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## U.S. Higher Education Financing Has Significantly Changed, So Too Should Seventh Circuit Student Loan Discharge Law

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# U.S. Higher Education Financing Has Significantly Changed, So Too Should Seventh Circuit Student Loan Discharge Law

WILLIAM L. RYAN<sup>1</sup>

*Every year in the U.S., millions of students use public and private student loans to finance a portion of their post-secondary education. Inevitably, many student borrowers find themselves in the financial doldrums in the years subsequent to the initial loan disbursement. From this precarious position of defaulted debtor, many seek a fresh start by way of a personal debt discharge in Bankruptcy Court. Prior to 1978, student loan debt was discharged in routine bankruptcy proceedings. In 1978, Congress inserted provision 11 U.S.C. 523(a)(8) into the Bankruptcy Code. Section 523(a)(8) is better known as the “undue hardship” provision. The undue hardship provision requires debtors to meet an undue hardship in a separate bankruptcy proceeding for a debtor’s loans to be discharged. Today, the seventh circuit, along with 8 other circuits, uses the Brunner test to evaluate student debt in bankruptcy proceedings. The reputation of the Brunner test rests on its often rigid application and its varied and sometimes absurd results. The remaining circuits have adopted some version of the more flexible Totality of Circumstances test. This Comment provides a snapshot of the current statutory, administrative, and judicial regime governing student loan debt. Under the current regime, millions of student debtors are funneled into federally administered income-based repayment programs. This Comment urges courts to be skeptical of these repayment programs and to provide student debtors discharges where courts find the debtor deserving of such a discharge. This Comment’s primary recommendation is that the Seventh Circuit should adopt the Totality of Circumstances test; however, this is not the only suggestion regarding judiciary paths forward in this area of law.*

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1. Northern Illinois University College of Law, December 2017. Thank you to my faculty advisor Professor David Rosenfeld. Thanks to Deputy Director of the Law Library and Professor Therese Clarke and the entire NIU COL library faculty and staff for providing outstanding research resources. Thanks to all members of NIU Law Review for all of their efforts. Also, I owe a tremendous amount of thanks and gratitude to the authors cited in footnotes of this work. Finally, thank you to friends and family for your sustained support.

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## I. CONTENTS, INTRODUCTION, AND BASIC PROCEDURE

### *a. Contents*

Student loan debt is a public policy issue with a significant judicial component due to judge-made tests intended to interpret the “undue hardship” provision of section 11 U.S.C. §523(a)(8) of the U.S. Bankruptcy Code. Section 523(a)(8) of the Code mandates the finding of an undue hardship in order for a court to justify discharge of a student’s loan debt, but to date the provision has arguably been left undefined.<sup>2</sup> Until there is a legislative fix (i.e. a

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2. See, e.g., Brief of Amici Curiae National Consumer Law Center and National Association of Consumer Bankruptcy Attorneys in Support of Appellant and Seeking Reversal of the District Courts Decision, *infra* note 229, at 10. This Amici Brief persuasively argues that the term “undue hardship” has been defined right next door to Section 523(a)(8) in Section 524(m) in a set of 2005 Code amendments. The brief states, “Although the context in which ‘undue hardship’ arises under § 524(c) and (m) is different than dischargeability under § 523(a)(8), there is no escaping the fact that Congress used the identical phrase in both sections

fix that unambiguously defines or abolishes the §523(a)(8) undue hardship provision), courts are left to make highly unpredictable, fact-intensive, and value-laden decisions under the current judge-made tests used to interpret the undue hardship provision.<sup>3</sup>

Attempts to judicially define section 523(a)(8), the undue hardship provision, of the Bankruptcy Code are part of a long-standing and energetic legal debate.<sup>4</sup> This Comment is meant to provide clarity with regard to the circumstances that have given rise to, sustain, and sometimes inflame this ongoing debate.

First, in this part, a general introduction to the student loan bankruptcy discharge debate is provided. This general introduction will be augmented with an overview of administrative and statutory student loan bankruptcy laws and procedures. A brief introduction to 11 U.S.C. §523(a)(8) of the Bankruptcy Code will also be provided in this section. After the basic introduction of Section 523(a)(8) is provided, the two primary judicial tests used to interpret the undue hardship provision of the Code will then be introduced.

Next, Part II will provide pertinent information of institutions involved in lending, information on how much has been lent, the potential risks of lending, and an explanation of who backs outstanding student loan debt. Part II also provides some relevant facts about student borrowers, information such as: total number of borrowers, average amounts borrowed, and differences between undergraduate and graduate borrowers.

After the discussion of creditors and debtors, Part III will provide an in-depth discussion of the relevant statutory, regulatory, and judicial framework relating to student loan management and student loan discharge. This framework serves as a loan management junction between the federal government, higher education institutions, creditors, and debtors. Part of this framework is used by the judiciary to provide student loan discharges to debtors under 11 U.S.C. §523(a)(8). Also, in this part further explanation is provided regarding the primary tests courts have developed to evaluate section 523(a)(8) of the Bankruptcy Code. Then, in Part IV, a detailed historical evolution of section 523(a)(8) of the Code is expounded.

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of the same statute.” Brief of Amici Curiae National Consumer Law Center and National Association of Consumer Bankruptcy Attorneys in Support of Appellant and Seeking Reversal of the District Courts Decision, *infra* note 229, at 10. The authors explain that this §524 definition should shed light on what Congress intended the §523 definition of the same “undue hardship” term to mean.

3. See generally, Ryan Freeman, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of § 523(a)(8) Under Appellate Review*, 30 EMORY BANKR. DEV. J. 147 (2013).

4. See, e.g., Vang v. UW Stout Student Bus. Servs. (*In re Vang*), 324 B.R. 76, 79 (Bankr. W.D. Wis. 2005); Ben Wallen, *One Standard to Rule Them All: An Argument for Consistency in Education Debt Discharge in Bankruptcy Proceeding*, 16 HOUS. BUS. & TAX L.J. 232 (2016).

Part V outlines the economic context in which the §523(a)(8) debate has unfolded. Understanding the broader economic context in which this legal debate has taken place is crucial in order to gain a full appreciation of the forces giving rise to this ongoing and intensifying public debate regarding student loan debt and the discharge of student debt under the Bankruptcy Code. Because at its core, the student loan discharge debate is about much more than just student loans—it raises fundamental political and economic questions.

Some professional economists believe that economic trends will likely continue into the future that could have a significant detrimental impact on employment and earnings of current and future U.S. workers.<sup>5</sup> Future employment and earnings are often taken under consideration by courts in order to make a section 523(a)(8) undue hardship determination.<sup>6</sup> Hence, it is important for courts to acknowledge and attempt to understand these economic trends in order to take them into account when they are deciding what test or standard should be used to evaluate student loan discharge cases.<sup>7</sup> Once all pertinent information is presented regarding relevant student loan law, its evolution, and its application, Part VI will highlight some inconsistencies with *Brunner*'s application today.

Part VII offers recommendations for the Seventh Circuit to consider when moving forward in regard to section 523(a)(8) undue hardship. In this part, this Comment argues that it is past time for the Seventh Circuit to reject the untenable and restrictive *Brunner* test and move to a more flexible version of the *Totality of Circumstances (ToC)* test. This Comment also argues that the Seventh Circuit should consider other discharge options in addition to adoption of the *ToC* test. Part VIII concludes this Comment. The remainder of this part is an introduction and overview of the relevant student loan law, as well as an introduction to a few of the issues surrounding the student loan discharge debate.

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5. See, e.g., Claire Cain Miller, *Evidence That Robots Are Winning the Race for American Jobs*, N.Y. TIMES, Mar. 28, 2017, [https://www.nytimes.com/2017/03/28/upshot/evidence-that-robots-are-winning-the-race-for-american-jobs.html?\\_r=1](https://www.nytimes.com/2017/03/28/upshot/evidence-that-robots-are-winning-the-race-for-american-jobs.html?_r=1).

6. See, e.g., *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 758-61 (7th Cir. 2015); See also Pardo, *infra* note 252, at 518-521.

7. See, e.g., Talks at Google, *Robert Reich: "Preparing Our Economy for the Impact of Automation & AI" | Talks at Google*, YOUTUBE (Feb. 9, 2017), [https://www.youtube.com/watch?v=5xflVUa4M\\_8](https://www.youtube.com/watch?v=5xflVUa4M_8); See also Larry Summers, *Men Without Work*, LARRY SUMMERS BLOG (Sept. 26, 2016, 3:05 PM), <http://larrysummers.com/2016/09/26/men-without-work/>.

*b. Introduction*

Student loan laws have been consistently reformed since the 1940s to expand access to student loans.<sup>8</sup> The Bankruptcy Code has been periodically reformed to restrict the discharge of student loans in bankruptcy proceedings since the late 1970s.<sup>9</sup> Judge-made tests were created in the 1980s in order to adapt to these continual Bankruptcy Code reforms.<sup>10</sup> These judge-made tests—which were meant to interpret reforms made to the 11 U.S.C. 523(a)(8) undue hardship provision of the Bankruptcy Code—have evolved to be very restrictive for student debtors seeking discharge of student loans in bankruptcy.<sup>11</sup>

These reforms have created a legal atmosphere where a typical student loan debtor's chance of receiving a discharge of his or her student loan debt in bankruptcy today is slim.<sup>12</sup> This typically discouraging atmosphere is often exacerbated by notable asymmetries that exist between powerless and impoverished debtors forced to battle with experienced and well-financed creditors.<sup>13</sup> These powerless debtors frequently operate from a remarkably inferior position as pro se representatives.<sup>14</sup>

Currently, the primary judicial test used by nine circuits to evaluate 11 U.S.C. §523(a)(8) “undue hardship” provision of the Bankruptcy Code is the *Brunner* test.<sup>15</sup> Generally, if a court finds the *Brunner* test satisfied, then the

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8. Robert Proudfoot, *Securitization of Student Loans: A Proposal to Reform Federal Accounting, Reduce Government Risk, and Introduce Market Mechanisms as Indicators of Quality Education* 9 U. MASS. L. REV. 6, 18-27 (2014). Proudfoot expounds the history of federal student lending programs starting with the 1944 Servicemen's Readjustment Act of 1944 (G.I. Bill) up to today's most significant student loan law, the Student Aid and Fiscal Responsibility Act of 2010, which required “all federal student loans [fall under the] Direct Loan Program.” *Id.*

9. See, Terrence L. Michael & Janie M. Phelps, “Judges?!—We Don't Need No Stinking Judges!!!”: *The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH. L. REV. 73, 77-84 (2005).

10. E.g., Supplemental Brief of Appellee, Educational Credit Management Corporation at 23-24, *Murphy v. Educ. Credit Mgmt. Corp.*, 2015 WL 6575755, No. 14-1691 (1st Cir. 2015).

11. *Id.*

12. See, e.g., NATIONAL CONSUMER LAW CENTER, THE TRUTH ABOUT STUDENT LOANS AND THE UNDUE HARDSHIP DISCHARGE (Apr. 2013), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/iulianoresponse.pdf>.

13. *Id.*

14. See, e.g., EmorySchoolofLaw, *Emory Bankruptcy Development Journal Symposium 2015: Consumer Panel*, YOUTUBE (Mar. 2, 2015), <https://www.youtube.com/watch?v=HfgLzCrsu4A&t=1132s>. Professor Pardo explains that the fact of approximately 32% of student loan bankruptcy debtors are unrepresented is a “non-trivial” fact. Commentary on representation begins at time mark 00:23:30. *Id.*

15. Letter on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings, *infra* note 18, at 16.

student debtor will be granted a student loan discharge by the court.<sup>16</sup> However, the *Brunner* test has run its course and courts today need to reconsider how they approach student loan discharge in bankruptcy. Unfortunately, even though the intractable problem deserves a legislative fix, one is unlikely to come to pass in the near future.<sup>17</sup>

In lieu of a permanent legislative fix, a “statutory, regulatory, and procedural” framework has developed over the last several decades with aims of providing relief to debtors in danger of defaulting on their student loan repayments.<sup>18</sup> Courts have had to continue to adapt to this ever-changing framework to attempt to address the myriad issues confronting today’s complex relationships between creditors and debtors.<sup>19</sup> Some have questioned whether this regulatory framework is so comprehensive as to completely preempt a judicial role in addressing student loan debt issues through the bankruptcy process.<sup>20</sup> Make no mistake, the framework does not remove authority from the judiciary, nor does it preempt the need to provide judicial relief to many deserving debtors through the bankruptcy process. In fact, courts have a crucial role to play in the successful functioning of this framework.<sup>21</sup>

However, the aim of the judiciary should be neither to offer predictability of student loan discharges, nor to serve as protectors of the financial integrity of the student lending system.<sup>22</sup> The complexities and informational asymmetries between students debtors, educational institutions, and lenders (generally the government) on the loan granting front-end are far too great for courts to then shackle student loan debt to distressed debtors on the back-end.<sup>23</sup> The most oft cited rationales used by courts to justify the current rigid

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16. *Id.*

17. *E.g.*, EmorySchoolofLaw, *Emory Bankruptcy Development Journal Symposium 2015: Consumer Panel*, YOUTUBE (Mar. 2, 2015), <https://www.youtube.com/watch?v=HfgLzCrsu4A&t=1132s> (quoting the Honorable Ray C. Mullins, Chief Judge on the U.S. Bankruptcy Court for the Northern District of Georgia, who says that a legislative fix is needed at time mark 00:44:28).

18. U.S. Dep’t. of Educ., Letter on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings 2 (July 07, 2015), <https://ifap.ed.gov/dpceletters/attachments/GEN1513.pdf>.

19. *See, e.g.*, DAVID J. LIGHT, DISCHARGING STUDENT LOANS IN BANKRUPTCY 1-39 (2009).

20. *See* Michael & Phelps, *supra* note 9, at 106; *see also* Fossey & Cloud, *infra* note 303, at 607.

21. *E.g.*, Michael & Phelps, *supra* note 9, at 106.

22. *Contra* Kevin J. Smith, *Defining the Brunner Test’s Three Parts: Time to Set a National Standard For All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 251 (2013).

23. *Compare*, Proudfoot, *supra* note 8, at 9-11 (stating that “Informational asymmetry is an economic term that describes an inefficient market caused by one party in a transaction having more information than the other, which makes it impossible to have rational, optimal

*Brunner* test are: 1) the protection of the integrity of the student lending system, and 2) to ensure rational student debtors engaged in a cold cost-benefit investment decision are held to account if their so-called “leveraged investment” fails to pay off.<sup>24</sup> This Comment casts serious doubt on both of these positions.

If there are systemic funding or integrity issues that arise to the student lending system, only the Legislative and Executive Branches of the Federal Government can properly address those funding or integrity issues, as they are inherently tied to the federal budget.<sup>25</sup> Integrity issues relating to the student-lending system are a result of an overdue policy debate regarding how to properly finance the socio-economically diverse higher education system in the U.S., as it exists today.<sup>26</sup> In fact, to ensure this debate is properly framed, courts should settle on a standard, rather than the *Brunner* test, that more reliably discharges student debt based on whether a debtor is unlikely to have the financial resources to meet their debt obligation, which the current *Brunner* test is unable to do.<sup>27</sup>

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pricing for a product. Students, for example, only make an educational investment once or possibly twice in their lifetime. Academic institutions, on the other hand, make decisions thousands of times per semester on whom to enroll, what to teach, and how to educate students effectively. State and federal regulators also have had decades of experience reviewing institutional quality and abuses. This imbalance of information creates an inefficient market where the average student makes an uninformed decision about his or her educational investment. . . . This informational asymmetry creates a bizarre relationship where an uninformed student makes an education choice that is supported by federal student loans. As a result the federal government—not the academic institution—bears the risk of whether the student will have a favorable outcome from his or her education investment.”) with *In re Roberson*, 999 F.2d 1132, 1137 (stating “The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.”). These excerpts are two dominant ideological views expressed in relation to higher education in the U.S. today. The first holds the educational institutions and federal government out as the more responsible actors engaged in education financial decision-making. The second holds the individual out as the most responsible actor engaged in a rational cost-benefit decision. The contradiction is that Proudfoot’s “uninformed student” is *In re Roberson*’s individual, impliedly making a rational decision to invest in their education today in order to obtain a payoff tomorrow for the implied “investment”. These worldviews conflict.

24. Michael & Phelps, *supra* note 9, at 79-81. The authors cite a National Bankruptcy Review Commission report that refutes the long-held belief of a systemic threat posed by bankruptcy discharges of student debts; *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. Ill. 1993). See conflict highlighted in footnote 23.

25. Proudfoot, *supra* note 8, at 8-13.

26. *See id.* at 1-10.

27. *See, e.g.*, Pardo, *infra* note 252, at 505-07.



