 (Bankr. W.D. Tex. 1990); Hable, 107 B.R. at 357, 358 ("It is . . . axiomatic that the provisions of the Bankruptcy Code dealing with discharge are remedial and should be construed liberally in favor of debtors and against creditors who challenge the scope and extent of the protection granted by the general bankruptcy discharge.").

5. This article also refers to this "honest debtor" as an "innocent debtor."

6. See, e.g., Jackson, supra note 1, at 225 (noting that "the principal advantage bankruptcy offers a debtor that is an individual lies in the benefits associated with discharge").

7. Gordon Bermant et al., A Day in the Life: The Federal Judicial Center's 1988-1989 Bankruptcy Court Time Study, 65 AM. BANKR. L.J. 491, 497-513 (1991). The figures in this study do not include the additional time spent on general challenges to discharge based on § 727 or indirect opposition to discharge pursuant to §§ such as 727, 1129 or 1325.

8. See, e.g., Jackson, supra note 1, at 225 (stating that individual debtors obtain discharge unless they violate "some norm of behavior specified in the bankruptcy laws . . . ").

9. A variety of moral values are reflected in 11 U.S.C. § 523. Section 523(a)(2), which excludes from discharge debts "obtained by—false pretences, a false representation,
little legislative explanation of these exceptions. Unsurprisingly, the result is considerable confusion, controversy and litigation.10

This article deals with the dischargeability of an honest individual11 debtor's liability when the debtor's agent, but not the

or actual fraud," provides the underlying basis for many of the cases dealing with the dischargeability of vicarious debt for another's wrongdoing. These cases repeatedly emphasize the legislative objective of distinguishing between honest and dishonest debtors. See, e.g., Brown v. Felsen, 442 U.S. 127, 128 (1979) (noting that the opportunity for protection in bankruptcy court is limited to "honest but unfortunate debtor[s]"); (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)); Neal v. Clark, 95 U.S. 704, 709 (1877) (stating that the bankruptcy act is intended to help "the honest citizen"); Jennen v. Hunter (In re Hunter), 771 F.2d 1126, 1130 (8th Cir. 1985) ("Congress established a fraud exception to discharge 'to discourage fraudulent conduct and to ensure that relief intended for honest debtors does not inure to the benefit of the dishonest.'") (quoting Castner Knott Co. v. Wilson (In re Wilson), 12 B.R. 363, 370 (Bankr. M.D. Tenn. 1981)); Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1477 (11th Cir. 1985) (noting that "[b]y creating the fraud exceptions to discharge, Congress sought to discourage fraudulent conduct . . ."); Sweet v. Hanson (In re Hanson), 104 B.R. 261, 262 (Bankr. N.D. Cal. 1989) (arguing that "bankruptcy is not supposed to be a haven for the dishonest debtor . . ."); Pacific Bancorporation v. Sears (In re Sears), 102 B.R. 781, 785 (Bankr. S.D. Cal. 1989) (finding that legislative history indicates that the fraud exception was only intended to benefit honest debtors); FDIC v. Smigel (In re Smigel), 90 B.R. 935, 939 (Bankr. N.D. Ill. 1988) ("[T]he purpose of excluding from discharge debts obtained by fraud is to protect lenders from dishonest debtors.") (quoting In re Bogstad, 779 F.2d 370, 373 n.4 (7th Cir. 1985)).

10. See, e.g., Luther Zeigler, Note, The Fraud Exception to Discharge in Bankruptcy: A Reappraisal, 38 STAN. L. REV. 891, 904 n.57 (1986) (asserting that the fraud exception, 11 U.S.C. § 523(a)(2), and its statutory precursor, Act of July 1, 1898, ch. 541, § 17a(2), 30 Stat. 544, 550, have been the most frequently litigated exceptions to discharge).

11. Interestingly, no special rule limits the discharge of wrongfully incurred debt of non-individual debtors. If a non-individual debtor liquidates, whether in Chapter 7 or Chapter 11, it receives no discharge, even of innocently incurred debt. 11 U.S.C. §§ 727(a)(1), 1141(d)(2). However, if a non-individual debtor successfully reorganizes in Chapter 11, it receives a discharge of all debts, even those wrongfully acquired. See, e.g., Yamaha Motor Corp., U.S.A. v. Shadco, Inc., 762 F.2d 668, 670 (8th Cir. 1985) (allowing discharge because corporate debtor is not "individual" to whom 11 U.S.C. § 523 exceptions to discharge apply); Krueger v. Push & Pull Enter., Inc. (In re Push & Pull Enter., Inc.), 84 B.R. 546, 551 (Bankr. N.D. Ind. 1988) (holding § 105 does not allow court to defeat Congressional intent that reorganizing Chapter 11 corporate debtors receive broad discharge); Middel v. Jake's on the Pike (In re Jake's on the Pike), 78 B.R. 461, 462 (Bankr. S.D. Va. 1987) (holding § 523(a)(5) exceptions to discharge do not apply to partnerships or other non-individual debtors); Savoy Records, Inc. v. Trafalgar Assoc. (In re Trafalgar Associates) 53 B.R. 693, 696 (Bankr. S.D.N.Y. 1985) (stating that whether or not a limited partnership obtains discharge depends only on the type of its plan and whether it is confirmed). The disparate treatment of individual and non-individual debt has been sustained against constitutional challenge alleging violation of equal protection. Beard v. A.H. Robins Co., 828 F.2d 1029, 1032 (4th Cir. 1987) (granting more comprehensive discharge to reorganizing corporation than to individual debtor is rationally justified).
debtor, acts wrongfully. Denial of a discharge in such circumstances is of enormous practical significance. Countless commercial transactions depend on the use of agents. The courts are in hopeless disarray over the discharge of these debts.

An early Supreme Court case, *Strang v. Bradner*,13 denied discharge of an innocent debtor's liability for the intentional wrongdoing of his agent.14 However, this decision failed to reconcile the denial of discharge with the general rule that an honest

The reason for different discharge rules regarding non-individual debtors cannot be fully explored at this time. Briefly stated, however, the purpose of discharging a reorganizing non-individual's debt is different from that of discharging an individual's debt. For instance, the specific humanitarian and economic justifications for providing individual debtors with a "fresh start" are generally inapplicable in the context of non-individual debtors. Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS., Spring 1987, at 173, 182 ("[T]he idea that a 'fresh start' for the corporation is a good in itself is nonsense."). The primary purpose of discharging the debt of non-individual debtors who reorganize is to ensure that the debtor will reorganize, rather than liquidate, when such reorganization is economically efficient. See JACkSON, supra note 2, at pp. 190-192; Baird, supra at 183-86 (observing that rehabilitation of corporate debtors through bankruptcy balances community economic concerns against individual creditors' self-interest). After all, the non-individual debtor, as an entity, could effectively discharge its debt outside of bankruptcy by dissolving and liquidating its assets. The choice whether or not to reorganize is perceived as an economic decision to be made on the basis of the alternative uses of the debtor's assets. If a reorganizing debtor were required to pay debts which could be avoided in liquidation, the benefits of reorganization to the debtor would be artificially reduced, and the debtor might make the inefficient decision to liquidate instead.

12. Common law and statutes impose analogous vicarious liability in the context of certain social relationships and institutions as well. See, e.g., Haw. Rev. Stat. § 577-3 (1985) (imposing joint and several liability on parents for the tortious acts of their children); Shook v. Beels, 217 P.2d 56, 60-61 (Cal. 1950) (holding all members of a fishing party liable for the destruction of a plane rented by the group through one of its members because the group had engaged in joint venture); Matthews v. State Farm Fire & Casualty Ins. Co., 550 So. 2d 936, 939 (La. Ct. App. 1989) (holding the aunt of an injured minor vicariously liable for the torts of her minor son who was found liable for inflicting the injuries); Kelly v. Gwinnell, 476 A.2d 1219, 1230 (N.J. 1984) (imposing liability on a social host who served alcohol to a visibly intoxicated guest later found to have caused injury while driving intoxicated); Piscataway Bd. of Educ. v. Caffiero, 431 A.2d 799, 801 (N.J.) (asserting that parents or guardians of a public school pupil may be held vicariously liable for the pupil's vandalism of public school property), appeal dismissed, 454 U.S. 1025 (1981).

For a discussion of adverse consequences of preventing an honest debtor from obtaining a discharge of vicarious liability for an agent's intentional wrong, see infra text accompanying notes 108-114 (Part III(C)).


14. For a discussion of the facts of *Strang*, see infra text accompanying notes 35-46 (Part I(B)). To facilitate discussion, the terms "agent," "partner," and "joint venturer," all of which raise vicarious liability issues, are used interchangeably throughout this article except where specifically indicated.
debtor is entitled to a fresh financial start. The Strang rule, reaffirmed by a number of recent cases, seems to be the majority view, especially in cases not involving a spousal relationship between debtor and agent.

On the other hand, a growing number of lower courts have sidestepped Strang. This phenomenon is remarkable in several ways. First, many of these decisions totally ignore Strang and simply assume that an honest debtor is not to be burdened by vicariously incurred debt. The basis for this assumption is a pre-Strang Supreme Court decision, Neal v. Clark. Ironically, Strang

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15. The nonbankruptcy vicarious liability rule typically imposes at least compensatory liability on an individual for her partner's wrongful actions. UNIF. PARTNERSHIP ACT § 13, 6 U.L.A. 1, 163 (1974) (partnership is liable for wrongful acts or omissions of a partner acting within the ordinary course of business or with the authority of the partner). For an explanation of the policy bases for the nonbankruptcy vicarious liability rule, and how they differ from those underlying the bankruptcy nondischargeability rule, see infra text accompanying notes 57-81 (Part II(A)).

16. See, e.g., FDIC v. Calhoun (In re Calhoun), 131 B.R. 757, 763 (Bankr. D.D.C. 1991) (imputing fraud to innocent partner for dischargeability purposes, but allowing discharge because creditor failed to plead reasonable reliance); BancBoston Mortgage Corp. v. Ledford (In re Ledford), 127 B.R. 175, 184 (M.D. Tenn. 1991) (finding that, with five exceptions, "the authorities are in agreement that the fraud of one partner may be imputed to another for determining dischargeability").

17. See, e.g., Walker v. Citizens State Bank (In re Walker), 726 F.2d 452, 454 (8th Cir. 1984) ("When the principal is recklessly indifferent to his agent's acts, it can be inferred that the principal should have known of the fraud."); on remand, 53 B.R. 174 (Bankr. W.D. Mo. 1985); American Savings and Loan Ass'n v. Weber (In re Weber), 99 B.R. 1001, 1012-13, 1015 (Bankr. D. Utah 1989) (refusing to deny discharge to debtor wife without evidence of her acting wrongfully, even though her husband's fraudulent acts within the scope of their mutual business were sufficient to deny his discharge); Sostarich v. Luton (In re Sostarich), 73 B.R. 731, 735 (W.D. Ky. 1987) (holding debt dischargeable in the absence of "actual fraud" on the part of the debtor); Cory v. Futscher (In re Futscher), 58 B.R. 14, 17 (Bankr. S.D. Ohio 1985) (holding standard for finding vicarious liability to be reckless disregard for the fraudulent character of one's agent's acts); Cash v. Armstrong (In re Armstrong), 54 B.R. 399, 404, 409 (Bankr. N.D. Ala. 1985) (holding evidence of intentional conduct in record before it sufficient to deny discharge to debtor husband under § 523(a)(2)(A) and giving collateral estoppel effect to previous state court judgment finding wife committed fraud to justify denial of discharge with respect to her as well); Alden State Bank v. Anderson (In re Anderson), 29 B.R. 184, 191 (Bankr. N.D. Iowa 1983) (holding an innocent partner entitled to discharge where the fraudulent partner's "intent to deceive" cannot be imputed to him); Elmore v. Davis (In re Davis), 23 B.R. 633, 634 (Bankr. W.D. Ky. 1982) (holding dischargeability under 11 U.S.C. § 523(a)(6) to be determined under a "'malicious, wanton, and oppressive[]' conduct standard (footnote omitted)); In re Rutkowski, 2 B.R. 677, 679 (Bankr. S.D.N.Y. 1980) (holding a debtor entitled to discharge in the absence of "willful and malicious" participation in a partner's fraudulent conduct).

18. 95 U.S. 704 (1877). For a discussion of Neal, see infra text accompanying notes 27-34 (Part I(A)).
acknowledged the vitality of *Neal v. Clark*, yet still denied discharge of vicarious debt. Second, the courts which have criticized *Strang* have failed to cite decisive sociological or ideological developments which would justify *Strang*'s reversal.

Not only is *Strang* based on an outdated, simplistic conceptualization of partnership and agency relationships, but it contradicts bankruptcy's intrinsic bias in favor of allowing a "fresh start."
In addition, it is fundamentally unfair and is inconsistent with bankruptcy law’s treatment of other forms of vicariously acquired debt. Moreover, as lower courts struggle to avoid application of Strang, some adopt questionable alternative rationales which in turn become poor case law. Consequently, the Strang doctrine may result in damage outside its own narrow analytical framework while serving no useful purpose in that framework or otherwise.

The pernicious effects of Strang are especially evident when the rule is applied in social contexts, such as between spouses, rather than in commercial ones. Social “partners” are less able to dissolve their “partnerships” or protect themselves against wrongful “agents.” Because the Strang doctrine is unlikely to affect such debtors’ conduct with respect to the relationship, it merely punishes these debtors for wrongs they did not commit. Thus, application of Strang condemns these innocent debtors to permanent, or at least indefinite, pauperism. Furthermore, to the extent that financial transactions within a marriage are predominantly controlled by one gender rather than shared, Strang exacerbates gender discrimination.

This article explores the basis for and status of the controversy regarding the dischargeability of an honest debtor’s liability for another’s fraud and proposes that the Strang rule be eliminated.

The article concludes that, although there is some basis for judicial repudiation of Strang, the likelihood of such reversal is slim. Consequently, the article proposes specific legislation to overrule Strang.

Part I reviews the origins of the Strang doctrine. Part II contrasts the policies underlying the vicarious liability rule of agency law to those of the basic rule regarding the nondischargeability of

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22. See infra text accompanying notes 112-14, 122-48 (Parts III(D), III(F)).

23. See, e.g., cases cited infra notes 153, 157-58 (dealing with distinctions between negligence and recklessness standards for debtors’ conduct and with agents’ actions outside the scope of their authority).

24. See infra text accompanying notes 115-21 (Part III(E)).

25. See Richard C.B. Beck, The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed, 43 VAND. L. REV. 317 (1990) (arguing that the current rule of joint return liability for spouses is unfair to the innocent spouse forced to pay the other’s taxes); see generally Karen Gross, Re-Vision of the Bankruptcy System: New Images of Individual Debtors, 88 MICH. L. REV. 1506 (1990) (discussing whether attributes of bankruptcy outside the scope of this article disparately and adversely affect women).
wrongfully incurred debt. Part III criticizes Strang's analytical foundation and its impact on individual debtors and on bankruptcy law generally. The current status of Strang is examined in Part IV, and Part V proposes alternative judicial and legislative methods for overruling the Strang doctrine.

I. ORIGIN OF THE STRANG DOCTRINE

In Neal v. Clark, the Supreme Court eloquently enunciated the goal of bankruptcy law: to provide a financial fresh start for honest debtors. Neal provides the basic foundation for the analysis undertaken in subsequent sections of this article.

A. Neal v. Clark

Griffith Neal bought two bonds from an estate in a transaction with the estate's executor. The Court noted that the executor, the brother of the deceased, was of "undoubted solvency." At the time of the sale, the executor explained to Neal that he was selling the bonds on behalf of the estate to reimburse himself for money he had advanced to the estate.

Subsequently, Clark became a surety of the estate and sued the executor, Neal, and others, alleging that the bonds had been sold below market value and the sale thus constituted a fraudulent waste of estate assets. The lower court agreed, finding Neal guilty of constructive, but not actual, fraud. After he purchased bonds, but before Clark filed suit, Neal was adjudicated a bankrupt under the bankruptcy law of 1867. He therefore pleaded his bankruptcy discharge as a defense in Clark's action regarding the bonds.

