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I. INTRODUCTION

One of the fundamental characteristics of the American dream is that anyone should have the opportunity to get an education regardless of their ability to pay the cost. The Federal Student Loan Program started as a small allocation from the Department of Education to guarantee private loans in those exceptional cases where a person wanted to attend college but lacked the means to pay and the credit to obtain financing. Today, the Federal Student Loan Program accounts for more than half of the revenue produced in many higher educational institutions, making student loans a staple of American education. In public universities, 62% of students graduated with some kind of student debt; that number was 72% at private universities, and at the increasingly popular for-profit universities—where tuition rates are among the highest in the nation—it was a whopping 96%.[1] Along with this rise in federal funding and student loan guarantees, default rates skyrocketed as well, forcing many to seek the protection of bankruptcy to avoid mounting debts.[2] As it turns out, the winning state for the most student debt is Arizona, home to the largest for-profit educational institution, the University of Phoenix.[3]

It's no secret: educational loans put students, as well as lenders, in a precarious position. There is no guarantee of employment for the student after graduation and no collateral for the lender. When the federal government started guaranteeing student loans, these loans were treated like any other kind of debt that could be discharged in bankruptcy. But in 1978, Congress began to withdraw such bankruptcy protection unless repayment of the loan would present an "undue hardship."[4] This Act has incurred substantial criticism over the years for apparently being at odds with the overall goal of the Bankruptcy Code to provide a "fresh start"

1. The Inst. for Coll. Access & Success, *Quick Facts About Student Debt*, THE PROJECT ON STUDENT DEBT (Jan. 2010), http://projectonstudentdebt.org/files/File /Debt_Facts_and_Sources.pdf.

2. Hibah Yousuf, *Student Loan Default Rate Creeps Higher*, CNNMONEY.COM (Sept. 13, 2010, 11:47 AM), http://money.cnn.com/2010/09/13/pf/college /student_loan_default_rate/index.htm.

3. *Id.*

4. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (codified at 11 U.S.C. § 523(a)(8) (2006)).

for the unfortunate debtor.[5] Lenders contend that because there is no collateral to secure the loan, they need some kind of protection in order to provide other students with lower interest rates. As a result, taxpayers would ultimately have to foot the bill when the government ends up with a large number of defaulted loans. With debtors, lenders, other students, and taxpayers playing a game of musical chairs, someone is inevitably going to end up without a chair and be unfairly forced to bear the cost.

The scholarly treatment of the "undue hardship" exception has been largely negative; scholars have argued either for a more lenient reading of § 523(a)(8) or for its repeal altogether.[6] This Comment argues that there are legitimate reasons in support of a strict, uniform interpretation of "undue hardship" according to its plain language and the clear intent of Congress. While one underlying purpose of bankruptcy law is to provide a "fresh start" for certain qualified debtors, Congress has chosen to diverge from that policy in dealing with student loans, and for good reason. The results may be harsh, but they are not absurd. As more debtors receive such harsh treatment in the courts, Congress may be forced to reconsider the issue. As a result, Congress could restore equal protection for student loan defaulters, just as the Bankruptcy Code does for other debtors. Alternatively, Congress could preserve the current approach but turn its attention to the universities themselves, requiring them to truthfully educate prospective students about the risks of student loans and the reality of employment prospects upon graduation.

Part II provides an overview of the bankruptcy system, the development of student loans in the United States, and the policies underlying § 523(a)(8) and its approach to student loans. Part III reviews how various courts have interpreted and applied the "undue hardship" exception in the student loan context. Part IV provides an analysis of these approaches, arguing that a strict implementation of the "undue hardship" exception is the best approach. Part V then offers a brief conclusion.

5. *See, e.g.*, Richard Fossey, *"The Certainty of Hopelessness": Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 33 (1997); 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, 116 (2003).

6. *See, e.g.*, Sarah Edstrom Smith, *Should the Eighth Circuit Continue to Be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy*, 29 HAMLINE L. REV. 601, 616–18 (2006); Huey, *supra* note 5.

II. THE BANKRUPTCY SYSTEM AND STUDENT LOANS

In order to fully explain the reasons supporting a strict interpretation of "undue hardship," this Part will provide an overview of the bankruptcy system, along with a brief history of the development of student loans in the United States, followed by the policy considerations underlying the enactment of § 523(a)(8) and its unique treatment of student loans. Any argument on the subject of exceptions to discharge is incomplete without a full understanding of the options available in bankruptcy. In particular, it should be noted at the outset that a discharge of debt is not always the debtor's only goal in bankruptcy.[7]

A. Bankruptcy Law

The United States Constitution gives Congress the power to establish uniform bankruptcy laws.[8] Congress has exercised this power to establish a separate judicial department of the federal district courts to administer the bankruptcy system.[9] The first permanent legislation on uniform bankruptcy laws was the Bankruptcy Act of 1898.[10] Since then, there have been major reforms to the Bankruptcy Code in 1978, 1990, 1998, and 2005.[11] As it stands today, the Bankruptcy Code offers the financially troubled individual the option of obtaining relief from creditors in the form of Chapter 7 liquidation[12] or a Chapter 13 adjustment of debts for debtors who have adequate income to repay all or part of the debts through a repayment plan.[13] Under both chapters, the goal of almost every debtor is typically the "discharge" of debts,[14] which enjoins any act by creditors to collect the discharged debt.[15] While discharge is most often the debtor's goal, the creditor's goal is typically to obtain a denial of the debtor's discharge altogether, or—even better—an exception from discharge for that creditor's particular claim on the

7. *See infra* note 19 and accompanying text. In Chapter 13 cases, for instance, the debtor's goal is not always to obtain a discharge, but to structure a repayment plan that the debtor can fulfill while enjoying the benefits of the automatic stay against creditors. *See* 11 U.S.C. § 362(a).

8. U.S. CONST. art. I, § 8, cl. 4.

9. 28 U.S.C. § 151.

10. 30 Stat. 544.

11. *See* Huey, *supra* note 5, at 93–95.

12. 11 U.S.C. §§ 701–727.

13. *Id.* §§ 1301–1330.

14. *Id.* §§ 727(a), 1328(a).

15. *Id.* § 524(a)(1)–(3); *In re* Olson, 38 B.R. 515, 518 (Bankr. N.D. Iowa 1984) (holding that a doctor's refusal to provide medical services until pre-petition discharged debts were paid violated the discharge injunction).

debtor.

This Comment focuses on the exception provided in § 523(a)(8), which states:

> (a) A discharge under . . . this title 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 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 . . . incurred by a debtor who is an individual . . . .[16]

To clarify, the debtor generally will receive a discharge of debts unless any of his debts are listed in § 523(a). If a particular debt, such as an educational loan, is listed in § 523(a), that debt is an "exception" to the possibility of discharge and will have to be paid. The "undue hardship" clause is therefore an exception to the student loan exception, in that if the debtor can show that repaying the debt would impose an undue hardship, the debt will then be discharged like all other debts generally.