Today, students with a wide range of socio-economic needs utilize private and public lending systems to finance their post-secondary educations.<sup>28</sup> U.S. post-secondary education is a decentralized hybrid system of private and public institutions.<sup>29</sup> Systems financing this decentralized hybrid higher education system offer to students a mix of grants, loans, and other types of financial aid alternatives, which enable students to afford their educations.<sup>30</sup>

In the U.S., the federal government has traditionally backed from 75 to 90 percent of student loans.<sup>31</sup> Student loans are crucial in financing undergraduate and graduate studies.<sup>32</sup> Student loans are vitally important to both the individuals and institutions of U.S. higher education.<sup>33</sup> Educational lending to students in the U.S. has expanded greatly in recent years.<sup>34</sup> This expansion allowed the outstanding aggregate student loan debt of \$480 billion in 2006 to grow to an outstanding aggregate debt of over \$1.4 trillion by 2017.<sup>35</sup> This is nearly a three-fold increase in a ten-year period of the 2006 aggregate student debt, an aggregate debt that took more than sixty years to accrue prior to 2006.<sup>36</sup>

Two of the expansion's policy goals were to increase access to higher education, while providing freedom of institutional choice to lower income students in the U.S.<sup>37</sup> Both policy goals have been achieved to date.<sup>38</sup> The financial expansion of student loans has been drastic in the last fifteen years.<sup>39</sup> This financial expansion has been accompanied by a steady growth

28. *E.g.*, *Trends in Education Series: Trends in Student Aid 2016*, COLLEGE BOARD 8-15 (2016), [https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid\\_0.pdf](https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid_0.pdf).

29. *See, e.g.*, RONALD G. EHRENBERG, *TUITION RISING: WHY COLLEGE COSTS SO MUCH* 3 (2000).

30. *Id.*

31. *E.g.*, COLLEGE BOARD, *supra* note 28, at 8-15; *see also* Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, J. KAN. B. ASS'N, Nov.-Dec. 2015, at 24, 34; *see also* Robert Shireman, *Straight Talk on Student Loans*, CTR. FOR STUDIES IN HIGHER EDUC. 1 (2004), <https://cshe.berkeley.edu/sites/default/files/publications/rop.shireman.loans.10.04.pdf>.

32. COLLEGE BOARD, *supra* note 28, at 3.

33. *Id.*

34. *Id.*

35. *Student Loans Owned and Securitized, Outstanding*, FED. RES. BANK ST. LOUIS (Feb. 27, 2017, 12:20 PM), <https://fred.stlouisfed.org/series/SLOAS>.

36. *See, e.g.*, Proudfoot, *supra* note 8, at 14-30.

37. *E.g.*, PEDRO N. TEIXEIRA & DAVID D. DILL, *PUBLIC VICES, PRIVATE VIRTUES? ASSESSING THE EFFECTS OF MARKETIZATION IN HIGHER EDUCATION* 6 (2011); *see also* COLLEGE BOARD, *supra* note 28, at 7.

38. *E.g.*, GOLDIE BLUMENSTYK, *AMERICAN HIGHER EDUCATION IN CRISIS? WHAT EVERYONE NEEDS TO KNOW* 12-15 (2015); *See, e.g.*, *Enrollment by Level of Enrollment and Attendance Status Over Time*, COLLEGE BOARD, <https://trends.collegeboard.org/college-pricing/figures-tables/enrollment-level-enrollment-and-attendance-status-over-time> (last visited Feb. 2017).

39. *E.g.*, COLLEGE BOARD, *supra* note 28, at 11.

of higher education attendees, resulting in “nearly twenty million people now attend[ing] college in the United States” as of today,<sup>40</sup> up from fourteen million enrolled in 1997.<sup>41</sup>

Many argue that overall student loan default rates, some graduate student debt loads, and the aggregate student loan debt level in the U.S. are signs that this system of financing education is in crisis.<sup>42</sup> Those who ring alarm bells usually invoke the rising \$1 trillion aggregate debt level of the entire student lending system as their rallying cry.<sup>43</sup> Even though the lump sum of over \$1 trillion and an actual default rate of likely over 20 percent is concerning, it is misleading if these are the only indicators one looks towards to assess the student lending system.<sup>44</sup> As suggested above, some statutory and regulatory programs have been created to attempt to relieve some defaulting debtors.

To ease the burden of millions of student debtors caught up in that \$1 trillion web, Congress has created income-driven repayment programs to assist student loan debtors in making their student loan repayments; however, today many of the repayment plans are underutilized.<sup>45</sup> Even though the repayment plans are underused, reforms in the laws and additions to some income-driven repayment programs have led to an uptick in enrollments.<sup>46</sup>

For example, “[i]n the third quarter of 2016, the borrowers in income-driven repayment plans held 43% of the outstanding debt in repayment under

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40. *E.g.*, GOLDIE BLUMENSTYK, AMERICAN HIGHER EDUCATION IN CRISIS? WHAT EVERYONE NEEDS TO KNOW 12 (2015).

41. *Enrollment*, NAT’L CTR. FOR EDUC. STATS., [https://nces.ed.gov/programs/digest/d15/tables/dt15\\_303.10.asp?current=yes](https://nces.ed.gov/programs/digest/d15/tables/dt15_303.10.asp?current=yes). (last visited Feb. 27, 2017)

42. Mark Kantrowitz, *Why the Student Loan Crisis Is Even Worse Than People Think*, TIME (Jan. 11, 2016), <http://time.com/money/4168510/why-student-loan-crisis-is-worse-than-people-think/>.

43. Mitchell Wellman, *Student Loan Debt Now Totals Over \$1.3 Trillion*, USA TODAY C. (Feb. 21, 2017), <http://college.usatoday.com/2017/02/21/student-loan-debt-now-totals-over-1-3-trillion/>; Libby Kane, *Student Loan Debt in The US has topped \$1.3 Trillion*, BUS. INSIDER (Jan. 12, 2016), <http://www.businessinsider.com/student-loan-debt-state-of-the-union-2016-1>.

44. *E.g.*, COLLEGE BOARD, *supra* note 28, at 4.

45. *If Your Federal Student Loan Payments are High Compared to Your Income, You May Want to Repay Your Loans Under an Income-Driven Repayment Plan*, DEP’T EDUC.: FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven>, (last visited Feb. 27, 2017) (Citing a Blog that provides access to portals for most income-driven repayment plans, which include: Revised Pay as You Earn Repayment Plan (REPAYE), Pay As You Earn Repayment Plan (PAYE), Income-Based Repayment Plan (IBR), Income-Contingent Repayment Plan (ICR)); *See* Marie Wilcox, *The Federal Student Loan Bubble: Looking Beyond Bankruptcy to Stay Afloat*, 36 AM. BANKR. INST. J. 34, 35 (2017) (noting that “51 percent of Direct Loan borrowers were eligible for [income-driven repayment plans], but only 20 percent actually participated in the plan.”).

46. COLLEGE BOARD, *supra* note 28, at 19.

the Federal Direct Loan program, up from 23 percent in 2013.<sup>47</sup> As of 2017, there are roughly six million student debtors enrolled in one of several federally offered repayment programs for an approximate aggregate debt of \$311 billion.<sup>48</sup> In addition to income-driven repayment programs, debtors also take advantage of deferment and forbearance programs.<sup>49</sup> Even though there has been a recent uptick in income-driven repayment programs usage by student debtors, this Comment will caution courts not to see these income-based repayment programs as a catch-all to be used as a justification to not offer student loan debt discharges to deserving debtors, as there is much left to debate in regards to the actual functioning of these debt management and forgiveness programs.<sup>50</sup> As the following figures imply, the current environment offers courts a comfortable window to reexamine their approach to the student loan discharge issue.

Jason Iuliano, a student loan discharge expert, has suggested that in recent years, less than 1,000 student debtors file every year to discharge their student debt in bankruptcy through adversarial proceedings.<sup>51</sup> This is a tiny fraction of the roughly 200,000 debtors holding student loan debt who annually file bankruptcy nationwide,<sup>52</sup> and only a minute fraction of the total 40+ million student loan borrowers in the U.S.<sup>53</sup> The approximate annual number of debtors filing for student debt discharge through adversarial bankruptcy proceedings (1,000) is small in comparison to total student debtors filing bankruptcy (200,000), and infinitesimal in relation to total debtors outstanding (42 million) or even to debtors in income-driven repayment programs (6 million). Today, there is significant leeway for courts to fashion a better

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47. COLLEGE BOARD, *supra* note 28, at 19.

48. *Federal Student Aid Portfolio*, DEP'T EDUC.: FED. STUDENT AID (Mar. 28, 2017, 3:55 PM), <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>. Quoting data found in the "Portfolio by Delinquency Status (DL, FFEL, ED-Held FFEL, ED-Owned" file).

49. COLLEGE BOARD, *supra* note 28, at 19.

50. Matt Taibbi, *infra* note 132. *Contra* Educ. Credit Mgmt. Corp. v. Jespersen, 571 F.3d 775, 778-91 (8th Cir. 2009) (refusing to grant an undue hardship discharge to an unsympathetic debtor holding roughly \$350,000 in student loans, and instead opting to push the debtor into an income-based repayment program with almost no possibility of the debtor every paying all of the interest down on his student loans, much less the principle; as noted below in footnote 305, the dissent should be heeded in this decision).

51. Jason Iuliano, *infra* note 131, at 505; *see also* Andrew Martin, *Debt Collector Misled Borrowers, Court Says*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/business/student-debt-collector-misled-borrowers-appeals-court-rules.html>.

52. Jason Iuliano, *infra* note 131, at 505.

53. *Federal Student Loan Portfolio*, U.S. DEP'T EDUC.: FED. STUDENT AID (Feb. 28, 2017, 8:34 PM), <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (Click link "Federal Student Aid Portfolio Summary" and see column "Unduplicated Recipients (in millions)", tracking years from 2007 to 2016).

standard in order to properly evaluate the undue hardship of 523(a)(8) of the Bankruptcy Code.

*c. Basic Bankruptcy Discharge Procedures*

Debtors must bring an adversarial proceeding in order to discharge student debt in bankruptcy, separate from their original Chapter 7 or Chapter 13 bankruptcy proceeding.<sup>54</sup> The proceedings “operate[] exactly like a lawsuit in federal court, and [are] subject to the civil procedural rules dealing with the filing of a complaint and service of process, pre-trial discovery, motion practice, and evidentiary requirements.”<sup>55</sup>

In student loan bankruptcy proceedings, creditors must prove by a preponderance of the evidence that the debtor’s loan was made for an educational purpose to trigger the 11 U.S.C. § 523(a) exception.<sup>56</sup> Once the creditor proves the loan was for an educational purpose, the debtor is excepted from discharging their student loans.<sup>57</sup> After the exception has been triggered the debtor then must prove an undue hardship by a preponderance of the evidence.<sup>58</sup> The debtor must show by a preponderance of the evidence that excepting the student loans “from discharge . . . would impose an undue hardship on the debtor and the debtor’s dependents.”<sup>59</sup> The two primary judicial tests used to evaluate a debtor’s undue hardship are *Brunner* and *ToC*.<sup>60</sup>

The conjunctive tri-part *Brunner* test is currently used by nine circuits to evaluate whether a student debtor would face an undue hardship if they were forced to repay their student loan debt.<sup>61</sup> The Eighth Circuit has affirmatively adopted the more flexible, disjunctive *Totality of Circumstances (ToC)* test,<sup>62</sup> and “[t]he [F]irst [C]ircuit [has] rejected *Brunner* and [endorsed the *ToC*] test in *In re Bronsdon*.”<sup>63</sup>

54. NATIONAL CONSUMER LAW CENTER, *STUDENT LOAN LAW FIFTH EDITION* 226 (Deanne Loonin et al. eds., 5th, 2015).

55. *The Truth About Student Loans and the Undue Hardship Discharge*, NAT’L CONSUMER L. CTR. (Apr. 2013), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/iulianoresponse.pdf>.

56. *Id.*

57. Light, *supra* note 19, at 8.

58. *Id.*

59. 11 U.S.C. § 523(a)(8) (1978).

60. *Bronsdon v. Educ. Credit Mgmt. Corp.* (*In re Bronsdon*), 435 B.R. 791, 797 (1st Cir. 2010).

61. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); see, e.g., Light, *supra* note 19, at 14-15.

62. *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549, 545-55 (8th Cir. 2003).

63. Paul B. Porvaznik, *Is Discharging Student Loan Debt in Bankruptcy Getting Easier?* ILL. B.J., Nov. 2016, at 540, 543-44 (giving a concise summary of the current state of the law governing the discharge of student debt in bankruptcy).

*Brunner*'s fact intensive analysis "allow[s] for significant judicial interpretation and speculation"<sup>64</sup> by every court that applies it, which some say has led the test to be "judicially defined too harshly by most bankruptcy courts."<sup>65</sup> In a 2013 outlier decision, *Krieger v. Educational Credit Management Corp.*, the Seventh Circuit cautioned that certain prongs of *Brunner* could be considered "judicial gloss" in danger of superseding the statutory language of undue hardship.<sup>66</sup> *ToC* is also a fact-intensive analysis, but uses different factors than *Brunner*, and its disjunctive nature offers courts more flexibility in its application than does *Brunner*.<sup>67</sup>

This flexibility is needed to properly evaluate student debtors operating in an extremely complex and decentralized world of higher education lending—because not all student debtors are created equal, in fact very few are, which makes it a futile effort to look for consistency, predictability, or precedential value in the current student loan bankruptcy tests.<sup>68</sup> Courts should instead look for flexibility, reasonableness, and equity in deciding what test to follow in order to evaluate whether a debtor's undue hardship exists, which ideally should be a test that measures a debtor's reasonable future *financial* ability to repay their loans, more so than looking towards the debtor's *health* or some far off hope of finding employment.<sup>69</sup>

## II. CREDITORS AND DEBTORS

This part provides information on whom the most affected student loan debtors are to date in the so-called student loan crisis. Hint: there are a multitude of individual crises ongoing, but not for every student debtor, and almost certainly not a systemic crisis.<sup>70</sup> As explained above, only a tiny fraction of individuals in crisis find their way into bankruptcy court.<sup>71</sup> Based on this "individual crises" assumption, facts will be presented to provide a

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64. Freeman, *supra* note 3, at 158-59.

65. See, e.g., Smith, *supra* note 22, at 251.

66. See, e.g., *Owens v. U.S. Dep't of Educ.* (*In re Owens*), 525 B.R. 719, 722 (Bankr. C.D. Ill. 2015).

67. See, e.g., NATIONAL CONSUMER LAW CENTER, *supra* note 54, at 204-05.

68. See, *Heaviest Debt Burdens Fall on 3 Types of Students*, U.S. NEWS & WORLD REP.: HECHINGER REP. (June 8, 2015), <https://www.usnews.com/news/articles/2015/06/08/heaviest-college-debt-burdens-fall-on-3-types-of-students>.

69. Pardo, *infra* note 252, at 505-07 (stating that medical conditions, not household income or expense level, increased a debtor's odds of receiving an "undue hardship" discharge by 150 percent, which entails the meaning given "to the statutory term 'undue hardship' that is far removed from financial indicia of ability to repay.").

70. BETH AKERS & MATTHEW M. CHINGOS, *GAME OF LOANS: THE RHETORIC AND REALITY OF STUDENT DEBT* 83 (2016).

71. See, e.g., EmorySchoolofLaw, *supra* note 14.

justification for the Seventh Circuit to transition to the more flexible *ToC* test from the anachronistic and restrictive *Brunner* test.<sup>72</sup>

The data necessary to develop a full understanding of the nuance of the student borrowing landscape are outside the scope of this Comment. The reader will be given enough information to appreciate the disparate impact of student loans on student debtors.<sup>73</sup> This disparity is due to the fact that student lending takes place in the context of a dynamic U.S. economy, in a decentralized higher education system, via private and public lending institutional actors, to a student population that is extremely diverse in socioeconomic makeup.<sup>74</sup>

#### *a. Creditors*

Colleges and universities have experienced a slow tightening of their financial systems in the last twenty years; one result has been continual raises in tuition and fees.<sup>75</sup> There are ongoing, and often contentious, debates attempting to explicate the causes that have led to these rapid raises in tuition and fees.<sup>76</sup> However, regardless of the causes, it is largely agreed that a significant portion of the ever-rising costs have been shifted to students in the form of significant annual hikes in tuition and fees.<sup>77</sup> Students have covered the costs of their tuition and fee raises by taking on an ever-increasing amount of student loan debt.<sup>78</sup>

Some argue that simply the “ready availability of federal student aid . . . [accounts] for most of the tuition increases” from 1987 to the present.<sup>79</sup> Others argue, “a major factor driving increasing [university] costs is the constant expansion of university administration,” that is, “administrative bloat.”<sup>80</sup> Another popular argument for university cost increases is “a decline

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72. *Contra*, Supplemental Brief of Appellee, Educational Credit Management Corporation, *supra* note 11, at 23-24.

73. *See, e.g.*, BRAD HERSHBEIN & KEVIN M. HOLLENBECK, *STUDENT LOANS AND THE DYNAMICS OF DEBT* 11-35 (Brad Hershbein et al. eds., 2015).

74. *Id.*

75. *See, e.g.*, JOHN R. THELIN, *THE RISING COST OF HIGHER EDUCATION* 3-49 (2013).

76. *Id.*

77. *Id.*

78. *See, e.g.*, Ellen Wexler, *Increased Student Aid, Not Faculty Salaries, Drives Tuition Up*, *INSIDE HIGHER ED* (Feb. 9, 2016), <https://www.insidehighered.com/news/2016/02/09/study-increased-student-aid-not-faculty-salaries-drives-tuition>; *see also* JOHN R. THELIN, *THE RISING COSTS OF HIGHER EDUCATION* 3-49 (2013).