Section 33 of the Bankruptcy Act of 1867, a predecessor to Bankruptcy Code subsections 523(a)(2)(A) and (B), provided that "no debt created by the fraud or embezzlement of the bankrupt... shall be discharged..." The Court of Appeals ruled that the debt incurred by Neal's constructive fraud was not dis-

26. 95 U.S. 704, 709 (1877) (finding that Congress intended the Bankruptcy Act to provide "the honest citizen [relief] from the burden of hopeless insolvency").
27. 95 U.S. 704 (1877).
28. Id. at 704.
29. The Court characterized the action as a "devastavit of the estate." Id. at 707.
Speaking for the Court in reversing the Virginia judgment, Justice Harlan announced that Congress intended to enact a bankruptcy law "by which the honest citizen may be relieved from the burden of hopeless insolvency." For a debt to be nondischargeable because it was created by "fraud," the fraud had to be "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong . . . and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." In thus upholding the discharge, the Supreme Court seemed to set a clear policy that the honest debtor would be entitled to a discharge, despite the "fraud" exception established by section 33.

B. Strang v. Bradner

Less than eight years after Neal, the Supreme Court had another opportunity to interpret section 33 of the Bankruptcy Act of 1867. Strang v. Bradner was a suit against a partnership, Strang & Holland Bros., and its individual partners. Strang, acting for the partnership, had defrauded Lowrey & Bradner into executing and delivering to him certain promissory notes which were then discounted to bona fide purchasers. The Court observed that individual defendants John B. Holland and Joseph Holland were not involved in the fraudulent misrepresentations. Furthermore, the misrepresentations were made neither at their behest nor even with their knowledge. The Hollands were honest debtors who were liable for the fraudulent act only by virtue of their relation to Strang. Partners are liable for partnership debts and are vicariously liable for acts committed by other partners in the conduct of partnership business.

The Court held that Strang, who had actually made the misrepresentations, was guilty of "positive fraud" under the Neal

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33. Neal, 95 U.S. at 709.
34. Id. (emphasis added).
35. Id. at 555 (1885).
36. Id. at 556.
37. Id. at 558.
38. Id. at 561.
39. Id.
40. Id.
test.41 The Court further held, in an opinion delivered by the same Justice Harlan who authored the Neal decision, that this fraud was "to be imputed . . . to all the members of his firm."42 It reasoned that each partner was the agent of the partnership and that when, in the conduct of the partnership, one partner makes false or fraudulent misrepresentations to innocent persons, the other partners "cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge."43 Justice Harlan added that this conclusion was especially valid "when . . . the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business."44

The Court did not explain why the honest partner was guilty of anything more than "implied fraud or fraud in law," which was dischargeable under Neal.45 The Court found the Hollands liable without finding they had been negligent in supervising Strang.46 The Court also failed to articulate how its decision in Strang was consistent with the Congressional intent to benefit the honest citizen. In contrast, the Court's exposition of partnership law was flawless. Had the honest partners not obtained a bankruptcy discharge, their liability under nonbankruptcy law for their partner's wrongful conduct would have been unquestionable. Unfortunately, the Court failed to explain why the imputed fraud in Strang warranted treatment different from the constructive or implied fraud addressed by Neal.

That the innocent partners in Strang benefited from the fraud cannot sufficiently explain such disparate treatment.47 First, the

41. Id. at 559.
42. Id. at 561.
43. Id.
44. Id. (citations omitted).
45. See id. at 559. Harmonizing Strang with Neal is arguably even more difficult in light of the Sixth Circuit's relatively recent interpretation of Neal:

In its use of the language 'moral turpitude' and 'intentional wrong,' the Court [in Neal] was indicating that all of the underlying elements necessary for the nondischargeability of a debt created by fraud must be effected by the personal action of the bankrupt and may not be imputed to him by the acts of another.

Carlisle Cashway, Inc. v. Johnson (In re Johnson), 691 F.2d 249, 256 (6th Cir. 1982).
46. Strang, 114 U.S. at 561.
47. Most post-Strang decisions have not required a showing that the innocent debtor benefits from the fraud:
Court indicated that the receipt of a benefit was merely an exacer-
bating factor, not a necessary one.48 Second, even in cases of
"implied fraud" covered by Neal, the debtor benefits at the
creditor's expense.49 Whether an innocent debtor benefitted from
her agent's conduct may be a reasonable basis for imposing vicari-
ous liability on the debtor.50 It simply is not, by itself, a good
reason for excepting such liability from discharge.51 In fact, al-

Although the Supreme Court in Strang noted that the innocent partners “re-
ceived and appropriated the fruits of the fraudulent conduct of their associate in
business,” 114 U.S. at 561, the courts have generally not required a showing of
ratification or acceptance of the benefits of a partner's wrongdoing in denying
dischargeability from partnership debts.

Frank R. Kennedy, The Discharge of Partnerships and Partners Under the Bankruptcy
Code, 38 VAND. L. REV. 857, 895 n.131. Nonetheless, some courts have stressed this
factor. See, e.g., First Nat'l Bank of Boston v. Mann (In re Mann), 40 B.R. 496, 499
(Bankr. D. Mass. 1984) (stating that financial benefit to debtor, who was president, direc-
tor and shareholder of corporation for which he obtained money, was enough to make
§ 523(a)(2) applicable); Shelton v. Wells (In re Shelton), 28 B.R. 218, 222 (Bankr. E.D.
Mo. 1983) (holding that where a wife profited from her husband's fraud she was liable
for damages); In re Maloof, 2 F.2d 373, 374 (N.D. Ga. 1924) (wife benefited from
husband's fraud). But see Chicago Title Ins. Co., Inc. v. Mart (In re Mart), 75 B.R. 808,
810 (Bankr. S.D. Fla. 1987) (refusing to impute husband's to his wife merely because she
received some benefit from the fraud); First Security Bank v. Steinman (In re Steinman),
61 B.R. 368, 374 n.11 (Bankr. W.D. Mo. 1986) (noting that receipt of benefits is relevant
only if the "innocent" party knowingly accepted the benefits of the malefactor's wrongdo-
that the marital community benefited from defendant's husband's acts and therefore that
the defendant should be barred from discharging the resulting debts amounts to fraud
implied by law . . . ").

48. Strang, 114 U.S. at 561.

And if, in the conduct of partnership business . . . one partner makes false or
fraudulent misrepresentations of fact to the injury of innocent persons who deal
with him as representing the firm . . . his partners cannot escape pecuniary
responsibility . . . . This is especially so when, as in the case before us, the
partners, who were not themselves guilty of wrong, received and appropriated
the fruits of the fraudulent conduct of their associate in business.

Id. (emphasis added).

49. For instance, the debtor in Neal benefited from the fact that the bonds had been

50. Of course, one could argue that such benefit should be insufficient to impose full
vicarious liability. Perhaps the innocent debtor should merely be forced to disgorge the
actual benefit enjoyed by her.

51. Acceptance of benefit with actual knowledge of the wrongdoing, however, may
Ins. Co., 487 P.2d 929, 932 (Idaho 1971) (holding insurer not liable for punitive damages
though debtor benefit is a natural concomitant of the creation of most debt, such benefit does not ordinarily prevent discharge of the debt.

*Strang* is rarely cited for the nondischargeability of vicariously incurred debt.52 Many subsequent lower courts, apparently oblivious of *Strang*, have ruled in ways at least facially inconsistent with it.53 Despite this considerable split in authority, there seems to have been virtually no discussion of *Strang* in academic or trade literature. Even some of the courts which cite and apply *Strang* do so grudgingly, acknowledging that they do not understand or agree with its reasoning.54 *Neal*, in contrast, is consistently cited as authority that debt dishonestly incurred is dischargeable so long as the debtor did not participate in the dishonest actions.55

52. *Strang* has actually been cited for the rule that only those frauds which involve moral turpitude produce nondischargeable debts. See, e.g., Wright v. Lubinko, 515 F.2d 260, 264 (9th Cir. 1975); First Nat. Bank v. Bruce (In re Bruce), 18 B.R. 135, 137 (Bankr. D. VT. 1982).


54. See supra note 20.

55. See, e.g., Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986) (“debtor must be guilty of positive fraud . . . and not implied fraud . . . which may exist without the imputation of bad faith or immorality” (citations omitted)); Public Fin. Corp. of Redlands v. Taylor (In re Taylor), 514 F.2d 1370, 1373 (9th Cir. 1975) (concluding that a party alleging fraud must prove “actual or positive fraud, not merely fraud implied by law”); Farina v. Balzano (In re Balzano), 127 B.R. 524, 530 (Bankr. E.D.N.Y. 1991)(discharging debt where creditor failed to prove that actual fraud or misrepresentations of the debtor led her to believe they would be married); Ellis v. Shear (In re Shear), 123 B.R. 247, 252 (Bankr. N.D. Ohio 1991)(refusing to give preclusive effect to a state court judgment for determining fraud because jury in state court did not have to find actual fraud to reach its verdict); Leeb v. Guy (In re Guy), 101 B.R. 961, 976 (Bankr. N.D. Ind. 1988) (interpreting the legislative history of § 523(a)(2)(A) which cites *Neal*); Shafer v. Wintrow (In re Wintrow), 57 B.R. 695, 706 (Bankr. S.D. Ohio 1986) (“[T]he fraud which is not dischargeable by a bankrupt is ‘positive fraud . . . involving
II. VICARIOUS LIABILITY AND NONDISCHARGEABILITY: A COMPARATIVE POLICY ANALYSIS

The Strang Court cited the vicarious liability rule of agency and partnership law as its basis for refusing to discharge the Hollands' vicarious debt. However, the Court offered no explanation of the relationship, if any, between the policies underlying the traditional vicarious liability rule and bankruptcy's exceptions to discharge. Examination of the policy bases of the vicarious liability rule and the rationale supporting its application in the bankruptcy context accentuates the problems with Strang. None of the principal rationales for the vicarious liability rule requires that vicarious liability be nondischargeable in bankruptcy. Furthermore, although direct scrutiny of the nondischargeability rule reveals a tenuous possible justification for Strang, that saving argument was not explicitly addressed by the Court.

A. Vicarious Liability Rule

Partnership law prescribes that partners are mutually liable for partnership debts incurred by any of them in the ordinary course of the partnership business. This is true whether the acting partner incurred debt reasonably, negligently, or by intentional fraud. A simplistic conceptualization of this rule would be that, together, the various partners form a single entity with multiple hands.

According to this analysis of partners' liability, where one partner is guilty of misconduct, the entity, and the other partners who are a part of the entity, are similarly culpable. It would
thus appear from the rule holding a passive partner vicariously liable for the intentional wrongdoing of an active partner that the passive partner is not "innocent," but somehow morally blameworthy. Yet this simplistic conceptualization of the vicarious liability rule is inaccurate both from a policy perspective and, in many instances, as the rule is applied.

1. Policies

This article cannot review the entire subject of vicarious liability. Examination of its major themes, however, reveals that they do not persuasively explain why such debt should not be dischargeable in bankruptcy. Modern commentators offer primarily four policy explanations for the vicarious liability rule.\(^6\) None justifies the *Strang* doctrine.

The traditional argument supporting vicarious liability is premised on the theory that a principal has control over her agent. Thus, the principal is in a position to prevent the loss from occurring through careful selection and monitoring of agents. Therefore, the vicarious liability rule motivates the principal to take effective measures to prevent the loss.\(^6\)

The other explanations address broader policy grounds.\(^6\) The

60. Other, more dubious rationales have been proffered historically. See W. PAGE KEeton et al., Prosser and Keeton on the Law of Torts, \$ 69, at 500 (5th ed. 1984); see also Thatcher v. Austin (In re Austin), 36 B.R. 306, 311 (Bankr. M.D. Tenn. 1984) (rejecting these other explanations).

To facilitate discussion, no distinction is made at this point between vicarious liability of partners for the acts of other partners and vicarious liability of principals, generally, for the acts of their agents. None of the cases discussing *Strang* have drawn such a distinction. Instead, a number of cases have simply applied *Strang* to agency contexts not involving partnerships. See, e.g., Industrie Aeronautiche E. Meccaniche Rinaldo Piaggio S.p.A. v. Kasler (In re Kasler), 611 F.2d 308, 309-10 n.3 (9th Cir. 1979) (noting that if liability arose from agent's misrepresentations, principal's debt not discharged); Aldis v. Brown (In re Brown), 412 F. Supp. 1066, 1068-70 (W.D. Okla. 1975)(holding that debt for agent's wrongful act nondischargeable); *In re Maloof*, 2 F.2d 373, 374 (N.D. Ga. 1924) (holding that debtor's liability agent's fraud is nondischargeable). See also other cases, infra note 156.

61. This view is known as the "prevention" or "private policeman" theory. See Steven N. Bulloch, Fraud Liability Under Agency Principles: A New Approach, 27 WM. & MARY L. REV. 301, 303 (1986) (arguing that the fraud rule developed to promote efficient business transactions); Harold J. Laski, The Basis of Vicarious Liability, 26 YALE L.J. 105, 114 (1916) ("If we allow the master to be careless of his servant's torts we lose hold upon the most valuable check in the conduct of social life.").

62. Some have said that the prevention theory is no longer the leading justification for the vicarious liability rule. See, e.g., Lange v. National Biscuit Co., 211 N.W.2d 783, 785 (Minn. 1973) (stating that the justification most frequently given is that of loss spreading);
second involves a theory of “loss spreading.” It assumes that an agent’s principal is in a better position than the agent’s victim to absorb or spread any loss among various parties. A principal might accomplish this through liability insurance, price increases, or profit or wage reductions. In contrast, the agent’s victim may lack a meaningful opportunity to spread the loss, either because appropriate insurance is unavailable, or because victims are emotionally or intellectually unable to appreciate the need for insurance.

A third theory contends that the principal should pay in order to increase economic efficiency through use of the price system. To accommodate her potential liability, the principal is expected to increase the cost of the product, using the extra proceeds to pay for appropriate liability insurance or to compensate for self-insuring. The argument is that all societal costs generated by a business should be included in the price of the product. Assuming that consumers make purchase decisions based on price, pricing goods so that they properly reflect their societal costs will result in an allocation of production resources which maximizes societal wel-

Bulloch supra note 61, at 305 (asserting that the modern trend among many courts and commentators is away from “prevention” theory toward “loss spreading” and “allocation of resources” theories).

63. See, e.g., Austin, 36 B.R. at 311 (defining vicarious liability as a social policy promoting allocation of risk); Lange, 211 N.W.2d at 785 (explaining that an employer “may . . . avoid the cost by insuring against such contingencies, or by adjusting his price so that his patrons must bear part, if not all, of the burden . . . “); see generally Young B. Smith, Frolic and Detour, 23 COL. L. REV. 444, 456-57 (1923) (elaborating on the historical legal perspectives of the doctrine of respondeat superior and policy of loss spreading); KEETON et al., supra note 60, ¶ 69, at 500-01 (noting that principal is better equipped to absorb and spread costs of loss).

64. Of course, this assumption may not always be correct. See generally Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 517-27 (1961) (discussing when enterprises can and cannot spread losses).

65. STEVEN SHAVERELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 173 (1987) (“principal may have better knowledge than actors about the nature of risk or be able themselves to take actions than can lower it.”); see also Alan O. Sykes, The Economics of Vicarious Liability, 93 YALE L.J. 1231, 1236 (1984) (“to the extent that the risks of civil liability are insurable, a principal often can obtain insurance more cheaply than his agents.”).

66. See Calabresi, supra note 64, at 505 (“[T]he cost of injuries should be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of those activities.”); see also Thomas C. Galligan, Jr., Augmented Awards: The Efficient Evolution of Punitive Damages, 51 LA. L. REV. 3, 84 (1990) (arguing imposition of vicarious liability for punitive damages can be economically efficient where compensatory damages and substantive tort rules do not adequately measure society's total accident costs).
A fourth explanation relates specifically to an agent’s apparent authority to act for her principal. The argument is that transaction of business through agents is economically efficient. To capture the benefits of such efficiency, people must be persuaded to rely on one another’s agents. This reliance is best promoted by legal rules holding principals fully accountable for their agents’ acts.

Even assuming that these rationales may justify the basic vicarious liability rule, they fail to explain why vicarious debt should be nondischargeable. None of the justifications assumes

67. See Calabresi, supra note 64, at 514 (“The postulate that people are by and large best off if they can choose what they want, on the basis of what it costs our economy to produce it, would be violated if enterprises are not charged with the true costs of the goods they produce.”); R. H. Coase, The Problem of Social Cost, 3 J. LAW & ECON 1, 40 (1940) (“The main advantage of a pricing system is that it leads to the employment of factors in places where the value of the product yielded is greatest and does so at less cost than alternative systems . . .”).

68. Bulloch, supra note 61, at 314 (arguing that this justification is more frequently used regarding liability for an agent’s fraud than for other torts).


70. Bulloch, supra note 61, at 315 (arguing that an agent’s apparent authority promotes efficiency by eliminating the time-consuming and burdensome requirement of verifying the agent’s status before entering legal or commercial relations with the principal).