The Supreme Court has stated that § 523(a)(8) is self-executing, meaning that "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt."[17] This brings up another point: discharge is not always the goal of bankruptcy. A debtor who carries both educational debt and consumer debt can first obtain a discharge of the consumer debt in a Chapter 7 liquidation within a matter of months.[18] The student debt will survive this bankruptcy, and then the debtor can more easily manage his student loan in a Chapter 13 repayment plan over the course of three to five

16. 11 U.S.C. § 523(a)(8) (emphasis added). A "qualified education loan" is defined under the Internal Revenue Code as any education loan to pay expenses while a student is enrolled in at least half the normal full-time student load; it does not include loans between family members or loans made under an employment contract. 26 U.S.C. § 221(d)(1).

17. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004).

18. 11 U.S.C. § 727(a)–(b).

years.[19]

Analysis of any bankruptcy problem and, particularly a problem arising in the educational loan context, begins with the two aims of the bankruptcy system: 1) to provide "equality of distribution"[20] to creditors and 2) to give a "'fresh start'" for the "'honest but unfortunate debtor.'"[21] While the phrase "fresh start" does not show up in the Bankruptcy Code, it is an accepted policy of the bankruptcy system and the clear purpose underlying discharge in bankruptcy.[22] Commentators often invoke this "fresh start" policy as a controlling and mandatory standard by which bankruptcy law must be tailored.[23] But Congress is under no obligation, constitutional or otherwise, to enact uniform laws on bankruptcy that operate under the "fresh start" policy, or any other policy.[24] Rather, Congress is free to structure bankruptcy law in any way that may protect the needs of the poor, unfortunate debtor, or favor the business interests of creditors. For better or worse, over the last thirty years Congress has favored the latter in dealing with the problem of student debt discharge.[25]

B. The Federal Student Loan Program

When the Soviet Union put Sputnik into orbit, Congress decided that it was time to put America back in school. As a result, in 1958 it enacted the National Defense Education Act, which established the predecessor to the Perkins Loan Program and allowed students to obtain student loans

19. 11 U.S.C. § 1322(a), (d). This method is often called a "Chapter 20" filing (Chapter 7 plus Chapter 13). The 2005 amendment in BAPCPA restricted the availability of this option by placing timing restrictions between filings.

20. Bailey v. Glover, 88 U.S. 342, 346 (1874).

21. Grogan v. Garner, 498 U.S. 279, 286–87 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating that the Bankruptcy Act "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt")).

22. *Id.*

23. *See, e.g.*, Fossey, *supra* note 5, at 33; Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 173–78 (1996); Huey, *supra* note 5, at 93.

24. *See* U.S. CONST. art. I, § 8, cl. 4.; *In re* Brunner, 46 B.R. 752, 753 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

25. In 1978, Congress had conflicting information about how many students were actually abusing the bankruptcy system to discharge student loans on the eve of lucrative careers, but Congress nevertheless enacted § 523(a)(8). *See* Huey, *supra* note 5, at 98.

from the government at five percent interest.[26] Congress later established a program in 1965 allowing the government to guarantee private loans, which later was named the Stafford Loan Program.[27] These loan programs were originally open only to those individuals able to demonstrate financial difficulty in paying for college, but in 1978, Congress opened the door further and made federally guaranteed loans available to virtually all students without regard to financial need.[28]

Because of this universal availability, maintaining the solvency of the Federal Student Loan Program is vital to higher education. Robert C. Cloud, Ed.D., identified two reasons why this is the case: "First, millions of deserving students depend on federal loans to finance their educations. Second, most institutions, both public and private, could not survive financially without the revenue generated through the federal loan program."[29] Thus, it is important that educational loans remain easy for students to obtain. However, as long as financing remains the primary revenue generator, universities will continue to raise their tuition.[30] One commentator described (with appropriate imagery) the situation as follows: "Colleges 'suddenly saw the government as this giant wobbling teat just waiting to be sucked and started a spastic race towards Who Could Charge the Most Ludicrous Tuition for Four Years . . . .'"[31] These practices have continued up to the present time. Today, the average cost of tuition at public universities is over $7,000 per year, while private universities charge, on average, over $27,000 per year.[32] Off to the races they went, and there is no sign that anyone is getting tired: universities have consistently raised their tuition above the inflation rate for the last thirty years.[33] With such heavy dependence on the Federal Student Loan

26. Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783, 786–87 (2004).

27. *Id.* at 787.

28. *Id.*

29. *Id.* at 788.

30. *See, e.g.*, Kim Clark, *College Tuition Prices Continue to Rise*, U.S. NEWS & WORLD REPORT, Oct. 23, 2007, http://www.usnews.com/education/paying-for-college/articles/2007/10/23/college-tuition-prices-continue-to-rise.html; Editorial, *Fees or Tuition, It's Too Much*, L.A. TIMES, Nov. 10, 2010, http://articles.latimes.com/2010/nov/10 /opinion/la-ed-tuition-20101110.

31. Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 506 n.23 (2000) (quoting Ian William, *The Indentured Class: Student Loans Are Robbing Us of Our Future*, THE PROVIDENCE PHOENIX, Sept. 20, 1996, at 8).

32. COLLEGE BOARD ADVOCACY & POLICY CENTER, TRENDS IN HIGHER EDUCATION SERIES: TRENDS IN COLLEGE PRICING 2010 10 (2010), *available at* http://trends.collegeboard.org/downloads/College_Pricing_2010.pdf.

33. *Id.* at 13.

Program, and the general push for students to attend college, student debt is here to stay.

C. Policy of the "Undue Hardship" Exception

There is much controversy today over the "undue hardship" exception, a great deal of which is reflected in the historical debate in Congress that occurred when it considered enacting § 523(a)(8). In 1978, the same year that federal loans were opened to most middle class Americans without the requirement that students demonstrate financial need, Congress added the § 523(a)(8) "undue hardship" exception to the Bankruptcy Code. This was a response to the fear that students might take advantage of the bankruptcy system by incurring large amounts of student debt, only to obtain a discharge of the debt on the eve of lucrative careers.[34] Proponents responded, however, that if the "undue hardship" rule was repealed or interpreted too leniently, the Federal Student Loan Program could collapse and lenders would refuse to loan to high-credit-risk students. The loss from defaults would fall on taxpayers. Other student debtors would also bear the burden of defaults through higher interest rates, and some students would not even be able to qualify for a loan because of the credit risk.

Democratic Representative Allen E. Ertel, who advocated the inclusion of § 523(a)(8), argued further: "At a time when political, business, and social morality are major issues, it is dangerous to enact a law that is almost specifically designed to encourage fraud."[35] Thus, it does not matter whether the bankruptcy system is *actually* being abused because educational debt is treated like any other debt; the real problem lies in offering the temptation. Indeed, just because student debtors historically have not taken advantage of the bankruptcy system does not mean that they would not do so now if given the opportunity. Perhaps such abuse has never existed precisely because Congress has never afforded the broad population of students the opportunity to discharge

34. H.R. REP. No. 95-595, at 536–537 (1977).

35. *Id.* at 536–37 ("For example, as a student leaves college to find a job, that student would have two options: (1) repay a substantial loan at a time when that student's financial situation is probably at its lowest, or (2) discharge the debt in bankruptcy, having received the benefit of a free education. If student A elects to repay the loan, honoring the legal and moral obligation that was incurred, he begins his career with a substantial debt and the accompanying financial pressure. Meanwhile, student B (who chooses to declare bankruptcy) can begin with a clean slate and is free to spend his initial earnings on other items. By combining the clean slate with the excellent credit rating that accompanies a bankruptcy (since the discharge debtor cannot declare bankruptcy again for six years), student B is rewarded for refusing to honor a legal obligation.").

student loans without a showing of "undue hardship."