79. Ellen Wexler, *Increased Student Aid, Not Faculty Salaries, Drives Tuition Up*, *INSIDE HIGHER ED* (Feb. 9, 2016), <https://www.insidehighered.com/news/2016/02/09/study-increased-student-aid-not-faculty-salaries-drives-tuition>.

80. Paul F. Campos, *The Real Reason College Tuition Costs So Much*, *N.Y. TIMES* (Apr. 4, 2015), <https://www.nytimes.com/2015/04/05/opinion/sunday/the-real-reason-college-tuition-costs-so-much.html>.

of state funding” for higher education, an argument used to push back against the “administrative bloat” position.<sup>81</sup> Regardless of the reasons underpinning the rise of student tuition and fees, and student loan debt, it is not disputed that both have sharply risen in recent decades.<sup>82</sup> Notwithstanding these rapid rises, the federal government has continued to promote almost universal access to higher education by providing its backing to private lenders, or directly providing loans to students who could not otherwise secure the loans privately due to a lack of securing collateral, or because of poor credit, or because of no credit history.<sup>83</sup>

The federal government’s policy to increase student enrollment has been a success.<sup>84</sup> As a result of the federal government’s promotion to expand access to higher education, and the government’s significant reliance on student loans to achieve the goal of access to higher education, there has been a notable expansion of the annual number of student borrowers, as well as a significant growth in the aggregate amount of student loan debt.<sup>85</sup> But what does this mean? Is there an impending crisis? What are the implications of this lending system on student loan debt discharge decisions in bankruptcy?

Student loan debt climbed past \$1.4 trillion as of the third quarter of 2016, almost tripling the aggregate debt of the first quarter of 2006, which was \$481 billion.<sup>86</sup> Media outlets and some scholars look to this aggregate student loan figure and tend to transform this complex higher education financing scheme into a simple headline: Is student debt the next housing crisis?<sup>87</sup> Student loan debt is likely not the next mortgage crisis, but a full

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81. Kellie Woodhouse, *Report Says Administrative Bloat, Construction Booms Not Largely Responsible for Tuition Increases*, INSIDE HIGHER ED (May 5, 2015), <https://www.insidehighered.com/news/2015/05/05/report-says-administrative-bloat-construction-booms-not-largely-responsible-tuition> [https://perma.cc/F8SP-CDFW].

82. See, e.g., THELIN, *supra* note 75, 1-19.

83. See, e.g., HERSHBEIN & HOLLENBECK, *supra* note 73, at 42. Comparing a linear increase from 2004-2012 in number of borrowers and average balances per borrower. In 2004, approximately 26 million borrowers possessed an average of \$16,000 per borrower. In 2012, roughly 40 million borrowers held average balances of \$24,000. Thus, we see significant increases in borrowers and amount borrowed, resulting in a rapid increase in the aggregate student debt.

84. See, e.g., AKERS & CHINGOS, *GAME OF LOANS* 44-50 (2016); see also BRAD HERSHBEIN & KEVIN M. HOLLENBECK, *STUDENT LOANS AND THE DYNAMICS OF DEBT* 19 (2015).

85. See, e.g., AKERS & CHINGOS, *GAME OF LOANS* 41-44 (2016).

86. *Id.*

87. See, e.g., Mark Kantrowitz, *Why the Student Loan Crisis Is Even Worse Than People Think*, TIME (Jan. 11, 2016), <http://time.com/money/4168510/why-student-loan-crisis-is-worse-than-people-think/> [https://perma.cc/BCD9-97HC]; see also Stephanie Berzinski & Erin Guy, *America’s Student Debt Crisis*, 25 WPBF NEWS (Nov. 17, 2016, 7:30 PM), <http://www.wpbf.com/article/america-s-student-debt-crisis/8301529> [https://perma.cc/EB6S-KBR8]; see also CRYN JOHANNSEN, *SOLVING THE STUDENT LOAN CRISIS: DREAMS, DIPLOMAS, & A LIFETIME OF DEBT* 1 (2016).

answer as to what the debt more likely represents is nuanced and has significant implications as to why the Seventh Circuit should adopt a new discharge test.

Systemic student loan debt risk is not similar to the systemic risk realized in the housing crisis; however, the student lending system does create countless crises for millions of individual borrowers.<sup>88</sup> “The fact students borrow to fund” their higher education in a similar manner to securing a mortgage for a home is not an inherent problem, especially because today it is arguable that “average debt levels are not alarming.”<sup>89</sup> Currently, total outstanding student loan debt is a fraction of outstanding mortgage debt, which is approximately \$8.84 trillion, and was almost \$10 trillion at the height of the financial crisis.<sup>90</sup>

Some portion of student loan debt is being securitized and sold to investors as student loan asset backed securities (SLABS), though not to the same degree as mortgage-backed securities (MBS).<sup>91</sup> Selling SLABS does resemble the selling of mortgage-backed securities, but the systemic risk SLABS pose as of today is not the same as MBSs, as “SLABS are only derived from private student loans.”<sup>92</sup> The sheer size of outstanding SLABSs (\$188 billion) today, when compared to MBSs (\$8.9 trillion), suggests that SLABS should not pose a similar systemic risk to the U.S. economy.<sup>93</sup> The broader economic risks that selling SLABS could pose is worthy of study, but there is scant evidence to validate the idea that student loans pose a similar systemic economic risk as MBSs did in the 2007-08 financial crisis.<sup>94</sup> This is because most

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88. See, e.g., Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS. 99, 105 (2016).

89. See e.g., AKERS & CHINGOS, *supra* note 85, at 16; HERSHBEIN & HOLLENBECK, *supra* note 73, at 17.

90. *The Federal Reserve Bank of New York's Household Debt and Credit Report*, FED. RES. BANK N.Y. (Mar. 19, 2017, 12:23 PM), <https://www.newyorkfed.org/microeconomics/hhdc.html>.

91. Proudfoot, *supra* note 8, at 48-52; see also RICHARD A. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY* 40-80 (2010). Posner offers a detailed accounting of securitization and other financialization processes that precipitated the mortgage-backed securities financial crisis in 2007-08. Today far fewer student loans have been securitized and subsequently financialized than were mortgages prior to 2007. See RICHARD A. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY* 40-80 (2010).

92. See, e.g., Jesse L. Noa, *The Student Loan Bubble: A Pending Crisis or Overblown Threat?*, 20 TRINITY L. REV. 65, 93 (2014); see also Proudfoot, *supra* note 8, at 48-52.

93. *Contra* Raul Carrillo, *How Wall Street Profits from Student Debt*, ROLLING STONE (Apr. 14, 2016), <http://www.rollingstone.com/politics/news/how-wall-street-profits-from-student-debt-20160414>; see Proudfoot, *supra* note 8, at 48-52.

94. *Compare US Mortgage-Related Issuance and Outstanding*, SIFMA (updated Feb. 13, 2017), <http://www.sifma.org/uploadedFiles/Research/Statistics/StatisticsFiles/SF-US-Mortgage-Related-SIFMA.xls?n=44482> (See “Mortgage-Related Outstanding” tab, column K, row 61) (explaining that today there is approximately \$8.9T in total mortgage-related securities outstanding), *with US ABS Issuance and Outstanding*, SIFMA (updated Mar. 03, 2017),



student loan debt sits on federal government balance sheets and is not securitized.<sup>95</sup> However, the systemic risk could increase if these loans sitting on federal balance sheets were securitized in the future. If there is not strong evidence that student loan debt poses a systemic risk similar to the MBS financial crisis, which there is not, then why all the news and academic articles regarding a crisis? Where is the crisis?

*b. Debtors*

The answer: there are many individual crises, not necessarily a systemic crisis.<sup>96</sup> Higher education is a decentralized system accommodating a diverse socioeconomic population in the U.S.<sup>97</sup> This system's diverse reality is reflected in the realm of student lending. First, there are a significant number of students who do not borrow to finance their post-secondary educations.<sup>98</sup> "In 2011-2012, 31 percent of bachelor's degree recipients, 50 percent of

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<http://www.sifma.org/uploadedFiles/Research/Statistics/StatisticsFiles/SF-US-ABS-SIFMA.xls?n=53719> (See "ABS Outstanding" tab, column H, row 77) (explaining that today there is approximately \$188B in total student loan-related securities outstanding. Assuming these spreadsheets reflect market realities, then the face-value comparison of the risk posed by a securities market of \$8.9T to a securities market of \$188B seems somewhat misguided.); *see also, e.g., CBO's January 2017 Baseline Projections for the Student Loan Program*, CONG. BUDGET OFF. (Jan. 2017), <https://www.cbo.gov/sites/default/files/recurringdata/51310-2017-01-studentloan.pdf> (stating that the CBO has outlays of over one trillion dollars for student loans projected to be lent to student borrowers over the next decade. The risk to the broader economy could increase, but most of these federal loans appear to accrue on federal balance sheets and the vast majority of student loans are not securitized and sold on secondary markets. The risk posed by student loans will be at its core a political issue and likely not a fundamental threat to the broader US economy—regardless of high default rates.); *see also, e.g., Should Fair-Value Accounting Be Used To Measure the Cost of Federal Credit Programs?*, CONG. BUDGET OFF. (Feb. 27, 2017), <https://www.cbo.gov/publication/43035> (stating that "[I]f payments received from borrowers with federal loans fall short of what is owed, the shortfall must ultimately be made up either by raising taxes or by cutting other spending. (Additional federal borrowing can postpone but not avert the need to raise taxes or cut spending.)" Ultimately student loans are a taxing and spending issue to be addressed in the political arena, not courts or financial markets. The political solutions to student loans will have to ultimately answer questions of student access to higher education, raising taxes to fund education, federally regulating higher education to control cost, or any other number of political issues outside the scope of this article. The upshot is that the student loan crisis, on its face, looks similar to the mortgage-backed loan crisis, but in reality it is very little like the mortgage-backed loan crisis.).

95. *See Proudfoot, supra* note 8, at 27.

96. *See, e.g., HERSHBEIN & HOLLENBECK, supra* note 73, at 11-21.

97. *Id.*

98. *See, e.g., AKERS & CHINGOS, supra* note 70, at 16; HERSHBEIN & HOLLENBECK, *supra* note 73, at 17.

associate's degree recipients, and 34 percent of those who earned postsecondary certificates did not have education debt."<sup>99</sup>

In 2014-15, upon graduation about 60% of undergraduate debtors held an average of \$28,000 in student debt.<sup>100</sup> About "10% of undergraduate borrowers and 43% of graduate borrowers owed \$40,000 or more."<sup>101</sup> "Graduate students have much higher average debt levels than undergraduate students, and while [graduate students] have relatively low default rates, the generous availability of federal loans makes it critical to watch [graduate student lending] patterns closely in future years."<sup>102</sup> In 2013-14, graduate students constituted 14 percent of the postsecondary system, but they accounted for an astonishing 34 percent of all federal student loans.<sup>103</sup>

Today 87.4 percent of student debtors hold less than \$50,000 each of the ever-growing mountain of student debt.<sup>104</sup> A minute portion of those debtors might find their way into a bankruptcy court seeking an undue hardship discharge.<sup>105</sup> It is more likely debtors will utilize some income-driven repayment program or other debt management option offered by the Department of Education.<sup>106</sup> Those 87.4 percent more so represent the impetus that today has raised student loan debt to a state and national political issue.<sup>107</sup> As the debt mountain is ascended, it is found that the next 9 percent of debtors towards the top of the mountain hold an average over \$50,000; near the peak, the next 2.2 percent of debtors hold between \$100,000 and \$150,000; at the summit, breathing the thin apex air are 1.5 percent of debtors who hold over \$150,000 in loans.<sup>108</sup> The crux of this barrage of numbers, figures, and percentages is this: not all debtors or debt loads are created equal.

99. See, e.g., HERSHBEIN & HOLLENBECK, *supra* note 73, at 17.

100. See, e.g., COLLEGE BOARD, *supra* note 28, at 4.

101. *Id.* at 18.

102. COLLEGE BOARD, *supra* note 28, at 4 (quoting a study that says 5 percent of graduate students defaulted; graduate students are a cohort borrowing the largest dollar amount, but their default rates are significantly lower than the larger default population, which was an overall rate of 28 percent).

103. See e.g., AKERS & CHINGOS, *GAME OF LOANS* 16 (2016).

104. HERSHBEIN & HOLLENBECK, *supra* note 73, at 42.

105. See, e.g., *infra* note 131, at 499. ("[B]arely 0.1 percent of student loan debtors in bankruptcy sought to discharge their educational debts. This figure illustrates the central flaw in the system: 99.9 percent of bankrupt student loan debtors do not even try to discharge their student loans").

106. See, e.g., Marie Wilcox, *The Fed. Student Loan Bubble*, AM. BANKR. INST. J., Feb. 2017, at 34, 35-57.

107. See Josh Boak, *Why It Matters: Student Debt*, U.S. NEWS & WORLD REP. (Sept. 5, 2016), <https://www.usnews.com/news/politics/articles/2016-09-05/why-it-matters-student-debt> [<https://perma.cc/J68X-7DJR>]; see also, Glenn Blain, *Breakaway Senate Dems Push Student Debt Relief in New York State Budget*, N.Y. DAILY NEWS (Feb. 19, 2017), <http://www.nydailynews.com/news/politics/breakaway-senate-dems-push-student-debt-relief-state-budget-article-1.2977000> [<https://perma.cc/3VCT-CKFZ>].

108. HERSHBEIN & HOLLENBECK, *supra* note 73, at 42.

All debtors and debt loads are not created equal. There are some debtors whom courts should give a hard look; namely, graduate students because they more often have higher debt loads,<sup>109</sup> for-profit graduates because of high levels of debt for bachelor's degree holders, poor job prospects, and notoriously predatory practices;<sup>110</sup> college dropouts, especially if they heavily invested in a degree and will not reap the rewards from it,<sup>111</sup> felons because they are known to have extreme difficulty obtaining employment,<sup>112</sup> and lastly, individuals with unreasonably high student loan debts (i.e. the top 1-5 percent of debtors).<sup>113</sup> One thrust of this Comment is to stress to the Seventh Circuit something they likely already know, which is this: the U.S. economy, with higher education as part of that whole, has undergone a seismic shift, discussed *infra*, for student debtors in the last two decades and the *Brunner* test does not fit the unfolding student-debtor landscape.<sup>114</sup>

What follows is the relevant statutory, judicial, and regulatory framework under which courts operate. This Comment outlines the relevant parts of this framework that courts may use to ensure deserving debtors of this

109. U.S. NEWS & WORLD REP.: HECHINGER REP., *supra* note 68.

110. *Id.*

111. *Id.*

112. *See, e.g.*, NICHOLAS EBERSTADT, AMERICA'S INVISIBLE CRISIS: MEN WITHOUT WORK 129-48 (2016). Explaining that national statistics are not kept on ex-felon populations, but some studies have suggested there are upwards of 20 million felons out in the civilian population today. Eberstadt then presents data to suggest what many already intuitively believe: it is more difficult to find work if you are a felon. Courts should take this into account when deciding student loan discharge cases, most do not. *Id.*; *see also* Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 778-79 (7th Cir. 2002) (ruling that debtor's felony conviction and alcoholism did not "make it impossible to find work," and discounted both because they predated the loans. These types of analyses are value laden with courts often finding it difficult to look at future financial and employment issues related to criminal histories, but rather focus or allude to the legal or moral failings that led to the conviction in the first place.); *see also* Ebelheiser v. Coll. Assist. (*In re* Ebelheiser), 543 B.R. 1, 4 (Bankr. S.D. Iowa 2015) (concluding in regards to a sexual assault conviction that "there is no evidence [of the debtor being denied employment or evidence that his felony conviction could harm his job prospects] that actually exists or would substantially impair his job search." This appears to be an example of a court ostensibly relying on a lack of evidence for their analysis, but more so substituting a value judgment in lieu of empirical evidence.).

113. *See, e.g.*, HERSHBEIN & HOLLENBECK, *supra* note 73, at 42.

114. *See, e.g.*, Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 886 (7th Cir. 2013) (stating in the concurrence a recent news article that banks write-offs of student debt were "\$3 billion . . . in the first two months of 2013, up more than 36% from the year-ago period." As stated herein, even a \$12 billion -\$15 billion write off would be a pebble chipped off the mountain of \$1.4T in total outstanding student debt, which might be destabilizing to the student lending system (which is a questionable assumption), but not the broader economy. Judge Manion goes on to correctly state that "[a] good and expensive education is no longer a guarantee that a good job will ensue," but goes on later in a problematic line of thought to suggest that "bankruptcy should not be the answer," instead suggesting that income-driven repayment programs should be the answer.).

modern era receive the relief they need. Suggestions below are made while keeping an eye towards maintaining the integrity of the higher education financing system, but not giving that system undue weight in the analysis of each individual student debtor. The current and future health of that financial system rests primarily with the executive and legislative branches of the federal government, not the federal judiciary.<sup>115</sup>

### III. RELEVANT ADMINISTRATIVE, STATUTORY, AND JUDICIAL STUDENT LOAN DISCHARGE LAW

This part opens with a detailed outline of many federal programs that student debtors often opt into rather than defaulting or filing for bankruptcy. Courts often look to see if debtors have attempted to enroll in one of these various administrative programs, or at the very least, that debtors have inquired into their eligibility of the programs. Once the administrative law is outlined, what follows is the relevant statutory provisions used by courts to decide student discharge cases. Next, the two most prominent judicial standards used to evaluate student loan discharge cases are detailed. This part then closes out by detailing a few creative discharges used by some courts to augment the two primary judicial discharge standards.