71. Id.
that the passive partner is morally culpable in the same way, or to the same extent, as the wrongdoer.\textsuperscript{73} Furthermore, none explains why a debtor should receive a bankruptcy discharge when her agent acted negligently, but not when the agent acted with moral turpitude.

In theory imposing vicarious liability without regard for the principal’s fault provides an incentive to principals to minimize the likelihood of agent misbehavior. This rule is designed to inhibit both negligent and purposeful agent misconduct. Actually, “strict” liability is even more appropriate regarding negligent conduct than intentional agent misconduct.\textsuperscript{74} The loss spreading, economic efficiency, and facilitation of commercial transactions arguments seem equally applicable to cases of agent negligence and intentional misconduct. None of these explanations, however, supports the notion that vicarious liability of innocent principals derives from their moral blameworthiness for their agents’ actions.

2. Application

A brief examination of punitive damages suggests that the moral blameworthiness conceptualization of vicarious liability is as inaccurate in practice as it is in theory. Under state law, punitive damages are often imposed for fraudulent conduct.\textsuperscript{75} If the fraudu-
lent acts of an agent are deemed to have been the acts of the principal, then whenever punitive damages are imposed on the agent they should be available against the principal as well. However, while the imposition of punitive damages on a party who directly commits fraud ordinarily lies within the broad discretion of the trier in fact, the imposition of punitive damages on persons who are only vicariously liable is subject to a variety of approaches. At the time *Strang* was decided, a large number of jurisdictions declined to impose punitive damages on an honest partner or principal. Moreover, not even all jurisdictions allowing the imposition of such damages necessarily burden honest partners or principals to the same extent as guilty actors. Frequently, triers of fact may consider the parties’ respective moral culpability. Similarly,

(Kan. 1982) (finding that defendant-appellee’s fraudulent representations justified jury’s award of punitive damages); Prince v. State Mutual Life Ins. Co., 57 S.E. 766, 768 (S.C. 1907) (stating that where breach of contract is accompanied by a fraudulent act, punitive damages are recoverable); see also KEETON et al., supra note 60, § 2, at 11.

76. See, e.g., Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 771-72, 776 (9th Cir. 1984) (affirming jury’s punitive damage award against principal for agent’s “extreme deviation” from reasonable broker conduct where “substantial evidence” showed the conduct was in the scope of employment); see also KEETON et al., supra note 60, § 2, at 11.

77. See, e.g., Maisenbacker v. Society Concordia of Danbury, 42 A. 67, 70 (Conn. 1899) (denying award of punitive damages for an assault committed by the defendant’s agent while removing plaintiff from dance floor); Craven v. Bloomingdale, 64 N.E. 169, 171 (N.Y. 1902) (holding a merchant whose agent caused the illegal arrest of customer not liable for punitive damages). See also infra notes 180-83 and accompanying text.

78. Often, such punitive damages, when assessed, are quite low relative to the compensatory award or the principal’s assets. See, e.g., Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985) (upholding a damage award of $9,577,760.00 including $500,000.00 in punitive damages against a grain terminal owner because the owner’s foreman, acting “within the ‘scope of his employment,’” was grossly negligent); Hatrock, 750 F.2d at 773 (holding a brokerage firm liable for punitive damages based on the conduct of two of its brokers and noting that the award was not excessive since the punitive damages equaled only one-third of one percent of the firm’s gross revenues). But see Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 384-85 (Cal. Ct. App. 1981) (holding a corporation liable for $3,500,000.00 in punitive damages because management continued production of defective automobiles with knowledge of test results indicating fuel tank danger).

79. There are four circumstances under which punitive damages are awarded against a principal because of the acts of an agent:

(a) the principal or a managerial agent authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
honest partners may be treated differently as to criminal liability.\textsuperscript{80} All of these rules, to the extent they permit such disparate treatment, suggest that the \textit{Strang} doctrine, based on its simplistic conceptualization of partnership or agency principles is on infirm ground.\textsuperscript{81}

\textbf{B. Policies Underlying the Nondischargeability Rule}

The basic policies underlying the intentional wrongdoing exceptions to discharge do not explain the \textit{Strang} results. Although courts have often stated that Congress, in providing a discharge, did not intend to benefit dishonest debtors, this conclusory assertion is unaccompanied by detailed explanation.\textsuperscript{82}

Some authorities suggest that discharge is denied to dishonest

\begin{itemize}
\item[(d)] the principal or a managerial agent of the principal ratified or approved the act.
\end{itemize}

\textit{Restatement (Second) of Torts} § 909 (1979). These four circumstances are also listed in the \textit{Restatement (Second) of Agency} § 217C (1958).

The Supreme Court recently decided that imposing punitive damages on a party who is only vicariously liable under a theory of \textit{respondeat superior} does not violate due process. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1041 (1991). \textit{See also infra} notes 180-190 and accompanying text.


81. The differences between the conceptualization of partnership and agency liability of the various states and the conceptualization upon which \textit{Strang} is predicated raises an important, broad question as to the proper integration of state law and federal bankruptcy law. However, this issue lies beyond the scope of this article.

82. \textit{See, e.g., Grogan v. Garner,} 111 S. Ct. 654, 659 (1991) (limiting application of "fresh start" policy to honest debtors); \textit{Local Loan Co. v. Hunt,} 292 U.S. 234, 244 (1934) (finding purpose of Bankruptcy Act is to give honest but unfortunate debtor new opportunity); \textit{Thul v. Ophaug (In re Ophaug),} 927 F.2d 340, 343 (8th Cir. 1987) (stating that once a debtor is proven dishonest, there is no entitlement to a "fresh start"); \textit{see also supra} note 9.

Commentators have made similar conclusory assertions. \textit{See, e.g., Charles G. Hallinan, Consumer Bankruptcy,} 21 U. Rich. L. Rev. 49, 90-95 (1986) (asserting that the effect of 1984 amendments to the Bankruptcy Code was to narrow the discharge availability found in the broad fresh start concept codified in 1975 version); Margaret Howard, \textit{A Theory of Discharge in Consumer Bankruptcy,} 48 Ohio St. L.J. 1047, 1051 (1987) (analyzing the 1984 amendments which bar discharge of debts incurred by false pretenses or actual fraud as recognizing the general goal of bankruptcy to reward only the honest debtor); \textit{Thomas H. Jackson, The Fresh Start Policy in Bankruptcy Law,} 98 Harv. L. Rev. 1393, 1441 (1985) (viewing the Bankruptcy Code's denial of discharge for fraud and similar misconduct against creditors as an effort to deter these activities); \textit{William T. Plumb, Jr., The Recommendations of the Commission on the Bankruptcy Laws - Exempt and Immune Property,} 61 Va. L. Rev. 1, 17 (1975) (concluding that the bankruptcy laws were designed "to keep body and soul together and facilitate debtor's 'fresh start'").
debtors to punish them.83 Presumably the purpose of this penalty is deterrence; a particular debtor will be deterred from repeating her fraud and other prospective debtors will be deterred from committing fraud altogether.84 In addition, some might argue that punishment also morally improves the debtor.85

Others contend that debts fraudulently incurred are nondischargeable to prevent particular creditors from being victimized.86 However, no such special concern is shown for a creditor whose borrower has simply become insolvent. Although the creditor is assumed to have knowingly accepted all ordinary business risks, a debtor's intentional wrong somehow falls outside the pale of a creditor's legitimate expectations. All other things being equal, creditors so wronged are purportedly entitled to our sympathy and protection, and the wrongdoing debtors are undeserving, as to such debts, of the benefit of a bankruptcy discharge. Thus, the nondischargeability rule is based primarily on the debtor's being guilty of morally offensive conduct.

III. CRITICISM OF STRANG

This section examines seven basic criticisms of the Strang doctrine.87 The first is analytical while the others are more prag-
matic. All are to some extent interdependent.

A. Presupposes a Primitive Partnership Model

Nonbankruptcy law treats partnerships flexibly, sometimes as aggregates of individuals and sometimes as monoliths. The treatment of a partnership in any particular context depends on the policy underlying the applicable laws. Strang is analytically flawed because it is based on a primitive model of partnerships as multihanded monoliths. This model does not speak to the policy objectives of bankruptcy's exceptions to discharge. Indeed, this model is not even the exclusive paradigm for determining the legal treatment of partners, partnerships, and standards of vicarious liability outside the realm of bankruptcy. Thus courts deciding whether to impose punitive damages need not treat individual partners identically. Instead, each partner is subject to individual assessment of culpability.

The denial of discharge in bankruptcy is punitive, both in purpose and effect, and is based on the debtor's moral culpability for fraudulent conduct. Consequently, a judicial rule denying discharge should examine the moral culpability of individual debtors.

B. Irrelevant to Dischargeability Goals

Courts are generally in agreement regarding the goals of policies underlying denial of discharge in bankruptcy. The second criticism of Strang is that it fails to promote any of those purposes.

1. Harms Honest Debtors

The Strang doctrine cannot be justified by reference to Congressional intent to withhold the benefit of a discharge from dishonest debtors. The essence of Strang is the denial of certain discharge benefits to honest debtors who were uninvolved in and

88. See infra notes 91-106 and accompanying text (Part III(B)).
89. See supra notes 75-81 and accompanying text (Part II(A)(2)).
90. Similarly, an innocent partner is not usually vicariously liable under criminal law for the acts of another partner. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.10(d) (2d ed. 1986) ("Generally, it may be said that the fact that the defendant is a partner in a business enterprise has no bearing on the question of whether he is accountable for the criminal conduct of others [unless] he has authorized or participated in them."); BROMBERG & RIBSTEIN, supra note 80, § 4.07(e), at 4:89-90.
91. See supra notes 82-86 and accompanying text (Part II(B)).
unaware of their partners' misbehavior. These honest debtors committed no act warranting retribution and require no moral catharsis.

2. Provides No Meaningful Deterrent

Deterrence is a similarly unpersuasive explanation for Strang. The debtor is guilty, at most, of negligence in not selecting or maintaining more honorable partners. Debts negligently incurred in other contexts are ordinarily dischargeable. Such debts are not excepted from discharge to encourage prospective debtors to be more circumspect. Effective deterrence of negligent conduct by potential debtors would require a rule applicable to a broader class of persons than the Strang doctrine affects.

Even if Congress were more interested in deterring morally offensive wrongdoing than in discouraging negligence, bankruptcy law provides an ineffective vehicle for accomplishing that goal. A nondischargeability rule can only marginally increase an honest person's motivation to prevent her partner's wrongdoing. Existing nonbankruptcy civil sanctions, including possible punitive damages, already serve as a powerful incentive for such oversight. Furthermore, any potential gain in incentive for exercising control over one's agents must be discounted by the fact that insolvency is not generally a planned condition, and, therefore, principals are unlikely to consider the Bankruptcy Code's sanctions in developing their agency relationships. Consequently, even if a prospective debtor properly appreciated these factors, the Strang rule would have little deterrent effect.

Furthermore, it has been argued that there are psychological limits on the ability of prospective debtors to fully appreciate these probabilities. Instead, people tend to process information in ways which underestimate future risks.

92. See infra notes 180-89 and accompanying text.

93. As long as the partnership is solvent, nondischargeability of a fraudulently incurred debt would be a completely empty threat to the culpable partner. Even if the debt were collected from that partner, she could collect all or substantially all of the sum from the partnership or from the other partners. Consequently, the rule could only effectively deter one who anticipated that both the partnership and she herself might go bankrupt.

94. See Stephen J. Hoch, Counterfactual Reasoning and Accuracy in Predicting Personal Events, 11 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 719, 720 (1985) (discussing overconfident and underconfident evaluation of future events, and citing research suggesting that a person might generate positive evidence for an anticipated future occurrence to avoid the "unpleasantness of missing out on a preferred outcome").

95. See JACKSON, supra note 1, at 237-40 (discussing the phenomenon of "incomplete
Where the relationship between the prospective debtor and the agent is primarily personal and emotional, as in the case of spouses, rather than commercial, the chance that a nondischargeability rule will alter debtor behavior is even slimmer. Spouses may be especially vulnerable to one another's deceptions and susceptible to wishful thinking about each other's character or financial prospects. Thus, the complex relationship between spouses may easily result in a greater than ordinary risk of debtor miscalculation. In addition, the prospective harm from the nondischargeability of particular debts may be overshadowed by a spouse's desire to avoid acts, such as demanding access to hard facts regarding the other

96. This argument does not depend on the assumption that the marital relationship itself establishes a partnership. Rather, the point is that even in business partnerships between spouses, the spousal relationship will tend to minimize any deterrent effect of the Strang rule. See JOHN SCANZONI & MAXIMILIANE SZINOVACZ, FAMILY DECISION-MAKING A DEVELOPMENTAL SEX ROLE MODEL 283 (1980) (suggesting that extralegal factors including "trust, cooperativeness, justice, and empathy arising from earlier decisioning experience[s]" coupled with "sex-role preferences" are the "guiding philosophy of decision-making"); see also IVAN BOSZORMENYI-NAGY & GERALDINE M. SPARK, INVISIBLE LOYALTIES: RECIPROCITY IN INTERGENERATIONAL FAMILY THERAPY 39-40 (1973) (concluding that loyalty commitments between family members are "invisible but strong fibers" and that the ultimate loyalty pertains to the maintenance of the family itself despite harmful or damaging behavior on the part of one member toward another).

If the marital relationship itself were treated as giving rise to a partnership, the availability of divorce under nonbankruptcy law would be exceedingly important. Any deterrent effect Strang conceivably has would be undermined if the honest spouse were unable to "dissolve" the partnership and disassociate from the wrongdoing spouse through divorce.

97. This may be especially true where applicable law makes it extremely difficult, if not impossible, to obtain a no-fault divorce. See, e.g., ARK. CODE ANN. § 12-301 (Michie 1991) (grounds for divorce are limited to impotence, conviction of felony, alcoholism, adultery, separation, or failure to support); LA. CIV. CODE ANN. art. 102-103 (West 1991) (180 day waiting period required for divorce, unless spouses have been separated one year, adultery is proven, or one spouse has been convicted of felony). The need to continue a matrimonial relationship may cause cognitive dissonance which could be resolved by formulation of a more positive view of the spouse than merited. See MARVIN E. SHAW & PHILIP R. COSTANZO, THEORIES OF SOCIAL PSYCHOLOGY 207 (1970) (explaining that part of the basic core of cognitive dissonance is that it "creates pressures to reduce dissonance and to avoid increases in dissonance . . .").
spouse's conduct, which might cause unpleasant disruption of a sensitive relationship. Finally, an innocent spouse may be so psychologically or physically dominated by the wrongdoing spouse that any possible deterrent impact of the nondischargeability rule is totally lost.

Even if a nondischargeability rule could generally induce individual partners to monitor each other more carefully, the return from such efforts would be nominal. Negligence may be combatted in a number of ways, including standardization of procedures, improved training, or increased incentives. By contrast, it is exponentially more difficult to devise effective mechanisms to prevent an agent's purposeful fraud, particularly if the agent's position inherently provides a degree of independence.

3. Difficulty of Proving Debtors' Personal Guilt Does Not Justify Vicarious Liability

One might argue that Strang is justified because it is too difficult for courts to determine whether particular debtors acted wrongfully. The difficulty of this liability determination is obviated if, once debt is found to have been incurred by one partner in a manner which renders it nondischargeable to that partner, the other

98. See, e.g., Macaux v. Commissioner, 47 T.C.M. (CCH) 225, 229 (1983) ("It is unlikely that in many marriages one spouse will risk domestic violence or even sacrifice domestic tranquility for the accurate reporting of financial information.").

99. See id. Psychological research indicates that the coping response of the abused spouse tends to agitation, anxiety, depression, and extreme passivity. Jerry Finn, The Stresses and Coping Behavior of Battered Women, 66 SOCIAL CASEWORK 341, 342 (1985). The more dependent the abused spouse, both psychologically and economically, the more likely she is to tolerate abuse. Debra S. Kalnuss & Murray A. Straus, Wife's Marital Dependency and Wife Abuse, 44 J. MARRIAGE & FAMILY 277, 278 (1982); James C. Overholser & Sara H. Moll, Who's to Blame: Attributions Regarding Causality in Spouse Abuse, 8 BEHAVIORAL SCI. & LAW 107, 114 (1990). This behavior is based on a pattern of "learned helplessness": the abused's belief that any response she makes will be ineffective in altering her situation. Finn, supra at 347. The pattern of internalization and self-blame that often prevents the abused from seeking help is a pattern of behavior likely to prevail in the bankruptcy situation. If anything, bankruptcy and attendant financial problems are likely to be one of the sources of external stress that triggers further abuse. Id. at 341.