Moreover, proponents of the "undue hardship" provision argued that a student loan is fundamentally distinct from other more traditional types of loans. Lending in the student loan context is increasingly based on and driven by risk. With a home loan, this risk is mitigated by the fact that there is property securing the debt. But the student is not a typical debtor, but rather a newcomer in society. She generally has no assets by which any debt could be secured, and she is often a poor credit risk. The education that the student seeks is not a transferable asset, and so the student essentially mortgages the only thing possible: her future earnings without the possibility of relief from bankruptcy. This trade-off, proponents argue, is what allows students to obtain financing on such relatively favorable terms.

Opponents in Congress pointed out that the empirical data did not suggest that discharges of student loans in bankruptcy were a problem, even if high default rates were problematic for the federal loan program.[36] In 1978, the Government Accounting Office (GAO) found that the default rate on education loans was 18%, and of those 18%, only about 3–4% received a discharge in bankruptcy.[37] The GAO also found that in most bankruptcy cases involving student debtors, the educational loans accounted for only a part of the debtor's total indebtedness, demonstrating that most student debtors were in bankruptcy as a result of "a true need for . . . relief rather than an abuse of the bankruptcy system."[38] Moreover, they reasoned that "[t]reating students, all students, as though they were suspected frauds and felons is no substitute for improving the administration of the (student loan) program."[39] In sum, opponents argued that the alleged abuse was more perceived than real, possibly because of exaggeration by the media, which created public concern that potentially devious students would take advantage of a bankruptcy loophole.[40]

In the present debate today, commentators who oppose § 523(a)(8) argue that the "undue hardship" rule is unnecessarily harsh, denying debt relief to all but a few select debtors, and usually only to those with

36. *Id.* at 133 (letter of comptroller general Elmer B. Staats).

37. *Id.* at 121.

38. *Id.*

39. *Id.*

40. *See* Huey, *supra* note 5, at 97 n.84 (citing Jean Seligman et al., *Study Now, Pay Never*, NEWSWEEK, May 7, 1977, at 95).

dependents and medical conditions that prevent gainful employment.[41] At the same time, debtors with other kinds of debt are not laden with the task of proving undue hardship. This problem is compounded because courts have developed varying standards, and the subsequent lack of uniformity prevents student debtors from knowing beforehand if they might qualify for undue hardship.

Today, along with the ever-increasing cost of tuition, the student loan default rate has risen as well. In a 2010 press release, U.S. Secretary of Education Arne Duncan announced that the average default rate in 2008 was 7%, with public universities suffering a default rate of 6%; private universities, 4%; and for-profit universities, 11.6%.[42] Duncan went on to say,

> This data confirms what we already know: that many students are struggling to pay back their student loans during very difficult economic times. . . . While for-profit schools have profited and prospered thanks to federal dollars, some of their students have not. Far too many for-profit schools are saddling students with debt they cannot afford in exchange for degrees and certificates they cannot use. This is a disservice to students and taxpayers . . . .[43]

There are arguments that cut both ways, but in the end, Congress had a legitimate reason for deviating from the "fresh start" policy that generally guides bankruptcy law. That policy was the potential abuse that could occur if students were allowed to discharge their educational loans in bankruptcy the same way that other debts are discharged. Students generally do not have the volume of assets that other debtors have, and a student's education cannot be liquidated like real or personal property in order to satisfy the creditors' claims. While many commentators have criticized the enactment of § 523(a)(8) as a response to a merely "perceived" problem rather than an actual one,[44] Congress was probably most concerned with the potential for abuse, perceived or actual, that could undermine the Federal Student Loan Program, shift the costs of defaults to the taxpayers, and burden future student borrowers with higher interest rates and less favorable loan terms. These policies are anything but obsolete today; if anything, there is an even stronger policy

41. *See, e.g.*, *id.* at 115–18.

42. Press Release, U.S. Dep't of Educ., Student Loan Default Rates Increase, (Sept. 13, 2010), *available at* http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0.

43. *Id.*

44. *E.g.*, Kurt Wiese, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of "Undue Hardship*,*"* 26 ARIZ. L. REV. 445, 446 (1984).

supporting tighter standards on student loans in bankruptcy as tuition and default rates increase.

Furthermore, even if a student cannot receive a discharge in bankruptcy, this is not the end of the analysis—the student has other remedies. First, the unavailability of discharge does not mean that the student cannot still file a petition for bankruptcy under Chapter 13 in order to establish a repayment plan.[45] Still, more remedies are available to the student through federal programs that allow the student to repay, such as "income-contingent repayment" and "extended repayment."[46]

Finally, Congress shows little sign that it has any intention of repealing the "undue hardship" exception in spite of strong opposition. A review of the history of § 523(a)(8) is revealing on this point. When first enacted in 1978, § 523(a)(8) provided that student loans were dischargeable only in the first five years after becoming due.[47] Furthermore, education loans were excepted from discharge only in Chapter 7 liquidation cases, not in Chapter 13 adjustment of debt cases.[48] In 1990, Congress amended the "undue hardship" exception so that educational loans could no longer be discharged in Chapter 13 cases.[49] In the same year, Congress extended the five-year exception period to seven years.[50] These amendments came at the precise time when student borrowing began to increase at greater rates.[51] In 1998, Congress repealed the seven-year exceptions, forcing the financially troubled student to prove undue hardship no matter how long it had been since the time the loan became due.[52] At this point, it was clear that this "pattern of amendment represents an obvious tendency on the part of Congress to tighten the gaps through which students could avoid loan repayment."[53]

With the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) overhaul of the Bankruptcy Code, Congress had the opportunity to remove or restrict the application of § 523(a)(8),

45. *See* 11 U.S.C. § 1322 (2006).

46. *See Solutions for Borrowers Who Are Having Trouble Repaying Education Loans*, FINAID, http://www.finaid.org/loans/troublerepayingdebt.phtml (last visited Mar. 4, 2011).

47. Huey, *supra* note 5, at 100 (citing Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388–28 (codified at 11 U.S.C. § 1328(a))).

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Cloud, *supra* note 26, at 788.

52. Huey, *supra* note 5, at 101 (citing Higher Education Amendments of 1998, Pub. L. No. 105–244, 112 Stat. 1837 (1998)).

53. Kapinos v. Graduate Loan Ctr., 243 B.R. 271, 276 (W.D. Va. 2000).

but chose not to do so. In fact, it expanded the exception even further. Prior to 2005, the "undue hardship" exception applied only to loans "insured, or guaranteed by a government unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution."[54] With the enactment of BAPCPA, Congress once again amended § 523(a)(8) and brought within the ambit of the "undue hardship" exception "any other education loan that is a qualified education loan."[55] The direction of Congressional action in the last thirty years with regards to educational loans has made abundantly clear Congress's intent that educational loans be discharged only in very unusual circumstances.