#### *a. Student Loan Debt Administrative Law*

The Department of Education provides many options to assist debtors who are in risk of defaulting on their student loans.<sup>116</sup> Deferment, forbearance, income-driven repayment programs, and many other programs exist to manage student loan debt.<sup>117</sup> Each program has its own caveats, considerations, special requirements, and pitfalls.<sup>118</sup>

While it is important to know that various deferment, forbearance, and income-driven repayment programs exist, for the purposes of this Comment it will not be necessary to flesh out the minutiae of every program. However, it will be worthwhile to focus on some factors of the income-driven repayment programs because of the frequency in which they are referenced in student loan bankruptcy decisions and used by student debtors. The repayment programs (ICRP, IBR, PAYE, REPAYE) range from twenty to twenty-five years and require the debtor to pay between 10 and 15 percent of their

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115. See, e.g., Proudfoot, *supra* note 8, at 8-24.

116. *There are Steps You Can Take to Repay Your Federal Student Loan Successfully and Avoid Going into Default*, U.S. DEP'T EDUC.: FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/default/avoid> (last visited Feb. 17, 2017).

117. NATIONAL CONSUMER LAW CENTER, *supra* note 54, at 39-51.

118. *Id.* at 39-70.

disposable income that is over 150 percent of the poverty line.<sup>119</sup> Generally, income-driven repayment programs are not available to private student loan holders.<sup>120</sup>

A potential pitfall to income-based repayment programs is that they allow for “negative amortization” throughout the life of the repayment period, which could lead to significant debt accrual over the lifetime of the program.<sup>121</sup> Outstanding debt is forgiven upon completion; “[h]owever, under current law, this [forgiven outstanding debt] is taxable.”<sup>122</sup> Not to mention, some courts have criticized the possibility of pushing debtors whose loans will negatively amortize into an income-based repayment program.<sup>123</sup> Their valid criticism follows.

When a large initial loan principal negatively amortizes as part of an income-driven repayment program, and that large negatively amortizing debt is combined with a long payment period, the result could be a significant tax liability for a debtor when that accrued debt is forgiven.<sup>124</sup> This fact should put some onus on courts to give debtors with high initial debt loads a hard look. Where debtors are in repayment programs but have a low potential to make any payments, and their circumstances are reasonably certain to remain the same in the years directly ahead, courts should consider one of the alternative discharge options outlined in this Comment (e.g. partial discharge or a Bankruptcy discharge in the window after successful completion of the income-driven repayment program, but prior to the program’s taxable discharge).

It is also important to understand, that under the *Brunner* test, courts look to ensure debtors do “not willfully or negligently cause [their] own default,”<sup>125</sup> and that they “make a good faith effort to repay [their] loans, as measured by [their] efforts to obtain employment, maximize income, and minimize expenses.”<sup>126</sup> Some courts have stated that “participation, or the lack thereof, in the [income-driven repayment plan] is not determinative but

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119. *Id.* at 39-51.

120. *Id.* at 41.

121. *See, e.g., Id.* at 41.

122. NATIONAL CONSUMER LAW CENTER, STUDENT LOAN LAW FIFTH EDITION 41 (Deanne Loonin et al. eds., 5th, 2015).

123. *See, e.g., Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013).

124. *See, e.g., Erbschloe v. U.S. Dep’t of Educ. (In re Erbschloe)*, 502 B.R. 470, 480-84 (Bankr. W.D. Va. 2013); *see also Grove v. Educ. Credit Mgmt. Corp. (In re Grove)*, 323 B.R. 216, 229-231 (Bankr. N.D. Ohio) (demonstrating, in both articles, methods courts used to discharge student loan debt via undue hardship after successful completion of an income-driven repayment program but before program forgave the debt to enable the debtor to avoid significant tax liability upon forgiveness).

125. *Clark v. U.S. Dep’t of Educ. (In re Clark)*, 341 B.R. 238, 255 (Bankr. N.D. Ill. 2006).

126. *In re Robertson*, 999 F.2d 1132, 1136 (7th Cir. 1993).

is a significant factor that should be considered by the bankruptcy court in determining whether an undue hardship exists.”<sup>127</sup>

In the Seventh Circuit, seeking knowledge about the various debt management programs, or only ostensible participation in one or more of the programs, will likely not alone be dispositive regarding the good faith prong of the *Brunner* test (barring some type of extenuating circumstances), which will prevent a debtor’s undue hardship discharge under 523(a)(8) of the Bankruptcy Code.<sup>128</sup> This will either force a debtor into an income-based repayment program or some other kind of debt default with no possibility of discharge of the debt in bankruptcy. If the rest of the income-based repayment programs function in practice as the Public Service Loan Forgiveness Program has, then the future is looking grim for student debtors.<sup>129</sup> Whether the Public Service Loan Forgiveness Program is a harbinger or an outlier in comparison to other programs will remain to be seen until those programs have an opportunity to reach maturity. However, debtors and courts would both be wise to take note of how this program is unfolding in reality.

Over the last several years, with all of the debt management and forgiveness programs available, some have questioned if bankruptcy is still necessary to discharge student loan debt.<sup>130</sup> It is, because, as detailed below, these debt management programs all hold the latent potential to fall short. Bankruptcy discharges for student loans are underutilized, in part due to a perception that it is impossible to receive an undue hardship discharge in student loan Bankruptcy proceedings.<sup>131</sup> The notion of the necessity of discharge of student loans in bankruptcy rings especially true today when considering the practical operation of the Public Service Loan Forgiveness Program—the first of these debt management and forgiveness programs to reach maturity.<sup>132</sup> Journalist Matt Taibbi states that:

The idea, launched by George W. Bush, was pretty simple: Students could pledge to work 10 years for

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127. Michael & Phelps, *supra* note 9, at 76; *see, e.g.*, U.S. Dep’t of Educ. v. Wallace (*In re Wallace*), 259 B.R. 170, 183-87 (Bankr. C.D. Cal. 2000).

128. *See, e.g.*, Myhre v. U.S. Dep’t of Educ. (*In re Myhre*), 503 B.R. 698, 702 (Bankr. W.D. Wis. 2013); *see also*, Clark (*In re Clark*), 341 B.R. at 256.

129. Matt Taibbi, *The Great College Loan Swindle*, ROLLING STONE (Nov. 02, 2017), <http://www.rollingstone.com/politics/features/taibbi-the-great-college-loan-swindle-w510880> [<https://perma.cc/NT2X-HUMM>].

130. *E.g.*, Michael & Phelps, *supra* note 9, at 106. The authors concluded that income-driven repayment programs are of significant value, but they do not “overrule the United States Bankruptcy Code,” nor do income-driven repayment programs overrule courts tasked with the Bankruptcy Code’s enforcement.

131. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012).

132. Taibbi, *supra* note 129.

the government or a nonprofit and have their debt forgiven. In order to qualify, borrowers had to make payments for 10 years using a complex formula. [In the latter months of this year (2017)], then, was to start the first mass wipeouts of debt in the history of American student lending. But more than half of the 700,000 enrollees have already been expunged from the program for, among other things, failing to certify their incomes on time, one of many bureaucratic tricks employed to limit forgiveness eligibility. To date, fewer than 500 participants are scheduled to receive loan forgiveness in this first round.<sup>133</sup>

The upshot, based on the functionality of this first debt management and forgiveness program, there can be no guarantee that other income-based repayment programs will be around for their stated duration or function in the way they purport they will when the time of mass forgiveness arrives. Therefore, the idea that these programs should be looked towards as a reliable catchall to funnel debtors into en masse is a misguided path forward for courts in order to deal with the 523(a)(8) issue.

*b. The Bankruptcy Code 11 U.S.C. 523*

Courts developed the *Brunner* and *ToC* tests in order to assess whether a debtor has overcome the section 523(a)(8) “undue hardship” exception to student loan debt discharges, effectively allowing the court to discharge a debtor’s student loan debt either in part or in full.<sup>134</sup> The relevant subsections of the 11 U.S.C. 523 “Exceptions to discharge” follow.<sup>135</sup>

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt--

(8) unless excepting such debt from discharge under this paragraph would impose an *undue hardship* on the debtor and the debtor's dependents, for--

(A) (i) *an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole*

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133. *Id.*

134. *See, e.g.,* Light, *supra* note 19, at 14-31.

135. 11 U.S.C. § 523 (2016).

*or in part by a governmental unit or nonprofit institution; or*

*(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or*

*(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 [26 USCS § 221(d)(1)], incurred by a debtor who is an individual.<sup>136</sup>*

The statute states that a debtor is prevented from discharging their student debt, except where to allow the debtor to retain the debt would cause the debtor “undue hardship for the debtor and debtor’s dependents.”<sup>137</sup>

For decades, the junction of the undefined 523(a)(8) undue hardship exception (e.g. the *Brunner* test (and other tests), bankruptcy courts, debtors, and creditors) has been a source of a tremendous number of contentious, contradictory, and inconsistent judicial decisions.<sup>138</sup> Most of the rulings have been attempts to delineate the most just and consistent means of deciding student loan discharge cases, an elusive feat to date.<sup>139</sup> However, some decisions have just simply been austere.<sup>140</sup> Brief explanations of the two primary tests used by courts to determine the 523(a)(8) undue hardship provision follow.

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136. 11 U.S.C. § 523(a)(8) (2016) (emphasis added).

137. *Id.*

138. *See, e.g., Light, supra* note 19, at 14-30.

139. *See, e.g., id.* at 14-30.

140. *See, e.g., Goulet v. Educ. Credit Mgmt. Corp. (In re Goulet)*, 284 F.3d 773, 775-79 (7th Cir. 2002) (finding no undue hardship where 55-year-old Goulet owed \$228 in child support, and his “mother generally support[ed] him from her own income” and allowed Goulet to live rent free in her house, and he had a felony, and suffered from alcoholism, but could not receive an undue discharge of \$76,000.).



c. *The Seventh Circuit Application of the Brunner Test*<sup>141</sup>

The *Brunner* test, which is today used by nine circuits—including the Seventh Circuit—is described below.<sup>142</sup>

- (1) The debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay loans;
- (2) Additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) The debtor has made good faith efforts to repay the loans.<sup>143</sup>

Each prong of *Brunner* must be satisfied for a debtor to receive an undue hardship discharge of student loan debt.<sup>144</sup> Each prong also has had a seemingly infinite number of characteristics read into it over the years, as each prong is evaluated in a fact-intensive fashion, and is an inherently subjective value-laden analysis.<sup>145</sup>

The first prong under the Seventh circuit’s “‘minimal standard’ of living is determined without regard for expenses that are not necessary, and, if eliminated, that would provide funds that could be directed toward repayment of the loan.”<sup>146</sup> Seventh circuit courts have applied a two part analysis to the first prong that follows: “(1) an evaluation of the debtor’s present standard of living based upon her lifestyle attributes that appear in the record, and (2) a

141. A survey of Seventh Circuit bankruptcy cases deciding student loan discharges was conducted for this Comment using Westlaw and Lexis Nexis. The selection process follows: selected Practice areas, selected bankruptcy law, then searched: Brunner OR "Totality of Circumstances" /s bankrupt! AND (discharge or "partial discharge"), filtered for bankruptcy and circuit court decisions, further refined to atleast4("Brunner") in both Lexis Nexis and Westlaw, selected out for overlapping cases between the services, selected out chapter 13 cases—leaving 27 chapter 7 cases ranging from 1993 to 2016.

142. Letter on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings, *supra* note 18, at 16.

143. *E.g.*, *Brunner v. N.Y. State Higher Educ. Servs. Corp.* (*In re Brunner*), 46 B.R. 752, 756 (S.D. N.Y. 1985).

144. *E.g.*, *Butler v. Educ. Credit Mgmt. Corp.* (*In re Butler*), No. 14-71585, 2016 WL 360697, at \*3 (Bankr. C.D. Ill. Jan. 27, 2016).

145. *See, e.g.*, Kevin J. Smith, *Defining the Brunner Test's Three Parts: Time to Set a National Standard For All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250 (2013).

146. *Clark v. U.S. Dep't of Educ.* (*In re Clark*), 341 B.R. 238, 249 (Bankr. N.D. Ill. 2006).

determination of whether the forced repayment of the loan obligation will preclude the debtor from maintaining a minimal standard of living.”<sup>147</sup>

This analysis “requires evaluating the [d]ebtor’s nearerterm financial circumstances.”<sup>148</sup> This is a forward and backward looking analysis where the court asks, “whether the [d]ebtor could, hypothetically, adjust her budget in the short-term to make room for student loan payments?”<sup>149</sup> Courts generally agree that *Brunner’s* minimal standard of living does not “require a debtor to live in abject poverty, [however] mere financial adversity is not sufficient” to satisfy prong one.<sup>150</sup> Courts ensure that debtors have “sufficient expenditures ‘for basic necessities such as food, shelter, clothing and medical treatment’ as well as a small allocation for discretionary or recreational purposes.”<sup>151</sup>

“Because the undue hardship determination rests upon the particular circumstances of each case, comparisons to the facts of other cases are of little assistance.”<sup>152</sup> This is true for all prongs in *Brunner*; however, even in this fact intensive and value-laden analysis, there are some criteria that increase a debtor’s chances of satisfying the first prong.<sup>153</sup> Some prominent factors that favor debtors are: to have dependents; to suffer from significant long-term mental or physical health issues; to owe significant healthcare-related expenses; or to not complete a course of study at a private for-profit college.<sup>154</sup> However, it must be emphasized that these specific factors need not be present for a court to find an undue hardship, and their presence is not a guarantee that an undue hardship will be found.<sup>155</sup>

147. *Id.*

148. *E.g.*, *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 WL 360697, at \*8 (Bankr. C.D. Ill. Jan. 27, 2016).

149. *Id.* at 8-9 (internal quotation marks removed).

150. *Armstrong v. U.S. Dep’t of Educ. (In re Armstrong)*, No. 10-82892, 2011 WL 6779326, at \*5 (Bankr. C.D. Ill. Dec. 27, 2011).

151. *E.g.*, *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 WL 360697, at \*8-10 (Bankr. C.D. Ill. Jan. 27, 2016).

152. *Armstrong v. U.S. Dep’t of Educ. (In re Armstrong)*, No.10-82892, 2011 WL 6779326, at \*5 (Bankr. C.D. Ill. Dec. 27, 2011).

153. Porvaznik, *supra* note 63, at 543.

154. *See, e.g.*, *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 Bankr. LEXIS 245, at \*12-13 (Bankr. C.D. Ill. Jan. 27, 2016) (finding debtor who had no “dependents, significant health needs, or major recurring expenses” did not meet first prong of *Brunner*); *see also*, *Larson v. United States (In re Larson)*, 426 B.R. 782, (Bankr. N.D. Ill. 2010) (holding that debtor who was blind, attended a for-profit university, and did not graduate met all prongs of *Brunner*).

155. *See generally*, *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013) (finding for debtor who had no dependents, no long-term physical or mental health-related issues, held a degree, but had not worked in ten years and subsisted off of her mother’s Social Security in area she was unlikely to find a job.).

Where courts analyze a debtor's finances and find that the debtor has reasonably minimized expenses (e.g. has not recently purchased a new car, home, or indulged in expensive habits), and the debtor possesses little or no disposable income after the analysis, then the debtor will likely meet the first prong.<sup>156</sup> Here, courts have allowed for debtors to pay cell phone bills, internet bills, religious tithings, private school bills for debtor's child(ren), recreational costs (e.g. smoking, pets), and similar expenses that fall into somewhat essential, somewhat non-essential, or quality of life categories.<sup>157</sup> If a debtor passes the first prong, they must then meet the next two prongs of "additional circumstances" and "good faith."<sup>158</sup>

Most constructions of the "additional circumstances" prong of *Brunner* draw from a combination of *Roberson*, *Goulet*, *Brunner*, and *Krieger*, though much more from the former three than *Krieger*.<sup>159</sup> A common construction of the second prong follows:

The second prong of the *Brunner* test requires an analysis of whether there are "additional, exceptional circumstances, strongly suggestive of continuing inability" to make the student loan payments "for a significant portion of the repayment period." This prong is often described as requiring a "certainty of hopelessness." Factors that can be considered include the debtor's age, education, job skills, employment history, any significant physical or psychiatric impediments to securing employment,

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156. See, *Henry v. U.S. Dep't of Educ. (In re Henry)*, No. 14-70113, 2016 Bankr. LEXIS 2482, at \*14-15 (Bankr. C.D. Ill. July 5, 2016) (ruling where a debtor had "sufficient income to own multiple vehicles, spend thousands of dollars on friends and family each year" and could receive more money in retirement than her current living arrangement, debtor did not meet "minimal standard of living" requirement).