Of course, in extreme cases courts may find that the dominated spouse lacked sufficient capacity to consent to creation of the partnership or agency. In such scenarios a question might still arise as to the dischargeability of vicarious debt from an apparent agency. See, e.g., Macaux, 47 T.C.M. (CCH) at 227-30 (to avoid liability for the signing of a joint return the spouse must be able to show that "he or she would not have signed the return except for the constraint applied to his or her will." (citing Brown v. Commissioner, 51 T.C. 116, 119 (1968))).
partners are deemed to have participated in the wrongdoing. Initially, it is important to note that this potential argument in favor of imputed liability was not mentioned in Strang or any of its progeny as a basis for the Strang rule. Presumably, this argument has not been made because, although proving a debtor's subjective intent can be difficult and costly, the public policy favoring discharge provides a presumption that debtors are innocent and debts dischargeable.

Treating partnerships as an exception to this general rule is inappropriate. Many partnerships, such as those with numerous partners or offices in widely dispersed geographical areas, are composed predominately of partners who are totally unaware of what most other partners are doing. Partners in relatively small partnerships also may, for other reasons, be unaware of their co-partners' activities. In addition, there is no reason to believe that partners are generally more aware of, or involved in, one another's misdeeds than other groups of potential debtors, such as employees in a single corporate office or shareholders or officers of a close corporation.

4. Inappropriate Protection for "Victimized Creditors"

The goal of preventing particular creditors from being victimized by certain debtors may best explain Strang. However, if this were the only applicable rationale, the often repeated distinction between honest and dishonest debtors would be irrelevant. Under Strang, a court's focus in determining dischargeability would be on the creditor and whether or not the creditor was victimized, not on the debtor and whether or not the debtor was "honest."

100. The fact that a creditor need only establish its case by a preponderance of the evidence in any event minimizes the need for an irrebuttable presumption of debtors' guilt as a means of protecting creditors. Grogan v. Garner, 111 S. Ct. 654, 659-60 (1991) (holding that a preponderance of the evidence standard accords with the Congressional intent behind the promulgation of the § 523 discharge exceptions).

101. See supra notes 1-4.

102. Note that the corporate veil does not shield officers or employees who engage in fraudulent conduct from personal liability for debts incurred as a result of that conduct. See, e.g., Klockner v. Keser, 488 P.2d 1135, 1137 (Colo. Ct. App.) (holding corporate directors and officers personally liable for fraudulently misrepresenting to a creditor that the corporation had sufficient funds to cover checks presented to the creditor), reh'g denied, 488 P.2d 1135, cert. denied, 488 P.2d 1135 (Colo. 1971); HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 232 (3d ed. 1983) (noting officers' personal liability for fraudulent securities issue).

103. See Kennedy, supra note 47, at 896. "The exceptions from dischargeability [of
Even assuming the key to Strang is avoidance of creditor victimization, more needs to be said. The honest debtor did not victimize the creditor; why then should the honest debtor be denied a discharge of the debt? The argument that the innocent debtor may have benefited from the wrongdoing is inadequate. Debtors typically benefit from the debt they incur; otherwise few would choose to incur debt. Nonetheless, debt is ordinarily dischargeable. Furthermore, the vicariously liable debtor may not have benefited from the debt, or may have benefited to an extent less than the full amount of the debt.

Perhaps the Strang rule is based on the principle that no debtor has a right to a bankruptcy discharge. In formulating discharge policy, there is an inherent balancing of equities between specific debts incurred through a partner’s wrongful acts] are not designed so much to affect the conduct of the bankrupt as they are to protect certain classes of creditors from loss of their just claims even as against an honest, deserving, but financially distressed debtor. Id. Nonetheless, Professor Kennedy does not explain why there is a policy preference in favor of this particular class of creditors as opposed to other classes of creditors such as tort victims, many of whom never voluntarily dealt with the debtor.

The Strang Court spoke of the debtor’s benefit as an additional, and apparently unnecessary, circumstance. Strang v. Bradner, 114 U.S. 555, 561 (1885).

Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business.

Id. (emphasis added).

Logically, the fact that the innocent partner obtained some benefit should be irrelevant. The benefit received by the debtor often may be a fraction of her vicarious liability. See, e.g., First Equip. Leasing Corp. v. Luce (In re Luce), 109 B.R. 202, 206 (Bankr. N.D. Tex. 1989) (holding husband’s fraud in obtaining $475,533 rendered wife’s debt nondischargeable, even absent evidence she received any of the funds). If receipt of benefit is a relevant factor, perhaps it should serve as a cap on the amount of debt not discharged.

For example, a partner might obtain a loan on the partnership’s account by fraud, then abscond or waste the funds. The probability of this scenario may increase in the marital context, at least in cases where one spouse is consistently dominant psychologically, economically, or physically. See Beck, supra note 25, at 348-56.

United States v. Kras, 409 U.S. 434, 444 (1973) (holding that the right to discharge of debt in bankruptcy is not fundamental).
prospective debtors and creditors. *Strang* construed Congressional intent as favoring creditors who have been victims of wrongdoing. Once the wrongdoing is established, it does not matter that the particular debtor was not responsible for it. The debtor's liability is simply not to be forgiven in light of the policy preference for assisting victimized creditors.

Unfortunately, this interpretation of *Strang* also leaves troublesome questions unanswered. For example, if the focus should be on the wrong suffered by the victim rather than the debtor's moral culpability, why should debts for negligent torts, at least where serious physical injury results, be dischargeable? There is no obvious basis for extending greater sympathy to one who is defrauded into entering a transaction with the debtor than to one who is harmed without ever having agreed to deal with the debtor. Even assuming some meaningful distinction between these two classes of victim, why was this distinction so clear to the *Strang* Court that the justices did not have to identify it?

C. Frustrates the Fresh Start Doctrine

The fresh start doctrine is designed to help debtors, creditors, and society at large. Thus, it provides the fundamental justification for bankruptcy law. *Strang* frustrates every objective of the doctrine. 107

A bankruptcy discharge functions as a final societal safety net for honest debtors. The denial of discharge for vicariously incurred debt eliminates this protection, allowing innocent debtors to be dashed on the rocks below. *Strang* exposes debtors to considerable potential damage: a partner's fraud could result in staggering financial


[A]pplication of vicarious liability would effectively vitiate the § 523(a)(6) requirement that only debts resulting from willful acts committed by the debtor be nondischargeable. Vicarious liability as a social policy or legal fiction ignores the master's knowledge and imposes fault and financial responsibility without regard to culpability or intent. Section 523(a)(6) is founded on the contrary notion that only a debt resulting from the deliberate acts of the debtor can be excepted from discharge in bankruptcy.

Id. See also Alden State Bank v. Anderson (In re Anderson), 29 B.R. 184, 191 (Bankr. N.D. Iowa 1983) (stating that an innocent partner should not be held liable for a dishonest partner's fraud because the purpose of bankruptcy law is to provide relief to honest debtors).
cial liability. Moreover, the modern development of huge international partnerships not only increases the number of prospective innocent debtor-partners, it diminishes the likelihood that any particular partner could effectively monitor the conduct of fellow partners.108

Another objective of the fresh start doctrine is to motivate debtors to engage in conduct which will minimize creditors' losses. By reducing or eliminating the benefits of discharge, *Strang* discourages debtors from such activity, harming creditors as a result. For instance, prospective debtors saddled with *Strang* debt are discouraged from voluntarily filing bankruptcy. Instead, they are more likely to choose high-risk economic options in last ditch efforts to rescue their finances. A more generous dischargeability rule could convince debtors to file bankruptcy in a timely manner, to the benefit of all concerned.

Similarly, debtors who learn of their partner's fraud or willful misconduct are deterred from disclosing that information because the evidence of wrongfulness will result in nondischargeable debt for the disclosing partner. Without such data, many victims could go uncompensated and perpetrators unpunished. Making the honest debtor's vicarious debt dischargeable would encourage disclosure, at least where the debtor has already filed bankruptcy.109

The fresh start policy also promotes overall societal welfare by encouraging debtors to become full and productive economic actors. Elimination of *Strang* may motivate debtors to be more productive economically by reducing their post-bankruptcy financial burdens.110 Regardless of the potential for positive motivation, however, the burden imposed on debtors by *Strang*'s continued vitality inhibits the success of the fresh start doctrine's societal

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108. The problem of a principal's inability to monitor an agent's activities is not limited to the partnership context. Arguably, a similar increase in reliance on agents in other settings leads to analogous difficulties.

109. If the debtor becomes aware of a partner's fraud prior to filing bankruptcy, the debtor might still be hesitant to disclose the information because of the threat of vicarious liability under agency or partnership law. Furthermore, awareness of such fraud prior to filing would probably render the nondisclosing partner-debtor a morally culpable participant whose debt would be denied discharge based on the debtor's own conduct.

110. Some have argued, without empirical support, that as a result of psychological devastation the debtor might be inhibited from pursuing productive work and become a costly ward of the state. See Zeigler, Note, supra note 10, at 910 ("The fraud exception inhibits the fraudulent debtor's productivity after bankruptcy by compromising his fresh start."). To the extent, if any, that this contention is correct, it militates against retention of a purposeless nondischargeability rule.
welfare goal.

D. Fundamental Unfairness

The Strang doctrine is fundamentally unfair because it essentially punishes the innocent debtor for something another person did. Many courts and commentators have recognized the unfairness of such punishment in connection with the nonbankruptcy vicarious liability rule.111 A nondischargeability rule is more acutely inequitable than a mere liability rule because of the bankruptcy debtor's relative vulnerability. Denial of discharge strips the innocent, desperate debtor of her very last legal protection.112 The Strang rule is especially unfair because, as already discussed, it offers no policy benefits to offset its harsh, even brutal, bite.113

E. Inequity in the Spousal Context

Application of Strang in the spousal context is especially unrealistic and oppressive. First, since some states do not allow unrestricted, no-fault divorce, innocent spouses may be trapped involuntarily in an "agency" relationship. Although marriage alone may not legally create a partnership, many of the typical activities

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Because vicarious liability runs counter to the deeply ingrained fault principle in the law of torts, the doctrine has been "viewed with suspicion and accepted with misgivings." As Justice Holmes stated: "I assume that common-sense [sic] is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility . . . ."

Id. at 31 (footnotes omitted). See also Robert J. Stern & D. Jackson Loughhead, Vicarious Liability for Punitive Damages: The Worst Side of a Questionable Doctrine, 54 DEF. COUNS. J. 29, 32-33 (1987) (arguing that punitive damages are unfair punishment when imposed vicariously).

112. See William C. Whitford, A Critique of the Consumer Credit Collection System, 1979 Wis. L. REV. 1047, 1100 & n.198 (explaining that exemption statutes protect the debtor by limiting the risks of borrowing and allowing him to retain minimum property in the event of bankruptcy); Zeigler, Note, supra note 10, at 895 n.19 (discussing discharge as a paternalistic "safety net" that protects the debtor by lessening the risk of seeking credit).

113. See supra notes 60-74, 91-106 and accompanying text (Parts II(A)(I), III(B)).
of married couples, such as the sale of jointly-owned property or
the use by one spouse of property nominally owned by the other,
could be regarded as establishing an agency relationship between
the parties. The timely proof of fault necessary to dissolve the
"agency" relationship may be impossible, in such situations.

Second, as argued above, the social dynamics of a mar-
riage are far more complex than those of a typical partnership or
agency. Therefore, many debtors may have no meaningful way to
control their respective spouses. The specter of possible post-bank-
ruptcy liability would be unlikely to motivate a passive spouse,
unsuspecting of the family's financial demise and unwilling to
incur her spouse's wrath, to participate actively in supervising or
monitoring the family's financial affairs. Even if divorce is a
legal possibility, the psychological, emotional, and financial facets
of the marital relationship may prevent a spouse from perceiving
divorce as a meaningful alternative. Application of the Strang

1988) (applying the Pennsylvania state law's presumption of spousal agency in transactions
related to property owned by the entities); Shelton v. Wells (In re Shelton), 28 B.R.
218, 222 (Bankr. E.D. Mo. 1983) (imputing a husband's fraud to his wife, even though
the wife did not participate in negotiations to exchange jointly-owned property with third
parties, because each would benefit from sale and they could be considered joint ventur-
ers); Thorp Credit & Thrift Co. v. Pommerer (In re Pommerer), 10 B.R. 935, 940 (Bankr.
D. Minn. 1981) (holding an innocent wife's liability for her spouse's fraud
nondischargeable because the defendant husband and wife "do not contend that a husband-
wife agency relationship did not exist" in connection with their farming operations); cf. In
re Tara of North Hills, 116 B.R. 455, 462 (E.D.N.C. 1989) ("Whereas a wife is not the
agent of her husband strictly by force of the marital relationship, . . . the court believes
the mutual confidence usually associated with such relationship to be relevant to the issue
of agency, just as would friendship or enmity [sic] between persons." (citations omitted)),
aff'd 904 F.2d 701 (4th Cir. 1990); In re Krokos, 12 B.R. 520, 522 (Bankr. S.D.N.Y.
1981) (finding that spouses operating a "mom and pop" grocery store were partners and,
therefore, could not file a Chapter 13 petition jointly as individuals).

115. See supra notes 96-99 and accompanying text.

116. It is objectionable in a nonbankruptcy setting that one spouse would be deprived
of the power to participate meaningfully in financial decisions affecting the family. To
employ a fiction attributing to debtors lacking such power the fraudulent decisions made
by their spouses and to deprive them of the benefits of a bankruptcy discharge seems
unconscionable folly.

117. The honest spouse's post-divorce economic prospects may be extremely unattractive,
depending upon the state's rules regarding property division and alimony as well as the
dishonest spouse's prospects for economic success. See, e.g., Lenore J. Weitzman, The
Economics of Divorce: Social and Economic Consequences of Property, Alimony and
Child Support Awards, 28 UCLA L. REV. 1181, 1251-52 (1981) (noting that due to a
marked difference in post-divorce standards of living between men and women (one Cali-
ifornia study showed a 42% increase for men and a 73% decrease for women), divorced
women report having constant, severe financial difficulties and having "more stress and
rule in such circumstances would simply punish an innocent spouse for failing to take heroic steps to change the intra-family power structure.\textsuperscript{118}

Little information is available to explain the degree to which family-run enterprises or family "joint" financial transactions are dominated by a spouse of a particular gender.\textsuperscript{119} If there is a gender-based prejudice in marital relationships, another disadvantage of the Strang doctrine is that it would contribute to the economic exploitation of the dominated gender as a class.\textsuperscript{120}

less satisfaction with their lives than any other group of Americans” (footnotes omitted)).

\textsuperscript{118} Often the Bankruptcy Code and bankruptcy courts seem either to ignore or misperceive the actual, or desirable, socio-psychological context of marriage. Consider a recent case in which the Eleventh Circuit Court of Appeals held that a wife’s reliance on her husband’s representations did not constitute excusable neglect justifying leave to file a proof of claim after the bar date. ITT Commercial Fin. Corp. v. Dilkes (In re Analytical Systems, Inc.), 933 F.2d 939 (11th Cir. 1991). The wife, Dilkes, and her wholly-owned company were creditors of Analytical Systems, whose sole shareholder was the husband, Dunning. \textit{id.} at 940. On reconsideration of its initial decision, the bankruptcy court found excusable neglect based on a breach of the confidential marital relationship by Dunning when he failed to inform Dilkes that her claim had been reduced on the debtor’s books. \textit{id.} at 941. The circuit court, after declaring that it would not allow a late filing based “solely on the grounds of equity,” \textit{id.} at 942, concluded that “any breach of the confidential marital relationship between husband and wife resulting from Dilkes’ reliance on Dunning’s statements does not constitute excusable neglect.” \textit{id.} at 943. In its footnote six, the court made the following curious comment:

\begin{quote} [I]n the context of contemporary life where husbands and wives frequently are pursuing respective business and professional lives that intersect on a commercial level, any other rule would ignore the separation of home and office implicit in the rules of commercial conduct (and common sense) reflected in the Bankruptcy Code and Rules.\textit{id.} at 943 n.6.

The exact thrust of the court’s remarks is unclear. However, the comments indicate that the court believes the circumstances underlying the actual socio-psychological relationship between spouses should be ignored in favor of inflexible rules which recognize a "separation of home and office.”