III. COURT-MADE "UNDUE HARDSHIP" TESTS

Whatever the considerations that led Congress to adopt the "undue hardship" exception, Congress left "undue hardship" undefined. As a result, federal courts have come up with several different tests to determine when an "undue hardship" exists. Some of the earliest decisions over educational debt discharge first attempted a definitional approach to "undue hardship" by looking at the dictionary definition of "undue."[56] One district court concluded that "undue" meant "inappropriate or unsuitable or not right and not extraordinary" and did not require "exceptional circumstances."[57] This approach was short-lived, and unsurprisingly did nothing to clear up the confusion over what constituted an "undue hardship."[58] Because of this confusion, courts began to adopt more uniform standards to determine when an "undue hardship" existed.

A. The Johnson *Test: The Mechanical Approach*

In the wake of the confusion left by the definitional approach to "undue hardship," the Pennsylvania Bankruptcy Court in *In re Johnson* set the first mechanical approach for interpreting "undue hardship."[59] The opinion first quoted a report of the Bankruptcy Commission from

54. 11 U.S.C. § 523(a)(8)(A)(i) (2000).

55. 11 U.S.C. § 523(a)(8)(B) (2006).

56. *In re* Johnson, No. 77-2033 TT, 1979 U.S. Dist. LEXIS 11428, at *20 (Bankr. E.D. Pa. 1979) (citing *In re* Moore, 4 Bankr. Ct. Dec. 791, 792 (W.D.N.Y. 1978)).

57. *Id.*

58. *Id.* at *21.

59. *Id.* at *21–23.

1973 when the idea of an "undue hardship" exception was first introduced:

> In order to determine whether nondischargeability of the debt will impose an "undue hardship" on the debtor, the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account.[60]

The court created a test whereby the debtor's past and future income and expenses are compared to determine whether the debtor has the ability to pay while maintaining a "minimal living standard."[61] The court set forth a complicated list of factors to consider, such as rate of pay, ability to obtain and retain employment, skills, sex (in cases where the debtor is a woman trying to obtain employment), current employment status, employment record, education, health, access to transportation, and whether the debtor has dependents.[62] Then the court adopted a two-part test for determining the amount of an individual's expenses. First, the court determines "what amount of monthly expenses is reasonable for a 'similarly situated hypothetical debtor.'"[63] Second, the court adds to this amount any "extraordinary expenses."[64] The court then identified three factors to guide courts in determining whether the first prong is satisfied.[65] As should be obvious at this point, the mechanical aspect of the *Johnson* test was rather complicated and difficult to apply. There are multiple prongs with multiple factors, which themselves breed more factors and more prongs, rendering the litigation too burdensome.[66] However, the *Johnson* test became the predecessor to the *Brunner* test, discussed in Subpart C below.

If the debtor was able to make it through the gauntlet of the mechanical test, the court would then look to see if the debtor had made

60. *Id.* at *21–22 (quoting COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, TRANSMITTING A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 140 n.17 (1973)).

61. *Id.* at *21–23.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* The three factors are 1) marital status, 2) number of dependents, and 3) whether any necessities are furnished in kind, or at reduced cost. *Id.* at *32.

66. Smith, *supra* note 6, at 616–18.

good faith efforts to repay the loan.[67] In order to do this, the court assesses whether the debtor was negligent or irresponsible in maximizing income, minimizing expenses, and making efforts to obtain employment.[68] For instance, if the debtor had an opportunity to find a residence at half the rent the debtor was currently paying, then the debtor was negligent in minimizing living expenses.[69] Moreover, if the debtor failed to seek gainful employment, a court would likewise be justified in denying the debtor's discharge.[70]

Additionally (since the two-part test apparently was not enough), the court added a third part: a policy analysis focusing on the amount of educational debt, the percentage of the debtor's total indebtedness, which is composed of student loans, and the extent to which the debtor's education has enhanced earning capacity.[71] Essentially, the court looks to the motives of the debtor, asking why the debtor filed bankruptcy and whether the debtor is trying to take advantage of the system.[72] If a debtor satisfies the mechanical test but fails the good faith test, the court may grant a discharge based on the policy test.[73]

Naturally, the results of the *Johnson* test were harsh because too many elements had to be proven, and the debtor largely carried the burden of proof.[74] Furthermore, the test is simply too convoluted to be of any value to other courts, let alone to debtors who must know whether they can satisfy the elements of the test.[75]

B. The Bryant *Test: The Objective Approach*

The same court (in a case involving the same party) developed a new test eight years later in *Bryant v. Pennsylvania Higher Education*

67. *In re* Johnson, 1979 U.S. Dist. LEXIS 11428, at *41.

68. *Id.* at *44–50.

69. *Id.* at *45.

70. *Id.* at *47.

71. *Id.* at *52. The court quoted from Bankruptcy Revision Hearings supporting such a policy analysis that comported with the policies discussed above in Part II.B.

72. *Id.*

73. *Id.*

74. *See id.*; Huey, *supra* note 5, at 104.

75. Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987) ("In the leading case on this issue arising in this Court, *In re Johnson*, Chief Judge Twardowski develops a comprehensive and thoughtful, but unfortunately complicated three-part progressive test, each level of which has numerous inquiries to be answered before proceeding to the next level. While we find the *Johnson* Opinion very helpful in cataloging circumstances which can be considered by courts in such matters, we respectfully decline to follow the *Johnson* test." (internal citation omitted)).

Assistance Agency.[76] In an attempt to "place the element of objectivity into the process of decision-making in this area,"[77] the court adopted a test which first analyzes the income and resources of the debtor in relation to the poverty guidelines.[78] If the debtor's income is below or close to the poverty line a presumption of dischargeability arises.[79] However, if the debtor's income is substantially above the poverty line, such a presumption is not warranted, although the debtor can still demonstrate "unique" and "extraordinary" circumstances which should nevertheless render the debt dischargeable.[80] Like the court in *Johnson*, the court in *Bryant* placed emphasis on the phrase "minimal standard of living" as utilized in the Bankruptcy Commission Report.[81] The court recognized that "poverty level" and "minimal living standard" are probably two different things.[82] While it is unclear what exactly is meant by "minimal standard of living," the court felt that if a debtor was below the "poverty level," the debtor was certainly below the "minimal standard of living."[83] For this reason, the court created an *ipso facto* presumption that satisfying the "poverty level" test automatically establishes "undue hardship."[84] In a further attempt to add objectivity to the test, the court held that the federal poverty guidelines should be used in making this determination.[85] However, one problem remained: what is meant by the phrase "substantially over" the poverty line? Unfortunately, the court never adequately explained this.[86] In analyzing whether "unique" and "extraordinary" circumstances existed, the court looked to the totality of the circumstances.[87]

The court conceded that although the test was harsh, § 523(a)(8) applied only to debtors in Chapter 7 cases, and not those in Chapter 13 cases. This fact led the court to conclude that its "poverty line" test was

76. *Id.*

77. *Id.* at 915.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* (quoting REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93–137 at 140, 141 app. 2 (1973)).