157. See, e.g., *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 Bankr. LEXIS 245, at \*10 (Bankr. C.D. Ill. Jan. 27, 2016) (finding debtors payments on "cell phone, internet, cigarette, and pet care expenses" to be reasonable); see also *Grawey v. Ill. Student Assistance Comm'n (In re Grawey)*, No. 00-83643, 2001 WL 34076376, at \*3 (Bankr. C.D. Ill. Oct. 11, 2001) (concluding that a \$277 dollar payment for children's' parochial school was reasonable); see also *Lawson v. United States (In re Lawson)*, 426 B.R. 782, 791 (Bankr. N.D. Ill. 2010) (ruling religious donations were ruled tithing between 10-15% was reasonable).

158. E.g., *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549 (8th Cir. 2003).

159. See, e.g., *Hoskins v. Educ. Credit Mgmt. Corp. (In re Hoskins)*, 292 B.R. 883, 887-88 (Bankr. C.D. Ill. 2003); see also *Larson v. United States (In re Larson)*, 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010); *Owens v. U.S. Dep't of Educ. (In re Owens)*, 525 B.R. 719, 722 (Bankr. C.D. Ill. 2015).

the size of the debt, and whether the debtor has any dependents.

"Certainty of hopelessness' is a tough standard and one that can generally only be met by the truly disabled or debtors whose repayment periods have already run so that the certainty of their inability to pay for the entire period is a matter of fact rather than speculation." That is, if the repayment period has elapsed or nearly elapsed, there is no need to attempt to predict the debtor's future.<sup>160</sup>

This second prong of *Brunner* is commonly referred to as “additional circumstances,” and is infamously known for its “catch-phrase ‘certainty of hopelessness.’”<sup>161</sup> In the Seventh Circuit in recent years, the restrictiveness of the second prong has experienced a tightening, then slight loosening in 2013 with *Krieger*, and has since arguably retightened. Essentially, there is a pre-*Krieger* and a post-*Krieger* formulation of *Brunner* in the Seventh Circuit.<sup>162</sup> Both pre- and post-*Krieger* configurations are similar and restrictive—with the outlier (*Krieger*) in the middle.<sup>163</sup> *Krieger* was a short-lived injection of common sense into the often very unreasonable undue hardship discharge jurisprudence.<sup>164</sup> Some thought *Krieger* could be a turning point,

160. *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 Bankr. LEXIS 245, at \*13-14 (Bankr. C.D. Ill. Jan. 27, 2016) (citations omitted) (explanatory parenthetical omitted).

161. *Owens v. U.S. Dep’t of Educ. (In re Owens)*, 525 B.R. 719, 722 (Bankr. C.D. Ill. 2015).

162. *Compare Clark v. U.S. Dep’t of Educ. (In re Clark)*, 341 B.R. 238, 248-49 (Bankr. N.D. Ill. 2006) (using *Roberson* and *Goulet* to construct “additional circumstances” prong, requiring a “certainty of hopelessness.”), *and Revere v. Nelnet (In re Revere)*, No. 06-11813, 2007 Bankr. LEXIS 4498, at \*5-9 (Bankr. N.D. Ind. 2006) (relying on *Roberson* and *Goulet* strict construction of “additional circumstances.”), *with Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (suggesting that “[i]t is important not to allow judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself.”), *and Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, 2016 Bankr. LEXIS 245, at \*12-17 (Bankr. C.D. Ill. 2016) (using the *Goulet*, *Roberson*, *Brunner* “certainty of hopelessness” phraseology with no reference to *Krieger*’s “judicial glosses” criticism, only using *Krieger* to establish “[f]actors that can be considered” to decided “additional circumstances”).

163. *Compare Clark v. U.S. Dep’t of Educ. (In re Clark)*, 341 B.R. 238, 252-55 (Bankr. N.D. Ill. 2006) (using *Roberson* and *Goulet* to construct “additional circumstances” prong, requiring a “certainty of hopelessness.”), *with Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 Bankr. LEXIS 245, at \*7-12 (Bankr. C.D. Ill. Jan. 27, 2016) (using the *Goulet*, *Roberson*, *Brunner* “certainty of hopelessness” phraseology with no reference to *Krieger*’s “judicial glosses” criticism, only using *Krieger* to establish “[f]actors that can be considered” to decided “additional circumstances.”).

164. *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 701-04 (Bankr. W.D. Wis. 2013) (stating that “In a recent decision, the Court of Appeals injected common sense

but it wound up being in line with what many believe of *Brunner*:<sup>165</sup> that it has always been a fact-intensive and inconsistent analysis, and in this instance, only slightly less restrictive.<sup>166</sup>

The second prong is known as the “heart of the *Brunner* test.”<sup>167</sup> A large number of the Seventh Circuit debtors fail on this second prong of *Brunner*. The circumstances are generally related to physical health, and in some cases just dire-straits conditions. Some Seventh Circuit debtors who have met the “certainty of hopelessness” standard follow: (1) a person with six kids living well below the poverty line,<sup>168</sup> (2) a person on social security, experiencing lifelong seizures, and had not worked in over a decade,<sup>169</sup> (3) an immigrant with an extremely low IQ and two dependents,<sup>170</sup> (4) a person who attended a for-profit college, did not graduate, and was blind,<sup>171</sup> (5) a quadriplegic person,<sup>172</sup> and (6) *Krieger* who had not worked in over a decade, and the case was accompanied by a concurrence cautioning that the ruling was an “outlier.”<sup>173</sup> These cases tend to fall in line with Pardo’s findings in his empirical analysis, which is explained in the next subsection of this section—where court outcomes tend to measure less of a debtor’s financial ability to repay, but more so debtor’s health related indicators of repayment.

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into its consideration of § 523(a)(8) . . . [by recognizing *Brunner*] but declin[ing] to require that the certainty of hopelessness and the proof of prior payment overwhelm the inquiry.”)

165. See, *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 701-04 (Bankr. W.D. Wis. 2013); see also Porvaznik, *supra* note 63, at 540-44.

166. See, *e.g.*, *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 703 (Bankr. W.D. Wis. 2013).

167. See, *e.g.*, Kevin J. Smith, *Defining the Brunner Test’s Three Parts: Time to Set a National Standard For All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 261(2013); see also Light, *supra* note 19, at 18. Stating that courts have been divided between those who would rather apply a “‘certainty of hopelessness’ in order to discharge [debtor’s] student loans and those that merely require debtors to prove something more than current inability to repay these debts.” The Seventh Circuit is clearly a “certainty of hopelessness” advocate.

168. *Lewis v. Ill. Student Assistance Comm’n (In re Lewis)*, 276 B.R. 912, 914-15 (Bankr. C.D. Ill. 2010).

169. *Hoskins v. Educ. Credit Mgmt. Corp. (In re Hoskins)*, 292 B.R. 883, 885-87 (Bankr. C.D. Ill. 2003).

170. *Vang v. UW Stout Student Bus. Servs. (In re Vang)*, 324 B.R. 76, 79-81 (Bankr. W.D. Wis. 2005).

171. *Larson v. United States (In re Larson)*, 426 B.R. 782, 786-88 (Bankr. N.D. Ill. 2010).

172. *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 698-75 (Bankr. W.D. Wis. 2013).

173. *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 886 (7th Cir. 2013) (stating “Ms. Krieger’s successful petition for a discharge of her \$25,000 obligation should be labeled as an extreme exception and an outlier.”).

The third and final prong of *Brunner* is an analysis of good faith.<sup>174</sup> This is often unanalyzed, as debtors have already failed the first prong's "minimal standard of living" or prong two's "additional circumstances."<sup>175</sup> Courts have tremendous leeway with this good-faith prong. Courts usually look to ensure that debtors have attempted to repay their loans. No "certain percentage or minimum amount of the loan" must be paid to prove good faith.<sup>176</sup> Courts will also look towards debtor eligibility or participation in an income-driven repayment program, but again, eligibility or non-participation does not preclude a debtor from discharge.<sup>177</sup>

It has been argued that Seventh Circuit courts could be relaxing their application of *Brunner*.<sup>178</sup> However, even the Seventh Circuit's arguable easing of the *Brunner* test, still produces unpredictable, contradictory, and often unreasonable outcomes.<sup>179</sup> This is due to the fact-intensive nature of the analysis required to discharge student loan debt.<sup>180</sup> *Brunner*'s lack of flexibility makes it an untenable test to evaluate student loan debt discharges moving forward. This is the case because, as explained in this Comment, student lending and debt dynamics have changed too drastically to maintain this restrictive and rigid test.<sup>181</sup>

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174. See, e.g., *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 886 (7th Cir. 2013).

175. See, e.g., *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 778-79 (7th Cir. 2002).

176. *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 Bankr. LEXIS 245, at \*15-18 (Bankr. C.D. Ill. Jan. 27, 2016).

177. *Id.*

178. Porvaznik, *supra* note 63, at 542-43.

179. Compare *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 757-61 (7th Cir. 2015) (holding 56-year-old debtor who was unemployed, lived with his mother, subsisted off her Social Security income, failed the Bar Exam twice, had misdemeanor convictions, and struggled with alcohol abuse, and owed \$260,000 in student loans was not entitled to undue hardship discharge), with *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 883-87 (7th Cir. 2013) (holding 52-year-old debtor who was unemployed and could not find work for over ten years despite having submitted 200 or so applications, lived with her mother in a rural area with sparse employment opportunities, and \$25,000 in student debt was entitled to an undue hardship discharge; even though the concurrence acknowledges a crisis was afoot, Judge Manion cautioned that debtor's "successful petition for a discharge of her [loan debt] should be labeled as an extreme exception and an outlier." This Comment confirms Judge Manion's view.).

180. See, U.S. Dep't of Educ., Letter on Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings (July 07, 2015), <https://ifap.ed.gov/dpccletters/attachments/GEN1513.pdf>.

181. *Myhre v. U.S. Dep't of Educ. (In re Myhre)*, 503 B.R. 698, 702-05 (Bankr. W.D. Wis. 2013).

*d. Brunner—An Empirical Analysis Revisited*

Bankruptcy Professor Rafael Pardo is a leading expert of student loan discharges under the Bankruptcy Code, and even more so in regards to empirical research of student loan discharges in bankruptcy.<sup>182</sup> Pardo conducted a 2008 empirical analysis that concluded that under the *Brunner* test a debtor's health played a statistically significant factor in loan discharges, but "financial indicia of ability to repay [were not] associated with legal outcome."<sup>183</sup> This is only anecdotal, but the results of a survey of Seventh Circuit undue hardship cases conducted for this Comment appear to reflect Pardo's findings.

Pardo suggests courts have "interpreted congressional intent [to underlie] the undue hardship discharge provision to be the prevention of abuse of the bankruptcy system by student loan debtors."<sup>184</sup> Pardo goes on to point out a paradox. If courts see one of their primary purposes to prevent abuse of the bankruptcy system, then they should focus on a debtor's "financial predictors of ability to repay," none of which were statistically significant in his findings.<sup>185</sup> Only debtor health held statistical relation to discharges.<sup>186</sup>

Professor Pardo reinforced his findings by citing a recent empirical study "of the 613 confirmed [Chapter 13] cases [where] 351 of those cases were either dismissed or converted to Chapter 7."<sup>187</sup> Pardo states, "[i]n other words, bankruptcy courts erroneously determined the financial feasibility of future repayment by the debtor in 57% of the confirmed cases."<sup>188</sup> An implication from his analysis follows: if courts can get it wrong so often in such a "controlled environment . . . where the repayment period will not exceed five years, then why should they fare any better in undue hardship discharge determinations that require them to forecast repayment ability over a period that can be as long as thirty years?"<sup>189</sup>

182. See, e.g., Jason Iuliano, *Student Loans and Surmountable Access-To-Justice Barriers*, 68 FLA. L. REV. 377, 377-80 (2016).

183. Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 513-18 (2008). Stating "it is clear that the status of a debtor's health greatly influenced a court's decision to grant an undue hardship in 60% of the discharge determinations" of a previous, broader, study conducted by Pardo. He goes on to point out potential weaknesses of his dataset and recommends exercising caution when drawing inferences. *Id.*

184. *Id.* at 519 (clarifying in footnote 58 of Pardo's paper "that the historical record suggests an absence of unequivocal intent to this effect.").

185. *Id.* at 513-18.

186. Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 513-18 (2008).

187. *Id.* at 522.

188. Pardo, *supra* note 183, at 522.

189. *Id.*

*e. Flexibility—Not Leniency—of Totality of Circumstances Test*<sup>190</sup>

The First and Eighth Circuits use the *ToC* test.<sup>191</sup> The Eighth Circuit “objected to the fact that debtors needed to prevail on *each* of the three factors in order to discharge their student loans” under *Brunner*, and opted for what the court thought was a less restrictive approach to discharging student loans in bankruptcy.<sup>192</sup> The Eighth Circuit strongly suggested that the “strict parameters” of the *Brunner* test made it ill equipped to properly assess whether or not to discharge a debtor’s student loans.<sup>193</sup>

The Eighth Circuit argued, “fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.”<sup>194</sup> Inevitably, the inference here is that the Eighth Circuit believed *Brunner* to be inadequate to accomplish this task of analyzing undue hardship across all bankruptcy cases in a fair and equitable manner.

The generally accepted *ToC* test follows: “(1) The debtor’s past, present, and reasonably reliable future financial resources, (2) The amount of the debtor’s and her dependent’s reasonable necessary living expenses, (3) All relevant facts and circumstances surrounding each particular bankruptcy case.”<sup>195</sup>

Other relevant factors include, but are not limited to the following:

- (1) total present and future incapacity to pay debts for reasons not within the control of the debtor;
- (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment;
- (3) whether the hardship will be long-term;
- (4) whether the debtor has made payments on the student loan;
- (5) whether there is permanent or long-term disability of the debtor;
- (6) the ability of the debtor to obtain gainful employment in the area of the study;
- (7) whether the debtor has made a good

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190. A survey of Eighth Circuit student loan debt bankruptcy cases was conducted for this paper using Westlaw and Lexis Nexis. Selection process follows: selected “Practice areas,” selected “bankruptcy law,” selected “cases,” then searched: *brunner* OR “totality #of circumstances” /s *bankrupt!* AND (discharge or “partial discharge”), filtered for bankruptcy and circuit court decisions, further refined to at least 4 (“Totality of Circumstances”) in both Lexis Nexis and Westlaw, selected out for overlapping cases between the services, then selected out Chapter 13 cases—leaving sixteen Chapter 7 cases ranging from 1999 to 2015.

191. 3 BANKRUPTCY SERVICE LAWYERS EDITION § 27:1609 (2018).

192. LIGHT, *supra* note 19, at 25 (emphasis added on word “each”).

193. *Id.* at 25.

194. *Id.*

195. *Id.* at 25-26.



faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and (9) the ratio of student loan debt to total indebtedness.<sup>196</sup>

Unlike *Brunner*, “good faith is not identified as a specific factor to be considered” under *ToC*.<sup>197</sup> A survey of the Eighth Circuit has been concisely summed up as follows: “the ‘totality of the circumstances’ test focuses on whether the debtor’s reasonable future financial resources will sufficiently cover payment of the student loan debt while allowing for a minimal standard of living. If they will, then the debt should not be discharged.”<sup>198</sup> The debtor’s burden of proving the undue hardship is rigorous.<sup>199</sup>

This analysis does not result in consistent or lenient pro-debtor outcomes,<sup>200</sup> though there are some debtors provided relief under *ToC* that would likely not receive relief under *Brunner* in the Seventh Circuit.<sup>201</sup> *ToC*

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196. *E.g.*, *Educ. Credit Mgmt. Corp. v. Jespersen (In re Jespersen)*, 571 F.3d 775, 783-85 (8th Cir. 2009); *see also* *Bakken v. Alaska Comm’n on Postsecondary Educ. (In re Bakken)*, No. 11-3104, 2015 WL 351924, at \*6-7 (Bankr. D. N.D. 2015).

197. LIGHT, *supra* note 19, at 26.

198. *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 545-55 (8th Cir. 2003); LIGHT, *supra* note 19, at 26.

199. *E.g.*, *Sederlund v. Educ. Credit Mgmt. Corp. (In re Sederlund)*, 440 B.R. 168, 171 (8th Cir. 2010) (ruling that 47-year-old debtor could not receive a discharge despite her below poverty income. This was due to the fact the court found her long-term boyfriend supplemented her income and she was eligible for an income-based repayment program. This outcome would have likely been similar under *Brunner*).

200. *See, e.g.*, *Collins v. Educ. Credit Mgmt. Corp. (In re Collins)*, 376 B.R. 708, 711-13 (Bankr. D. Minn. 2007) (holding that 33-year-old chiropractor, in good health, with three dependents, and a wife all in good health, could not receive an undue hardship discharge. They were \$6000 behind on their rent of a townhouse); *see also* *Ebeleheiser v. Coll. Assist (In re Ebeleheiser)*, 543 B.R. 1, 6 (Bankr. S.D. Iowa 2015) (ruling that 38-year-old chiropractor convicted of sexual assault could not receive an undue hardship discharge. The court said, “Given his age, experience, education and the distant horizon of the conclusion of his working years, it is reasonable to conclude Ebeleheiser will have future income sufficient to make some payment on his student loans.” The court also added that the debtor had an income-driven repayment program as an option to address some of debtor’s repayment concerns. This case arguably underestimated the impact of debtor’s felony on his chances to earn enough income to make payments on over \$180,000 in debt.).