\textsuperscript{119} See generally Phyllis N. Hallenbeck, \textit{An Analysis of Power Dynamics in Marriage}, 1966 J. MARRIAGE & FAM. 200 passim (discussing studies dealing with the distribution of power in marriages). Some theorists argue that the respective earning power of the spouses is a significant factor in controlling family enterprises. \textit{id.} at 200. Census statistics suggest that the earning power of men is consistently greater than that of women. For example, among full-time workers 18 years and older, men earn an average of 59% more than women. \textbf{BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES}, 455, Table 737 (1990).

\textsuperscript{120} See sources cited supra notes 96-99, 119 (suggesting that women, as a class, are relatively disempowered). Although formal proof for this proposition may be scant, the proposition that women are disempowered is consistent with what this author believes to be the generally held perception of reality.
F. Inconsistent Treatment of Other Vicarious Debt

The dischargeability of vicarious debt arises in at least two contexts outside the scope of *Strang*: (1) Section 523(a)(6) liability for "willful and malicious injury by the debtor;" and, (2) Section 523(a)(9) liability for certain consequences of the "debtor's operation of a motor vehicle." The few Bankruptcy Code cases on point have consistently construed these two provisions to allow discharge of an innocent party's vicariously acquired debt.

1. Section 523(a)(6) — "Willful and malicious injury"

Most reported cases have construed section 523(a)(6) as allowing discharge of debts acquired vicariously as a result of another's willful and malicious conduct, notwithstanding an early, pre-Code Supreme Court decision, *McIntyre v. Kavanaugh*, declaring such debts to be nondischargeable. Close examination of section 523(a)(6) cases suggests that they are fundamentally inconsistent with the *Strang* doctrine's treatment of vicarious debts arising from

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Although the Ninth Circuit Court of Appeals initially applied *McIntyre* in § 523(a)(6) cases, it subsequently questioned this "broad proposition." *LaTrattoria, Inc. v. Lansford (In re Lansford)*, 822 F.2d 502, 905 (9th Cir. 1987). See supra note 20. Courts frequently, but not invariably, applied *McIntyre* to statutory predecessors of § 523(a)(6). Compare *Industrie Aeronautiche E. Meccaniche Rinaldo Piaggio, S.p.A. v. Kastler (In re Kastler)*, 611 F.2d 308, 309-10 n.3 (9th Cir. 1979); *Frank v. Michigan Paper Co.*, 179 F. 776, 779 (4th Cir. 1919); and *Aldis v. Brown (In re Brown)*, 412 F. Supp. 1066, 1070-71 (W.D. Okla. 1975) (citing agency relationship between debtor and intentional wrongdoer as one ground for denial of discharge) with *In re Rutkowski*, 2 B.R. 677, 679 (Bankr. S.D.N.Y. 1980) (finding no proof of debtor's active participation in intentional wrongdoing without explaining why such proof was required under the Bankruptcy Act of 1898 § 17a(2)). In construing earlier versions of the current code, as in cases under § 523 itself, courts also characterized debtors' negligent acts as willful in order to deny discharge. E.g., *In re Papale*, 17 F. Supp. 146, 146 (E.D.N.Y. 1936) (denying discharge of a parent's debt for a child's act because permitting the child to possess and shoot an air rifle was an act of wanton and willful negligence). For a discussion of characterization as a means of denying discharge under § 523, see infra notes 150-52 and accompanying text.
another's fraud. Comparing these cases with McIntyre, which treats circumstances similar to those found in the section 523(a)(6) cases in accord with the Strang doctrine, clarifies the nature of this inconsistency.

a. McIntyre v Kavanaugh

Thirty-one years after Strang, the Supreme Court interpreted section 17(2) of the Bankruptcy Act of 1898 in McIntyre v. Kavanaugh. The act stated that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another . . .".

The McIntyre defendants were partners in a partnership which converted property belonging to the plaintiffs. One partner argued that he did not participate in the conversion and that any liability he might incur for the conversion was discharged in his personal bankruptcy proceeding. The Court rejected this contention, declaring that "[i]f under the circumstances here presented the firm inflicted a willful [sic] and malicious injury to property . . . [the allegedly innocent partner] incurred liability for that character of wrong." Finding that conversion was "a wilful [sic] and malicious injury to property" of another, the Court concluded that the debt, even of the allegedly innocent partner, was nondischargeable.

McIntyre, like Strang, ignores the logic underlying Neal and fails to address the relevant policy considerations before denying a discharge to innocent partners. Instead of focusing on the bankruptcy policy favoring discharge, McIntyre and Strang analyze vicarious liability under nonbankruptcy rules and then baldly state

128. ch. 487, 32 Stat. at 798.
130. Id.
131. Id. at 139 (emphasis added).
132. Id. at 142.
133. Id.
that the resulting debt is nondischargeable. The cases following Strang and McIntyre do little to advance the analysis. To evaluate the McIntyre approach, it is necessary to examine the policies underlying the nonbankruptcy vicarious liability rule and contrast them with those forming the basis for the bankruptcy nondischargeability rule.

b. Section 523(a)(6) Cases

Most of the reported cases construing section 523(a)(6) have held debtors' vicarious liability for the "willful and malicious" actions of another dischargeable.\(^{134}\) Two basic reasons have been advanced for this conclusion.

A number of courts circumvented the McIntyre analog of the Strang rule by relying on the specific language of subsequent statutes. McIntyre dealt with debts arising from wrongful and willful injury. Section 523(a)(6) of the Bankruptcy Code specifies that debts "for willful and malicious injury by the debtor" are nondischargeable.\(^{135}\) This language has been construed to apply only where the willfulness and malice were actually that of the debtor, rather than merely inferred from the actions of the debtor's agent.\(^{136}\)

\(^{134}\) See cases cited infra note 136.


\(^{136}\) Jones v. Whitacre (In re Whitacre), 93 B.R. 584, 585 (Bankr. N.D. Ohio 1988) (declining to impute child's intent to parents because of the "by the debtor" language); Yelton v. Eggers (In re Eggers), 51 B.R. 452, 454 (Bankr. E.D. Tenn. 1985) (holding, because of "by the debtor" language, a son's intent is not imputable to his mother despite the state's vicarious liability law); Bowse v. Cornell (In re Cornell), 42 B.R. 860, 862-63 (Bankr. E.D. Wash. 1984) (holding that even if the actions of the debtor's son were intentional, there was no basis under statute, case law, or the facts of the case to impute liability to his parents); Thatcher v. Austin (In re Austin), 36 B.R. 306, 309-11 (Bankr. M.D. Tenn. 1984) (holding that under the language of 11 U.S.C. § 523(a)(6) the liability of a rock concert promoter is dischargeable even if a death is caused willfully and maliciously by a concert patron for whose conduct the debtor is vicariously liable under nonbankruptcy law); Bowse v. Cornell (In re Cornell), 42 B.R. 860, 862-63 (Bankr. E.D. Wash. 1984) (holding that even if the actions of the debtor's son were intentional, there was no basis under statute, case law, or the facts of the case to impute liability to his parents); Thacher v. Austin (In re Austin), 36 B.R. 306, 309-11 (Bankr. M.D. Tenn. 1984) (holding that under the language of 11 U.S.C. § 523(a)(6) the liability of a rock concert promoter is dischargeable even if a death is caused willfully and maliciously by a concert patron for whose conduct the debtor is vicariously liable under nonbankruptcy law); Elmore v. Davis (In re Davis), 23 B.R. 633, 635 (Bankr. W.D. Ky. 1982) (allowing discharge of a sheriff's debt from a personal injury judgment because the staff member/tortfeasor's intent was not imputable to the sheriff); see also Ordmann v. Hoppa (In re Hoppa), 31 B.R. 755, 754-55 (Bankr. E.D. Wis. 1983) (holding that an employer's debt for the drunk driving liability of an employee is dischargeable notwithstanding 11 U.S.C. § 523(a)(6)); cf. Gray v. Lewis (In re Lewis), 77 B.R. 972, 973 (Bankr. S.D. Fla. 1987) (holding a car owner's vicarious liability for debt caused by his daughter's drunken driving dischargeable because 11 U.S.C. § 523(a)(9) refers only to debts arising out of "the debtor's operation of a motor vehicle . . ."); Modern Distrib., Inc. v. Gray (In re Gray), 22 B.R. 676, 680 (Bankr. W.D. Wis. 1982) (focusing on new "intent to deceive" language in 11 U.S.C. § 523(a)(2)(B)). But cf. In re Papale, 17 F.
Courts construing section 523(a)(6) have also relied on the fresh start policy in deciding that vicarious liability is dischargeable. The courts argue that the fresh start policy is designed to distinguish between honest and dishonest debtors and that denying a discharge of vicarious debt would contravene this objective.\(^\text{137}\)

c. Contrast to Strang

Under section 523(a)(6), if an innocent partner is vicariously liable for her partner's willful and malicious injury to another, the resulting debt is dischargeable. On the other hand, under the Strang doctrine, if the innocent partner is vicariously liable for her partner's fraud the vicariously acquired debt cannot be discharged. In fact, under section 523(a)(6) the vicarious liability is dischargeable even when the debtor-partner acted negligently, and that negligence facilitated the wrongful partner's conduct. Yet under Strang, the vicarious debt of a non-negligent, completely innocent partner is not discharged. In both the section 523(a)(6) case and the case governed by the Strang doctrine, the debtors are partners of the persons directly responsible for the debts, and those directly responsible persons acted wrongfully and intentionally in acquiring the debts. No apparent policy justifies treating these classes of cases differently.

The statutory construction argument asserted by courts in section 523(a)(6) cases to avoid Strang and McIntyre is by itself unpersuasive.\(^\text{138}\) There seems to be no reference in the legislative history of section 523(a)(6) which expressly purports to overrule McIntyre.\(^\text{139}\) In addition, under the old partnership model, the

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137. One court specifically stated that there is nothing in the legislative history of 11 U.S.C. § 523(a)(6) to suggest that the nonbankruptcy vicarious liability rule was to be "appended to the statutory exceptions to discharge in bankruptcy." Austin, 36 B.R. at 312. "Quite the contrary, application of vicarious liability would effectively vitiate the § 523(a)(6) requirement that only debts resulting from willful acts committed by the debtor or be nondischargeable." Id.

138. See supra notes 134-37 and accompanying text (Part III(F)(1)(b)). An additional analytical element will be added which makes the statutory argument as to § 523(a)(6) and 523(a)(9) more credible. See infra notes 171-90 and accompanying text (Part V(A)). This statutory argument will be used to bolster the conclusion that vicarious liability for fraudulent debt is also dischargeable, notwithstanding the construction applied to section 523(a)(2) under Strang.

139. See, e.g., Fluehr v. Paolino (In re Paolino), 75 B.R. 641, 649 (Bankr. E.D. Pa.)
willful and malicious act of the wrongful partner is the willful and malicious act of the "innocent" partner. Consequently, the resultant vicarious liability will be liability for acts "by" the innocent partner. Furthermore, the special emphasis placed on section 523(a)(6)'s "by the debtor" language ignores similar language in the predecessor to section 523(a)(2) construed by the Strang court. The statute considered in Strang referred to "debt created by the fraud... of the bankrupt..."\(^{140}\) This language seems the functional equivalent of "fraud by the debtor."\(^{141}\) Yet Strang interpreted this language as including fraud for which the debtor was only vicariously liable. Therefore, Congress' choice of language for section 523(a)(6) virtually identical to that in Strang should be read as affirming the analogous McIntyre decision, not overruling it.

Finally, if the statutory construction argument is determinative, two different rules would apply under section 523(a)(2) regarding discharge of debts arising from fraud. Section 523(a)(2)(A) refers generally to "any debt for money, property, [or] services... to the extent obtained by false pretences, a false representation, or actual fraud..."\(^{142}\) Because this section does not explicitly state that the benefit represented by the debt had to be obtained "by the debtor," a debtor's vicarious liability for such debts obtained by a partner's fraud could remain nondischargeable.

In contrast, section 523(a)(2)(B)(iv) refers to "any debt... for money, property, [or] services... to the extent obtained by the use of a statement in writing that the debtor caused to be made or published..."\(^{143}\) This provision's reference to the debtor's actions could be read to allow a discharge for vicarious debt. However, no legislative discussion explains why the fresh start policy would support different treatment of vicarious liability for fraud in scenarios covered by two subsections of the same provision.

2. Section 523(a)(9)

Section 523(a)(9) declares certain debts arising out of "the

\(^{140}\) Strang v. Bradner, 114 U.S. 555, 556 (1885) (emphasis added).
debtor's operation of a motor vehicle" nondischargeable.\textsuperscript{144} Limited case law on point states that vicarious liability for another person's operation of a motor vehicle is dischargeable.\textsuperscript{145} The policy basis for discharge of such vicariously acquired debts is the fresh start doctrine.\textsuperscript{146} The fresh start doctrine similarly justifies the discharge of vicarious debt arising out of another's fraud.

3. Reflections

Even if the dischargeability of vicarious liability under sections 523(a)(6) and 523(a)(9) is logically inconsistent with denial of discharge of vicarious debts under section 523(a)(2), the inconsistency alone does not indicate which of the two rules should be changed.\textsuperscript{147} Nevertheless, the fact of the inconsistency demonstrates, at least, the unfairness faced by debtors who find their vicarious debts governed by section 523(a)(2) compared with those similarly situated who, fortuitously, find themselves within the scope of sections 523(a)(6) or 523(a)(9).

G. Generates Miscellaneous Costs

Before proceeding to survey the current status of \textit{Strang} and the prospects for change, the article will consider a few of the nondischargeability rule's incidental analytical and pragmatic costs which defy neat categorization. Courts have exhibited confusion regarding the rationale and applicability of \textit{Strang} ever since the decision was initially rendered. This judicial confusion has led to a variety of problems.

Many courts limited the impact of \textit{Strang}, and \textit{McIntyre}, by distinguishing between denial of discharge for a particular debt and denial of a global discharge. Under \textit{Strang}, an innocent partner would be denied discharge of any debts related to her partner's intentional fraud, but the innocent partner would retain the right to discharge of unrelated debts regardless of vicarious responsibility.

\textsuperscript{144} 11 U.S.C. § 523(a)(9).
\textsuperscript{145} \textit{E.g.}, Gray \textit{v. Lewis (In re Lewis)}, 77 B.R. 972, 973 (Bankr. S.D. Fla. 1987) (discharging a car owner's debt attributable to his daughter's drunken driving because 11 U.S.C. § 523(a)(9) refers only to debts arising out of "the debtor's operation of a motor vehicle . . .").
\textsuperscript{146} \textit{Lewis}, 77 B.R. at 973 (stating that extensive vicarious liability due to automobile accidents is contrary to the "fresh start" policy of bankruptcy law).
\textsuperscript{147} Other criticisms of the \textit{Strang} rule discussed in this part argue compellingly for repudiation of the nondischargeability rule.
for her partner's wrongful conduct.\textsuperscript{148} Thus, even if her partner committed an act which specifically results in denial of a global discharge under the statute for the wrongful partner, the innocent debtor is entitled to a discharge. The policy justification for this distinction between debts, which contradicts the multi-handed monolith partnership model underlying \textit{Strang}, has never been adequately explained.\textsuperscript{149} Repudiation of \textit{Strang} would tie off this
analytical loose end.

Rather than impute fraud based on pure agency principles, a number of courts have based their refusal to discharge debts on the debtor's alleged "reckless indifference" for the truth.\textsuperscript{150} Traditionally, a debtor's reckless disregard for the truth has been sufficient to establish her intent to deceive and to render a resultant debt nondischargeable.\textsuperscript{151} The problem is that in order to avoid the distasteful \textit{Strang} doctrine and its \textit{McIntyre} corollary, some courts seem to have characterized mere negligence as reckless disregard.\textsuperscript{152} Not only is this result unfair for the specific debtors in-

\textsuperscript{150} Meyers, 105 F. 353, 354 (S.D.N.Y. 1900) (stating that, but for earlier precedent, the court would have denied the principal's general discharge based on an agent's fraud). \textit{But see} Walker, 53 B.R. at 179 (arguing that a distinction is reasonable).