82. *Id.* at 916.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 918.

not overly strict.[88] Additionally, the court rejected any notion that the motives of the debtor should be taken into consideration in determining discharge.[89]

In applying the newly created test to Bryant, one of the debtors in the case, the court found that even though the debtor did not satisfy the poverty level test, he did satisfy the totality of the circumstances test, in part because he was a recent law graduate who had failed to pass the bar five times.[90] The result comported with the policies underlying the "undue hardship" exception, since originally Congress would have been concerned about students' ability to declare bankruptcy on the "eve of a lucrative career."[91] Here, the unusual circumstances existed where a debtor was not trying to take advantage of the bankruptcy system, but rather was simply involved in a difficult situation that he was unable to remedy. On the other hand, one could argue that the debtor should not have been relieved of his burden when it was his decision to enter law school and assume a large debt. Wasn't this the risk that the debtor undertook when he obtained the financing to attend school? In this way, the totality of the circumstances test, as will be discussed below in Part IV.D, is inappropriate because it does not comport with the legislative intent of § 523(a)(8).[92]

C. The Brunner *Test: The Majority Rule*

The "undue hardship" test used by a majority of courts is derived from the case of *Brunner v. New York State Higher Education Services Corp*.[93] Instead of using a test comprised of alternative elements, the district court developed a single three-part test, in which each element is necessary to establish "undue hardship." The debtor must prove that 1) the debtor cannot, based on current income and expenses, maintain a

88. *Id.* at 917.

89. *Id.* at 915 n.2.("[W]e disagree with the attachment of any significance to the factor set forth in the first part of the *Johnson* 'policy test,' in which the court considers the amount and percentage of student loan indebtedness to all of the debtor's indebtedness in the bankruptcy, in order to determine whether the dominant purpose of the bankruptcy was to discharge the student loan. In *In re Gathright*, we observed that avoiding the consequences of debts is normally the reason for filing for bankruptcy and the fact that the Debtor seeks to discharge almost exclusively student loan obligations in his bankruptcy should be irrelevant. We believe that this factor should likewise be entirely irrelevant in a § 523(a)(8)(B) analysis.").

90. *Id.* at 926.

91. *In re* Andresen, 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999).

92. *See* discussion *infra* Part IV.D.

93. 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d. Cir. 1987).

"minimal standard of living" if forced to repay, 2) "additional circumstances" exist indicating that the debtor's current condition will continue for a significant portion of the repayment period, and 3) the debtor has made a "good faith" effort to repay the loan.[94] In this case, the debtor received a master's degree in social work, incurring a total of $9,000 in student debt, and then filed for bankruptcy about seven months later.[95] The debtor was unable to find work, had no dependents, and was living primarily off of welfare for the four months prior to her bankruptcy filing.[96] She offered testimony from her therapist that she suffered from depression due to her unemployment, but that she was still able to work.[97] Moreover, she had sent out over a hundred resumes to employers in her field but was unsuccessful, as were many in her field in the early 1980s.[98] The court conceded that the debtor clearly did not have the ability to repay her student loans and at the same time maintain a minimal living standard.[99] However, the debtor failed to show that her circumstances would continue into the foreseeable future since she did not have a "psychological impairment,"[100] and was "apparently healthy, presumably intelligent, and well-educated."[101]

The debtor's situation in *Brunner* is a typical one: the debtor is usually able to show that paying off the debt while maintaining a minimal living standard would be impossible.[102] However, the debtor will face a far more difficult task in proving that this inability to pay will continue into the future. A bankruptcy judge in the same circuit that decided *Brunner* stated that "dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial obligations."[103] This "certainty of hopelessness" standard has been the staple of virtually all undue hardship analysis.[104] But, as

94. *Id.* at 754–57.

95. *Id.* at 754.

96. *Id.* at 757.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* The bankruptcy court judge found that the debtor did in fact have a psychological impairment. *See id.* However, the district court determined this finding to be clearly erroneous since, although the debtor may have suffered from depression, such a condition did not impair her ability to work.

101. *Id.*

102. *See, e.g.*, *In re* Hinkle, 200 B.R. 690 (Bankr. W.D. Wash. 1996) (holding that a fifty-one-year-old woman with a degree and a steady income was entitled to an "undue hardship" discharge).

103. *Id.* at 755 (quoting *In re* Briscoe, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)).

104. Fossey, *supra* note 5, at 30 (citing Commonwealth State Educ. Assistance Auth. v.

one commentator notes, it is "an almost impossible burden to overcome."[105] The reason for this is that "[t]hose debtors who are in the most dire need of relief—that is, those for whom repayment will certainly impose an undue hardship—will likely lack the resources to pursue such relief in the first instance."[106]

D. The Totality of the Circumstances Test

Some courts have criticized the use of a mechanical test, such as the *Johnson* or *Brunner* tests, and instead have adopted a "totality of the circumstances" test. The Eighth Circuit adopted the totality of the circumstances test in the case of *Andrews v. South Dakota Loan Assistance Corp.* In this case, the court reasoned that all circumstances surrounding the debtor's situation should be considered, particularly because the policy underlying bankruptcy relief is equity, which requires more of an in-depth factual analysis than a purely legal one.[107] Under this test, a court is free to consider any fact that may bear on the debtor's case in addition to those already considered in the mechanical tests.[108] Because of this freedom to consider any factor relevant to the debtor's case, commentators have praised the inherent flexibility of the test.[109] One commentator argued, "As tuition rates continue to rise, students continue to take out more student loans. . . . The test provides a look at the debtor's whole financial situation and still provides for the

Dillon, 189 B.R. 382 (W.D. Va. 1995); *In re* Coveney, 192 B.R. 140 (Bankr. W.D. Tex. 1996); *In re* Walcott, 185 B.R. 721 (Bankr. E.D. N.C. 1995); *In re* Garrett, 180 B.R. 358 (Bankr. D. N.H. 1995); *In re* Mathews, 166 B.R. 940 (Bankr. D. Kan. 1994)).

105. Huey, *supra* note 5, at 116.

106. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 191 (citing NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 212 (1997) ("It hardly is surprising that some courts see few requests for hardship discharges of educational loans given the pitfalls of the undue hardship standard. The borrowers most likely to prevail in many courts are those with the least possibility of being able to litigate the question. The risk of losing is also high. Failure to meet the burden of proof leaves the debtor with student loan debts and substantial litigation expenses.")).

107. *See* Moorman v. Ky. Higher Educ. Assistance Auth., 44 B.R. 135, 137–38 (Bankr. W.D. Ky. 1984) ("'Undue hardship' is a concept so fraught with subjective elements that we must consider the totality of a debtor's circumstances to confirm its presence or absence. . . . Our approach is not intended to yield a general rule applicable to a broad class of cases, but remains as flexible and adaptable as the concept of equity itself. We are able to say only that the whole of a debtor's condition, in an undue hardship case, should be sufficient to strike a chord of pity in the heart of equity.").

108. *See* Cloud, *supra* note 26, at 797.