201. *See, e.g.*, *Cline v. Ill. Student Loan Assistance Assoc. (In re Cline)*, 245 B.R. 617, 621 (Bankr. W.D. Mo. 2000) (holding that “[l]ike some other debtors, Ms. Cline obtained an education that was not worthwhile to her financially. To require her to pay for that decision for the rest of her working life would indeed impose an undue hardship on her.” However, the decision was criticized on appeal to the Bankruptcy Appellate Panel of the Eighth Circuit.); *see also* *Brown v. Union Fin. Servs., Inc. (In re Brown)*, 249 B.R. 525, 530-532 (Bankr. W.D. Mo. 2000) (finding that to force 61-year-old debtor to repay over \$36,000 in loan debt over a twenty-year period justified an undue hardship for the debtor).

is not inherently more lenient than *Brunner*; it is essentially just more flexible than *Brunner*, a feature that allows courts to respond to the current student loan environment in a way that does not “diminish the inherent discretion contained in § 523(a)(8)(B).”<sup>202</sup> But what exact discretion is implied in 11 U.S.C. 523(a)(8)? An explanation follows in Part IV, but first a brief aside on alternative discharges.

*f. Optional Discharges Applied in the Seventh and Other Circuits*

Where courts find an undue hardship, they traditionally discharge the entire student loan debt, but this is not always the case. The options presented promote two principles: 1) to ensure deserving debtors some kind of relief, while 2) preventing abuse of the Bankruptcy Code. Courts have created alternative discharges where special circumstances of debtors have permitted. The first creative discharge is to accompany a *ToC* or *Brunner* analysis with the granting of a partial discharge of student debt, where a court relieves a debtor of part of their student loan debt obligations.<sup>203</sup> This method has been used by several courts throughout the country,<sup>204</sup> including the Seventh Circuit.<sup>205</sup> A partial discharge can be granted with or without finding an undue hardship.<sup>206</sup>

The second discharge option that is less than a full discharge is to grant the debtor a judicial discharge of their student debt in the window of time immediately after successful completion of an Income-Based Repayment Program (IBRP), but prior to discharge of the debt under the IBRP statute.<sup>207</sup> The bankruptcy discharge prior to the IBRP discharge allows deserving debtors to avoid significant tax liabilities that result from discharges under the IBRP program.<sup>208</sup> This option gives *Brunner* courts a guarantee that the debtor’s good faith will have been met upon IBRP completion.<sup>209</sup> However,

202. Long v. Educ. Credit Mgmt. Corp. (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003).

203. See, e.g., NATIONAL CONSUMER LAW CENTER, *supra* note 54, at 224-25.

204. *Id.*

205. Fecek v. Sallie Mae, Inc. (*In re Fecek*), Bankr. No. 12-13062, Adv. No. 13-50089, 2014 WL 1329414, at \*9 (Bankr. S.D. Ind. 2014) (quoting Shirzadi, “Partial discharge, as well as other modifications to student loan obligations, allows a bankruptcy court to reach a more equitable result, tailored to a debtor’s specific financial situation. The debtor is better able to achieve a ‘fresh start’, while still preserving the policy goals behind § 523(a)(8).” The court then states, “[t]he Seventh Circuit has approved of relief to the debtor short of a complete discharge.”); see also Porvaznik, *supra* note 63, at 544.

206. Shirzadi v. U.S.A. Group Loan Servs. (*In re Shirzadi*), 269 B.R. 664, 673 (Bankr. S.D. Ind. 2001).

207. See, e.g., Erbschloe v. U.S. Dep’t of Educ. (*In re Erbschloe*), 502 B.R. 470, 483-85 (Bankr. W.D. Va. 2013).

208. See, e.g., Erbschloe, 502 B.R. at 482-84.

209. See, e.g., Erbschloe, 502 B.R. at 484-85.

some say this option can run contrary to the Bankruptcy Code's "fresh start" principle.<sup>210</sup> It has also been argued that IBRPs can have negative impacts for decades on a debtor's credit and could impose significant emotional or psychological hardships on debtors—creating a so-called mental debtor's prison.<sup>211</sup>

#### IV. HISTORY AND EVOLUTION OF UNDUE HARDSHIP AND COURT IMPOSED TESTS

Congress derives its authority "[t]o establish an uniform. . . Laws on the subject of Bankruptcies throughout the United States" from the U.S. Constitution.<sup>212</sup> The original Bankruptcy Code of 1898 contained very few dischargeability exceptions "prior to the late 1970s,"<sup>213</sup> as such, student debts were discharged along with all other discharged debts in bankruptcy.<sup>214</sup> Federal courts were hesitant to split discharges, preferring to leave the task of splitting general discharges to "[state] court[s] in which the creditor attempt[s] to enforce the claim."<sup>215</sup>

Over time the lack of dischargeability exceptions altered and the Bankruptcy Code was impregnated with an array of dischargeability exceptions.<sup>216</sup> The section of the Code at the heart of this Comment, 11 U.S.C. §523(a)(8), was incorporated into the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 et. seq. (1978).<sup>217</sup> A perception of abuse of the Bankruptcy Code in regards to discharge of student loans gave rise to the initial reform and has traditionally sustained reform efforts since.<sup>218</sup> From the initial date

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210. *Durrani v. Educ. Credit Mgmt. Corp.* (*In re Durrani*), 311 B.R. 496, 507-10 (Bankr. N.D. Ill. 2004) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'") (Attaching debt to debtors for up to twenty-five years clearly poses a problem to this fresh start policy.).

211. Fossey & Cloud, *infra* note 303, at 609-11.

212. U.S. CONST. art. I, § 8, cl. 4; *see also*, B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH. L. REV. 89, 93 (2002); *see also*, *Tetzlaff v. Educ. Credit Mgmt. Corp.*, No. 15-485, 2015 WL 6083507, at \*2 (U.S. 2015).

213. Huey, *supra* note 212, at 97.

214. LIGHT, *supra* note 19, at 1.

215. *Id.* at 1.

216. *Id.* at 1.

217. UNITED STATES DEPARTMENT OF EDUCATION, *supra* note 18, at 12 (stating this section was previously codified in 1976 in the Higher Education Act under Public Law 94-482 and was subsequently repealed and inserted into the Bankruptcy Code in 1978); *see* LIGHT, *supra* note 19, at 3.

218. LIGHT, *supra* note 19, at 2.

of the addition of section 523(a)(8) in 1978, “[it] has experienced a creeping expansion of its nondischargeability.”<sup>219</sup>

After the 1978 additions and revisions to Bankruptcy Code section 523(a)(8), the Code mandated that a student loan debtor had to wait five years prior to filing a bankruptcy petition to have their student debt discharged, after which time a successful bankruptcy petitioner with student debt would have their debt discharged “along with their credit card debt.”<sup>220</sup> “In 1990, the waiting period was extended to seven years,”<sup>221</sup> and an additional reform made student loans nondischargeable under Chapter 13.<sup>222</sup> If a debtor wished to obtain a student loan discharge prior to the statutorily mandated waiting periods of either five or seven years, they must first have been able to “demonstrate an undue hardship.”<sup>223</sup> In 1998, Congress removed any waiting period for student loan discharges, effectively making the undue hardship requirement an indefinite necessity for debtors to meet.<sup>224</sup>

In the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 “Congress decided to render private student loan debt—along with the already nondischargeable federal student loan debt—nondischargeable out of fear that debtors on the eve of lucrative careers would file bankruptcy to get out of their obligations.”<sup>225</sup> At every student loan discharge-Bankruptcy Code reform juncture, generally there was a perceived abuse of student loan programs and the Bankruptcy Code; however, at no point has empirical evidence ever confirmed or justified this perception of abuse—in fact, at every juncture there has been evidence to refute the unjustified beliefs of massive abuse of the Bankruptcy Code and abuse of the lending system by debtors.<sup>226</sup> Regardless, Congress has refused to unambiguously define undue hardship of 523(a)(8).

219. *Id.* at 3.

220. Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, J. KAN. B. ASS'N, Nov.-Dec. 2015, at 24, 25-32.

221. *Id.* at 25.

222. *E.g.*, Huey, *supra* note 212, at 100.

223. Wiard, *supra* note 220, at 25.

224. Michael & Phelps, *supra* note 9, at 79-81.

225. *E.g.*, Mike Pappandrea, *Should We Really Discharge the Student Loan Debt Discharge Exception? Why Reversing The 2005 BAPCPA Amendment is Not Relief to the Debtor*, 12 RUTGERS J.L. & PUB. POL'Y 555, 556 (2015) (internal quotes omitted).

226. *See, e.g.*, Anne E. Wells, *Replacing Undue Hardship with Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy*, 33 Cal. Bankr. J. 313, 325 (2016) (“These [1978 lender] concerns [of student’s abusing the Bankruptcy Code to quickly discharge student loans shortly after graduating] were directly contradicted by a contemporaneous Government Accountability Office (GAO) study that concluded that less than 1% of federal loans were being discharged in bankruptcy.”); *e.g.*, Michael & Phelps, *supra* note 9, at 79-81 (stating that Congress maintained the undue hardship exception in spite of recommendation from the 1997 Report of the National Bankruptcy Review Commission “that widespread abuse of the bankruptcy system by student loan borrowers was largely a myth and that

In 2005 Bankruptcy Code reforms, Congress left section 523(a)(8) undue hardship undefined and expanded the provision to cover student loans made by private lenders.<sup>227</sup> Some have opined that Congress' silence on 523(a)(8)'s undue hardship during reforms suggests they implicitly accepted existing judicial interpretations.<sup>228</sup> However, others have argued that undue hardship was defined in 2005 amendments to the Bankruptcy Code when Congress inserted a definition of undue hardship next door to 523(a)(8) in 11 U.S.C. § 524(m)(1) "there is no escaping the fact that Congress used the identical phrase in both sections of the same statute," implying at the very least Congressional intent exists in order to more precisely define section 523(a)(8) undue hardship in the Bankruptcy Code.<sup>229</sup>

The 1973 Commission on Bankruptcy Laws of the United States, a group tasked with analyzing the Code and offering suggestive reforms to the Code, never defined the criteria that would satisfy the undue hardship statutory language.<sup>230</sup> Nor did Congress define undue hardship when they passed the law in 1978.<sup>231</sup> Defining undue hardship is a task that has beleaguered courts up to the present day.<sup>232</sup> As explained above, *Brunner* and *ToC* are the two primary tests developed by courts to evaluate whether debtors satisfy the heretofore arguably undefined undue hardship statutory provision.<sup>233</sup>

Today the Seventh Circuit, and eight other circuits, use the *Brunner* test to measure whether a debtor will face an undue hardship if they are forced to

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many of the loans that were not discharged would nonetheless remain uncollectible."); *e.g.*, Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 499 (2012) (explaining that "barely 0.1 percent of student loan debtors in bankruptcy sought to discharge their educational debts."). With so few debtors seeking a discharge the implication is that the systemic integrity threat is somewhat hyperbolic.

227. Michael & Phelps, *supra* note 9, at 80.

228. *Id.* at 92 (stating that Congress "consciously chose to leave undue hardship language intact" when it "expand[ed] its reach to all qualified educational loans as defined in I.R.C. § 221(d)(1).").

229. Brief of National Consumer Law Center and National Ass'n of Consumer Bankruptcy Attorneys as Amici Curiae Supporting at 10, *Murphy v. Educ. Credit Mgmt. Corp.*, 511 B.R. 1 (2015) (No. 14-1691) ("At a minimum, the presumptive [the 524(m)] test added in 2005 sheds light on what Congress intends when it uses the phrase 'undue hardship.'" Under 524(m) an undue hardship should be found to exist "if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's [reaffirmation agreement] . . . is less than the scheduled payments on the reaffirmed debt.").

230. *Vang v. UW Stout Student Bus. Servs.* (*In re Vang*), 324 B.R. 76, 79-81 (Bankr. W.D. Wis. 2005).

231. *Id.*

232. *Id.*

233. *See, e.g.*, DEANNE LOONIN, ET AL., *STUDENT LOAN LAW* 204-05 (5th ed. 2015).

pay the life of their student loan.<sup>234</sup> The *Brunner*<sup>235</sup> test was adopted by the Second Circuit in 1987 when:

[U]ndue hardship was the infrequently invoked exception to the general rule of automatic discharge after a set number of years . . . [essentially,] Congress has moved from a structure that relied upon the passage of time as a bright line standard, to one that subsumes that factor within the undefined and inherently amorphous standard of undue hardship.<sup>236</sup>

The focus of the text quoted above is to highlight the transition from a bright line rule regarding the discharge of debt “that relied upon the passage of time as a bright line standard,” to a regime where “age of the debt [was] to be but one factor . . . [among] the totality of circumstances.”<sup>237</sup> Even though the focus of the quote is on the passage of time specifically, the stressing of the undefined nature and amorphousness of *Brunner* is significant in that it highlights the difficulty courts have always had in trying to reach any coherent, consistent method to evaluate when debtors face an undue hardship.<sup>238</sup>

Though the *Brunner* test persists, as explained in this Comment, there is and has been for some time mounting pressure on courts to jettison the test in favor of a more reasonable approach. Indeed, many Seventh Circuit courts have acknowledged that the *Brunner* test, and much of the current judicial understanding of undue hardship to date, runs the risk of being little more than amorphous “judicial gloss” possibly superseding the statute.<sup>239</sup>

234. *Id.*

235. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 395-97 (2d Cir. 1987); *see also* *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 753-58 (Bankr. S.D.N.Y. 1985).

236. *Ordaz v. Ill. Student Assistance Comm’n (In re Ordaz)*, 287 B.R. 912, 919-20 (Bankr. C.D. Ill. 2002).

237. *Id.* at 920.

238. *Id.*

239. *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013) (explaining that “[i]t is important not to allow judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself.”); *see also* *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 702 (Bankr. W.D. Wis. 2013) (restating “judicial gloss” statement from *Krieger*.); *see also* *Owens v. U.S. Dep’t of Educ. (In re Owens)*, 525 B.R. 719, 723 (Bankr. C.D. Ill. 2015) (stating in footnote 1: “It could be argued that the *Brunner* test, creating a three-part test not found in the statutory language, is itself judicial gloss, however understandable given the vagueness of the undue hardship standard. For better or worse, *Brunner* has been widely adopted, including by the Seventh Circuit, where it has been applied on a regular basis since *Roberson*.”).

## V. ECONOMIC CONTEXT

Any challenge to the *Brunner* test and the undefined 523(a)(8) undue hardship provision must acknowledge some of the significant changes, or transformations, the U.S. economy has undergone in the thirty years since the test was adopted. The Second Circuit created the *Brunner* test in 1987 to prevent discharges prior to a statutorily defined waiting period.<sup>240</sup> The test was then adopted in 1993 by the Seventh Circuit in *Roberson v. Illinois Student Assistance Commission*, roughly five years before Congress struck the minimum waiting period from the Bankruptcy Code, removing the bright-line test and forcing courts to rely alone on the amorphous standard of undue hardship.<sup>241</sup>

Seventh Circuit courts have written opinions in recent years that signaled there is a growing belief in the Circuit that the loose system of higher education finance and the broader economy has changed so much since the adoption of *Brunner* that courts need to be careful not to supersede the statute with “judicial gloss;” however, in good keeping with the *Brunner* test, the Seventh Circuit has since issued contradicting opinions, reverting back to the traditional restrictive approach of the test.<sup>242</sup>

Some Seventh Circuit courts have also alluded to the idea that *Brunner* became an increasingly restrictive test since its inception to include phraseology such as “certainty of hopelessness” and “additional circumstances.”<sup>243</sup> The *Brunner* analysis has evolved to rely heavily on a debtor’s ability to find future employment and earn future income in order to assess whether the debtor should receive an undue hardship discharge.<sup>244</sup> However, as stated in the original *Brunner* ruling, attempting to make employment and earnings

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240. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1985); e.g., Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, J. KAN. B. ASS’N, Nov.-Dec. 2015, at 24, 25 (2015).

241. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 395-97 (2d Cir. 1985); *In re Roberson*, 999 F.2d 1132, 1132-37 (7th Cir. 1993); Wiard, *supra* note 31 at 25.

242. *Porvaznik*, *supra* note 63, at 542; compare *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 882-86 (7th Cir. 2013) (reversing District Court appeal in favor of Bankruptcy Court decision), and *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 702-04 (Bankr. W.D. Wis. 2013), with *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F. 3d 756, 757-61 (7th Cir. 2015), and *Butler v. Educ. Credit Mgmt. Corp. (In re Butler)*, No. 14-71585, 2016 Bankr. LEXIS 245, at \*1-18 (7th Cir. 2016).

243. See e.g., *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 883-86 (7th Cir. 2013); see also *Myhre v. U.S. Dep’t of Educ. (In re Myhre)*, 503 B.R. 698, 699-705 (Bankr. W.D. Wis. 2013); see also *Armstrong v. U.S. Dep’t of Educ. (In re Armstrong)*, No. 10-82092, 2011 WL 6779326, at \*1-8 (Bankr. C.D. Ill. 2011).