\textsuperscript{151} \textit{E.g.}, \textit{Walker v. Citizens State Bank (In re Walker)}, 726 F.2d 452, 454 (8th Cir. 1984) (implying a negligence standard by declaring that an agent's fraud is imputed to the principal for purposes of finding debt nondischargeable if the principal "knew or should have known" of the fraud); David v. Annapolis Banking & Trust Co., 209 F.2d 343, 344 (4th Cir. 1953) (denying discharge to wife who signed fraudulent loan documents in reliance on her husband since such reliance constituted "reckless disregard" for the truth); \textit{American Inv. Bank, N.A. v. Hosking (In re Hosking)}, 89 B.R. 971, 977 (Bankr. S.D. Fla. 1985) (holding a debt nondischargeable because the debtor showed "reckless indifference" for the truth by signing false loan documents prepared by his agents without first reading them (citing \textit{Walker, 726 F.2d 452}); \textit{Cory v. Futscher (In re Futscher)}, 58 B.R. 14, 17 (Bankr. S.D. Ohio 1985) (denying discharge of debt when a debtor was "recklessly indifferent" to acts of her agent by allowing the agent to continue to operate the business after the debtor expressed "suspicion" regarding the agent's honesty and integrity); \textit{Gray}, 22 B.R. at 680 (declaring that "the current law would seem at a minimum to support holding a debtor liable where he had seen the financial statement and the errors were such that he knew or should have known of their falsity"). \textit{But see} \textit{North Shore Savings & Loan Ass'n v. Jones (In re Jones)}, 88 B.R. 899, 903 (Bankr. E.D. Wis. 1988) (holding that a wife's signature on false loan statements did not render her debt nondischargeable, even though she failed to read them, since her signature was not vital to the loan renewal).

\textsuperscript{152} \textit{E.g.}, \textit{Selfreliance Credit Union v. Harasymiw (In re Harasymiw)}, 895 F.2d 1170, 1171 (7th Cir. 1990) (holding that the defendant's "reckless disregard for the accuracy of her representations was enough to establish a knowing intent to deceive"); \textit{Case, 755 F.2d at 1476} (holding that "reckless disregard for the truth ... constitutes a 'false representation' under [11 U.S.C.] § 523(a)(2)(A) . . .").
volved, but it constitutes dangerously misleading precedent which could be misused to erroneously deny discharge for debts where no one, neither principal nor agent, had actual evil intent.

The Strang doctrine is also wasteful. While the rule does not promote substantially any legitimate purpose, it is costly to the public and burdensome on the bankruptcy system. Significant systemic costs associated with nondischargeability litigation and post-bankruptcy collection efforts, ranging from the salaries of court personnel to the adverse ramifications of delay in other pending cases, are not borne by the creditor-plaintiffs. Consequentiy, plaintiffs are encouraged to initiate a large volume of litigation with attempts to prove fraud by debtor's partners or other agents.

Proving an agent's bad faith usually requires circumstantial or indirect evidence. This type of litigation can be especially costly. While the same criticism could be leveled against all dischargeability litigation, the difference is that the nondischargeability of an honest debtor's vicarious liability for an agent's wrongdoing not only serves no worthwhile purpose but is counter-productive. For this reason the expense is unacceptable.

IV. CURRENT STATUS OF THE STRANG DOCTRINE

Having determined that the Strang doctrine is not soundly based on the policy principles underlying either the vicarious liability rule or the bankruptcy nondischargeability rule, one must next identify the adverse ramifications of the doctrine. This necessitates a review of courts' treatment of Strang.


153. Litigants in such other cases are not afforded the opportunity to buy a higher priority on the court calendar, and even if litigants were given the opportunity to do so, it is possible that non-litigants may also be adversely affected by a delay in the case.

154. Cost is one of the factors cited by authorities suggesting elimination of most discharge exceptions. See, e.g., John C. Welstarst, The Costs of Bankruptcy, 41 LAW & COMTEMP. PROBS., Autumn 1977 at 107, 111 (noting a potential "net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance"); Zeigler, Note, supra note 10 at 904 (explaining that proof of a debtor's fraudulent acts is costly not only because of the time and resources expended on litigation, but also because it distracts the court from its primary task of distributing the debtor's assets among the creditors). But cf. Steven H. Resnicoff, Barring Bankruptcy Banditry: Revision of Section 523(a)(2)(C), 7 Bankr. Dev. J. 427, 440 (1990) (arguing that a creditor's right to object to a discharge should not be denied merely because of inherent litigation costs).
An apparent majority of courts addressing the issue have continued to rule that an innocent debtor’s liability for her agent’s wrongdoing is nondischargeable.\(^\text{155}\) Other courts, including many

\(^{155}\) See, e.g., Impulsora Del Territorio Sur v. Cecchini (In re Cecchini), 780 F.2d 1440, 1444 (9th Cir. 1986) (holding an innocent debtor’s liability for partner’s fraud nondischargeable); Industrie Aeronautiche E. Meccaniche Rinaldo Paggi (In re Kasler), 611 F.2d 308, 309-10 n.3 (9th Cir. 1979) (stating that if debts are incurred as a result of willful and malicious statements made by agents, then the debts are nondischargeable as to the principals (citing McIntyre v. Kavanaugh, 242 U.S. 138)); Aldis v. Brown (In re Brown), 412 F. Supp. 1066, 1068-70 (W.D. Okla. 1975) (citing an agency relationship with the intentional wrongdoer as a ground for nondischargeability of the resultant debt); First Equip. Leasing Corp. v. Luce (In re Luce), 109 B.R. 202, 206 (Bankr. N.D. Tex. 1989) (holding that where a husband and wife were business partners, the husband’s fraudulent acts in his capacity as partner were imputed to the wife, making her debt nondischargeable); Smith, 98 B.R. at 427 (holding that where the business license was in the wife’s name, debts incurred by a husband’s fraudulent acts in his capacity as an agent were not dischargeable as to the wife); Powell v. Bear, Stearns & Co. (In re Powell), 95 B.R. 236, 240 (Bankr. S.D. Fla.), aff’d, 108 B.R. 343 (S.D. Fla. 1989), aff’d, 914 F.2d 268 (11th Cir. 1990) (holding a debtor’s liability for his agent’s wrongful misstatements in connection with purchase of securities nondischargeable); Fluehr v. Paolino (In re Paolino), 89 B.R. 453, 461 (Bankr. E.D. Pa. 1988) (holding a wife’s debt from her husband’s fraud nondischargeable where the husband was her wife’s agent); American Inv. Bank, N.A. v. Hosking (In re Hosking), 89 B.R. 971, 977 (Bankr. S.D. Fla. 1988) (holding a debtor’s liability for his agent’s submission of a fraudulent financial statement nondischargeable whether or not debtor should have known of the agent’s act); Laborers Clean-up Contract Admin. Trust Fund v. Kay (In re Kay), 60 B.R. 174, 177 (Bankr. C.D. Cal. 1986) (holding a debtor vicariously liable for deceptive statements by business partners and thus denying discharge); Walker v. Citizens Bank (In re Walker), 53 B.R. 174, 181-82 (Bankr. W.D. Mo. 1985), on remand from 726 F.2d 452 (8th Cir. 1984) (holding a debt incurred by the wife/agent’s fraud nondischargeable as to debtor/husband); Shelton v. Wells (In re Shelton), 28 B.R. 218, 222 (Bankr. E.D. Mo. 1983) (finding that husband and wife were joint venturers and imputing the husband’s fraud to his wife); Thorp Credit & Thrift Co. v. Pommerer (In re Pommerer), 10 B.R. 935, 940 (Bankr. D. Minn. 1981) (holding that because husband and wife operated a farm as partners, the innocent debtor’s liability for the spouse’s fraud was nondischargeable); Terminal Builder Mart of Piedmont v. Warren (In re Warren), 7 B.R. 571, 573 (Bankr. N.D. Ala. 1980) (holding a debtor’s liability for goods fraudulently acquired by a partner nondischargeable); Magna v. Moore Dev. Corp. (In re Moore), 1 B.R. 52, 53 (Bankr. C.D. Cal. 1979) (holding an innocent manager’s liability for an employee’s willful and malicious racial discrimination nondischargeable); Marine Distrib., Inc. v. Lubbers (In re Lubbers) 5 Collier Bankr. Cas. (MB) 506, 509 (Bankr. W.D. Mich. 1975) (denying discharge of debt to partners who had no knowledge of a fraudulent transaction by their third partner); In re Maloof, 2 F.2d 373, 374 (N.D. Ga. 1924) (holding a debtor wife’s liability for the fraud of her husband who ran her business nondischargeable); A. Sam & Sons Produce Co. v. Campese, 217 N.Y.S.2d 275, 277 (N.Y. App. Div. 1961) (stating that one partner’s fraud resulting in partnership gain leads to nondischargeability as to both partners); Griffin v. Bergeds, 279 S.W. 385, 386 (Tenn. 1926) (holding that debt incurred by the actual fraud of one’s partner is nondischargeable); George Busby Ford, Inc. v. Ross, 459 S.W.2d 46, 50 (Tenn. App. 1970) (whether fraud committed by debtor’s partner or salesman, debt nondischargeable as to innocent debtor); see also Giesinger v. Beleau (In re Beleau), 35 B.R. 259, 262 (Bankr. D. R.I. 1983) (stating that an attorney’s misrepresentation is attrib-
rendering decisions over the past few years, have blunted the impact of the *Strang* rule in a number of ways. These modern cases can be divided roughly into two categories: those dealing with general limitations on the *Strang* doctrine and those arising specifically in the inter-spousal context.

### A. General Limitations on *Strang*

Some courts avoided the *Strang* rule by finding that the malefactor-partner acted outside the scope of the partnership. Thus, where the wrongdoer was acting for her own personal benefit and to the detriment of the partnership, the debt was dischargeable. The problem with this argument is that if the malefactor truly acted outside the scope of the partnership, the better construction is not merely that the debtor’s debt should be dischargeable. Rather, the debtor would not be liable for the wrongdoer’s misdeeds even under nonbankruptcy rules.

As discussed above, some courts have avoided endorsing *Strang* by requiring, and finding, that the debtor acted with reckless disregard for the truth. Other courts, however, have simply rejected the nondischargeability of vicarious debts under section 523(a)(2)(A) without logically explaining how they circumvent *Strang*.

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156. Cf. Robles v. Lowther (*In re Lowther*), 32 B.R. 638, 641-42 (Bankr. W.D. Okla. 1983) (holding debt dischargeable where evidence showed that an advisor who misrepresented an investment was not the debtor’s agent, but acted in his own behalf).

157. See, e.g., *In re Schultz*, 109 F. 264, 265 (S.D.N.Y. 1901) (approving *Strang* but finding that a partner who skimmed funds to pay gambling debts, thus defrauding both his debtor/partner and firm creditors, acted outside the scope of his authority so that liability for the fraud did not attach to the debtor).

158. HAROLD G. REUSCHEL & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 194 (1979) (“acts of a partner not intended to benefit the business of the partnership do not bind the partnership”); cf. infra notes 181-89.

159. See supra notes 150-52 and accompanying text.

B. Limitations in Inter-Spousal Context

Courts have long addressed the conditions under which spouses should be treated as partners, or at least as agents for each other.\textsuperscript{161} Often this question arises when courts must decide whether to hold one spouse vicariously responsible for the acts of the other. A number of courts have adopted approaches allowing an honest spouse a discharge of debts despite the non-debtor spouse's wrongdoing.\textsuperscript{162}

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\textsuperscript{161} E.g., Arline v. Brown, 190 F.2d 180, 182 (5th Cir. 1951) (requiring mutual control over the subject matter in order to label spouses as partners in joint venture); Chocknok v. State Commercial Fisheries Entry Comm’n, 696 F.2d 669, 675 (Alaska 1985) (requiring proof of co-ownership to prove partnership between spouses); Remmenga v. Selk, 34 N.W.2d 757, 762 (Neb. 1948) (requiring that spouses have equal rights to direct and control one another’s conduct to prove they are joint venturers); Harrington v. Harrington, 742 S.W.2d 722, 724 (Tex. 1987) (examining spouses’ intent as a factor in determining existence of a partnership); Painter v. Lingon, 71 S.E.2d 355, 357 (Va. 1952) (denying that mere presence of owner in automobile driven by owner’s spouse was sufficient to establish agency relationship between spouses); cf. Leane E. Cerven, Note, The Problem of the Innocent Co-Insured Spouse: Three Theories on Recovery, 17 VAL. U.L. REV. 849, 857-63 (1983) (discussing traditional treatment of married couple as entity to deny insurance proceeds to innocent spouse when other spouse commits arson); see generally James, supra note 72, at 212-14 (criticizing analysis whereby factors in addition to marital relationship, such as one spouse’s ownership of property combined with presence when other spouse uses the property, lead to a conclusion that an agency relationship exists).

\textsuperscript{162} See, e.g., First Security Bank v. Steinman (In re Steinman), 61 B.R. 368, 374 (Bankr. W.D. Mo. 1986) (holding that a judgment may be rendered against the husband only); Chios v. Klein (In re Klein), 58 B.R. 397, 398 (Bankr. E.D. Pa. 1986) (holding a wife’s debt dischargeable where the evidence was insufficient to show she had knowledge of her husband’s scheme to deceive creditors); Band of Knights Booster Club v. Norton (In re Norton), 34 B.R. 666, 668 (Bankr. D. Ariz. 1983) (dismissing a complaint against a spouse where no evidence was presented as to that spouse’s misrepresentation concerning travel deposit refunds); Morris Plan Co. of Iowa v. Benedict (In re Benedict), 15 B.R. 671, 675 (Bankr. W.D. Mo. 1981) (holding a husband’s debt nondischargeable due to his misrepresentation, but allowing discharge of his wife’s debt absent sufficient evidence to implicate her in his husband’s wrongdoing); Wilson v. Bursh (In re Bursh), 14 B.R. 702, 706 (Bankr. D. Ariz. 1981) (refusing to impute an attorney/husband’s fraud to his debtor/wife where she did not commit fraud, despite a community property law which allows assessment of damages against community property if a tort is committed in interest of the property).

Interestingly, there is one scenario in which the Code clearly calls for a result which functionally approximates denial of a discharge because of a spouse’s wrongdoing. This
Courts almost uniformly announce that the marital relationship, by itself, does not give rise to a partnership or agency.\textsuperscript{163} The fact that the law of the relevant state may impute fraud from one spouse to another, and even impose punitive liability on one spouse for the acts of the other in certain circumstances, has been found insufficient for the innocent spouse’s debts to be nondischargeable.\textsuperscript{164}

After reviewing the facts before it, a court may find that no agency relationship was established.\textsuperscript{165} Other courts refuse to impute fraud from one spouse to another even where the facts sug-

\begin{itemize}
  \item\textsuperscript{163} In re Tara of North Hills, 116 B.R. 455, 462 (E.D.N.C. 1989) (holding that a wife was not agent of her husband “strictly by force of the marital relationship . . . ” (citations omitted)), aff’d 904 F.2d 701 (4th Cir. 1990); Bradford v. Bentonville Farm Supply, Inc., 510 N.E.2d 745, 747 (Ind. App. 1987) (holding that marriage alone does not create agency relationship between spouses); see also Chevy Chase F.S.B. v. Hable (In re Hable), 107 B.R. 356, 359 (Bankr. M.D. Fla. 1989) (holding a debt dischargeable where the creditor could not prove which debtor, husband or wife, fraudulently made credit card purchases); American Charter Fed. Savings & Loan Ass’n v. Harris (In re Harris), 107 B.R. 210, 215 (Bankr. D. Neb. 1989) (finding no evidence that the wife acted as her husband’s agent and holding the husband’s acts and omissions not imputable to his wife by virtue of their marriage); Bentley v. Slavik, 663 F. Supp. 736, 739 (S.D. Ill. 1987) (holding that where a wife had no ownership in a violin and played no role in its sale, she could not be held liable for her husband’s alleged fraud); First Security Bank v. Steinman (In re Steinman), 61 B.R. 356, 374 (Bankr. W.D. Mo. 1986) (holding evidence insufficient to show that a wife actually appointed her husband to be her agent); Sur Gro Plant Food Co. v. Curl (In re Curl), 64 B.R. 14, 18-19 (Bankr. W.D. Mo. 1986) (finding no evidence that the husband acted as agent for his wife in executing fraudulent financial statements without her knowledge).

  \item\textsuperscript{164} Norton, 34 B.R. at 668 (fraud cannot be imputed to a wife simply based on Arizona community property law) (citing Bursh, 14 B.R. at 706). \textit{But see Paolino}, 89 B.R. at 460 (holding that under Pennsylvania law, spouses are presumed to be mutual agents with regard to entireties property so long as the acts of one spouse are beneficial to both, even where one acts without the other’s knowledge).