109. *See* Smith, *supra* note 6, at 632–33; Jennifer Frattini, Comment, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537, 572 (2001).

consideration of other facts and circumstances."[110]

IV. EFFECTIVENESS OF THE VARIOUS STANDARDS

Now that the various tests have been outlined, this Part will analyze the various ingredients that have been used in these tests. Up to this point, the courts have attempted to concoct the perfect recipe that balances both the needs of unfortunate debtors and the stability of the federal student loan program. The relevant factors include 1) the poverty level/minimal living standard with the "additional circumstances" test, 2) the good faith standard, 3) the motivation standard, and 4) the totality of the circumstances approach. As stated, this Comment proposes a modified test based on the *Brunner* test.

A. Living Standard: Analysis of Income and Expenses

Virtually all courts have accepted that the determination of the debtor's income relative to the minimal living standard is a necessary element of the analysis.[111] First, the Bankruptcy Commission that initially recommended the inclusion of § 523(a)(8) expressly referenced the requirement that debtors show that repayment of the debt will prevent the debtor from maintaining a minimal living standard.[112] The Ninth Circuit has interpreted the first element in this way:

> To meet this requirement, the debtor must demonstrate more than simply tight finances. In defining undue hardship, courts require *more than temporary financial adversity, but typically stop short of utter hopelessness*. The proper inquiry is whether it would be "*unconscionable"* to require the debtor to take steps to earn more income or reduce her expenses.[113]

In other words, the debtor need not show that she is in poverty, but mere financial difficulty is not enough. Under the Ninth Circuit interpretation, the court is free to make an individualized analysis of the debtor's income and expenses and may also consider past fluctuations in income to produce an accurate picture of the debtor's real financial

110. Smith, *supra* note 6, at 633, 635.

111. *See, e.g.*, *In re* Brunner, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987); *In re* Bryant, 72 B.R. 913 (Bankr. E.D. Pa. 1987); *In re* Johnson, No. 77-2033 TT, 1979 U.S. Dist. LEXIS 11428 (Bankr. E.D. Pa. 1979).

112. *Brunner*, 46 B.R. at 754.

113. *In re* Birrane, 287 B.R. 490, 495 (B.A.P. 9th Cir. 2002) (emphasis added) (citing *In re* Nascimento, 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999)).

situation.[114] However, this interpretation allows courts to "infuse subjectivity into what should be a straightforward financial calculation."[115] The main criticism is that this infused subjectivity will lead to inconsistent results,[116] but the results would likely be no more varied than the results of other types of analyses, such as those of unconscionability in contract law or reasonableness in tort law. If a straightforward analysis of income and expenses is what Congress envisioned, it could have easily included a formula in the Bankruptcy Code itself that expressly outlined a student debtor's necessary income and expense ratio to support an undue hardship exception.[117] Instead, it chose to leave the term undefined, subject to the court's varied interpretations. Furthermore, there is no reason to provide predictability to debtors in this context. The "undue hardship" exception is not a bankruptcy planning device but rather a situation that Congress believed should override the general presumption of nondischargeability because it constitutes an unexpected and unfortunate turn of events.[118]

The next question is whether the "minimal living standard" is a more appropriate standard than the strict poverty line standard. In other words, should debtors have to be utterly impoverished to be eligible for discharge? The text of § 523(a)(8) states that the debt should not be discharged "unless excepting such debt . . . would impose an undue hardship."[119] Importantly, an inquiry into the poverty level is not necessarily determinative of whether an undue hardship exists. One could conceive of a situation in which a debtor has an income below the poverty line, but lived in such conditions that payment of the debt *would not* be an "undue hardship," depending on the amount of the debt.

More likely, however, is the situation where a recent graduate above the poverty level nonetheless faces undue hardship in meeting her loan obligations. For instance, if a debtor has an apartment in a large city, where living expenses are high, and the debtor is carrying a heavy debt, one could conclude that such a situation constitutes undue hardship if the debtor's income is only slightly or moderately above the poverty line. In these circumstances, the debtor should be entitled to a discharge even

114. Pardo & Lacey, *supra* note 106, at 197.

115. *Id.*

116. *Id.* at 197 n.82.

117. *See, e.g.*, 11 U.S.C. §§ 523(a)(2), 707(b) (2006). Congress had no qualms about providing rigid formulaic calculations in the Code as part of the 2005 BAPCPA.

118. *See* H.R. REP. NO. 95-595, at 138 (1977).

119. 11 U.S.C. § 523(a)(8).

though her income is above the poverty line. Thus, the poverty line can become a poor and overly rigid indicator of "undue hardship."

The "additional circumstances" or "certainty of hopelessness" standard is an outgrowth of the minimal living standard, in that the additional circumstances test asks whether the debtor's current financial condition will continue throughout the repayment period.[120] In this way, the minimal living standard actually consists of two parts: an analysis of the current situation followed by an analysis of whether that situation will continue. In the *Brunner* test, the additional circumstances test is not dependent on the court's findings under the good faith test discussed below.[121]

But should this element be necessary for determining "undue hardship?" The answer is yes, because without consideration of "additional circumstances," a debtor who anticipates inheriting a large sum of money, but who is unemployed (i.e., below the minimal living standard) would be able to qualify for an undue hardship discharge without having to show *actual* undue hardship, assuming that he has made good faith efforts to pay the debt. Thus, courts must consider, and even require, a continued inability to repay because of additional circumstances. The problem with the "additional circumstances" test is that the debtor faces a difficult task of producing sufficient evidence necessary to show such circumstances.[122] Generally, even if the debtor succeeds in showing a current inability to repay, courts will not presume that such a financial condition will continue into the future, and so the burden remains on the debtor to prove additional circumstances.[123] As a result, the court in the case of *In re Nys* reasoned that this rule would prevent a debtor from purposely choosing circumstances that prevent him or her from repaying.[124] For these reasons, the "additional circumstances" element is responsible for incurring the most criticism of

120. *In re* Brunner, 46 B.R. 752, 755 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

121. *See id.* ("There is no specific authority for this requirement, but the need for some showing of this type may be inferred from comments of the Commission report.").

122. Pardo & Lacey, *supra* note 106, at 198.

123. *See In re* Nys, 446 F.3d 938, 946 n.7 (9th Cir. 2006) ("By 'additional circumstances' or 'exceptional circumstances' we mean only that the debtor must present something more than her current financial situation. In other words, she cannot rely on the fact that if she made payments now on her student loans, she would not be able to maintain a minimal standard of living. Rather, she must present the court with circumstances that she cannot reasonably change. To prove 'undue hardship,' the circumstances must indicate that the debtor cannot reasonably be expected to increase her income and make payments for a substantial portion of the loan's repayment period.").

124. *Id.*

the *Brunner* test.[125] The primary problem with this test is that proving "additional circumstances" is highly difficult as it requires the production of expert testimony showing, for example, a physical or mental disability, incapacity to work for long periods of time, inability to stay committed to a single line of work, etc.[126] The litigation costs for the debtor can accordingly skyrocket in trying to prove this one element.