244. See e.g., *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F. 3d 756, 757-61 (7th Cir. 2015); see also *Armstrong v. U.S. Dep’t of Educ. (In re Armstrong)*, No. 10-82092, 2011 WL 6779326, at \*1-8 (Bankr. C.D. Ill. 2011).

forecasts too far into the future is problematic—to say the least.<sup>245</sup> Complexities of the modern, dynamic U.S. economy do not assist courts in their futile long-term forecasts.<sup>246</sup>

Professional government economists, private sector economists, academic economists, and thousands of other economists across the United States spend significant page space and intellectual energy debating the current state of the U.S. and global economy.<sup>247</sup> There is a tremendous amount of human time, labor, and research that is invested in developing various understandings and interpretations of how the U.S. economy *ought* to work versus how the U.S. economy *is* or *is not* working.

Often, inferences, conclusions, and theoretical underpinnings of various research projects within the field of economics are contradictory, meaning experts within the discipline have some kind of fundamental theoretical or methodological disagreement. These disagreements become points of academic and practical contention.<sup>248</sup> This has been the case since the founding of the academic profession of economics, which has produced well-known and sometimes contradictory figures such as Adam Smith, Karl Marx, John Maynard Keynes, Milton Friedman, Fredrick Hayek, and many other prominent thinkers. All of these well-known figures considered themselves economists, but often espoused opposing views of economic thought—often radically different.<sup>249</sup>

Economies are often difficult for trained professionals to understand or predict, which could make both the *Brunner* and *ToC* tests potentially “problematic;” essentially it just depends how far forward or backward-looking courts want to be.<sup>250</sup> The second prong of the *Brunner* test requires

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245. *Brunner*, 831 F.2d 395, 396 (2d Cir. 1987).

246. *See, e.g.*, POSNER, *supra* note 91, 288-332 (Posner outlines many uncertainties and insufficient understandings that exist in the ability of the modern economics profession to fully understand the current economy); *see also How Economics has Evolved Since the Crisis*, FT ALPHACHAT (Mar. 16, 2017) (downloaded using iTunes) (Guest, economist Noah Smith, provides contradicting empirical examples that call into question well-established supply and demand theories as they apply to labor markets).

247. NICHOLAS EBERSTADT, *AMERICA’S INVISIBLE CRISIS: MEN WITHOUT WORK* 9-27 (2016); Larry Summers, *Men Without Work*, LARRY SUMMERS’ BLOG, (Jan. 30, 2017), <http://larrysummers.com/2016/09/26/men-without-work/>; *Occupational Outlook Handbook: Economists*, BUREAU OF LABOR STATISTICS (Jan. 30, 2017), <https://www.bls.gov/ooh/Life-Physical-and-Social-Science/Economists.htm>.

248. NICHOLAS EBERSTADT, *AMERICA’S INVISIBLE CRISIS: MEN WITHOUT WORK* 110-130 (2016); Larry Summers, *Men Without Work*, LARRY SUMMERS’ BLOG, (Jan. 30, 2017), <http://larrysummers.com/2016/09/26/men-without-work/> (critiquing Eberstadt’s work; Summers and Eberstadt’s debate serves as an example of two professional economists making opposite inferences and drawing different conclusions based on many of the same data sets).

249. *See generally*, DOMINIC BARTON, DEZSO HORVARTH, & MATTHIAS KIPPING, *RE-IMAGINING CAPITALISM* (2016).

250. *Brunner*, 831 F.2d 395, 396 (2d Cir. 1987).



bankruptcy courts to analyze whether a debtor's financial and employment prospects will "persist for a significant portion of the repayment period of the student loan."<sup>251</sup> This "significant portion" will vary from debtor to debtor, but could entail judges making predictions that could be up to thirty years into the future, which makes the predictions a crapshoot for courts.<sup>252</sup>

These debtors are operating in an economy difficult for trained economists to understand in real time, which begs the question: can courts understand economic indicators well enough to forecast employment or earnings prospects for individual debtors five years, ten years, or up to thirty years into the future? Common sense suggests not. This Comment agrees with sentiments that courts are incapable of forecasting long-term debtor success in the broader economy and are quite possibly incapable of predicting short-term success too.<sup>253</sup>

Under this lack-of-forecasting-ability assumption, *ToC* is the better-suited test to properly evaluate debtors' "reasonably reliable future financial resources."<sup>254</sup> Based on Professor Pardo's analysis of Chapter 13 cases mentioned above, and economic complexity, a court's reasonable gaze into future debtor employment and earnings should be significantly less than five years.<sup>255</sup>

According to political economist Nicholas Eberstadt, today is no exception to the general rule that understanding the U.S. economy is difficult.<sup>256</sup> He states that today, the difficulty does not arise out of a lack of data.<sup>257</sup> Thanks to the digital age, data of a seemingly infinite number of economic metrics can be analyzed.<sup>258</sup> What Eberstadt sees as the main problem is that

251. *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 756 (S.D.N.Y. 1985).

252. Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 521-25 (2008). Pardo explains that a 2006 empirical study of 613 confirmed Chapter 13 cases where "351 of those cases were either dismissed or converted to Chapter 7. . . [reiterating that] bankruptcy courts erroneously determined the financial feasibility of future repayment by the debtor in 57% of the confirmed cases." *Id.* Pardo then goes on to lead the reader through a logical inference, which boils down to this: if courts get "repayment ability" wrong so often when making predictions "where the repayment period will not exceed five years," and doing so under a "relatively controlled environment," then it is likely courts get it wrong when operating under an adversarial environment and making predictions that could be as far out as thirty years. *Id.*

253. *See* Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 521-23 (2008).

254. *E.g.*, Long v. Educ. Credit Mgmt. Corp. (*In re Long*), 322 F.3d 549, 554 (8th Cir. 2003).

255. *Id.*

256. *See* NICHOLAS EBERSTADT, *AMERICA'S INVISIBLE CRISIS: MEN WITHOUT WORK* 4-20 (2016).

257. *See id.*

258. *See id.*

“fundamental indicators of our country’s economic outlook are far out of alignment with one another.”<sup>259</sup> He goes on to state “the United States has witnessed an ominous and growing divergence among three trends that should ordinarily move together: wealth, output, and employment.”<sup>260</sup>

The United States’s history of wealth inequality is generally agreed upon.<sup>261</sup> Wealth and income inequality have become the focus of a tremendous amount of study and debate.<sup>262</sup> Wealth inequality is usually explained as follows. Top earners in the U.S. were reaping roughly twenty-five percent of economic gains leading up to the financial collapse of 1929, a disproportionate amount of annual economic wealth for the respective population.<sup>263</sup> There was over a decade of economic sputtering prior to World War II.<sup>264</sup> Then, “[t]he years from the end of World War II into the 1970s were ones of substantial economic growth and broadly shared prosperity,” resulting in a closing of the gap between America’s haves and have-nots.<sup>265</sup> The post-World War II economic pie was growing faster and was more equally divided up among U.S. society than it is today.<sup>266</sup>

Starting in “the 1970s, economic growth slowed and the income gap widened,” with income stagnating for “middle and lower parts of the distribution” and slowly growing for higher earners.<sup>267</sup> The end result is that the U.S.’s wealth and income are as stratified today, if not more so, than they were in the 1920s prior to the stock market crash.<sup>268</sup> Academics, business leaders, and political leaders throughout the U.S. debate the reasons for such stark inequality, the implications of the inequality, and the solutions to inequality, but very few argue that it does not exist.<sup>269</sup> It is broadly accepted that the economic pie is growing slower and is disproportionately funneled to

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259. *See id.* at 9.

260. *See id.* at 9.

261. *E.g.*, Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 7, 2016), <http://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality>.

262. *See, e.g., id.*; *see also* Stephanie Flanders, *Capital in the Twenty-first Century* by Thomas Piketty-review, *GUARDIAN* (July 17, 2014), <https://www.theguardian.com/books/2014/jul/17/capital-twenty-first-century-thomas-piketty-review>.

263. Stone et al., *supra* note 261.

264. *Id.*

265. *Id.*

266. *See, e.g.,* Stephanie Flanders, *Capital in the Twenty-first Century* by Thomas Piketty-review, *GUARDIAN* (July 17, 2014), <https://www.theguardian.com/books/2014/jul/17/capital-twenty-first-century-thomas-piketty-review>.

267. Stone et al., *supra* note 261.

268. *Id.*

269. *See, e.g., id.*

higher earners, leaving a smaller portion of a smaller pie to the U.S.'s have-nots.<sup>270</sup>

Some academics even argue that this concentration of wealth has a correlative effect on congressional policy outcomes, strongly suggesting, “policymaking is dominated by powerful business organizations and a small number of affluent Americans” that undermines “America’s claims to being a democratic society.”<sup>271</sup> This belief that American politics is dominated by economic and political elites can also be validated by a quick glance at the incoming president and his administration.<sup>272</sup> Donald Trump is the wealthiest president in U.S. history surrounded by the wealthiest cabinet in U.S. history—even when adjusted for inflation.<sup>273</sup> When so much wealth and political power is held by so few economic and political elites, courts would be unwise not to at least take that information into consideration when deciding student loan discharges. After all, student loan bankruptcy decisions are inherently financial matters, which are tied to that broader-dominated economy.<sup>274</sup>

In the years leading up to the adoption of *Brunner*, the U.S. economy was undergoing tremendous changes, some of the strongest forces were increased financialization, deindustrialization (primarily via trade and automation policies), and the increasing automation of the economy.<sup>275</sup> As a result of these forces, Eberstadt argues the U.S. finds itself with well over ten million “prime-age” (ages 20 to 64) males who have completely dropped out of the workforce (i.e., not employed or seeking employment).<sup>276</sup> This low labor force participation can be juxtaposed against today’s 4.7 percent

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270. See, e.g., Stephanie Flanders, *Capital in the Twenty-first Century* by Thomas Piketty-review, GUARDIAN, (July 17, 2014), <https://www.theguardian.com/books/2014/jul/17/capital-twenty-first-century-thomas-piketty-review>.

271. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 3, 556-57 (2014).

272. *Id.*

273. See, e.g., Brooke Harrington, *Yes, Trump’s Cabinet is Super Rich. That’s Not Why We Should Be Worried*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/01/19/trump-rich-cabinet/?utm\\_term=.1f997ff110e8](https://www.washingtonpost.com/posteverything/wp/2017/01/19/trump-rich-cabinet/?utm_term=.1f997ff110e8).

274. See Pardo, *supra* note 252, at 505-20.

275. See Eberstadt, *supra* note 256, at 40; see also, Charlie Eaton et al., *The Financialization of US Higher Education*, 14 SOCIO-ECONOMIC REVIEW 507 (2016), <http://dx.doi.org/10.1093/ser/mwv030> (outlining and defining aspects of financialization of U.S. higher education); Derek Thompson, *Where Did All the Workers Go? 60 Years of Economic Change in 1 Graph*, ATLANTIC (Jan. 26, 2012), <https://www.theatlantic.com/business/archive/2012/01/where-did-all-the-workers-go-60-years-of-economic-change-in-1-graph/252018/> (showing precipitous declines in manufacturing and agricultural jobs (though manufacturing output sextupled during the same time period) from 1947 to 2009, while showing increases in finance, education healthcare and social services, and professional and business services).

276. Eberstadt, *supra* note 256, at 40.

unemployment, which is historically low—but arguably, this unemployment rate is not an accurate measurement for the health of the modern U.S. economy.<sup>277</sup> Eberstadt argues low labor force participation is more acute and problematic for men today than women, but is nonetheless a serious problem for women.<sup>278</sup> Other studies have suggested similar low labor force participation issues among African Americans and Hispanics.<sup>279</sup>

Eberstadt and others have recognized that the more education a person has, the less likely they are to be in this not-in-labor-force (NILF) cohort.<sup>280</sup> This does not imply that a bachelor's degree holder will not find himself or herself in this NILF cohort, they are just less likely to be in the cohort today under his analysis.<sup>281</sup>

The suggestion is not that if a debtor fails to attain a degree they are destined for the NILF cohort and should be shown preferential treatment by courts, but only that they might have a higher likelihood of finding themselves in the NILF cohort.<sup>282</sup> A significant contention of this section is this: some courts have been reluctant to factor general economic trends into account for individual debtors due to a stated belief that courts, creditors, debtors, and everyone else are “in this [economy] together.”<sup>283</sup> This Comment contends that the Seventh Circuit should seriously consider broader competing economic realities when deciding how best to move forward in configuring an undue hardship discharge test to evaluate section 523(a)(8) undue hardship.

At some point in the future, courts in the Seventh Circuit and beyond are going to have to grapple with a modern economic reality that the twenty-first-century U.S. economy has significant issues with regards to maintaining full employment, and serious problems measuring employment accurately.<sup>284</sup> According to some professional economists and industry leaders, this current precarious employment dynamic is likely to be difficult for the foreseeable

277. *Id.* Providing graphed data juxtaposing unemployment ratio to not in labor force (NILF) ratio; see also Patricia Cohen, *Steady U.S. Job Growth Sets Stage for Fed to Raise Interest Rates*, N.Y. TIMES (Mar. 10, 2017), [https://www.nytimes.com/2017/03/10/business/economy/february-unemployment-jobs-report.html?rref=collection%2Ftime-stopic%2FUemployment&action=click&contentCollection=timetopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=2&pgtype=collection](https://www.nytimes.com/2017/03/10/business/economy/february-unemployment-jobs-report.html?rref=collection%2Ftime-stopic%2FUemployment&action=click&contentCollection=timetopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection) (showing official unemployment rate as of February 2017).

278. EBERSTADT, *supra* note 256, at 40.

279. *Underemployment Among Hispanics: The Case of Involuntary Part-Time Work*, U.S. DEP'T LAB. (Dec. 2016), <https://www.bls.gov/opub/mlr/2016/article/underemployment-among-hispanics.htm>.

280. *E.g.*, EBERSTADT, *supra* note 256, at 40; U.S. DEP'T LAB., *supra* note 279.

281. See EBERSTADT, *supra* note 256, at 18-47.

282. See *id.*

283. *Sederlund v. Educ. Credit Mgmt. Corp. (In re Sederlund)*, 440 B.R. 168, 174 (B.A.P. 8th Cir. 2010).

284. See, *e.g.*, EBERSTADT, *supra* note 256, at 4-18.

future due to automation and other emerging economic realities.<sup>285</sup> These analyses should influence how circuits formulate their undue hardship discharge test, especially in regard to predicting future employment and income. At some point, the Seventh Circuit should take historic and recent economic realities into consideration when deciding how to properly evaluate undue hardship. The most likely outcome of doing so in an honest and rigorous manner, will be for courts to acknowledge that they should drastically limit the distance into the future that they project debtor employment and income.

The purpose of this Part is not to get to the root causes of inequality, or the decline of manufacturing, or an attempt to solve America's low labor force participation rate issue. The purpose is to emphasize that the economy is difficult for professional economists to understand and even harder to predict, this is even more true for courts. Therefore, the criteria that courts use to evaluate individuals operating in that broader economy should not be too far forward or backward looking.

When Bankruptcy Courts are deciding a student loan debtor's fate, and making forward looking analyses of that debtor, courts should only take into account the most probable of scenarios, and be very skeptical of making predictions as to what type of employment or income will be available to a given debtor too far into the future and/or skeptical as to how attainable that potential employment or income is. After all, if debtors are not found to have an undue hardship discharge, they will still have to pay their loans off with money—money that may never arrive. If courts over-optimistically project a debtor's future earnings, they are essentially sending a debtor back into the

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285. E.g., Talks at Google, *Robert Reich: "Preparing Our Economy for the Impact of Automation & AI,"* YOUTUBE (Feb. 9, 2017), [https://www.youtube.com/watch?v=5xfl-VUa4M\\_8&t=14s](https://www.youtube.com/watch?v=5xfl-VUa4M_8&t=14s) (explaining to an audience at Google many significant issues surrounding past, current, and future employment and earnings issues in the US economy); see also Larry Summers, *Men Not at Work: Lawrence Summers on America's Hidden Employment*, FIN. TIMES (Sept. 23, 2016), <https://www.ft.com/content/eb0c4aa4-80b5-11e6-8e50-8ec15fb462f4> (confirming elements of Eberstadt's research and suggesting some of Eberstadt's predictions regarding the number of displaced US workers in the future was low—Eberstadt suggests "a quarter of men between 25 and 54 will be out of work by mid-century," (see EBERSTADT, *supra* note 256) but Summers suggests IT could accelerate job destructions and that he could "imagine scenarios in which a third or more of men in this [twenty-five to fifty-four] cohort are out of work in the United States by 2050"); Eduardo Porter and Farhad Manjoo, *A Future Without Jobs? Two Views of the Changing Work Force*, N.Y. TIMES (Mar. 8, 2016), [https://www.nytimes.com/2016/03/09/business/economy/a-future-without-jobs-two-views-of-the-changing-work-force.html?\\_r=0](https://www.nytimes.com/2016/03/09/business/economy/a-future-without-jobs-two-views-of-the-changing-work-force.html?_r=0) (discussing policies and issues surrounding the uncertain US job market of the near future).

world with a financial hardship, regardless if it is deemed a § 523(a)(8) undue hardship.<sup>286</sup>

## VI. CONTRADICTION, PARADOX, AND ABSURDITY

There is no silver bullet for the student loan discharge issue; it is a system rife with contradictions, absurdities, and to a certain degree—myth. The abuse of the Bankruptcy Code and “[s]olvency of the student loan system [have] been . . . enduring, though exaggerated, justification[s] for restricting discharge of student loan debt.”<sup>287</sup> Therefore, the Seventh Circuit and other Bankruptcy Courts feel an obligation not to set the conditions of a “limitless expansion of [bankruptcy] relief” to debtors, which is believed to lead to solvency issues of the student lending system.<sup>288</sup> It is somewhat of a paradox because there has never been any evidence to validate the idea that the Bankruptcy system was ever being abused or that the student lending system was ever in jeopardy of becoming insolvent.<sup>289</sup> Also, common sense suggests courts could offer more opportunities for debtor relief than the false choice between *Brunner’s* current application and rubber-stamping student loan discharges.