  \item\textsuperscript{165} See, e.g., Steinman, 61 B.R. at 374 (holding that the wife neither acquiesced in the specific misrepresentations nor gave her husband “general authority to act for her in signing the financial statement,” although her husband made written fraudulent representations to bank in connection with loan to husband and the wife knew that husband would be making certain representations to bank).
gest that an agency relationship at least arguably exists. These cases cover diverse fact patterns, including situations in which spouses jointly borrow money or sell jointly-owned property.\footnote{166} Because these opinions usually mention neither \textit{Strang} nor specific concepts of agency or partnership law, it is unclear whether they are based on a lack of agency or on a rule of law contrary to \textit{Strang}. Other courts, in many of these same scenarios, apply \textit{Strang}.\footnote{167}

\footnote{166} E.g., FDIC v. Figge (\textit{In re Figge}), 94 B.R. 654, 670 (Bankr. C.D. Cal. 1988) (holding that although a husband signed loan documents and knew or should have known that she and her husband, as guarantors, could not afford interest payments on the loans, and although she attended at least one investor meeting, "[h]er role ... was too peripheral to warrant a determination that the debt is ... nondischargeable ... "); North Shore Savings & Loan Ass’n v. Jones (\textit{In re Jones}), 88 B.R. 899, 903 (Bankr. E.D. Wis. 1988) (holding that although the wife signed a false security agreement and loan application, her debt was dischargeable where there was no evidence that she, as opposed to husband, had fraudulent intent); Leone v. Shane (\textit{In re Shane}), 80 B.R. 240, 243 (Bankr. S.D. Fla. 1987) (holding a wife’s debt dischargeable despite her husband’s fraudulent misrepresentation to purchasers in a sale of jointly held property); Chios v. Klein (\textit{In re Klein}), 58 B.R. 397, 398 (Bankr. E.D. Pa. 1987) (finding that although the wife guaranteed a loan for her husband’s business, the wife’s debt was dischargeable despite her husband’s fraud in the loan documents she had signed); Cash v. Armstrong (\textit{In re Armstrong}), 54 B.R. 399, 409 (Bankr. N.D. Ala. 1985) (finding that although husband and wife sold jointly held property, the husband’s knowledge was not imputable to his wife); First Nat’l Bank v. Curry (\textit{In re Curry}), 12 B.R. 421, 424-25 (Bankr. M.D. Fla. 1981) (holding that a husband’s debt was dischargeable although his wife fraudulently arranged for the loan); Morris Plan Co. v. Benedict (\textit{In re Benedict}), 15 B.R. 671, 675 (Bankr. W.D. Mo. 1981) (holding a wife’s debt dischargeable despite her husband’s fraud in obtaining jointly secured loan); cf. Norton, 34 B.R. at 668 (holding a husband’s fraudulent representation in the operation of a jointly owned travel agency was not imputable to wife).

\footnote{167} See, e.g., First Equip. Leasing Corp. v. Luce (\textit{In re Luce}), 109 B.R. 202, 206 (Bankr. N.D. Tex. 1989) (holding a husband’s fraud imputable to his wife where the spouses were business partners, even though they worked in separate areas of the business); Love v. Smith (\textit{In re Smith}), 98 B.R. 423, 426 (Bankr. C.D. Ill. 1989) (holding a husband’s fraud imputable to his wife because, although the wife made no business decisions, the license required to do business was in her name and she allowed her husband to operate the business); Paolino, 89 B.R. at 460 (holding that where a wife told her husband to “go forward as he saw fit” in a transaction involving entirety property and where there is a state law presumption of agency, the wife’s debt was nondischargeable); Shelton v. Wells (\textit{In re Shelton}), 28 B.R. 218, 222 (Bankr. E.D. Mo. 1983) (holding a husband’s fraud imputable to wife where an exchange of jointly owned property with third parties benefited both, since as a joint venturer, her lack of participation in negotiations was irrelevant); Thorp Credit & Thrift Co. v. Pommerer (\textit{In re Pommerer}), 10 B.R. 935, 940 (Bankr. D. Minn. 1981) (finding that because husband and wife debtors “do not contend that a husband-wife agency relationship did not exist” in connection with their farming operations, the innocent wife’s liability for her spouse’s fraud was nondischargeable); \textit{In re Maloof}, 2 F.2d 373, 374 (N.D. Ga. 1924) (holding that a debtor/wife’s liability for the fraud of her husband, who ran her business, was
At least one court has suggested a minor limitation to the Strang rule. This standard would impute fraud only if the "innocent" spouse had personally participated, even if with honest intent, in the underlying transaction. The same court held that a higher standard of involvement would be necessary to impute willful and malicious conduct under section 523(a)(6). All of the criticisms raised against the Strang rule apply to this modified rule as well.

V. PROPOSALS FOR CHANGE

A reasonable case can be made for judicial rejection of the Strang doctrine. Part V(A) states and evaluates this case. However, perhaps the greatest hope for effective, uniform change is through corrective legislation. Part V(B) proposes specific statutory amendments to accomplish this goal.

A. The Case for Judicial Rejection of Strang

The largest obstacle to judicial repudiation of the Strang doctrine is that neither the legislative history of section 523(a)(2) nor case law prior to the enactment of the Bankruptcy Code of 1978 contains any express rejection of Strang. The Supreme Court has repeatedly stressed that a change in statutory construction must be clearly corroborated by Congressional intent. To overrule nondischargeable).

168. Figge, 94 B.R. at 669-70 (holding a wife's debt dischargeable where she played only a "peripheral" role in her husband's fraudulent misrepresentations in a loan application (construing In re Lansford, 822 F. 2d 902, 904 (9th Cir. 1987), in which the court held a wife's debt nondischargeable after finding she had participated in her husband's fraudulent transaction)).

169. Id.

170. See, e.g., BancBoston Mortgage Corp. v. Ledford (In re Ledford), 127 B.R. 175 (M.D. Tenn. 1991) (indicating that uniformity by judicial construction should follow Strang); Paolino, 75 B.R. at 649 (stressing that old Supreme Court precedents retain validity until Congress indicates clearly that legislative changes are intended to alter those precedents and suggesting Strang must be changed legislatively).

171. Pennsylvania Dep't of Pub. Welfare v. Davenport, 111 S. Ct. 2126, 2133 (1990) (declaring "we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure"); Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409, 424 (1986) (stating there is a "strong presumption of continued validity that adheres in the judicial interpretation of a statute [so that] overruling of a [judicially-created] rule . . . must come from Congress"); Midlantic Nat'l Bank v. N.J. Dep't of Env't Protection, 474 U.S. 494, 501 (1986) (stating that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific
Strang, the Court would have to find a clear expression of Congressional intent to do so in the Bankruptcy Code of 1978.\textsuperscript{172}

1. The Plain Language Argument

The best case against Strang begins with the plain language of the exceptions to discharge under sections 523(a)(2)(B), 523(a)(6), and 523(a)(9). This language applies to liabilities arising from the debtor's own acts, and should not extend to vicarious liability for the acts of others.\textsuperscript{173}

Section 523(a)(2)(A) must be similarly construed in light of the apparent Congressional intention set forth in sections 523(a)(2)(B), 523(a)(6), and 523(a)(9). As argued in Part III(F),\textsuperscript{174} there is no policy basis for denying discharge for an innocent debtor's vicariously acquired debt under section 523(a)(2)(A) while allowing discharge for similar debts governed by related sections. Moreover, the objection raised to the "plain language" argument in Part III(F) becomes inapposite in this context. While the earlier discussion argued that reliance on the plain language of sections 523(a)(2)(B), 523(a)(6), and 523(a)(9) was an unreasonable basis for preferential treatment of debts under those sections, it does not follow that uniform treatment requires uniform denial of discharge. Instead, the uniform rule should grant a discharge.

In addition, one of the primary objections to the plain language argument raised in Part III(F) relies upon Strang's primitive conceptualization of partnerships as multi-handed monoliths. Under this concept of partnership, the plain language of the statute applies equally to acts personally performed by the debtor and those she...

\textsuperscript{172}See Ledford, 127 B.R. at 184 (citing doctrine requiring clear expression of congressional intent to change statutory interpretation); Paolino, 75 B.R. at 649 (explaining that the Supreme Court has emphasized the rule of construction that if Congress intends to alter a statutory interpretation of long standing, it must do so expressly). The Paolino court cited as authority for this proposition Kelly v. Robinson, 479 U.S. 36 (1986), which held that a general acceptance of the judicial exception for the restitutionary obligations of convicted criminals supported a presumption of Congressional intent that such debts remain nondischargeable under 11 U.S.C. § 523(a)(7), and Midlantic Nat'l Bank, 474 U.S. 494, which held that Congress, in codifying a rule of abandonment, did not intend to allow a trustee's abandonment power to supercede legitimate state interests in public safety.


\textsuperscript{174}See supra text accompanying notes 121-47.
performs vicariously through her partners. One might reasonably argue, however, that in enacting the Bankruptcy Code of 1978, Congress viewed partnerships as aggregates of individuals, a perspective better tailored to the Code’s fresh start policies. The Code’s legislative history, which constantly repeats the fresh start theme, provides adequate authority that Congress sought to distinguish between a debtor’s liabilities for her own, direct acts and her indirect, vicarious liabilities. Under this aggregate view of partnership, the plain language of sections 523(a)(2)(B), 523(a)(6), and 523(a)(9) refers only to the debtor’s personal actions.

Aside from the evidence available from legislative history, other evidence supports the idea that the applicable partnership model has changed from the one which underlies Strang. During the century and more since Strang was published, a number of legal fictions similar to that of the monolithic partnership model have been widely rejected. For example, the fictions treating husband and wife as an entity for purposes of interspousal tort immunity or testimonial privilege have been widely discredited.

175. See supra notes 140-42 and accompanying text.
176. See, e.g., Austin, 36 B.R. 306 (discussing legislative history).
177. Courts eliminating interspousal tort immunity, or limiting it to specific torts, generally find the legal fiction portraying husband and wife as an entity to be no longer supported by public policy. See, e.g., Klein v. Klein, 376 P.2d 70, 72 (Cal. 1962) (finding public policy support for interspousal tort immunity, based on fear of fraud or collusive suits, outweighed by public policy favoring compensation to legitimately injured plaintiffs); Boblitz v. Boblitz, 462 A.2d 506, 521 (Md. 1983) (abrogating interspousal tort immunity because traditional policy justifications are inadequate to overcome policy favoring recovery in modern social context); Cain v. McKinnon, 552 So.2d 91, 92-93 (Miss. 1989) (balancing interests of parties to apply elimination of interspousal tort immunity retroactively); Burns v. Burns, 518 So.2d 1205, 1210-11 (Miss. 1988) (eliminating interspousal tort immunity based on principle that for every wrong there is a remedy, and finding the “unity” of husband and wife to be a legal fiction disproportionately harmful to wives); Hein v. Harper, 759 P.2d 253, 263 (Or. 1988) (abolishing interspousal tort immunity for negligent torts because preserving it in such a limited context was “neither symmetrical nor otherwise rational . . . .”); Hack v. Hack, 433 A.2d 859, 868 (Pa. 1981) (finding policy bases for interspousal immunity doctrine inconsistent and no longer applicable); Tader v. Tader, 737 P.2d 1065, 1068 (Wyo. 1987) (rejecting notions that preservation of family harmony and prevention of insurance fraud offer support for continued application of interspousal tort immunity). But see, e.g., Saunders v. Hill, 202 A.2d 807, 810 (Del. 1964) (denying wrongful death claim by wife’s estate because cause of action in tort would be barred if wife had survived accident caused by husband’s negligence); Sturiano v. Brooks, 523 So.2d 1126, 1130 (Fla. 1988) (recognizing limits on interspousal tort immunity in cases where one spouse is deceased, but upholding doctrine in other contexts, and barring wife’s claim against husband’s estate based on application of New York insurance law); Treciak v. Treciak, 547 So.2d 169, 170 (Fla. Dist. Ct. App. 1989) (barring insurer’s claim, as husband’s subrogee, against wife for fire damage result-
2. The Policy Argument

Should the plain language argument fail, courts,\textsuperscript{178} in order to avoid \textit{Strang}, would probably have to identify \textit{Strang}'s policy or doctrinal basis and explain that fundamental changes warrant the opinion's reversal.\textsuperscript{179} Thus, one might argue that \textit{Strang} was
based on an outdated version of the nonbankruptcy doctrine of vicarious liability. The problem with that assertion is that although there has been substantial development in the law of vicarious liability, the change is probably not enough to reverse Strang.

As has already been discussed, the denial of a discharge is punitive in nature. Therefore, the policies behind the nondischargeability of vicarious debt should be similar to those supporting the imposition of punitive damages on persons who are vicariously liable. Rules regarding the imposition of punitive damages based on vicarious liability have become more restrictive. Arguably, the policy considerations—and conceptualization of agency—underlying this restrictive trend would also justify more restrictive rules regarding the nondischargeability of vicarious debt.

At the end of the last century, a substantial minority view held that a principal could be vicariously liable for punitive damages under the “scope of employment rule” without having done anything wrong. Punitive damages could be vicariously imposed on a principal for any actions taken by the agent within the scope of the agent’s employment. Subsequently, the Restatement (Second) of

180. A number of authorities argue that this was, or is, the majority view. See, e.g., Briner v. Hyslop, 337 N.W.2d 858, 863 (Iowa 1983) (citing authorities which identify the scope of employment rule as the majority view); Keeton et al., supra note 60, § 2, at 13 (a majority of jurisdictions retain the rule that “the vicarious liability of the master for acts within the scope of the employment extends to punitive as well as compensatory damages”); Parlee, supra note 111, at 27 n.2 (“[t]he scope of employment rule, long the majority rule, is now followed in a minority of jurisdictions”). The remaining jurisdictions adhere to some form of the “complicity rule.” Stern & Loughhead, supra note 111, at 30. Most authorities, however, generally agree that the modern trend is toward the more restrictive “complicity rule.” See, e.g., Briner, 337 N.W.2d at 867 (adopting the complicity rule as more consistent with the purpose of punitive damages and noting that other jurisdictions, such as Florida and Wyoming, had recently done so); Kline v. Multi-Media Cablevision, Inc., 666 P.2d 711, 716 (Kan. 1983) (adopting complicity rule); Parlee, supra note 111, at 27 n.2 (“[t]he Restatement [complicity] rule . . . has now become the rule in most jurisdictions”).

According to Parlee, id. at 31 n.27, the following jurisdictions continue to apply the older scope of employment rule, which allows punitive damages for vicarious liability even if the principal was not guilty of wrongful conduct. See, e.g., Avondale Mills v. Bryant, 63 So. 932, 934 (Ala. Ct. App. 1913) (holding employer liable for punitive damages for foreman’s assault and battery of laborer); Western Coach Corp. v. Vaughn, 452 P.2d 117, 120 (Ariz. Ct. App. 1969) (holding corporation liable for punitive damages where employees acted with reckless indifference to plaintiffs’ interests); Ray Dodge, Inc. v. Moore, 479 S.W.2d 518, 523 (Ark. 1972) (holding auto dealer liable for punitive damages in sale of truck with falsified odometer whether or not he knew of and ratified employee’s wrongful action resetting the odometer); Piedmont Cotton Mills, Inc. v. General Warehouse No. Two, Inc., 149 S.E.2d 72, 74 (Ga. 1966) (awarding punitive damages against corporation whose agent maliciously diverted stream, damaging plaintiff’s property);
Torts formalized a different general rule, based on developing case law. This rule, known as the "complicity rule," is usually described as preventing the vicarious imposition of punitive damages unless the principal did something wrong.\(^{181}\) However, where a

\(^{181}\) The Restatement provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

Hibschman Pontiac, Inc. v. Batchelor, 362 N.E.2d 845, 848 (Ind. 1977) (holding evidence of agents' fraud, malice, gross negligence, and breach of warranty sufficient to support punitive damage award against auto dealer-principal); Kiser v. Neumann Co. Contractors, Inc., 426 S.W.2d 935, 938 (Ky. 1967) (noting that employer's punitive damage liability is derivative and refusing to hold corporation liable for punitive damages when none were assessed against the employee); Goddard v. Grand Trunk Ry., 57 Me. 202, 202 (1869) (awarding damages against railway company who knowingly retained an employee who assaulted a passenger); Safeway Stores, Inc. v. Barneck, 122 A.2d 457, 462 (Md. 1956) (dismissing employer's objection that without proof of employer's actual malice, it could not be held liable for agent's actions of malicious prosecution and false imprisonment); Lucas v. Michigan Cent. R.R. Co., 56 N.W. 1039, 1040-41 (Mich. 1893) (holding that railway company can be held liable in exemplary damages for conductor's oppressive ejectment of passenger because such conduct is within scope of conductor's authority); Sandifer Oil Co. v. Dew, 71 So.2d 752, 758 (Miss. 1954) (approving award of punitive damages against oil company for employee's negligent acts which resulted in death of young girl); Johnson v. Allen, 448 S.W.2d 265, 269-70 (Mo. Ct. App. 1969) (holding employer liable for actions of employees who were acting within the scope of their employment when they installed the wrong transmission and told the customer otherwise); Rickman v. Safeway Stores, Inc., 227 P.2d 607, 613 (Mont. 1951) (holding corporation liable for agent's acts even though outside the scope of agent's duties, because the corporation had ratified the agent's acts); Hairston v. Atlantic Greyhound Corp., 18 S.E.2d 166, 170 (N.C. 1942) (allowing punitive damages against bus company for assault against customer by bus company employee, but remanding on other grounds); Kurn v. Radence, 141 P.2d 580, 582 (Okla. 1943) (citing with approval the scope of employment rule, but deciding case on grounds that employer retained employee while knowing of his tendency to use unnecessary force and violence toward third parties in the course of his employment); Stroud v. Denny's Restaurant, Inc., 532 P.2d 790, 794 (Ore. 1975) (adopting scope of employment rule and holding restaurant liable for punitive damages for malicious prosecution although there was evidence that the cook's conduct was directed by restaurant management); Philadelphia Traction Co. v. Orbann, 12 A. 816, 820-21 (Pa. 1888) (noting that if the conductor's action was malicious, railroad company would be liable for exemplary damages); Hooper v. Hutto, 158 S.E. 726, 727 (S.C. 1931) (overruling defendant's exception to punitive damages for its employee's recklessness while driving a truck within the scope of his employment); Odom v. Gray, 508 S.W.2d 526, 534 (Tenn. 1974) (holding newspaper liable for punitive damages for its reporters' conspiracy to make false reports of an attorney indecently exposing himself publicly).
(d) the principal or a managerial agent of the principal ratified or approved the act.