However, the main problem with the *Brunner* approach is that satisfying the first element, because it initially establishes that the debtor's income is below the level needed to maintain a "minimal standard of living," undermines the debtor's ability to satisfy the second element. Thus, these two tests (the "minimal living standard" and the "additional circumstances" tests) are self-contradictory when applied, because satisfaction of the first element provides evidence that the debtor failed the second element. The first two elements of the *Brunner* test, therefore, have the effect of allowing discharge for only a few select debtors. When applied, the test allows fewer still. Although Congress intended only a few particular kinds of debtors to qualify for an "undue hardship" discharge, the rule in its application achieves this result in the wrong way. It essentially means that if a student debtor's "additional circumstances" happen to be psychological in nature, as opposed to something more easily provable such as permanent paralysis, then by this fact alone the psychologically impaired debtor will generally receive harsher treatment.[127] Congress intended the results to be harsh, not arbitrary and capricious, and so courts should use a different test that avoids this problem.

The simplest way to avoid the self-contradiction of these first two prongs would be to shift the burden of proof of "additional circumstances" to the bankruptcy trustee, or whoever is claiming that the student debt should not be discharged. If the debtor is able to show that his current situation is such that he could not pay off the loan while maintaining a minimal standard of living, then the debtor should be entitled to a presumption that his situation will continue. This presumption could then be rebutted by a showing through a

125. *See* Smith, *supra* note 6, at 615; Huey, *supra* note 5, at 115–18.

126. Pardo & Lacey, *supra* note 106, at 198–99 (citing *In re Nys*, 446 F.3d at 946).

127. *Compare In re* Daugherty, 175 B.R. 953, 959–60 (Bankr. E.D. Tenn. 1994) (holding that the debtor was not entitled to a discharge because although she had mental and physical conditions creating substantial medical bills, the debtor failed to prove that her medical condition prevented her from working to repay the loan), *with In re* Hinkle, 200 B.R. 690, 693–94 (Bankr. W.D. Wash. 1996) (holding that a debtor whose expenses included medical bills was entitled to a discharge because she was an older woman with few prospects for increased earning capacity).

preponderance of the evidence that the debtor's situation is likely to change, or that there are no "additional circumstances" that would prevent the debtor from being able to repay in the future. This would cast the responsibility of producing expensive expert testimony on the party that typically has the greater ability to fund the litigation, while at the same time avoiding the "draconian application" of *Brunner*.[128] Making this change would provide a more equitable solution to the debtor's situation.

However, some argue that this solution does not solve the problem identified by the court in *In re Nys*, where a debtor could choose a lifestyle that would prevent her from repaying the debt.[129] But with the third element of the *Brunner* test, this problem is avoided.[130] If a debtor intentionally places himself in a situation where repayment becomes impossible, then the debtor would fail to show that he has made good faith efforts to repay the loan. Therefore, there is no reason why courts should not presume a future inability to repay when the debtor succeeds in showing both a good faith effort and a current inability to repay. Consequently, courts should keep the "minimal standard of living" test, but the debtor should not have the burden of producing evidence, such as expert testimony, to prove that "additional circumstances" exist.

Furthermore, one element that no court seems to have considered in this analysis is the element of reasonable foreseeability. In the "undue hardship" analysis, congressional intent almost begs the courts to ask whether the current predicament of the debtor is a situation that the debtor should have reasonably foreseen before acquiring the loan. If it was, then the debtor should be held responsible for the risk of his decision. Of course, arguably all students enter into a program with the hopes of at least a moderate income and, in that way, almost never foresee the risk. Conversely, mere foreseeability may allow courts to include too many student debtors since attending college is no guarantee of any employment. Hence, courts might ask whether, under the debtor's circumstances, there was any foreseeable way the debtor could have expected to repay the loan. If not, then the implication is that the student negligently assumed the debt without properly considering the risks involved. In one other section of the Bankruptcy Code, Congress provides a path to discharge if the "debtor's failure to complete such

128. *See* Huey, *supra* note 5, at 115–16.

129. *In re Nys*, 446 F.3d at 946.

130. *See* discussion *infra* Part IV.B.

payments is due to circumstances for which the debtor should not justly be held accountable."[131] This provision has been informally nicknamed the "hardship discharge" in Chapter 13 cases.[132] This may be why the *Brunner* court noted that Congress intended not a "garden-variety 'hardship,'"[133] but a hardship that was unexpected.

B. Good Faith Effort to Repay

The good faith standard is a necessary element for undue hardship analysis, but it can also serve the additional purpose of assessing the "additional circumstances" requirement. In the previous section, it was shown that the "additional circumstances" test produces unfair results when applied in many situations. The good faith standard is an indirect way of assessing those "additional circumstances" without expressly testing them and therefore requiring the debtor to produce the necessary evidence to prove such "additional circumstances." Take, for instance, Debbie Debtor, a recent graduate of law school. She has incurred $130,000 of educational loans but was involved in an accident where she suffered a head injury that prevents her from concentrating for any significant amount of time. She also now suffers from migraine headaches that further prevent prolonged concentration. While she was able to secure a job with a small law firm for a few months, it became clear that she would not be able to last there because of her physical condition. Under the "additional circumstances" test, Debbie would have to prove that her condition prevents her from working, possibly requiring the production of a doctor's testimony, in addition to lay witnesses from the law firm who can testify to Debbie's condition. The litigation process would likely involve substantial discovery and a lengthy trial, even though Debbie has no way to pay the legal fees.

The good faith standard requires only two things of Debbie. First, she must use her efforts to maximize her income and minimize expenses. Likely, she will apply for other jobs, send out resumes, and possibly obtain employment in a less demanding field. But at the end of the day, she will only have to produce the applications she has sent to prospective employers, along with a financial statement of her income and expenses. All the court needs to ask is, "Did Debbie make a good faith effort to maximize employment, including finding employment, and minimize

131. 11 U.S.C. § 1328(b)(1) (2006).

132. H.R. REP. NO. 95-595, at 430–431 (1977).

133. *In re* Brunner, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

expenses?" Under these facts, the court should grant her a discharge for "undue hardship." The fact that she has made diligent efforts to apply for employment and has been unable to hold a job because of her condition is an indirect way of showing that she will probably not be able to find the kind of employment that will allow her to pay off such a large debt. The good faith standard would also encompass all possible methods that Debbie could use to defer, adjust, consolidate, or otherwise modify the debt outside of bankruptcy. Because of the extensive programs under federal law that allow debtors to deal with overbearing debt, the debtor should have the duty to seek out all possible remedies before resorting to bankruptcy.

Recall that remedies such as an income-contingent repayment plan may exist outside of bankruptcy. Creditors have argued that if the debtor has not applied for such a program, this could be grounds for a finding that the debtor has not made good faith efforts to repay the loan.[134] *Collier on Bankruptcy* states, however, that "[t]hese arguments overstate the role that an income-contingent repayment plan should play in determining dischargeability."[135] In other words, the fact that the debtor has other options, such as an income-contingent repayment plan, should not be a per se basis for a finding that the debtor has failed to make good faith efforts to repay the loan as it could unfairly prejudice the debtor.[136] The reason this prejudice may exist is that the debtor would have to be below the poverty line in order to qualify for the income-contingent repayment plan, which is a different and harsher requirement than the "minimal living standard" test.[137] Therefore, as a rule, the fact that the debtor has failed to take advantage of an income-contingent repayment plan should only be a factor in this analysis and not determinative.[138]

C. Motivation Standard

To review, the motivation standard requires the court to ask whether the debtor's purpose in filing bankruptcy was primarily to eliminate his

134. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 292 B.R. 635 (B.A.P. 8th Cir. 2003).