Another contradiction that undercuts the belief in the student lending program solvency justification for adhering to the austere *Brunner* standard is the massive number of debtors and the amount of loan funds being diverted into income-driven repayment programs.<sup>290</sup> Today, millions use income-driven repayment programs.<sup>291</sup> Due to their relatively recent creation, reforms that have increased eligibility, and increased awareness of the programs “the amount is only projected to grow.”<sup>292</sup> There is a growing belief that the federal government could lose a tremendous amount of money originally issued for educational loans when the income based programs start to forgive en masse beginning in 2034—potentially threatening the solvency of federal student loan programs.<sup>293</sup> If that is true, why not just hasten the inevitable policy debate? Solvency, in an absolute sense will not be an issue because the primary source of student lending is the Federal Direct Loan

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286. See, e.g., *Vargas v. Educ. Credit Mgmt. Corp. (In re Vargas)*, Bankr. No. 08-82824, Adv. No. 08-8135, 2010 WL 5395142, at \*2 (C.D. Ill. Dec. 22, 2010).

287. Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 236 (2012).

288. *Id.* at 236.

289. *Id.* at 188.

290. E.g., Michael & Phelps, *supra* note 9, at 101-06.

291. See, e.g., Jonathan A. LaPlante, Note, *Congress’s Tax Bomb: Income-Based Repayment and Disarming a Problem Facing Student Borrowers*, 100 CORNELL L. REV. 703, 731 (2015).

292. See, e.g., *id.* at 703, 731.

293. See, e.g., *id.* at 716-17.

Program, which is administered by the federal government and the government can ultimately ensure the financial solvency of its programs.<sup>294</sup> An explanation follows.

The federal government can temporarily issue additional Treasury debt to ensure student loan solvency.<sup>295</sup> The fundamental question of long-term lending system solvency is one of taxing, spending, and allocation of resources.<sup>296</sup> These social-value decisions rest with policy makers, and ultimately will rest in the political realm with voters. In the meantime, courts should abandon the false belief they are protecting a lending system from systemic abuse or systemic integrity issues. They are not. As stated above, those systemic issues can only be addressed by Congress and the executive branch of the federal government.

Still yet another contradiction is the competing interest of the Bankruptcy Code's policy of providing "deserving debtors" a "fresh start," while courts today apply the *Brunner* test with its extremely restrictive "certainty of hopelessness."<sup>297</sup> It has been posited that the Supreme Court "characterized the idea of a fresh start essentially as a means of integrating the bankrupt debtor back into the economy as a productive wage-earner."<sup>298</sup> Keep that thought in mind and look at fifty-two-year-old Susan Krieger, who was a destitute debtor and held \$25,000 in debt and was given a fresh start.<sup>299</sup> But fifty-six-year-old Mark Tetzlaff who held \$260,000 in debt, even though he was a less sympathetic debtor than Krieger, walked out of bankruptcy court with \$260,000 in debt and no chance at a fresh start.<sup>300</sup> This is not an apples to apples comparison, but neither is it apples to oranges. There are serious problems with reconciling *Brunner* with the "fresh start" policy of the Bankruptcy Code.

One last contradiction in this non-exhaustive list is in regard to an issue with the income-driven repayment programs. Some suggest that the programs "are the direct antithesis of the concept of a 'fresh start.'"<sup>301</sup> Some going so far as to label the programs a type of "long-term economic indenture to the [Department of Education]."<sup>302</sup> The Seventh Circuit addressed this

294. See, e.g., CONG. BUDGET OFF., FAIR-VALUE ACCOUNTING FOR FEDERAL CREDIT PROGRAMS 7 (2012); see also Stephanie Kelton, *How We Think About Deficits Is Mostly Wrong*, N.Y. TIMES (Oct. 5, 2017), [https://www.nytimes.com/2017/10/05/opinion/deficit-tax-cuts-trump.html?\\_r=0](https://www.nytimes.com/2017/10/05/opinion/deficit-tax-cuts-trump.html?_r=0).

295. CONG. BUDGET OFF., FAIR-VALUE ACCOUNTING FOR FEDERAL CREDIT PROGRAMS 7 (2012).

296. *Id.* at 7.

297. Taylor, *supra* note 287, at 222.

298. *Id.* at 219.

299. Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 886-90 (7th Cir. 2013).

300. Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 756-60 (7th Cir. 2015).

301. E.g., Michael & Phelps, *supra* note 9, at 105.

302. E.g., *id.* at 104.

issue in *Krieger* where they could have put the fifty-two-year-old debtor in the program with almost a guarantee of negative amortization for twenty-five years resulting in a huge tax liability for the debtor.<sup>303</sup> She was granted a discharge instead. There has been a tension for over a decade as to tenability of the Department of Education's apparent position that "the [income-driven repayment plan] is (or should be) king."<sup>304</sup> Income-based repayment programs should not be king, courts should have their day to provide well-intentioned debtors, hapless victim debtors, or even malfasant debtors a "fresh start."<sup>305</sup>

## VII. RECOMMENDED BANKRUPTCY LEGAL REGIME FOR THE SEVENTH CIRCUIT

Substantial evidence has been presented in this Comment to justify the Seventh Circuit's jettison of *Brunner*. If bankruptcy courts' policy goals are to provide debtors with a "fresh start," then the standard must be abandoned because it is so far afoul from promoting that policy. If a justification for the continued application of *Brunner* is to prevent abuse of the Bankruptcy Code and protect the solvency of student lending, then the standard must be given

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303. Richard Fossey & Robert C. Cloud, *The U.S. Department of Education's 2015 Letter Outlining Guidelines for When Creditors Should Not Oppose Bankruptcy Discharge for Student-Loan Debtors Under the "Undue Hardship" Rule: What Does It Mean for Distressed Student-Loan Debtors?*, 329 WEST'S EDUC. L. REP. 595, 603 (2016).

304. See, e.g., Michael & Phelps, *supra* note 9, at 103; see also Fossey & Cloud, *supra* note 303, at 603.

305. *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 778-91 (8th Cir. 2009) (stating in the dissent contra the majority opinion, in cases similar to *Tetzlaff v. Educ. Credit Mgmt. Corp.* [e.g. *Jespersen* held over \$350,000 in debt like *Tetzlaff*, was granted bankruptcy and district court discharge unlike *Tetzlaff*, but was denied undue discharge by the appellate court, like *Tetzlaff*], that even though the debtor was unsympathetic, he should have been granted an undue hardship discharge because the ruling, as is, risks opening the door to allowing income-driven repayment plans to be a default path for all debtors, effectively preempting bankruptcy courts). The majority opinion attempted to undermine the notion that income-driven repayment plans are antithetical to the fresh start policy. The majority writes off the issue of debtors being trapped in a potential twenty-five-year mental debtor's prison with little analysis. A twenty-five-year mental debtor's prison is inimical to the fresh start policy. The opinion engages in an analysis of the income-driven repayment program that entails the debtor would have to live with \$350,000 accruing overhead for twenty-five years, if the debtor were successful in his career he would be subject to significant tax liability upon the repayment plan's discharge of the debt, and if unsuccessful in his career the debtor would have the debt discharged having lived a life in relative poverty, only to receive his fresh start well after his sixty-fifth birthday. "*Jespersen* is a paradigmatic example" of the inherent problems with the current state of student loan law and income-based repayment plans. *Jespersen*, 571 F.3d at 782. This case should be viewed as a cautionary tale of courts deferring too much to the Department of Education. This Comment agrees with the dissent in *Jespersen*. This case is also an example that *ToC* is not a panacea, only preferable to the draconian *Brunner*, but *ToC* can also lead to draconian outcomes.



up because there is not now nor has there even been proven abuse of the Bankruptcy Code or a systemic threat to the student lending system. *Brunner* is no longer a tenable test to evaluate student debtor undue hardship.<sup>306</sup>

This Comment posits that courts are fundamentally incapable of fully understanding the ever-changing student lending system and should cease using lending system solvency as a partial justification for the austere reading of § 523(a)(8). Courts are simply preventing the necessary policy debates of the executive and legislative branches of the federal government needed to bring about a proper accounting of U.S. higher education. The crafting of that student lending system is fundamentally a public policy issue with real-time political concerns linked to the federal budget.<sup>307</sup> A fundamental question that must be answered moving into the future is: who is going to have access to higher education in the United States and who is going to pay for it? The current system has continually expanded access to higher education, but the current funding structure has serious deficiencies. We see the stresses of the system with the “individual-crises” assumption taken up in this Comment. [Footnote?]

If the Seventh Circuit were to transition to some form of the *ToC* test there is an increased likelihood other circuits would make a similar transition or at least begin to take a serious look at the significant shortcomings of the *Brunner* test. In the absence of congressional action to engage in systemic reform of U.S. higher education finance, then § 523(a)(8)’s undue hardship is one of only a few avenues for financially distressed debtors to seek some form of relief. Now is the time for the Seventh Circuit (as well as other circuits) to reject *Brunner* and adopt some version of *ToC*.

To transition to *ToC* would be a conservative move. *ToC* fits well within the pre-existing congressional statutory and regulatory framework. The Eighth and First Circuits have a body of jurisprudence surrounding *ToC*. Moving to *ToC* would provide courts a peace of mind in regard to lending system solvency more so than adopting 524(m)(1)’s definition of undue hardship. 524(m)(1) is arguably a less rigorous test for a debtor to meet than existing *ToC* used in the First and Eighth Circuits; however, 524(m)(1) interpretation of undue hardship carried over to section § 523(a)(8) would provide the most consistent discharges of all available tests used to evaluate discharge of student loans.<sup>308</sup>

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306. See, e.g., Ben Wallen, *One Standard to Rule Them All: An Argument for Consistency in Education Debt Discharge in Bankruptcy Proceedings*, 16 Hous. Bus. & Tax L. J. 232 (2016); Kurtis Wiard, *Hope for the Hopeless: Discharging Student Loans in Bankruptcy*, J. Kan. B. Ass’n, Nov.-Dec. 2015, 24, 34 (2015).

307. See, e.g., Proudfoot, *supra* note 8, at 1-20.

308. See Emily S. Kimmelman, Comment, *Student Loans: Path to Success or Road to the Abyss? An Argument to Reform the Student Loan Discharge Exception*, 89 Temp. L. Rev. 155, 184-85 (2016). Explaining that under § 524(m)(1)’s undue hardship “a

The Seventh Circuit courts would have their fears relieved of possibly triggering a landslide of debtor abuse of the Bankruptcy Code that might subsequently call into question the solvency of Federal Direct Loan programs.<sup>309</sup> Courts could not discharge enough debt to call the system into question; however, if they did, it would just provoke Congress and the Executive branch of the federal government to do a more proper accounting of higher education funding in the United States. *Brunner* is a draconian test, which some in the Seventh Circuit appear to be in favor of applying;<sup>310</sup> however, by the response of other judges in the Seventh Circuit to *Krieger* (e.g. *In re Myhre*), there is clearly a desire for change within the circuit.<sup>311</sup>

Courts could also offer partial discharges to deserving debtors where a court deemed the action necessary. Ideally, Seventh Circuit courts would still utilize income-driven repayment programs where needed. The Seventh Circuit could replicate relief granted to debtors by other circuits. For example, *In re Erbschloe* a debtor was placed into an income-driven repayment program and was allotted a judicial discharge of the debt upon successful completion of the program, but prior to the taxable discharge provided by the income-driven repayment program.<sup>312</sup> Even though this method provides debtors relief, courts could run the risk of ruling contrary to the Bankruptcy Code's "fresh start" policy in taking this action. Again, it would be just one tool among many.

Partial discharges suit the "fresh start" policy of the Bankruptcy Code more so than pushing debtors into twenty to twenty-five year income-based repayment plans. Indeed, some Seventh Circuit courts have cautioned in

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debtor...experiences undue hardship if, considering the debtor's income, expenses, and the amount of the payment, there is not enough income to make the payment." *Id.* at 184. This type of analysis would be a significant departure from both *Brunner* and ToC but would likely be the most consistent and predictable method of discharge. The inherent issue is that mass adoption and execution of this method could potentially hasten the questioning of federal student loan program's solvency faster than under the undue hardship provision or the ICRP time bomb, both of which provide student loan programs a temporary illusion of solvency.

309. See, e.g., Preston Mueller, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEV. J. 229, 232 (2015).

310. See, e.g., Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 778-79 (7th Cir. 2002); see also Educ. Credit Mgmt. Corp. v. Krieger, 482 B.R. 238, 239-42 (Bankr. C.D. Ill. 2012), *rev'd*, 713 F.3d 882 (7th Cir. 2013).

311. See *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 883-91 (7th Cir. 2013); see also *Myhre v. U.S. Dep't of Educ. (In re Myhre)*, 503 B.R. 698, 702 (Bankr. W.D. Wis. 2013).

312. E.g., *Erbschloe v. U.S. Dep't of Educ. (In re Erbschloe)*, 502 B.R. 470, 475-84 (Bankr. W.D. Va. 2013).

regards to the psychological toll that enrolling in a twenty to twenty-five year ICRP can place debtors in—a psychological debtor’s prison of sorts.<sup>313</sup>

The Seventh Circuit should configure the test that measures “the debtor’s past, present, and reasonably reliable future financial resources” in a shortsighted manner; a proper length of time would be approximately one year before and after the date of the analysis.<sup>314</sup> This will avoid the problems of being unreasonably optimistic when assessing a debtor’s future employment or earnings prospects. Courts are best positioned to decide the superior practical method of achieving this. The overarching goal should be to assess what each debtor’s “reasonably reliable future resources” will be used to pay toward a reasonable amount of student loan debt.

The goal of this transition should be to accomplish several things simultaneously. First, courts should aim to bring student loan discharges a little closer in line with long-time accepted Bankruptcy Code “fresh start” policies. *Brunner* has taken the Seventh Circuit into essentially anti-“fresh start” territory under its current application. “Fresh start” and student loan discharges are not incompatible ideas, legal outcomes, or policy goals. Second, if the Seventh Circuit transitioned to the *ToC* it could influence other courts to take similar actions. It is no secret of how anachronistic and out of place the *Brunner* test is in this current era of rapidly expanding student debt loads. Even though the formulation of *ToC* predates *Brunner*, *ToC* has proven to be the superior test in terms of its adaptability over time.<sup>315</sup> *ToC* fits this modern student debt era far better than *Brunner*.

## VIII. CONCLUSION

It is time to abandon the unworkable *Brunner* test in favor of a known replacement in order to better evaluate student debtors in the ever-changing § 523(a)(8) undue hardship jurisprudence. The purpose of this shift should be to link the undue hardship analysis to each debtor’s “financial indicia of ability to repay” their loans, which over time should give policy makers a better understanding of the financial health of the federal student loan system.<sup>316</sup> As Professor Pardo has commented publicly, a result from the shift in the law could “call into question how much of this [\$1.4] trillion [in student

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313. See, e.g., *Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani)*, 311 B.R. 496, 508 (Bankr. N.D. Ill. 2004) (stating that “the psychological and emotional toll on a debtor that results from adding 25 years to the life of a student loan should not be overlooked”).

314. LIGHT, *supra* note 19, at 1-39.

315. Supplemental Brief of Appellee, *Educ. Credit Mgmt. Corp.*, *supra* note 11, at 22-24.

316. Pardo, *supra* note 252, at 505-07.

debt] is collectable.”<sup>317</sup> Fear alone of calling the student lending system into question should not be seen as a justification for not engaging in the necessary reforms of the day.<sup>318</sup>

We are likely far from calling into question the financial solvency of the student lending system in the United States. However, if that day approaches and the solvency of the Federal Direct Loan Program is called into question, then conducting a proper accounting of that program will need to happen publicly. Courts should not prevent nor prolong these political, and educational funding debates. The above issues are deserving of public debate. It is time for student loan discharge law to meet today’s reality. Hopefully the Seventh Circuit will see the need for this evolution of the law and engage it. Because honestly, some debtors are contemplating suicide over their inability to manage or discharge student loan debt—in a very real way—as real, or even more so, than any threat of solvency to the student lending system has ever been.<sup>319</sup>

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317. Natalie Kitroeff, *This Court Case Could Unshackle Americans From Student Debt*, BLOOMBERG (Oct. 8, 2015), <https://www.bloomberg.com/news/articles/2015-10-08/this-court-case-could-unshackle-americans-from-student-debt>.

318. *Id.*

319. Taibbi, *supra* note 129.