The more modern rule has been referred to as the "some fault" or "complicity" rule. This rule has been applied in the following jurisdictions, as noted in Parlee, supra note 111, at 36 n.49: MINN. STAT. § 549.20(2) (1990); Agarwal v. Johnson, 603 P.2d 58, 69-70 (Cal. 1979) (noting that even if defendants' exception to jury instruction had been sustained, their liability would be the same since the employees at fault acted in a managerial capacity within the scope of their employment); Frick v. Abell, 602 P.2d 852, 856 (Colo. 1979) (refusing to require a municipality to indemnify a police officer for exemplary damages because the municipality's retention of the officer did not constitute ratification of his tortious conduct); Maisenbacher v. Society Concordia of Danbury, 42 A. 67, 70 (Conn. 1899) (holding that a corporation is not liable for the malicious conduct of its manager); Dart Drug, Inc. v. Linthicum, 300 A.2d 442, 444 (D.C. 1973) (holding that a store was not liable for punitive damages for a false arrest by the store detective where the store manager freed the plaintiff); Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981) (finding no corporate liability for a wrongful death where the plaintiff did not allege fault on the part of the corporate employer); Lauer v. YMCA, 557 P.2d 1334, 1335 (Haw. 1976) (noting as a matter of public policy that city is not liable for police officer's misconduct absent authorization or condoning such conduct); Openshaw v. Oregon Auto. Ins. Co., 487 P.2d 929, 932 (Idaho 1971) (holding insurer not liable for punitive damages absent showing that insurer's manager ratified subordinate's acts); Holda v. Kane County, 410 N.E.2d 552, 553 (Ill. App. Ct. 1980) (holding county not liable for punitive damages for the willful misconduct of its jailers); Briner v. Hyslop, 337 N.W.2d 858, 868 (Iowa 1983) (holding employer liable for punitive damages where employer allowed employee to drive for an excessive period of time); Kline v. Multi-Media Cablevision, Inc., 666 P.2d 711, 716 (Kan. 1983) (adopting the Restatement rule and finding corporation not liable for employee's tort unless corporation authorized the act or was reckless in employing or retaining the employee); Summa Corp. v. Greenspun, 607 P.2d 569, 575 (Nev. 1980) (requiring principal to have knowledge of agent's wrongful conduct, combined with authorization or ratification of that conduct, before vicarious liability for punitive damages may be imposed); Security Aluminum Window Mfg. Corp. v. Lehman Assoc., Inc., 260 A.2d 248, 254 (N.J. Super. Ct. App. Div. 1970) (holding real estate broker liable for punitive damages where broker attempted to defend agent's actions and sought benefit of agent's illegal transaction, thus ratifying agent's misconduct); Samadon Oil Corp. v. Neeld, 577 P.2d 1245, 1249 (N.M. 1978) (holding gas well owner not vicariously liable for employee's negligent design of safety vent system which caused death of plaintiff's decedent); Craven v. Bloomingdale, 64 N.E. 169, 169 (N.Y. 1902) (reversing trial court where jury instruction was given which allowed punitive damages against employer for false imprisonment by employee without additional jury instruction requiring finding an authorization or ratification of employee's actions); John Deere Co. v. Nygard Equipment, Inc., 225 N.W.2d 80, 95 (N.D. 1974) (finding employee's authority sufficient to allow him to act for the corporation, so his wrongful act was the wrongful act of the corporation justifying assessment of punitive damages, but noting such damages would be inappropriate absent authorization); Tracy v. Athens & Pomeroy Coal & Land Co., 152 N.E. 641, 642 (Ohio 1926) (holding company superintendent's intent to remove coal from plaintiff's land not imputable to company for purposes of liability for punitive damages); Conti v. Walter Winters, Inc. 136 A.2d 622, 624 (R.I. 1957) (finding deceptive conduct was authorized by management and holding auto dealership liable for punitive damages); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630-31 (Tex. 1967) (holding hotel liable for punitive damages when manager commits assault and battery while acting in
principal has acted wrongfully to any degree, punitive damages may be allowed even when the principal’s wrong is less egregious than that which would ordinarily warrant punitive damages. The limited ability to impose vicarious punitive damages arguably reflects the fact that the agent’s wrong-

managerial capacity); Freeman v. Sproles, 131 S.E.2d 410, 414 (Va. 1963) (requiring authorization of agent’s wrongful conduct in order to award punitive damages against corporate principal); Shortt v. Central Vt. Pub. Serv. Corp., 399 A.2d 517, 518-19 (Vt. 1979) (holding customers not entitled to punitive damage award where utility employees negligently disconnected service absent showing of malicious act by governing officer); Addair v. Huffman, 195 S.E.2d 739, 740 (W. Va. 1973) (holding collection agency liable for punitive damages where agency exclusively employed justice of the peace known to be incompetent); Garcia v. Sampson’s, Inc., 103 N.W.2d 565, 567 (Wis. 1960) (requiring ratification of employee’s tortious conduct in order to impose punitive damage award on employer); Campen v. Stone, 635 P.2d 1121, 1125, 1127 (Wyo. 1981) (reversing trial court’s punitive damage award against employer and adopting Restatement (Second) rule for determining liability).

It should be noted that the dicta in several of the cases cited by Parlee suggest that the application of either rule would often produce the same result. See, e.g., Maisenbacker v. Society Concordia of Danbury, 42 A. 67, 70 (Conn. 1899); Piedmont Cotton Mills, Inc. v. General Warehouse No. Two, Inc., 149 S.E.2d 72, 74 (Ga. 1966); Stroud v. Denny’s Restaurant, Inc., 532 P.2d 790, 794 (Ore. 1975).

The law in a few jurisdictions is more restrictive than the complicity rule. See Briner, 337 N.W.2d at 863-864 (citing jurisdictions).

182. See Parlee, supra note 111, at 38-39, 46 (noting that, when agents are employed in managerial capacities, principals may be vicariously liable for punitive damages when the agents’ intentional wrongs fall within the scope of employment). Substantial authority provides that punitive damage awards against vicariously liable principals need not equal the awards against their agents. See, e.g., Embrey v. Holly, 442 A.2d 966, 973 (Md. 1982) (holding punitive damages for defamation may be apportioned between employee radio broadcaster and vicariously liable employer radio station). Because the purpose of exemplary damages is to punish wrongdoers, punitive damages should be apportioned in accordance with the respective culpability of the various defendants. These cases explain that such apportionment is essential to the punitive purpose of exemplary damages. See, e.g., Exxon Corp. v. Yarema, 516 A.2d 990, 997 (Md. Ct. Spec. App. 1986) (“Because of the exemplary nature of punitive damages . . . punitive or exemplary damages may be awarded in different amounts against several defendants or they may be awarded against one or more of the defendants and not others, depending, not upon the damages sustained by the plaintiff, but upon the differing degree of culpability or the existence or nonexistence of malice on the part of the defendants.” (citing Embrey, 442 A.2d 966)). See generally D.E. Ytreberg, Annotation, Apportionment of Punitive or Exemplary Damages as Between Joint Tortfeasors, 20 A.L.R.3d 666.

183. For contrasting views at slightly different periods of time, compare Parlee, supra note 111, at 36 (“The majority of jurisdictions follow the rule that a principal cannot be held vicariously liable for punitive damages assessed against an agent unless the principal’s conduct, in relation to the agent’s, was itself somehow wrongful.” (footnote omitted)) with Embrey, 442 A.2d at 969 (finding that a majority of jurisdictions hold employers vicariously liable for punitive damages against employees).
doing is not attributed to the principal.

A major flaw in this reasoning is that even under the Restatement rule, punitive damages may sometimes be imposed vicariously upon an innocent principal for the fraud of her agent. According to section 909(c) of the Restatement, "[p]unitive damages can properly be awarded against a . . . principal because of an act by an agent if, but only if, . . . the agent was employed in a managerial capacity and was acting in the scope of employment . . . ."\(^{184}\) The Restatement recognizes that persons in positions of discretion, such as managers, generally have the power intentionally to cause injury to third parties. The Restatement retains the vicarious liability rule to motivate principals to exercise great care in the selection of such persons.\(^{185}\) Given that the modern trend does not limit the imposition of punitive damages where agents occupy and act in managerial capacities, the trend does not support reversal of the Strang rule in those cases.\(^{186}\)

A partner is typically entitled to exercise certain managerial powers.\(^{187}\) Consequently, if the Restatement rule applies, it seems that punitive damages could be imposed vicariously. Interestingly, however, a separate rule seems to regulate vicarious imposition of punitive damages on innocent partners, as opposed to non-partner principals.\(^{188}\) There is no clear trend as to the restrictiveness of

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184. RESTATEMENT (SECOND) OF TORTS § 909(c) (1979).

185. The principal's liability is still only imputed liability, because she is liable even if she was neither reckless nor negligent in hiring or maintaining the employee.

186. Note, however, not all positions involving the exercise of discretion have been characterized as managerial capacities. See, e.g., Hale v. Farmers Ins. Exch., 117 Cal. Rptr. 146 (Cal. Ct. App. 1975) (stating that the trial judge was correct in holding that a defendant, although a supervisor, was not a manager within the definition of Restatement § 909); Kimmel v. Iowa Realty Co., Inc., 339 N.W.2d 374, 383 (Iowa 1983) (stating that real estate agent did not occupy managerial capacity for broker).

187. See UNIF. PARTNERSHIP ACT § 18(e), 6 U.L.A. 213 (1969) ("All partners have equal rights in the management and conduct of the partnership business.").

188. No persuasive policy has been suggested to explain these disparate rules. Some courts have held that punitive damages cannot be vicariously imposed on a passive partner unless that partner authorized or ratified the wrongdoing. 1 BROMBERG & RIBSTEIN, supra note 80, § 4.07, at 4:91-92; REUSCHEL & GREGORY, supra note 158, § 203; see generally, Michael A. Rosenhouse, Annotation, Derivative Liability of Partner for Punitive Damages for Wrongful Act of Copartner, 14 A.L.R.4th 1335 (1982). However, a rule which shields innocent partners from vicarious punitive damages is inconsistent with the rule imposing on principals for the acts of managerial agents. 1 BROMBERG & RIBSTEIN, supra note 80, § 4.07, at 4:91. Other courts have imposed vicarious liability for punitive damages, but limited the extent of the passive partner's liability because that partner's conduct was relatively less culpable. See, e.g., State ex rel. Hall v. Cook, 400 S.W.2d 39, 41-42 (Mo. 1966) (holding that punitive damage judgments in differing amounts could
this separate rule. Consequently, no definitive lesson can be gleaned from these partnership punitive damage rules relative to Strang, which applies both to partners and non-partner principals.

B. Legislative Change

Legislation would be the clearest, most efficient method of introducing change, and it could take either of at least two forms. One approach would be to mimic the Restatement rule. This would continue to render nondischargeable certain vicariously acquired debts, even where the debtor did not herself commit the type of conduct which would ordinarily be nondischargeable. It seems that little good could be said about such an unprincipled compromise.

Fundamental fairness and bankruptcy’s “fresh start” policy require that clear legislation be enacted to provide a discharge to honest debtors for vicarious liability for another’s wrongdoing. This could be accomplished in two ways. First, the following provision should be added to every subsection of the Bankruptcy Code section 523(a) dealing with a type of debtor misconduct:

Nondischargeability pursuant to this Subsection may be based only on the action or inaction of the debtor and not on the action or inaction of another person vicariously attributed to the debtor; except, however, that if a debtor has conspired in or otherwise knowingly assisted in an action—or has authorized or ratified an action which, had

be entered against various defendant partners in a real estate partnership based on their relative culpability and wealth). This result is consistent with cases allowing apportionment of punitive damages among vicariously liable principals and agent wrongdoers. See supra note 182.


190. Although Strang involved a partnership, Strang has been applied to non-partnership agencies as well. See, e.g., cases cited supra note 166.

191. 11 U.S.C. § 523(a). As discussed supra notes 148-49 and accompanying text, case law establishes that such vicarious liability is not a bar to a global discharge under 11 U.S.C. § 727. Nonetheless, possible confusion might be avoided by adding the proposed language to appropriate subsections of § 727 as well.

192. This proposal assumes that ratification involves morally culpable conduct which should be punished and deterred.
the debtor directly performed the action, would have rendered the debtor’s resulting debt nondischargeable, such debt shall be nondischargeable.

The foregoing amendment would substantially remedy the problems arising in the spousal context as well. However, this language would not prevent courts from finding that debtors had committed fraud by blindly relying on information supplied by their partners or spouses. As discussed above, some courts have employed the concept of “reckless disregard” or “reckless indifference” for the truth to capture such debtors, even though they may have been guilty of mere negligence. To ensure that the dischargeability rules are construed and applied in the manner intended, the following language should be added to section 523(a)(2):

No person shall be deemed to have acted with “reckless disregard for the truth” where such person relied in good faith upon information supplied by another. Reliance on information supplied by another shall be presumed to have been in good faith unless the person allegedly so relying can be shown to have had substantial reason to doubt the veracity of the person who provided the information and then made no good faith effort to dispel the doubt or verify the information.

Although these proposed statutory amendments should provide substantial protection in the spousal context, they are arguably insufficient. There may be cases in which debtors, because of complex psychological, emotional and financial attachments to their spouses, feel compelled to comply blindly with their spouses’ fraudulent directions or to “rely” on their spouses’ obviously falacious facts. In extreme cases, traditional legal doctrines such as incompetence or duress may protect the debtor from losing her discharge. The possibly problematic cases are those in which substantial, but arguably not overwhelming, pressure is subjectively experienced. Of course, any spousal exception to the

193. If a debtor spouse knew of her spouse’s wrongdoing and participated in or contributed to it, even by failing to disclose material facts, the debtor spouse would be personally liable based on her own wrongdoing and the debt would still be nondischargeable.
194. See supra notes 150-52 and accompanying text.
nondischargeability rules may be abused by dishonest debtors. Before exploring the contours of any such exception, it would be helpful to measure the extent to which spouses in fact experience substantial compulsion. Devising an appropriate empirical study, however, lies outside the purview of this article.

CONCLUSION

The *Strang* doctrine serves no significant public policy. Without providing any meaningful deterrent not already produced by nonbankruptcy vicarious liability rules, *Strang* unfairly and imprudently frustrates bankruptcy's fresh start policy by denying discharge of vicariously incurred fraudulent debts. The Code inconsistently discharges those who are vicariously liable for other sorts of nondischargeable debts.

Public policy and equity require rejection of *Strang*. The Code may be sufficiently flexible to allow courts to distinguish *Strang* and discharge these debts. If the courts continue to refuse this route, however, section 523 should be explicitly revised and *Strang* reversed.