135. 4-523 COLLIER ON BANKRUPTCY ¶ 523.14 (3d ed. Rev. 2011) ("The U.S. Department of Education regulations provide that under an income-contingent repayment plan, a debtor is obliged to make some payment once the debtor's income exceeds the federal poverty level. However, the federal poverty level is below a 'minimal' standard of living.").

136. *Id.*

137. *See id.*

138. *See id.* ("Courts must also be careful not to treat the enactment of the statute authorizing the U.S. Department of Education to accept an income-contingent repayment plan as an implied repeal of section 523(a)(8) of the Bankruptcy Code.").

student debt. This standard is therefore logically inconsistent with the bankruptcy system as explained by the court in *In re Bryant*. That court correctly reasoned that the main purpose of debtors in bankruptcy is to eliminate debt. Thus, it should not be a surprise that a student might race to the bankruptcy court to rid himself of a large educational loan. As a result, the only time this standard will be utilized is if a bankruptcy trustee or the government could prove that the debtor had the actual intention of declaring bankruptcy *before* his situation became dire. Because this situation is extraordinarily rare, as a general rule, the motivation standard is often irrelevant.

D. Totality of the Circumstances

As the name suggests, a true "totality of the circumstances test" inherently contemplates a potentially infinite number of factors that could affect a student debtor's ability to repay a debt.[139] There are many problems with this test as a result. First, it is overly broad. For example, one factor that should be dismissed from consideration in an "undue hardship" analysis is the value of the degree that the debtor holds.[140] Although the value of higher education is on the decline, the value of one's degree should never come into undue hardship analysis because the kind of degree a debtor chooses to pursue is a conscious decision that the debtor makes before schooling begins. As a result, the debtor should be the one to bear the costs of her decision to enter a particular field with a certain amount of debt. This is particularly true when the specific field bears little promise of significant future earnings, or the program or school attended has not been accredited by the appropriate authority.

Additionally, allowing more debtors to claim undue hardship because of an unprofitable degree may encourage more students to take on educational debt with the intention of relying on the safety net of

139. *See* Smith, *supra* note 6, at 632.

140. *See id*. The totality of the circumstances test proposed by Smith would include consideration of good faith filing. In one case applying the *Johnson* test, the court stated that the mechanical test should be applied, followed by a consideration of good faith,

> "including whether the debtor has made a bona fide attempt to repay the loan, and whether the debtor was negligent or irresponsible in conducting his financial affairs such that the debtor's misfortune is self-imposed and the conclusion drawn under the mechanical test should be altered. Lastly, if bad faith is found, there must be a presumption against discharge which can be rebutted only by finding that the debtor's dominant reason for filing was not eradication of substantial student loans and *that the debtor has not benefited financially from the education financed by the loan*."

In re Briscoe, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981) (emphasis added).

bankruptcy in the future. Granted, in 1997 the Bankruptcy Commission found that the likelihood of bankruptcy abuse by student debtors was small, concluding that § 523(a)(8) should be repealed.[141] However, although individual student debtors may not flock to bankruptcy in large numbers after a repeal of the undue hardship exception, for-profit institutions may use the repeal of § 523(a)(8) to attract more students, encouraging them to take on enormous amounts of debt while assuring them that doing so bears minimal risk. The enrollment practices of for-profit universities often are questionable at best, and fraudulent or highly deceptive at worst. In an undercover study, the GAO recently reported that enrollment officers at for-profit universities have often engaged in hard-sell sales and marketing techniques while withholding financial aid advice in order to push prospective students into enrollment.[142] One representative told an undercover applicant that he should not worry about repaying his student loans because "no one will come after you if you don't pay."[143] Another representative told an applicant that he personally had over $85,000 of student debt, but that he had no intention of repaying it.[144] It seems likely that if the undue hardship exception is repealed or interpreted broadly to encompass a larger number of student debtors, for-profit institutions could capitalize on such a change in order to boost their enrollment as well as their tuition. This demonstrates that in the context of "undue hardship" analysis the courts should not consider all conceivable factors.

The congressional intent behind § 523(a)(8) suggests that a narrow test should be used instead of a broad or all-encompassing test.[145] In addition to the reasons previously listed, consider the text of § 523(a)(8) stating "undue hardship." The court in *Brunner* correctly noted that Congress obviously did not contemplate a broad definition of "undue hardship," but that the "existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as an insufficient excuse for a discharge of student loans."[146]

Finally, the test does not provide uniform results in the student

141. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 213–16 (1997).

142. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES 11–12 (2010).

143. *Id.* at 12.

144. *Id.*

145. *See* discussion *supra* Part II.C.

146. *In re* Brunner, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

debtor context. The test is of course flexible, but this perceived benefit could end up being a curse rather than a blessing, as different courts would apply the test differently, leading to unpredictable and inconsistent results.[147] "Under the current standard, however, courts may choose from a multitude of factors and apply any combination of them to a given case, which only adds to the ambiguity and complexity of determining what constitutes undue hardship."[148] In other words, even though a court is directed to consider all factors equally, the court may still take the Orwellian approach of treating some factors more equally than others. For instance, one court may treat a debtor's situation differently by focusing more on the current and future ability to repay, while others may emphasize the good faith element. This varying treatment could lead to forum shopping, inconsistent results, and a lack of guidance to student debtors.

V. CONCLUSION

In light of the plain language and the congressional intent behind § 523(a)(8), the *Brunner* test provides the best foundation for "undue hardship" analysis because it provides a simple and straightforward three-step analysis that is strict but predictable. However, the *Brunner* test should be modified so that the burden of proof regarding the "additional circumstances" is not on the debtor, but on the party claiming nondischargeability. This presumption can be overcome by a showing that the debtor's situation could possibly change or is not permanent. But whatever test is used, it should be as strict as Congress originally intended it to be. It should not matter that Congress may have been motivated by a perceived rather than an actual abuse of the system. Perhaps the mere possibility of abuse is enough to warrant the differing treatment. Those who oppose § 523(a)(8) will likely achieve their desired results more quickly if the bankruptcy courts adopt a draconian application of the "undue hardship" exception, thereby forcing Congress to deal with the results that follow.

Moreover, there were and are rational policy considerations that support the continued application of § 523(a)(8), even in a strict form. The "fresh start" policy is not a constitutional requirement; rather it is merely a general framework that has emerged from the conglomeration of provisions that Congress has adopted over the years. Judges, as well as

147. Huey, *supra* note 5, at 108.
148. Frattini, *supra* note 109, at 566.

scholars in particular, must realize that there is more at stake than mere logical consistency. Relieving a debtor of student loans under the banner of "fresh start" is not the end of the analysis: someone is going to have to foot the bill, whether it is the taxpayers, fellow student borrowers, or the debtor who incurs the loss.

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